SUPREME COURT OF QUEENSLAND

CITATION:	*Peden P/L & Ors v Bortolazzo* [2006] QCA 350
PARTIES:	**PEDEN PTY LTD** ACN 080 906 485 **AS TRUSTEE FOR THE DUNN FAMILY TRUST** (first plaintiff/first respondent) **PETER DUNN** and **DENISE DUNN** (second plaintiffs/second respondents) **v** **CELINA MARIA BORTOLAZZO** (second defendant/applicant/appellant)
FILE NO/S:	Appeal No 470 of 2006 DC No 201 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	15 September 2006
DELIVERED AT:	Brisbane
HEARING DATE:	10 May 2006
JUDGES:	McMurdo P, White and Philippides JJ Joint reasons for judgment of McMurdo P and Philippides J; separate reasons of White J, concurring as to the orders made
ORDER:	**1. Application for leave to appeal granted** **2. Appeal allowed with costs to be assessed** **3. District Court Appeal No 201 of 2005 from the decision of the Magistrates Court at Innisfail on 5 July 2005 is set aside with costs to be assessed**
CATCHWORDS:	TORTS - NUISANCE - WHAT CONSTITUTES - PRIVATE NUISANCE - IN GENERAL - where the second respondents were neighbours of premises owned and leased by the applicant to tenants - where second respondents repeatedly complained to applicant that tenants were causing an ongoing nuisance in the form of excessive noise, unruly and drunken behaviour and smoke from burning off - where applicant spoke to and regularly visited tenants and found no evidence of the nuisance - whether applicant was liable in nuisance by allowing tenants to remain in possession of premises - whether applicant failed to take reasonable steps to terminate the tenancy or to ensure that the tenants ceased the nuisance TORTS - NUISANCE - WHO MAY BE SUED FOR - where

general law holds that a lessor is not ordinarily liable for a nuisance created by a tenant - whether applicant was responsible for nuisance caused by her tenants which she had neither authorised nor anticipated nor known of despite regular visits to premises

Residential Tenancies Act 1994 (Qld)

Attorney-General v Stone & Ors (1895) 12 TLR 76, distinguished
Aussie Traveller Pty Ltd v Marklea Pty Ltd [1998] 1 Qd R 1, considered
Blackett v Olanoff (1977) Mass, 358 NE 2d 817, considered
Bocchini v Gorn Management Co 515 A 2d 1179 (Md App 1986), considered
Chartered Trust plc v Davies [1997] 2 EGLR 83, considered
Godfrey v New South Wales (No 2) [2003] NSWSC 275, cited
Harris v James (1876) 35 LT 240, applied
Hussain v Lancaster City Council [2000] QB 1, considered
Page Motors Ltd v Epsom and Ewell BC (1981) 80 LGR 337, distinguished
R v Shorrock [1994] QB 279, distinguished
Rich v Basterfield (1847) 4 CB 783, applied
Sedleigh-Denfield v O'Callaghan [1940] AC 880, applied
Smith v Leurs (1945) 70 CLR 256, applied
Smith v Scott [1973] 1 Ch 314, applied
Sykes v Connolly (1895) 11 WN (NSW) 145, applied
W D & H O Wills (Aust) v SRA (1998) 43 NSWLR 338, applied
Wilkie v Blacktown City Council (2002) 121 LGERA 444, cited

COUNSEL: M A Jonsson for the applicant/appellant
E J Morzone for the respondent

SOLICITORS: Bennett & Philp, town agents for Vince Martin & Co (Innisfail) for the applicant/appellant
Vandeleur & Todd for the respondent

[1] **McMURDO P and PHILIPPIDES J:** This is an application for leave to appeal under s 118(3) *District Court of Queensland Act* 1967 (Qld) from a decision of the District Court in its appellate jurisdiction.

Background

[2] The first plaintiff/first respondent, Peden Pty Ltd as trustee for the Dunn Family Trust ("the company"), was the occupier of the Moondarra Motel ("the motel") in Innisfail. The second plaintiffs/second respondents, Peter Dunn and Denise Dunn ("the Dunns"), were the managers of the motel where they resided and the shareholders and directors of the company. The second defendant/applicant, Celina Maria Bortolazzo, jointly with her two daughters, Clara de Faveri and Gloria Sim, owned the property adjacent to the motel at 17 Ernest Street on which was situated an old house divided into two flats. The applicant, who was about

80 years old, and Ms de Faveri, on behalf of the three co-owners, undertook the letting of those flats. In about March 2003 Frank Maru and Cynthia Broome became the occupants and tenants of one of the flats, initially under an oral tenancy agreement with the applicant and her co-owners. From 19 August 2003 Ms Broome was responsible for the flat under a written standard Form 18a General Tenancy Agreement under the *Residential Tenancies Act* 1994 (Qld). Clause 21(2) of that agreement provided:

> "The tenant must not -
> (a) use the premises for an illegal purpose; or
> (b) cause a nuisance by the use of the premises; or
> *Examples of things that may constitute a nuisance:*
> ● using paints or chemicals on the premises which go onto or cause odours on adjoining land
> ● causing loud noises
> ● allowing large amounts of water to escape onto adjoining land.
> (c) interfere with the reasonable peace, comfort or privacy of a neighbour of the tenant; or
> (d) allow another person on the premises to interfere with the reasonable peace, comfort or privacy of a neighbour of the tenant."

