

[HIGH COURT OF AUSTRALIA.]

CROOKS NATIONAL STORES PROPRIETARY }
LIMITED } APPELLANT ;
DEFENDANT,

AND

COLLIE AND ANOTHER RESPONDENTS.
COMPLAINANTS,

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

Landlord and Tenant—Prescribed premises—Recovery of possession—On ground that lessor a trustee or personal representative and premises reasonably required by a beneficiary under the trust or in the estate for his personal occupation—Whether includes beneficiary who has no right under trust to possession—Meaning of “required”—Meaning of trustee—Whether includes executor in whom property subject to trusts of will vested—Landlord and Tenant Act 1948-1955 (No. 5264—No. 5884) (Vict.), s. 37 (5) (i).

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MELBOURNE,
Oct. 16, 17 ;
SYDNEY,
Nov. 22.
Dixon C.J.,
McTiernan,
Williams,
Webb and
Kitto JJ.

Section 37 (5) of the *Landlord and Tenant Act 1948-1955* (Vict.) provides that a lessor may give notice to quit to a lessee on the ground “ (i) That the lessor is a trustee or personal representative and the premises are reasonably required by a beneficiary under the trust or in the estate (as the case may be) for his personal occupation or for the occupation of some person who ordinarily resides with, or is wholly or partly dependent upon, him ”. Section 52 provides by sub-s. (1) that if a notice to quit is given on certain grounds in s. 37 including ground (i) and the premises in question are vacated in accordance with the notice or if an order for the recovery of possession is made on any such ground a person shall not, without the consent of the appropriate court, again lease etc. the premises until after the expiration of three years from the date on which possession was recovered and by sub-s. (2) that “ Nothing in the last preceding sub-section shall prevent . . . (b) where notice to quit has been given on the ground specified in paragraph . . . (i) . . . the letting of the premises . . . (ii) to a beneficiary under the trust ”.

Held by Dixon C.J., McTiernan, Williams and Kitto JJ., Webb J. dissenting, that the word “ beneficiary ” in s. 37 (5) (i) is not to be read as applying only

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to a beneficiary who either is entitled under the trust to possession of the premises or would be let into possession thereof by a court of equity on application made for that purpose.

Ex parte Keirnan ; *Re Permanent Trustee Co.* (1946) 46 S.R. (N.S.W.) 252 ; 63 W.N. 158 ; *Nichols v. Wilson* (1950) Tas.S.R. 1, approved ; *Frish Ltd. v. Barclays Bank Ltd.* (1955) 2 Q.B. 541, distinguished.

Held further by *Dixon C.J., McTiernan and Williams JJ., Webb J. contra*, that the word "required" in s. 37 (5) (i) means "needed" rather than "claimed" or "demanded".

Kiely v. Loose (1948) V.L.R. 181 ; *Dansie v. Jones* (1949) S.A.S.R. 131 ; *Higgs v. Binder* (1950) 67 W.N. (N.S.W.) 101 and *Armstrong v. Vallance* (1951) 52 W.A.L.R. 90, referred to.

Per Dixon C.J. and Williams J. : There have been cases relating to paragraphs in s. 37 (5) other than par. (i) in which the word "required" has been given the meaning of "demanded" or "claimed" and not that of "needed". It would appear that the word should be given the same meaning in all the paragraphs and that meaning should not be too precise. If it is necessary to choose between the two meanings that of "needed" is to be preferred.

Held further by *Dixon C.J. and Williams J.* that the word "trustee" in s. 37 (5) (i) is not limited to an express trustee and is wide enough to include an executor in whom property subject to the trusts of a will is vested whether he is also appointed a trustee of the will or not. The validity of a notice to quit would not be affected by the fact that persons who had completed their executorial duties and had become trustees described themselves in the notice as the personal representatives of the testator.

Decision of the Supreme Court of Victoria (Full Court) affirmed.

APPEAL from the Supreme Court of Victoria.

Stuart Henry Collie and John Wallace Ball laid a complaint dated 6th February 1957 against Crooks National Stores Pty. Limited that the defendant neglected or refused to deliver up possession of a shop situated at 107 Waverley Road, East Malvern which was held of the complainants under a monthly tenancy which was determined by notice to quit on 31st December 1956. The relevant ground of the notice to quit was as follows :—"This notice is given pursuant to the provisions of the *Landlord and Tenant Acts* on the following ground :—(a) Pursuant to s. 37 (5) (i) of the said Acts on the ground that we are personal representatives and the premises are reasonably required by a beneficiary in the estate for his personal occupation. Particulars :—We are the personal representatives of the estate of Edward George Whiteford dec'd. and the premises are reasonably required for the occupation of Edward

Carter Whiteford a beneficiary under the Will of the said Edward George Whiteford dec'd."

