1997 CarswellOnt 547
Ontario Court of Justice (General Division)

Divitcos v. CompCorp Life Insurance Co.

1997 CarswellOnt 547, [1997] O.J. No. 186, 12 R.P.R. (3d) 122, 23 O.T.C. 349, 68 A.C.W.S. (3d) 753

Diane Divitcos and Steve Divitcos, Tenants/Respondents v. CompCorp Life Insurance Company, Landlord/Applicant

Sutherland J.

Heard: February 23, 1996
Judgment: January 24, 1997
Docket: 96-LT-110075

Counsel: *Lawrence Ducas* , for tenants/respondents.
Natalie Marconi , for applicant/landlord.

Subject: Property
Headnote
Landlord and tenant --- Residential tenancies — Relationship of landlord and tenant
Landlord and tenant — Residential tenancies — Relationship of landlord and tenant — Mortgagee obtained default judgment and writ of possession after mortgage going into default — Adult children of mortgagor brought motion to vacate writ — Adult children not named or served notice of proceedings — Adult children claimed to be tenants of property — No bona fide tenancy agreement in place — Motion dismissed — Landlord and Tenant Act, R.S.O. 1990, c. L.7, Part IV — Ontario, Rules of Civil Procedure, r. 60.10(2).
Mortgages --- Possession and ejectment — Practice and procedure — Notice requirements
Mortgages — Possession and ejectment — Practice and procedure — Notice requirements — Mortgagee obtained default judgment and writ of possession after mortgage going into default — Adult children of mortgagor brought motion to vacate writ — Adult children not named or served notice of proceedings — Notice to parents constituted notice to adult children — Landlord and Tenant Act, R.S.O. 1990, c. L.7, Part IV — Ontario, Rules of Civil Procedure, r. 60.10(2).
The plaintiffs were the two adult children of the mortgagors. The mortgagors had mortgaged their house to the defendant. After the mortgage went into default, the defendant obtained default judgment against the mortgagors and a writ of possession. The plaintiffs were not named or served with any notice of the proceedings leading to the writ of possession. The plaintiffs contended that they were tenants of parts of the mortgagors' home and were improperly evicted. The plaintiffs had each been paying some amount to the mortgagors as rent or for room and board. Their claim of being tenants was based on an alleged earlier oral tenancy agreement and a written document. The plaintiffs forced their way back into the premises and changed the locks but were persuaded to leave when the police were called. The plaintiffs moved for an order vacating the writ of possession, directing the mortgagee to return possession of the premises to the plaintiffs as tenants and enjoining the mortgagee from evicting the plaintiffs from the premises. The mortgagee submitted that the moving parties were not bona fide tenants and, alternatively, if they were tenants, they were not tenants of residential premises under Part IV of the *Landlord and Tenant Act* .
Held:
The motion was dismissed.
There was no bona fide tenancy agreement. The evidence was more consistent with there being a family consisting of two parents and their two adult children sharing a house, with the children making contributions toward the expenses. The tenancy was not properly buttressed by a great emphasis on the areas of the house that were said to be in exclusive possession of the plaintiffs. The layout of the house made it difficult to consider the children's areas as one unit. The plaintiff S had no more right to go into the plaintiff D's bedroom or bathroom than the parents did. The moving parties, being the son and daughter of the mortgagors, living with their parents in the home, were not within the ambit of the purpose of r. 60.10(2) and could not

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reasonably be said to not have had sufficient notice of the default proceedings. Their father, the mortgagor, was aware of the proceedings and knew that the proceedings threatened all the occupants of the home. The mortgagee had failed to do what was required but it would be a perversion of the purpose of r. 60.10(2) to afford relief to the moving parties. It was also an abuse of process for the family to hold back their claims for some remedies until they were certain how successful they had been with other claims for remedies. Finally, it was clear that the residence was not covered by Part IV of the *Landlord and Tenant Act* .

MOTION for order vacating writ of possession of home, directing mortgagee to return possession to plaintiffs as tenants and enjoining the mortgagee from evicting plaintiffs.

***Sutherland J.*:**

1 Although this matter was estimated to take two hours of hearing time, it took all day. On endorsing my decision, late in the afternoon, soon after the end of the submissions of counsel, I dismissed the motion and wrote that "brief reasons [were] to be endorsed [on the motion record] in the near future." On further consideration it appeared to me to be more appropriate to prepare and release written reasons instead of a brief endorsement. Many other things have intervened. The reasons follow.

Background

2 This motion is brought by two adult children of Louis and Kay Divitcos in respect of parts of a two-storey dwelling house, known municipally as 19 Robinter Drive, North York. The parents had mortgaged the whole property to Compcorp Life Insurance Company, the respondent herein. After the mortgage went into default the respondent obtained a default judgment against the mortgagors in May, 1995, and also obtained a writ of possession.

