IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA432/2017
[2018] NZCA 183

BETWEEN	ROBERT HOANI CLIFFORD CRIBB AND KAREN LYNNE STEVENS Appellants
AND	FM CUSTODIANS LIMITED Respondent

Hearing:	8 March 2018
Court:	Asher, Brewer and Collins JJ
Counsel:	S A McKenna and J A Alchin-Boller for Appellants N L Penman-Chambers and R W Belcher for Respondent
Judgment:	6 June 2018 at 11 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] The issue in this appeal is whether a mortgagee selling a property occupied by non-owners under its power of sale is entitled to recover the costs of removing and storing the non-owners' chattels. In the High Court the statement of claim of

the respondent mortgagee, FM Custodians Ltd (FM Custodians), pleaded that the appellants, Robert Cribb and Karen Stevens, trespassed by leaving their chattels on the mortgaged property after they were given notice to vacate. It asserted that, as involuntary bailee of the trespassing chattels, it acted reasonably in removing and storing the chattels. It claimed the costs associated with that removal and storage. The statement of defence of Mr Cribb and Ms Stevens alleged that the removal of the chattels was unlawful, and asserted a counterclaim in trespass based on FM Custodians' removal of the chattels. After a short trial Woolford J upheld the claim of FM Custodians, and that judgment is the subject of this appeal.[1]

Background

[2] There is a long and unfortunate history of dealing between FM Custodians and Mr Cribb, which we do not need to traverse in detail. The land in question is a substantial residential property at 103 Te Awa Road, Hamilton. It was owned by SOS Investments Ltd (SOS). Mr Cribb was SOS's sole director, and was a shareholder of the company. There was a mortgage of the property to FM Custodians. SOS did not make loan payments and was in default of its mortgage obligations.

[3] On 7 November 2013 FM Custodians filed High Court proceedings seeking an order for possession of the property as mortgagee. On 17 April 2014 the High Court made an order in favour of FM Custodians directing SOS to deliver possession of the property to it.[2] This decision was appealed to this Court and the appeal was unsuccessful.[3]

[4] Following that decision, on 19 August 2015 FM Custodians' solicitors wrote to SOS's solicitors by email requiring Mr Cribb to vacate the property and deliver up the keys by 26 August 2015. On 21 August 2015 Mr Cribb's solicitor replied advising that Mr Cribb would "cooperate … regarding possession" and invited FM Custodians' solicitors to enter into discussions to make arrangements in that regard. This email on behalf of Mr Cribb effectively ignored the request that he vacate and deliver the keys within the stated time.

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1 *FM Custodians Ltd v SOS Investments Ltd* [2014] NZHC 817.
2 At [58].
3 *SOS Investments Ltd v FM Custodians Ltd* [2015] NZCA 380.

[5] On 24 August 2015 Mr Cribb's solicitors wrote to FM Custodians' solicitors, again stating that Mr Cribb was willing to cooperate to obtain the best price for the property and willing to make the keys available. However, they said that Mr Cribb and Ms Stevens were in Europe and the property was being looked after by a family friend. Mr Cribb was prepared to arrange to vacate the property at an agreed date which it was anticipated would coincide with the arrangements for the sale of the property. We comment that despite the mild language used, Mr Cribb was effectively thumbing his nose at FM Custodians, given that he had no right to remain in the property and had been asked to vacate by 26 August 2015.

[6] On 26 August 2015 the High Court issued an order instructing the sheriff of the High Court at Hamilton to take possession of the property on behalf of FM Custodians. The possession order was in a standard form, and had a section for taking possession of chattels, but that had been crossed out. On 4 September 2015 FM Custodians' solicitors sent a copy of that possession order to Mr Cribb's solicitors advising that their instructions were to proceed to enforce the order.

[7] On Monday 7 September 2015 a process server served the possession order on the occupier of the property at the time, Ms Lorna Hose, who was associated with the appellants. On 9 September 2015, the sheriff executed the possession order. This was done by bailiffs with the police in attendance. Immediately prior to the taking of physical possession by FM Custodians, a removal firm removed the chattels that were in the property and put them into storage.

[8] On 11 September 2015 the appellants' solicitors wrote to the solicitors for FM Custodians objecting to the taking of possession and the removal of the chattels. FM Custodians responded on 16 September 2015 stating that it was entitled to take the steps it had, and that it had given the appellants an opportunity to deliver vacant possession. It stated that the chattels had been packed and wrapped and provided an inventory of the chattels taken. The letter advised where the chattels were stored, and forwarded the invoice of the firm that had removed the chattels with its costs to date in removing and storing those chattels. It provided trust account details for the purposes of payment for those costs.