The complaint came on for hearing before the court of petty sessions at Malvern constituted by a stipendiary magistrate. On 2nd April 1957 the magistrate ordered that a warrant of ejectment issue and be executed within thirty days of the date of issue and further ordered that the issue of the warrant be stayed for three months.

On 30th April 1957 the defendant obtained from the Supreme Court of Victoria an order nisi to review the decision of the magistrate on the following grounds:—1. That the magistrate was wrong in law in holding that the word "beneficiary" in s. 37 (5) (i) of the *Landlord and Tenant Act* 1948-1955 had an unrestricted meaning and applied to any person who received a benefit in the estate referred to in the notice to quit. 2. That the magistrate should have held that Edward Carter Whiteford was not a "beneficiary" under the trust or in the estate within the meaning of the said s. 37 (5) (i) of the *Landlord and Tenant Act* 1948-1955. 3. That the magistrate should have held:—(a) that on the proper construction of the said s. 37 (5) (i) the word "beneficiary" was limited to a beneficiary who was entitled to possession of the subject premises under the trust or in the estate; (b) that Edward Carter Whiteford was not such a beneficiary under the trusts of the will or in the estate of Edward George Whiteford deceased. 4. That the magistrate was wrong in law in holding that the subject premises were reasonably required within the meaning of the said s. 37 (5) (i) by Edward Carter Whiteford for his personal occupation. 5. That the magistrate was wrong in law in holding that the subject premises were reasonably required by Edward Carter Whiteford for his personal occupation in that:—(a) the said Edward Carter Whiteford was not entitled to possession of the subject premises under the will of Edward George Whiteford deceased; (b) there was no evidence that any agreement had been made between the complainants and the said Edward Carter Whiteford as to the terms upon which the said Edward Carter Whiteford would occupy the subject premises if possession thereof was obtained by the complainants. 6. That the magistrate should have held that the complainants as lessors giving the notice to quit were not "personal representatives" within the meaning of the said s. 37 (5) (i).

The order nisi to review, having been made returnable before the Full Court of the Supreme Court of Victoria, came on for hearing before that court constituted by *Lowe, O'Bryan* and *Barry JJ.* On

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From this decision the defendant appealed to the High Court.
 The argument of counsel appears sufficiently in the judgments
 hereunder.

M. J. Ashkanasy Q.C. and *W. O. Harris*, for the appellant.

L. Voumard Q.C. and *R. G. De B. Griffith*, for the respondents.

Cur. adv. vult.

Nov. 22.

The following written judgments were delivered :—

DIXON C.J. AND WILLIAMS J. This is an appeal by Crooks National Stores Proprietary Limited from an order of the Full Supreme Court of Victoria discharging an order nisi to show cause why an order of the court of petty sessions at Malvern made on 2nd April 1957 under the provisions of the *Landlord and Tenant Act* 1948-1955 (Vict.) for the ejectment of the appellant from a grocer's shop situated at 107 Waverley Road, East Malvern should not be reviewed. The respondents to this appeal, the complainants named in the complaint and summons pursuant to which the order of ejectment was made, are the executors and trustees appointed by the will of Edward George Whiteford deceased to whom probate was issued on 17th February 1953. One asset in the estate of the deceased, who died on 27th March 1952, is land situated at the corner of Burke and Waverley Roads, Malvern, on which is erected a two-storeyed building. The ground floor is for the greater part occupied by a son of the deceased, Edward Carter Whiteford, who carries on there the business of a motor garage proprietor and panel beater under the title "Whiteford Motors". The remainder of the ground floor consists of a grocer's shop fronting the corner of the two roads and an electrical shop and a butcher's shop fronting Waverley Road. The land owned by the testator does not include the land on which the electrical and butcher's shops are erected. The upper floor includes two residences, of which one is occupied by E. C. Whiteford and the other is vacant. E. C. Whiteford is desirous of occupying the whole of the ground floor so that he can enlarge his garage and equip it to the extent necessary to become the agent in the Malvern district for Volkswagen motor vehicles. In particular he requires the grocer's shop to convert it into a showroom. If he can provide the necessary facilities he has been promised the agency, which he has already been given temporarily.

He is purchasing on terms the land on which the electrical and butcher's shops are erected both of which are occupied by tenants but by arrangement with the tenant of the electrical shop he already occupies part of the rear area of that shop.