[3] The respondents commenced an action in nuisance on 24 December 2003 in the Innisfail Magistrates Court against the tenant Mr Maru and the applicant claiming damages for injury arising from excessive noise from the property; a repeated smoke nuisance caused by tenants burning off; excessive barking of a dog; unruly and drunken behaviour by persons at all hours of the day and night and the broadcasting of music at high volume. The respondents claimed that since about 3 December 2003 the applicant should have taken action to alleviate the nuisance and that as a result of the nuisance the company had suffered financial loss and the Dunns claimed damages for interference with the residential amenity. The respondents joined Ms Broome as a defendant on 2 April 2004. Before trial Mr Maru died and Ms Broome moved out of the premises. Ms Judy Assa (Mr Maru's niece) and Mr Chris Siltanen who were already residing in the flat began paying rent directly to the applicant and her co-owners. The company and the Dunns then discontinued their action against Mr Maru and Ms Broome and proceeded only against the applicant, ultimately also contending that she was liable in nuisance because she allowed Ms Assa and Mr Siltanen to remain in possession of the flat knowing that they were responsible for the nuisance complained of by the respondents and that she failed to take reasonable steps to terminate their tenancy of the flat from which the acts of nuisance emanated and that she failed to take reasonable steps to ensure those tenants ceased the nuisance.

The magistrate's decision

[4] The hearing took place in the Innisfail Magistrates Court on 6 May and 1 July 2005. The magistrate gave his decision on 5 July 2005. He made the following findings. Although the evidence given by Mr and Mrs Dunn as to the behaviour of Mr Maru and Ms Broome was not supported by very much independent objective evidence and they had a tendency to overstate the extent and quality of events, they were not dishonest. On balance the matters about which they complained constituted a nuisance created by Mr Maru and Ms Broome who were no longer being sued. There was no evidence to suggest that when the tenancy with Mr Maru and Ms Broome commenced it was foreseeable to the applicant that they would

subsequently create a nuisance. That foreseeability was not affected by cl 21.2 of the tenancy agreement with Ms Broome whereby she undertook not to create a nuisance. When Ms Assa and Mr Siltanen became tenants the applicant was on notice that complaints had been made about Mr Maru and Ms Broome's behaviour. Ms Assa and Mr Siltanen contributed to the nuisance created by Mr Maru and Ms Broome. The evidence did not establish on balance that the propensity of Ms Assa and Mr Siltanen to cause a nuisance was drawn to the applicant's attention when she entered into the rental agreement with them. After the Dunns' initial complaints and telephone calls about Mr Maru and Ms Broome to the co-owners in about June 2003 there was correspondence between the parties' solicitors commencing in August 2003. Between 4 February 2004 and 29 July 2004 there was a gap in the correspondence between the solicitors and no direct contact between the parties. In September 2004 a letter from the respondents' solicitors to the applicant's solicitors first referred specifically to the conduct of Ms Assa and Mr Siltanen. There is no clear evidence of when Mr Maru died and Ms Broome left the property. In those circumstances it was not appropriate to infer that the applicant should have foreseen that Ms Assa and Mr Siltanen would have caused the nuisance complained of; to do so would be to infer guilt by association. An alternative inference was that the lack of complaints from the respondents between 4 February and 29 July 2004 suggested that the change of tenants had resolved the problem between them and the Dunns. Prior to the tenancy with Ms Assa and Mr Siltanen, the co-owners did not resume occupation or control of the premises, even constructively. It remained good law that there was no obligation on a landlord to put an end to a tenancy where he had discovered that a tenant was committing a nuisance from that property: *Sykes v Connolly*.[1] It followed that the applicant was not liable to the respondents. The magistrate gave judgment for the applicant against the respondents.

The appeal to the District Court

[5] On appeal the District Court judge reviewed the evidence before the magistrate and found that it uncontroversially established that Mr Maru and Ms Broome were tenants from about March 2003 until 19 August 2003; others residing at or visiting the premises during that time were invitees of the tenants. From 19 August 2003 until October 2004 Ms Broome was the sole tenant of the premises. From October 2004 Ms Assa and Mr Siltanen became the tenants of the premises.[2]

[6] His Honour found that the magistrate wrongly considered that the lease to Ms Broome had been assigned to Ms Assa and Mr Siltanen. By issuing a Notice to Leave to Ms Broome on 16 September 2004 the co-owners sought to terminate the tenancy with Ms Broome. She left the premises in October 2004 effectively accepting that termination. There was therefore no assignment of the tenancy but rather the creation of a new tenancy with Ms Assa and Mr Siltanen.[3] Because the change of tenants did not occur until October 2004 the lack of complaints from the respondents between 4 February and 29 July 2004 could have had nothing to do with the change in tenancy, especially as the only co-owner to give evidence, Ms de Faveri, gave no testimony to that effect.[4]

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1 (1895) 11 WN (NSW) 145.

2 *Peden Pty Ltd as Trustee for the Dunn Family Trust and Ors v Bortolazzo*, unreported, DC No 201 of 2005, 22 December 2005, [8].

3 Above, [9].

4 Above, [12].

[7] The judge considered that it was unnecessary to establish that the applicant had actual knowledge that Ms Assa and Mr Siltanen could create a nuisance; knowledge, or means of knowledge, that she knew or should have known of the nuisance in time to correct it, was sufficient. In October 2004 when the tenancy was granted to Ms Assa and Mr Siltanen the applicant had knowledge that they had been living at the premises for some time. She knew or should have known that during that time the incidents of nuisance were continuing. The respondents' solicitors wrote to her solicitors in those terms on 29 July, 30 July and 14 September 2004. She should have known that the incidents of nuisance were being carried out not just by Mr Maru and Ms Broome but also by their invitees. The magistrate should have concluded that the applicant knew or should have known that if a tenancy was granted to Ms Assa and Mr Siltanen there was a real risk that the incidents of nuisance would continue. After the termination of Ms Broome's tenancy the co-owners had an immediate right to possession of the premises but granted a tenancy to Ms Assa and Mr Siltanen. Because of the foreseeability of the continuing nuisance, the applicant was liable to the respondents for that nuisance between October 2004 and the date of trial.[5] The magistrate erred in concluding otherwise.

