SUPREME COURT OF QUEENSLAND

CITATION:	*King v King & Ors* [2012] QCA 39
PARTIES:	**JOHN FRANCIS KING** (applicant) **v** **SARAH LOUISE KING** (first respondent) **LYDIA ELLEN KING** (second respondent) **BENEDICT JOHN KING** (third respondent) **SAMUEL DAVID KING** (fourth respondent)
FILE NO/S:	Appeal No 7123 of 2011 DC No 832 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	6 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	21 February 2012
JUDGES:	Chesterman and White JJA, and Margaret Wilson AJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The applicant has leave to appeal against the orders of the District Court made on 18 July 2011.** **2. The appeal be allowed and the orders made in the District Court on 18 July 2011 setting aside and/or striking out action BD 832/11 be set aside and instead order that the application to the District Court of 5 July be dismissed.** **3. The parties file a consent order in the District Court in the terms appearing in the agreed directions annexed to this order.**
CATCHWORDS:	BANKRUPTCY – ADMINISTRATION OF PROPERTY – PROPERTY AVAILABLE FOR PAYMENT OF DEBTS – PROPERTY NOT DIVISIBLE AMONGST CREDITORS – OTHER MATTERS – where applicant and respondents parties to a residential tenancy agreement – where

respondents commenced proceedings for an order that the agreement be terminated – where order made – where execution of order stayed pending proceedings commenced by applicant – where applicant sought declaration that respondents are bound by an agreement for life, an order for specific performance of the agreement and an injunction restraining the respondents from evicting the applicant – where applicant a bankrupt – where judge below ordered claim be struck out – where no reasons were given for the order but apparent from the transcript of argument that his Honour was convinced by the respondents' counsel's argument that, as a matter of law, the right the applicant sought to enforce in his action was not his but had vested in his trustees in bankruptcy – where the applicant was not legally represented in the District Court – where applicant appeals order striking out his action – where the applicant's pleading is capable of claiming a bare licence to occupy the unit for the duration of the applicant's life or for as long as he wishes to remain in occupation – where applicant submits he has an arguable claim – whether the applicant has a distinctly arguable claim that his right to occupy the unit was a personal right or privilege, not a right of property, and that he is the only person (subject to his former wife's conjoint right) who may enjoy the right by occupying the premises – whether the application should have been struck out

Bankruptcy Act 1966 (Cth), s 5, s 58, s 116, s 116(2)
Bankruptcy Regulations 1996 (Cth), reg 6.03(2)
Settled Land Act 1958 (Vic)
Uniform Civil Procedure Rules 1999 (Qld), r 16(3), r 171

Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 106; [1992] HCA 45, cited
Commissioner of Stamp Duties (NSW) v Yeend (1929) 43 CLR 235; [1929] HCA 39, cited
Cummings v Claremont Petroleum NL (1996) 185 CLR 124; [1996] HCA 19, cited
Errington v Errington [1952] 1 KB 290; [1951] EWCA Civ 2, cited
Griffiths v Civil Aviation Authority (1996) 67 FCR 301; [1996] FCA 1502, cited
Jack v Smail (1905) 2 CLR 684; [1905] HCA 25, cited
Re Hoppe deceased; Hoppe v McDavitt [1961] VR 381; [1961] VicRp 64, cited
Rose v Buckett [1901] 2 KB 449, cited
Wood v Browne [1984] 2 Qd R 593, cited

COUNSEL: R Lilley SC, with J Carter, for the applicant
S Hogg for the respondents

SOLICITORS: Minter Ellison Lawyers for the applicant
McCarthy Durie Solicitors for the respondents

[1] **CHESTERMAN JA**: The respondents are the registered proprietors, as tenants in common in equal shares, of a home unit situated at 18/17 Whyenbah Street, Hamilton, being Lot 18, on BUP 9265, County of Stanley, Parish of Toombul. The applicant is their father. He resides in the unit and used to do so with his wife, but they are now divorced and Mrs King has moved out. The respondents want him to leave the unit and live elsewhere.

[2] The applicant and respondents were parties to a residential tenancy agreement dated 3 October 2007 which permitted, subject to its terms, the applicant to reside in the unit. On 9 April 2010 the respondents commenced proceedings in the Residential Tenancy Tribunal (now QCAT) for an order that the agreement be terminated. An order to that effect was made on 2 June 2010 but the execution of the order has been stayed pending the determination of proceedings commenced by the applicant in the District Court.

