Chief Executive Officer (Housing) v Binsaris [2002] NTSC 9

PARTIES:	CHIEF EXECUTIVE OFFICER (HOUSING) v LEANNE BINSARIS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY APPELLATE JURISDICTION
FILE NO:	LA 9 of 2001 (20010136)
DELIVERED:	5 February 2002
HEARING DATE:	8 January 2002
JUDGMENT OF:	BAILEY J

CATCHWORDS:

APPEAL – Local Court – whether Local Court has jurisdiction to grant equitable relief against forfeiture in proceedings under the *Tenancy Act* – *Local Court Act* s 14(1)(b)

Tenancy Act, s 48(2)
Local Court Act, ss 14(1)(b), 19(6)
Law of Property Act 2000, s 138(5), (6)

Howard v Fanshawe [1815] 2 Ch 581 at 588, referred.
Gill v Lewis [1956] 1 All ER 844 at 853, referred.
Direct Food Supplies (Vic) Pty Ltd v DLV Pty Ltd [1975] VR 358, referred.
Barrow v Isaacs [1891] 1 QB 417 at 425, referred.
Upjohn v Macfarlane [1922] 2 Ch 256, referred.
Shiloh Spinners Ltd v Harding [1973] AC 691, referred.

Pioneer Gravels (Qld) Pty Ltd v T & T Mining Corporation Pty Ltd [1975] Qd R 151, referred.
Gallic Pty Ltd v Cynayne Pty Ltd (1986) 83 FLR 31, referred.
Esther Investments Pty Ltd v Cherrywood Park Pty Ltd [1986] WAR 279, referred.
Love v Gemma Nominees Pty Ltd; Supreme Court of WA, unreported, delivered 14 September 1982, referred.
Barrow v Isaacs & Son [1891] 1 QB 417, referred.
Evanel Pty Ltd v Stellar Mining NL [1982] 1 NSWLR 380, referred.
Pioneer Quarries (Sydney) Pty Ltd v Permanent Trustee Co of NSW Ltd (1970) 2 BPR 9562, referred.
Mason and Mason v Northern Territory Housing Commission (1997) 6 NTLR 152, applied.

REPRESENTATION:

Counsel:

Appellant:	M Grant
Respondent:	(No appearance)

Solicitors:

Appellant:	Morgan Buckley
Respondent:	(No appearance)

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Chief Executive Officer (Housing) v Binsaris [2002] NTSC 9
No. LA 9 of 2001 (20010136)

BETWEEN:

CHIEF EXECUTIVE OFFICER (HOUSING)
Appellant

AND:

LEANNE BINSARIS
Respondent

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 5 February 2002)

Background

[1] This appeal raises an important and novel point concerning the jurisdiction of the Local Court to grant relief against forfeiture in respect of proceedings for possession brought pursuant to the *Tenancy Act*.

[2] The respondent took up residence at 7 Bernier Court, Karama during 1998. A formal lease between the respondent and the Chief Executive Officer (Housing) was not executed until 28 January 2000. A notice to quit pursuant to s 47 of the *Tenancy Act* was served on the respondent on 18 April 2000 specifying some 14 grounds. The appellant made an

application pursuant to s 48 of the *Tenancy Act* on 2 June 2000 for a warrant of possession. It was agreed that the notice to quit and the application for a warrant of possession complied with the requirements of the *Tenancy Act*.

[3] It is not necessary for present purposes to detail the long and protracted history of the proceedings. It is sufficient to indicate that in February 2001 counsel for the respondent flagged an intention to argue that the respondent was entitled to equitable relief against forfeiture in the event that any of the grounds in the notice to quit were established. On 28 March 2001, the learned magistrate held that the Local Court had concurrent power with the Supreme Court to grant equitable relief against forfeiture. On 17 April 2001, the learned magistrate held that the appellant had succeeded in establishing a single ground (ground no 7) in the notice to quit and was entitled to a warrant of possession. Subsequently, the learned magistrate heard evidence in relation to the conduct of the respondent since service of the notice to quit and the application for the warrant of possession. On 5 June 2001, the learned magistrate indicated that he was contemplating granting the respondent relief against forfeiture upon certain conditions.

[4] On 15 November 2001, the learned magistrate ordered that "the application for a warrant of possession is stayed and the court grants the tenant relief against forfeiture" on specified conditions. The conditions required the respondent to comply with the terms of the lease dated 28 January 2000 and with certain provisions of the appellant's internal (housing) policy (copies of which were attached to the order). His Worship's order made provision

for the matter to be relisted if the respondent failed to comply with the conditions. Upon proof of failure to comply, a warrant of possession was to issue four business days after the date of (further) order.

