[HIGH COURT OF AUSTRALIA.]

ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA . . . } APPLICANT;

AND

R. T. COMPANY PROPRIETARY LIMITED AND OTHERS . . . . . } RESPONDENTS.

[No. 2]

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MELBOURNE, *March* 1, 15; *May* 20.

Fullagar J. (In Chambers.)

*High Court—Execution—Marshal—Warrant authorising Marshal to deliver up possession of land acquired to Commonwealth—Presence on land of cumbersome chattels—Duty of Marshal.*

*Fixtures—Purpose of affixing—Lands Acquisition Act* 1906-1936 (*No.* 13 *of* 1906—*No.* 60 *of* 1936), *s.* 59.

Section 59 of the *Lands Acquisition Act* 1906-1936 provides that in certain circumstances a Justice of the High Court may, on the application of the Attorney-General, grant a warrant authorising the Marshal "to deliver the possession of the land" acquired under the Act "or to enforce the entry on the land" of the Minister or any person authorised by him. A warrant was issued under the section in respect of the basement of a building in which were various chattels, some of a very heavy and cumbersome nature.

*Held*, that the Marshal was not under a duty to remove the chattels.

Two printing presses, each weighing about forty-five tons, were attached by nuts and bolts to a concrete foundation in the basement of a building.

*Held*, that the purpose of the affixing was to hold the presses steady when in operation and consequently that they were not fixtures.

*Craven* v. *Geal* (1932) V.L.R. 172, explained.

SUMMONS.

The Attorney-General of the Commonwealth of Australia applied on summons to *Fullagar* J. in chambers for a determination of certain questions which arose in connexion with the execution of a warrant under s. 59 of the *Lands Acquisition Act* 1906-1936 signed

by *Fullagar* J. on 27th July 1953. The respondents to the summons were R. T. Company Proprietary Limited, Radioprogram Proprietary Limited, Radio City Proprietary Limited and Henry Drysdale.

The facts are fully set out in the judgment of *Fullagar* J. hereunder.

*M. V. McInerney*, for the applicant.

The respondent Drysdale in person.

*Cur. adv. vult.*

May 20.

FULLAGAR J. delivered the following written judgment :—

I have before me a summons issued at the instance of the Commonwealth in a proceeding commenced by the Minister of State for the Interior by originating summons on 15th February 1952. The originating summons asked that a warrant should issue under s. 59 of the *Lands Acquisition Act* 1906-1936 (Cth.) directing the Marshal to put the Minister in possession of the basement of a building on certain land compulsorily acquired by the Commonwealth under that Act. Another proceeding which had for its object the assessment of compensation under s. 39 of the Act was commenced by the Minister at the same time. On 27th July 1953 I signed a warrant under s. 59 directing the Marshal of this Court and the Deputy Marshal on any day after 30th September 1953 " to enter, by force if needful, and with or without the aid of any other person or persons whom you may think requisite to call to your assistance into and upon the said basement and to eject thereout any person and to deliver the said basement or part thereof to the said Minister or any person authorised by him." The warrant followed the form which had been used in previous cases. The summons now before me asks me in effect to determine certain questions which have arisen in connexion with the execution of this warrant, and to give certain directions to the Marshal and the Deputy Marshal.

I think it desirable, for more than one reason, that I should begin by briefly recording the various steps and events which have led up to the making of the present application, but I will first state in outline the factual position out of which the present difficulties have arisen. The acquisition was effected by the Commonwealth more than eight years ago. The land acquired is a block known as 300 King Street, Melbourne. It is situate at the north-east corner of King Street and Little Lonsdale Street in the City of Melbourne, having frontages of about 105 feet to King Street and

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129 feet to Little Lonsdale Street. There is erected on this land a building consisting of a basement, a ground floor and two upper floors. The Commonwealth has been in possession for some time of the ground floor and the two upper floors of this building, but it has not yet obtained possession of the basement. More than half of the floor space of this basement is occupied by certain printing machinery and plant and accessories, to the nature of which I will refer more particularly later. This plant and machinery is useless to the Commonwealth, and, while it remains *in situ*, the Commonwealth will be unable to use the basement for the purposes for which it acquired the building. I understand that before the acquisition it was used for the purposes of printing and publishing a newspaper, but that this enterprise was discontinued about the time of, or not long after, the acquisition. Whether the discontinuance was brought about by the acquisition I do not really know. As will be seen, the Commonwealth was prepared at one stage to grant a lease of the basement to the proprietor of the newspaper.

