ACT CIVIL & ADMINISTRATIVE TRIBUNAL

GRANTOR RT535 v OCCUPANT RT535 (Residential Tenancies) [2020] ACAT 117

RT 535/2020

Catchwords: **RESIDENTIAL TENANACIES –** termination and possession order – termination under section 51 of the *Residential Tenancies Act 1997* – serious or continuous interference with the quiet enjoyment of nearby premises – intention or recklessness – capacity – meaning of 'intentional' or 'recklessly' – statutory interpretation – where tenant lacks capacity to form intent or recklessness as to the consequences of their actions – application dismissed

Legislation cited: *Legislation Act 2001* ss 138, 139
Residential Tenancies Act 1997 s 51; standard terms 70
Residential Tenancies Amendment Act 2005

Cases cited: *Commissioner for Social Housing v CC* [2017] ACAT 17
Faull v Commissioner for Social Housing for the ACT [2013] ACTSC 121
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125
Occupant RT391 v Grantor RT391 [2020] ACAT 43
Occupant RT391 v Grantor RT391 (No 2) [2020] ACAT 59

Tribunal: Presidential Member H Robinson

Date of Orders: 18 September 2020
Date of Reasons for Decision: 22 December 2020

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) RT 535/2020

BETWEEN:

GRANTOR RT535
Applicant

AND:

OCCUPANT RT535
Respondent

TRIBUNAL: Senior Member H Robinson

DATE: 18 September 2020

ORDER

The Tribunal orders that:

1. The application is dismissed.

……*Signed*……..
Senior Member H Robinson

REASONS FOR DECISION

1. By way of this application, the lessor sought termination of a residential tenancy agreement under section 51(d) of the *Residential Tenancies Act 1997* (**RT Act**). Section 51 provides:

> *On application by a lessor, the ACAT may make a termination and possession order effective immediately if satisfied that the tenant has intentionally or recklessly caused or allowed, or is likely to cause or allow—*
>
> *(a) serious damage to the premises or to other property of the lessor; or*
>
> *(b) if the lessor is an individual—injury to the lessor or a member of the lessor's family; or*
>
> *(c) if the lessor is a corporation—injury to a representative of the corporation or a member of a representative's family; or*
>
> *(d) serious or continuous interference with the quiet enjoyment of nearby premises by an occupier of the premises.*

2. The question in this case was whether the Tribunal can terminate a residential tenancy agreement under section 51(d) of the RT Act in circumstances where a tenant has limited or no capacity to understand the consequences of his actions.

3. I delivered my decision in this matter 18 September 2020 and advised the parties that I would publish reasons later. These are my reasons.

Damage, injury or intention to damage or injure

4. Section 51 provides for urgent termination of a residential tenancy agreement where the Tribunal is satisfied that the tenant has intentionally or recklessly caused or allowed, or is likely to cause or allow, a serious or continuous interference with the quiet enjoyment of nearby premises by an occupier of the premises. Unlike most other grounds for termination set out in the RT Act, it does not require that the lessor serve notices on the tenant, or that the tenant be given an opportunity to remedy their behaviour.

Background

5. The background to this matter is set out in the Tribunal's previous decisions in *Occupant RT391 v Grantor RT391* [2020] ACAT 43 and *Occupant RT391 v Grantor RT391 (No 2)* [2020] ACAT 59. There is no need to repeat the full history here.

6. In summary, the applicant lessor is a community organisation that provides various forms of accommodation to vulnerable persons. The respondent tenant is one such person. He has severe and complex disabilities, requires full time care and has no capacity to make decisions about that care. He lives in a group home (**the premises**) under a residential tenancy agreement with the applicant. He is one of several persons residing at the premises with similarly complex needs.

7. It was alleged by the applicant that the tenant's conduct had caused a nuisance to the other tenants, or had interfered with their quiet enjoyment of the premises. These allegations have not yet been tested in the Tribunal.

8. The lessor was concerned for the welfare of the other tenants and sought to terminate the tenancy with the respondent and move him to another property.

