

Graham H. Roberts Pty Ltd v Maurbeth Investments Pty Ltd [1974] 1 NSWLR 93.

Groongal Pastoral Co Ltd (in liq) v Falkiner (1924) 35 CLR 157.

United Travel Agencies Pty Ltd v Cain (1990) 20 NSWLR 566.

Parker v Mielicki [2003] VSC 263.

Williams & Anor v Rampino [2002] VSC 343.

Byrne & Anor v Ritchie & Ors [2009] VSC 114.

Remar Australia Inc v Dayspring Community Ltd [2010] VSC 352.

Hudson on Building Contracts 9th ed p 524.

Kerr, *Principles of Australian Lands Title (Torrens) System* (1927) p 447.

Tyler, Young and Croft, *Fisher & Lightwood's Law of Mortgage*, 2nd Aust Ed, LexisNexis Butterworths, 2005.

REPRESENTATION:

Counsel:

Plaintiff:	Mr Cureton
Defendant:	Mr Mariotto

Solicitors:

Plaintiff:	Minter Ellison
Defendant:	MSP Legal

Judgment category classification: B

Judgment ID Number: LUP1203

Number of pages: 15

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Linga v C & N Constructions Pty Ltd [2012] NTSC 8
No. 3 of 2012 (21203167)

BETWEEN:

SANTHOSH KUMAR LINGA

Plaintiff

v

C & N CONSTRUCTIONS PTY LTD

Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 29 February 2020)

- [1] By Originating Motion issued pursuant to Rule 53.01 of the Supreme Court Rules (“the Rules”) the Plaintiff has sought recovery of possession from the Defendant of a certain parcel of residential land situated in the suburb of Lyons (“the Property”).
- [2] The Plaintiff is the registered proprietor of the Property. The Defendant is a builder who entered into a contract (“the Contract”) with the Plaintiff to construct a residence on the Property. The Contract gave possession of the Property to the Defendant for the purpose of completing the building works.
- [3] Most of the background facts and circumstances are disputed but essentially the Plaintiff claims that the Defendant breached the Contract and that it is

now terminated. The Plaintiff asserts that the termination of the Contract also terminates the Defendant's contractual right to possession of the Property. The Defendant disputes the Plaintiff's allegations and claims to be entitled to retain possession based on the security rights given to it by the Contract.

[4] The Defendant has filed a Summons seeking dismissal of the Plaintiff's Originating Motion and, in the alternative, that the matter proceeds as if commenced by Writ. The Defendant says that the use of the Order 53 procedure is inappropriate for two reasons. Firstly, the Defendant asserts that it is in possession of the Property based on the security rights given to it under the Contract and that Rule 53.01 therefore does not apply. Secondly the Defendant argues that there are extensive factual disputes which require resolution before the question of possession can be determined and therefore the matter is inappropriate for determination by the summary procedure provided for in Order 53.

[5] The background facts to the current application are:-

1. The Plaintiff is the registered proprietor of the Property.
2. The Contract entered into by the Plaintiff and the Defendant was in writing and essentially provided for the construction of a house, pool and associated works for a lump sum price of \$460,000.00 inclusive of GST. There is a dispute as to the true scope of the works and as to

collateral contracts requiring payment of a greater amount and varying the scope of the works.

3. The Contract provided for progress payments upon the works being completed to various stages. The final progress payment was \$46,000.00 which was payable after the works reached practical completion as defined in the Contract.
4. The Defendant took possession of the site in October 2010.
5. The works were to commence in October 2010 and were to conclude by March 2011. There were initial delays in the construction and, as late as February 2011, the walls had not been completed. There is a dispute as to whether the Defendant is entitled to extensions under the Contract and whether extensions had been agreed to.
6. On 16 September 2011, the Defendant submitted its final progress claim. In addition to the amount of \$46,000.00 as provided for in the Contract, the Defendant claimed an additional payment of the order of \$169,000.00 plus GST for variations. There is a dispute as to whether variations were effected and as to whether the Defendant is entitled to payment for variations.
7. The Plaintiff rejected the claim pointing out that the works were not completed and that a claim for variations had not been made under the Contract.
8. There were discussions between the Plaintiff and a representative of the Defendant on or about 20 September 2011. Although it is not entirely

clear, it seems to have been agreed that for an additional payment of between \$50,000.00 and \$60,000.00, the Defendant would complete the works by 31 October 2011.