As to the ownership of the machinery—on the assumption that none of it constitutes " fixtures "—there is no evidence before me apart from a statement made by a Mr. Henry Drysdale on the hearing of the present summons. At the time of the acquisition the owner of the land was a company named Radio City Pty. Limited, which was controlled by Mr. Drysdale. Mr. Drysdale, however, appears to have a controlling interest in three other companies which are named respectively, R. T. Company Pty. Limited, Radioprogram Pty. Limited, and The Australian Cricketer Pty. Limited. He is also the sole member of a firm registered as the Melbourne Times Company. Mr. Drysdale said: " The Australian Cricketer purchased the building and put it in the name of Radio City for the purpose of putting machinery in. The R. T. Company leased the floor that the machinery was on, and paid rent to Australian Cricketer. There was no formal lease between Australian Cricketer and Radio City." I refer also to a statement by Mr. Drysdale which is document No. 52 on the file, and to a letter from Mr. Ness, a solicitor who has been acting in the matter, which is No. 47 on the file. For present purposes it does not seem to me to be important to determine which of the institutions of which Mr. Drysdale appears to be the animating essence is in law the owner of the machinery or in actual possession of the basement, although it might, of course, become important if a claim for compensation were made by a person who claimed to be a lessee or tenant.

I set out below the various steps in the present proceedings which have led up to the present application. The procedure has, perhaps, been open to criticism on technical grounds, but I have regarded the originating summons as commencing an action in the Court, and my principal concern has been to see that every person who could have any interest in the matter has had a full opportunity of being heard.

14*th November* 1948 :

A notification under s. 15 of the *Lands Acquisition Act* 1906-1936 that the land had been acquired under the Act was published in the Commonwealth *Gazette*. The stated purpose of the acquisition was " Postal purposes at Melbourne ". The effect of this notification was, by virtue of s. 16 of the Act, to vest the fee simple in the Commonwealth.

6*th November* 1950 :

I signed a warrant under s. 59 of the *Lands Acquisition Act* 1906-1936 authorising the Marshal to deliver to the Minister of State for the Interior possession of the ground, first and second floors of the building.

1*st December* 1950 :

The Marshal executed the warrant, and possession was taken on behalf of the Minister of the ground floor and the first and second floors. Shortly afterwards negotiations commenced with Mr. Drysdale with a view to one of his companies taking a lease of the basement, but no agreement could be reached.

15*th February* 1952 :

On this date the two proceedings mentioned above were commenced on behalf of the Commonwealth. The first was occasioned by the fact that possession of the basement had not been given to the Minister. It was commenced by originating summons, and sought a warrant under s. 59 directing the Marshal to deliver possession of the basement of the building to the Minister. The originating summons was directed to the R. T. Company Pty. Ltd., Radioprogram Pty. Ltd., Radio City Pty. Ltd. and Henry Drysdale. The other proceeding was occasioned by the fact that neither Radio City Pty. Ltd., the owner of the fee, nor any other person had made any claim for compensation in respect of the acquisition. It was commenced by notice of motion, by which the Minister asked for an assessment under s. 39 of the Act of the amount of compensation payable to Radio City Pty. Ltd. in respect of the acquisition of the land. The notice of motion was originally directed to Radio City Pty. Ltd. alone, but it is convenient to state

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at this point that by amendment made in pursuance of an order made by me on 24th May 1955 the R. T. Company Pty. Ltd., Radioprogram Pty. Ltd., Australian Cricketer Pty. Ltd. and Melbourne Times Company were added as respondents to the motion. The object of this order was, of course, to enable any of these parties to make any claim for compensation which it might be advised to make.

I will follow up the first proceeding, i.e. the proceeding by originating summons seeking a warrant of possession, and then turn to the course which the other proceeding took.

