



HIGH COURT OF AUSTRALIA

3 August 2011

MARTIN FRANCIS BYRNES & ANOR v CLIFFORD FRANK KENDLE
[2011] HCA 26

Today the High Court allowed an appeal from the decision of the Full Court of the Supreme Court of South Australia dismissing a claim by Mr Martin Byrnes and his mother against Mr Clifford Kendle for breach of trust in relation to the renting of a property in Murray Bridge ("the property").

Mrs Joan Byrnes and Mr Kendle married in 1980 and separated in early 2007. In 1994 the property was purchased. Mr Kendle was the sole registered proprietor. In 1997 Mr Kendle executed an Acknowledgement of Trust declaring that he held a half interest in the property "upon trust" for Mrs Byrnes. In March 2007 Mrs Byrnes assigned to Mr Byrnes her interest in the property.

In December 2001 Mrs Byrnes and Mr Kendle moved out of the property. The property was let by Mr Kendle to his son, Mr Kym Kendle. Kym lived there until early 2007 but paid only two weeks' rent. In 2008 Mr Byrnes and his mother instituted proceedings in the District Court of South Australia seeking an order for an account for Mr Kendle's breach of trust in failing to collect rent.

The primary judge held that there was no trust because, although the deed used the words "upon trust", evidence extrinsic to the Acknowledgement of Trust revealed that Mr Kendle nevertheless lacked the intention to create a trust. His Honour also held that, even if there had been a trust, Mr Kendle was not under a duty to rent the property and that Mrs Byrnes "co-operated" in Mr Kendle's decision not to press for rent. On appeal, the Full Court of the Supreme Court of South Australia held that the Acknowledgement of Trust created a trust and that Mr Kendle's subjective intentions were not relevant. However, the Full Court held that Mr Kendle did not have a duty to rent the property or collect rent and that Mrs Byrnes had consented to or acquiesced in Mr Kendle's inaction. Mr Byrnes and his mother appealed by special leave to the High Court.

The High Court held that, by the terms of the Acknowledgement of Trust, Mr Kendle held a half interest in the property on trust for Mrs Byrnes. Evidence extrinsic to the Acknowledgement of Trust was not admissible to show that there was no intention to create a trust. The High Court also held that Mr Kendle had a duty to rent the property even without any express provision to that effect in the Acknowledgement of Trust. Mr Kendle had a continuing duty to ensure that the rent was paid and, if it were not paid, that a new tenant was found. Mr Kendle's failure to do so was a breach of duty. He was therefore required to compensate Mrs Byrnes for her interest in the unpaid rent (less her share of the outgoings). The Court held that Mrs Byrnes' failure to insist upon collection of the rent did not amount to consent to or acquiescence in Mr Kendle's breach.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*