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Précis Paper

Case v Frimont [2021] NSWCA 30 – Residential Tenancy Agreements and Estates

A discussion about the case *Case v Frimont* [2021] NSWCA 30, including a discussion about residential tenancy agreements, estates, and legal and equitable interests.

Discussion Includes

- Key Facts
- Occupation of the Land
- The Alleged Tenancy Agreements
- The Estate's Arguments
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- Judgments on the Residential Tenancy Agreements
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Case v Frimont [2021] NSWCA 30 – Residential Tenancy Agreements and Estates

In this edition of BenchTV, David Currie (Barrister, 4th Floor Selborne Chambers, Sydney) and David Ireland (Solicitor, Paine Ross & Co, Sydney) discuss the case *Case v Frimont* [2021] NSWCA 30. This edition includes a discussion about residential tenancy agreements, estates, and legal and equitable interests.

Key Facts

1. In this case, Ms Frimont, the respondent and administrator of her late father's unadministered estate, sought a writ of possession. Mr Donald Case, her nephew and the grandson of the original owner of the land, refused to vacate the property, despite the estate having sold the property and making several demands for him to vacate. It was alleged that he was a trespasser of that land and he had no right to remain in occupation.
2. Mr Albert Case died intestate on 11 April 1968. Ms Frimont was one of four children of Albert Case. The other children were Kenneth Case, Sylvia Case and Robert Case. After the original land owner, Mr Albert Case, died in 1968, one of his sons obtained letters of administration. However, that was unadministered for various reasons.
3. Ms Frimont was appointed as the administrator in March 2018 of Mr Albert Case's unadministered estate. Despite Albert's estate remaining unadministered for almost fifty years, the land and at least one of the houses on the land had remained occupied by one of Albert's sons, Robert, who is the uncle of the appellant. Robert and his family remained in occupation of that land and the house since at least his father, Albert, passed away in 1968. None of the family members complained about this arrangement so Robert kept living in the house. Whilst the estate of Albert was and had been unadministered for many years, Albert's surviving relatives, including the appellant and respondent at the date of the grant of the letters of administration, had the following beneficiary entitlements: the respondent as to five tenths of the estate, the appellant as to one tenth, and the four other grand children of Albert each having a one tenth share.

Occupation of the Land

4. Despite Donald being a mere beneficiary, he contended that prior to his uncle Robert's death (who died on 17 January 2011), Robert stated to the appellant words to the effect of "If you look after me, you can stay here as long as you like". The appellant argued that he

was entitled to remain in occupation of the land as long as he chose to do so, based on the alleged representation from his uncle.

5. The appellant alleged that his uncle, Robert, who had lived on the land and in the house since before 1968, could pass on his rights or entitlements to the land to the appellant, and based on the representation from Robert, that the appellant could live in the house as long as he wanted. The appellant alleged that he was therefore a successor to this right and believed that he had a superior claim to the land as against the administrator, who was registered on title. Prior to the first hearing of the matter, the respondent filed an amended defence, pleading several defences, including an estoppel argument, a tenancy at will argument pursuant to s 127 of the *Conveyancing Act 1919* (NSW), together with three separate residential tenancy agreements.

The Alleged Tenancy Agreements

6. The first of the alleged tenancy agreements was entered into in around September 2010, when the appellant and his wife moved into the residence in order to provide domestic services, essentially palliative care, to Robert.
7. The second alleged tenancy agreement put forward by the respondent was one that was allegedly entered into after Robert's death, when in consideration for remaining in occupation of the residence, the defendant and his wife paid half of the rates and charges levied by Hawkesbury City Council in respect of the land. The appellant alleged that this was to the knowledge of Ms Frimont. It was therefore alleged that there was a residential tenancy agreement between the estate of Mr Albert Case as landlord and the defendant, or alternatively, the defendant and his wife as tenants of the residence.
8. The third alleged tenancy agreement was one that was entered into with the administrator by continuing to make payments towards half the council rates and charges by various instalments, the last of which was paid to the council in 2018 in the sum of $100.