[9] During the enforcement process Mr Cribb had provided written authority for an agent to uplift a limited number of the chattels. FM Custodians had cooperated, with Mr Cribb's agent taking those items into his care. In terms of the bulk of items still not uplifted FM Custodians said that it would provide access to the property for a further 14 days.

[10] The chattels then stayed in storage for a year and a half until the appellants provided an address to which they could be delivered. The chattels were delivered to that address on 28 March 2017. The costs of removal and storage were not paid. FM Custodians filed proceedings to recover those costs in the High Court.

The High Court decision

[11] Woolford J held that under s 139(1)(c) of the Property Law Act 2007 (the Act), FM Custodians had become a mortgagee in possession of the property on the date of its application to the High Court for a possession order on 7 November 2013.[4] The date that FM Custodians entered into or took physical possession was not significant.[5] It had the right to take possession when it did and the appellants had notice that they had to vacate and take away any chattels that happened to be on the property.[6] He held that FM Custodians was an involuntary bailee when it removed the chattels. It was entitled to be compensated for expenditure incurred in the fulfilment of the duty of care imposed on it. What FM Custodians did in storing and insuring the chattels was right and reasonable.[7]

[12] He noted that the appellants chose not to provide a delivery address for 18 months, and could not complain about the costs. He gave judgment against the appellants for $51,586.40 together with interest.[8]

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4 *FM Custodians Ltd v Cribb* [2017] NZHC 1562 at [19].
5 At [20].
6 At [22].
7 At [31].
8 At [32].

The contentions of the parties

[13] Mr McKenna for the appellants submitted that the appeal turned ultimately on the issue of whether, for the purposes of the law of trespass, the party trespassed against must be in actual physical possession of the land. He argued that a plaintiff who claims damages in this situation must have exclusive possession and there must be an intention to possess the land. FM Custodians had neither at the time the chattels were removed, which was immediately prior to the physical taking of possession. At that time, FM Custodians only had what Mr McKenna termed "technical possession", a form of backdated possession by virtue of s 139(1)(c) of the Act. He submitted that such possession is not sufficient to found a claim in trespass.

[14] He submitted that FM Custodians should have allowed the chattels to remain, after physical possession had been taken by it, and there should have been a negotiation while the property was marketed. The chattels should only have been removed from the property when the time came for vacant possession to be handed over to the purchaser. If during that time explicit notice had been given for the removal of the chattels, that could have given rise to a right to claim for the costs of removing the chattels. He submitted that the error was not of FM Custodians but of the sheriff in requiring that the chattels be removed, and that the sheriff should be liable for any damage that was caused by the mistake.

[15] Ms Penman-Chambers for FM Custodians submitted that when the sheriff took possession of the property on behalf of FM Custodians on 9 September 2015, FM Custodians had the right to immediate possession by virtue of the High Court order granting possession on 17 April 2014, and later affirmed on appeal on 18 August 2015. The right of possession dated back to 7 November 2013 by virtue of s 139(1)(c) of the Act. The chattels were trespassing from that date, and FM Custodians was entitled to remove and store the chattels. In general terms FM Custodians supported the judgment of Woolford J in all respects.

FM Custodians' right to possession

[16] Section 137(1)(c) of the Act provides:

> **137 Exercise of power to enter into possession**
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> (1) If a mortgagee becomes entitled under a mortgage, after compliance with subpart 5, to exercise a power to enter into possession of mortgaged land or goods, the mortgagee may exercise that power by—
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> …
>
> (c) applying to a court for an order for possession of the land or goods.

[17] Section 139(1)(c) of the Act provides:

> **139 When mortgagee becomes mortgagee in possession**
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> (1) A mortgagee who exercises a power to enter into possession of mortgaged land or goods in accordance with section 137 becomes a mortgagee in possession of the land or goods on the earlier of—
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> …
>
> (c) the date of the mortgagee's application to the court for the order if—
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> (i) the mortgagee applies to the court for an order for possession of the land or goods; and
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> (ii) the court, in response to the mortgagee's application, makes the order.

[18] In this case the High Court, confirmed by the Court of Appeal, made an unambiguous order for possession of the property on 17 April 2014. At that point FM Custodians had a right to possession by virtue of ss 137(1)(c) and 139(1)(c), backdated to 7 November 2013 when the application was made. Rule 17.80 of the High Court Rules 2016 provides:

> **17.80 Effect of possession order**
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> (1) A possession order authorises and requires an enforcing officer to deliver possession of the land or chattels described in the order to the person named in the order.
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> (2) For the purpose described in subclause (1), the officer may—
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> (a) eject any other person from land; or

(b) seize and take possession of the chattels.

