IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2012-485-2107
[2012] NZHC 3322

BETWEEN	WAYNE SEYMOUR CHAPMAN Plaintiff
AND	MALCOLM EDWARD RABSON Defendant

Hearing: 7 December 2012

Counsel: N Whalley with H Arathimos for Plaintiff
Defendant in Person

Judgment: 10 December 2012

JUDGMENT OF THE HON JUSTICE KÓS

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[1] This is an application for summary judgment by the plaintiff trustee for vacant possession of a residential property at 153 Main Road North, State Highway 1, Paraparaumu (Property).

Background

[2] A brief background to the matter is that the plaintiff is the sole trustee of the Gallagher Rabson Family Trust (GRF Trust). He was appointed by Court order in October 2010 by Wild J. The Property is vested in him as registered proprietor pursuant to vesting orders made in March 2011 by Miller J. This followed lengthy property-related litigation between the defendant and his former partner, Ms Gallagher.

[3] Orders made by the Court of Appeal in December 2011 require the plaintiff trustee to offer the Property to the defendant (or his nominated purchaser) at current market value, and upon terms as determined in the plaintiff's discretion. That offer

is open to acceptance by the defendant on the basis that the settlement is completed either by:

(a) the defendant paying the purchase price in cleared funds at settlement; or

(b) the defendant's obligation to pay the purchase price being satisfied by (i) a payment to the plaintiff in cleared funds of an amount to the value of Ms Gallagher's outstanding relationship property entitlement, (ii) a series of credits to reduce the amounts owed by the GRF Trust to the Malcolm Rabson Family Trust (and the latter Trust to the defendant), and (iii) any balance of purchase price being paid to the plaintiff in cleared funds.

In the event no sale occurs in accordance with the above, on the terms specified by the plaintiff, the plaintiff is to sell the Property to best advantage.

Submissions summarised

[4] The plaintiff's position is that he has offered the Property to the defendant for a price equal to Ms Gallagher's outstanding relationship property entitlement. That is the sum of $463,492.68. He has requested that the defendant cooperate with the sale process. The defendant, he says, has rejected this offer, has not cooperated in the sale process, and has obstructed the plaintiff's real estate agent from accessing the Property. The plaintiff has revoked any occupancy rights the defendant may have had and asked him to leave the Property. The defendant has refused to do so.

[5] The defendant's position is that he accepts that the plaintiff is the registered proprietor of the Property. He does not however accept that the plaintiff has the right to possession or the right to sell the Property. In particular he says that the amount required by way of purchase price has changed, and the plaintiff has "made incorrect statements, provided incorrect information and has not followed the orders of the Court of Appeal". In particular he says he has accepted the offer to purchase, but not specifically at the price nominated by the plaintiff. He said he is prepared to pay the

amount "payable pursuant to the orders of the Court of Appeal". What that amount is, the defendant appears to dispute. He does not however provide his own calculation of it.

Service

[6] On 9 October 2012 the present proceedings were filed. They were given a date for hearing of 26 November 2012. There is an affidavit of service by Anthony Lowe, process server. Mr Lowe deposes that he served the defendant personally[1] on 18 October 2012 at 12.08 pm. He says that he served the documents on the defendant at the Property, "by placing the documents at his feet, him [sic] having refused my attempt to hand the documents to him". Mr Lowe says that he believes it was the defendant he served, for two reasons. First, because the defendant acknowledged his own identity. Secondly, because his appearance matched two Google pictures of the defendant that Mr Lowe was given by his instructing solicitors. The defendant appeared in person before me today. The photographs Mr Lowe attaches to his affidavit certainly appear to be of the defendant. The defendant accepted before me that they are indeed photographs of him. I note that Mr Lowe swore his affidavit before a Deputy Registrar on the same day he effected service, i.e. 18 October 2012. I note also that the affidavit has annexed to it a process report consistent with the contents of the affidavit.

[7] The defendant denies that he was served personally. He gives evidence that at 12.08 pm on 18 October 2012 he was at the yard of Porirua Tow and Salvage Limited. He dates the occasion by reference to an email said to be sent the next day, on 19 October 2012. He asserts that Mr Lowe's affidavit is perjured. He also presents affidavit evidence from three employees of Porirua Tow and Salvage. One of those affidavits does not specify the date at all; one effectively dates the occasion to "the Thursday before Labour Weekend" (which would make it 18 October 2012); and the third does identify 18 October 2012. The defendant's first affidavit sworn 20 November 2012 deposes to an unnamed visitor staying with him having "seen a person get over the fence at the northern end of the property and called out to him.