[3] Those proceedings were commenced by claim and statement of claim on 18 March 2011. In them, the applicant sought a declaration that the respondents are bound by an agreement "made on or about August 1998 pursuant to which [the respondents] agreed to grant … the [applicant] a right to reside [in the unit] …" for life, an order for specific performance of the agreement and an injunction restraining the respondents from evicting the applicant.

[4] The respondents delivered a defence on 28 April 2011 and the applicant replied on 16 June 2011.

[5] On 21 January 2009, the applicant was adjudicated bankrupt. His bankruptcy came to an end three years later on 21 January 2012. The respondents became aware of the bankruptcy only on 14 June 2011. They responded to the information by filing an application on 5 July 2011 seeking orders striking out the claim or action on the ground that the applicant had no standing to sue, the right claimed in his action having passed to the trustees in bankruptcy.

[6] On 18 July 2011 a Judge of the District Court ordered that the applicant's claim be struck out pursuant to UCPR 16(e) and 171. No reasons were given for the order but it is apparent from the transcript of argument that his Honour was convinced by the respondents' counsel's argument that, as a matter of law, the right the applicant sought to enforce in his action was not his but had vested in his trustees in bankruptcy. The point was said to be "clear" as was "the case law … on this point . … section 58 of the *Bankruptcy Act* says that [the applicant] … has no standing. He's been divested of this property and this right to bring these proceedings."

[7] The applicant was not legally represented in the District Court. His pleadings were drafted with some assistance from a firm of solicitors acting *pro bono* but he was unrepresented at the hearing on 18 July 2011. Indeed, he did not appear himself. He wrote a letter to the Registrar on 14 July enclosing a medical certificate which said that the applicant:

> "… is suffering from recurrence of severe depression. His symptoms include poor concentration, poor organization, melancholia and unable (sic) to make rational decisions."

The doctor had changed his medications and she thought he would be better in about a month, i.e. mid August 2011.

[8] The applicant did not send a copy of his letter, or the doctor's certificate, to the respondents or their solicitors. They first learned of it when the Judge drew it to their attention at the commencement of the hearing on 18 July 2011. They were understandably annoyed at the applicant's presumption that the application would inevitably be adjourned despite his discourtesy to the court, and his opponents, in not appearing and not informing them of his application.

[9] It is clear from the Judge's remarks that he would have adjourned the application to allow the change in medication to take effect so that the applicant could oppose the application as best he could, had his Honour not been convinced that any opposition would be futile. That is, the judge was convinced of the correctness of the respondents' proposition that the applicant had no right to bring the action.

[10] The applicant seeks leave to appeal the order striking out his action. Now represented by solicitors, and senior and junior counsel, the applicant complains of the refusal to grant an adjournment and that the judge heard the application in his absence. Secondly, he submits the Judge was wrong to find that the right he sought to enforce by his action had passed to his trustees in bankruptcy.

[11] The first ground attacks a discretionary judgment on a question of procedure and if pressed would face notorious difficulty. It is not necessary, in this case, to deal with the point as a separate ground because it is clear that the Judge, quite correctly, indicated he would have granted the adjournment if not persuaded that it would serve no purpose. The point in this application is therefore whether the respondents' challenge to the applicant's standing is correct. If the Judge was wrong about that then the action should not have been struck out and the applicant has suffered a particular injustice which can only be remedied by a grant of leave to appeal and by allowing the appeal.

[12] The applicant had another argument, that the right to possession of the unit was "household property" which by the operation of s 116(2) and regulation 6.03(2) is not property divisible among a bankrupt's creditors. There appears no authority on the question (at least we were referred to none) and the notion that an estate or interest in real property entitling the holder to occupy the property is not property divisible amongst creditors may have far reaching and odd consequences. Because the appeal should succeed on the applicant's primary ground it is not necessary to consider the point.

[13] Section 116 of the *Bankruptcy Act* 1966 (Cth) provides that:

> "… [A]ll property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy, or has been acquired or is acquired by him … or has devolved or devolves on him … after the commencement of the bankruptcy and before his … discharge; … is property divisible amongst the creditors of the bankrupt."

[14] Section 5 of the *Bankruptcy Act* defines "property" to mean:

> " … [R]eal or personal property of every description, whether situate in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property."

[15] By s 58 the property of a bankrupt vests forthwith in the trustee of the estate of the bankrupt.

[16] The question on which the application turns is whether the right of occupancy which the applicant's proceedings seek to protect is property, as defined, which passed to his trustees.

