SUPREME COURT OF QUEENSLAND

CITATION:	*Simonova v Department of Housing and Public Works* [2019] QCA 10
PARTIES:	**MILKA SIMONOVA** (applicant) **v** **DEPARTMENT OF HOUSING AND PUBLIC WORKS** (respondent)
FILE NO/S:	Appeal No 3402 of 2018 QCATA No 33 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal – [2018] QCATA 33 (Carmody J)
DELIVERED ON:	Date of Orders: 30 April 2018 Date of Publication of Reasons: 5 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	30 April 2018
JUDGES:	Sofronoff P and Philippides JA and Daubney J
ORDERS:	**Date of Orders: 30 April 2018** **1. Leave to Appeal be allowed.** **2. The Appeal be dismissed.** **3. All previous orders of the Queensland Civil and Administrative Tribunal and the Appeal Tribunal of the Queensland Civil and Administrative Tribunal relating to the tenancy of 3A Alba Court, Currimundi in the State of Queensland ("the Premises") are set aside.** **4. The residential tenancy agreement between the parties be terminated from midnight on 7 May 2018.** **5. A Warrant of Possession be prepared pursuant to section 350 of the Residential Tenancies and Rooming Accommodation Act 2008, to lie on the court file until 4 June 2018 ("the Warrant").** **6. On 4 June 2018, the Registry issue the Warrant in respect of the Premises and the Warrant be conditioned that:**

(a) The Warrant takes effect from midnight on 7 June 2018;

(b) The Warrant takes effect for a period of 14 days and ends at midnight on 21 June 2018;

(c) The Warrant authorises entry to the Premises between the hours of 8.00 am and 4.00 pm.

7. There be no order as to costs.

CATCHWORDS: STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – GENERAL APPROACHES TO INTERPRETATION – GENERALLY – where the applicant was a long-term public housing tenant – where her tenancy was terminated for objectionable behaviour – where the behaviour complained of is involuntary and symptomatic of mental illness – whether the appeal tribunal erred in the construction of s 297A(1)(c) of the *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld) in failing to import elements of intention or voluntariness into the operation of the second limb of s 297A(1)(c) which on its plain terms, enables a lessor of public or community housing to apply for a termination order when a 'tenant, an occupant, a guest or an invitee "has … interfered with the reasonable peace, comfort or privacy of a person occupying premises nearby"' or by construing the second limb as giving rise to strict liability on the part of the tenant

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – where the applicant sought to raise issues that were not before the tribunal in the original decision – where the applicant sought to raise issues for which the appeal tribunal had not granted leave – whether such arguments could be maintained before the Court of Appeal

Queensland Civil and Administrative Act 2009 (Qld), s 150(3)
Residential Tenancies and Rooming Accommodation Act 2008 (Qld), s 297A, s 345A

Clarey v The Principal and Council of the Women's College (1953) 90 CLR 170; [1953] HCA 58, considered
Jones v Pritchard [1908] 1 Ch 630, cited
SAS Trustee Corporation v Miles (2018) 92 ALJR 1064; (2018) 361 ALR 206; [2018] HCA 55, cited
Sztal v Minister for Immigration and Border Protection (2017) 91 ALJR 936; (2017) 347 ALR 405; [2017] HCA 34, considered

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M M Hindman QC, with D D Keane, for the respondent

SOLICITORS: Anderson Fredericks Turner for the applicant
Crown Law for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Daubney J.

[2] **PHILIPPIDES JA:** The reasons of Daubney J reflect the basis for my joining in the orders made on 30 April 2018.

[3] **DAUBNEY J:** From 18 October 2013, the applicant was the tenant of the property situated at 3A Alba Court, Currimundi. The Chief Executive of the respondent department was the lessor. It was not in issue that this was a tenancy of public housing governed, relevantly, by the provisions of the *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld) ("*RTRAA*").

[4] On 24 November 2016, the respondent applied to the Queensland Civil and Administrative Tribunal ("QCAT") pursuant to s 297A of the *RTRAA* for termination of the applicant's tenancy on the ground of objectionable behaviour. That application was a "tenancy matter", within the meaning of that term in the *Queensland Civil and Administrative Act* 2009 ("*QCAT Act*"), and accordingly fell within QCAT's "minor civil dispute" jurisdiction.[1]

[5] The hearing of that application (with both parties legally represented) took place over five days from March to July 2017, with QCAT constituted by a magistrate at Caloundra.

[6] On 20 July 2017, QCAT ordered that the tenancy be terminated from 10 August 2017, and made consequential orders and directions for the issuing of a warrant of possession. The learned magistrate constituting QCAT published the written reasons for her decision on 30 August 2017.

[7] In the meantime, on 4 August 2017 the applicant filed an application for leave to appeal to the Appeal Tribunal of QCAT, and on 10 August 2017 the Appeal Tribunal (constituted by Carmody J) granted a stay of the Tribunal decision.

