IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV-2016-419-000266
[2017] NZHC 1562

BETWEEN	FM CUSTODIANS LIMITED Plaintiff
AND	ROBERT HOANI CLIFFORD CRIBB AND KAREN LYNNE STEVENS Defendants

Hearing: 21 June 2017

Appearances: N Penman-Chambers and R W Belcher for Plaintiff
S McKenna and J Alchin-Boller for Defendants

Judgment: 7 July 2017

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Friday, 7 July 2017 at 1:00 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors/Counsel
Hesketh Henry, Auckland
Grantham Law, Hamilton

Introduction

[1] The plaintiff, FM Custodians Limited, took possession of a property at 103 Te Awa Road, Hamilton (the property), on 9 September 2015, pursuant to an order of the High Court dated 17 April 2014, which was upheld in a decision of the Court of Appeal dated 18 August 2015.[1] At the time the plaintiff took possession of the property, its principal occupiers were the defendants, Robert Hoani Clifford Cribb and his wife, Karen Lynne Stevens. The defendants were then in Europe on an extended business trip. The plaintiff accordingly made arrangements with a professional moving and storage company, Allied Pickfords, to pack and store the defendants' chattels in five containers at a storage facility. Mr Cribb did not provide an address to which his and his wife's chattels could be delivered until 15 March 2017. The chattels were therefore not returned to them until 28 March 2017.

[2] The plaintiff now claims the sum of $51,586.40 from the defendants for packing, transport, storage and insurance of their chattels between 9 September 2015 and 28 March 2017.

Factual background

[3] The registered proprietor of the property at all relevant times was SOS Investments Limited (the company). As at the date of the Court of Appeal decision Mr Cribb was the company's sole director. He was also a shareholder of the company.

[4] Following release of the Court of Appeal decision, the plaintiff's lawyers wrote to the company's lawyers on 19 August 2015 as follows:

> We write further to the release of the Court of Appeal's decision in this matter. In accordance with that decision the possession order made by Associate Judge Doogue stands and our client is entitled to immediate possession of the property. If Mr Cribb is no longer in occupation of the property, please confirm by return and arrange to have all keys to the property delivered to us. If Mr Cribb is still in possession of the property, our client is prepared to give Mr Cribb to 26 August 2015 in which to vacate the property and deliver up all keys to the property. We would appreciate it if you could take instructions and come back to us today.

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[1] *SOS Investments Ltd v FM Custodians Ltd* [2015] NZCA 380, affirming *FM Custodians Ltd v SOS Investments Ltd* [2014] NZHC 817.

[5] The company's lawyers responded on 21 August 2015 as follows:

> I have spoken to Mr Cribb and have instructions. He is willing to co-operate with FM Custodians regarding possession of the property and has asked that I liaise with you as to specific arrangements.

[6] On 24 August 2015, the company's lawyers wrote again to the plaintiff's lawyers as follows:

> Further to our telephone conversation today, Mr Cribb confirms he is willing to co-operate with your client to obtain the best price for the property. He is willing to make available to your client keys to the property which will enable access into the buildings. The home is very large and furnished with good quality furniture and effects which will keep the property dressed for prospective buyers. The property, including lawns and gardens, has been kept well and presentable by Mr Cribb, a task which he is willing to continue to facilitate. Mr and Mrs Cribb are presently in Europe and the home is being looked after by a close family friend who has lived at the property with them for the last two years. Mr Cribb expects to return to New Zealand in the near future. Our client is prepared to arrange to vacate the property at an agreed date, no doubt which will coincide with arrangements for the sale of the property.
>
> We ask that you seek your clients' instruction.

[7] This proposal was not accepted by the plaintiff's lawyers. On 26 August 2015, the plaintiff's lawyers obtained a possession order from the High Court at Hamilton. It was addressed to the sheriff at Hamilton and authorised him to take possession for the plaintiff of the property at 103 Te Awa Road, Hamilton. The order also authorised the sheriff to deliver possession of "any land ~~or chattels~~ received under this possession order" (crossing out in original) to the plaintiff. The possession order was forwarded to the company's lawyers by email on 4 September 2015 as follows:

> Please find attached by way of service on SOS Investments a possession order in favour of FM Custodians, sealed by the Court. We note our instructions are to proceed to enforce this order.

[8] No advice was however given to the company's lawyers as to when the possession order might be enforced. The possession order was executed by two court bailiffs five days later – on 9 September 2015. Acting on the direction of the bailiffs, who required all chattels to be removed from the property prior to executing

the possession order, the plaintiff arranged for the chattels at the property to be professionally packed, removed, stored and insured at its expense.

[9] Of the chattels removed, a snooker table, golf cart and ride-on mower were subsequently returned to Mr Cribb by arrangement. The balance of the chattels, which comprised of five container-loads, remained at Allied Pickfords storage facility until being returned to Mr Cribb on 28 March 2017, following provision of an address for delivery on 15 March 2017.