9. On 15 December 2011, at a time when the Plaintiff asserts that completion had not yet occurred, the Defendant again submitted its final progress claim, this time for the amount of \$46,000.00 as stipulated in the Contract but in addition to an amount for variations in the sum of approximately \$44,000.00 inclusive of GST. The Defendant claimed entitlement to payment on the basis that “part practical completion” had been achieved.
10. On 19 December 2011 the Plaintiff disputed both the Defendant’s entitlement to the amount claimed in that progress claim and that the works had been completed.
11. On 10 January 2011 the Plaintiff’s solicitors wrote to the Defendant alleging that the Defendant was in breach of the Contract and requiring the Defendant to confirm that the Defendant intended to comply with the Defendant’s obligations.
12. The required confirmation not being received within the time specified, by letter dated 13 January 2012 the Plaintiff’s solicitors notified the Defendant that the Contract was therefore repudiated and revoked the Defendant’s licence.

[6] Rule 53.01 of the Supreme Court Rules provides:-

53.01 Application

- (1) Subject to subrule (2), the Order applies where the plaintiff claims the recovery of land which is occupied solely by a person who entered into occupation or, having been a licensee, remained in occupation without the plaintiff's licence or consent or that of a predecessor in title of the plaintiff.
- (2) This Order does not apply where the land is occupied by a mortgagor or successor in title and the claim is made by the mortgagee or successor in title or in respect of premises to which Part 13 of the *Business Tenancies (Fair Dealings) Act* applies.

- [7] I am satisfied on the available evidence that subrule (2) does not apply to the current case.
- [8] The first basis of the Defendant's challenge to the appropriateness of the Order 53 procedure can be quickly dealt with. In my view there is nothing in the wording of the Rule which would prohibit its use on the facts of this case. The Rule operates in respect of the occupation of land adverse to the owner of the land and, in the case where the occupation commenced pursuant to a licence, as in the current case, where the occupation continues beyond the term of the licence. No authority was submitted in support of the interpretation advanced by the Defendant. In my view, the Rule clearly has application.
- [9] As to the second basis of the challenge, in *Pappas v Bowmark Pty Ltd*,¹ when discussing a provision similar to Order 53 contained in the Victorian Supreme Court Rules, Tadgell JA pointed out that the procedure was designed to enable speedy resolution in favour of the proprietor of land to

¹ (1999) V.Con.R 54-594

resume possession from a trespasser where the right to possession was obvious. It was said that significant factual disputes could count against the availability of the procedure under that rule. In that respect the objective of the rule is similar to an application by a party for summary judgment in that the object is to grant summary relief where the ultimate decision is obvious without the delay and expense required by the usual litigious process.

[10] It is necessary to set out relevant parts of the contract to put the issues into perspective. These are:-

9. Possession Of The Site

- 9.1 *You must give us possession of the site by the start date.*
- 9.2 *The site must then be vacant (unless you and we have a different agreement).*
- 9.3 *Our possession of the site continues until it is returned to you under Clause 18.*
- 9.4 *You, and any other person you wish, can visit the site.*
- 9.5 *However, you, and they, must not disrupt the work.*
- 9.6 *Building materials surplus to the requirements for the works shall be and remain our property.*

27. Termination Of Contract

- 27.1 *We may terminate this contract by written notice if*
 - 27.1.1 *you fail to make any payment due*
 - 27.1.2 *you take possession of the work without our consent*
 - 27.1.3 *you disobey Clauses 7.4 or 9.5 or*
 - 27.1.4 *there is any other substantial breach of this contract by you.*

- 27.2 *You* may terminate this contract by written notice if there is a substantial breach of this contract by *us*.
- 27.3 Either *you*, or *we*, may terminate this contract by written notice if the other
- 27.3.1 does an act of bankruptcy or
- 27.3.2 comes under external administration, if a company.
- 27.4 Either *you*, or *we*, may terminate this contract by written notice if someone else lawfully takes possession of any of the other's property.
- 27.5 Termination does not affect rights arising from a breach of contract.