[8] The application for leave to appeal and appeal was heard, with both parties legally represented, by the QCAT Appeal Tribunal on 15 December 2017. On 8 March 2018, the Appeal Tribunal published its decision by which it refused leave to appeal on some grounds, granted leave to appeal on other grounds, but then dismissed the appeal. The Appeal Tribunal subsequently gave the respondent leave to apply for orders to recover possession of the premises.

[9] On 26 March 2018, the applicant filed an application for leave to appeal to this Court. An urgent application for a stay was also brought, and on 27 March 2018 orders were made to prevent the respondent from taking possession of the property until the conclusion of the present proceeding.

[10] The application for leave to appeal was heard by this Court on 30 April 2018. As is usual practice, the Court heard full argument in anticipation of the prospect of leave to appeal being granted. At the conclusion of the hearing, the Court made orders to the effect that the applicant have leave to appeal but that the appeal be dismissed, and consequential orders were made to permit the respondent to recover possession.

[11] These are my reasons for joining in the making of those orders.

[12] By s 150(3) of the *QCAT Act*, leave to appeal to this Court is required, with any appeal being limited to questions of law only. In that context, then, there were no challenges

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1 *QCAT Act*, s 12(4)(f), s 13(2)(b) and definition of "minor civil dispute" in Schedule 3.

to the factual findings below, and the applicant's case in this Court turned principally on contentions about the proper interpretation of s 297A and s 345A of the *RTRAA*.

***Residential Tenancies and Rooming Accommodation Act* 2008**

[13] Termination of the applicant's tenancy agreement was governed by Chapter 5 of the *RTRAA*. Chapter 5, Division 2, Subdivision 3, outlines a range of circumstances in which a lessor may apply to QCAT for an order terminating a tenancy. Relevant to this case is s 297A:

> "**297A Application for termination for objectionable behaviour in public or community housing**
>
> (1) The lessor may apply to a tribunal for a termination order because the tenant, an occupant, a guest of the tenant or a person allowed on the premises by the tenant –
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> (a) has harassed, intimidated or verbally abused –
>
> (i) the lessor or lessor's agent; or
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> (ii) a person occupying, or allowed on, premises nearby; or
>
> (b) is causing, or has caused, a serious nuisance to persons occupying premises nearby; or
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> (c) has intentionally or recklessly endangered another person at the premises or interfered with the reasonable peace, comfort or privacy of a person occupying premises nearby.
>
> (2) An application under this section is called an application made because of ***objectionable behaviour***.
>
> (3) In this section –
>
> ***lessor*** means –
>
> (a) the chief executive of the department in which the *Housing Act 2003* is administered, acting on behalf of the State; or
>
> (b) a community housing provider.
>
> *Note* –
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> See sections 335(1) and 345A for other provisions about the application."

[14] The orders which QCAT may make on a termination application, and the matters to which the Tribunal must have regard when considering different sorts of termination applications, are set out in Chapter 5, Division 6. Relevant for present purposes is s 345A, which provides:

> "**345A Objectionable behaviour in public or community housing**
>
> (1) If an application is made to a tribunal for a termination order because of objectionable behaviour, the tribunal may make the order if it is satisfied –

(a) the applicant has established the ground of the application; and

(b) the behaviour justifies terminating the agreement.

(2) In deciding if the behaviour justifies terminating the agreement, the tribunal may have regard to –

(a) whether the behaviour was recurrent and, if it was recurrent, the frequency of the recurrences; and

(b) for behaviour in the form of harassment, intimidation or verbal abuse – its seriousness; and

(c) for behaviour in the form of intentional or reckless endangerment – its seriousness; and

(d) for behaviour in the form of interference with a person's reasonable peace, comfort or privacy – its seriousness.

(3) Also, in deciding if the behaviour justifies terminating the agreement, the tribunal must have regard to –

(a) any serious or adverse effects on neighbouring residents or other persons, including whether neighbouring residents or other persons are likely to be subjected to objectionable behaviour if the agreement is not terminated; and

(b) any evidence regarding the tenancy history of the tenant; and

(c) if the tenant is a tenant under a State tenancy agreement –

(i) the department's responsibility to other tenants; and

(ii) the needs of persons awaiting housing assistance from the State.

(4) Subsections (2) and (3) do not limit the issues to which the tribunal may have regard.

(5) In this section –

applicant means –

(a) the chief executive of the department in which the *Housing Act 2003* is administered, acting on behalf of the State; or

(b) a community housing provider.

State tenancy agreement means a residential tenancy agreement under which the lessor is the chief executive of the department in which the *Housing Act 2003* is administered, acting on behalf of the State."

The QCAT decision

[15] The residential tenancy dispute application filed by the respondent in QCAT on 24 November 2016 expressly invoked s 297A of the *RTRAA*, and stated that the respondent was seeking a termination order and warrant for possession because it was satisfied that the applicant "has had serious and adverse effects on neighbouring residents in the form of harassment, intimidation and verbal abuse".