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[1] With the statement of claim, notice of proceeding, notice of interlocutory application, affidavit of the plaintiff and affirmation of a Mr Eggo (a real estate agent).

He advised me he ignored the person as being a visitor he did not wish to engage with anyone". The defendant's affidavit goes on to to say:

> Several days after this on the 12th day of October 2012 a friend of mine Mr Collins who was walking around the property while having a cigarette (I do not allow smoking inside) came across a bundle of papers lying on the ground on the farm with access about 100 metres from the house.

There is also produced by the defendant an affidavit by Mr Collins, but he says nothing about this incident. In any case, the papers referred to in the defendant's affidavit (which are not otherwise identified) cannot have been the papers that Mr Lowe says he served, because that did not occur until 18 October 2012 – six days after the alleged discovery by Mr Collins, which itself was "several days" after the visitor trespasser incident. So the Collins papers must have been something else. The proceedings, it will be recalled, were filed on 9 October 2012.

[8] Mr Lowe has sworn an affidavit in reply. Given the accusation of perjury made against him, it is only reasonable to receive it. The defendant, when before me, accepted that that must be so. Mr Lowe says that just before midday on Thursday 18 October 2012 he attended the Property. Initially there was no one present, but when approaching the house from a different angle a man left the house and came towards him. Mr Lowe says the man closely fitted the pictures of the defendant that he had with him. Mr Lowe said he yelled out "Malcolm" and gestured to the man to come towards him. He did. I quote from the affidavit:

> He came towards me at which time I got the relevant documents out of my car. As he approached the fence he said "What do you want?" I said, "I have some documents for you". He immediately turned saying "Get off my property". As he turned to return to the house, I dropped the documents over the fence at his feet.

Mr Lowe also annexes copies of telephone records corroborating his evidence that he called his instructing solicitors immediately after effecting service. They show a telephone call between Mr Lowe's cellphone and Buddle Findlay at 12.12 pm on 18 October 2012.

[9] The defendant, before me, said he was not the man Mr Lowe spoke to on 18 October 2012.

[10] Be that as it may, what he did not explain was how, if service did not occur as Mr Lowe deposes, he came by the papers. Because the defendant plainly did have the papers. On 20 November 2012 he filed a notice of opposition and three other supporting affidavits. These he prepared and filed himself. He has not retained a solicitor.

First call

[11] On 26 November 2012 the application was called in the Associate Judge's list.

[12] The plaintiff sought to have the matter argued then and there, at the end of the list. Rule 12.9 requires any notice of opposition and affidavit in answer to the application to be served at least three days before the date for hearing. That relevant date for hearing was 26 November. The defendant had filed his notice of opposition and affidavits in due time. Where summary judgment is not opposed, or there is no substantial issue, hearing may proceed on the date stated in the application. In other cases a further and later hearing date is usually allocated. Timetable orders are then made for the filing of submissions. As all the evidence is in, the hearing may follow swiftly after first call.

[13] The defendant opposed the plaintiff's request and sought adjournment, indicating that he would be seeking legal advice and representation.[2]

[14] The Associate Judge granted the defendant's adjournment application and directed that the opposed summary judgment application be set down for hearing on 4 December 2012, before me.

Further application for adjournment

[15] In a memorandum dated 28 November 2012 the defendant applied for further adjournment, to February 2013. Various reasons are proferred. The only one of any potential substance was that he had been unable to secure legal representation "in the

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2 Minute of Associate Judge Gendall, 26 November 2012 at [6].

short time since becoming aware of the papers (but not accepting that service has been properly effected)".

[16] The plaintiff opposed adjournment. Again a number of grounds are offered. Primarily, that the defendant had ample time to obtain legal advice, had chosen to proceed without it, and that the present application for adjournment to February 2013 is a mere pretext for delay.