[8] His Honour referred to cl 21.2 of the tenancy agreement with Ms Broome and noted that the co-owners could have used that term of the tenancy agreement to prevent the repeated incidents of nuisance and if necessary to terminate the tenancy as they did in Ms Broome's case.[6] There was no explanation in the evidence of Ms de Faveri as to why the co-owners did not take this action sooner. After discussing *Sykes v Connolly*[7] and *Aussie Traveller Pty Ltd v Marklea Pty Ltd*[8] his Honour concluded "that the duty of a landlord to prevent the activities of a tenant causing a nuisance to a neighbour is not materially different from the duty of a landlord to another tenant under a covenant of quiet possession."[9] It followed that the magistrate also erred in not concluding that the applicant was liable to the respondents for damages for the nuisance created from 3 December 2003 until Ms Broome vacated the premises in October 2004.

[9] The District Court judge allowed the appeal, set aside the Magistrates Court order and gave judgment against the applicant for the company for $3,500 together with interest of $396 and for the Dunns for $10,000 together with interest of $503. The judge also ordered that the applicant pay the present respondents' costs of and incidental to the action and the District Court appeal.

The applicant's contentions

[10] In her application for leave to appeal the applicant contends that an appeal is necessary to correct a substantial injustice to her; that the District Court judgment is based on errors which require correction; and that her proposed appeal raises an important question of law which has a significance extending beyond the immediate facts of this matter. Were leave to appeal granted she proposes to argue as her grounds of appeal that the District Court judge erred in concluding that the duty of a landlord to prevent the activities of a tenant causing a nuisance to a neighbour is not materially different from that of a landlord to another tenant under

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5 Above, [15].
6 Above, [19].
7 See fn 1.
8 [1998] 1 Qd R 1, especially 12 - 14.
9 See fn 2, [20] - [24].

a covenant of quiet possession; that the judge erred in concluding that with the departure of Ms Broome from the property in October 2004, the applicant and her co-owners acquired or reacquired an immediate right to possession of the premises; and that the judge erred in finding the magistrate wrongly concluded that there was no evidence upon which he could be satisfied that the propensity of Ms Assa and Mr Siltanen to cause a nuisance was drawn to the applicant's attention prior to their assumption of occupancy in their own right.

[11] Whether leave to appeal should be given requires some consideration of the prospects of success on appeal on the proposed grounds of appeal.

When is a lessor liable for the nuisance created by a tenant?

[12] An occupier of land commits a nuisance if, with knowledge or presumed knowledge of a nuisance initially committed by another, the occupier fails to take reasonable means to end a nuisance within a reasonable time: *Sedleigh-Denfield v O'Callaghan*.[10] The law is reluctant to impose a duty on one person to control the conduct of another for whom the first person has no primary responsibility; the general rule is that one person is under no duty to control another person to prevent doing damage to a third: *Smith v Leurs*;[11] *W D & H O Wills (Aust) v SRA*.[12]

[13] Consistent with that general rule, a lessor (who is necessarily not in occupation having leased the premises to a tenant) will not ordinarily be liable for a nuisance created by the tenant (*Rich v Basterfield*,[13] *Harris v James*[14]) and is under no obligation to put an end to the tenancy when he or she discovers that a tenant is creating a nuisance (*Sykes v Connolly*[15]). The primary judge was concerned that, because of the antiquity of *Sykes v Connolly*, it may no longer accurately state the law. However, the principle behind that case and the decisions of *Rich v Basterfield* and *Harris v James* has been followed in *Smith v Scott*.[16] In that case, the plaintiff, the owner of a home neighbouring premises owned by the defendant, brought an action against the defendant arising out of actions of the defendant's tenants. As in the present case, the terms of the tenancy expressly prohibited the creation of a nuisance. Pennycuick V-C made the following pertinent observations concerning a landlord's liability for a nuisance created by a tenant:

> "It is established beyond question that the person to be sued in nuisance is the occupier of the property from which the nuisance emanates. In general, a landlord is not liable for nuisance committed by his tenant, but to this rule there is, so far as now in point, one recognized exception, namely, that the landlord is liable if he has authorized his tenant to commit the nuisance: *Harris v James* (1876) 35 LT 240. But this exception has, in the reported cases, been rigidly confined to circumstances in which the nuisance has either been expressly authorised or is certain to result from the purposes for which the property is let: *Rich v Basterfield* (1847) 4 CB 783 and *Ayers v Hanson, Stanley & Prince* (1912) 56 SJ 735 ... I have used the word 'certain,' but 'certainty' is obviously a very difficult matter

10 [1940] AC 880.
11 (1945) 70 CLR 256, Dixon J, 262.
12 (1998) 43 NSWLR 338, Mason P (with whom Beazley JA agreed), 357.
13 (1847) 4 CB 783; 136 ER 715
14 (1876) 35 LT 240.
15 See fn 1.
16 [1973] 1 Ch 314.