[16] The learned magistrate who constituted QCAT for the hearing of the application delivered admirably comprehensive reasons. The case obviously turned on the applicant's conduct and the effect of that conduct on her neighbours. The magistrate described the applicant as follows[2]:

> "Ms Simonova is an elderly trauma survivor from a non-English speaking background aged in her early 70's, who has dual diagnoses of chronic paranoid schizophrenia and PTSD. She is currently receiving a new form of drug therapy whose likely success is as yet unknown. She has painful arthritis as well as polyps on her vocal [chords], for which she has declined surgical treatment. The latter causes her to speak in a loud penetrating monotone, variously described as '*raspy*', '*gravelly*' and '*mechanical*', '*like a dog*' and similar to the vocal tone of some hearing impaired people. From the recordings I have heard in court I would describe it as 'having a foghorn like' quality."

[17] The magistrate set out at some length the evidence from the applicant's psychiatrist, which was to the effect that the applicant lacked voluntary control of her behaviour, and said:

> "[22] As to her ability to control the disruptive noisy behaviour the subject of the neighbours' complaints, the doctor said it is unlikely she has any voluntary control of those behaviours. Distress from her psychosis combined with her vocal [chord] dysfunction make it difficult for her to speak softly. The patient experiencing intrusive delusional thoughts will commonly talk back to the thoughts, which possibly explains her loud talking to herself.
>
> [23] The doctor was supportive of her wish to remain living independently in the community, and cautioned against extrapolating from her generally compliant behaviour in the hospital ward that she would settle into a residential care setting. She however also conceded that Ms Simonova could realistically be displaying the behaviours reported by the neighbours, and that these behaviours could be quite disturbing to other people.
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> [24] Given that the treatment for PTSD is psychologically based, it is very difficult to treat PTSD in the patient with schizophrenia, due to the disordered thinking and intrusivity of psychotic symptoms, and the lack of insight which makes it hard for her to engage, as she cannot reality-test her experiences and engage in CBT. Her non-English speaking and cultural background

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2 *State of Queensland through the Department of Housing and Public Works v Simonova* [2017] QCAT 328 at [10], and omitting footnotes.

present barriers to her such that it would be difficult for her to engage in those therapies, so she could not change her behaviour and emotional response.

[25] It is clear from Dr Hudson-Jessup's evidence that even consistency in the current medication regime is unlikely to eliminate the behaviour complained of by the neighbours. Treatment of her PTSD and the symptoms she manifests (which are impossible to distinguish from the symptoms of schizophrenia) is not a feasible option."

[18] The magistrate then turned to consider the considerable body of evidence led from numerous nearby residents (all in the same street as the applicant) about the impact of the applicant's disruptive behaviours on them, both during the day and at night time, and considered each of the criteria specified in s 297A(1)(a), (b) and (c).

[19] The magistrate found, as matters of fact, that the applicant's various behaviours, which included direct and personal verbal confrontation with neighbours, had amounted to acts of intimidation and acts of harassment.

[20] It was also found that the applicant's noisy conduct within her property was causing a serious nuisance to persons occupying premises nearby. In that regard, the magistrate said:

"[41] There was ample evidence in the present case of the noisy behaviour of the tenant, Ms Simonova, being of such frequency and volume, that the ordinary and necessary functioning of a number of her neighbours impacted by her behaviour was unreasonably affected, such that it goes well beyond mere inconvenience or unpleasantness for them.

…

[47] I am satisfied that the accounts of the residents of the noise disturbance emanating from the residence of Ms Simonova are entirely plausible. I am satisfied that she causes noise in the form of vocalisation speaking to both herself and calling out abuse to the neighbours, and by banging of doors, windows and cupboards. I am satisfied that the accounts by the neighbours of the impact of this noise pollution on their lives, in their oral evidence, affidavits and complaints, are reliable, as they were barely challenged. They were consistent one with the other and are corroborated by:

(a) The evidence of Dr Pamela Hudson-Jessop that it is likely that she is behaving in this fashion.

(b) The fact that a previous adjoining tenant at 3B Alba [Court] was moved due to the impact on his mental health of the noise made by Ms Simonova.

(c) The fact that the noise made by Ms Simonova at her previous departmental tenancy at Verney Street was intolerable to the neighbours and resulted in her being moved to the present address by the Department, in the

> hope that the Alba Court placement might be more sustainable.
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> …
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> [49] I am satisfied that the evidence in the present case is that the volume and frequency of the noise emanating from the home of Ms Simonova, particularly during the night, is such as to unreasonably interfere with the lives of the Condon family, and Ms Mills, the adjacent neighbours. It no longer interferes with Ms Luxmore, as she has gone to the expense of installing air conditioning, and has to bear increased electricity bills. There is no evidence that any of these people suffer unusual sensitivity to noise. The nearby residents are not complaining of some new and previously unknown phenomenon."