[17] Having heard the parties when the matter was called on Tuesday, 4 December, I was not prepared to grant adjournment to February 2013. My reasons are these. First, an application for adjournment is an appeal to the Court's discretion liberally. I was satisfied that this was not an appropriate case in which to exercise discretion. The defendant has throughout the process of dealing with the plaintiff this year represented himself. The probability of such proceedings being brought, in the absence of agreement, has been obvious since a letter from the plaintiff dated 21 May 2012. Despite the fact that the parties were disagreed as to the price to purchase the Property, meaning these proceedings would follow inevitably, the defendant continued to act for himself. I note that that is not at all an unusual course for him. There have been many appearances in the High Court and the Court of Appeal in this protracted litigation (and in other proceedings the defendant has been involved in) where he has acted for himself. Further, the present application is a relatively straightforward one, involving no viva voce evidence. It required no special skill. Certainly not the skill of senior counsel, as the defendant suggests. I was satisfied that there was nothing unjust in the present circumstances requiring the defendant to complete the course he had chosen.

[18] However, although it was a pure indulgence, I was prepared to grant the defendant a short further adjournment, to Friday 7 December, purely to obtain legal counsel. The defendant ultimately did not appear with counsel. He did not seek further adjournment. He had taken legal advice in the meantime, albeit the source of that did not appear. I record that the defendant argued his position clearly and well. There was no inequality of arms in the hearing, which largely concerned itself with factual issues. As will this judgment.

Issues and approach

[19] This application gives rise to two present issues:

(a) Is the application defective for want of service?

(b) Has the plaintiff established, to the standard required, that he is entitled to possession?

[20] The principles governing applications for summary judgment are well known. The plaintiff must discharge the burden of establishing that there is no real defence requiring trial evidence to be taken.[3] In *Jowada Holdings Ltd v Cullen Investments Ltd* the Court of Appeal put it thus:[4]

> In essence, the Court must be persuaded that on the material before the Court the plaintiff has established the necessary facts and legal basis for its claim and that there is no reasonably arguable defence available to the defendant. Once the plaintiff has established a prima facie case, if the defence raises questions of fact, on which the Court's decision may turn, summary judgment will usually be inappropriate. That is particularly so if resolution of such matters depends on the assessment by the Court of credibility or reliability of witnesses. On the other hand, where despite the differences on certain factual matters the lack of a tenable defence is plain on the material before the Court, to the extent that the Court is sure on the point, summary judgment will in general be entered. That will be the case even if legal arguments must be ruled on to reach the decision.

Issue 1: Defective for want of service?

[21] A great deal of time was spent in evidence on this particular question. I have described that evidence already. In the end, however, I am satisfied that it is largely irrelevant. I explained that to the parties when the matter was called on Tuesday. There is no question in this case that the documents have come to the defendant's attention and possession. That is the whole purpose of personal service, regardless of the mechanism employed to achieve that. The defendant has had time to file a

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

[4] *Jowada Holdings Ltd v Cullen Investments Ltd* CA248/02, 5 June 2003 at [28].

detailed notice of opposition, and now six affidavits. I accept Mr Whalley's submission that any issue as to service has been cured in these circumstances.[5]

[22] The application is not therefore defective for want of service.

[23] Although it is not necessary for me to express any further view on this matter, I note:

(a) Mr Lowe's evidence as to service is cogent,. It is supported by the annexures thereto, by the fact it was sworn on the alleged date of service, and by his subsequent affidavit and its annexures. It is also supported by the fact that the defendant has obtained the documents.

(b) The defendant's failure to depose in earlier of his affidavits as to how he actually came by the documents is, on the other hand, curious and unsatisfactory.

[24] The conflict of evidence on this purely peripheral point does not necessitate the conduct of a trial.

Issue 2: Entitlement to possession?

[25] The plaintiff is the registered proprietor of the Property. That is not in issue. The defendant accepts that. I agree with Mr Whalley's submission that, as such, the plaintiff has a prima facie right to possession of his Property.

[26] The defendant's original right to occupy the Property resulted from a resolution of the previous trustees, undated but circa 2007. Clause 3 of that minute records:

> It was resolved to permit Malcolm Rabson and Linda Gallagher to occupy and use, without creating a lease or a tenancy, the property of the Trust situated at 21 Sunset Parade, Plimmerton and 141-153 Main Road, Paraparumu for as long a period as they wish provided that they pay all costs of repairs and maintenance, rates, insurance premiums, interest on any

[5] *Argyle Estates Ltd v Bowen Group Ltd* (2003) 17 PRNZ 57 (HC) at [32], [33] and [39].

> borrowings and other outgoings in respect of the properties, unless otherwise agreed with the trustees.