> to establish. It may be that ... the proper test in this connection is 'virtual certainty' which is another way of saying a very high degree of probability, but the authorities are not ... altogether satisfactory in this respect. Whatever the precise test may be, it would, I think, be impossible to apply the exception to the present case. The exception is squarely based in the reported cases on express or implied authority: see in particular the judgment of Blackburn J in *Harris v James* 35 LT 240, 241. The exception is not based on cause and probable result, apart from express or implied authority. In the present case, [the defendant] let [the premises] to [the tenants] as a dwelling house on conditions of tenancy which expressly prohibited the committing of a nuisance, and, notwithstanding that [the defendant] knew [the tenants] were likely to cause a nuisance, I do not think it is legitimate to say that [the defendant] impliedly authorized the nuisance."[17]

[14] Pennycuick V-C also rejected the proposition that a duty of care was owed by a landlord to a neighbour when selecting a tenant and made the following additional observations:

> "... the relationship of landowner, tenant and neighbour is, in its nature, of the most widespread possible occurrence, and the introduction of the duty of care in this connection would have far reaching implications in relation to business as well as to residential premises."[18]

[15] Pennycuick V-C's statement of the law relating to a lessor's liability for a nuisance created by a tenant has been recently followed by the English Court of Appeal in *Hussain v Lancaster City Council*[19] on a strike out application[20] and was even more recently referred to with approval by the New South Wales Court of Appeal in *Wilkie v Blacktown City Council.*[21] Pennycuick V-C's conclusions concerning the absence of a duty of care in a landlord in selecting tenants were endorsed in *Wills.*[22] Mason P (Beazley JA agreeing) noted that Pennycuick V-C's approach was "nothing more than a particular application of judicial restraint based upon the fear of creating 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'", consistent with McHugh J's observations in *Pyrenees Shire Council v Day*[23] (see also Shaw J in *Godfrey v New South Wales*[24]).

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17 Above, 321.

18 Above, 322. See also M Lee, *What is Private Nuisance?* (2003) 119 LQR 298; C Gearty, *The Place of Private Nuisance in Modern Law of Torts* (1989) 48 CLJ 214.

19 [2000] QB 1, 23 - 24.

20 Cf *Wilson & Ors v New South Wales Land and Housing Corporation* [1998] ANZ Conv R 623 where Master Harrison refused the defendant's application for summary judgment on the plaintiffs' claim against the defendant lessor for injuries arising from a nuisance created by the defendant lessor's tenants. Under the lease the tenant agreed not to cause or create a nuisance. Master Harrison noted that summary judgment was given only in the clearest of cases (6 - 8) and that the plaintiffs' claim for nuisance was not hopeless because it could not be predicted with firm assurance what the future holds in relation to the law of nuisance (at 627). See also R Bagshaw, *Private Nuisance by Third Parties* (2000) 8 Tort L Rev 165.

21 (2002) 121 LGERA 444, per Davies AJA (Heydon JA and Young CJ in Eq agreeing), [61].

22 See fn 12, 360.

23 (1998) 192 CLR 330, 368..

24 [2003] Aust Torts Reports 81-700, [47].

[16] Furthermore, *Smith v Scott* is included in the authorities supporting the following statement of the relevant law in Fleming's *The Law of Torts*:[25]

> "Passing from cases of disrepair, the owner is not responsible for any nuisance *created* by his tenant, unless he let the premises to him for a purpose calculated to cause a nuisance, like using a hall for noisy parties. In the traditional formula, the nuisance must have been either expressly authorized or certain to result from the purposes for which the property is being let. Nothing less than at least a high degree of probability ('virtual certainty') that the tenants would misbehave will suffice; nor will the landlord's mere failure to intercede and terminate the tenancy after becoming aware of the nuisance.
>
> Beyond that, a landlord cannot be held to account."

[17] The District Court judge was influenced in reaching a contrary conclusion by the case of *R v Shorrock*.[26] Shorrock appealed against his conviction for public nuisance arising out of him granting a licence to use his premises over a weekend for an "acid house party". Between 3,000 and 5,000 people attended and paid £15 admission each. The event caused very extensive noise and greatly disturbed the local populace; 275 telephone complaints were received from nearby residents disturbed by the music and speech relayed over a public address system. Shorrock accepted that a public nuisance was caused but contended he was not liable for it. The English Court of Appeal relied on a passage from *Sedleigh-Denfield v O'Callaghan*[27] where Lord Wright considered the liability in private nuisance of a landowner for a nuisance created on the land by a trespasser and concluded that the occupier will be liable even though the occupier did not create the nuisance if the occupier knowingly leaves the nuisance on the land or if with ordinary care in the management of the property the occupier should have realised the risk of the existence of the nuisance.[28] The Court of Appeal concluded that the mental element of the offence of public nuisance was established if Shorrock knew, or ought to have known in the sense that the means of knowledge were available to him, that there was a real risk that the consequences of the licence granted by him in respect of his field would be to create the sort of nuisance that in fact occurred.[29]

[18] *Shorrock* is plainly distinguishable from the present case because he was not a lessor; it does not state the law relating to the responsibility of a lessor for a nuisance created by a tenant. Cases such as *Attorney-General v Stone & Ors*[30] and *Page Motors Ltd v Epsom and Ewell BC*[31] can similarly be distinguished from the present case because they concerned the liability of an occupier not of a lessor for the conduct of a tenant.

[19] The District Court judge and counsel for both parties in this appeal placed considerable emphasis on this Court's decision in *Aussie Traveller Pty Ltd v*

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25 9th ed, LBC Information Services, 1998, 483. See also R Balkin & J Davis, *Law of Torts*, 3rd ed, LexisNexis Butterworths, 2004, [14.37]; J Clerk, *Clerk & Lindsell on Torts*, 19th ed, Sweet & Maxwell, 2006, [20-62] - [20-63].

26 [1994] QB 279.

27 See fn 10, 904 - 905.

28 See fn 26, 284 - 285.

29 Above, 289.

30 (1895) 12 TLR 76.

31 (1981) 80 LGR 337.