[21] In relation to s 297A(1)(c), the magistrate rejected an argument that the words "intentionally or recklessly" qualified both the words "endangered" and "interfered", and held that the plain reading of the statute was that the interference with a person's reasonable peace, comfort or privacy need not be intentional or reckless. The magistrate noted that there was no suggestion that the applicant's behaviour endangered any other person at the premises, but after further analysing the evidence held that:

> "[64] In the circumstances, the extensive evidence of the impact of Ms Simonova's behaviour on the neighbours, and the substantial adjustments they have had to make to their lives to attempt to ameliorate the effects on themselves, particularly to be able to sleep uninterrupted, is sufficient to satisfy this limb, and her inability to regulate her behaviour is an irrelevant consideration."

[22] The learned magistrate summarised her findings in relation to the s 297A(1) criteria as follows:

> "[68] Whilst I accept that the level of harassment, intimidation and verbal abuse if taken in isolation would, given the serious consequences for the tenant of termination, be unlikely to warrant a finding of objectionable behaviour such as to justify termination, I am satisfied that the ground of the application is amply made out by the evidence of interference with the reasonable peace, comfort or privacy of the persons occupying premises nearby."

[23] The magistrate then turned to consider the matters referred to in s 345A and in particular, having been satisfied that the applicant had established the ground of the application, whether the applicant's behaviour justified terminating the tenancy agreement.

[24] Each of the matters identified in s 345A(2) as ones to which the Tribunal may have regard was dealt with in turn, with the magistrate finding:

(a) that the noisy vocalisation during the night, the slamming of doors and windows, and banging sounds made by the applicant were an almost nightly occurrence, and this behaviour was not abating;

(b) the acts of harassment and verbal abuse were, of themselves, not sufficiently serious to justify termination of the tenancy;

(c) there was no evidence of intentional or reckless endangerment;

(d) the applicant's behaviour did constitute a serious interference with the reasonable peace and comfort of other residents in the street.

[25] The magistrate then turned to the matters which, by s 345A(3), the Tribunal was required to consider and:

(a) held that, on the evidence including that of the applicant's own psychiatrist, the magistrate was satisfied that, if the tenancy was not terminated, the applicant's behaviour and its effects would continue unabated;

(b) analysed the evidence about the applicant's past history as a tenant. The magistrate noted some positive evidence from a former respite carer for the applicant, but observed[3]:

> "Of far greater relevance is the fact that Ms Simonova was housed in a unit at Verney St in Caloundra before she entered the current tenancy, alongside other public housing tenants, and had to be re-housed in the present premises due to the hostility of those neighbours who were agitated by her behaviour."

The magistrate also referred to evidence from an aged care nurse who had cared for the applicant in 2010 while she received residential aged care respite for six months, and the difficulties encountered by the applicant and the other residents in that situation. Evidence about the history of complaints during the tenancy and the Department's responses was also outlined by the magistrate. The applicant's desire to remain living independently, with appropriate support, was also noted by the magistrate.

[26] In relation to s 345A(3), the magistrate observed that the Department had let the adjoining duplex to hearing impaired tenants whose evidence was that they had not been disturbed by the applicant's behaviour. There were no current complaints by other departmental tenants. There was no issue that there was a very long waiting list of people seeking public housing of the type occupied by the applicant.

[27] The magistrate then canvassed the evidence concerning other discretionary factors, including the attempts by the Department to explore any available options to sustain the applicant's tenancy, and investigations into the prospect of mitigating the noise, with the magistrate concluding that there were no practical options to modify the property to create an effective sound barrier against the noise which was impacting so severely on the neighbouring residents.

[28] The magistrate then considered the availability of overnight emotional support for the applicant as a means of alleviating "the most disturbing sounds of emotional distress that disturb the neighbours in Alba Court [which] occur at night, to disturb their sleep".[4] Her Honour reviewed the evidence of support which had been provided to the applicant during the times when she was a hospital inpatient and while in respite care. The magistrate concluded that the availability of staff to offer support before

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3 At [82].

4 At [100].

the applicant's behaviour escalated was a factor not available when the applicant was home alone. There was no source of funding to pay, on a long-term basis, for that sort of overnight support to be provided to the applicant at home.

[29] The procedural history of the dealings with the applicant (and her daughter) was reviewed by the magistrate, with a conclusion that the Department had acted sensitively and conservatively, having regard to the special needs of the applicant.

[30] The Tribunal, constituted by the learned magistrate, concluded that the respondent had, on the balance of probabilities, proved that the applicant's behaviour was objectionable and justified terminating the applicant's tenancy agreement.

The Appeal Tribunal decision

[31] As noted above, the decision of the Tribunal constituted by the learned magistrate was in a "tenancy matter", and was thereby a decision in a minor civil dispute proceeding. By s 142(3) of the *QCAT Act*, an appeal against a decision in a minor civil dispute proceeding may only be made if the party has obtained the Appeal Tribunal's leave to appeal.

[32] The applicant sought to appeal against the Tribunal on four grounds. The Appeal Tribunal granted leave to appeal, but only in relation to a number of specific grounds. There was no challenge in this Court to the Appeal Tribunal's refusal to allow leave to appeal on other grounds which had been identified.