[27] The defendant's occupation was thus dependent on his paying rates in respect of the Property. The plaintiff deposes that on 16 February 2012 he received a copy of a demand from the Kapiti Coast District Council for rates arrears of $14,556.30 in respect of the Property. The Trust paid those arrears on 22 February 2012. It follows that a condition for occupation was unmet by the defendant for a period of some four years.[6] The defendant has since resumed the payment of rates.

[28] On 21 May 2012 the plaintiff wrote to the defendant advising in accordance with the Court of Appeal's orders, the Property was available for sale to him for $418,992.68. Absent agreement for sale on those terms, the Property would be put on the market. In the absence of cooperation with valuers and agents to sell the Property, the plaintiff said:

> I will have no option but to terminate your occupation right, and obtain an order for vacant possession of the property and sell it without your involvement.

[29] On 29 June 2012 the GRF Trust revoked the licence permitting the defendant to occupy the Property. It rescinded the prior resolution quoted above. A copy of that was sent to the defendant the day the resolution was made.

[30] On 30 August 2012 the plaintiff wrote again to the defendant. He identified that there was an error in the previous calculation of the amount payable in accordance with the Court of Appeal's orders. In fact the amount payable had been *understated* by $44,500. Accordingly the balance due to Ms Gallagher under the Court of Appeal's orders was $463,492.68. The plaintiff again offered sale of the Property to the defendant for that sum. The plaintiff said that unless he received a response by 7 September, he would apply for an order for vacant possession. The letter reminded the defendant that any right of occupation of the Property had already been revoked. The defendant was required to move out of the property and render up vacant possession not later than 30 September 2012.

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[6] The annual rates are approximately $3,000 per annum.

[31] On 6 September 2012 the defendant wrote to the plaintiff saying:

> I confirm (as I have previously) I wish to purchase the Paraparaumu property in accordance with the orders of the Court of Appeal.

[32] On 12 September 2012 the plaintiff responded. He said:

> The orders insofar as they deal with the process I have described authorise me to retain funds for costs which I have done and which will not be brought into account at this point of the exercise. They then authorise me to offer to sell the property to you personally for the difference between what Ms Gallagher is entitled to and what she has already received and otherwise on such terms as I think appropriate. As set out in my letter of 30 August, the price you are required to pay is $463,492.68.

The letter enclosed a formal contract for execution. It was open for acceptance until 5.00 pm on 26 September 2012. No counteroffer would be entertained. Again it reminded the defendant that absent acceptance, and absent cooperation, an order for vacant possession would be sought. It will be recalled that the Court of Appeal orders provided for sale terms, other than price, to be determined by the plaintiff in his discretion.

[33] The defendant did not accept or sign the formal contract tendered by the plaintiff. On 26 September 2012 the defendant responded. The letter said:

> I record that you made an offer to me pursuant to the orders of the Court of Appeal and that I accepted that offer in writing. My advice is that a contract now exists between us and I rely upon that contract.
>
> I confirm that if you and I are unable to agree as to the figure that the orders produced then the matte will have to be decided by an independent party or the Court. I note that the Court of Appeal has refused to consider the matter and that earlier the Supreme Court has said that the Court of Appeal should do so.
>
> I am prepared to have my business adviser discuss with you on a "without prejudice" basis the figures that should be used to ascertain the amount to be paid to complete the settlement.

[34] The final letter in the sequence is from the plaintiff, dated 27 September 2012. It responds to the defendant's letter of 26 September. It says:

> That letter does not constitute an acceptance of my offer to sell because you do not unequivocally accept the price which is a critical element of the offer. Accordingly no contract has been formed.

Discussion

[35] As I said at the outset, this application is for an order that the defendant provide vacant possession of the Property. What is sought in the prayer for relief is an order for vacant possession on the expiration of eight days after service of an order of the Court to that effect. The plaintiff prays also that service of such order may be effected by service at the address for service stated in the notice of opposition (which is the address of the Property), rather than by personal service.

[36] The question is whether the defendant is entitled to continue to occupy the Property. Three points here alone are germane.

[37] First, the plaintiff, as registered proprietor, is prima facie entitled to occupation of the Property. It is his Property, by virtue of prior Court orders, for the purpose of effecting sale.