29*th February* 1952 :

The originating summons came on before me, but was adjourned into Court and placed in the list for hearing.

23*rd June* 1952 :

The R. T. Company issued a summons for directions as to the proceedings on the originating summons seeking in particular orders for discovery and interrogatories.

24*th June* 1952 :

The originating summons was referred into Court, and I ordered that pleadings be delivered. This was done because Mr. *Smithers*, who appeared for some one or more of Mr. Drysdale's companies, on this occasion announced that he wished to challenge the validity of the acquisition of the land.

22*nd October* 1952 :

Pleadings were filed. These consisted of statement of claim, defences, replies, and demurrers to certain paragraphs of the defences. The defences raised the question of the validity of the acquisition. The demurrers were set down for argument before a single Justice.

5*th November* 1952 :

I made an order referring the demurrers to the Full Court and also referring to the Full Court certain questions of law, which, because they would affect the admissibility of evidence, it was convenient to have decided before the action proceeded to trial.

1*st April* 1953 :

The Full Court delivered judgment on the demurrers and the questions of law referred. The demurrers to the defences were allowed and the questions of law referred by me were answered favourably to the Commonwealth : see *Attorney-General of the Commonwealth* v. *R. T. Co. Pty. Ltd.* (1).

(1) (1953) 87 C.L.R. 501.

27*th July* 1953 :

An application for a warrant under s. 59 was made to me. The application was opposed. I decided that the warrant should issue, but stayed its execution until 30th September 1953 mainly on the ground that an application to the Privy Council for special leave to appeal from the judgment of the Full Court was contemplated. No order staying the execution of the warrant appears to have been drawn up.

4*th August* 1953 :

I signed a warrant directing the Marshal to give possession of the basement to the Minister. Execution of this warrant was later stayed by an order made by *Taylor* J. until 2nd November 1953. Again, apparently no formal order staying the warrant was drawn up. No further stay of the execution of the warrant has since been granted.

4*th December* 1953 :

Special leave to appeal from the judgment of the Full Court was refused by the Privy Council.

12*th December* 1955 :

I assessed compensation in the other proceedings. I will refer later to the order made by me.

25*th July* 1956 :

A writ in Action No. 10 of 1956 was issued by the Commonwealth against R. T. Company Pty. Ltd., Radioprogram Pty. Ltd., Radio City Pty. Ltd. and Henry Drysdale claiming occupation rent in respect of the basement. The total amount claimed was £8,923 6s. 4d. An appearance to this writ was entered.

10*th September* 1956 :

Judgment in default of pleading was entered in the action for £8,923 6s. 4d. There is, I think, some ground for thinking that this judgment was irregularly entered, but, although the defendants' solicitors threatened to challenge the judgment on this ground, no step has ever been taken to have it set aside.

10*th October* 1956 :

A summons issued asking me to direct the Marshal to execute the warrant. I declined to give this direction except upon the Commonwealth's undertaking to indemnify the Marshal and his deputy. My main reason for refusing to give the direction without the undertaking lay in the fact that the *Lands Acquisition Act* 1955, which repealed the *Lands Acquisition Act* 1906-1936, came into force by proclamation on 16th February 1956. I was of opinion that the new Act did not apply to a case where a warrant under

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s. 59 of the Act of 1906-1936 had actually issued before it came into force, but I felt sufficient doubt about the actual effect of s. 3 (2) of the new Act to think that the Commonwealth ought to give the indemnity. A comprehensive indemnity was, in effect, shortly afterwards given by the Commonwealth to the Marshal and his deputy, but no order has been made on the summons.

16*th January* 1957 :

A writ was issued in Action No. 1 of 1957 by R. T. Company Pty. Ltd., Radioprogram Pty. Ltd., Radio City Pty. Ltd. and Henry Drysdale against the Minister for the Interior and the Deputy Marshal seeking a declaration that the plaintiffs were in possession of the basement of the premises at 300 King Street and an injunction restraining the defendants from entering upon the basement.