(3) A possession order may be in form E 8.

[19] It can be seen that delivery of possession is not defined. Nevertheless, delivery of possession must take place when the sheriff ejects the occupying party. That is implicit in r 17.80(2)(a). Form E 8 of the High Court Rules, which sets out the form of a possession order, authorises and requires the sheriff to take possession of the liable party's land, "ejecting others from the land as necessary".

[20] The appellants and the person occupying the property, Ms Hose, had been served with the possession order on 4 and 7 September 2015 respectively, and the bailiffs took possession and ejected Ms Hose on 9 September 2015 as we have previously described. The chattels were still in the property. In that regard it had not been vacated as requested on 19 August 2015.

[21] The appellants and indeed Ms Hose had ample opportunity to vacate the premises and remove the chattels between 19 August 2015 and 9 September 2015. The actions of FM Custodians in enforcing the possession order, and the sheriff through the bailiffs in entering the property, were lawful having been ordered by the Court, and reasonable in that fair notice had been given. From 9 September 2015 FM Custodians had physical possession of the property.

Were the chattels trespassing?

[22] Historically trespass has been a cause of action available to the person in actual possession of the land. However, the law has developed to enable a person with an immediate right to possession to sue. This was recognised by this Court in *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd* where it was observed that a person has the right to sue in trespass if that person had the right to immediate possession, providing actual possession is obtained before suit.[9] It was stated: "[t]his is known as trespass by relation; the possession actually taken is deemed to relate back to the time when the right to take possession accrued".[10]

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9 *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd* [1995] 1 NZLR 22 (CA) at 32.
10 At 32.

[23] Tipping J went on to quote a statement from *Todd on Torts* that is substantially the same in the current edition:[11]

> In order to sue under this exception [trespass by relation], therefore, the plaintiff must establish two things. First, the plaintiff must establish that at the time of the trespass he or she was entitled to immediate possession. Normally, therefore, he or she will point to the title or an interest under a lease or mortgage. In the last case, the mortgagee will need to show that, at the time the trespass was committed, he or she had served on the mortgagor a notice under s 92 of the Property Law Act 1952 and that the mortgagor had failed to remedy the default specified in the notice before the date therein specified. That is because the power to enter into possession does not become exercisable before then.

The second matter which the plaintiff must establish is the taking of possession before commencing the proceeding.[12] The common law concept of relation back is codified with respect to mortgagees by s 139(1)(c) of the Act.[13]

[24] The fact that the chattels were removed before physical possession was taken does not affect FM Custodians' ability to sue in trespass, or to treat the chattels as trespassing. It is plain that to place or leave a chattel on the land of another who has a right to possession without consent is a trespass. A party lawfully in possession of land is entitled to enjoy that land free from trespassing chattels.[14] Any form of possession if it is clear and exclusive, and exercised with the intention to possess, is sufficient to support a claim.[15]

The rights of FM Custodians as involuntary bailee

[25] What steps then could FM Custodians take with the trespassing chattels? In practical terms their options were limited. They could leave them there, but that would preclude them selling the property and in the short term could constrain the marketing and maintenance of the property. They could place them out on the street, but the chattels clearly had considerable value, and that would be a needlessly destructive act.

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11 At 32. See also Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at [9.2.04(4)].

12 *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd*, above n 9, at 32.

13 Law Commission *A New Property Law Act* (NZLC R29, 1994) at 325–326.

14 *HongKong and Shanghai Banking Corp Ltd v Erceg* HC Auckland CIV-2010-404-2835, 1 November 2010 at [21].

15 *Halsbury's Laws of England* (5th ed, 2015, online ed) vol 97 Tort at [574].

The appellants were plainly of no mind to uplift them in the short term or to assist in their storage.

[26] Ms Penman-Chambers submitted that in this situation FM Custodians was entitled to relief by virtue of its status as an involuntary bailee of the trespassing chattels. An involuntary bailee is defined in *Palmer on Bailment*:[16]

> … as a person whose possession of a chattel, although known to him and the result of circumstances of which he is aware, occurs through events over which he has no proper control and to which he has given no effective prior consent.

[27] We accept that this is a correct statement of the law in New Zealand.[17] A mortgagee who takes possession of a property, which contains inside it chattels belonging to or under the control of the mortgagor or a third party who is aware of the mortgagee's right to possession, may be in the position of an involuntary bailee. In such a situation possession of the chattels has not been sought by the mortgagee, and the mortgagee finds them in the property without that mortgagee's permission or consent, despite the mortgagee's expressed wish to take possession of the property by an earlier date. The chattels are likely to be an impediment to any sale. In such circumstances the mortgagee must, if it has acted reasonably by having given fair notice, be able to remove and store the chattels.

