

**IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY**

CIV 2010-419-001440

UNDER Part 13 of the High Court Rules

IN THE MATTER OF a summary proceeding for recovery of land

BETWEEN JOHN HOWARD ROSS FISK AND
DAVID MURRAY BLANCHETT
Plaintiffs

AND CRAIG CHRISTOPHER GEORGE
FAGAN
First Defendant

AND SARAH RACHAEL MARY FAGAN
Second Defendant

...../continued

Hearing: 8 December 2010

Counsel: DP MacKenzie for plaintiffs
No appearance for defendants/caveator

Judgment: 9 December 2010 at 9:30am

**JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on applications for summary judgment and that caveat not lapse]**

This judgment was delivered by me on 9 December 2010 at 9:30am
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: MinterEllisonRuddWatts, PO Box 3793, Wellington

And To: CCG Fagan, 1714 Oparure Road, Te Kuiti

UNDER the Land Transfer Act 1952
AND
IN THE MATTER OF a caveat
BETWEEN CRAIG CHRISTOPHER GEORGE
FAGAN
Applicant/Caveator
AND MAIROA HOLDINGS LIMITED
Respondent

Appearances

[1] On Monday, 6 December 2010 counsel for the plaintiffs and the first and second defendants appeared before me when the plaintiffs' summary judgment application was called. For reasons which are later explained in this judgment, I adjourned the summary judgment application until 2:15pm on 8 December 2010 for hearing. I also directed that the defendants' caveat application be called and determined at the same time.

[2] No appearance was entered by the defendants and caveator at 2:15pm on 8 December 2010. I arranged for the court registrar to make telephone contact with the defendants. I received a report back to the effect that they advised that they would not be attending. I was also provided with a document that was sent by facsimile which has, as part of its heading, *Notice of non-attendance*. There is no justification provided to me for the defendants' and caveators' non-attendance. I therefore proceed with this application for summary judgment and the application in relation to the caveat in their absence.

Introduction

[3] The plaintiffs were appointed joint receivers and managers of Mairoa Downs Ltd and Mairoa Holdings Ltd by ANZ National Bank Ltd on 28 May 2010.

[4] The first defendant is a director of Mairoa Down Ltd and Mairoa Holdings Ltd. The second defendant is the first defendant's wife.

[5] Mairoa Holdings Ltd owns a farm near Te Kuiti. The first and second defendants reside in a house located on the farm at 1714 Oparure Road, Te Kuiti.

[6] The receivers wish to sell the property owned by the companies, including the house. They have asked the defendants to vacate the house. The defendants refuse to vacate the house.

The application

[7] The plaintiffs apply for summary judgment in the form of an order that the first and second defendants deliver up vacant possession of the house and lands.

[8] The house is situated on title identifier 317916. The registered proprietor is shown as Mairoa Holdings Ltd.

[9] The receivers' affidavit sets out the steps taken by them:

- a) To obtain documents from the defendants; and
- b) To ascertain what basis the defendants assert for maintaining possession of the house.

The receivers say that Mr Fagan told Mr Blanchett that there was no lease in place for the house.

[10] The receivers have obtained an order from the Tenancy Tribunal pursuant to the Residential Tenancies Act 1986. That decision confirms that the Residential Tenancies Act 1986 does not apply to the house.

[11] Out of an abundance of caution the plaintiffs have applied for an order joining Mairoa Holdings Ltd as a further plaintiff. The addition of that company as a plaintiff does not impact in any way of the substantive allegations or claims that have been made. An order will be made confirming that joinder at the conclusion of this judgment.

The court's approach to a plaintiff's summary judgment application

[12] Rule 12.2 of the High Court Rules requires that a plaintiff satisfy the court that a defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action. The obligations imposed by the rule have been examined by a number of authorities.

[13] The correct approach to an application for summary judgment by a plaintiff was recently summarised in *Krukzeiner v Hanover Finance Ltd*¹ where the court said:

The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1 at 3 (CA). The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341 (PC). In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

¹ *Krukzeiner v Hanover Finance Ltd* [2008] NZCA 187 (CA) at [26].

[14] In *Pemberton v Chappell*² the court also commented on the position where a defence is not evident on a plaintiff's pleading and said:

If a defence is not evident on the plaintiff's pleading I am of opinion that if the defendant wishes to resist summary judgment he must file an affidavit raising an issue of fact or law and give reasonable particulars of the matters which he claims ought to be put in issue. In this way a fair and just balance will be struck between a plaintiff's right to have his case proceed to judgment without tendentious delay and a defendant's right to put forward a real defence.