By his will the testator devised the whole of the land he owned at the corner of Burke and Waverley Roads, Malvern, therein called "my second property" to his trustees upon trust to retain the same until 1st January 1962, and out of the income therefrom to make certain payments and as to the balance then remaining to pay the same to certain beneficiaries "Provided that should my said son Edward Carter Whiteford so desire he shall be entitled to remain in possession of the said second property paying therefor a weekly rental to be assessed by three independent valuers to be appointed by my Trustees And at the expiration of the period of trust hereinbefore provided Upon Trust that my Trustees shall as soon as conveniently may be after that date offer to my said son Edward Carter Whiteford the option of purchasing the said second property at a valuation to be made by three independent valuers to be appointed by my Trustees to allow my said son a space of one calendar month from the time of making such offer to him—for—determining whether he will accept or refuse same And if my said son shall accept such offer of my said second property within the space aforesaid Then upon payment to my Trustees of the purchase money for the same my Trustees shall transfer the same unto my said son But if my second property shall not be purchased by my said son pursuant to the trust last aforesaid Then upon Trust that my Trustees shall sell and absolutely dispose of the said property by public auction or private contract" and to divide the net proceeds therefrom amongst certain beneficiaries. At the dates of the testator's will and death, E. C. Whiteford was not in possession of the whole of the "second property" so that the wording of the proviso that if this son should so desire he should be entitled to remain in possession thereof at a weekly rental to be assessed by three valuers to be appointed by the trustees is somewhat inapt. But when the devise is read as a whole it would appear to be clear that the options to lease and purchase the "second property" refer to the whole of this property. By the will therefore E. C. Whiteford is given the option to rent the whole of the "second property" until 1st January 1962 from the trustees and an option to purchase it upon that date.

In December 1955 the respondents requested the appellant to vacate the grocer's shop so that they could lease it to E. C. Whiteford but it refused to do so. On 25th September 1956 they served a

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notice upon the appellant to quit and deliver up possession of the premises on 31st December 1956 and that in default of such possession being given they would take ejectment proceedings against the appellant. The notice to quit so far as material states: "This Notice is given pursuant to the provisions of the *Landlord and Tenant Acts* on the following ground:—(a) Pursuant to s. 37 (5) (i) of the said Acts on the ground that we are personal representatives and the premises are reasonably required by a beneficiary in the estate for his personal occupation. *Particulars.* We are the personal representatives of the estate of Edward George Whiteford deceased and the premises are reasonably required for the occupation of Edward Carter Whiteford a beneficiary under the Will of the said Edward George Whiteford deceased." The appellant failed to quit the premises by 31st December 1956 and the legal proceedings now under appeal were instituted. The magistrate held that the complainants had proved the ground stated in s. 37 (5) (i) of the *Landlord and Tenant Act*, and that it would be a greater hardship to the beneficiary on whose behalf possession was sought not to make an order of ejectment than it would be for the appellant to have to give up possession and accordingly ordered that a warrant of ejectment should be issued to be executed within thirty days of issue, but that the issue of the warrant should be stayed for three months.

Before the Supreme Court and before us a number of grounds were argued on behalf of the appellant which can be summarised under three heads. (1) That in s. 37 (5) (i) "beneficiary" means a beneficiary who as against the trustee is entitled to possession of the premises or who may be entitled to be let into possession by the court in the exercise of its discretion. (2) That there was no evidence that the beneficiary, E. C. Whiteford, reasonably required the premises for his personal occupation or for some person who ordinarily resides with, or is wholly or partly dependent upon, him. (3) That the notice to quit was defective because it was given by the respondents as the personal representatives of the testator, whereas it should have been given by them as his trustees.

In order to discuss these grounds it will be convenient to set out verbatim the provisions of par. (i) of sub-s. (5) of s. 37 of the *Landlord and Tenant Act*. It is in the following terms: "(i) That the lessor is a trustee or *personal representative* and the premises are reasonably required by a beneficiary under the trust or *in the estate (as the case may be)* for his personal occupation or for the occupation of some person who ordinarily resides with, or is wholly or partly

dependent upon, him.” The words italicised were introduced into the paragraph by the *Landlord and Tenant (Amendment) Act* 1955. It will also be convenient to set out an extract from s. 52 of the Act. It provides that: “(i) If a notice to quit is given on the grounds specified in paragraphs (g), (h), (i), (j), or (k) of sub-section (5) of section 37 of this Act and the premises in respect of which the notice is given are vacated in accordance with the notice, or if an order for the recovery of possession of the premises or for the ejectment therefrom of the lessee is made on any such ground, a person shall not, without the consent of the appropriate court (a) again lease or sell or agree to lease or sell the premises . . . until after the expiration of a period of three years immediately succeeding the date on which the premises were vacated, possession of the premises was recovered, or the ejectment effected. (2) Nothing in the last preceding sub-section shall prevent . . . (b) where notice to quit has been given on the ground specified in paragraph . . . (i) . . . the letting of the premises . . . (ii) to a beneficiary under the trust.”

