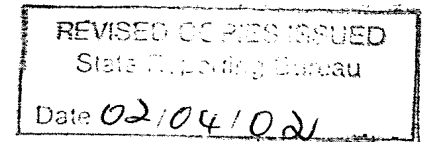




Transcript of Proceedings

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

JONES J

Application No 115 of 2001

PATRIA BESTORILLO PULOD

Applicant

and

BEN LOMBARDO

Respondent

CAIRNS

..DATE 26/03/2002

JUDGMENT

As corrected
[Signature]

HIS HONOUR: The applicant is the principal beneficiary of the estate of the late John Robert Houghton who died on 30th March 1998 in Cebu City, the Philippines.

After the nominated executor, the Public Trustee of Queensland, renounced administration, the applicant has sought letters of administration with the will. The only other beneficiaries are the testator's two sons who are to share equally the testator's interest in the yacht "Esoteric". Failing their acceptance of the terms attached to that gift, the yacht would vest in the applicant.

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The principal part of the testator's estate was land in Queensland leased from the Crown. It is described as Special Lease 43/41900 Lot 57 Crown Plan TS180 County Torres, Parish Muralug, title reference 17596059. The land is situated in the island of Muralug (Prince of Wales Island).

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By the will, which was dated 10 February 1995, the devise of the land to the applicant was subject to a condition that if she disposed of it, an amount of \$10,000 was to be paid to the respondent, Ben Lombardo. By a codicil to the will made on the 13th of January 1998, that condition was removed.

The testator's interest in the lease appears to have been transferred to the respondent in or about 1994/1995 as appears from paragraph 9 of the affidavit of the applicant, filed in support of her application for letters of administration. It refers to the lease being held "in escrow".

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The whereabouts of the instrument of lease is not known, but one presumes that it is being held by the respondent.

Before me also is a photocopy of an affidavit by the respondent sworn on 4 July 1994 which contains the following paragraph -

"(1) The lease of land on Prince of Wales in Queensland described as:

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Special Lease 41900
District Torres
Parish Muralug
County Torres
Portion 47 on Plan TS112
Area approximately 3,600 square metres

is being held by myself in escrow for John Robert Houghton until such time as the said lease is required to be disposed of, by whatever lawful means is decided upon by John Robert Houghton, when I will deliver up all necessary documentation properly executed on advice from John Robert Houghton that disposal of the lease has been decided upon.

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(2) All buildings, appurtenances and equipment are wholly and solely owned by John Robert Houghton without any encumbrance or liability due to myself in any way whatsoever and for my part John Robert Houghton is completely free to dispose of the said buildings, appurtenances and equipment as he sees fit."

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I infer that this document was sworn at or about the same time the land was transferred to the respondent by the testator. The remark in that affidavit that the land was being held "in escrow" rather suggests that the land was transferred to the respondent on trust to be retransferred on demand.

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The respondent now refuses to transfer the lease to give effect to the testator's wishes under the will and to allow the due administration of the estate. The respondent claims that he was owed \$48,000 by the testator but that he would

transfer the lease if paid \$20,000.

The nature of the respondent's claimed interest in the land is not properly known. The evidence certainly establishes that he is the registered lessee, but the affidavit from which I have quoted indicates that he held the beneficial interests on behalf of the testator.

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The terms of the testator's will, which appears to me to have been made subsequent to that transfer, might well indicate that the holding of the legal title in the lease may have been security for some debt to secure the fulfilment of the condition that the \$10,000 be paid on disposal of the lease by the applicant. If that is the basis, then the testator's intention that the condition no longer applies, expressed in the codicil, would be contradicting any such claim.

If the payment of the \$10,000 referred to in the will was no more than an intended gift to the respondent at the time when the applicant was expected to have surplus funds, then of course the codicil effectively revokes that gift.

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The affidavit of Aurelio Soleno proves the service of the application and supporting affidavits. The amended application was pursuant to directions served by prepaid registered post, such document and letter being posted on the 6th of March 2002.

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The affidavit of Amanda Millyard attests to the contact which

the applicant's solicitors have had with the respondent. That includes a discussion on the 28th of May 2001 wherein the respondent claimed that the testator was indebted to him, but the particulars of the debt are not specified. That claim is contradicted by the applicant who suggests that any indebtedness would be by the respondent to the testator. Such claims and counterclaims cannot be resolved in a summary hearing of this kind.

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In the end result I am satisfied on the evidence before me that as of the 4th of July 1994, the respondent had no claim against the land which he held, apparently in trust, on behalf of the testator. The respondent has not come to Court to claim any interest in the land. The best evidence before me is his sworn disavowal that he had any interest in the land.

The proper administration of the estate requires that the matter be determined as soon as possible. I can only make the determination on the evidence before me which, as I have indicated, leads to a conclusion that the respondent held the land in trust on behalf of the testator.

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To give effect then to the terms of the testator's will and to allow the administration of the estate, it is appropriate that I make the declaration sought in the application.

My orders therefore are:

- (1) I declare that Ben Lombardo holds his interest in Special Lease 43/41900 Lot 57 Crown Plan TS180,

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County of Torres, Parish of Muralug, title reference 17596059 in trust for the estate of John Robert Houghton (deceased).

(2) I order that Ben Lombardo transfer all his right, title and interest in the said lease to Patria Bestorillo Pulod, care of Williams Graham and Carman upon her being granted letters of administration with the will and within 28 days of such request being made by Patria Bestorillo Pulod as administrator or her solicitors.

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(3) I further order that if the Ben Lombardo fails or neglects to sign or execute any deed or instrument necessary to give effect to these orders or fails to do all acts and things necessary to give validity and operation to the said deed or instrument within 28 days of being required to do so, then the Registrar of the Supreme Court of Queensland at Cairns shall be empowered to sign and execute such deed or instrument on behalf of and in the name of the said Ben Lombardo.

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...

(4) I direct that a copy of the order and these reasons be served by prepaid registered post to the last known address of Mr Lombardo.

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- (5) I further order that the respondent pay the applicant's costs of and incidental to this application to be assessed on the standard basis.