The Appeal

[5] The appellant is appealing against the learned magistrate's decision to grant relief against forfeiture on the alternative grounds that:

1. The learned magistrate erred in law in determining that the Local Court has jurisdiction to grant relief against forfeiture in proceedings under the *Tenancy Act*.

2. The learned magistrate erred in law in determining that relief against forfeiture was properly granted in the circumstances.

[6] Mr Grant appeared as counsel for the appellant. The respondent did not appear. In the proceedings before the Local Court, the respondent was represented by NAALAS. NAALAS was willing to continue its representation of the respondent at the appeal. However, the respondent's grant of legal aid was withdrawn after repeated failures by the respondent to attend appointments, provide instructions and sign a costs agreement. On 8 January 2002, I granted leave to NAALAS to withdraw from representing the respondent. I did so reluctantly in view of the importance of the appeal to the respondent personally and potentially to other leaseholders who are subject to the *Tenancy Act*. I was satisfied that

Ms Shirley Rowe on behalf of NAALAS had done everything that could possibly have been done to assist the respondent and seek to provide her with legal advice and representation. The respondent's attitude and failure to cooperate made it impossible for NAALAS to continue its representation of the respondent.

Availability of Relief against Forfeiture

[7] Section 14(1) of the *Local Court Act* provides that the Local Court has jurisdiction to hear and determine:

> "(b) a claim for equitable relief if the value of the relief sought is within the jurisdictional limit."

[8] The "jurisdictional limit" is $100,000 (s 3).

[9] Neither Mr Grant nor I are aware of any authorities which have considered s 14(1)(b) either specifically in relation to equitable relief against forfeiture or generally.

[10] In superior courts, it has long been recognized that there is an equitable jurisdiction to relieve against the forfeiture of a lease for non-payment of rent. Equity considered that a right of forfeiture was only a security for payment of rent. Therefore, it would favour restoring the tenant to his position despite the landlord's action to forfeit the lease if –

a) the tenant paid the arrears of rent;

b) the tenant paid all the expenses to which the landlord had been put by the tenant's breach; and

c) it was just and equitable to grant relief.

(See *Howard v Fanshawe* [1815] 2 Ch 581 at 588; *Gill v Lewis* [1956] 1 All ER 844 at 853; *Direct Food Supplies (Vic) Pty Ltd v DLV Pty Ltd* [1975] VR 358).

[11] It has been said that as a general rule equity would not relieve against forfeiture for breach of covenants other than covenants to pay rent, unless there was fraud, accident or mistake: *Barrow v Isaacs* [1891] 1 QB 417 at 425; *Upjohn v Macfarlane* [1922] 2 Ch 256. Although this view may now be regarded as too narrow: *Shiloh Spinners Ltd v Harding* [1973] AC 691; *Pioneer Gravels (Qld) Pty Ltd v T & T Mining Corporation Pty Ltd* [1975] Qd R 151.

[12] In *Shiloh Spinners*, supra, the House of Lords affirmed the right of equity to relieve against forfeiture for breach of any covenant or condition. The case was cited with approval by the High Court in *Legione v Hateley* (1983) 152 CLR 406 (and see *Minister for Lands and Forests v McPherson* (1990) 22 NSWLR 687 (CA) at 693 per Kirby P). However, *Legione* was not a case concerning relief against forfeiture of a lease and it cannot be said with any real confidence that Australian courts have recognized a power to grant relief against forfeiture for breach of covenants other than covenants to pay rent.

[13] The uncertainty in the present context is explicable on the basis that in both the United Kingdom and most Australian jurisdictions, the common view that equity would not grant relief in respect of breaches other than non-payment of rent led to the introduction of legislation to give courts jurisdiction to grant relief in the case of other breaches of covenant. Until recently, the Northern Territory was an exception.