The Estate's Arguments

9. The estate put forward ten primary arguments. Firstly, the estate argued that the elements of the contract must be established; that is, that there are parties to the agreement, there is an intention to create legal relations, as well as there being an offer, acceptance and consideration. The estate argued that these factors were not present, so therefore no agreement or lease could have come into existence.
10. The second argument put forward was that only a party that could agree to terms were the true landowners, who was Albert (the original land owner) because he was the only registered proprietor of the land, but as he died in 1968, there could not be any other person who could legally enter into a contract or lease, except for say, the NSW Trustee pursuant

to s 61 of the *Probate and Administration Act 1898* (NSW). There was no evidence of either Albert or the NSW Trustee agreeing to terms of a lease or a contract for occupation.

11. The third argument put forward by the estate was that the mere beneficiary of the estate, Robert Case, and the defendant, had no interest, either legal or equitable in the estate assets themselves. This argument heavily relied on *Commissioner of Stamp Duties (Qld) v Livingston* [1965] 112 CLR 12. This is because while the estate is still being administered, as it was since 1968 and/or after 2018, the legal and beneficial rights in the estate vested in the personal representative of the estate.
12. The fourth argument put forward was that s 23C of the *Conveyancing Act 1919* (NSW) deals with the creation and disposition of legal and equitable interest in land in writing. The beneficiary of the unadministered estate does not have a proprietary interest in any particular asset of an unadministered estate. Where the executorial duties are yet to be performed, a beneficiary cannot be a co-owner of the land; the estate again relied on *Commissioner of Stamp Duties (Qld) v Livingston* [1965] 112 CLR 12.
13. The fifth argument put forward was in answer to any suggestion by the defendant that a lease came into effect by parole evidence. This was denied and it was stated that if a lease came into effect, it is a lease at will, and such a creation of a lease is at best rent. Therefore, it was impossible for any oral lease to exist when Robert Case (the appellant's uncle), who at the time was only in possession of the land, was at best a mere beneficiary of an unadministered estate himself so he had no proprietary or legal interest in the land that could be passed or transferred to the appellant. Furthermore, the defendant had not paid any rent in over nine years of occupancy; that is, apart from some council rates, the defendant had lived in the property effectively rent-free.
14. The sixth argument put forward by the estate was that the only assistance equity may offer to a beneficiary under a will in an unadministered estate is a right to compel an executor to carry out the terms of the will. Again, reliance was placed on *Commissioner of Stamp Duties (Qld) v Livingston* [1965] 112 CLR 12.
15. The seventh point argued was that even if the defendant was or is a tenant at will, pursuant to s 127 of the *Conveyancing Act 1919* (NSW), a tenancy at will is determinable by one month's notice in writing, expiring at any time. The estate argued that the defendant was given written notice to vacate the land on 7 December 2018 and again on 15 May 2019.
16. The eighth argument was that mere possession of the land will not, absent evidence of the existence of a lease, constitute proof of a tenancy as a defence to an action for ejectment. The authority relied on was *Mason v Stevens* (1943) 60 WN (NSW) 70.
17. The ninth argument put forward was a denial that the administrators encouraged a request or entice the appellant to pay the council rates or even a portion of the council rates as alleged. Therefore, no tenancy agreement could have come into existence.
18. The tenth and final submission put forward was that Robert Case did not, save for his entitlement as a beneficiary of the estate, have any interest or rights or ownership in the

land himself, either legal or equitable. Robert himself could not, as alleged in the amended defence, pass, transfer or offer any of the occupancy rights to the defendant that he himself did not have at first instance, because Robert himself was not an owner of the land, and save for his intestacy entitlements, he was just a beneficiary of the estate.