Paragraph (i) of sub-s. 5 of s. 37 of the Act contains three requisites, (1) that the lessor is a trustee or personal representative; (2) that the premises are reasonably required by a beneficiary under the trust or in the estate; and (3) that the beneficiary reasonably requires the premises for his personal occupation or for the occupation of some person who ordinarily resides with him or is wholly or partly dependent upon him. The words “a beneficiary under the trust” include in their ordinary natural grammatical signification any person who is a beneficiary under the trust. The trust in question must of course be or comprise a trust of the premises. It is in respect of such a trust that the person requiring the premises must be a beneficiary. In *Ex parte Keirnan; Re Permanent Trustee Co. of New South Wales* (1) the Full Supreme Court of New South Wales held, in relation to par. (i) of sub-s. (5) of reg. 58 of the *National Security (Landlord and Tenant) Regulations* (S.R. 97 of 1945), which was in the same terms as par. (i) of sub-s. (5) of s. 37 of the *Landlord and Tenant Act* except for the words which have been italicised that the regulation was applicable wherever the trustee intended to make the premises available for the personal occupation of a beneficiary under the trust or of some person as mentioned in that clause and the magistrate was of opinion that they were reasonably required by that beneficiary or person and that there was nothing in the paragraph to suggest that it was

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intended to be applicable only where there was a sole beneficiary, or a beneficiary who was absolutely entitled, or entitled under the terms of the trust instrument, or in the discretion of a court of equity, as against the trustee, to the possession of the premises. That decision was followed by the Supreme Court of Tasmania in *Nichols v. Wilson* (1). In *Keirnan's Case* (2) *Jordan C.J.* delivering the judgment of the court said: "I think that it is applicable wherever the trustee intends to make the premises available for the personal occupation of a beneficiary under the trust or of some other person as mentioned in the clause, and the magistrate is of opinion that they are reasonably required by that beneficiary or person. If there are a number of competing requests to the trustee by beneficiaries, it is for the trustee to decide whether he will take any proceedings at all, and whether, if he does, on whose behalf, and whether if on behalf of several he will leave it entirely to the magistrate to determine whether the premises are reasonably required by any of the competitors to whom the trustee would be prepared to dispose of the premises, and if so by which of them" (3). With that statement we agree. There is nothing in the language of the paragraph which would justify the court in reading the words "a beneficiary under the trust" as meaning anything less than any beneficiary under the trust. It was sought to confine their meaning to a beneficiary who is entitled under the trust to possession of the premises or a beneficiary whom the court of equity in the exercise of its discretion would let into possession of the premises. It was submitted that it was necessary to limit the generality of the language in this way because the premises could only reasonably be required by a beneficiary who had some legal or equitable right to enter into or to be placed in personal occupation of the premises. It would be a breach of trust for a trustee to let any other beneficiary into personal occupation and no beneficiary could reasonably require the premises for his personal occupation if the trustee could only let him into possession by committing a breach of trust. The short answer to this contention is that a trustee who has the management of property, in the absence of any express power to grant a lease contained in the trust instrument, or conferred by statute, has an implied power to lease the premises for a reasonable period unless expressly or impliedly restrained from doing so by the trust instrument: *Underhill, Law of Trusts and Trustees*, 8th ed. (1926), p. 344.

(1) (1950) Tas.S.R. 1.

(2) (1946) 46 S.R. (N.S.W.) 252; 63 W.N. 158.

(3) (1946) 46 S.R. (N.S.W.), at pp. 253, 254; 63 W.N., at pp. 158, 159.

At the date of the death of the testator the whole of the second property was let, partly to E. C. Whiteford and partly to the appellant. E. C. Whiteford has an option to rent the whole of the property from the trustees until 15th January 1962 when the trust for sale will take effect. If possession of the property or any portion of it should become vacant prior to that date and the option should not be exercised, the trustees, there being no express power to lease in the will, would clearly be entitled to let the property or that portion until 1st January 1962 and to let it, *inter alia*, to any beneficiary under the trust. Accordingly, subject to E. C. Whiteford's option, it could not be a breach of trust to let the property to any such beneficiary and s. 52 of the Act excepts such a lease from the general prohibition contained in the section.

