EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT WAIROA

CIV-2017-082-000057
[2018] NZDC 1025

BETWEEN	ROLAND MATLEY Plaintiff
AND	SUSANNE ELIZABETH LYONS Defendant

Hearing:	19 January 2018
Appearances:	H Vaughn for the Plaintiff Defendant appears in Person
Judgment:	19 January 2018

ORAL JUDGMENT OF JUDGE W P CATHCART

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[1] Mr Matley applies for summary judgment to recover possession of land situated at [address deleted] on the Hawke's Bay Registry. He pleads he is now the unencumbered owner of the land and is entitled to its possession.

[2] The respondent, Ms Lyons, signed a deed dated 27 April 2017. The deed records that Ms Lyons was originally the owner of the property, subject to a mortgage in favour of Mr Matley. The principal sum of the mortgage was over $187,000. Consecutive fortnightly instalments of $400 were due to be paid under the mortgage penalty interest of 12 percent per annum.

[3] Under that deed, she transferred the land to Mr Matley. The deed also allowed Ms Lyons a further 42 days from 27 April 2017 to vacate the land. Mr Matley pleads she has refused to do so.

[4] By way of notices of demand, dated 18 February 2015 and 12 April 2017, Ms Lyons was required to pay the whole principal sum under the mortgage but failed to do so. There were also rate arrears. Several windows broken on the property. There was rubbish on the property. Several walls had been broken in the house. These matters are recited in the contents of the deed.

[5] Also, the deed records Ms Lyons refused to allow Ms Matley access to the land and that this was in breach of cl 13(d) of the mortgage.

[6] A proposal was put forward, as noted in the deed. The proposal was dated 30 March 2017. It was designed to avoid a mortgagee sale. The proposal was Ms Lyons transfer the property to Mr Matley in return for him giving $131,000 of the debt that was owed to him under the mortgage. The balance of the debt to be repaid upon demand by equal consecutive fortnightly instalments at $400. The proposal also included a stipulation Ms Lyons vacate the property 42 days after the settlement date. The settlement date was 27 April 2017.

[7] As evidenced in the deed, the parties agreed to that proposal. The property was transferred under the deed back to Mr Matley. He forgave the substantial sum of $131,000 of the principal sum secured by the mortgage. The balance owed under the mortgage was payable in accordance with the proposal. And it was agreed between the parties—as evidenced in the deed—Ms Lyons would vacate the property in 42 days thereafter.

[8] When that 42-day period expired, Ms Lyons did not vacate the property. Mr Matley has applied for summary judgment to recover possession of the land. He relies on the central proposition that Ms Lyons, pursuant to the deed, has no defence because she is in possession of the land without right, title or licence. In short, he says Ms Lyons presently is in law and fact a trespasser. Ms Lyons has not challenged the application for summary judgment by any formal steps. I have in front of me an unchallenged affidavit.

[9] Ms Vaughn for the plaintiff advised me, as is her duty as an officer of the Court, that there were some payments that came from Ms Lyon's WINZ benefit that reached

Mr Matley after the 42-day period had expired. I initially raised the issue of any payments during that period in case there was an arguable defence Ms Lyons had effectively become a tenant by conduct since the 42-day period expired. In short, a tenancy at will. Even under the deed, the relationship between the parties during the 42-day period would have been equivalent to a landlord-tenancy relationship for that exact period.

[10] Ms Vaughn advises, as at 30 October, no further payments were received. Ms Vaughn was a bit concerned about whether the earlier payments were designed to create the very defence I enquired about. However, no payments have been made since 30 October 2017. Ms Lyons has expressly confirmed that position to me. Under questions from me, she said no payments have been made since 30 October 2017. Thus, it is uncontested that since 30 October 2017 Ms Lyons made no payments and was reminded by notice to vacate the land, therefore no landlord-tenancy relationship could possibly exist.

[11] Ms Lyons, however, does not focus on that today. She wants the opportunity to obtain legal advice because she says, to use her words, she was "blackmailed" into handing over the title. That is a serious allegation. It is tantamount to an allegation of fraud. All the warnings to parties making unsubstantiated fraud allegations come to mind. Ms Lyons, however, is self-represented. She told me today she has tried to obtain legal advice but she has been told that she is entitled to civil legal aid.

[12] The difficulty for Ms Lyons is that she took no steps to formally defend these proceedings. Moreover, her representation to me that she has made no payments since 30 October is significant. And the blackmail allegation made without evidence.

[13] The Court's jurisdiction to deal with this matter is covered by the District Courts Act 2016. Under s 79, the Court has jurisdiction to hear and determine any proceedings for the recovery of land within statutory cap where the following situation relevantly exists; namely, the defendant is "a person without right title or licence is in possession of the land."[1]

[1] s 79(2)(c) District Courts Act 2016.