3 The writ of possession was attacked by Kay Divitcos, one of the mortgagors, in a motion brought before my brother Pitt, who, on December 15, 1995, dismissed the motion with solicitor and client costs to the plaintiff (our respondent, Compcorp Life). An application to the Court of Appeal for a stay of the execution of the writ of possession was dismissed by Finlayson J.A. on January 11, 1996, and, in his endorsement, his Lordship expressed the view that defences put forth were being concocted to delay the mortgagee in the realization of its security on the matrimonial home.

4 The record shows that the same lawyer, Mr. Ducas, acted for the parents with respect to the default on the mortgage, and for Kay Divitcos on the motion, and for the adult children on this motion. The record also shows that Pitt J. and Finlayson J.A. were made aware that the adult children lived in the home and made payments in that regard to their parents.

5 After the order of Finlayson J.A., the writ of possession was renewed, and it was executed on February 5, 1996, and the parents and children were evicted. A Sheriff's Notice to Vacate was mailed to the parents and to "all Occupants and Tenants", at the address of the premises on January 25, 1996. The Notice to Vacate was accompanied by a "Notice to Occupants/Tenants" (Ex. "G" to the affidavit of Virginia Celis, filed) describing itself as a "courtesy" notice and advising occupants or tenants of the writ of possession and of the obligation of the Sheriff's office to execute the same, suggesting that occupants/tenants get ready to move out promptly and giving such persons the telephone number of the Lawyer Referral Service of the Law Society of Upper Canada. The Sheriff's notice was not addressed to the moving parties by name.

6 The parents have not reoccupied, or attempted to reoccupy, the premises or any part thereof. However, the adult children, (our applicants), after consulting with Mr. Ducas, formed the opinion that as they had not been named in, or properly served with notice of, the proceedings that led to the issuance of the above-mentioned writ of possession, and that they, as tenants of parts of the matrimonial home, had been improperly evicted. It is uncontested that the adult children, one a nurse and the other a pilot, had each been paying some amount monthly to their parents as rent or for room and board. Their claim to be, or to have been, tenants is based upon an alleged earlier oral tenancy agreement and upon a document entitled "Tenancy Agreement", dated September (blank) 1995, and signed by Louis Divitcos as landlord, and by the two adult children as tenants. Co-owner, Kay Divitcos, did not sign that document.

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7 The adult children forced their way back into the premises and changed the locks. A letter dated February 6, 1996 was sent by fax on that day from Mr. Ducas to the solicitors for the respondent mortgagee, informing such solicitors that Steven and Diane Divitcos had re-entered the premises and had had the locks changed.

8 The applicant Diane Divitcos deposed in an affidavit sworn February 9, 1996, that on February 8, 1996 a man named Steve attended at the premises alone and, stating that he represented the mortgagee, demanded that Diane and Steve leave the property. Diane further deposed that the police were called and said that Diane should leave, whereupon she left.

9 Those are the main features of the background to this motion for an order:

(a) vacating the writ of possession obtained by the mortgagee against the applicants;

(b) directing the mortgagee/landlord to return possession of the premises to the applicants (as tenants);

(c) enjoining the mortgagee/landlord from evicting the applicants (styled as tenants) from the premises;

(d) for costs; and

(e) for other relief, etc.

Landlord Did Not Proceed under Section 53 of the Mortgages Act

10 It should be noted that, in obtaining default judgment and a writ of possession, the mortgagee did not purport to be moving or acting under the provisions of s.53 of the *Mortgages Act* , R.S.O. 1990, c.M.40, as amended, in that the mortgagee did not purport to evict a tenant or tenants of the mortgagor so that the single family dwelling could be sold under the power of sale in the mortgage to a proposed purchaser who had filed with the mortgagee/landlord/vendor a written undertaking to the effect that the proposed purchaser intended to use the premises for his own use and occupation as a residence, or as a residence for one or more members of his family (as defined).

11 Here, the mortgagee/landlord was not purporting to evict any persons regarded by it as tenants of a single family home or of a part thereof. The mortgagee takes the position that the moving parties are not *bona fide* tenants and, alternatively, that if they are tenants they are not tenants of residential premises as defined.

12 I observe in passing that even if the moving parties had been found to be tenants of "residential premises" as defined in s. 1 of the *Landlord and Tenant Act* and had been restored to possession of parts of the house that they formerly occupied, their tenancy and occupation could be terminated if the mortgagee in possession entered into a binding agreement of purchase and sale of this single family dwelling (as defined) with a purchaser who provided an affidavit deposing that he was purchasing the property for his or her use and occupation (or that of one or more of the specified categories of his or her relatives), and if the other requirements of s.53 of the *Mortgages Act* , were complied with in that regard. But that is not our case. I mention it only to make clear that the moving parties, if successful in their bid to be restored to occupation of part of the building, would not have been able to tie up the whole, or any part, of the property for an indefinite period.

A Tenant Has Status to Apply for a Writ of Possession

13 I adopt with respect the conclusion and the reasoning of Hayes J. in *Foster v. Lewkowicz* (1993), 34 R.P.R. (2d) 74 (Ont. Gen. Div.) , where he held that an application under s.113 of the *Landlord and Tenant Act* , R.S.O. 1990, c.L.7, may be brought by either a landlord or a tenant of residential premises.