[14] In *Gallic Pty Ltd v Cynayne Pty Ltd* (1986) 83 FLR 31 at 35, Kearney J summed up the position as follows:

> "I note in passing that in all other Australian jurisdictions statutes have spelled out the circumstances in which relief against forfeiture for breach of covenants in a lease can be granted; see for example s 146 of *Property Law Act* 1958 (Vic). These reforms followed statutory reform in England stemming from 1852 regulating the jurisdiction in equity to relieve against forfeiture for non-payment of rent; see *Gill v Lewis* [1956] 2 QB 1. The courts in those jurisdictions are given a broad discretion to grant relief; the principles which govern the exercise of the discretion are discussed in *Rose v Hyman* [1911] 2 KB 234; (1912) AC 623. There is no such detailed provision in the statute law of the Northern Territory. It is conceded that the common law of landlord and tenant applies; the approach is laissez faire, the rights and duties of lessor and lessee being governed by the express provisions of the lease. It appeared to be conceded in *Baier v Heinemann* [1962] Qd R 192 at 204 that apart from statutory provision the court has no power to relieve against forfeiture; but see the differing view expressed in *Pioneer Gravels (Qld) Pty Ltd v T & T Mining Corporation Pty Ltd* [1975] Qd R 151. The better view appears to be that there is a long-established jurisdiction in equity to restrain the exercise of the legal right to forfeit for breach of covenant, at any rate as far as concerns forfeiture for breach of a covenant to pay rent."

[15] The situation has now changed with the enactment of the *Law of Property Act 2000* which came into operation on 1 December 2000. Section 138 of

that Act provides a broad discretion to grant relief against forfeiture for breach of any covenant or condition of a lease. The jurisdiction under s 138 is vested exclusively in the Supreme Court. Sub-sections (5) and (6) of s 138 provide:

> "(5) The rights and powers conferred by this section are in addition to and not in derogation of any other right to relief or power to grant relief against forfeiture.
>
> (6) This section -
>
> (a) applies to leases made before or after the commencement of this Act; and
>
> (b) has effect despite any term of a lease to the contrary."

[16] It is clear that, if there was any doubt about the Supreme Court's ability to grant relief against forfeiture for breach of covenant other than covenants to pay rent, there can be no doubt now. But what about the Local Court?

[17] Section 138(5) of the *Law of Property Act 2000* recognizes the existence of a non-statutory jurisdiction to provide relief against forfeiture (without referring to its precise limits or the courts which may exercise it). The learned magistrate relied on s 138(5) as a 'textural clue" or implied recognition that a court other then the Supreme Court had concurrent jurisdiction in relation to relief against forfeiture. However, I think that it is more likely that the draftsman was aware of – and expressly recognized – a line of authorities which have held that statutory provisions for relief against forfeiture do not exclude the equitable jurisdiction of superior courts to grant relief in cases falling outside the area governed by the legislation:

Esther Investments Pty Ltd v Cherrywood Park Pty Ltd [1986] WAR 279 at 306; *Love v Gemma Nominees Pty Ltd*; Supreme Court of WA, unreported, delivered 14 September 1982; *Barrow v Isaacs & Son* [1891] 1 QB 417 at 430; *Pioneer Gravels (Qld) Pty Ltd v T & T Mining Corp Pty Ltd*, supra; *Evanel Pty Ltd v Stellar Mining NL* [1982] 1 NSWLR 380 at 386; *Pioneer Quarries (Sydney) Pty Ltd v Permanent Trustee Co of NSW Ltd* (1970) 2 BPR 9562 at 9571-2; *Shiloh Spinners Ltd v Harding*, supra.

[18] I do not consider that any support can be drawn from s 138(5) of the *Law of Property Act 2000* for the proposition that the Local Court has jurisdiction to grant relief against forfeiture of a lease subject to the *Tenancy Act* pursuant to s 14(1)(b) of the *Local Court Act*. If such a jurisdiction exists, it is at least curious that s 138 makes no reference at all to the Local Court. The result would be that the Supreme Court has a statutory discretion to grant relief from forfeiture while the Local Court has a concurrent jurisdiction in equity.

[19] The *Tenancy Act* confers upon the Local Court jurisdiction to entertain summary proceedings for the recovery of possession of land. The procedure under the *Tenancy Act* operates as an alternative to the common law proceeding for recovery of land (formerly ejectment) which was previously the exclusive jurisdiction of the Supreme Court.