21*st January* 1957 :

An application was made to me in chambers for an interlocutory injunction in this action and for a further stay of the execution of the warrant. The basis of this claim was an allegation that, by entering judgment in Action No. 10 of 1956, the Commonwealth had created a tenancy from year to year between itself and one or more or all of the plaintiffs. I refused the application for an interlocutory injunction and refused to stay further the execution of the warrant. No further step has been taken in Action No. 1 of 1957.

22*nd February* 1957 :

A summons was issued by the Commonwealth with a view to determining certain questions which have arisen in connexion with the execution of the warrant.

This last-mentioned summons is the summons which I now have before me, and on which I reserved judgment. Before dealing with the questions which it raises, it will be convenient to set out, also in outline, the course of the proceedings on the motion which sought the assessment of compensation. That course was as follows.

15*th February* 1952 :

A notice of motion was filed by the Minister, directed to Radio City Pty. Ltd., and asking for an order determining the amount of compensation payable by the Commonwealth to Radio City Pty. Ltd. in respect of the acquisition. The application was made under s. 39 of the *Lands Acquisition Act* 1906-1936.

22*nd June* 1953 :

The matter came on for hearing before me in chambers. Mr. *Lush* appeared for the Commonwealth, and Mr. *Smithers* appeared

for the R. T. Company Pty. Ltd., Radio City Pty. Ltd. and Radioprogram Pty. Ltd. Mr. *Lush* said that he wished to make it clear that the proceeding had been commenced by the Minister for the sole purpose of assessing the value of the fee simple, but that it appeared likely that other persons or companies would claim compensation on the basis that they had been disturbed in the conduct of a business. The matter was adjourned to 27th July 1953.

27*th July* 1953 :

Mr. *Smithers* intimated that it was intended to apply to the Privy Council for special leave to appeal from the decision of the Full Court which has been mentioned above. The matter was by consent adjourned *sine die*.

24*th May* 1955 :

On this date I made an order (1) That the R. T. Company Pty. Ltd., Radioprogram Pty. Ltd., Australian Cricketer Pty. Ltd. and Melbourne Times Company be added as respondents to the notice of motion ; (2) That each of the five respondents deliver within thirty days to the Crown Solicitor at Melbourne particulars in writing of the interest, if any, claimed by it in the land ; and (3) That each party within fourteen days after delivery of such particulars should file an affidavit of documents. This order was served on each of the parties mentioned in it, but no claim has ever been made by any of them.

2*nd November* 1955 :

The matter came before me again, Mr. *Voumard* of counsel appearing for the Commonwealth. Mr. Drysdale produced authorities under the seals of the four companies to represent them, but tendered no evidence. To give him an opportunity of obtaining evidence if he wished to do so, I adjourned the matter to 12th December 1955.

12*th December* 1955 :

Mr. Drysdale again appeared, but tendered no evidence and thereupon I made an order assessing compensation. The Commonwealth produced several affidavits by expert witnesses, which placed varying values on the freehold. Mr. *Voumard* informed me that the Commonwealth was prepared to pay the highest of these valuations. I determined accordingly that the amount of compensation payable by the Commonwealth in respect of its acquisition of the property in question was the sum of £74,400. I ordered that from this amount the sum of £26,468 18s. 10d. paid by the Commonwealth in October 1949 in discharge of a first mortgage, the sum of £1,758 16s. 3d. paid by the Commonwealth in September

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1950 in discharge of a second mortgage, and the sum of £4,963 1s. 4d. paid by the Commonwealth to the Commissioner of Taxation with the authority of Radio City Pty. Ltd., should be deducted. It was further ordered that the balance of £41,209 3s. 7d. should be paid to the respondent Radio City Pty. Ltd., such payment being in full satisfaction of all rights to compensation which the respondents and each of them had or might have had in respect of the acquisition by the Commonwealth as aforesaid. I stayed proceedings under the order for twenty-one days. The balance of £41,209 3s. 7d. was subsequently paid into the Treasury under s. 43 of the *Lands Acquisition Act* 1906-1936. No application under s. 45 for payment to Radio City Pty. Ltd. or any other of the respondents has ever been made.

