

SUPREME COURT OF QUEENSLAND

CITATION: *Bank of Queensland Limited v Bottomley* [2015] QSC 329

PARTIES: **BANK OF QUEENSLAND LIMITED**
ACN 009 656 740
(plaintiff)

v

ELEANOR MARY BOTTOMLEY (ALSO KNOWN AS ELEANOR MARY WHIGHT)
(defendant)

FILE NO: BS 10473 of 2013

DIVISION: Trial Division

PROCEEDING: Application on the papers without oral hearing

DELIVERED ON: 24 November 2015

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers.

JUDGE: Peter Lyons J

ORDER:

1. **The order for possession with respect to 169 Dornoch Terrace, Highgate Hill in the State of Queensland, Lot 14-15 on Registered Plan 12103, included in the Plaintiff's Default Judgment granted on 25 August 2014, be enforced.**
2. **Leave be given to the Plaintiff pursuant to rule 913 of the Uniform Civil Procedure Rules 1999 (Qld) for the issue of an enforcement warrant to enforce the order for possession.**
3. **The Plaintiff's application for the issue of an enforcement warrant to enforce the order for possession be otherwise referred to the Registrar in accordance with r 906(4).**
4. **Liberty to apply.**

CATCHWORDS: PROCEDURE – JUDGMENTS AND ORDERS – ENFORCEMENT OF JUDGMENTS AND ORDERS – EXECUTION AGAINST PROPERTY – WARRANTS OF SEIZURE AND SALE OR WRIT OF FIERI FACIAS – PRACTICE – TAKING POSSESSION – where, on 25 August 2014, the plaintiff obtained a default judgment against the defendant, which included an order that the plaintiff recover possession of the land – where three units on the land were occupied by persons other than the defendant – where the plaintiff applies for the Court's leave for the issue of an enforcement warrant against the occupants – where the plaintiff has not served a copy of the order for possession on the occupants – where, on 14 July 2015, the plaintiff notified one occupant of its intention to exercise its power of sale, and

provided a Notice to Vacate – where, on 23 July 2015, that occupant requested a 60 day extension to vacate – whether an occupant of land the subject of an order for possession, who is not the person against whom the order is made, is a person against whom the order is to be enforced for the purposes of r 913(1) – whether, in the circumstances, the Court should grant leave for the issue of an enforcement warrant – where no reason has been identified why the question of the issue of a warrant should not be dealt with by the Registrar

Uniform Civil Procedure Rules 1999 (Qld), r 906, r, 908, 913, 914, 915

Residential Tenancies and Rooming Accommodation Act 2008 (Qld), s 317

SOLICITORS: HWL Ebsworth Lawyers, for the plaintiff.

No appearance for the defendant.

- [1] **PETER LYONS J:** On 25 August 2014 the plaintiff obtained a default judgment against the defendant, which included an order that the plaintiff recover possession of land located at 169 Dornoch Terrace, Highgate Hill¹. The plaintiff has applied for leave under r 913(2) of the Uniform Civil Procedure Rules 1999 (Qld) (*UCPR*) for the issue of an enforcement warrant under r 915 against any occupants of the land under a lease or tenancy agreement; for an order that the warrant issue; and for an order in its favour for costs. The plaintiff has proposed that the application be decided without an oral hearing, under r 489.
- [2] There is on the land a building comprised of three units, used for residential purposes. Two of the units have been occupied by Ms Crump².
- [3] The plaintiff became the registered mortgagee of the land on 15 April 2009. The defendant is the registered proprietor³.
- [4] On 16 April 2015, a letter was sent to 169 Dornoch Terrace, addressed to the Occupant/s stating that the defendant had defaulted under its mortgage with the plaintiff and that the plaintiff was exercising its power of sale. It enclosed a Notice to Vacate in Form 19 under the *Residential Tenancies and Rooming Accommodation Act 2008 (Qld) (RTRA Act)*⁴.
- [5] Subsequently the plaintiff's solicitors became aware that the building on the land comprised three units, two of which were occupied by Ms Lisa Crump, and that the third was separately occupied⁵. On 14 July 2015, a process server for the plaintiff placed under the front door of the premises occupied by Ms Crump, an envelope containing a letter from the plaintiff's solicitors in similar terms to the letter sent on 16 April, and enclosing a Notice to Vacate⁶. That Notice required Ms Crump and any other occupant of the two units to vacate those units by 16 September 2015⁷.

¹ See Document 9 on the Court File.

² Affidavit of Ms Reanna Clare Lawrence, sworn 22 October 2015 (*RCL*), at [12].

³ *RCL* Ex 9 at p 38.

⁴ *RCL* at [6].

⁵ *RCL* at [12].

⁶ *RCL* at [14]; see also Affidavit of Service of Paul Buxton sworn 13 October 2015 (*PB*) at [3]-[4].

⁷ *PB* Ex 2.

The process server affixed to the front door of the third unit an envelope containing similar documents, addressed to the occupants of that unit⁸.