Issues Raised on Appeal

19. When the matter was heard on appeal, the issues raised by the appellant had been narrowed. The prescriptive ownership was not raised in trial or on appeal. The tenancy at will was abandoned at trial, and the tenancy agreements and estoppel arguments were not pressed on appeal by the appellant. The Court of Appeal held that an agreement is distinct from a lease and turns on occupation rather than exclusive possession. As the *Residential Tenancies Act 2010* (NSW) states at s 13, a residential tenancy agreement need not be written or formal. In order for there to be a residential tenancy agreement, there has to be an agreement and it may be implied. The main point of a claim of a residential tenancy agreement or agreement is found in s 119 of the *Residential Tenancies Act 2010* (NSW) which states that a landlord or former landlord must not commence proceedings against a tenant or former tenant of the landlord in the Supreme Court, the District Court or the Local Court to obtain recovery of possession of a residential premises, where the arrangement is subject to a residential tenancy agreement.
20. The appellant's argument was that if the estate was the landlord and the appellant was a tenant under the *Residential Tenancies Act 2010* (NSW), any proceedings commenced against the appellant should have been commenced at NCAT, and these proceedings were therefore barred from being in the Supreme Court. This was held by their Honours to be a question of construction as stated by the High Court in *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364. Furthermore, it was held that s 119 of the *Residential Tenancies Act 2010* (NSW) does not have the pleaded effect of denying jurisdiction as per *Whiteford and Another v Commonwealth of Australia* (1995) 38 NSWLR 100.
21. The Court of Appeal held that there was no error by the court at first instance with respect to any of the residential tenancy agreements that were alleged. The first alleged residential tenancy agreement was said by the appellant to be in 2010 when the appellant and his wife moved in to care for Robert. There was no evidence regarding any family member dating back as far as Albert and Kenneth. On the assumption that there was some formal agreement between Kenneth and Robert, the critical question was the position in late 2010. The definition of a residential tenancy agreement does not refer to owner or lessor, but refers merely to the granting by one person to another for value of right of occupation.
22. As fragile as Robert's tenure may have been, the Court of Appeal said that s 13 does not preclude him agreeing to share occupation of the dwelling, which had been occupied by

him for many years in exchange for the provision of services. In that event, Robert could be taken to be a landlord. His Honour, Davies J, dealt with that as follows:

> *There are a number of difficulties associated with a conclusion that a residential tenancy agreement came into being between Robert and the defendant when the Defendant and Peggy moved into the house. The first is that there is no certainty about what care was to be provided so that the care could be regarded as constituting 'value' for the purposes of s 13. For a lease at common law to come into existence, there must be a term identifying the rent or a mechanism for determining the rent: Whitlock v Brew (1968) 118 CLR 445 at 456 and 460. Further, the party asserting that an agreement exists, must show that there was an intention to create legal relations, even although no presumption exists that legal relations are not intended in a family arrangement: Ermogenous v Greek Orthodox Community of SA Inc (2002) 2019 CLR 95; [2002] HCA 8 at [26]. In my opinion, the evidence does not show that the parties did intend to create legal relations. I note also that the claim was not put on the basis of some proprietary estoppel arising from promises by Robert in return for which care was provided*.

Judgments on the Residential Tenancy Agreements

23. It was concluded by the appellant that the first residential tenancy agreement, as alleged, turned on s 81(4) of the *Residential Tenancies Act 2010* (NSW), which states that a residential tenancy agreement terminates if a person having superior title (such as a head landlord) to that of the landlord becomes entitled to possession of the residential premises. The Court stated that the provision turns not merely upon a person having superior title but also upon that person becoming entitled to possession. The Court stated that it is clear that merely transferring ownership of property which is subject to a residential tenancy agreement to a third party does not without more bring the residential tenancy agreement to an end.
24. The second alleged tenancy agreement was said to be one entered after Robert's death arising from the payment of half the council rates. The Court of Appeal found no error by his Honour Davies J at first instance. Kenneth died in 2003. The office of administrator is personal and not transmissible, so no executor or administrator of Kenneth's estate could succeed as representative of Albert. The pleading alleged is an agreement with the estate of Albert, but that simply cannot be because there was no such legal person. Even if there were any representatives of Albert's deceased estate between 2003 and 2018, it was the NSW Trustee, pursuant to s 61 of the *Probate and Administration Act 1898* (NSW), but there is no suggestion of any such agreement. Davies J rejected the second residential tenancy agreement. The primary judge said that the difficulty faced by Donald was that there was no person who could grant a right of occupation to the premises. The primary judge observed that until letters of administration were obtained by Ms Frimont on 29 March 2018,