28. Security For Payment

- 28.1 *We* are entitled to possession of *the site* and *the work* and materials located on *the site* until *you* have paid *us* all moneys that are or may become payable under the contract and
- 28.1.1 *we* have a lien on the materials located on *the site*
- 28.1.2 *we* have an interest in *the site* and *you*
- (a) grant to *us* an equitable mortgage over *the site* by which you charge *the site* as security for *your* performance of all *your* obligations under this contract including the due payment to *us* of all moneys that are or may become payable to *us* by virtue of this contract or otherwise arising from *us* doing *the works*
- (b) consent to *us* lodging a caveat over *the site* to secure *our* interest in *the site* as equitable mortgage and
- (c) agree to be responsible for all costs that may be payable on this contract or on any caveat lodged by *us*.

[11] Mr Cureton for the Plaintiff submitted that notwithstanding the contractual right to possession given by the Contract, the Plaintiff as owner of the Property has the absolute right to revoke that licence and to exclude the

Defendant even in circumstances where the revocation might be in breach of contract. He submitted that it is irrelevant whether the licence was said to be exclusive or irrevocable. As I see it, that would apply equally in respect of a licence which is said to continue for a specified term. That applies in the case given the use of the words “*until you have paid us all moneys that are or may become payable under the contract*” in clause 28.1. Mr Cureton went on to argue that essentially all that is left for the Defendant is a separate claim for damages if a breach of contract can be established.

[12] Mr Cureton relied on *Cowell v Rosehill Racecourse Co Ltd*² (“*Cowell*”).

That case involved a licence granted pursuant to an admission ticket to attend a race meeting. The defendant owner of the land terminated the licence and forcibly removed the plaintiff from the racecourse. The plaintiff sued for assault and the defendant argued that the assault was justified as the plaintiff had then become a trespasser. The plaintiff argued that the licence contained an implied term that the defendant would not revoke the licence. Essentially, the plaintiff was asserting that the license was irrevocable.

[13] The High Court held that despite the plaintiff paying an admission fee the licence remained revocable at common law and that a licence is only irrevocable if it is coupled with an interest, specifically a proprietary interest. In that case Latham CJ said:-

“In this case the plaintiff relies upon an equitable replication containing an allegation that the defendant for consideration agreed

² (1937) 56 CLR 605

not to revoke the licence to enter and remain upon the race course. Whether this replication is good or not depends upon whether such an agreement, if proved, prevents in equity the revocation of the licence in such a sense as to make entirely ineffectual anything purporting to be a revocation of the licence. Except in *Hurst's Case*³ there is no authority for the proposition that such a licence cannot be revoked at law in cases where no proprietary interest has been granted. The question is whether there is any principle of equity which prevents the effectual revocation of such a licence even though the revocation be a breach of contract.”⁴

[14] The High Court declined to follow *Hurst v Picture Theatres Ltd*.⁵ In respect of whether equity would prevent the revocation of a licence, the Court firstly rejected the principle that equity would have granted an unconditional injunction, based on unconscionability, restraining a party from relying on the parties' own wrongful act namely, the wrongful withdrawal of a licence. In addition, when looking at the equitable remedies of injunction and specific performance, Latham CJ said that those principles “...*were never applied merely or generally on grounds of unconscientiousness.*”⁶

[15] Secondly, the Court considered whether the remedies of specific performance or injunction were available and were able to be utilised for that purpose. Latham CJ said that “...*equity would never have decreed the specific performance of a contract to provide entertainment.*”⁷ His Honour suggested that the same situation would apply in cases of contracts of employment and building contracts.⁸ Subsequent cases confirm that a

³ *Hurst v Picture Theatres Ltd* [1915] 1 KB 1

⁴ (1937) 56 CLR 605 at p 618-619

⁵ [1915] 1 KB 1

⁶ (1937) 56 CLR 605 621

⁷ (1937) 56 CLR 605 at 619

⁸ (1937) 56 CLR 605 621

building contract is not specifically enforceable.⁹ This reflects the well established principle that specific performance will not be granted where personal service is involved or where supervision by the Court will be required.