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Counsel for the appellant relied strongly upon the decision of the Court of Appeal in *Frish Ltd. v. Barclays Bank Ltd.* (1). It was submitted that the reasoning of their Lordships in that case is inconsistent with the reasoning of *Jordan C.J.* in *Keirnan's Case* (2) and shows that the latter case was wrongly decided. The *Landlord and Tenant Act* 1954 (Imp.) contains provisions authorising a tenant whose tenancy is expiring to apply for a new tenancy and for the landlord to oppose the application. One ground on which the landlord may oppose the application is contained in s. 30 (1) (g) "that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence." Section 41 (2) provides that "Where the landlord's interest is held on trust the references in paragraph (g) of subsection (1) of section 30 of this Act to the landlord shall be construed as including references to the beneficiaries under the trust or any of them." The Court of Appeal held that the only beneficiary under the trust who could intend to occupy the premises for the purposes or partly for the purposes of a business to be carried on by him therein or as his residence would be a beneficiary who had such an interest under the trust as either to entitle him to be put into occupation, or, at all events, to justify the trustees on his application, if they thought fit to do so, in letting him into occupation. Lord *Evershed* M.R. said: "if the intended occupation is to be that of a beneficiary, it must be shown that it is the intention that he should so occupy by virtue of his quality or right as a beneficiary" (3). *Jenkins* L.J. said: "As some limit must be

(1) (1955) 2 Q.B. 541.

(3) (1955) 2 Q.B., at p. 552.

(2) (1946) 46 S.R. (N.S.W.) 252; 63 W.N. 158.

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placed upon the words, it seems to me that in the context, and having regard to the manifest intention of par. (g), the limit must be, broadly speaking, of the nature suggested by Mr. *Avgherinos*. That is to say, the beneficiary, who intends to occupy, must have such an interest under the trust as either to entitle him to be put in occupation, or, at all events, to justify the trustees on his application, if they think fit to do so, in letting him into occupation. That would cover, besides the case of an absolute beneficial owner with the legal estate outstanding in a trustee, such interests as that of a life tenant" (1). The United Kingdom Act provides that references to the landlord should be considered as including references to the beneficiaries under the trust or any of them so that it provides in effect for the beneficiaries or any of them being substituted for the landlord as the person or persons entitled to oppose the application. But in order to oppose the application the beneficiary or beneficiaries had to show that he or they were persons who intended to occupy the holding for the purposes of a business to be carried on by him or them therein, or as his or their residence. In such an Act it is not difficult to understand why the Court of Appeal should have considered that the language must be given a limited meaning. That decision does not appear to throw any light upon the meaning of par. (i) of sub-s. (5) of s. 37 of the *Landlord and Tenant Act* 1948-1955 (Vict.). If this paragraph, even before it was amended in 1955, stood alone there would be "no context or manifest intention" to indicate that "a beneficiary under the trust" should be limited in any way. But there is the 1955 amendment which extended its provisions to intestacy and placed a beneficiary in an intestate estate in the same position as a beneficiary under a trust. No beneficiary in an intestate estate has any right to possession against the personal representative except in special cases such as where the value of the estate is such that the widow would be entitled to the whole of it or where all the beneficiaries agreed upon one or more of them going into possession. Finally there are the provisions of s. 52 already extracted which clearly contemplate that a trustee who recovers possession under par. (i) will do so in order to lease them to a beneficiary who requires them for his personal occupation. But a beneficiary who is entitled to possession or to be let into possession under the trust as a legal or equitable tenant for life or as the absolute owner would not require a lease from the trustee for that purpose. The only beneficiary who would require a lease would be a beneficiary who otherwise would not be entitled to possession or to be let into possession.

(1) (1955) 2 Q.B., at p. 554.

The first contention can be disposed on this broad basis but it should not be overlooked that E. C. Whiteford, the beneficiary on whose behalf the notice to quit was given, is a beneficiary who has under the will an option to lease the second property until 1st January 1962 and then an option to purchase it. He is therefore in quite a different position from the beneficiary in *Frish's Case* (1) who was interested in the trust only as a beneficiary under a discretionary trust of the income of the proceeds of sale. The Court of Appeal considered that he had no right to occupy the holding under the trust. He could only be let into occupation as a result of a commercial bargain to which the proposed occupant's beneficial interest under the trust was irrelevant. In the present case an option to lease the property is conferred upon E. C. Whiteford by the will. He has to pay a full rental for the lease. But he is placed in a privileged position in that he can demand a lease from the trustees and they are bound to grant it. Such a lease could not be described as a commercial bargain to which his beneficial interest under the trust is irrelevant. The option is conferred upon him by the trust and he would be a beneficiary under the trust even within the limited meaning placed upon the words "the beneficiaries under the trust or any of them" in the United Kingdom Act by the Court of Appeal in *Frish's Case* (1).

