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Queensland Government
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[2003] QSC 212

Transcript of Proceedings

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Date: 17 June, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

JONES J

No 175 of 2003

MARK LA BAYSSE

First Applicant

and

CORRINE LA BAYSSE

Second Applicant

and

FRANK MICHEL BOTEL

Respondent

CAIRNS

..DATE 12/06/2003

JUDGMENT

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: By their originating application the applicants seek inter alia an order that the respondent deliver possession of shop premises situated at 20 Coondoo Street, Kuranda. The land which is, well, particularly described as Lot 1 on registered plan 819399 in County of Nares, Parish of Cairns, is owned by the applicants.

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On the land is erected a retail complex comprising of five shops at street level and a large shop below street level (hereinafter "the basement premises"). The applicants carry on business in three of the street level shops. There is also a detached house at the rear of the complex.

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The respondent is married to the applicants' daughter, Dianne, but that marriage has broken down with Dianne and the respondent separating on 6 February 2003. Prior to this date the respondent and Dianne lived in the detached house.

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Since early 1999 the applicants have permitted the respondent to use the basement premises and part of the car park for woodworking business which the respondent conducted on his own account. There is no formal basis for the respondent's occupation of these premises. The applicants say he just moved in without seeking their permission, and he has stayed without paying rent. At the same time no rent has been demanded from him. In all the circumstances it seems to me that the respondent was on the premises as a permissive occupant.

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There is a stairway that links the shops on street level with toilets located at the basement level. These toilets are used by staff and customers of the shops in the complex. The respondent also used these toilets and has visited the applicants' shops from time to time without permission.

The respondent has a violent nature, and has been subject to a temporary protection order issued by the Magistrates Court at Cairns. The applicants, who are elderly, have sworn to threats of violence being made towards them, as well as to other serious forms of harassment - the details of which need not be discussed here - however, one consequence was that the applicants have had to close their business for a period.

Notices to vacate the premises and various letters have been sent to the respondent by the applicants' solicitors, but these have been to no effect. Initially, the respondent retained a firm of solicitors who wrote to suggest that because of the matrimonial relationship between he and the applicants' daughter, and Family Court proceedings in respect of matrimonial property, he had a right to continue in occupation.

The respondent also asserted that he is the beneficiary of a constructive trust. The basis for this appears to be the fact that the respondent carried out some alterations to the basement premises to facilitate the carrying on of his business. The nature of those alterations did not seem to me to be of any benefit to the applicants, and moreover they were

done without the applicants' permission, and for the respondent's own benefit.

When the matter came on for hearing, the respondent's solicitors were granted leave to withdraw and there was no appearance by the respondent. There is no evidence before me which would in any way justify the assertion that the respondent enjoyed the benefit of any constructive trust.

I am satisfied on the affidavit material before me that:

- (i) the applicants are the registered proprietor of the subject premises;
- (ii) the respondent's occupation of the premises was as a mere licensee;
- (iii) the respondent has not shown any legal basis for his continued occupation of the premises;
- (iv) the applicants have withdrawn their permission for the respondent's continued occupation;
- (v) notices of the withdrawal of that permission have been duly served;
- (vi) the respondent's continued occupation of the premises is unlawful.

The applicants seek a final order pursuant to rule 658 of the Uniform Civil Procedure Rules which states:

- "(i) the Court may, at any stage of a proceeding, on the application of a party make any order including a judgment that the nature of the case requires;
- (ii) the Court may make the order even if there is no claim for relief extending to the order in the originating process statement of claim, counterclaim, or similar document."

Ordinarily, the judgment which is sought in a case such as this for recovery of possession of land would be done only if there was a claim and that the only relief sought was for recovery of possession. This proceeding was started by application and not by claim as it should have been. It also seeks other relief, namely a declaration which is essentially in support of the principal relief, and may easily be discounted, and an application for an interim order which has been disposed of.

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These matters have been addressed by counsel on behalf of the applicants, who justifies the commencement of the proceedings by way of application, rather than claim, on the basis that there was some urgency in its commencement. That urgency may have existed up until the making of the interim order, but has not continued as a basis for not delivering the claim.

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Rule 14, however, provides that, "...if the Court considers that proceeding started by application should not mean started by claim...the Court may order that the proceedings continue as if started by claim and give the directions the Court considers appropriate..." In the circumstances that prevail here, particularly considering that the respondent has not sought to contest the claim, and there is no apparent basis upon which any contest could be sustained, it seems to me that I should continue the proceeding pursuant to rule 14 and, in the circumstances, give judgment pursuant to rule 658 of the Rules.

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I would therefore order that the respondent deliver up possession of the premises of the applicants forthwith. I order that the respondent pay the applicants' costs of and incidental to the application, including reserved costs, if any, to be assessed on a standard basis.

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