[15] That position was further reinforced in *Australian Guarantee Corporation (New Zealand) Ltd v McBeth*³ where the court said:

Although the onus is upon the plaintiff there is upon the defendant a need to provide some evidential foundation for the defences which are raised. If not, the plaintiff's verification stands unchallenged and ought to be accepted unless it is patently wrong

[16] Hypothetical possibilities in vague terms, unsupported by any positive assertion or corroborative documents advanced by defendants will not frustrate the obligation on a plaintiff to discharge the onus of proof: *SH Lock (NZ) Ltd v Oremland*.⁴

[17] In *Tilialo v Contractors Bonding Ltd*⁵ the court raised a caution and said:

The Courts must of course be alert to the possibility of injustice in cases in which some material facts to establish a defence are not capable of proof without interlocutory procedures such as discovery and interrogatories. That does not mean that defendants are to be allowed to speculate on possible defences which might emerge but for which no realistic evidential basis is put forward.

[18] A court is not required to accept uncritically any or every disputed fact: *Eng Mee Yong v Letchumanan*.⁶ However the court will not reject even dubious affidavit evidence, even though there must be suspicion as to the good faith of the deponent, if there is an essential core of complaint that supports a defence. In essence, the

² *Pemberton v Chappell* [1987] 1 NZLR 1(CA) at 3.

³ *Australian Guarantee Corporation (New Zealand) Ltd v McBeth* [1992] 3 NZLR 54 at 59.

⁴ *SH Lock (NZ) Ltd v Oremland* HC Auckland CP641/86, 19 August 1986.

⁵ *Tilialo v Contractors Bonding Ltd* CA 50/93, 15 April 1994 (CA) at 6.

⁶ *Eng Mee Yong v Letchumanan* [1980] AC 331.

inquiry is whether or not the person's assertion passes the threshold of credibility:
Pemberton v Chappell;⁷ *Orrell v Midas Interior Designs*.⁸

[19] In *Tilialo v Contractors Bonding Ltd*⁹ it was observed:

Drawing the line between mere assertions of possible defences and material which sufficiently raises an arguable defence so that the defendant should not be denied the opportunity to employ interlocutory procedures and have a trial is a matter of judgment. Views may well differ.

The defendants' position

[20] The defendants have not filed a notice of opposition.

[21] The defendants have filed a document entitled *Notice of appearance*. It makes the claim that the subject land is vested in Ngä Uri Whakatipurunga O Ngarae (Inc). It claims that the land concerned is vested in the incorporation and that the land has the status of Mäori customary land.

[22] The defendants rely on an order made by the Tenancy Tribunal.

[23] It is significant that in the final two paragraphs of the reasons given by the Tenancy Tribunal the following is provided:

14. Therefore I find that the premises are not residential premises to which the Residential Tenancies Act 1986 "RTA" applies and this is accordingly not a landlord and tenant dispute.

I find that John Fisk and David Blanchett, receivers of Mairoa Downs Ltd (in receivership) are not entitled to an order for possession of the premises at 1714 Oparure Road, RD5, Te Kuiti. John Fisk and David Blanchett, receivers of Mairoa Downs Ltd (in receivership) are not entitled to assume and landlord rights pursuant to s 58 RTA because Mairoa Downs Ltd was not the landlord and there was no residential tenancy in place prior to the company being placed in receivership.

⁷ *Pemberton v Chappell*, above n 2.

⁸ *Orrell v Midas Interior Designs* (1991) 4 PRNZ 608 at 613.

⁹ *Tilialo v Contractors Bonding Ltd*, above n 5, at 8.

[24] The defendants claim that they do not require any licence or permission to occupy the house because they claim they are legally the owner of it.

Analysis

[25] Mr MacKenzie summarised in his submissions the justification for the application for the possession order sought.

[26] The application is made by the receivers who were duly appointed by the ANZ National Bank Ltd. Pursuant to the Receivership Act 1993, s 14(2) a receiver may:

- a) Demand and recover, by action or otherwise, income or property in receivership and

...
- b) Manage the property in receivership.

[27] Receivers appointed by a mortgagee, as is the case before me, also have a power of sale under the Property Law Act 2007. Section 95 applies certain covenants in mortgages over land. They are contained in the Property Law Act 2007, Schedule 2, Part 1. Schedule 2, Part 1, s 13 gives the receiver appointed by a mortgagee the power of sale.