The second contention is really wrapped up in the first. It is that the word "required" means demanded or claimed and not needed. Therefore it was submitted premises could not reasonably be required for any particular purpose until the lessor, apart from the provisions of the *Landlord and Tenant Act*, could demand or claim possession of them. In the case of par. (i) the person on whose behalf possession was demanded or claimed was a beneficiary and it could therefore only be demanded or claimed if under the trust the beneficiary was entitled to possession or to be let into possession. There have been cases relating to other paragraphs in sub-s. (5) of s. 37 in which the word "required" has been given the meaning of demanded or claimed. Whether this was right or wrong in the case of those paragraphs does not directly arise on the present appeal. But it would appear that the word should be given the same meaning in all the paragraphs and that meaning should not be too precise. If it is necessary to choose between the two meanings that of "needed" is in our opinion to be preferred. In the case of par. (i) demanded or claimed cannot be the correct meaning because the beneficiary could never be in a position to

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demand or claim the premises from the lessee, as of right. Only the lessor could do that. As between a beneficiary and the lessee the premises could be reasonably required by the beneficiary only in the sense that he needs them. The position is the same in the case of pars. (h), (j), (k) and (l) because in each of these paragraphs the person by whom the premises must be reasonably required is not the lessor but a person whose need supplies a legal justification for the lessor giving the tenant the statutory notice to quit. In the present case there was ample evidence before the magistrate on which he could find that the premises at the date of notice to quit were reasonably needed by E. C. Whiteford for his personal occupation.

The third contention remains for consideration. There is no evidence that at the date of the notice to quit the respondents had completed their executorial duties and that the legal estate in the second property had become vested in them as trustees of the will. The subject land is held under the provisions of the *Transfer of Land Act* 1928 (Vict.) and the respondents were at the date of the notice to quit and still are registered by transmission as the personal representatives of the deceased. The word trustee in par. (i) is not limited to an express trustee. It is wide enough to include the executors in whom property subject to the trusts of a will is vested whether they are also appointed trustees of the will or not. But in the present case the same persons are appointed executors and trustees of the will. The legal estate is still vested in them as executors and there is no evidence that they have completed their executorial duties. But if there was, and at the date of the notice to quit they had become trustees, to describe themselves as the personal representatives of the testator in the notice to quit would be quite immaterial—*Falsa demonstratio non nocet*. To comply with par. (i) the notice to quit should identify the lessor, and state that he is a trustee of premises which in his hands are held upon a trust, and that under that trust a beneficiary whose name is given reasonably requires the premises for his personal occupation etc. Paragraph (a) of the present notice to quit and the particulars which are given at the foot of this paragraph satisfy this requirement. Read together they are sufficient to inform the lessee that the lessors are the personal representatives of the estate of Edward George Whiteford deceased and that the premises are reasonably required for the personal occupation of Edward Carter Whiteford a beneficiary under the trusts of his will: *Rheuben v. Cremen* (1).

For these reasons, the appeal should be dismissed.

MCTIERNAN J. It is convenient to deal first with the point that the material ground of the notice to quit was not made out because the respondents were therein described as personal representatives, whereas they were then, as contended, strictly trustees. The ground of the notice to quit, which is in question, was referable to s. 37 (5) (i) of the *Landlord and Tenant Act* 1948-1955. The respondents were the executors of the deceased lessor of the premises in question and probate of his will had been issued to them. There is no evidence in the case from which it can be inferred that they had completed their executorial duties and at the time they gave the notice to quit were strictly trustees. This is sufficient to dispose of the point that they are wrongly described as personal representatives in the notice to quit. I do not decide that, if they would have been more correctly described as trustees, the variance would be an obstacle to sustaining the order of ejectment.

The main ground of objection to the order was that Edward Carter Whiteford, for whose occupation the respondents said in the notice to quit that the premises were required, was not such a beneficiary as is intended by s. 37 (5) (i). He was (as the Supreme Court said) a beneficiary with "very real interests" in the subject premises. It was argued, however, for the appellant that the words "a beneficiary" should receive a limited meaning because of the presence of the word "required". The definition given in *Kiely v. Loose* (1) was relied on. There, the word "required", in a comparable context, was held to mean "demanded" or "claimed", and not, "needed". For my part, I would think, upon a general survey of the whole Act, that the present provision contemplates a beneficiary needing rather than demanding premises for his occupation. In the present case, the definition in *Kiely v. Loose* (1) was used to support reading the words "a beneficiary" as applicable only to a person with an equitable right to possession, presumably because no beneficiary would, unless so qualified, demand possession. I think it would be contrary to the rules of interpretation to imply such a limitation on the words "a beneficiary". The word "beneficiary" is used in a general sense without any express limitations. But if a person is a beneficiary only nominally in the premises sought to be recovered, the trustees could hardly say with any more reason that the premises were reasonably required by him than if the description "a beneficiary" did not fit him at all. On behalf of the appellant use is made of the decision in *Frish Ltd. v. Barclays Bank Ltd.* (2). It is argued that there the Court of