[17] The statement of claim is seriously defective. It mostly pleads evidence rather than material fact, and much of what is pleaded appears irrelevant. Facts which are pleaded are confusing or ambiguous. The respondents did not attack the pleading on the basis of these or other deficiencies. Such an attack would, no doubt, have led to an order that the statement of claim be reformulated to produce greater clarity. The Court must therefore approach the pleading on the basis that such facts as might fairly be said to appear in it must be accepted as established, and in the most favourable light for the applicant.

[18] Paragraph 3 of the statement of claim alleges that the applicant suggested to his then wife and the respondents that he would give the respondents some money to allow them to purchase the unit which was Mr and Mrs King's home. The balance of the price would come from a loan obtained by the respondents secured by mortgage over the unit.

[19] Paragraph 4 alleges that the applicant and the respondents implemented the proposal and contracted on terms which bound the applicant to provide funds for the deposit and the respondents to "purchase the [unit] using those funds and by obtaining a loan for the balance of the … price." The applicant and his wife "would have the right to reside in the property for life."

[20] Paragraph 5 pleads that the applicant provided $8,750 towards the purchase price of the unit, his wife paid $5,622.50 for stamp duty on the purchase, and he or his wife paid $560 for legal costs, and that on 24 February 1999 the respondents executed a contract for the purchase of the unit.

[21] Paragraph 6 pleads that between 1999 and 2010 the applicant and his wife paid interest on the loan and made some reductions in the loan capital. As well, paragraph 7 alleges that the applicant and Mrs King made capital improvements to the unit at a cost of about $25,000 and (by paragraph 8) paid rates and body corporate levies in respect of the unit.

[22] Lastly, it is pleaded that the applicant has resided continuously in the unit since 1999.

[23] The applicant's counsel submitted that the contractual right to occupy the unit is an "unassignable contractual licence" and/or an "unassignable bare right to reside" in the unit and is not property divisible among the applicant's creditors.

[24] There are rights

> "which do not pass to a trustee on bankruptcy because they are personal to the bankrupt and do not affect the quantum of the bankrupt estate"

per Brennan CJ, Gaudron and McHugh JJ in *Cummings v Claremont Petroleum NL* (1996) 185 CLR 124 at 136.

[25] One of the authorities cited by their Honours for the proposition is *Rose v Buckett* [1901] 2 KB 449 in which Collins LJ regarded it as settled for the purposes of the (English) *Bankruptcy Act* 1869 and earlier legislation:

> "… [T]he statute transfers not all rights of action which would pass to executors … but all such as would be assets in their hands for the payment of debts, and no others – all which could be turned to profit, for such rights of action are personal estate" (at 454).

[26] The case concerned a right to bring an action for damages but the principle is not, I think, confined to such choses in action.

[27] In *Griffiths v Civil Aviation Authority* (1996) 67 FCR 301 the Full Federal Court was concerned with whether a commercial pilot's licence was property which passed to the bankrupt pilot's trustee in bankruptcy or whether it was a right personal to the licensee, "being neither transferable nor assignable," and therefore not property divisible among creditors. The Court held that the licence was not property and that a right of appeal to challenge onerous conditions imposed on the licence had not passed to the trustee and could be exercised by the licence holder.

[28] Einfeld J (at 311) referred to *Jack v Smail* (1905) 2 CLR 684, a case concerning a licence to conduct a grocer's business on specified premises, in which Griffith CJ had said (at 705):

> "It is not property; it is a personal right of the insolvent to carry on business in a particular place …"

[29] His Honour also referred (at 312) to the judgment of Isaacs J in *Commissioner of Stamp Duties (NSW) v Yeend* (1929) 43 CLR 235 at 245:

> "… The test in every such case must be whether the "right" which is either "transferred to" or "vested in" or "accrues to" the alleged taxpayer, is a *personal right* or a *property right* … The standard is the inherent nature of the right that is the immediate subject matter of the agreement …".

and to the remark of Brennan J in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 166 that:

> "… [T]he want of assignability of a right is a factor tending against the characterization of a right as property."

[30] Cooper J, the third member of the Court, attempted a more general formulation. His Honour said (at 325-6):

> "There is a unity of object and purpose in the operation of ss 58, 60 and 116 of the [*Bankruptcy*] Act if it is recognised that the consistent focus of attention is upon rights which the trustee can turn to advantage for the benefit of creditors or upon rights the exercise of which will adversely affect or delay the administration of the estate. It is these rights which fall within the definition of 'property' in s 5 and the enforcement of which by action are stayed by s 60(2) upon a person becoming bankrupt. To interpret 'property' for the purposes of s 5 in this way avoids the injustice of denying to the bankrupt the power to exercise a right in which the trustee has no interest and the exercise of which cannot operate adversely on the property of the bankrupt or the administration of the bankrupt's estate."