9. The tenant's guardian, acting on his behalf, opposed any proposal to move him. The tenant's representatives sought to have the application dismissed on a summary basis as the tenant's mental capacity meant he could not form the necessary intention or recklessness to satisfy the requirements of section 51(d).

The lessor's substantive case

10. The lessor put its case under section 51(d) of the RT Act on two basis:

    (a) That the tenant recklessly caused or allowed serious or continuous interference with the quiet enjoyment of nearby premises by an occupier of those premises. This ground relies on past acts (**the past acts ground**).

    (b) That the tenant is likely to cause or allow serious or continuous interference with the quiet enjoyment of nearby premises by an occupier of the premises. This ground relies on future risks, as evidenced by a pattern of past acts (**the future risks ground**).

11. The parties agreed that the "intention or recklessness" required by the provisions is intention or recklessness in relation to the outcome of the actions – which in this case meant an intention to engage in the actions constituting the alleged interference with the quiet enjoyment of the other tenants.

12. The preliminary questions before the Tribunal were:

(a) whether a provision that requires 'intention' or 'recklessness' can ground an eviction when the tenant is under a legal disability and lacks the capacity to make decisions about his care; and

(b) whether section 51(d) of the RT Act requires intention or recklessness, or whether a mere likelihood of serious or continual interference with quiet enjoyment is sufficient.

The tenant's strike out application

13. In any summary dismissal or strikeout application, the onus is on the party making the application to establish that there is no reasonable cause of action or that the proceedings are doomed to fail e.g. *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 128–129.

14. The tenant's position was that the Tribunal may only make an order under section 51 of the RT Act if it can make a specific finding that there was intention or recklessness as to the outcome of a particular action. This is a question of jurisdictional fact that must be established prior to the making of any order. If it cannot be established, the Tribunal cannot proceed to determine the matter, and the proceeding must fail.

15. In support of this contention, the tenant relied on the decision of Justice Refshauge in the ACT Supreme Court case of *Faull v Commissioner for Social Housing for the ACT* [2013] ACTSC 121 (***Faull***).

16. Similarly to the present case, *Faull* involved an application under section 51 to evict a tenant who was allegedly causing a nuisance to his neighbours. However, the tenant in that case had an alcohol-related mental health condition that may have affected his capacity to form an intention to act. The Tribunal, being satisfied that the tenant had caused a nuisance to the neighbours, granted a termination and possession order under section 51 of the RT Act. The tenant appealed. One of the questions in the appeal was whether the tenant had the capacity to act intentionally or with recklessness.

17. In considering the appeal, Justice Refshauge observed that:

> *The RT Tribunal could only make the termination order if satisfied that* [the tenant] *intentionally or recklessly caused or allowed the outcomes set out in 51(c) and (d) of the RT Act. This is a jurisdictional fact.*
>
> *...The issue here is whether the RT Tribunal was actually satisfied that Mr Faull intentionally or recklessly caused or permitted the outcomes set out in s 51(c) and (d) of the RT Act. That involves a consideration of not just whether the actions of Mr Faull were voluntary but whether he intended or had foresight that his actions would bring about those outcomes. This is, as the Court of Appeal said in Crook v Commissioner, Trading and Tenancy Tribunal of New South Wales at 311; [39], "a difficult question". It depended not merely on the voluntariness of Mr Faull's actions, but also his state of mind as to the specific outcomes at the time. In this case, his intoxication was a very relevant factor, not only for voluntariness where the issue was expressly addressed by* [counsel for the lessor] *but for whether he was aware of the consequences of his actions at the time he did them in the specific ways set out in the section, and either intended them or proceeded with foresight nevertheless.*

18. Significantly, his Honour determined that, in order for section 51 of the RT Act to be available, the tenant must be "…aware of the consequences of his actions at the time he did them in the specific ways set out in the section, and either intended them or proceeded with foresight nevertheless." His Honour determined that the Tribunal had not considered this question, and ultimately remitted the matter to the Tribunal to make findings about capacity.