[33] By reference to the applicant's amended grounds of appeal before the Appeal Tribunal[5], the only grounds of appeal for which leave was granted by the Appeal Tribunal were:

> "**Ground 1** – the learned QCAT Member erred in law in finding that the Applicant's conduct was objectionable behaviours in terms of section 297A Residential Tenancies and Rooming Accommodation Act 2008 (Qld) ("RTRAA"), which includes that the Magistrate erred in:
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> i. The statutory interpretation of s 297A;
>
> ii. Finding that the objectionable behaviour need not be willed or voluntary;
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> …
>
> **Ground 3** – Whether the conduct was reasonably open on the evidence or found by the tribunal was legally capable of justifying a termination order under s 345A Residential Tenancies and Rooming Accommodation Act 2008 (Qld), which includes that the Magistrate erred in:
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> (i) the failure to inform herself of the test of whether the conduct was 'justified'; ..."

[34] In relation to Grounds 1(i) and (ii), the Appeal Tribunal observed[6] that the key question of law raised under Grounds 1(i) and (ii) was whether or not, for objectionable

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5 Appeal Record 216.

6 *Simonova v Department of Housing and Public Works* [2018] QCATA 33 at [47].

behaviour within s 297A(1)(c), the expression "intentionally or recklessly" was intended to quantify interference as well as endangerment. The Appeal Tribunal agreed with the learned magistrate's interpretation, holding[7] that:

> "[Section 297A] provides for [Tribunal] termination of a state tenancy agreement for purely physical acts and defined consequences without requiring any subjective mental or personal fault element; that is, for objective breaches of the tenancy by either the occupant or any for whom the tenant is deemed responsible to protect the vulnerable property and enjoyment interests of neighbouring residents from outside interference."

[35] In relation to the other ground of appeal, the Appeal Tribunal noted:

> "[82] Ground 3(i) asserts a failure of the justification discretion based on a principle derived from *Clarey v The Principal and Council of the Women's College*[8] to the effect that loud noise is 'incidental to the occupation of premises as a dwelling' and termination for undue interference is not justified in relation to any behaviour (including the applicant's known propensities) contemplated (or reasonably anticipated) by the parties at the time the tenancy began, at least, where the applicant is not in breach of any duty to mitigate it."

[36] The Appeal Tribunal observed that this argument was addressed to discretionary justification and not factual substantiation.

[37] The Appeal Tribunal noted the Department's submission that the findings of the learned magistrate were well within the realm of a reasonable and legitimate value judgment or choice between rival possibilities, and there was no basis for disturbing the justification finding made by the magistrate. It was observed that *Clarey* was restricted to its unique facts, and[9]:

> "There is no evidence supporting any rational inference against the Department that it took the known risk on behalf of neighbouring residents of placing the applicant in unsuitable premises when it reasonably should have foreseen that the noise the applicant made was likely to interfere with the quiet enjoyment or privacy of other property owners to the degree that it did."

[38] The Appeal Tribunal held that the termination order made by the magistrate was not so unjust as to imply some unidentifiable process error, nor was there any sign of a failure on the part of the magistrate to adequately consider any mandatory or other relevant considerations, and considered that there was no basis to justify appellate interference.

[39] Accordingly, the Appeal Tribunal dismissed the applicant's appeal.

The present hearing

[40] The grounds of appeal relied on by the applicant before this Court were as follows:

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7 At [68].
8 (1953) 90 CLR 170.
9 At [84].

"**Ground 1** – The appeal tribunal erred in law in construing section 297A(1)(c) of the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) including the words '***interfered with the reasonable peace, comfort or privacy***" (emphasis added) by:

(a) Agreeing with the conclusion of QCAT that voluntariness was not a consideration or element of this part of the section;

(b) Agreeing with the conclusion of QCAT that intention need not be considered in this part of the section;

(c) Concluding that the words of this part of the section operate as a strict liability provision; and

(d) Failing to construe the section to include the elements of intention and voluntariness.

Ground 2 – The appeal tribunal erred in law in failing to provide adequate reasons why voluntary conduct and intention elements did not apply to section 345A.

Ground 3 – The appeal tribunal erred in law in construing section 345A of the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) by:

(a) Agreeing with the conclusion of QCAT that neither voluntariness nor intention was a matter for consideration, pursuant to section 345A(1)(b), in determining whether the objectionable behaviour (found pursuant to s. 297A) justified terminating the tenancy agreement;

(b) Failing to include the factors of intention and voluntariness as matters for consideration, pursuant to section 345A(1)(b), in determining whether the objectionable behaviour (found pursuant to s. 297A) justified terminating the tenancy agreement;

(c) Failing to include the factors of intention and voluntariness as matters for consideration, pursuant to section 345A(2)(d), in determining whether the seriousness of objectionable behaviour (found pursuant to s. 297A) in the form of interference with a person's reasonable peace, comfort or privacy."