Marklea Pty Ltd.[32] That case however, as the District Court judge rightly recognized, was not analogous to the present case.[33] In *Aussie Traveller* the plaintiff brought an action against its lessor defendant for damages for breach of an implied covenant of quiet enjoyment caused by a nuisance created by another tenant of the defendant in premises adjoining the plaintiff's. The claim was based on the terms of the respective leases with each tenant; the lessor defendant was capable of exercising control over the tenant creating the nuisance through the lease; and the lessor defendant breached its implied obligation to the plaintiff tenant not to derogate from its grant and the covenant of quiet enjoyment under the lease.

[20] Fitzgerald P considered that the evidence established that there was an implied promise as a matter of fact by the lessor defendant, which the defendant had breached, that the plaintiff tenant should be permitted to use its premises without unreasonable disturbance by the defendant's other tenants.[34]

[21] McPherson JA (Thomas J agreeing) referred to the older authorities, which suggested that in the circumstances before the court (where the nuisance was not that of the lessor but another tenant of the lessor) a lessor's liability was dependant on proof of authorisation or active participation. His Honour noted that the law had moved some way since those decisions were given, referring to decisions such as *Sedleigh-Denfield* and *Shorrock* as examples of the development of a liability for nuisance where a landowner failed to take steps to eliminate or prevent it although able to do so, adding:

> "... although, apart from any provision in the lease, a lessor generally loses control over premises once they are let to a tenant, he may nevertheless remain legally responsible for tortious acts done on the land by a tenant at least if at the time he agreed to part with possession and control, it was reasonably foreseeable that the tenant was likely to do those acts."[35]

His Honour did not refer to *Smith v Scott* or its more recent judicial consideration and approval, no doubt because it did not directly concern the case before him. His Honour concluded that, as it was a condition of each lease that the lessee undertake not to do or permit any act or thing which might be a nuisance or cause damage or disturbance to any other tenant or to the lessor, the landlord could have exercised control over the offending tenant through that clause and so was liable through the terms of the lease to the plaintiff tenant for nuisance created by the offending tenant.

[22] McPherson JA considered that this conclusion was consistent with *Shorrock* and with two US appellate decisions: *Blackett v Olanoff*[36] and *Bocchini v Gorn Management Co.*[37] For the reasons given earlier, *Shorrock*, who was an occupier not a landlord, has no application to the present case.

[23] Both the US cases, like *Aussie Traveller*, were brought against landlords who were the landlord of both the plaintiff tenant and the offending tenant. In *Bocchini*,

32 [1998] 1 Qd R 1.
33 See fn 2, [17].
34 See fn 32, 6.
35 Above, 12.
36 358 NE 2d 817, (Mass. 1977)
37 515 A 2d 1179 (Md App 1986).

Wilner J, delivering the judgment of the Court of Special Appeals of Maryland, observed:

> "Our concern is not with the underlying principle but rather with its application. The more recent cases dwell not so much on whether the landlord has *approved* the conduct of the tenant as whether he is in a position to *correct* or *terminate* it. **Where, through lease provisions or otherwise, he has that ability, the thought is that he ought not to be able to escape his obligation under a covenant of quiet enjoyment** by steadfastly refusing to exercise his authority.
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> We adopt that view. It is fair and it is reasonable. The insertion in a lease of a restriction against excessive noise or other offensive conduct is precisely for the purpose of enabling the landlord to control that conduct. Its principal function - at least in a multi-unit apartment lease - is to protect the right of other tenants to the quiet enjoyment of their homes by allowing the landlord to evict a tenant who transgresses upon that right." (emphasis added)

[24] In *Blackett*, Wilkins J, delivering the judgment of the Supreme Judicial Court of Massachusetts, stated that, if the landlord leased both an entertainment lounge and nearby residential apartments, the situation differed from the usual annoyance of one residential tenant by another where traditionally the lessor has not been liable for the annoyance. The position was different where the lessor entered with one tenant into a lease which the lessor knew permitted that tenant to engage in activity which would interfere with the rights of another tenant. The clash of tenants' interests may have been only a known potentiality initially but it was the natural and probable consequence of the lessor permitting the lounge to operate where it did; the lessor could have controlled the actions at the lounge and therefore should not be entitled to collect rent for residential premises which the lessor had acquiesced in making not reasonably habitable.

[25] In the same vein as *Aussie Traveller* is the decision in *Chartered Trust plc v Davies*.[38] Henry LJ (with whom Staughton LJ agreed) held that the landlord of a shopping centre, who failed to intervene to prevent a tenant (a pawnbroker) using the communal area of a shopping mall so as to cause a nuisance to the defendant tenant, had continued the nuisance and derogated from its grant to the defendant. In so concluding, Henry LJ rejected the proposition that the older authorities (such as *Malzy v Eichholz*[39]) meant that a landlord was never obliged to take any action to restrain a nuisance to a tenant caused by the activities of another tenant:

> "I take the law to be clear that, where the mere fact of letting the landlord's retained and neighbouring land is not a derogation from his grant to the original tenant, then the landlord will only be vicariously liable for the activities of his tenant on the land where he has consented to (or, in the language of nuisance, continued or adopted) them. What I would question is whether *Malzy v Eichholz supra* is authority for the proposition that the landlord is never obliged to take any action himself to restrain those activities. I question whether so sweeping a proposition can be the law today."[40]

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38 [1997] 2 EGLR 83.

39 [1916] 2 KB 308.