the land remained registered in Albert's name. His Honour considered, at paragraph 35, that there could not be an agreement under s 13 because there was no person to enter into that agreement with Donald. The Court of Appeal agreed with that finding.

25. The third and final residential tenancy agreement put forward by the defendant turned on the payment of council rates by the appellant after Ms Frimont became the appointed administrator. His Honour found that the only evidence of this was paying $100 on 20 August 2018. Davies J said that he accepted the appellant's submission that the finding was erroneous. However, the appellant tendered evidence of post office receipts which, on various dates, was actually more than $100, which is what the Court of Appeal found was an error. However, there was evidence that some $900 was outstanding in March 2018, which approximately equated to the payments made by the appellant. The primary judge found that Ms Frimont was unaware of these additional payments and said that they were relatively small, ceased some 4-5 months after she was appointed, and there had been no subsequent payments. That finding was one that was expressly informed by her demeanor in cross-examination, where, when confronted with documents that showed that he had done so, she accepted that he had. It appeared to the Court that she was finding out for the first time by the questions that the defendant had paid some of the rates. The Court of Appeal said that although ground 13 challenged the finding that Ms Frymont did not know that the appellant was paying half the rates, there was no real basis for that challenge, which was governed by the principles stated in *Fox v Percy* (2003) 214 CLR 118. There was no basis to overturn the finding of the primary judge.

Other Grounds of Appeal and Final Judgment

26. Another ground of appeal was ground 14, which challenged a statement by the primary judge that there was no evidence that Ms Frimont gave copies of the rate notices in March 2018, where it asked Donald to pay them. The Court of Appeal held that nothing turns on these issues in light of the finding of Ms Frimont's lack of knowledge about the payments. Similarly, on ground 12 that was challenged, there was the conclusion that the appellant had not proven that he had paid half the rates. However, the primary judge expressly proceeded on the basis that even if the appellant had not shown that he had paid half the rates, that would not have itself stood in the way of the conclusion that there was a residential tenancy agreement. The Court held that there could be no residential tenancy agreement with the administrator based merely upon the appellant's continuing occupation of the premises and payment of the fraction of the rates and charges of which the administrator was unaware of.
27. The NSW Court of Appeal held unanimously that no residential tenancies existed with either the dying uncle or the administrator. The appeal was therefore dismissed.

BIOGRAPHY

David Currie

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Mr Currie was admitted to the bar in 2009, after spending 5 years as a commercial litigation lawyer at The Argyle Partnership Lawyers. His practices encompasses a wide range of legal issues such as Commercial & Corporations Law, competition & consumer protection, Wills and Probate (including succession and family provision) and property & trusts. Mr Currie is also an accredited Mediator under the National mediator Accreditation System.

David Ireland

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Mr Ireland has a broad range of property law experience gained through advising and acting on property sales and purchases, all types of leasing, property development, joint ventures, strata development, licenses and easements. IN addition to property law and conveyancing, he also practices in estate planning, preparation of wills, probate and business sales and acquisitions.

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Legislation

Conveyancing Act 1919 (NSW) ss 23C and 127
Probate and Administration Act 1898 (NSW) s 61
Residential Tenancies Act 2010 (NSW) ss 13 and 119