[31] What then is the nature of the right to reside in the unit pleaded by the applicant? The statement of claim is defective, as I have said, and fails to identify with any particularity the nature and incidence of the right asserted but it is correct, as Mr Lilley SC who appeared for the applicant submitted, that the pleading is capable of claiming a bare licence to occupy the unit for the duration of the applicant's life or for as long as he wishes to remain in occupation. The case should therefore be dealt with on the basis that that is the, or at least a claim, made by the applicant.

[32] Text book writers agree that a licence, whether gratuitous or contractual, confers no interest in the property with respect to which the licence is granted. Megarry and Wade, *The Law of Real Property* 2nd ed say (at 743):

> "A licence is a permission given by the occupier of land which allows the licensee to do some act which would otherwise be a trespass, e.g., to lodge in his house, or to go onto his land to play cricket. The relating to licences is full of difficulty, but until quite recently it could be said that it was not part of the law of real property; for a licence was merely a personal arrangement between two parties and did not create any proprietary interest which could bind a third party …"

Helmore, *The Law of Real Property (NSW)*, says (at 207):

> "A gratuitous licence is a mere permission to enter on the land of another for a limited purpose … Such a licence, being purely personal to the licensee, is not assignable, and does not constitute an interest in land either at law or in equity. A contractual licence … is one granted in pursuance of a promise supported by a consideration … They are within the realm of the law of contract, and not that of the law of property, and in that respect they resemble … gratuitous licences."

Meagher, Heydon and Leeming, the authors of the 4th ed of Meagher, Gummow and Lehane's *Equity Doctrines and Remedies* say (at 759-760):

> "All licences, whether given for valuable consideration or gratuitous and whether under seal or not, if they are not coupled with the grant of some proprietary interest in land, have this feature in common: that they do not of themselves confer on the licensee any proprietary right or interest in the property to which the licence extends."

The successive editions of that work have ridiculed the notion, "invented" by Lord Denning, 'that mere licensees have equitable estates in land'. (See e.g. *Equity Doctrines and Remedies* 4th ed at 87-88).

[33] *Wood v Browne* [1984] 2 Qd R 593 is an example of a licence to occupy premises for the life of the licensee which the court was prepared to protect by declaration. The right in question was one to occupy a modest beach house which Mr Wood built on land at Stradbroke Island owned by a friend. The arrangement was recorded in writing and persisted amicably until the friend died and a successor in title to the Crown lease sought to curtail Mr Wood's occupation of the house. There are some passages in the judgment of Campbell CJ (with whom Kelly J agreed) which might suggest that his Honour regarded the licence as conferring some

proprietary interest in the grantor's land, although in the end he described the right as one:

> "… [T]o possess and occupy, to the exclusion of others, the dwelling for his lifetime and for that purpose to free access to it at all times." (at 598)

Macrossan J expressed himself more cautiously:

> "… [T]he plaintiff was to be provided with a purely personal right for himself and his guests to reside in the house … This … involves a notion that the contemplated guests of the plaintiff were to be guests in a social and not a commercial sense. Just as the plaintiff was not free to sell the house so … he could not himself part with possession by letting it. Finally, once the parties … agreed … that the plaintiff should contribute half the lease rental and rates … this became a permanent feature of their arrangement so that the continuance of the plaintiff's right to insist upon his own equity became thereafter dependent upon his observance of this requirement" (at 608).

[34] The case in which Lord Denning propounded his heresy was *Errington v Errington and Woods* [1952] 1 KB 290. The case was referred to in *Wood* and is, no doubt, the source of the suggestion in that case that the licensee had some equitable interest in the land on which the beach house was erected. The facts in *Errington* were that a man bought a cottage to be the residence of his son and daughter-in-law. He paid part of the purchase price and borrowed the balance secured by mortgage from a building society. The property was conveyed to him. He paid the rates but promised his son and daughter-in-law that if they remained in occupation and made the payments due under the mortgage he would transfer the property to them when the loan was repaid. The father died before the mortgage was discharged and his widow claimed the property from the daughter-in-law who had, in the meantime, separated from the son but remained in occupation.