19. In the present case, that there was no dispute or doubt about the tenant's capacity. The lessor accepted that the tenant "lacks capacity" in relation to nearly all decision making. Moreover, the only pertinent evidence before the Tribunal as to capacity was the opinion of the tenant's psychiatrist, a specialist in intellectual disabilities, who opined that the tenant:

> *...does not have any decision-making capacity due to his intellectual disability ... nor has the capacity to weigh up consequences of any untoward behaviour.*

20. *Faull*, as a decision of the ACT Supreme Court, is binding upon this Tribunal. Accordingly, the tenant's representatives submitted, to the extent that the application relies on intention or recklessness as to the consequences of an action, and the 'past act ground' must fail.

21. The tenant's representatives further submitted that the same requirements for intention or recklessness applied no matter whether the actions were past or

future. In any case, the evidence before the Tribunal relating to past events and circumstances was outdated and historical, and there was no evidence upon which the Tribunal on could be satisfied that the tenant was "likely to cause or allow" damage or breach of quiet enjoyment in the future.

The lessor's response

22. In relation to the 'past acts ground', the lessor acknowledged the decision of the Supreme Court in *Faull*, but submitted that the circumstances under which the matter came before the Tribunal meant that decision was distinguishable and was in any case *obiter* and therefore not binding on the Tribunal.

23. The lessor referred instead to the decision of the *Commissioner for Social Housing v CC* [2017] ACAT 17 (***CC***):

> *The tenant relied upon a number of authorities from the criminal law concerning 'intentionality'. It is hard to know just how relevant criminal authorities are in the present civil context. For present purpose the Tribunal intends to follow the lead of the Appeal Tribunal of the New South Wales Civil and Administrative Tribunal in Cure v Bridge Housing Ltd [2014] NSWCATAP 80. The Appeal Tribunal took the view that intentionality was made out where the tenant deliberately undertook some action where it was apparent to the tenant that some damage would probably occur as a result of those actions.*[1]

24. While the lessor accepted (for the purposes of this case) that the tenant could not make decisions about his care, the lessor submitted that this did not necessarily mean that he could not be reckless as to the actions that cause that nuisance. The lessor suggested that striking out the proceedings on this basis was premature, because further evidence may substantiate the tenant's capacity to form the intention to engage in reckless actions that result in a nuisance.

25. In relation to the 'future acts ground' the lessor argued that no intention was necessary, all that was required was that the tenant be "likely to cause" interference with the quiet enjoyment of neighbouring occupants. In this regard, the lessor submitted that:

> *...on the ordinary reading of the section "is likely to cause or allow" stands separately from the intention or recklessness requirements, so that*

[1] At [62]

> *if the if the tenant is "likely to" cause or allow the damage, injury or breach of quiet enjoyment, there is no fault element.*
>
> *The Supreme Court in Faull did not disagree with this interpretation (see paragraph 130 of the decision).*
>
> *The Applicant submits that, if, on the evidence, the tenant is likely to cause serious or continuous interference with the quiet enjoyment of other residents, this ground is made out, even if the tenant does not act intentionally or recklessly.*
>
> *Such an interpretation is consistent with the purpose of the section to allow termination is* [sic] *urgent circumstances where there is a risk to neighbouring occupants (in this case fellow residents).*[2]

26. The reference to *Faull* at [130] was, the lessor submitted, only relevant in relation to past conduct, not future conduct. The lessor submitted that:

> *The jurisdictional fact is that, in order for the RT Tribunal to exercise a power to make a termination and possession order effective immediately under s 51 of the RT Act, the RT Tribunal must "be satisfied that the tenant has intentionally or recklessly caused or allowed, or is likely to cause or allow" one of the four stated matters in the paragraphs to the section. The reference in the section to "likely to cause or allow" is not relevant; the Commissioner's case before the RT Tribunal was based on past conduct and not future likelihood. I shall not refer to this part of the section further*[3].

27. The lessor ultimately submitted that the dismissal was pre-emptive, and that whether the tenant is likely to cause interference with other occupants' quiet enjoyment in the future was a matter for evidence.