[28] In *Da Rocha-Afodu v Mortgage Express Ltd* a mortgagee found chattels on a property when it took possession. The chattels were not removed by the mortgagor despite numerous requests by the mortgagee both before and after the mortgagee took possession. The mortgagee disposed of the chattels having given 14 days' notice of their intention to do so. The Court found there to be an involuntary bailment, and the mortgagee's acts to be lawful. It was observed by Arden LJ of the English and Wales Court of Appeal:[18]

> … within each category of bailee there will indeed be a wide variety of circumstances. However, the Court can take those into account when applying

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16 Norman Palmer *Palmer on Bailment* (3rd ed, Thomson Reuters, London, 2009) at [13-001] (footnotes omitted).

17 We note that it was endorsed by the English Court of Appeal in *Da Rocha-Afodu v Mortgage Express Ltd* [2014] EWCA Civ 454 at [9] and [49]. See also *Laws of New Zealand* Bailment (online ed) at [12].

18 *Da Rocha-Afodu v Mortgage Express Ltd*, above n 17, at [50].

> the duty which is imposed on involuntary bailees that they should do what is right and reasonable in all the circumstances. The Court must be alert to have regard to all the particular circumstances in the case.

The Court of Appeal upheld the trial Judge's ruling that the defendant bailee had done what was right and reasonable in the circumstances.

[29] What is right and reasonable depends upon the facts in each case. In *Campbell v Redstone Mortgages Ltd*, a decision of the English High Court, a mortgagee had enforced a possession order and became the involuntary bailee of goods left at the property.[19] It was held there that the mortgagor had acted unreasonably in not removing the chattels, and that the mortgagee was entirely justified in commencing to clear the property of the chattels and dispose of them.[20] There was no claim for the costs of storage or removal. It was observed:[21]

> As the mortgagee in possession, Redstone became a bailee through events over which it had no proper control. Its obligation in law as involuntary bailee was to do what was right and reasonable in the circumstances of the case.

[30] In the decision of the Ontario Court of Appeal of *R v Howson* Laskin JA commented that an involuntary bailee who removed a trespassing chattel from his or her property to a place of safekeeping should be entitled to recover the reasonable expenses incurred in doing so.[22]

[31] FM Custodians acted lawfully and reasonably in taking possession of the property. The position of the appellants in deferring any meaningful engagement on the issue of vacant possession was unreasonable. It should also be observed that ample notice had been given to the appellants and indeed Ms Hose of the pending taking of possession. The appellants chose to stay in Europe. Ms Hose chose to stay on the property and clearly was not prepared to leave without instructions from the appellants to do so.

[32] Therefore, when the options available to FM Custodians are considered, the option chosen of removal, storage and forwarding of the chattels as soon as an address

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19 *Campbell v Redstone Mortgages Ltd* [2014] EWHC 3081 (Ch).
20 At [122].
21 At [117].
22 *R v Howson* (1966) 55 DLR (2d) 582 (ONCA) at [37].

was provided, was entirely right and reasonable. There was no submission for Mr Cribb that the giving away or destruction of the chattels would have been preferable. As we have discussed, Mr McKenna's suggestion that they should have been left in place for some further negotiation or return closer to sale is not a reasonable expectation of a mortgagee who is trying to sell. Moreover, the unhelpful correspondence of Mr Cribb and the long history of failures to respond to deadlines on his part and that of SOS could not leave a reasonable mortgagee with any confidence that Mr Cribb would be any more helpful about the removal of the chattels at any later date. An involuntary bailee in the position of FM Custodians was entitled to act to remove the chattels, and recover its reasonable costs in these circumstances.

Conclusion

[33] It follows that we are satisfied that FM Custodians was entitled to remove and store the chattels of the appellants on 9 September 2015 as involuntary bailee, and should be reimbursed for the reasonable costs incurred in doing so. We are satisfied that FM Custodians' actions were lawful and reasonable. The appellants' conduct, in taking no meaningful action in relation to the chattels until approximately 18 months after FM Custodians took possession, and refusing to co-operate in giving up vacant possession, were not. Therefore we agree with the decision of Woolford J and the damages award that he made.

Result

[34] The appeal is dismissed.

[35] The appellants must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Grantham Law, Hamilton for Appellants
Hesketh Henry, Auckland for Respondent