[14] The plaintiff relies on that jurisdiction. That immediately requires me to ascertain whether under s 79(2)(c) Ms Lyons is a person who has any arguable right title, licence or possession in the land. But, as I have already established, it is uncontested that since 30 October 2017 no payments have been made. Subject to this allegation about "blackmail," there is no evidence to suggest a landlord-tenancy relationship currently exists and that Ms Lyons is in fact and in law a trespasser on the land.

[15] The principles applicable to summary judgment are well settled. They are as follows:

(a) The power to give summary judgment is intended to apply only in clear cases where there is no reasonable doubt that the plaintiff is entitled to judgment and where it is inexpedient to allow a defendant to defend for mere purposes of delay.[2]

(b) It is important to pay proper regard to a defendant's interest and to be wary of allowing the summary judgment procedure to become an instrument of oppression or injustice in the laudable interest of an expediting litigation.[3]

(c) Summary judgment will not be granted where there is a credible dispute since questions of credibility can be determined only when a witness is in the witness box on oath, and cross-examined, and the summary judgment procedure does not permit that method of testing allegations.[4]

(d) The onus is on the plaintiff to satisfy the Court that the defendant has no defence to the claim.[5]

(e) While the onus of showing that there is no defence lies with the plaintiff, the discharge of that onus is not to be frustrated by a defendant

[2] *Pemberton v Chappell* [1987] 1 NZLR 1 (1986) 1 PRNZ 183.
[3] *Doyles Trading Co Ltd v West End Services Ltd* (1989) 1 NZLR 38, (1986) 1 PRNZ 677.
[4] *Busch v Dive & Marine Tours Ltd* HC Auckland, 19/2/1987, CP1587/86.
[5] *Pemberton v Chappell* [1987] 1 NZLR 1 (1986) 1 PRNZ 183.

raising hypothetical possibilities in vague terms unsupported by any positive assertions or corroborative documents.[6]

(f) A denial of liability in general terms is unacceptable. Where there is documentary evidence supporting the defence, this should be included. This is particularly important where the facts of the defence are peculiarly within the knowledge of the defendant.[7]

[16] In *AGC (NZ) Ltd v McBeth*,[8] the Court of Appeal emphasised:

> 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

[17] Applying those well settled principles to the current application, there is on the evidence before me and the representations by Ms Lyons, no doubt Mr Matley is the legal owner of the property and that Ms Lyons is a trespasser.

[18] The blackmail allegation is unsubstantiated. The only basis upon which this summary judgment procedure could not be granted in favour of the plaintiff today is if I considered it appropriate for Ms Lyons at this "midnight" hour be given the opportunity to obtain legal advice about that allegation.

[19] However, as I have indicated with the recital of the various principles, the summary judgment procedure should not be frustrated by a defendant raising hypothetical possibilities in vague terms unsupported by positive assertions, especially where there is delay.

[20] I have looked at the issue as to whether there is a plausible argument Ms Lyons could suggest blackmail. The deed was drawn up by the plaintiff's solicitors. But, in the deed, Ms Lyons acknowledges that Woodward Chrisp, the firm acting for the plaintiff in respect of the matter, had drawn up the deed and that she had been advised to seek independent legal advice in respect of the transaction, but declined to do so.

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[6] *S H Lock (NZ) Ltd v Oremland* HC Auckland, 19/8/1986, CP641/86, Wylie J.
[7] *Pemberton v Chappell* [1987] 1 NZLR 1 (1986) 1 PRNZ 183.
[8] *AGC (NZ) Ltd v McBeth* [1992] 3 NZLR 54, (1992) 4 PRNZ 544.

On the face of the deed, therefore, Ms Lyons' allegation of blackmail cannot stand. She simply declined to obtain that legal advice. Also, the contents of the deed undermine any suggestion of blackmail or undue influence or unconscionability. As noted earlier, Mr Matley forgave a substantial sum under the mortgage. Moreover, I have no evidence in front of me to even begin to look at Ms Lyon's blackmail allegation.

[21] Quite apart from summary judgment, I alerted Ms Vaughn to the possibility that judgment by default could be obtained. This is under r 15.8(1) District Court Rules 2014. I set out r 15.8(1) below:

> **15.8 Recovery of land or chattels**
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> (1) If the relief claimed by the plaintiff is the recovery of land or chattels and the defendant does not file a statement of defence within the number of working days required by the notice of proceeding, the plaintiff may seal judgment that the person whose title is asserted in the statement of claim recover possession of the land or the chattels together with costs and disbursements as fixed by the Registrar.

[22] I have dealt with this issue before in other proceedings. I refer to *Māori Trustee v Hooper*.[9] In that decision, I dealt with two points of law. The first does not relate to this case. It was a jurisdictional issue about the recovery of land under the Property Law Act 2007. The second point related to the availability of a judgment by default procedure in claims for recovery of land.