[20] In *Mason and Mason v Northern Territory Housing Commission* (1997) 6 NTLR 152, I held that there was no discretion under s 48 of the *Tenancy*

Act for the Local Court to refuse to issue a warrant of possession where a valid ground for a notice to quit was established and there had otherwise been compliance with the Act. At p 158, I observed:

> "Analysis of the Act's provisions indicates that the legislation provides a substantial measure of restriction upon the circumstances in which a lessor can terminate a lease. It should not be overlooked that a lease is a commercial agreement in which both the lessor and lessee undertake various obligations. The Act restricts the grounds upon which a lessor can terminate a lease and thus potentially deprives the lessor of at least some of the value of his property. Against this background, can the legislature have intended that the Local Court would have an overriding general discretion not to order the issue of a warrant of possession where the lessor has established one of the statutory grounds and otherwise complied with the Act?
>
> Considering the Act as a whole, I consider the answer must be no.
>
> The Act provides a measure of protection for lessees by restricting the grounds upon which a lessor may issue a notice to quit, by imposing procedural requirements and abolishing the common law right of a lessor to re-enter by way of self-help on termination of a lease (whether by expiry of a fixed term or upon contractual breach). Section 47B of the Act expressly limits the operation of an otherwise valid notice to quit in specified circumstances. If the legislature had intended that there should be discretion to mitigate the effects of a valid notice to quit in other circumstances, this could – and I am satisfied would – have been provided for expressly. Section 48(2) does provide the Local Court with power to postpone the date upon which a warrant of possession is to take effect. No limit is placed on the length of such a postponement (in contrast to the repealed section 48(7)(a) providing a maximum for postponement of 90 days). Accordingly, the Local Court has a wide discretion to take account of the effect of a warrant of possession on the lessee and alleviate the practical consequences of the lessee's eviction.
>
> I consider that the legislature's intent in Part VII of the Act is clear, i.e. that subject to section 47B, once the Local Court is satisfied that:
>
> (a) pursuant to the Act the lessor was entitled to give the notice to quit;

(b) the ground specified in the notice has been established; and

(c) such notice complies with the requirements of the Act and has been duly served on the lessee,

the Local Court is required to order the issue of a warrant of possession."

[21] In *Minister for Lands and Forests v McPherson*, supra, the NSW Court of Appeal considered the availability of equitable relief against forfeiture in the case of an interest in a statutory lease. The present case does not concern a statutory lease, however I am satisfied that the issues raised in this case are analogous to those canvassed in *McPherson*. Kirby P at p 696 held:

> "… the first duty of the Court is to examine the statute to see whether, consistently with its terms, other rights and obligations that would apply by the general law attach to the statutory entitlements and duties of the parties. In the case of an interest called a "lease", long known to the law, the mere fact that it also exists under a statute will not confine its incidents exclusively to those contained in the statute. On the face of things, the general law, so far as it is not inconsistent with the statute, will continue to operate. Thus, the answer to whether relief against forfeiture of a statutory lease under the Act is available to a party having an interest in that lease depends not upon any broad exclusion of the general law (including of forfeiture) but upon a detailed consideration of whether that law is compatible with the provisions of the Act, specifically those providing for forfeiture."

[22] I am satisfied that the availability in the Local Court of equitable relief from forfeiture is incompatible with the provisions of the *Tenancy Act*, in particular s 48, as explained in *Mason and Mason*, supra. Accordingly, I am satisfied that the appeal should be upheld on the first ground of appeal. The

learned magistrate had no jurisdiction to grant relief against forfeiture in proceedings under the *Tenancy Act*.

[23] In the circumstances, it is unnecessary to address the appellant's second ground of appeal.

[24] The remedy sought by the appellant is that a warrant of possession for the premises at 7 Bernier Court, Karama issue with immediate effect. The power of this court to order the issue of such a warrant pursuant to s 48 of the *Tenancy Act* is provided by s 19(6) of the *Local Court Act* which provides that after hearing and determining an appeal, "the Supreme Court may make such order as it thinks fit".

[25] Section 48(2) of the *Tenancy Act* requires the Court to specify the day on which an order for the issue of a warrant of possession takes effect. I noted in *Mason and Mason*, supra, that s 48(2) provides a wide discretion to take account of the effect of a warrant of possession on the lessee and alleviate the practical consequences of the lessee's eviction. I am conscious of the fact that the respondent is the mother of seven young children who reside with her. In the circumstances, I propose to give the respondent an opportunity to make submissions as to when the warrant of possession is to take effect and as to the issue of costs with respect to both the appeal and the proceedings in the Local Court.

Orders

(a) The appeal is allowed;

(b) A warrant of possession for the premises at 7 Bernier Court, Karama is to issue and take effect on a date to be determined;

(c) The appellant is to serve a copy of these reasons and orders on the respondent; and

(d) I will hear from counsel for the appellant as to the timing and method of service and as to when the matter is to be set down for submissions as to:

i) the date on which the warrant of possession is to take effect; and

ii) costs.

———————————————