Mortgagee's Right to Obtain Information as to Tenants of Mortgaged Residential Property

14 Section 50 of the *Mortgages Act* gives the mortgagee of residential premises the right, where the mortgage is in default, to make inquiries of the mortgagor regarding the existence and the terms of any tenancy agreement, and to demand a list of all tenants. Subsection 50(2) authorizes the mortgagee to enter the "common areas" of the premises to make inspections and

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also to demand copies of any written tenancy agreements. Other subsections of s.50 obligate the mortgagor and the tenants to provide the information and documents requested, and it is further provided that if a mortgagor or a mortgagor's tenant does not comply with the mortgagee's proper requests in this regard, the mortgagee may apply to the Ontario Court (General Division) for an order requiring compliance.

15 It is clear that in this case the mortgagee did not avail itself of its rights under s.50, probably because its officers believed that the premises were occupied by the owner/mortgagors as a family home, no part of which was rented to anyone, let alone to the adult children of the owner/mortgagors.

Mortgagees not to Interfere, by way of Self-Help, with Tenant's Reasonable Enjoyment of Residential Premises

16 It is provided by s.51 of the *Mortgages Act* , that a mortgagee shall not interfere with the reasonable supply of services, such as heating, to residential premises, or otherwise substantially interfere with the reasonable enjoyment of the premises by the mortgagor's tenants, on pain of a fine upon conviction.

17 I observe that the mortgagee here did not indulge in self-help remedies but acted under writs of possession, albeit writs of possession obtained without the mortgagee having availed itself of s.50, and without having addressed any notice to the moving parties by name.

Attack on Writs of Possession

18 On behalf of the moving parties it is asserted that the initial writ of possession herein was obtained on the basis of an affidavit of one Elaine Kehoe, that contained a falsehood as to an alleged statement by a Mr. Michael Reiman, a financial consultant who was seeking to arrange a refinancing of the mortgagee debts here in question.

19 In her affidavit Elaine Kehoe, a law clerk with the law firm acting for the respondent, deposed that Mr. Reiman, of Tory York Financial Services, financial advisers to Louis and Kay Divitcos, was involved in trying to arrange refinancing of the mortgage debt and had told her that the only adult persons living at the residence in question were Louis and Kay Divitcos.

20 On behalf of the moving parties there is filed a vehement affidavit of Mr. Reiman in which he deposes that he told Elaine Kehoe no such thing. He goes on to state that there was no reason for him to gather any information as to the occupants of the residence. There I think that he "doth protest too much". Mr. Reiman was trying to refinance the debt of Louis and Kay Divitcos, and that is highly likely to have involved the prospect of a new mortgage. Given the rights of residential tenants as against mortgagees, I would have thought that information as to whether or not there were any tenancies of any part of the property would have been highly relevant to a proposed mortgage lender, and therefore within the scope of Mr. Reiman's duties to look into.

21 However, it does appear that neither Louis nor Kay Divitcos or anyone acting with or for them mentioned to Mr. Reiman anything about the tenancy of Steve and Diane Divitcos. I cannot help wondering how long that alleged tenancy would have remained in existence if a possible new mortgage lender had made it a condition of his loan that there be no tenants of any part of the property. I must acknowledge that I find the alleged tenancy very suspect.

The Alleged Tenancy

22 Diane Divitcos and Steve Divitcos are in their early thirties. She is a nurse and he is described as a pilot, and he is also said to have health problems. Each has lived in the house since being six or seven years of age. There is no affidavit from Steve Divitcos. Diane Divitcos has provided a detailed description of the part of the house occupied, she deposes exclusively, by herself and her brother Steve. The building has two stories and a full basement. On the second floor is a bedroom and a bathroom that was used exclusively by Diane. Also on the second floor is a master bedroom with full bathroom en suite, for the exclusive use of the parents, Louis and Kay Divitcos.

23 The ground floor was for the exclusive use of the parents, (but this could not be said to have been strictly enforced).

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24 In the basement there was a bathroom with shower and toilet, a living room with a couch and a futon, a library area where each of Steve and Diane had desks and a rudimentary kitchen which had a laundry tub, a stove, a refrigerator and some other kitchen equipment.

25 There were no separate entrances. There was no evidence that Diane used to lock her bedroom door or the second floor bathroom door. There was no lock at the top of the basement stairs that was used to enforce the stated exclusive possession by Steve and Diane of the basement area. The layout was consistent with a family home in which certain areas were regarded as the exclusive preserve of particular family members. Diane's room on the second floor was hers, but so is the bedroom of many children, grown or otherwise, who are not tenants. The same can be said of Steve's right to roll out the futon in the basement and to sleep on it to the exclusion of other members of the immediate family.

26 Kay Divitcos has deposed that she was a homemaker and, that except for rare occasions of helping out in her husband's restaurant business, she had for years stayed at home and looked after her house. Diane Divitcos has deposed that she and Steve prepared meals in the kitchen area of the basement. I have no reason to doubt that that happened, perhaps frequently, but I am far from persuaded that the meals of Steve and Diane were as regularly separate from Kay Divitcos' cooking as Diane suggested.