[35] The Court of Appeal held that the couple were licensees with no power to assign or sublet but entitled under a personal contract to occupy the house for so long as they paid the instalments. The widow's claim for possession failed. Denning LJ, who delivered the leading judgment said (at 298):

> "… [A]lthough the couple had exclusive possession of the house, there was clearly no relationship of landlord and tenant. They were not tenants at will but licensees. They had a mere personal privilege to remain there, with no right to assign or sub-let. They were, however, not bare licensees. They were licensees with a contractual right to remain. As such they have no right at law to remain, but only in equity, and equitable rights now prevail."

[36] It would, I think, be wrong to accept (as *Wood* may have done) that a contractual licensee has any equitable proprietary interest in the land with respect to which the licence is granted. Protection is instead afforded by the implication of a negative stipulation that the licence will not be revoked and that any purported revocation may be restrained by injunction. The matter is thoroughly discussed in *Equity Doctrines and Remedies*, 4th ed (pp 759-766). It is not necessary to refer to the

analysis which is irrelevant to the present application. What one takes from *Errington* and *Wood* is that the licensee's right is personal, not proprietary, and cannot be transferred by the licensee.

[37] Mr Lilley referred to *Re Hoppe (deceased)* [1961] VR 381, a case concerning a will by which the testator permitted his wife and daughter:

> "… [T]o continue to reside in the home occupied by [them] … at my death … for so long as my … wife remains my widow and thereafter in the case of my daughter … only until she attains the age of twenty-three years" (at 400).

[38] Upon the occurrence of the last of those events the estate was to be divided equally between the testator's children. The question was whether the permission given to the widow and daughter to occupy the house made the disposition of the house property a settlement so that the land became subject to the *Settled Land Act* 1958 (Vic). In deciding that it did, the Court considered the nature of the right of occupation. Herring CJ, Gavan Duffy and Dean JJ said at (401-402):

> "They have an absolute right, if they so desire, to continue living in the premises, the applicant until death or remarriage and the daughter until she attains the age of 23 … It is true that the right given them is personal in the sense that they must exercise the right themselves, they cannot transfer that right to anybody else. Apart from statutory power they cannot let the premises and so enjoy them without residing there. … The owner may of course enjoy his residence in other ways, for example, by letting it. The person who merely has a personal right of residence cannot do this …"

[39] This review of the authorities leads to the conclusion that the applicant has a distinctly arguable claim that his right to occupy the unit was a personal right or privilege, not a right of property, and that he is the only person (subject to his former wife's conjoint right) who may enjoy the right by occupying the premises. If the applicant does not exercise the right it will cease to exist. The right cannot be assigned, or sold, and therefore has no value to anyone but the applicant. It is not capable of realisation for the benefit of the applicant's creditors.

[40] It is therefore in that class of rights which does not pass pursuant to s 58 of the *Bankruptcy Act* to the trustees.

[41] The judge was wrong to conclude that the applicant's bankruptcy had unquestionably deprived him of the right to enforce his right of occupation against the grantors of the right. The action should not have been summarily struck out. To prevent injustice the applicant should have leave to appeal and the appeal should be allowed with the result that the orders setting aside and striking out the claim must themselves be set aside.

[42] The action is one in which the parties are a father and his children and appears to be a dispute over relatively modest property. Its compass is small and will involve testimony from a small number of family members as to the terms of conversations and some limited disclosure of documents which may corroborate one or other version of events. The trial should take no more than a day and is capable of quick preparation. It would be in the interests of all concerned if the trial were held

quickly. To that end the parties have agreed upon directions for the future conduct of the action in the District Court. Lest there be any doubt about this Court's power to make directions for the conduct of an action in that court, the parties should be ordered to file a consent order in the District Court giving effect to the directions.

[43] The orders should be:

(1) The applicant has leave to appeal against the orders of the District Court made on 18 July 2011.

(2) The appeal be allowed and the orders made in the District Court on 18 July 2011 setting aside and/or striking out action BD 832/11 be set aside and instead order that the application to the District Court of 5 July be dismissed.

(3) The parties file a consent order in the District Court in the terms appearing in the agreed directions annexed to this order.

[44] The lawyers who represented the applicant in this court did so *pro bono*. The court commends their public spirit but the nature of the representation makes it inappropriate to order the respondent's to pay the costs of this successful application and appeal.

[45] **WHITE JA:** I have read the reasons for judgment of Chesterman JA and agree with those reasons and the orders proposed by his Honour.

[46] **MARGARET WILSON AJA:** I agree with the orders proposed by Chesterman JA and with his Honour's reasons for judgment.