**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI**

**SC 49/2018**
**[2018] NZSC 90**

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| BETWEEN | ROBERT HOANI CLIFFORD CRIBB AND KAREN LYNNE STEVENS<br>Applicants |
| AND | FM CUSTODIANS LIMITED<br>Respondent |

Court: Elias CJ, Glazebrook and O'Regan JJ

Counsel: S A McKenna for Applicants
N L Penman-Chambers for Respondent

Judgment: 9 October 2018

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**JUDGMENT OF THE COURT**

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**A The application for leave to appeal is dismissed.**

**B The applicants must pay costs of $2,500 to the respondent.**

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**REASONS**

[1] The applicants, Mr Cribb and Ms Stevens, were the occupiers of a property in Hamilton. SOS Investments Ltd (SOS), a company associated with Mr Cribb, was the registered proprietor. SOS had granted a mortgage over the property to secure a loan made to SOS by the respondent, FM Custodians Ltd (FM). SOS defaulted and FM initiated proceedings in the High Court seeking an order for possession of the property on 7 November 2013. The order sought by FM was made on 17 April 2014.[1] The order was upheld on appeal.[2]

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

[2] After unsuccessful attempts to come to an agreed arrangement for FM to take possession of the property, FM obtained a court order instructing the sheriff of the High Court to take possession of the property and this order was executed on 9 September 2015. The sheriff required the chattels owned by the applicants that were located at the property to be removed from the property before the possession order was executed. The chattels (apart from specified chattels that were dealt with at the instruction of Mr Cribb) were packed and moved to the premises of a house moving company, and stored at those premises. They were also insured. The applicants did not arrange for the chattels to be picked up from the house moving company for nearly 18 months, and substantial costs were incurred in the packing, moving, storing and insuring of the chattels.

[3] FM commenced the current proceedings to recover the costs of packing, moving, storing and insuring the applicants' chattels. The applicants resisted this claim on the basis that FM had not been entitled to remove the chattels from the property when it did so. The High Court found in favour of FM.[3] The Court of Appeal dismissed the applicants' appeal.[4]

[4] The applicants seek leave to appeal to this Court.

[5] In the High Court, Woolford J found that the applicants had committed the tort of trespass to property by failing to remove their chattels from the property. As involuntary bailee, FM was entitled to arrange for removal of the chattels from the property at the instigation of the sheriff prior to the enforcement of the possession order. The actions of FM in arranging for the packing, moving, storage and insurance of the chattels was a proper action on the part of an involuntary bailee and FM was therefore entitled to be reimbursed for the costs of those steps, which amounted to $51,586.40. Judgment was entered for that sum plus interest.[5]

[6] In coming to this conclusion, Woolford J rejected an argument by the applicants that FM did not have possession of the property at the time it removed the

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3 *FM Custodians Ltd v Cribb* [2017] NZHC 1562 (Woolford J) [HC decision].
4 *Cribb v FM Custodians Ltd* [2018] NZCA 183, [2018] NZAR 1055 (Asher, Brewer and Collins JJ) [CA decision].
5 HC decision at [31]–[32].

chattels, and therefore the chattels never trespassed on the property. This argument was made on the basis that the sheriff had required the removal of the chattels prior to actually taking possession. Woolford J found that FM became a mortgagee in possession from the date of its application to the Court for a possession order (7 November 2013), once the Court had granted the possession order (on 17 April 2014). So it was in possession of the property before the chattels were removed and there was, therefore, a trespass arising from the presence of the chattels at the property. He said this was the effect of s 139(1)(c) of the Property Law Act 2007.

[7] The Court of Appeal upheld the decision on a slightly different basis.[6] As FM had been entitled to immediate possession at the time that the chattels were removed and actually took possession before commencing the proceeding for the recovery of its costs, it was entitled to pursue an action for trespass by relation even though it was not, at the time the chattels were removed, actually in possession of the property.

[8] The applicants wish to argue on appeal that both Courts were in error in finding that FM was entitled to remove the chattels prior to taking physical possession of the property. It wishes to argue that a mortgagee who is not actually in possession of a property may sue for trespass only if permanent damage is done to the secured property, relying on the decision of the Court of Appeal in *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd*.[7] As the presence of the chattels at the property did not cause permanent damage to the property, the action for trespass should have failed if this argument were accepted.

[9] We do not consider that this argument has sufficient prospects of success to justify the grant of leave for a further appeal given the clear terms of s 139(1)(c) of the Property Law Act. We do not consider *Lockwood* supports the argument the applicants seek to raise. And we note that, even if leave were given and the applicants were successful on this point, they would still face an argument that FM was nevertheless an involuntary bailee of the chattels, given their failure to uplift the chattels after their removal into storage.

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6 CA decision at [22]–[23].

7 *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd* [1995] 1 NZLR 22 (CA) (*Lockwood*).

[10] In their application for leave to appeal the applicants also raised two further points challenging the finding that FM was an involuntary bailee of the chattels and that the incurring of the costs for packing, moving, storage and insurance of the chattels were the actual and foreseeable result of any conduct on the part of the applicants. Neither of these points was developed in submissions and we see no proper basis for granting leave in relation to either of them.

[11] We dismiss the application for leave to appeal.

[12] We award costs of $2,500 to FM.

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