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## SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

**NORTHERN ADVANCES v YOUNG****Jacobs P, Reynolds and Hutley JJ A****12 November 1973****CIVIL PROCEEDINGS – LEASE – CONDITION THAT VACANT POSSESSION BE GIVEN UPON PAYMENT – PERSON STILL IN OCCUPATION AT THE RELEVANT DATE – WHETHER "VACANT POSSESSION".**

Plaintiff, lessor of premises, brought action against defendant-lessee for breach of agreement whereby it was agreed that in consideration that the plaintiff paid \$1400 to defendant, defendant would give vacant possession on or before 12th February or (in the event of time for the execution of a warrant being extended upon application being made to the court by some third person) on or before the last day for such execution as so extended. Key was exchanged for \$1400 payment on 25th February. No warrant had been issued, and a certain Miss Mulcahy was still in the premises, the evidence showing that she could only be a mere lodger or resident, but not a sub-tenant. Upon appeal—

**HELD: Appeal dismissed.**

1. The words 'vacant possession' must be given their ordinary meaning. There is no basis for distinguishing between the use of these common words in relation to dealings with land in the case of the sale of land on leasehold or otherwise, and their use in the case of a giving up of possession by a lessee whether by a process of court order or otherwise.

2. The phrase 'vacant possession' is no doubt generally used in order to make it clear that what is being sold is not an interest in a reversion. But it is not confined to this. Occupation by a person having no claim of right prevents the giving of 'vacant possession', and it is the duty of the vendor to eject such a person before completion. The reason for this is that the right to actual unimpeded physical enjoyment is comprised in the right to vacant possession.

*Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264; (1946) 1 All ER 284, applied.

3. It was not a condition precedent to the admitted obligation of the defendant to give vacant possession that the plaintiff should issue a warrant, which might or might not achieve such a purpose.

**JACOBS P:** ... This brings me to the first submission on behalf of the appellant, namely, that the words 'vacant possession', as they appear in the agreement between the parties, mean not 'vacant possession physically', as they do in the law of vendor and purchaser, but mean 'possession without there being left in the premises any person who had a right to possession'.

Now if this be correct, then of course it may be true to say that there was no evidence that Miss Mulcahy had a right to possession as a sub-tenant. But it is not necessary to pursue this aspect, because, in my opinion, the words 'vacant possession' must be given their ordinary meaning. There is no basis for distinguishing between the use of these common words in relation to dealings with land in the case of the sale of land on leasehold or otherwise, and their use in the case of a giving up of possession by a lessee whether by a process of court order or otherwise.

It is convenient to refer to the decision of the Court of Appeal in England in *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264; (1946) 1 All ER 284, where it was said (All ER) at 287:—

"The phrase 'vacant possession' is no doubt generally used in order to make it clear that what is being sold is not an interest in a reversion. But it is not confined to this. Occupation by a person having no claim of right prevents the giving of 'vacant possession', and it is the duty of the vendor to eject such a person before completion. The reason for this, it appears to us, is that the right to actual unimpeded physical enjoyment is comprised in the right to vacant possession."

I therefore see no reason in the present case for giving these commonly used words a different meaning, a limited meaning in the manner proposed in the argument on behalf of the appellant.

I turn then to the second submission as I understand it, namely, that the learned District Court Judge ought to have found that vacant possession was given, because the plaintiff ought to have issued the warrant for possession, which is referred to in the terms of settlement, but in fact did not do so in the time there indicated. This would seem to be a reliance on a breach of a condition precedent to the obligation of the defendant to give vacant possession.

It was submitted that it was incumbent on the plaintiff to issue the warrant and to execute it. However, this cannot be so. If the obligation of the defendant is to give vacant possession, this is not consistent with an obligation of the plaintiff to carry out that duty of the defendant. It could not be a condition precedent to the admitted obligation of the defendant to give vacant possession that the plaintiff should issue a warrant, which might or might not achieve such a purpose. I do not think that this point succeeds.

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