The two proceedings, the course of which I have now outlined, are separate and distinct proceedings. The matter of compensation is one thing, and the matter of obtaining possession of the basement is another thing. But, before dealing with the present summons, there is one aspect of the matter of compensation to which I think I should advert.

I have said that Mr. *Lush* (for the Commonwealth) stated clearly on 22nd June 1953 that the proceeding by motion had been commenced by the Minister for the sole purpose of assessing the value of the fee simple. It is, of course, clear that compensation in respect of a compulsory aquisition of land may be claimed by persons other than the owner of the fee: see, e.g. *The Commonwealth* v. *Reeve* (1), and it was for the purpose of giving an opportunity for the making of any such claim that the order of 24th May 1955 was made, although any such claim might have been thought to have been long since barred by s. 33 of the Act. Here no claim for compensation of any kind has ever been made by anybody. The Minister is empowered in such a case, by s. 39, himself to take proceedings for the assessment of compensation. The Minister is, of course, in a position to adduce evidence of the value of the fee, and compensation may be assessed on such evidence even though the expropriated owner refuses or neglects to take any step in the matter. But it will not, as a rule, be practicable for the Minister to seek an assessment under s. 39 of any compensation which may be payable to, e.g., an occupier who has been carrying on a business on the land. He may not be prepared to admit that any such person has any valid claim. In any case, the relevant facts will, generally speaking, be within the exclusive knowledge of the potential claimant, and, if he refuses or neglects to make a claim, there is nothing that the Minister is called upon to do, or, so far as I can see, can do.

(1) (1949) 78 C.L.R. 410.

In the present case the possibility of a claim by one of Mr. Drysdale's companies as a tenant of the basement has been present to my mind throughout. I ought perhaps to say that up to the making of the order assessing compensation, and indeed until the present summons came on before me, I was not aware of the details of the position existing in the basement, or of the possible magnitude of a claim that might be made, although Mr. *Voumard*, on the day when the final order was made, referred to the fact that there was some printing machinery in the basement, and told me that his valuations were based on the view that that machinery was not a fixture. But, even if I had been fully aware of the details of the physical position, I do not think that any greater opportunity could have been given than has in fact been given to Mr. Drysdale and his companies to make a claim on the basis of an occupation of the premises for business purposes. Those companies, although a solicitor (Mr. Ness) appears to have been acting for them throughout, were not represented by counsel in the later stages of either the proceeding for possession or the proceeding for the assessment of compensation. Mr. Drysdale, however, was present on each occasion when either matter was before me, and was strongly urged to obtain, and act upon, the advice of counsel as to the position. I have had difficulty in understanding his attitude in the matter. It has not been in any way obstructive: he has simply declined (apart from the attempt to have the acquisition declared invalid, and apart from Action No. 1 of 1957, which is still pending) to take any active step whatever in the matter, maintaining that the acquisition was illegal and the proceedings "irregular". I am not, of course, expressing any opinion that he or any of his companies has any claim for compensation other than that which was awarded by my order of 12th December 1955. Technically speaking, any such claim may well, as I have said, have been barred long ago by s. 33 of the Act, and may be barred now by s. 39 (5) and by the terms of my order. But there does seem to be a possibility of such a claim, and—up to a stage at any rate—I think that the Commonwealth has been just as concerned as I have been to give an opportunity for the making of any claim that could justly be made.

I have said these things partly because I think that they should be placed on record, and partly because they may have an indirect bearing on the questions raised by the present summons. I turn now to that summons.

The plant and machinery which has given rise to the problems now brought before me is described in the affidavit of Mr. H. S.

