



Transcript of Proceedings

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

JONES J

Claim No 555 of 2002

IAN DAVID JESSUP

Plaintiff

and

TURQUOISE ENTERPRISES PTY LTD
TOAD HALL INVESTMENTS and
J & G BOULTER

Defendants

CAIRNS

..DATE 11/11/2002

JUDGMENT

No corrected
[Signature]

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HIS HONOUR: This is an application pursuant to section 447A of the Corporations Act seeking, specifically, an order that the respondent deliver up premises at 91 Grafton Street together with all fixtures, furniture, fittings, plant and equipment, books and records in the premises at the time the respondents assumed possession of the premises on 1 November 2002.

These premises were the business premises of National World Travel, which on the material before me, is owned by Specwell Pty Ltd (hereinafter "Specwell"). The applicant is a voluntary administrator of the company Specwell, having been appointed on 29 October 2002.

On the same day, staff of the administrator attended at the premises to take an inventory of its contents and to take an evaluation. The applicant arranged for removalists to attend on the following day to remove property.

Before this could happen, however, the respondents entered into possession of the premises. The respondents claim a right to possession of the premises because they are the registered owners of them. The premises had formerly been leased to a company Kahn Pty Ltd (hereinafter "Kahn"). Kahn, as a tenant, was in default and the respondents entered into occupation, they claim, in accordance with the terms of the lease.

The respondents claim that they have right, under the lease, with respect to the fixtures and fittings, and on that basis resist any action by the administrator to remove such articles.

The issue which is at the root of this conflict is who was the respondent's tenant and therefore the owner of the fixtures and fittings. The respondents assert that their agreement was with Kahn, and that they had no knowledge of the entity Specwell until after the administrator was appointed. Certainly invoices for rent were addressed to Kahn, and it seems in 1999 it was Kahn which exercised the option for an extended term of the lease.

Against this, the principals of both Kahn and Specwell claim that Kahn's interest in the lease was assigned to Specwell in 1996. One of the principals, Mrs Houston, claims that the respondents were made aware of this assignment. The assignment, however, does not appear to have been recorded in any formal way, nor does there appear to be any document in writing evidencing the assignment.

The applicant argues for an order of the kind contemplated by section 440C of the Corporations Act which reads:

"During the administration of a company, the owner or lessor of a property that is used or occupied by or is in the possession of the company cannot take possession of the property or otherwise recover it except:

- (a) With the administrator's written consent; or
- (b) With the leave of the Court."

The applicant claims that the respondents wrongly took possession on the 1st of November 2002, and are now impeding the administrator from assessing the value of the business and thereby reporting to the creditor. It is necessary also for the administrator to continue the business's obligations to its customers and to maintain its goodwill until a decision is made about the disposition of the business.

On the other hand, the respondents argue that the situation is more correctly identified in section 441H of the Act which applies if -

- "(a) For the purpose of enforcing a right of the owner or lessor of the property, used or occupied by, or in possession of a company to take possession of the property or otherwise recover it, a person:
 - (i) Enters into possession or assumes control of the property , or
 - (ii) Exercises any other power in relation to the property; and
- (b) The company is under administration when the person does so, or the company later begins to be under administration."

That situation, if it is found to apply, as seems to be the case, permits the Court to order that the respondents in this instance "not perform specified functions, or exercise specified powers in relation to the property, except as permitted by this order."

The respondents have no objection to the administrator attending to the business interests of Specwell and to enter onto the premises for this purpose. The respondents' only interest seems to be to protect whatever interest it may have

in fixtures and fittings until the issue is properly
determined. So the issue of who is the tenant is properly
determined.

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This application, having being made under section 447A,
permits the Court to make such order as it thinks appropriate
about how this part concerning external administration is to
operate in relation to a particular company. In my view it is
important for the status quo in relation to the occupation of
premises and the dealing with fixtures and fittings to be
maintained until the question of the identity of the true
tenant is ascertained. That, it seems to me, can occur whilst
allowing the administrator to enter into possession of the
premises to attend to the business interests of Specwell and
to maintain that business's goodwill.

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The only restriction that needs to be placed on the
administrator is to ensure that nothing other than business
records and property in respect of which the tenant and,
through the tenant, the landlord, could have no legitimate
claim from being removed.

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The order then that I propose is that the premises be
delivered up to the administrator to permit the administrator
to carry out its function with respect to the business of
Specwell, but on condition that the administrator does not
remove any fixtures, furniture, fittings, or plant, or
equipment which would properly be regarded as the property of

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a tenant under the lease which prevailed between the respondents and the company Kahn.

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HIS HONOUR: The further order I make is that the period during which the applicant must convene a meeting of creditors of Specwell Enterprises Pty Ltd be extended to 4 p.m. on the 3rd of December 2002.

I adjourn the further consideration of this matter to 6th of December 2002, and I will reserve the question of costs.

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HIS HONOUR: I will add as a condition to my first order that the applicant's occupation of the premises will not attract any obligation to pay rent to the respondents at least for the period ending the 18th November 2002.