Plaintiff's claim

[10] The plaintiff claims that in failing to remove their chattels from the property the defendants committed the tort of trespass to property. In consequence of the trespass, the plaintiff was required by the sheriff to remove the chattels from the property upon enforcing the possession order at which point the plaintiff came to hold the chattels as involuntary bailee.

[11] The plaintiff says its claim is quite simple. Pursuant to the possession order granted by the High Court, upheld by the Court of Appeal, the plaintiff became a mortgagee in possession of the property on 18 August 2015 and it enforced the possession order on 9 September 2015.

[12] As Asher J held in *HongKong and Shanghai Banking Corp Ltd v Erceg*:[2]

> …[a] mortgagee in possession undoubtedly has the usual rights that emanate from possession in relation to the property…
>
> … A party lawfully in possession of land is entitled to enjoy that land free from trespassing chattels. Any form of possession if it is clear and exclusive, and exercised with the intention to possess, is sufficient to support a claim. Chattels or goods which remain on land after the party lawfully in possession has revoked any permission for them to be there, can constitute a trespass to the land: see *Konskier* v *B Goodman Ltd* and *Jones v Gospel.* This can be the case even when the chattel has been the subject of a bailment and the bailment has ceased. Of course, goods lawfully on the property do not trespass overnight. Reasonable notice for their removal must be given.

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[2] *HongKong and Shanghai Banking Corp Ltd v Erceg* HC Auckland, CIV-2010-404-2835, 1 November 2015, at [16] and [21] (footnotes omitted).

[13] The plaintiff submits that the correspondence between the plaintiff's lawyers and the company's lawyers revoked any permission for the chattels to remain on the property after 26 August 2015. A reasonable period of time was given to the defendants to give up vacant possession of the property in circumstances where the plaintiff had an immediate and enforceable right. Despite reasonable notice being given, vacant possession was not delivered within the seven day notice period given.

The defence

[14] The defendants claim that the plaintiff did not have possession of the property at the time it removed their chattels and therefore their chattels never trespassed on the property. The defendants point to evidence that the sheriff required the plaintiff to remove the chattels "prior to taking possession". The plaintiff was therefore never in possession while the chattels were present on the property.

[15] Further, the defendants say that the plaintiff did not revoke its permission for the chattels to remain on the property. In its letter dated 19 August 2015 the company's lawyers proposed a grace period for the defendants to vacate. It did not state that the defendants were required to vacate by a specific date nor did it state that vacation of the premises necessarily included removal of the chattels. The defendants say that in the absence of a demand by the plaintiff specifically requiring the removal of the chattels within a reasonable period of time, there can be no action founded on trespass.

[16] The defendants point to the sheriff's insistence that the chattels be removed as the cause of the packing, removal, storage and insurance costs. They say the sheriff was wrong to require their removal. Had the chattels simply remained at the property they would have caused no harm, at least until the property was sold. In any event, the plaintiff should have deducted the packing, removal, storage and insurance costs from the proceeds of sale of the property as the costs were costs occasioned by the mortgagee sale.

Discussion

[17] The first issue for determination is at what time does the law regard the plaintiff as having possession of the property for the purposes of the tort of trespass. That time may not necessarily be the time of actual physical possession, as asserted by the defendants.

[18] The plaintiff points to s 139(1) of the Property Law Act 2007, which provides:

> **139 When mortgagee becomes mortgagee in possession**
>
> (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—
>
> (a) the date on which the mortgagee enters into, or takes, physical possession of the land or goods; or
>
> (b) the date on which the mortgagee first receives any income from the land or goods as mortgagee in possession; or
>
> (c) the date of the mortgagee's application to the court for the order if—
>
> (i) the mortgagee applies to the court for an order for possession of the land or goods; and
>
> (ii) the court, in response to the mortgagee's application, makes the order.

[19] In my view, the effect of s 139(1)(c) is that the plaintiff became a mortgagee in possession of the property from the date of its application to the court for a possession order, once the court had granted a possession order. In that sense, the order had retrospective effect.

[20] The plaintiff first made application for a possession order in its statement of claim dated 7 November 2013. Associate Judge Doogue granted the application on 17 April 2014. The Court of Appeal upheld Associate Judge Doogue's order for possession on 18 August 2015. In terms of s 139(1)(c) of the Property Law Act 2007, the plaintiff was therefore a mortgagee in possession from 7 November 2013. The date that the plaintiff entered into or took physical possession of the property is not of significance in the context of this claim. This is consistent with the statement by Asher J in *HongKong and Shanghai Banking Corp Ltd v Erceg* that "any form of

possession if it is clear and exclusive, and exercised with the intention to possess, is sufficient to support a claim [of trespass]".[3]

[21] The second issue for determination is whether the plaintiff revoked permission for the chattels to remain on the property. In their letter of 19 August 2015, the plaintiff's lawyers confirmed that the plaintiff was entitled to immediate possession of the property, but said that the plaintiff was prepared to give Mr Cribb to 26 August 2015 in which to vacate the property and deliver up all keys to the property. The company's lawyers responded with a counter proposal in a letter dated 24 August 2015. The company's lawyers said that the defendants were prepared to arrange to vacate the property on an agreed date "no doubt which will coincide with arrangements for the sale of the property". The counter proposal was not accepted by the plaintiff's lawyers, who then served a possession order on the company's lawyers by letter dated 4 September 2015, with the advice that their instructions were to proceed to enforce the order.