27 It was deposed by Diane that from the times when they, respectively, began working she and Steve had paid "rent" to their parents. There were few particulars as to that. It was known to their counsel that the *bona fides* of the alleged tenancy were under attack by the respondent mortgagee, and yet there were no cancelled cheques in evidence to show payments of "rent".

28 There was no evidence as to what would have happened to the rent of the other if one of Steve and Diane had moved out. There was no evidence as to how the grounds around the house were to be shared, or as to whose responsibility it was to cut the grass, rake leaves or shovel snow. There was no evidence as to the rights of Louis or Kay Divitcos with respect to access to the furnace situate in the basement.

29 When Stephen Flegg, a representative of the mortgagor first went to the premises, the door was answered by Diane Divitcos, who stated that Louis and Kay Divitcos was not in, and that she was the girlfriend of the man who lived in the basement. On one occasion a number of large envelopes were left at the house with Diane. The top one was addressed to Louis Divitcos. All related to the mortgagee's actions and claims for possession. Diane deposed that, without looking at the other envelopes, she left all of the envelopes near or on the piano, at a place where she deposed that she usually left mail for her father. This evidence shows that Diane was routinely in the part of the house deposed by her to have been in the exclusive possession of her parents. Diane deposed that she later saw that the envelopes had been taken away. She deposed that her father had told her that the envelopes related to business and that he would take care of it.

30 It is a recurrent theme in the evidence of Kay Divitcos and Diane Divitcos that no one ever tells them anything. It is apparent that Louis Divitcos did not discuss his business affairs with his wife, or at least not often or in detail. On her motion her counsel sought to make the mortgagee bear the brunt of Louis Divitcos' secretiveness. Somewhat similarly Diane states that she never received any notice of the default judgment or of the writ of possession, which I can accept in the formal sense of her not having notices addressed to her by name on behalf of the mortgagee. I do accept as true the deposition of an employee of the Sheriff's Office to the effect that in respect of each of the two writs of possession notices were mailed to the house by the Sheriff's office, addressed in each case to Louis Divitcos, Kay Divitcos and all tenants and occupants of the property at 19 Robinter Drive. I find that those notices were sent and that, on a balance of probabilities, they arrived at the house. When Diane deposes that she did not receive any such notice I find that hard to believe. If she did not receive those notices she has her father or mother, or someone other than the Sheriff's Office, to blame for her lack.

31 The evidence about the rental payable under the alleged tenancy arrangement is, as stated, vague. It is also contradictory. As late as September, 1995, Kay Divitcos was stating in an affidavit filed on her said motion that Diane and Steve each paid $200 a month for room *and board* . The evidence that the payments were also made for board is inconsistent with the impression sought to be created by Diane as to the cooking of most meals by her and by Steve, in the basement. This evidence of Kay

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Divitcos is more consistent with there being a family consisting of two parents and their two adult children sharing a house, with the children making some contributions toward the expenses.

32 The $200 a month is less than half the amount stated in the one page "tenancy agreement" dated September (blank) 1995 and signed by Louis, Steve and Diane. Diane when asked at the house did not have a copy of the "tenancy agreement" but said it was at the law office of Mr. Ducas. There was no evidence of independent legal advice for any of the parties.

33 There was no affidavit of execution on, or attached to, the copy of the tenancy agreement that forms part of the record.

34 The dating of the tenancy agreement is also suspicious. The default judgments were obtained in May, 1995, and the first writ of possession was dated August 15, 1995, or thereafter. According to the affidavit of Michael Reiman, Elaine Kehoe told him on August 18, 1995, that the respondent mortgagee was still considering the refinancing proposal that Reiman had submitted on behalf of Louis Divitcos, but that in the interval the respondent would be proceeding with its legal remedies. The refinancing obviously did not go through.

35 Diane Divitcos deposed that it was she who prepared the tenancy agreement bearing date September (blank) 1995, that is attached to her affidavit sworn on February 15, 1996. I note from the document the rental of $500 a month was to commence on October 1, 1995, and that the agreement contains the statement that it supersedes any previous agreements, oral or written. No last month's rent deposit was required.

36 In September, 1995, (if that was when the tenancy was in fact signed) Louis Divitcos must have known that the end was near. By mid-May there had been three default judgments against him and in August the first writ of possession was issued.

37 I acknowledge that the written tenancy agreement need not be the whole story. There can be oral tenancy agreements.

38 However, I am not persuaded that what we have here is a *bona fide* tenancy agreement. I accept that Steve and Diane lived in the house and that when they started to work they may well have paid something in the way of "rent" or a regular contribution toward the carrying costs of the house. But similar contributions are made by many working adult children who live in their parents' homes without the children being considered to be tenants. Nor can the tenancy be properly buttressed by a great emphasis on the areas of the house that were said to be in the exclusive possession of Diane and Steve. The layout makes it difficult to consider the children's areas as one unit. Steve had no more right to go into Diane's bedroom or bathroom than the parents did.