[41] I will deal with each of the grounds in the same order as they were addressed by counsel for the applicant.

Ground 1

[42] The applicant expressly eschewed the argument which had been advanced and rejected below that the words "intentionally or recklessly" in s 297A(1)(c) qualified both "endangered" and "interfered".

[43] The applicant's current argument, however, sought to challenge the correctness of the QCAT finding that "the plain reading of the words of the statute is that the interference with a person's reasonable peace, comfort or privacy need not be

intentional or reckless"[10], and of the finding[11] that the applicant's inability to regulate her behaviour was an irrelevant consideration for the second limb of s 297A(1)(c).

[44] The applicant contended:

(a) whilst the "endangerment" ground in s 297A(1)(c) is modified by "intentionally or recklessly", this did not mean that the other grounds specified in s 297A(1)(a) and (b) and the "interference" ground in s 297A(1)(c) did not contain an element of intention as an essential requirement of proving "objectionable behaviour";

(b) the "endangerment" ground is expressed as including either intention or recklessness "because the endangerment of another person at the premises is so serious that recklessness rather than any form of positive intention is regarded as a sufficient mental element to justify an application for a termination order"[12];

(c) the question for present purposes is what mental element (if any) forms part of the actions (apart from endangerment) which constitute grounds to apply for a termination order;

(d) reference to extrinsic materials, including the Explanatory Note and the Second Reading Speech for the legislation which introduced s 297A "do not support the proposition that the provision should be read to create a strict liability"[13];

(e) there is a presumption that legislation does not create a strict liability unless there is an express statement in the statutory instrument which displaces the presumption[14];

(f) there is nothing in s 297A of the *RTRAA* or the extrinsic material "that expressly supports a parliamentary intention to create strict liability under the provision or to exclude the elements of intention and voluntariness from the interference with reasonable peace, comfort or privacy ground in s 297A(1)(c)"[15];

(g) the Appeal Tribunal erred by referring only to the ability to create strict liability as within the ambit of statutory power, and did not discriminate between the creation under s 297A(1)(c) of two different bases for liability, "namely, intention or recklessness for what appears more serious interference with others (endangerment) and strict liability for the less serious action (interference with reasonable peace, comfort or privacy)"[16];

(h) it is incongruous to have a mental element operating in s 297(1)(a) and (b) and have strict liability for the "interference" ground in (c). It is equally incongruous for there to be a mental element for "endangerment" in s 297(1)(c) but not for the "interference" ground;

(i) a construction of s 297A(1)(c) which attributes strict liability to the "interference" ground ignores the context;

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10 QCAT decision at [55].
11 At [64].
12 Applicant's submissions, para 38.
13 Applicant's submissions, para 43.
14 Citing *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 566-567.
15 Applicant's submissions, para 45.
16 Applicant's submissions, para 46.

(j) a construction which includes elements of intention and voluntariness as part of the interference ground allows the section to be read consistent with the *Anti-Discrimination Act* 1991 (Qld) which prohibits discrimination in accommodation and housing areas.

[45] The applicant's counsel summarised their submissions as follows:

> "[50] It is submitted that:
>
> (a) The element of intention applies to the *interference* with '*peace, comfort or privacy*' ground of objectionable behaviour;
>
> (b) Voluntary conduct is required to enliven the operation of the interference with 'peace, comfort or privacy' ground of objectionable behaviour;
>
> (c) The failure to construe voluntariness and intention as elements of the interference ground in s 297A(1)(c) RTRAA was an error by both QCAT and the Appeal Tribunal; and
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> (d) In its context within s 297A, there is no basis to construe the interference with peace, comfort or privacy ground of objectionable behaviour as involving strict liability."

[46] The contemporary approach to statutory interpretation was recently summarised by Kiefel CJ, Nettle and Gordon JJ in *Sztal v Minister for Immigration and Border Protection*[17]:

> "The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognised that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected."

See also the recent observations by Kiefel CJ, Bell and Nettle JJ in *SAS Trustee Corporation v Miles*.[18]

[47] Section 297A(1)(c), on its plain terms, enables a lessor of public or community housing to apply for a termination order in either of the following circumstances:

- The tenant, an occupant, a guest or an invitee "has intentionally or recklessly endangered another person at the premises";
- The tenant, an occupant, a guest or an invitee "has … interfered with the reasonable peace, comfort or privacy of a person occupying premises nearby".

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17 (2017) 347 ALR 405 at [14], and omitting references.

18 [2018] HCA 55 at [20].

It is convenient to refer to these as the first limb and the second limb of s 297A(1)(c) respectively.

[48] Two points should be noted about the first limb and the second limb which go to both the plain meaning of the text of each and their context.

[49] The first is that the two limbs are separated by the disjunctive "or". They are, therefore, discreet in their operation. So much was recognised by the now unchallenged, and patently correct, findings below that the modifiers "intentionally or recklessly" in the first limb do not qualify the second limb.