[22] Although the plaintiff's lawyers' letter did not specifically refer to the defendant's chattels, I am of the view that to vacate means to give up possession or occupancy of the property, which necessarily includes taking away the chattels that the vacating party wishes to retain. Of course a vacating party can choose to leave behind chattels that they do not wish to retain, which can then be treated as abandoned and disposed of by the party in possession of the property. It was clear in the present case, however, from the number, nature and quality of the chattels that the defendants did not intend to abandon them and that they clearly wished to retain them.

[23] The third issue for determination is whether reasonable notice for the removal of the chattels was given. Immediately after the plaintiff took possession of the property, the company's lawyers wrote to the plaintiff's lawyers complaining about the removal of the chattels. The company's lawyers stated:

> As you are aware, Mr Cribb and Ms Stevens have been temporarily based in Europe for some weeks. As a result, they have largely been unable to deal

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3 At [21].

> with steps by your client to remove their possessions from the property and bring to an end their tenancy and occupation.

[24] Mr Cribb did not, however, choose to return to New Zealand immediately "to deal with steps by [the plaintiff] to remove their possessions from the property". He did not return to New Zealand until 21 November 2015, more than two months after execution of the possession order. There is also no evidence that the defendants took any action prior to execution of the possession order to investigate options for the removal and storage of their chattels, notwithstanding their knowledge that the plaintiff's lawyers had instructions to enforce the possession order. The possession order had originally been granted a year and a half earlier and the defendants must have known that if the Court of Appeal declined the company's appeal, the possession order obtained by the plaintiff would be actioned.

[25] In those circumstances, I am of the view that the plaintiff gave reasonable notice for the removal of the chattels.

[26] The fourth issue for determination is the defendants' contention that the costs were caused by the sheriff's (wrongful) insistence that the plaintiff remove the chattels from the property before giving possession of the property to the plaintiff, rather than by the defendants' decision to leave their chattels at the property.

[27] This is a rather artificial argument. The chattels could not remain on the property and it was only ever a question of when they were removed. When they were removed, packing and removal costs at least would be incurred. There may well have been storage and insurance costs incurred as well if the chattels were not to be immediately delivered to a new property occupied by the defendants.

[28] The defendants have also been on notice since shortly after the execution of the possession order that the plaintiff would claim packing, removal, storage and insurance costs against them. By letter dated 16 September 2015, a week after the execution of the possession order, the plaintiff's lawyers wrote to the company's lawyers as follows:

> …we enclose Allied Pickfords' invoice for its attendance to date in removing and storing the chattels for Mr Cribb's attention, together with our trust account details for the purpose of payment.
>
> As you will note from the invoice [the plaintiff] has paid for storage until 7 October 2015. [The plaintiff] therefore invites [the company] to either:
>
> (a) Collect the chattels from Allied Pickfords; or
>
> (b) Make arrangements to transfer the existing storage and insurance to its name, by 7 October 2015.

[29] The defendants chose not to take up the first option and say they were unable to take up the second option.

[30] Finally, although there may be some merit in the defendants' contention that the packing, removal, storage and insurance costs could be properly viewed as costs occasioned by the subsequent mortgagee sale and should have been deducted from the proceeds of sale, I am advised that there was no surplus from the subsequent sale of the property from which the costs could have been deducted and the plaintiff remains out of pocket.

Conclusion

[31] By nature of its status as an involuntary bailee, the plaintiff is entitled to be compensated for expenditure incurred in fulfilment of the duty of care imposed on it. The duty of an involuntary bailee is to do what is right and reasonable in the specific circumstances of the case.[4] Although at one stage the plaintiff's lawyers advised the company's lawyers that they would treat the chattels as abandoned, the plaintiff chose to continue to store and insure the chattels which, in my view, was right and reasonable.

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4 *Campbell v Redstone Mortgages Ltd* [2014] EWHC 3081 (Ch) at [116].

[32] The defendants chose not to provide a delivery address for 18 months and cannot now complain that the extensive costs incurred by the plaintiff were not properly incurred. Accordingly, there will be judgment against the defendants in favour of the plaintiff in the sum of $51,586.40 together with interest at the Judicature Act rate from the date of delivery of the chattels, 29 March 2017. The plaintiffs are also entitled to costs on a 2B basis.

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Woolford J