39 It is, I believe, of interest to consider the provisions of s.52 of the *Mortgages Act* . Subsection 52(1) empowers this court upon application by the mortgagee to set aside or vary a tenancy agreement in certain circumstances. The whole section is as follows:

> 52.(1) The Ontario Court (General Division) may on application by the mortgagee vary or set aside a tenancy agreement, or any of its provisions, entered into by the mortgagor in contemplation of or after default under the mortgage with the object of,
>
> > (a) discouraging the mortgagee from taking possession of the residential premises on default; or
> >
> > (b) adversely affecting the value of the mortgagee's interest in the residential premises.
>
> (2) In considering the application, the judge shall have regard to the interests of the tenant and the mortgagee.

40 In keeping with the tendency of the solicitors for the respondent to ignore or under use the available provisions of the *Mortgages Act* , there was no application under s.52 on behalf of the mortgagee.

41 The importance of s.52 to these proceedings is therefore indirect. It represents an awareness on the part of the Legislature of the vulnerability of a mortgagee of property that can be leased out by a mortgagor under a "sweetheart" deal between the mortgagor, who is in default under the mortgage, and a tenant who will in the ordinary course, under relatively recent

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amendments, be "inherited" by the mortgagee in possession, whether or not the mortgage was in place before the "sweetheart" tenancy agreement was entered into.

42 If an application had been made to me under s.52 I would, on the facts in this record, have issued an order setting aside the tenancy agreement. I would have done so out of an abundance of caution, and not because persuaded of the legitimacy of the tenancy agreement.

Res Judicata not Made Out

43 Counsel for the respondent submits that in the proceedings before Pitt J., and in the later proceedings before Finlayson J.A., the court was in each instance aware that there were other adult occupants of the house, namely Steve and Diane Divitcos. Counsel for the respondent argues that each of Steve and Diane is a privy of their parents, and that in upholding, and refusing to stay the execution of the writ of possession, the courts were making orders that were equally binding upon Steve and Diane. I have read the authorities cited and I am not persuaded of the proposition advanced. I obviously share the skepticism expressed by Finlayson J.A., but I do not think it fair or correct to conclude that he was dealing with anything more than the motion that was before him, the motion of Kay Divitcos. The refusal of the stay was in any event an intermediate matter and not a final judgment.

44 Where a statute, the *Mortgages Act* , protects the separate position of a tenant, I do not believe that it can properly be said that the upholding of a writ of possession against the mortgagors/lessors can be said to operate by way of *res judicata* to foreclose the rights of a legitimate tenant.

45 As stated, counsel for the respondent has not paid enough heed to the amendments of the *Mortgages Act* , affecting the rights of a tenant vis-a-vis a mortgagee in possession. The law as stated by Master Dunn in the well known 1968 decision in *Jamort Investments Ltd. v. FitzGerald*, [1968] 1 O.R. 541 (Master) , has to be read in the light of subsequent statutory increases in the rights of tenants against a mortgagee in possession.

46 Thus the statement in para.31 of the factum of the respondent that an occupant with a right of possession *subordinate* to that of the mortgagor [presumably in terms of the timing of the creation of the respective interests] "can at most apply to the court to be granted a few days to leave the property" is, quite clearly, an incorrect statement of the law. Valid tenancies arising after the mortgage later in default will be protected against the mortgagee in possession by the *Mortgages Act* , subject to the exceptions set forth in the *Mortgages Act* itself.

47 The respondents are fortunate indeed that I am of the view that the asserted tenancy agreement is spurious.

Re-entry Illegal

48 When Diane and Steve Divitcos re-entered the building and changed the locks after they had been evicted pursuant to a writ of possession, they were clearly doing an illegal act. One of the main public policies manifested in Part IV of the *Landlord and Tenant Act* is a legislative determination not to have the obtaining of possession of leased residential premises made the subject of self-help remedies by either landlords or tenants.

49 It is provided by s.96(1) of the *Landlord and Tenant Act* that:

> Except as expressly otherwise provided in this Act, no tenancy of residential premises ... shall be terminated except upon notice by the landlord or the tenant given to the other in accordance with the provisions of the Part.

50 It is provided by s.121 of the last mentioned Act that, unless a tenant has vacated or abandoned rented premises, the landlord shall not regain possession of the premises on the grounds that the landlord is entitled to possession except under the authority of a writ of possession under s.113 or s.114 of that Act. Thus, even where the landlord is entitled to recover possession he or she may do so only under the authority of a writ of possession.

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51 The Act reflects the expectation that in the usual case it would be the landlord that would be seeking to recover possession. However, as decided by Hayes J. in *Foster v. Lewkowizc, supra* , a tenant may seek a writ of possession - and it would follow that in the case of the tenant as much as in the case of the landlord that is the only lawful way to recover possession.

52 The policy against self-help is underscored by the provisions of s.93 prohibiting the changing of locks. Section 93 is as follows:

> A landlord or a tenant shall not, during the occupancy of the rented premises by the tenant, alter or cause to be altered the locking system on any door giving entry to the rented premises except by mutual consent.

