



Transcript of Proceedings

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State Reporting Bureau
Date: 23 August, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WHITE J

No BS4159 of 2004

PERMANENT CUSTODIANS PTY LTD
(ACN 001 426 384)

Plaintiff/Respondent

and

HOLSEF PTY LTD (ACN 077 345 656)
(IN LIQUIDATION)

Defendant/Applicant

BRISBANE

..DATE 13/08/2004

JUDGMENT

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HER HONOUR: The applicant, Mark Andrew Fitzgerald, lives at premises at Tanah Merah in the outskirts of Brisbane. On 16 June 2004, the mortgagee of that property obtained the judgment of the Court that it as plaintiff recover possession of land against the registered proprietor of the land which is a company. Mr Fitzgerald seeks to have the warrant of possession which is to be executed tomorrow either stayed for seven days or, alternatively, set aside.

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Mr Fitzgerald was a director of the registered owner, it appears, until 21 July 2003. He is an undischarged bankrupt and, accordingly, could not continue as a director of the company. He is also the sole shareholder of the company. The company went into liquidation in March 2004. Mr Fitzgerald maintains that he has not been given notice pursuant to Section 187A of the Residential Tenancies Act (1994) - that is, four weeks notice before the mortgagee obtains possession of the land.

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The solicitors for the mortgagee wrote by letter dated 21 April 2004 advising him as the tenant that the registered proprietor was in default under its mortgage and enclosed a notice purportedly pursuant to Section 187A of the Residential Tenancies Act. The letter went on to inform Mr Fitzgerald that he must vacate the property within 30 days of the receipt of the letter and then goes on to deal with issues of rent.

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It would appear that Mr Fitzgerald has remained resident on the property after the liquidation at the sufferance of the

liquidator. Nonetheless, it appears to me that that is sufficient since there is a relationship of landlord and tenant to bring him within the description of a residential tenancy agreement in Section 8 of the Residential Tenancies Act which is defined as an agreement which gives someone a right to occupy residential premises.

The form which was attached to the letter was a form said to relate to Section 193 of the Residential Tenancies Act, a notice to leave premises. It is contended by Mr Kronberg on behalf of Mr Fitzgerald that that was an inappropriate form. Mr Mountford, solicitor for the respondent mortgagee, who is being heard by telephone conference link since he practises outside Brisbane and, I might add, has been given very limited notice of this application, resists the application on two bases: namely, that the warrant is being exercised against the company and that Mr Fitzgerald being the sole shareholder and a former director of the company is, for all intents and purposes, the company, and that adequate notice has been given.

He refers to a decision of Justice Williams, *Equity Loan Securities Pty Ltd v. Carozo Pty Ltd* (1999) 1 Queensland Reports 243 where his Honour considered the provisions of Rule 913 of the Uniform Civil Procedure Rules. His Honour there came to the conclusion that a director of a company was not a tenant of a company for the purposes of avoiding the consequences of a warrant of execution.

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In this case, there seem to be too many impediments in the way of reaching that conclusion once the company entered into liquidation and Mr Fitzgerald became an undischarged bankrupt. There is not sufficient material for me to draw any conclusions about what Mr Fitzgerald does vis a vis the liquidator of the company to identify him in the way in which Justice Williams identified the directors and employees of the company in Equity Loan Securities.

The question then is whether there has been sufficient notice under Section 187A. I have formed the conclusion that there has been. The section itself does not require any specific form. It really requires that a mortgagee who has become entitled to obtain possession of the premises may not obtain possession unless at least four weeks before obtaining possession the mortgagee gives written notice. That, in my view, is what has occurred here and, accordingly, I would conclude that the warrant can issue against the company at the appropriate time.

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HER HONOUR: I would order that the applicant pay the respondent's costs of and incidental to this application, to be assessed on the standard basis.

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