[28] Mr MacKenzie also drew attention to hcr 13. Rule 13.2 provides:

13.2 Application of Part

- (1) This Part applies to every proceeding in which the plaintiff claims the recovery of land that is occupied solely by 1 or more unlawful occupiers.
- (2) This Part does not affect the application of Part 12 (summary judgment) to a proceeding for the recovery of land.

[29] Rule 13.1 defines an unlawful occupier:

13.1 Interpretation

In this Part, **unlawful occupier** means a person who—

- (a) occupies or continues to occupy land of the plaintiff without the licence or consent of the plaintiff or the plaintiff's predecessor in title; and
- (b) is not a tenant or subtenant holding over after the termination of a tenancy or subtenancy.

[30] If there is no subject lease, as is acknowledged by the defendants, the question then is whether the defendants have any licence to occupy the house. A licence to occupy, if it exists in this case, may be terminated at will by the entity who has the control of the land: *McLaughlin v McGarry*.¹⁰

[31] The plaintiffs terminated the defendants' right to occupy the house on 21 June 2010 by giving the defendants ninety days to leave. A further notice to leave was issued on 26 October 2010, which required the defendants to remove their possessions and vacate the house.

[32] I can find no justification in the document filed by the defendants' entitled *Notice of appearance* for a defence to the claim for possession. Out of an abundance caution, though, I consider whether the document was intended to be a challenge to the court's jurisdiction to hear and determine this application, pursuant to r 5.49. If that was its intention I reject it entirely. Evidence has been placed before me that the land concerned is registered under the Land Transfer Act 1952. No foundation for the claim that it has been legally vested in an entity other than the current registered proprietor has been placed before me. Having reached that conclusion I conclude that the plaintiffs are entitled to the order for possession that they seek.

The caveat application

When this matter was called in the summary judgment list on 6 December 2010 I was advised by Mr and Mrs Fagan that they had filed an application to sustain a caveat that has been lodged against the title. The application was given a date of

¹⁰ *McLaughlin v McGarry* (2000) 15 PRNZ 178 at [34].

hearing by the Registrar for 7 February 2011. If, in fact, the application was left until that date for its disposal without any order having been made the caveat would lapse pursuant to the Land Transfer Act 1952, s 145A(3). When I drew that matter to Mr and Mrs Fagan's attention I offered to them the opportunity of having the application listed for determine on Wednesday, 8 December 2010 along with the summary judgment application. They accepted that position and led me to believe that they would attend the hearing on 8 December 2010. That, then, is the reason why I now consider the caveat application.

[33] Mr Fagan, in his affidavit in support, says he is the creator of a trust. He says that he has transferred the land concerned to be held in trust. He claims that he is beneficially entitled to the land.

[34] He makes an application pursuant to the Land Transfer Act 1952, s 145A that his caveat not lapse.

[35] The Land Transfer Act 1952, s 145A provides:

145A Early lapse of caveat against dealings

- (1) The registered proprietor of any estate or interest in the land protected by a caveat against dealings (other than a caveat lodged by the Registrar) may apply to the Registrar for the caveat to lapse.
- (2) The Registrar must give the caveator notice of an application under subsection (1).
- (3) The caveat lapses with the close of the prescribed period after the date on which the notice under subsection (2) is given unless—
 - (a) the caveator has earlier given to the Registrar notice that an application for an order to the contrary has been made to the High Court; and
 - (b) an order to that effect has been made and served on the Registrar within the prescribed period after the date on which the notice under paragraph (a) is given to the registrar

[36] The applicable principles which apply in considering applications pursuant to the Land Transfer Act 1952, ss 143, 145 and 145A are well known and can be shortly stated. They are:

- (a) The Land Transfer Act 1952, ss 143, 145 and 145A give no guide as to the circumstances in which the Court may make an order that a caveat not lapse: *Catchpole v Burke*;¹¹
- (b) If it is clear that there was no valid ground for the lodging of a caveat, or that the interest which in the first place justified the lodging of the caveat no longer exists, such a caveat should be removed: *Sims v Lowe*;¹²
- (c) The onus under the Land Transfer Act 1952, ss 143, 145 and 145A lies on the caveator to show that he has a reasonably arguable case for the interest he claims: *Castlehill Run Ltd v NZI Finance Ltd*;¹³
- (d) The caveat, being a creature of statute, may be lodged only by a person upon whom a right to lodge it has been conferred by statute. It is not enough to show that the lodging and continued existence of the caveat would be in some way advantageous to the caveator: *Guardian Trust & Executor Co of New Zealand Ltd v Hall*;¹⁴
- (e) For the purpose of this application, the caveator must show that he is entitled to, or be beneficially interested in, the estate referred to in the caveat by virtue of an unregistered agreement: Land Transfer Act 1952, s 137;
- (f) What the caveator must establish is an arguable case for claiming an interest of the kind in the Land Transfer Act 1952, s 137;
- (g) Even if the caveator establishes an arguable case for the interest in the land claimed, the Court retains a discretion to make an order

¹¹ *Catchpole v Burke* [1974] 1 NZLR 620 (CA).

¹² *Sims v Lowe* [1988] 1 NZLR 656 (CA) at 659.

¹³ *Castle Hill Run Ltd v NZI Finance Ltd* [1985] 2 NZLR 104 (CA) at 106.

¹⁴ *Guardian Trust & Executor Co of New Zealand Ltd v Hall* [1938] NZLR 1020 (CA) at 1025 per Callan J.

removing the caveat although it will be exercised cautiously: *Pacific Homes Ltd (in rec) v Consolidated Joineries Ltd*;¹⁵

- (h) Delay is a relevant factor to be weighed in the exercise of the Court's wide discretion under ss 143, 145 and 145A. Delay is more important where there is specific prejudice. What is required is a consideration of all the circumstances: *Varney v Anderson*;¹⁶
- (i) The summary procedure for the removal of a caveat against dealing is wholly unsuitable for determination of disputed questions of fact. Accordingly it has been said:

. . . that an order for the removal of such a caveat will not be made under s 143 unless it is patently clear that the caveat cannot be maintained either because there was no valid ground for lodging it or that such valid ground as then existed no longer does so. *Sims v Lowe* [1988] 1 NZLR 656 at pp 659-660.

- (j) The summary removal of a caveat pursuant to the Land Transfer Act 1952, ss 143 or 145 or 145A is proper only where it is patently clear:
 - (i) That there is no valid ground for lodging it originally; or
 - (ii) That the interest which originally justified it being lodged no longer exists: *Mall Finance & Investment Co Ltd v Slater*.¹⁷

[37] There is no basis for the caveat which has been lodged in this case. There is no evidence of any grant or any basis for an interest being said to arise from the registered proprietor in favour of Mr Fagan in this case. I am satisfied that Mr Fagan has no beneficial interest in the land which would justify a caveat pursuant to the Land Transfer Act 1952, s 137. It follows from that conclusion that the caveat must be removed.

¹⁵ *Pacific Homes Ltd (in receivership) v Consolidated Joineries Ltd* [1996] 2 NZLR 652 at 656.

¹⁶ *Varney v Anderson* [1988] 1 NZLR 478 (CA) at 480.

¹⁷ *Mall Finance & Investment Co Ltd v Slater* [1976] 2 NZLR 685.

Judgment

[38] I enter judgment and make the following orders:

- a) Mairoa Holdings Ltd is added as a plaintiff to this proceeding;
- b) The defendants shall vacate the house and land contained in certificate of title 317916 (South Auckland Registry) and having the residential address at 1714 Oparure Rd, Te Kuiti within ten calendar days of the service of this order on the defendants;
- c) Leave is reserved to the plaintiffs to apply further orders to implement the principal order made in this judgment;
- d) Caveat No 8612238.1 on identifier 317915 will be removed;
- e) Caveat No 8612248.1 on identifier 317916 will be removed;
- f) Caveat No 8612260.1 on identifier 317917 will be removed;
- g) Caveat No 8612276.1 on identifier sa46d/960 will be removed;
- h) Caveat No 8612263.1 on identifier sa47b/795 will be removed;
- i) Caveat No 8612253.1 on identifier sa493/24 will be removed;
- j) Caveat No 8612283.1 on identifier sa208/220 will be removed;
- k) Caveat No8612258.1 on identifier sa650/223 will be removed;
- l) Caveat No 8612267.1 on identifier sa1263/97 will be removed; and
- m) The defendants shall pay costs on the summary judgment application and the caveat application based on Category 2 Band B together with

disbursements as fixed by the Registrar