[50] The second is that the two limbs address different circumstances. The first is directed to the endangerment of "another person at the premises"; the second is directed to interference with the amenity of "a person occupying premises nearby". In other words, the first limb goes to conduct directly and dangerously affecting persons within the leased premises; the second limb is concerned with protecting the reasonable peace, comfort and privacy of the occupants of nearby premises.

[51] These distinctions are highlighted when one further considers the legislative context of s 297A(1)(c). Section 297 is the provision which allows the lessor of a property, which is not public or community housing, to apply for termination for objectionable behaviour. Importantly, the prefatory words of s 297(1) are limited in their application to "the tenant", whereas s 297A(1) extends to "the tenant, an occupant, a guest of the tenant or a person allowed on the premises by the tenant". Otherwise, s 297(1)(a) and (b) are in identical terms to s 297A(1)(a) and (b), but there is no equivalent to s 297A(1)(c).

[52] The purpose of each of s 297 and s 297A is clear enough, i.e. to enable a landlord to apply for termination of a tenancy when "objectionable behaviour", as that term is defined in each of the respective sections, has occurred. Equally, it is clear that the purpose of s 297A is to provide a more expansive base for the bringing of such applications in respect of tenancies of public or community housing. The base is expanded by reference to the categories of persons who engage in "objectionable behaviour", and by the inclusion of the further forms of "objectionable behaviour" identified in the two limbs of s 297A(1)(c).

[53] If confirmation of that expanded purpose be needed, it is sufficient to refer to the Explanatory Notes for the *Residential Tenancies and Rooming Accommodation and Other Legislation Amendment Bill* 2013, which enacted s 297A, in which it was said:

> "Section 297A also broadens the scope of objectionable behaviour to include situations where the tenant, an occupant or a guest or a person allowed on the premises by the tenant:
>
> (a) has harassed, intimidated or verbally abused the lessor or lessor's agent or a person occupying, or allowed on, premises nearby;
>
> (b) is causing or has caused, a serious nuisance to persons occupying premises nearby; or
>
> (c) has intentionally or recklessly endangered another person at the premises or interfered with the reasonable peace, comfort or privacy of a person occupying a premises nearby.

> In this section a lessor means the chief executive of the department in which the *Housing Act 2003* is administered, acting on behalf of the State or a community housing provider. Section 297A is intended to be wider than s. 297 because the Department of Housing and Public Works has encountered many cases of antisocial behaviour in public housing properties. It is considered that the tenant must take responsibility for the behaviour referred to in s. 297A."

[54] Bearing in mind that context and purpose, then, one turns to interpret the two limbs of s 297A(1)(c). As appears from the above summary, central to the propositions advanced on behalf of the applicant is the notion that the second limb ought not be construed as imposing strict liability, particularly when read against the first limb which expressly imports elements of intention. The applicant's argument, however, fails to distinguish between the two very different circumstances addressed by the first limb and the second limb respectively. The first limb, as has been noted, is concerned with endangerment of persons at the premises. The second limb is concerned with something quite different, namely amenity of persons occupying nearby premises.

[55] It is hardly heterodox for a law to impose strict liability in the circumstances contemplated by the second limb of s 297A(1)(c). That is conventionally the basis of the law of nuisance, in that "nuisance is a field of tort liability rather than a particular type of tortious conduct", and that its "unifying element resides in the general kind of harm caused, not in any particular type of conduct causing it".[19]

[56] The second limb of s 297A(1)(c), by its terms, is directed to the harm caused, i.e. interference with the reasonable amenity of a nearby occupant.

[57] In that context, and acknowledging the purpose of the section, there is in my view no warrant for construing the plain language of the second limb to import or infer elements of intention or voluntariness, as the applicant argues should be done. Indeed, to do so would tend to defeat the manifest purpose of the section. On its face, the section effectively makes a tenant liable for the objectionable behaviour of the tenant's invitees when that objectionable behaviour interferes with the reasonable amenity of a neighbour. But that simple proposition becomes unworkable if the interference is modified by elements of intention or voluntariness – if, for example, a tenant claims that they did not intend that an invitee engage in objectionable behaviour which disturbs a neighbour. Such an outcome would clearly defeat the purpose of the legislation.

[58] It follows that, in my opinion, there was no error in either the Tribunal or the Appeal Tribunal with respect to the construction of s 297A(1)(c), either in failing to import elements of intention or voluntariness into the operation of the second limb or by construing the second limb as giving rise to strict liability on the part of the tenant.

Ground 3

[59] In respect of Ground 3, the applicant argued that the Appeal Tribunal's reasons fail to identify "why the appeal tribunal rejected the argument that voluntariness and intention were matters to be considered in determining whether the objectionable behaviour found to have occurred justified the making of a termination order pursuant

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19 Sappideen &Vines "Fleming's The Law of Torts (10th edition)" (Thomson Reuters 2011).

to s.345A" of the *RTRAA*.[20] On that foundation, the applicant went on to submit that the construction of s 297A(1)(c) applied by the Appeal Tribunal prevented s 345A from having a protective function, and that, when considering s 345A, the need for the intention (if any) and voluntariness (or otherwise) of the tenant's actions need to be taken into account for the section to achieve its protective function.