The self-help re-entry by Diane and Steve Divitcos represented a contravention of Part IV of the *Landlord and Tenant Act* , and the changing of the locks was obviously a contravention of s.93. Both actions were apparently taken with the knowledge of the solicitor for Diane and Steve Divitcos, as he clearly did nothing to disavow the action when he wrote on the same day to the solicitors for the respondents to inform such solicitors of the actions taken by his clients.

53 If the solicitor counselled or countenanced these clearly illegal acts of his clients his own conduct was outrageous, and well below the standard which the court is entitled to expect from any solicitor licenced to practice as such in Ontario. The policy against self-help - against the recovery of possession of residential premises except under the authority of a writ of possession - is too well established to allow for an exculpatory plea of ignorance of the law from a solicitor purporting to act in this area of the law. The provision prohibiting the changing of locks is very clear - and may be seen as part of the larger policy against self-help. I am convinced that instances of self-help with respect to residential tenancies have a significant potential for begetting violence. A majority of the persons in Metropolitan Toronto live in rented accommodation. The public interest in avoiding self-help remedies is obvious and the public policy is clearly reflected in the legislation. It is not tolerable that solicitors, or other representatives of landlords or tenants, whether through ignorance or defiance, countenance, counsel or assist with illegal activities such as those carried out in this case by Diane and Steve Divitcos.

Relevant Statutory Provisions

54 As amended by the *Mortgages Amendment Act, 1991* , S.O. 1991, c.6, Part V of the *Mortgages Act* has the following definitions, among others, added thereto:

> "residential premises" has the same meaning as in section 1 of the Landlord and Tenant Act;
>
> "tenancy agreement" has the same meaning as in section 79 of the Landlord and Tenant Act; and
>
> "tenant" has the same meaning as in section 79 of the Landlord and Tenant Act.

55 By s.46(1) of the *Mortgages Act* it is provided that the provisions of Part V of the Act (which Part relates to mortgagees in possession of rental residential premises) prevail over any other provisions of that or any other Act unless the other provision or Act states that it is to prevail over Part V.

56 By s.47 of the *Mortgages Act* it is provided that a person who becomes the mortgagee in possession of mortgaged residential premises which are the subject of a tenancy agreement between the mortgagor and a tenant shall be deemed to be the landlord under the tenancy agreement. In short, the mortgagee in possession becomes the landlord under the tenancy agreement. This is very different from the view of the law put forward on behalf of the respondent.

57 Under s.47(3) of the *Mortgages Act* , as amended, the person (mortgagee in possession) who is deemed to be the landlord is subject to the tenancy agreement and to the provisions of the *Landlord and Tenant Act* which apply to residential premises.

58 It is provided by s.47(6) of the *Mortgages Act* that a person who is deemed go be a landlord shall "serve notice to all tenants of the change in landlord". No such notice was timely served upon Diane or Steve Divitcos.

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59 It is provided by s.48(1) of the *Mortgages Act* , as amended, that:

> No person exercising rights under a mortgage may obtain possession of residential premises from the mortgagor's tenant except according to the provisions of the *Landlord and Tenant Act* which apply to residential tenancies.

60 In summary, a mortgagee in possession of residential premises all or part of which are in the possession of tenants (as defined in the *Landlord and Tenant Act*) replaces the mortgagor as landlord and cannot evict the tenants except as provided in Part IV of the *Landlord and Tenant Act* or in s.52 or s.53 of the *Mortgages Act* .

61 In s.79 of the *Landlord and Tenant Act* the following definitions appear:

> "tenancy agreement" means an agreement between a tenant and a landlord for possession of residential premises, whether written, oral or implied and includes a licence to occupy residential premises;
>
> "tenant" means a tenant as defined in section 1 and in addition includes a boarder, a roomer and a lodger.

62 The definition in s.1 of the *Landlord and Tenant Act* is as follows:

> "tenant" includes a person who is a lessee, occupant, sub-tenant, under-tenant and the person's assigns and legal representatives.

The terms "occupant", "boarder", "roomer" and "lodger" are not defined in the lastmentioned Act or in the *Mortgages Act* , as amended, and so presumably they have their ordinary meanings.

63 There is no issue that the premises in question are occupied for residential purposes only. Accordingly, the cited judicial decisions applying the predominant purpose test, where there was an issue as to whether premises were used for residential or business purposes, have little relevance here - because in the main they deal with an issue that simply does not arise here.

The Position of the Moving Parties

64 The position of the moving parties may be summarized as follows. They were adult persons who were, at the least, occupants, of the residential building in question and as such they are within the applicable definition of "tenant" and so, subject to what might be done under s.52 or s.53 of the *Mortgages Act* , they are tenants of the mortgagee in possession and as such can be removed only in accordance with the provisions of Part IV of the *Landlord and Tenant Act* . Moreover, they claim to have been entitled to notice from the mortgagee of the fact that the mortgagee was deemed to have become their landlord.

65 The importance of this position lies in the fact that, as noted in *Lamont: Residential Tenancies* (5th ed., Carswell, Toronto, 1993) at p. 104:

> In view of the limited reasons or causes for which landlords can regain possession, residential tenants who pay their rent on time now have indefinite security of tenure.