- [6] Ms Kathryn Hickson, who holds the position of Senior Officer – Recoveries with the plaintiff deposed that on 10 July 2015, she received a telephone call from a person who identified herself as Ms Joanna Leusink⁹. Ms Leusink said that she occupied the third unit on the land, and had received the Notice to Vacate. If Ms Hickson has correctly identified the date of the telephone call, it would mean that Ms Leusink had received the letter sent on 16 April. Ms Hickson also deposed to being informed by Ms Leusink on 9 October 2015 that she had vacated the unit; and that the other two units on the land remained occupied¹⁰.
- [7] On 23 July 2015, Ms Crump wrote a letter to the plaintiff's solicitors stating that she has occupied two of the units since 2000, and has complied with the conditions of her tenancy agreement with the defendant. She also stated that the other unit was occupied by unnamed neighbours. Ms Crump said that she had received the letter and Notice to Vacate served on 14 July; and requested a 60 day extension of the date for vacating the premises, due to medical circumstances¹¹.
- [8] Pursuant to r 913(2) leave of the Court is required for the issue of an enforcement warrant under r 915 (being an enforcement warrant authorising entry onto land, and delivery of possession of the land to the person entitled to its possession) if a person other than the person against whom the order for possession of the land has been made is in occupation of it under a lease or tenancy. The evidence suggests that the land is in the occupation of Ms Crump, and her neighbours, under a lease or tenancy agreement, and the plaintiff does not contend otherwise. It was therefore appropriate to proceed on the basis that leave is required.
- [9] Under r 913(1), an order for possession of land may be enforced only if the person against whom the order is to be enforced is served with a copy of the order at least seven days before the warrant is issued. On 22 September 2015, a copy of the judgment containing the order for possession of the land was sent by post to the defendant at 134 Kundes Road, Mt Samson, described as the defendant's last known address¹².
- [10] An enforcement warrant directs an enforcement officer to enter upon the land, and to deliver possession of it to the person named in the warrant as the person entitled to possession¹³. It seems to me, therefore, notwithstanding submissions on behalf of the plaintiff to the contrary, that a person in possession of the land, and in particular a person in possession under a lease or tenancy agreement, is a person against whom an order for the possession of land is to be enforced by an enforcement warrant. There is no evidence that the order has been served on any of the occupants of the land. Accordingly, the condition identified in r 913(1) has not been satisfied.
- [11] However, r 913 permits the Court to order that an order for possession of land may be enforced against a person who has not been served with a copy of the order for

⁸ PB at [1]-[2].

⁹ Affidavit of Kathryn Hickson sworn 13 November 2015 (*KH*), at [3].

¹⁰ *KH* at [4]-[5].

¹¹ RCL Ex 7.

¹² Affidavit of Service of Sandra Louise Miller sworn 13 October 2015 (*SLM*) at [4] and Ex 2.

¹³ See Form 85.

possession. The only person other than the defendant against whom it may now be necessary to enforce the order is Ms Crump. Given the notice she has had of the plaintiff's intention to exercise its power of sale, the time that has passed since she was served with a Notice to Vacate, and the fact that the extension she nominated has now expired, this is an appropriate case to make such an order.

- [12] Section 317 of the RTRA Act applies to residential premises which are subject to a mortgage, if, after the premises became subject to the mortgage, a residential tenancy agreement was entered into for the premises, the mortgagee did not consent to the tenancy, and the mortgagee has become entitled to obtain possession of the premises. Since the land is being used by its occupants as a place (or more accurately, places) of residence, then it constitutes residential premises for the purposes of the RTRA Act. The likely explanation for the occupancy of the land by Ms Crump and her neighbours is that there are residential tenancy agreements with the defendant. It seems likely that Ms Crump's agreement was entered into before the defendant granted a mortgage over the land to the plaintiff; though there is a prospect that the agreement was renewed subsequently. There is no evidence to indicate when Ms Crump's neighbours entered into a residential tenancy agreement with the defendant.
- [13] Section 317 of the RTRA Act prevents a mortgagee from obtaining possession of premises to which the section applies, unless, at least two months before obtaining possession, the mortgagee gives the tenant notice in the approved form, informing the tenant that possession is to be obtained. If the section applies, then it has been complied with. Leave should not be refused on that ground.
- [14] The procedure for applying for an enforcement warrant is set out in r 906 of the UCPR. It requires the filing of an application and supporting affidavit, and may be made without notice to another party. Under r 906(4) such an application must be dealt with by the Registrar without a formal hearing, unless the Court or a Registrar directs otherwise. Rule 908 identifies matters that must appear in the enforcement warrant, and provides that the Registrar must give the enforcement warrant to an officer to be enforced. If leave were to be granted, no reason has been identified why the question of the issue of a warrant should not be dealt with by the Registrar, in accordance with these rules.
- [15] Accordingly I propose to order that the plaintiff's judgement be enforced, notwithstanding any failure to serve a copy of it on any person; that there be leave to issue an enforcement warrant; and that the matter be otherwise referred to the Registrar. In case of any unforeseen difficulty, I shall also grant liberty to apply.