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Wynne, and I inspected it myself on the premises. The two most important items are two Goss Rotary Printing Machines with their electrical driving equipment. The rest consists of three flat bed printing presses, eight linotype machines, and the auxiliary equipment necessary for the production of a newspaper. The total value *in situ* at the date of acquisition was probably very substantial: Mr. E. M. Purdy has valued it on that basis at £15,500. Mr. Wynne, however, who is qualified as an expert in such matters, says that the two Goss machines are obsolete, that they would not interest the proprietor of any metropolitan newspaper, and that they would be unlikely to interest the proprietor of any provincial newspaper. If they are dismantled and removed to a store, they will never, he says, be sold as complete printing machines. Each weighs about forty-five tons, and, as appears from the photographs exhibited, their top-most part is very little below the ceiling of the basement. They are attached by nuts and bolts to a concrete foundation, the cost of which Mr. Wynne estimates as at least £500. The only practicable way to remove them would be to dismantle them completely, and Mr. Wynne estimates the cost of dismantling and removal of the two machines at about £1,000. After dismantling and removal they would, he thinks, have a scrap value only, which would probably be less than the cost of dismantling and removal. I should add here that Mr. Wynne, in answer to a question by me, said that the machines as they stand, although they are now in a dirty, dusty and neglected condition and unworkable, could be cleaned up and reconditioned and put into working order. He said "it would take quite a lot of work to do it, but it could be done". He thought that they had been "quite useful machines", but it was about eight years since they had been run. With regard to the articles other than the two presses and their electrical driving equipment, less difficulty would attend their removal, but I gather that this also would be quite an expensive business.

Nobody concerned has at any stage suggested that the two Goss presses and their electrical driving equipment are fixtures, and my order assessing compensation was made on the footing that they are not fixtures. If they were fixtures I take it that they would pass to the Commonwealth by virtue of the proclamation and s. 16 of the Act, and the position would in some respects be simplified. Whether the question can still be regarded as open or not, I have thought it right to consider it on the material before me. I would regard it as clear that none of the plant other than the two Goss presses and their electrical equipment could be considered as fixtures. And, after an inspection of them *in situ*, and after consideration

of the more recent cases, I am of opinion that the presses and their equipment also are not fixtures. I refer to *Reid* v. *Smith* (1); *Spyer* v. *Phillipson* (2); *Hulme* v. *Brigham* (3) and *Billing* v. *Pill* (4). I have felt some difficulty over the decision of *Cussen* A.C.J. in *Craven* v. *Geal* (5). But the basis of that decision is, I think, that the articles in question were " erected by an equitable owner in fee for the better use of the land at the site of tile manufacturing operations " (6). The clay for the making of the tiles was obtained from the land : cf. *Commissioner of Stamps (W.A.)* v. *L. Whiteman Ltd.* (7). Here I think that the only proper inference is that the affixing of the presses by nuts and bolts was effected for the purpose of holding them steady when in operation and for the more efficient use of them as presses.

The summons was said to have been taken out under O. 45, r. 9 of the Rules of this Court. I doubt whether it is authorised by that rule, but I think it is clear that I have jurisdiction to deal with any question which arises out of or in connexion with the execution of the warrant signed by me. On the other hand, I do not think any court ought to assume a general advisory jurisdiction, and I refer to what I said in *Union Trustee Co.* v. *Grant* (8).

In considering the summons I have felt again pressed by the possibility that one of Mr. Drysdale's companies is possibly entitled to compensation over and above that which was assessed by my order of 12th December 1955. It is true that the right of the Commonwealth to possession and the right (if any) of any person to compensation are in no way interdependant. It is true, as Mr. *McInerney* said, that the companies and Mr. Drysdale have had ample opportunity in the compensation proceedings of claiming the full amount of compensation to which they may have been justly entitled. It is true that they appear to have had a solicitor acting for them throughout, and in the earlier stages had counsel acting for them also. It is true that more than five years have elapsed since the compensation proceedings were commenced and more than a year since I made my assessment. And it is true also that either s. 33 or s. 39 (5) of the Act or the terms of my order may be raised by the Commonwealth as a bar to any further claim for compensation. But, in spite of these things, having regard to the possibilities of the position as I now see it, I feel that I ought to hold matters in *statu quo* for a further short period. I cannot, as I have said more than once during the proceedings, compel Mr. Drysdale or

(1) (1905) 3 C.L.R. 656.
(2) (1931) 2 Ch. 183.
(3) (1943) K.B. 152.
(4) (1954) 1 Q.B. 70.
(5) (1932) V.L.R. 172.
(6) (1932) V.L.R., at p. 176.
(7) (1940) 64 C.L.R. 407.
(8) (1946) V.L.R. 323, at pp. 328, 329.