66 In addition to the arguments based on the relevant provisions of the *Mortgages Act* and the *Landlord and Tenant Act* referred to above, the moving parties also rely upon the provisions of rule 60.10(2) of the *Rules of Civil Procedure* which states:

> The court may grant leave to issue a writ of possession only where it is satisfied that all persons in actual possession of any part of the land have received sufficient notice of the proceeding in which the order was obtained to have enabled them to apply to the court for relief.

The submission is that Steve and Diane Divitcos were persons in actual possession of part of the property in question and that they received no notice addressed to them in respect of either the default judgment or the mortgagees application for a writ of possession. In support of this submission is cited the oft-cited 1968 decision of Master Dunn in *Jamort Investments Inc. v. FitzGerald, supra* , dealing with a predecessor of rule 60.10. In that case, it was held that even if the premises were occupied by

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transients the information that must be put before the court must be such as to enable the Master to determine with certainty the identity of all persons in actual possession at the material time. That decision was given back in the days when it was still relevant for the purposes of the predecessor of rule 60.10 to determine whether the rights of the occupant were or were not subordinate to the rights of the mortgagee. The position of the occupant is, as stated, notably stronger under the present statutory law, because a tenant becomes a tenant of the mortgagee in possession regardless of the time-based priorities of their respective interests.

67 In discussing the predecessors to rule 60.10, Master Dunn, at pp.543-4, described the purpose of those rules as follows:

> Rule 567 was introduced to prevent the abuse that occurred from time to time in the use of the drastic relief afforded by the writ of possession. Persons without knowledge of the plaintiff's claim under his judgment can no longer be summarily turned out of their shelter or place of business under a writ obtained in an action to which they were not parties and of which they had received no notice. A plaintiff cannot sit indefinitely on his right to obtain the issue of a writ and to execute it (Rules 567(3) and 568). Accordingly, the writ can no longer be used as a continuing threat against defendants while the plaintiff rests on his other remedies, or obtains advantages to which he may not be entitled.
>
> In dealing with an application under Rule 567(2), it seems to me that it is incumbent on the Master to see that the material before him provides sufficient information so that he may determine with certainty the identity of all persons in actual possession of the lands and tenements in question, and the nature of their possession. In the context of this Rule, I would interpret the words "actual possession" to mean physical occupation of the premises similar to that ordinarily enjoyed by an owner, tenant or licensee.
>
> Once having determined the identity of all the persons in actual possession, the Master must be satisfied from the affidavit material that they "have received sufficient notice of the proceedings in which such judgment was obtained to have enabled them to apply to the court for relief or otherwise". When and in what form should notice be given? The rule is not clear as to the length of the notice, and prescribes no form.

In the result in that case the application for a writ of possession was dismissed but without prejudice to the right of the applicant mortgagee to bring another application on better material.

68 I include the following excerpt from Master Dunn's reasons in *Jamort, supra* , found at p.546, because it deals with the rights of a mortgagee who has recognized the tenancies of the persons in possession (and thus deals with the position in which mortgagees in possession now found themselves placed by statute):

> It seems apparent that the plaintiffs intend to recognize the tenancies of these persons in possession. If such is the case, a writ should not issue that would affect their particular *ménages* . If the plaintiffs have in any way adopted the tenancies as their own, it seems to me that, on a breach by the tenant, their proper recourse is to take proceedings elsewhere by commencing an action for possession, proceeding under the provisions of the *Landlord and Tenant Act* , R.S.O. 1960, c.206, s.1(d) and Part III, or using whatever other remedy that may be available to a landlord to evict his tenant.
>
> It may well be that in certain circumstances the plaintiffs would be entitled to recover possession of part only of the lands and tenements in respect of which the action was brought, as is envisaged in the form of judgment, in which case the order granting leave would confine the operation of the writ to such part.

Conclusion with respect to the Submissions of the Moving Parties

69 Apart from the submissions with respect to rule 60.10(2), the argument of the moving parties would be irresistible if the moving parties were legitimate arm's length occupants of part of the building in question. Before dealing with the position under the two relevant statutes, I will deal with the submissions of the moving parties with respect to rule 60.10(2).

70 The mortgagee did not exercise its statutory rights under s.50 of the *Mortgages Act* to find out the names of all of the occupants of the residence. As a result, the mortgagee did not know that Steve and Diane Divitcos were occupants and did not give them any notice (addressed to them by name) of the mortgage action that resulted in the default judgment, nor of the