40 See fn 38, 87.

[26] Henry LJ referred to *Hilton v James Smith & Sons (Norwood) Ltd*[41] as illustrative of a case where the Court of Appeal, relying on *Sedleigh-Denfield*, held that a landlord was obliged to take positive action to prevent a nuisance to one of its tenants through the actions of other tenants (by obstructing a right of way and parking place) and found to have continued the nuisance by not taking such action. Henry LJ noted (as McPherson JA had done in *Aussie Traveller*) the development in the law of nuisance, especially *Sedleigh-Denfield*, and identified, as a critical factual distinction between the older decisions such as *Malzy v Eichholz* and the case before the court, that the nature of the grant to the defendant tenant depended to a large measure on the proper management of the mall and common parts thereof.[42] Not only did the lease include a covenant restraining the tenants from committing a nuisance and specifically regulate the conduct of the tenancy, but the landlord also retained a rule-making power for the better use of the shopping centre, in particular the common parts, and the power to make the tenants obey such rules. Henry LJ stated:

> "If a landlord was never required to take action to protect what he had granted to his tenant, he could render valueless the protection of his tenant's business seemingly built-in to the letting scheme he was marketing. That would offend the principle of fair dealing. There must come a point where the landlord becomes legally obliged to take action to protect that which he has granted to his tenant: subject perhaps to the landlord's ability to take the necessary action …"[43]

[27] In *Hussain* (which was not cited to this Court or below) the plaintiffs, who owned a shop and residence on a council housing estate, brought an action in nuisance and negligence against the defendant council alleging that it had failed to take effective steps to prevent its tenants from committing criminal acts of harassment against the plaintiffs. The Court of Appeal upheld the decision of the master who struck out the statement of claim and dismissed the action as disclosing no reasonable cause of action. As to the claim in nuisance, Hirst LJ (with whom Thorpe and Hutchison LJJ agreed) found that, while the acts complained of interfered with the plaintiffs' enjoyment of their land, they did not involve the tenants' use of the tenants' land and thus fell outside the scope of the law of nuisance. But additionally, his Honour held that the council could not be liable for acts of nuisance committed by its tenants unless the council had specifically authorised or adopted those acts. In that regard, Hirst LJ considered *Smith v Scott* to be decisive authority in favour of the council which remained good law.[44] In reaching this conclusion, his Honour rejected the contention that the well established doctrine stated in *Smith v Scott* had been overtaken by decisions such as *Page Motors* or *Chartered Trust*. As to the latter, Hirst LJ stated:

> "But here again, as in the *Page Motors* case, the adverse decision against the landlord was attributable to the special circumstances of that case on which Henry LJ laid strong emphasis, namely the landlord's special role in the management of the shopping mall in which both premises were situated."[45]

[28] *Aussie Traveller*, like *Blackett, Bocchini* and *Chartered Trust*, does not change the general law under which a lessor is not ordinarily liable for a nuisance created by a

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41 [1979] 2 EGLR 44.
42 See fn 38, 87.
43 See fn 38, 88.
44 See fn 19, 23 - 24.
45 See fn 19, 24.

tenant. Those cases turn on the terms of the leases between the lessor and the respective tenants. They concern the lessor's liability for a nuisance created by the first tenant, which affects the second tenant's rights to quiet enjoyment and the lessor's obligation not to derogate from the grant under the second tenant's lease; they do not concern a lessor's general liability for a nuisance created by a tenant.

[29] In our view the relevant legal principles applicable here are as follows. A lessor is not responsible for a nuisance created by a tenant unless the lessor let the premises for a purpose calculated to cause a nuisance, that is, by express authorization of the nuisance or in circumstances where the nuisance was certain to result from the purposes for which the property was being let.

[30] This statement of the law may seem harsh to unfortunate people like the Dunns when their lives are made miserable by the inconsiderate behaviour of tenant neighbours whose lessor may be able to exercise positive influence over their anti-social behaviour through the terms of the lease. But to extend the law relating to a lessor's liability for a nuisance created by a tenant in the way suggested by the respondents and the District Court judge would effectively allow neighbours with no contractual relationship with the lessor to influence the selection of a lessor's tenants. Neighbourhood disputes are notoriously frequent. Such a proposal seems to us to be commercially and socially unworkable. We apprehend no present need to depart from the long-established legal principles governing this well-settled aspect of the law. Any incremental developments to the law in this area are matters for the High Court not an intermediate Court of Appeal.

[31] It follows that in our view the applicant's first proposed ground of appeal is made out: the District Court judge erred in finding that the lessor's liability for a nuisance created by his tenant was not materially different from that of a lessor to one tenant to prevent the nuisance of another under the terms of the leases. The District Court judge also erred in treating the lessor's liability for the nuisance of a tenant as being akin to that of an occupier's liability for a nuisance created without his knowledge and consent if the occupier had the means of knowledge or should have known of the nuisance in time to correct it and obviate its effects (*Sedleigh-Denfield*[46]).

[32] The respondents' case against the applicant insofar as it was based on the applicant's responsibility to take action to alleviate the tenants' nuisance was misconceived unless the respondents demonstrated that the applicant let the flat for a purpose calculated to cause a nuisance, that is, by either expressly authorising the nuisance or in circumstances where the nuisance was certain to result from the residential tenancy. Although that was not the case pleaded or conducted at trial, we will briefly deal with whether the respondents established a case in nuisance against the applicant on the evidence.

Was the applicant liable for the tenants' nuisance before October 2004?

[33] There was no evidence that when the applicant rented the premises to Mr Maru and Ms Broome she authorised them to create a nuisance or that a nuisance was certain to result from the residential lease. The magistrate was right to find the applicant was not liable for the nuisance created during the tenancy with Mr Maru and Ms Broome which ended in October 2004.

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46 See fn 10, 894.

Was the applicant liable for the tenants' nuisance after October 2004?