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any of his companies to make a claim, nor can I make a claim for them. The most I can do is to give them an opportunity to make a claim. Apart from such a claim, the outcome of it all, so far as I can see (for I see no reason to doubt Mr. Wynne's evidence or the right of the Minister to dismantle and remove the plant), will be that all the plant in question will be reduced to the value of scrap iron and they will have no remedy at law or in equity. I have decided to stay the execution of the warrant for one month from this day for that purpose. Whether, if proceedings are commenced, the stay ought to be continued is a matter which I will consider if and when it arises.

The only other matters with which I propose to deal now are the matters raised by questions (1) and (5) of the summons. Question (1) asks "Whether the Marshal or Deputy Marshal is under a duty to remove the machinery installed in the basement of the premises situate at 300 King Street Melbourne?". I have felt some doubt about this question, but I have formed the opinion, that whatever may be the position of a sheriff executing a writ of possession after judgment in an action, the Marshal is not under a duty to remove the plant and machinery in the basement. It is quite possible for him to "deliver possession of the land" to the Minister, or to "enforce the entry on the land" of the Minister, with the chattels as they stand. It is material, I think, to remember that the chattels were not originally placed wrongfully on the land and I am inclined to think that their presence on the land does not become wrongful unless and until the Minister actually enters into possession of the land. Whatever remedies, judicial or extra-judicial, are available in respect of chattels wrongfully on land are available generally speaking to the occupier and not to the owner as such. It would seem to me in the present case that any right to remove the chattels is not, so to speak, a concurrent right with the right to enter into possession, but that the former is consequential on the exercise of the latter. The presence of the chattels does not hinder the taking possession of the land: it only hinders the use that can be made of the land after possession has been taken of it. I am inclined to think that s. 59 of the Act, under which the warrant issued, was enacted only because, if it were simply left to the Commonwealth to take possession by virtue of its ownership, an officer of the Commonwealth, who had to use force to enter, might render himself liable under the *Statute of Forcible Entries* (in Victoria now s. 197 of the *Crimes Act* 1928). If that was the object of s. 59, that object is fully secured on the view which I take of the extent of the Marshal's authority. There is a curious lack

of judicial authority on the subject, but I have come to the conclusion that that is the correct view, and that the chattels are no concern of the Marshal.

My answer to question (1) in the summons makes it unnecessary to answer questions (2) and (3). I will not answer question (4) because I think that to attempt to do so would be to assume that sort of general advisory function which I deprecated in *Union Trustee Co.* v. *Grant* (1). Question (5) is really answered by my answer to question (1), but there is an implication in it with which, in view of the letter from Mr. Ness of 23rd January 1957, I think I ought to deal. That letter is based on a complete misconception of the effect of the warrant. In answer to question (5) I will declare that the warrant authorises the Marshal to enter into possession of the basement by force, if necessary, as against Australian Cricketer Pty. Ltd. or any other person or company which may have or claim possession.

If I had given a different answer to question (1) I should probably have been prepared to answer question (6), but my answer to question (1) means, I think, that question (6) is not a question which concerns this Court at present. It relates to matters on which the Crown must take such action and such steps as it may be advised to take. It is unnecessary to refer to the remaining questions in the summons.

What I have said with respect to the Marshal applies, of course, equally with respect to the Deputy Marshal.

I will make no order as to the costs of this summons. I certify for counsel.

*Stay execution of warrant for one month. Declare that no part of the plant and machinery at present in the basement of the premises at* 300 *King Street Melbourne is a fixture. Declare that the Marshal and the Deputy Marshal are not under a duty to remove the said plant and machinery or any part thereof. Declare that warrant authorises the Marshal or Deputy Marshal to take possession of the basement by force if necessary as against Australian Cricketer Pty. Ltd. or any other person or company who or which may have or claim possession. No order as to costs of summons. Liberty to apply. Certify.*

Solicitor for the applicant, *H. E. Renfree*, Crown Solicitor for the Commonwealth of Australia.

R. D. B.

(1) (1946) V.L.R. 323.