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application for the first writ of possession. Had the moving parties been at arm's length to the mortgagors that would have meant under rule 60.10(2) that the writ of possession should not have issued as to the whole of the property. However, when one looks at the actual wording of the subrule one sees that the test to be applied on the application for a writ of possession is whether all persons in actual possession of any part of the property have received "sufficient notice" of the proceeding. Accepting for the present that the moving parties who were admittedly occupants of the building were also "persons in actual possession of part of the land", I am persuaded that the moving parties, being the adult son and daughter of the mortgagors, living with their parents in the home, were not within the ambit of the purpose of the subrule and cannot reasonably be said not to have had "sufficient notice" of the default proceedings. Clearly their father was aware of those proceedings and knew that they threatened all occupants of the home. Diane was clearly aware of the mortgage action and the writ of possession well before the latter was exercised. If Louis Divitcos kept from the members of this immediate family who occupied his home with him on economic terms very favourable to them, that should not mean that the moving parties are held not to have "sufficient notice" of the mortgage action. Admittedly, the mortgagee failed to do what it should, and could, have done, but in the circumstances of this case it would be in my opinion a perversion of the purpose of subrule 60.10(2) to afford relief to these moving parties under it. There is also an element of abuse of process in the actions of the Divitcos family in holding back certain of their claims for remedies until they have seen whether or not they had success with other claims for remedies.

71 Turning now to the more difficult issue of the rights of occupants of residential premises under the above mentioned provisions of the *Mortgages Act* and the *Landlord and Tenant Act* , I have already stated that I find the brief written tenancy agreement to be spurious, a concoction or device entered into long after the parties thereto had long been aware of the mortgage action and the issuance of, or intention to apply for, the writ of possession. I state now that I have the same view of the alleged oral tenancy agreement or agreements. I do not regard it, or them, as valid or legitimate agreements conferring rights of exclusive possession of any parts of the home, such as to bring either of the moving parties within the extended meaning of the term "tenant". Given the purpose of the statutory provisions the moving parties are not, in my opinion, "occupants" within the above quoted definition of "tenant". In my view, the extended meaning of "tenant" is still confined to persons having some right enforceable against the mortgagors, be it a tenancy agreement, a licence of occupation, or whatever. By contrast, what we have in this case is a family home where the owner parents have living with them two adult children who have agreed to make some sort of contribution to the expenses of the household and who, by family arrangement and mutual convenience, use or occupancy designated parts of the house, but in an arrangement considerably more flexible and informal than the one sought to be portrayed.

72 In effect, I do not believe that there is any sort of enforceable agreement that was ever enforceable against the mortgagors for the exclusive occupation of any part of the residence. While the mortgagee clearly, under the statutory provisions referred to above, is bound by tenancies (in the extended meaning of the term) enforceable against the mortgagor, the mortgagee is not bound by occupations that could not have been enforced against the mortgagors. There is no "springing" tenancy.

73 The fact remains that Diane and Steve were occupants in the sense that they were adults who lived in the home. As such, their presence there should have been discovered by the mortgagee who ought then to have given notice directed to them by name. That did not happen. But for the reasons stated, in the unusual circumstances of the relationship and the deemed actual notice, the relief sought by the moving parties ought in my opinion to be refused.

74 I pass now to the alternative argument of the respondent.

Whether the Premises in Question are Residential Premises to which Part IV of the Landlord and Tenant Act Applies

75 It is submitted on behalf of the respondent mortgagee that the premises here in question, while clearly residential in the sense that they are not used for any other purpose, are excluded from the operation of Part IV of the *Landlord and Tenant Act* by virtue of subdiv.1(e) of that Act, which excludes from the definition of "residential premises" in that Act (which definition and exclusion are adopted and made applicable to Part V of the *Mortgages Act*) premises described as follows:

> (e) premises whose occupant or occupants are required to share a bathroom or kitchen facility with the owner, the owner's spouse, child or parent, or the spouse's child or parent, where the owner, spouse, child or parent lives in the building in which the premises are located,

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I observe that the words "required to share ... a kitchen" require some interpretation. In my view, they mean that the only kitchen available for use by an occupant is one which another occupant is also entitled to use. An applicant may of course avoid sharing by simply not using the kitchen facilities. There is no mandatory requirement that he use them.

76 The respondents state that Steve and Diane are "required" to share a kitchen with each other, on the evidence of Diane. It is not argued that either is required to share a bathroom or kitchen with the owners, only with each other.

77 Each of Steve and Diane is a child of the owners, and the owners live in the building. The premises are therefore premises described in subdiv.1(e), and therefore are excluded from the term "residential premises". It follows that the provisions of the *Mortgages Act* and the *Landlord and Tenant Act* , which are applicable only to residential tenancies as defined, do not apply to the premises here in question.

78 Although the argument is admittedly quite technical I find it to be technically correct. And I find that the equities in this case so favour the respondents that I have no reluctance to accept the technical argument. I accept it as a second ground or reason for the dismissal of the motion.

79 It might be argued that Steve and Diane should be regarded for the purposes of this argument as a unit, a team, an entry or at any rate not as separate and independent tenants "required" to share a kitchen. As stated, I do not believe that if one of them were to leave the remaining one would be required to pick up the rental payments theretofore made by the departed one. Nor would the remaining one have the right to introduce a substitute occupant. I therefore believe it to be reasonable to regard Steve and Diane as occupants "required" to share a kitchen.

Costs

80 In my initial endorsement the motion was dismissed and costs followed the event.

Motion dismissed.

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