[16] The important consideration from this case is that a licence is only irrevocable if it is coupled to a proprietary interest. This is relevant in the extant case given that clause 28.1.2 of the Contract asserts that the Defendant has an interest in the Property. The Defendant argues that the right of possession given by the Contract to the Defendant was irrevocable because it was therefore coupled to an interest namely, an interest as equitable mortgagee.

[17] The principle was considered specifically in the context of a building contract in *Porter & Thompson v Hannah Builders Pty Ltd*.¹⁰ The contract in question gave the usual licence to the defendant as builder to enter the land to carry out the building work. The license was terminated and it seems clear from the decision that the termination was in breach of contract. The Court followed *Cowell* and held that the determination of the contract by the plaintiff in that case determined the licence even if the determination itself was a breach of contract. Lush J approved of the following extract from *Hudson on Building Contracts*¹¹:-

⁹ *Porter & Thompson v Hannah Builders Pty Ltd* [1969] VR 673 at 679 and *Graham H. Roberts Pty Ltd v Maurbeth Investments Pty Ltd* [1974] 1 NSWLR 93 at 105

¹⁰ [1969] VR 673

¹¹ 9th Ed p 524

“In the absence of express provisions to the contrary the contractor in ordinary building or engineering contracts for the execution of work upon the land of another has merely a licence to enter upon the land to carry out the work. Notwithstanding that contractually he may be entitled to exclusive possession of the site for the purpose of carrying out the work, such licence may be revoked by the employer at any time, and thereafter the contractor’s right to enter upon the site of the works will be lost. The recovery, however, if not legally justified will render the employer liable to the contractor for damages for breach of contract, but subject to this the contractor has no legally enforceable right to remain in possession of the site against the wishes of the employer.”¹²

[18] His Honour reaffirmed that a licence may be determined even if the determination involves a breach of contract and he confirmed that was the case even if the licence was said to be irrevocable.

[19] *Graham H. Roberts Pty Ltd v Maurbeth Investments Pty Ltd*¹³ also involved a building contract. In that case it was argued that the right of possession given by the contract was the subject of an implied term that the licence was not to be revoked whilst the contract remained on foot and whilst the builder had works to complete under the contract. Although the Court agreed with that in principle, Helsham J followed *Cowell* and said that a contractual licence, notwithstanding an agreement not to revoke, remains revocable at law. He acknowledged that different considerations might apply if it could be established that the contract created a licence coupled with an interest. He said that building contracts were not in any special category and that no proprietary interest was created simply by reason of the nature of the contract.

¹² [1969] VR 673 at p 678

¹³ [1974] 1 NSWLR 93

[20] That case is particularly relevant to the current proceedings because it was also argued that a charge given to the builder by the contract satisfied the requirement that the licence was coupled to an interest. The relevant term of the contract (clause 28) provided as follows:-

“The Proprietor hereby charges the parcel of land on which or on part of which the Works are to be erected with the due payment to the Master Builder of all moneys that may become payable to the Master Builder by virtue of this Contract or otherwise arising from the carrying out of the Works.”

In respect of that his Honour said:-

“But while conceding that this clause creates an equitable charge over the land of the proprietor to secure payment of moneys owing to the builder, I do not believe that it can be said to be in any way an interest that is coupled with the licence in any relevant sense. The right of the builder to go onto the land is quite independent of and may be exercised quite independently of any right with respect to payments owing to it under the contract. The contract as a whole results in the builder having a licence to go onto the land for the purposes of the contract and results in it having a charge over the land to secure payments of money owing. But those two aspects are quite separate and it cannot be said in my opinion that the licence which the contract gives is any different than it would be if cl. 28 were not in the contract at all, nor does the presence of cl. 28 had anything to the licence of the builder. The two aspects are distinct, and the licence is not converted into a licence coupled with an interest, because there is a separate charge given over the land in the way I have mentioned.”¹⁴

[21] In this case, Mr Mariotto for the Defendant argues that the right of possession is coupled to an interest, the interest being as equitable mortgagee.