[60] The fundamental difficulty for the applicant, however, is that none of this formed part of the contest dealt with by the Appeal Tribunal in its decision.

[61] When the applicant's then solicitor first filed submissions on the application for leave to appeal and appeal against the primary QCAT decision, the argument concerning s 345A which was advanced dealt with the learned magistrate's distinguishing of the effect of the decision in *Clarey v The Principal and Council of the Women's College*[21] and asserted, based on observations in *Jones v Pritchard*[22], that the termination of the tenancy was not justified because, in effect, the respondent knew about the applicant's noisy behaviour when she entered into the tenancy agreement.

[62] This submission was repeated and adopted in the applicant's written submissions to the Appeal Tribunal on the application for leave to appeal. At that time, the applicant's relevant proposed ground of appeal to the Appeal Tribunal was limited to "whether the conduct was reasonably open on the evidence or found by the tribunal was legally capable of justifying a termination order under s 345A".

[63] Subsequently, at the hearing before the Appeal Tribunal, the applicant filed an amended application for leave to appeal and appeal by which the proposed Ground 3 was sought to be expanded as follows:

> "**Ground 3** - Whether the conduct was reasonably open on the evidence or found by the tribunal was legally capable of justifying a termination order under s 345A Residential Tenancies and Rooming Accommodation Act 2008 (Qld), which includes that the Magistrate erred in:
>
> i. The failure to inform herself of the test of whether the conduct was 'justified'; and/or
>
> ii. The failure to inform herself of the Applicant's circumstances, including that the objectionable behaviour was involuntary and/or her true state of homelessness."

[64] It is clear enough that the arguments now sought to be ventilated on behalf of the applicant concern the proposed Ground 3(ii). The problem for the applicant is that the Appeal Tribunal refused leave to appeal on that ground – as noted above, the grant of leave to the Appeal Tribunal was limited to Ground 3(i).

[65] The Appeal Tribunal appropriately identified the proposed further ground of appeal sought to be pursued under Ground 3(ii), and refused the applicant leave to appeal, noting that the proposed ground sought to introduce factual and legal issues which had not been in contest before the learned magistrate.

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20 Applicant's submissions, para 51.
21 (1953) 90 CLR 170.
22 [1908] 1 Ch 630.

[66] There was no challenge before this Court to the Appeal Tribunal's decision to refuse leave to appeal on Ground 3(ii). Nor could there have been any sensible challenge. Having regard to the factual and legal cases run before the learned magistrate in relation to s 345A, which were dealt with so comprehensively in the primary QCAT judgment, it was clearly within the discretion of the Appeal Tribunal to refuse to entertain a proposed ground of appeal which sought to agitate legal and factual issues which had not previously been relied on by the applicant.

[67] The Appeal Tribunal's appeal decision was, therefore, limited to dealing with Ground 3(i). The Appeal Tribunal's reasons identify the arguments which were advanced by the parties in relation to Ground 3(i), and more than adequately deal with the disposition of those arguments.

[68] Accordingly, the applicant's present arguments in relation to this ground could not be maintained before this Court.

Ground 2

[69] Before this Court, the applicant contended that the Appeal Tribunal had not provided reasons as to why the voluntariness or intentional elements had no operation in considering s 345A. For the reasons identified above in respect of Ground 3, however, there was no need for the Appeal Tribunal to traverse these matters, as leave to appeal in respect of the proposed ground which sought to agitate those issues had been refused.

Conclusion

[70] Given the issue of statutory interpretation raised in this Court, I considered it appropriate for there to be a grant of leave to appeal but, for the reasons set out above, concluded that the appeal should be dismissed. It was also necessary for the Court to make consequential orders to secure an orderly termination of the applicant's occupancy of the premises.

[71] Accordingly, I joined in the making of the following orders by the Court:

1. Leave to Appeal be allowed.

2. The Appeal be dismissed.

3. All previous orders of the Queensland Civil and Administrative Tribunal and the Appeal Tribunal of the Queensland Civil and Administrative Tribunal relating to the tenancy of 3A Alba Court, Currimundi in the State of Queensland ("**the Premises**") are set aside.

4. The residential tenancy agreement between the parties be terminated from midnight on 7 May 2018.

5. A Warrant of Possession be prepared pursuant to section 350 of the Residential Tenancies and Rooming Accommodation Act 2008, to lie on the court file until 4 June 2018 ("the Warrant").

6. On 4 June 2018, the Registry issue the Warrant in respect of the Premises and the Warrant be conditioned that:

    (a) The Warrant takes effect from midnight on 7 June 2018;

(b) The Warrant takes effect for a period of 14 days and ends at midnight on 21 June 2018;

(c) The Warrant authorises entry to the Premises between the hours of 8.00 am and 4.00 pm.

There be no order as to costs.