[34] The applicant leased the premises to Ms Assa and Mr Siltanen in October 2004. To determine whether on the evidence the magistrate was entitled to find she was not liable for the tenants' nuisance from October 2004 until trial it is necessary to refer in a little more detail to the evidence on behalf of the applicant, remembering that the magistrate found the tenants created a nuisance although the Dunns exaggerated its extent and quality.

(a) Ms de Faveri's evidence

[35] The applicant, who was elderly and apparently indisposed, called only one witness, her daughter and co-owner Ms de Faveri. She said that Ms Broome and Mr Maru became tenants of the property in about February 2003 and that Ms Broome entered into a written tenancy agreement in August 2003. She had no reason to question their suitability as tenants. She attended the premises every second Saturday morning between 9.00 am and 11.30 am to collect the rent. She never noticed anything untoward. Some months after the tenancy commenced the Dunns phoned her early one morning complaining that the tenants were having a rowdy party. She suggested the Dunns call the police. She attended the premises at 7.00 am the next morning and again saw and heard nothing untoward. She discussed the incident of the previous evening with the tenants. They explained they had visitors from their home in Badu. Ms Broome said she did not think they had done anything wrong. The Dunns spoke to Ms de Faveri and expressed views which Ms de Faveri felt showed racial prejudice. Because of the Dunns' regular telephone complaints about the tenants she kept a regular watch on the premises. The tenants' dog seemed happy and did not bark a lot. She never saw any fire or smoke at the premises and nor did she ever hear any significant noise coming from the premises.

[36] On 11 August 2003 she received a first written complaint from the Dunns' solicitors which included the following:

> "When approached in the past we are instructed that you have indicated that you had given the tenants a warning and would put them out if our clients could find you another tenant. We would respectfully point out that it is your obligation to ensure that your tenants do not cause a nuisance to adjoining occupiers and it is your responsibility entirely to abate these acts of nuisance even if it results in a loss of a tenant.
>
> Our clients require that you advise us within ten (10) days of the date of this letter that you have served a Notice on the tenants under the Residential Tenancies Act to recover possession of the premises and also undertake to prosecute all necessary proceedings under the Residential Tenancies Act to have the tenancy terminated at the earliest possible date. …"

[37] On 22 August 2003 Ms Bortolazzo's solicitors responded in these terms:

> "My client has brought the contents of your letter to the tenants [sic] notice, who have apparently got advice in relation to the matter.
>
> My client's [sic] and the tenants are prepared to engage in mediation with your clients in an endeavour to resolve matters."

[38] She discussed the letter of 11 August with Mr Maru who told him it had nothing to do with her as lessor; he seemed to think it was racial discrimination. She did not

consider she had any legitimate grounds to end the tenancy because the tenants paid rent on time and she had never heard any excessive noise or other problems.

[39] On 26 November 2003 the Dunns' solicitors wrote a further letter to Ms Bortolazzo's solicitors complaining about ongoing noise and bad behaviour from the tenants and concluding:

> "This conduct is having a devastating effect on our clients' business and their peace of mind. Our clients require a written assurance by noon next Wednesday that your client has given the tenants a Notice to Leave and an undertaking that she will take all necessary steps to enforce that Notice. In the event of that undertaking not being received our clients propose to commence proceedings immediately in a Court of appropriate jurisdiction for an Injunction and damages. Our clients consider that even though your client is not in occupation of the premises she is in effect causing or permitting a nuisance which seriously interferes with our clients' right to peacefully enjoy their property."

[40] On 27 January 2004 Ms Bortolazzo's solicitors responded in these terms:

> "The problem our clients have is that when they have taken your clients [sic] complaints to the tenants, there has been a denial and it is your clients [sic] word against that of the tenants. When our clients have called at the premises on a weekly basis, there has been nothing untoward i.e. dogs barking, people being assaulted or drunks walking around. Apart from your clients [sic] complaints which have been denied by the tenants, the tenants have fulfilled their tenancy obligations. Can you prove any third party evidence to support your clients [sic] claims?
>
> We await to hear from you further."

[41] Ms Bortolazzo's solicitors in preparing for trial on 29 July 2004 wrote to the Dunns' solicitors about discovery and in terms which included:

> "At this stage, your clients haven't produced one iota of evidence to justify a forced eviction of the tenant, who has made it clear that they will not leave voluntarily."

[42] On 14 September 2004 the Dunns' solicitors wrote to Ms Bortolazzo's solicitors in these terms:

> "The nuisance is ongoing. Our clients found it necessary to call the police about two weeks ago and there have been two significant instances since then. In particular, Mrs Dunn's health has been affected.
>
> We also point out that the number of people in residence at the premises is such that ongoing nuisance is almost inevitable. As previously indicated, Cynthia Broome appears to have left the premises some months ago. Our clients say that over many months the occupants of the premises as far as they are concerned (apart from Cynthia Broome) include ... Frank Maru, adult persons known as 'Judy' and 'Jim' and their three children ... There is also an adult son of Jim living in the premises and very often a youth called 'Daniel' who appears to be a son of Jim.

> The situation as far as our clients are concerned is intolerable and our clients again demand that your client takes immediate and decisive action to obtain the vacant possession of the premises."

[43] In September 2004 Ms de Faveri and her co-owners issued the tenants with a Notice to Leave under the *Residential Tenancies Act* because of the respondents' constant complaints and for everyone's peace of mind. Mr Maru died in October 2004, Ms Broome left about a week later and Ms Assa and Mr Siltanen took over the tenancy. She apprehended that the co-owners of the premises did not regain possession of the premises at any time after Ms Broome moved into the flat in early 2003.