¹⁴ [1974] 1 NSWLR 93 at p 105

- [22] The evidence reveals that the subject property is Torrens title land. Equitable interests, and in particular an equitable mortgage, can exist over Torrens title land.¹⁵
- [23] The description of the security interest in the Contract as an equitable mortgage is inconclusive as to whether an equitable mortgage is actually created. Whether an equitable mortgage or an equitable charge is created is a question of the intent of the transaction. In turn, the intention is to be found from common sense, the fair construction of the documents and the surrounding circumstances. The label which the parties use in the documents will not alter the true classification of the transaction.¹⁶
- [24] With an equitable mortgage there is a right to foreclosure and a power of sale.¹⁷ In the case of an equitable charge there is no power of sale but there is a right to have, by separate process, an appropriation of the property to satisfy the debts in the event of default.¹⁸ An equitable charge is created when land is expressly made liable to the discharge of a debt or other obligation. It creates an equitable interest which is enforceable by judicial process.
- [25] The wording of clause 28.1.2 is more consistent with the creation of an equitable charge than an equitable mortgage as specified. It recites all the

¹⁵ *Groongal Pastoral Co Ltd (in liq) v Falkiner* (1924) 35 CLR 157

¹⁶ See the cases discussed in Tyler, Young and Croft, *Fisher & Lightwood's Law of Mortgage*, 2nd Aust Ed, LexisNexis Butterworths, 2005 at p 29

¹⁷ *United Travel Agencies Pty Ltd v Cain* (1990) 20 NSWLR 566

¹⁸ Tyler, Young and Croft, *Fisher & Lightwood's Law of Mortgage*, 2nd Aust Ed, LexisNexis Butterworths, 2005

key features of an equitable charge, namely that the Property is expressly liable to secure the obligations and debt of the Plaintiff to the Defendant in respect of the Contract. Disregarding the label of equitable mortgage and having regard to the foregoing, in my view the interest created by the Contract is an equitable charge as opposed to an equitable mortgage.

[26] Although Mr Mariotto submitted that Rule 53.01 does not apply because the Defendant is in possession as an equitable mortgagee, I do not think that anything turns on the classification. Even if the interest created by the Contract can properly be classified as an equitable mortgage, there has been no change in the nature of the possession since the Defendant took possession. There can be no doubt that the possession was purely contractual when the Defendant took possession under the Contract. No debt was owed to the Defendant at that time on any view of the facts or on any interpretation of the Contract. The Defendant could not then have been in possession as an equitable mortgagee and there is no evidence of any change of that status. For that reason I am of the view that any interest created by clause 28.1.2 is not coupled to the possession on the authority of *Graham H. Roberts Pty Ltd v Maurbeth Investments Pty Ltd*.¹⁹

[27] Whatever security rights the Defendant has remain separately enforceable subject to proof. However the issue before me remains the right of possession consequent upon the apparent termination of the Defendant's licence to occupy the Property pursuant to the Contract. The law is clear in

¹⁹ [1974] 1 NSWLR 93

that such licence is revocable even if given for consideration, whether it is exclusively granted and even if it is specified as being irrevocable. The only exception is where the licence is coupled with an interest. Although either an equitable mortgage or an equitable charge is a sufficient interest for this purpose, any interest that exists by reason of clause 28.1.2 of the Contract is separate and distinct to the right of possession. It is not coupled for the purposes of the application of the principle derived from *Cowell*. The most obvious instance of the latter is a *profit a prendre* for example, a right to enter land to remove rocks, timber, crops and the like. The possession and interest are inextricably linked in that situation.

[28] For these reasons it is unnecessary for me to attempt to resolve the factual disputes before deciding the current application. On that basis and consistent with the decision in *Parker v Mielicki*,²⁰ and other cases dealing with the equivalent of Order 53 in the rules of Court in Victoria,²¹ the Defendant must yield up possession and pursue its contractual or other remedies separately.

[29] Accordingly there will be an order in terms of the Plaintiff's Originating Motion filed on 24 January 2012. The Defendant's summons dated 10 February 2012 is dismissed. I will hear the parties as to any ancillary orders and as to costs.

²⁰ [2003] VSC 263

²¹ *Williams & Anor v Rampino* [2002] VSC 343, *Byrne & Anor v Ritchie & Ors* [2009] VSC 114, *Remar Australia Inc v Dayspring Community Ltd* [2010] VSC 352.