Consideration

28. In *Faull* Refshauge J observed that:

> *134. The question here, then, is what content is to be given to "intentionally or recklessly", as referred to in the section. These are words frequently encountered in the criminal law. It seems to me there is no reason why they should not be given the same meaning.*
>
> *135. Intent, of course, is an ordinary English word and should be given its ordinary meaning: Cutter v The Queen [1997] HCA 7; (1997) 94 A Crim R 152 at 165-6.*
>
> *136. Recklessness at common law requires some foresight that the prohibited consequences will eventuate and the action is nevertheless*

[2] Applicant's submissions dated 10 September 2020
[3] Applicant's submissions dated 10 September 2020.

> *taken. See, for example, Pemble v The Queen [1971] HCA 20; (1971) 124 CLR 107 at 127, 135 and La Fontaine v The Queen (1976) 136 CLR 62 at 76.*

29. *Faull* is a decision of the Supreme Court on the interpretation of the provision in issue in this case, and as such it would, at the very least, be highly persuasive. It is appropriate that I follow it.

30. The Supreme Court's reasoning in *Faull* is very clear, at least in so far as it related to past acts: for an order to be made under section 51(d) of the RT Act the applicant must show that the tenant either intended to damage the premises, or that he foresaw the probability and undertook the action anyway. There is no evidence that the tenant in this case could meet that test, and clear evidence that he cannot.

31. *CC* is clearly distinguishable. *CC* was an internal appeal against a decision by the Tribunal to issue a termination and possession order under section 51. The tenants in *CC* had many challenges, including limited capacity and drug and alcohol issues, but in that case the Tribunal ultimately determined that the tenants understood the consequences of their actions. There is no evidence that the tenant in this case can form such an intention.

32. Consequently, following the reasoning in *Faull*, the application for a termination and possession order based on past actions must be dismissed.

33. The position in relation to the future risks ground is more complicated.

34. There is an argument, on a plain language reading of section 51(d) of the RT Act, that all the lessor requires to found an action under paragraph (d) in relation to future risks is evidence that the tenant is likely to cause or allow serious or continuous interference with the quiet enjoyment of the nearby premises. If correct, evidence of intention or recklessness is not required, only evidence of consequence.

35. It is useful to again turn to *Faull*. In considering the issues that arose in that case, Refshauge J set out, in some detail, the history and purpose of section 51 of the RT Act:

> *119. As approved by the Full Court in Devenport, I have had regard to the Community Law Reform Committee's Report. The relevant passage and recommendation in the Report is as follows:*
>
> > *Urgent applications for termination as a result of danger to the premises or risk of injury to the lessor.*
> >
> > *813. The effect of the above recommendations is that in certain cases the lessor may have to wait between five and seven weeks for a tribunal order terminating the tenancy agreement. The Committee agrees with submissions in support of a facility for urgent termination in extreme situations. In extreme situations there may be a significant risk of extensive damage to the premises or of injury to the lessor during this delay. The Committee therefore agrees that in cases where the lessor has a reasonable fear that the premises are about to be severely damaged or further damaged then the lessor should be able to seek an urgent hearing before the tribunal to terminate the tenancy and so reduce the risk of damage. The following recommendations are based on the Residential Tenancies Act 1987 (NSW) [s 68(1)].*
> >
> > *Recommendation 152: The proposed Residential Tenancies Act should enable the lessor to apply to the tribunal for an urgent hearing to terminate the tenancy where the premises are at serious risk of severe damage or the lessor has suffered or is likely to suffer injury to him or herself. The Committee also recommends that the tribunal have a discretion to terminate the tenancy if it is satisfied that the tenant has intentionally or recklessly caused or permitted, or is likely intentionally or recklessly to cause or permit:*
> >
> > - *serious damage to the residential premises; or*
> > - *injury to the lessor, the lessor's agent or any person in occupation of or permitted on adjoining or adjacent premises.*
>
> *120. The Explanatory Memorandum made it explicit that s 51 implemented this recommendation.*

36. Having regard to the comments of the Community Law Reform Committee's Report, as quoted by his Honour, and to his Honour's observations about them, it is clear that the Committee recommended that the Tribunal have a discretion to terminate the tenancy only if it is satisfied that a tenant has intentionally or recklessly caused or permitted, *or is likely to intentionally or recklessly to cause or permit,* serious damage or nuisance. In other words, the intention or the recklessness were, in the committee's mind, crucial to both the past actions and the future.