[44] In cross-examination Ms de Faveri said she did not think Ms Assa and Mr Siltanen were a problem to the Dunns because she understood the complaints centred on Mr Maru and Ms Broome. Her mother, the applicant, was the main contact with their solicitors in this matter. She agreed, however, that the "Judy" and "Jim" referred to in the letter of 14 September 2004 were references to Ms Assa and Mr Siltanen. Despite that letter, Ms de Faveri maintained that she was unaware that Ms Assa and Mr Siltanen were the subject of the Dunns' complaints of noise or inappropriate behaviour before accepting them as tenants.

(b) Conclusion on the applicant's liability after October 2004

[45] The applicant will only be liable for the nuisance created by her tenants after October 2004 if she expressly authorized the nuisance or the nuisance was certain to result from the purposes for which the property was let. The co-owners, as Ms de Faveri explained in her evidence, were in a difficult position. They did not believe they had any reason to end the initial tenancy with Mr Maru and Ms Broome. They had no independent verification of the complaints made by the respondents. They and their tenants were concerned that the complaints may have been unreasonable and influenced by racial prejudice. The magistrate, however, found that although the complaints of nuisance were exaggerated, they were legitimate and the respondents established the tenants created a nuisance. The respondents' reference to Ms Assa and Mr Siltanen in the letter to the applicant's solicitor of 14 September 2004 did not mean that renting the premises to them the following month was expressly authorizing a nuisance or that a nuisance was certain to result from the residential tenancy. Indeed, the fact that the former tenant Ms Broome had been served with a Notice to Leave because of the Dunns' complaints must have been an indication to the new tenants that the applicant was not a landlord who would tolerate the creation of a nuisance. Applying the legal principle set out above to those facts, the applicant was not liable in damages for the nuisance committed by her tenants after October 2004.

[46] It follows that the District Court judge was wrong to overturn on appeal the magistrate's finding on that issue.

[47] Ms de Faveri's evidence and the correspondence between the parties to which we have referred provide a good example of the wisdom of the present law strictly limiting a lessor's general liability for the nuisance created by a tenant and the difficulties which would follow if the law were as proposed by the respondents.

[48] Our conclusions on the first ground of appeal make it unnecessary to consider the remaining proposed grounds of appeal raised by the applicant.

Conclusion

[49] The District Court judge erred on an important question of law. This Court should correct that error which could have wide-ranging effects. That error has also resulted in substantial injustice to the applicant. For those reasons leave to appeal should be granted, the appeal allowed with costs to be assessed and the decision of the District Court judge set aside. Instead we would order that the District Court Appeal No 201 of 2005 from the decision of the Magistrates Court at Innisfail on 5 July 2005 be dismissed with costs to be assessed.

[50] **WHITE J:** The President and Philippides J have comprehensively set out the facts and circumstances of this application for leave to appeal and analysed the relevant cases and writings with which I respectfully agree. I agree with their conclusions and the orders which they propose and wish only to add a few observations about the important point of law which gives rise to leave being granted, namely, whether a lessor is liable to a neighbour for a nuisance created by a tenant.

[51] It was, with respect, a major shift in legal principle to conclude as the learned District Court Judge did that:

> "... the duty of a landlord to prevent the activities of a tenant causing a nuisance to a neighbour is not materially different from the duty of a landlord to another tenant under a covenant of quiet possession." R29

[52] His Honour was influenced in coming to this decision by what he suggested was the process of reasoning of McPherson JA in *Aussie Traveller Pty Ltd v Marklea Pty Ltd* [1998] 1 Qd R 1. But neither that decision nor the three cases of *Blackett v Olanoff* 358 NE 2d 817 (Mass 1977), *Bocchini v Gorn Management Co* 515 A 2d 1179 (Md App 1986) and *R v Shorrock* [1994] QB 279 referred to with approval by McPherson JA depart from established principle. His Honour concluded at p 12:

> "The result is that although, apart from any provision in the lease, a lessor generally loses control over premises once they are let to a tenant, he may nevertheless remain legally responsible for tortious acts done on the land by a tenant at least if at the time he agreed to part with possession and control, it was reasonably foreseeable that the tenant was likely to do those acts".

[53] The respondents relied on *Wilson v New South Wales Land & Housing Corporation*, decision of 18 March 1998 (202492/97) a decision of Master Harrison, extracted in [1998] ANZ Conv R 623. It was a strike out application in the New South Wales Supreme Court by a landlord in respect of a claim of nuisance brought by the neighbours of tenants who leased a house from the landlord housing authority. The facts pleaded particularly egregious conduct by the tenants not dissimilar to that complained of in *Smith v Scott* [1973] 1 Ch 314 discussed in the President's and Philippides J's reasons. The lease contained a covenant not to interfere with the reasonable peace, comfort or privacy of neighbours. Master Harrison recognised the novel nature of the claim but considered that an arguable case arose in light of the allegation in the pleading that the landlord "adopted" the offensive acts after complaint, an entirely orthodox "exception", and not by analogy from the co-tenant cases as was the case here by the learned judge below.

[54] In *Smith v Scott*, although the housing authority knew that the tenants were likely to cause a nuisance, Pennycuick V-C concluded at 321 that it had not impliedly authorised the nuisance. As the President's and Philippides J's analysis of the facts demonstrates, this was far from a plain case of nuisance and there was, accordingly, no foundation for a finding of "adoption" or "authorising" of the nuisance.

[55] There is ready sympathy for neighbours of tenants who compromise the quiet enjoyment of their premises but the present state of the law does not make a landlord responsible to those neighbours even where there is a covenant in the lease requiring the tenants not to interfere with the reasonable peace of the neighbours unless the landlord expressly authorises the nuisance or it is close to certain when the landlord enters into the lease that a nuisance will ensue.