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Appeal limited the meaning of “beneficiaries” in the way contended for on behalf of the appellant in the present case. But I think that there is not sufficient similarity between the comparable provisions to introduce into s. 37 (5) (i) the limitations which were implied on “beneficiaries” in s. 41 (2) of the English Act. Reliance is placed for the respondents on s. 52 (2) (b) (ii) of the Victorian Act as shedding light on what is contemplated by “a beneficiary” in s. 37 (5) (i). I think that it is evident from the former provision that the latter is not intended to be applicable only in a case in which the beneficiary is entitled to possession or would, in the discretion of a court of equity, be put into possession, by virtue of his equitable rights. For, s. 52 (2) (b) (ii) deals with the beneficiary, for whose occupation premises have been recovered, as if his occupation may have to depend on a tenancy. Speaking of reg. 58 (5) (i) of the *National Security (Landlord and Tenant) Regulations*, with which s. 37 (5) (i) is comparable, *Jordan C.J.* said that the regulation contained nothing which suggested that it was intended to be applicable only where there is a beneficiary entitled to the possession of the premises: *Ex parte Keirnan*; *Re Permanent Trustee Co. of New South Wales* (1).

The final ground upon which the order for ejectment was called into question was that the magistrate erred in holding that the premises were “reasonably required”. The points involved in that ground were fully considered by the Supreme Court and none was found to have any substance. I agree entirely with the conclusion at which the Supreme Court of Victoria arrived on all those objections.

The appeal should, in my opinion, be dismissed.

WEBB J. This is an appeal from the Full Court of the Supreme Court of Victoria. The respondents are trustees and executors under a will and the testator’s estate includes land which was leased to the appellant company for a term of years. The respondents gave the appellant notice to quit on the ground that the land was reasonably required by a beneficiary under the will for his personal occupation. In proceedings based on non-compliance with this notice to quit a court of petty sessions made an order for the issue of a warrant of ejectment against the appellant. An appeal to the Full Court of Victoria against this order was dismissed.

The beneficiary in question was entitled under the will to two-fifths of the income of the land for a period ending in 1962 and he

(1) (1946) S.R. (N.S.W.) 252, at p. 253; 63 W.N. 158.

was then given by the will an option to purchase the land at a valuation to be fixed by three independent valuers. That was the full extent of his interest in the land under the will.

Section 37 of the *Landlord and Tenant Act* 1948-1955 (Vict.) provides *inter alia* : “(1) . . . except as provided . . . the lessor of any prescribed premises . . . shall not give any notice to terminate the tenancy . . .”. “(3) . . . a lessor may take proceedings in any court of competent jurisdiction . . . for an order for the recovery . . . of any prescribed premises . . . if the lessor, before taking the proceedings has given to the lessee, upon one or more of the prescribed grounds . . . notice to quit . . .”. “(5) The prescribed grounds shall be—(i) that the lessor is a trustee or personal representative and the premises are reasonably required by a beneficiary under the trust or in the estate (as the case may be) for his personal occupation or for the occupation of some person who ordinarily resides with, or is wholly or partly dependent upon, him . . .”.

Questions arise as to the meaning of “beneficiary” and “reasonably required” in this position.

As to the meaning of “beneficiary” : in *Frish Ltd. v. Barclays Bank Ltd.* (1) Lord *Evershed* M.R. said that the words “beneficiaries under the trust” in s. 41 (2) of the *Landlord and Tenant Act* 1954 (Imp.) must be given some limitation (2), and their Lordships found that limitation in a provision in the English Act which does not appear in the Victorian Act. Still I understand it to be common ground here that there is a limitation, e.g., that a beneficiary does not include a mere annuitant, but that there is a difference of opinion as to the extent of the right the beneficiary must have under the trust, that is to say, whether he must have the right to possession of or to occupy the land, or whether it is sufficient that he should have an interest in the land short of any such right. The Full Court of Victoria took the latter view ; but with great respect I prefer the former view as being more in accordance with the meaning of “beneficiary” in that context and in a section with the history of s. 37. No doubt the interest of this beneficiary is substantial and extends to the land, as he is not only entitled to share the income of the land for a period of years but is also given the option to purchase the land on the expiration of that period, although at what would appear to be its true value. However one would suppose it would have been no part of Parliament’s intention to protect a beneficiary’s right to possession of or to occupy the

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land, unless and until he should become entitled to that right under the trust, and the will gives this beneficiary no such right, and the option to purchase the land is postponed until 1962. If the will had given him the right to a lease s. 52 (2) (b) (ii) would have authorised the trustees to grant him the lease, notwithstanding the prohibition in s. 52 (1) against re-letting within twelve months. In those circumstances a beneficiary is properly so designated, even if he has to pay full rent and not a reduced rent, because he is given the right to the lease under the will without competition, and so he can then be said to have a benefit conferred on him and not to be simply a tenant on a commercial basis.