37. Subsection 51(d), which relates to interference with quiet enjoyment, was inserted later by way of the *Residential Tenancies Amendment Act 2005*. In relation to that amendment, His Honour observed that:

> *123. The present form of paragraphs (b) and (c) were inserted on 8 March 2005 and paragraph (d) was inserted on 28 February 2006. The Explanatory Statement for the latter insertion was particularly bland and did not explain why this provision was included in what the Community Law Reform Committee had described as providing for "extreme situations". The Explanatory Statement simply said:*
>
> > ***Clause 16 Damage, injury or intention to damage or injure Section 51(b)** – inserts new section 51(c) [sic] into the Act, which provides that the Residential Tenancies Tribunal may evict a tenant who is seriously or continuously interfering with a neighbour's quiet enjoyment of their property. This is consistent with the existing prescribed clause 70 which states that a 'tenant shall not interfere, or permit interference, with the quiet enjoyment of the occupiers of nearby premises'.*
>
> *124. Paragraph (d) is, after all, quite a different provision without the obvious element of urgency and serious risk inherent in the other paragraphs.*
>
> *125. Nevertheless, the section still provided that such termination under s 51 was only available where the RT Tribunal was "satisfied that the tenant has intentionally or recklessly caused or allowed ..." the relevant outcomes specified in the subsequent paragraphs.*

38. In other words, section 51(d) added a ground for termination that did not carry with it the urgency of the other subsections of 51. Rather, the test hinged upon an intention or recklessness on the part of the tenant.

39. It would be extraordinary then, if the intention of the legislature were to draft a provision that required intention or recklessness in relation to past, proven actions, but applied a different, lower standard to terminations based on likely future actions. It would enable a lessor to obtain a termination under section 51(d) for, for example, an action that may happen in the future in circumstances where the same action could not found a termination if proven to have happened in the past. Such an outcome would be manifestly absurd or is unreasonable and an interpretation that avoids such an outcome is to be preferred.[4]

[4] *Legislation Act 2001* sections 138(c) and 139(1)

40. Consequently, I am satisfied that for any order for termination made under section 51(d), I need to be satisfied both that the tenant is likely to intentionally or recklessly cause or allow interference with quiet enjoyment of nearby premises. As a capacity to form an intention or recklessness as to the outcome cannot be established in this case, the matter must be dismissed.

41. In making this decision, I acknowledge the frustration that the applicant lessor must feel at this decision. No doubt it has the welfare of all its tenants in mind when it makes difficult decisions such as the one to evict the tenant. However, the lessor is not without alternative remedies. By the time this decision was delivered, the lessor had already advised that it will seek an order under section 48 of the RT Act for termination breach of the terms of the residential tenancy agreement, for breach of the obligation in clause 70(c) of the standard terms not to interfere with the quiet enjoyment occupiers of nearby premises. This appears to be the more appropriate course, as the section 48 process contains protections, including notices and periods of time in which to address breaches, that are not available under section 51 of the RT Act. Alternatively, there is a no-fault process under section 47 of the Act, including the option of a 26 week, no cause notice.

42. Ultimately, however, an acceptable solution to the current situation is not likely to be found through litigation, and the Tribunal strongly encourages the parties to seek resolution through another means that better preserves what has been, until relatively recently, a lengthy and seemingly successful relationship.

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Presidential Member H Robinson

Date(s) of hearing	20 August 2020, 1 September 2020 & 18 September 2020
Solicitors for the Applicant:	Mr P Christensen
Solicitors for the Respondent:	Ms E Towney, Canberra Community Law