[38] Secondly, the defendant has no continuing right of occupation of the property. Whatever right he had originally was a mere licence. The undated resolution gives him rights of occupation expressly excluded any lease or tenancy. That licence was conditional on the payment of rates, which did not occur for a lengthy period. Regardless of that, and whether by resumed payment of rates the defendant has reinstated the licence under the undated resolution, it is clear that the plaintiff's resolution (as trustee of the GRF Trust) of 29 June 2012 revoked that former licence. It follows that the defendant has no continuing right of occupation of the property.

[39] Thirdly, I am satisfied that there is no arguable case of contractual entitlement by the defendant to purchase, which might in turn support an implied right of occupation. I note that even if there were such a contractual relationship, it does not follow necessarily that it would trump the plaintiff's proprietary rights pending settlement, including the right to revoke the licence to occupy. There are two distinct inquiries needed. Regardless of that, however, I am satisfied on the balance of probabilities that the exchange of correspondence between the plaintiff and the defendant gives rise to no contract for sale. That is a matter for determination on the face of the documents themselves. The subjective intentions of the parties are not

material. The correspondence speaks for itself. I am satisfied that a reasonable, objective bystander reading the correspondence would have to conclude, as the plaintiff did in his letter of 27 September 2012, that there was no agreement for sale. That is because there was no agreement on an essential term, price. As a result, any remaining agreement would be too uncertain to constitute an enforceable contract.

[40] The defendant had here an election. Either he accepted the plaintiff's offer, which would entitle him to purchase the Property (and perhaps also to continue to occupy it pending settlement) or he did not. If he did not accept it, but rather counter-offered by reference to the original orders of the Court of Appeal, there could be no contract.

[41] Eventually, the defendant himself acknowledged that that was the position. He acknowledged in submissions before me that he does not agree to the $463,492 price offered by the plaintiff. Nor does he agree to the special terms included by the plaintiff in the formal sale contract tendered for execution on 12 September 2012. In particular he objects to a clause requiring him to remove two caveats on the Property. It is clear that the defendant was instrumental in the imposition of those caveats in the first place. But he says that one of them is now beyond his control (the caveator having gone into liquidation) and that the other caveat is for the protection of the Malcolm Rabson Family Trust (of which he is one of two trustees). I do not need to get into the detail of that argument; the short point is that for this reason also there is no final contract of sale.

[42] The defendant advanced a number of complaints about the conduct of the plaintiff as Court-appointed trustee. In particular he complains that an excessive sum has been retained by the plaintiff to allow for fees and the eventual winding-up of the GRF Trust after sale of the Property. The evidence before me is not focused on those issues, and nor should it have been. They are beyond the scope of the present proceeding. He complains also that the offer is inconsistent with the Court of Appeal's orders. In essence that he is being asked to pay too much. That argument does not pass scrutiny. I see nothing in the record to suggest the plaintiff's calculation, as independent Court-appointed trustee, is incorrect. The calculation is not one for his own benefit. Notably, the defendant does not say what the right price

is. But even if he were correct, none of that creates any arguable prerequisite for continued occupation post-licence revocation, based on a contract of purchase.

[43] It may be that as a beneficiary of the GFR Trust, and as a party in the previous proceedings, the defendant has issues to ventilate. But they must be ventilated separately from this proceeding for possession.[7] None of those issues go any way to sustaining a continuing right of possession by the defendant in the face of (1) transfer of ownership by Court order in favour of the plaintiff, (2) revocation of the previous licence to occupy, and (3) the absence of any contract of purchase.

[44] The plaintiff has therefore satisfied me that the defendant has no reasonably arguable defence to the plaintiff's claim for possession of the Property.

Result

[45] There will therefore be an order in accordance with the prayer in the statement of claim. Namely, an order that the defendant provide vacant possession of the Property to the plaintiff on the expiration of eight days after service of the sealed order of this Court.

[46] Service of such order may be effected by delivery of the papers to 153 Main Road North, State Highway 1, Paraparaumu, rather than by way of personal service. I direct that a copy also be emailed to the defendant at bluescape@xtra.co.nz.

[47] The plaintiff is entitled to costs. They are to be calculated on a category 2 band B basis. If not agreed, I will receive short memoranda.

Stephen Kós J

Solicitors:
Buddle Findlay, Wellington for Plaintiff
And to:
Defendant in Person, 153 Main Road North, SH1, Paraparaumu (bluescape@xtra.co.nz)

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7 See *Hankins v Jamieson-Bell* HC Wanganui CIV 2008-483-002, 15 February 2008 at [37].