It appears to me that Parliament in enacting s. 37, and more particularly sub-s. (5) (g) to (m) inclusive, intended to protect the lessor and purchasers from him and others, who, although not having rights against him or the lessee, still have moral or other substantial claims to be identified with him in respect of housing accommodation, either as his dependants or through domestic or other relationship or association, or arising out of a common purpose or pursuit, such as ministers of religion, hospital staffs and employees generally, or who are the recipients of his bounty in respect of the particular leased land; and that Parliament did not intend to protect a lessor's beneficiaries independently of any right or claim they might have presently to possess or to occupy the land. I think that Parliament did not intend to do more than to protect rights and well-founded claims, and did not have the intention of conferring concessions. Certainly there was here nothing more than a claim for a concession, outside the will, and not the assertion of a right or claim expressly given by the will.

I think then that this beneficiary was not a beneficiary within s. 37 (5) (i).

It becomes unnecessary for me to decide the meaning of "reasonably required"; but I see no reason to differ from the views as to the meaning of this expression in this legislation stated by *Fullagar J.* in *Kiely v. Loose* (1) and shared by *Abbott J.* in *Dansie v. Jones* (2); by *Herron J.* in *Higgs v. Binder* (3) and by the Full Court of Western Australia in *Armstrong v. Vallance* (4).

It also becomes unnecessary for me to decide whether the proceedings should have been instituted by the lessors as "trustees" and not as "personal representatives". In their correspondence the lessors (who incidentally were, we are told, members of the legal profession) described themselves as "trustees", which might

(1) (1948) V.L.R. 181.
(2) (1949) S.A.S.R. 131.

(3) (1950) 67 W.N. (N.S.W.) 101.
(4) (1951) 52 W.A.L.R. 90.

well have amounted to an admission by persons in a position to know what was the nature of their duties for the time being, although their mere opinion could not be evidence. Moreover there was evidence from which it could be concluded that all duties and debts had been paid. Still no assent appears to have been signed by the personal representatives under s. 31 (10) of the *Administration and Probate Act* 1928-1955 (Vict.) terminating their executorial functions. But on the limited argument we have heard as to the effect of this provision I am not prepared to express an opinion on the point.

I would allow the appeal.

KIRTO J. I should venture to doubt whether the right given by the will to Edward Carter Whiteford "to remain in possession of the said second property" extends beyond that portion of the second property of which Edward Carter Whiteford had possession at the testator's death. But even if it does not, he was a beneficiary under the trust of the second property and in the estate of the testator, and I agree that in s. 37 (5) (i) the word "beneficiary" is not to be read, as the appellant sought to read it, as applying only to a beneficiary who either is entitled under the trust to possession or would be let into possession by a court of equity on application made for the purpose. The observations of the learned members of the Court of Appeal in *Frish Ltd. v. Barclays Bank Ltd.* (1) upon which the appellant relied were made in reference to a statutory provision which applies to a beneficiary if, and only if, he "intends to occupy the holding". Obviously he cannot be found to have the intention referred to if he cannot occupy the holding consistently with the beneficial rights and interests of others. There is no similar context in s. 37 (5) (i), and the case is therefore, I think, clearly to be distinguished.

But if it had not been for the inference arising from s. 52 (2) (b) (ii) I should have thought that much might be said for a view producing a similar result, namely that the reference to a beneficiary reasonably requiring premises for his personal occupation or for the occupation of another implies that the required occupation is an occupation to be enjoyed in virtue of the beneficiary's character as such. In the face of s. 52 (2) (b) (ii), however, this view is not open; for that provision recognises quite clearly that, when a trustee or personal representative has recovered possession of premises from a tenant on the ground of such a reasonable requirement as is described in

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s. 37 (5) (i), it is within the policy of the Act that he shall be at liberty to make a lease to a beneficiary, with the necessary result that the occupation of the premises thereafter is to be enjoyed, not by virtue of the beneficiary's title under the will, but by virtue of his title under the lease.

I do not think there is any force in the other arguments submitted for the appellant.

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Aitken, Walker & Strachan.*

Solicitors for the respondents, *Henderson & Ball.*

R. D. B.