[23] In claims where a plaintiff seeks an order for recovery of land, that ability to use the default procedure was recently confirmed in the High Court jurisdiction by Palmer J in *Andrews v Trustee Advisors Limited*.[10]

[24] In *Māori Trustee v Hooper,* I confirmed that that same analysis applies equally to the District Court. I set out below [28] to [38] of my judgment.

> [28] A further issue arises as to whether the District Court can grant judgment by default in relation to that aspect of the plaintiff's claim where he seeks an order for possession of the land. A plaintiff may seal judgment by default in relation to a liquidated demand (r 15.7) or recovery of land or

[9] *Māori Trustee v Hooper* [2017] NZDC 10975, 15 December 2017.
[10] *Andrews v Trustee Advisors Limited* [2015] NZHC 2934.

chattels (r 15.8). Where judgment by default is sought, "for other than a liquidated demand" the proceeding must be conducted by way of formal proof (r 15.9).

[29] Rule 15.7(1) District Court Rules 2014 reads:

> **Liquidated demand**
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> (1) If the relief claimed by the plaintiff is payment of a liquidated demand in money and the defendant does not file a statement of defence within the number of working days required by the notice of proceeding, the plaintiff may seal judgment in accordance with this rule for a sum not exceeding the sum claimed in the statement of claim plus—
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> (a) interest (if any) payable as of right calculated up to the date of judgment (if interest has been specifically claimed in the statement of claim); and
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> (b) costs and disbursements as fixed by the Registrar

[30] Rule 15.8(1) reads:

> **Recovery of land or chattels**
>
> (1) If the relief claimed by the plaintiff is the recovery of land or chattels and the defendant does not file a statement of defence within the number of working days required by the notice of proceeding, the plaintiff may seal judgment that the person whose title is asserted in the statement of claim recover possession of the land or the chattels together with costs and disbursements as fixed by the Registrar.

[31] Rules 15.9(1) and (2) reads:

> **Formal proof for other claims**
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> (1) This rule applies if, or to the extent that, the defendant does not file a statement of defence within the number of working days required by the notice of proceeding, and the plaintiff seeks judgment by default for other than a liquidated demand.
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> (2) The proceeding must be listed for formal proof and no notice is required to be given to the defendant.

[32] Under the District Court Rules, quick resolution of an action for recovery of land may be dealt with under not only the procedure for obtaining summary judgment (Part 12) but also under the special summary proceeding for recovery of land under Part 13. The latter does not replace the summary judgment procedure. The summary proceeding option is an alternative to the summary judgment procedure. If the Part 13 procedure is adopted, a statement of claim and affidavit must be filed with the aim of obtaining a speedy judgment. Where the procedure under Part 13 is engaged, the provisions are mandatory and must be complied with. However, the summary judgment procedure is an available alternative.

> [33] Commentary suggests therefore that the Part 13 procedure appears to confer little benefit and is often ignored in practice. As reflected in the High Court, most plaintiffs choose the summary judgment procedure to ensure the possibility of a quick judgment.
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> [34] However, r 15.8 clearly contemplates that the judgment by default procedure is also available. In cases where the defendant has not filed a statement of defence within the required time, and if preconditions in r 15.8(1) are satisfied, a plaintiff may seal judgment that the person whose title is inserted in the statement of claim can recover possession of the land or the chattels.
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> [35] The availability of this alternative approach is supported by the decision of Palmer J in *Andrews v Trustee Advisors Limited*.[11] In *Andrews,* the appellant applied to set aside a judgment by default obtained against them by the respondent. No statement of defence had been filed. The plaintiff requested judgment by default and the registrar of the High Court granted judgment by default for recovery of a chattel, namely, shares.
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> [36] The appellants unsuccessfully argued that because r 15.9 applied only to liquidated demands the respondent should proceed by way of formal proof under r 15.9. Palmer J dismissed that argument because it would obviate r 15.8 which expressly enables a plaintiff to seal judgment by default for the recovery of land or chattels. Palmer J therefore read r 15.9(1) as if it said:[12]
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> > This rule applies if, or to the extent that, the defendant does not file a statement of defence within the number of working days required by the notice of proceeding, and the plaintiff seeks judgment by default for other than a liquidator demand *or recovery of land or chattels*.
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> [37] Palmer J considered that this reading of r 15.9(1) is consistent with the text, scheme and purpose of the rules. He considered r 15.8 was an alternative avenue of obtaining default judgment to judgment by formal proof under r 15.9. Palmer J did not question the availability of the judgment by default procedure under r 15.8 where that rule was engaged by the circumstances of the case.
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> [38] In my view, there is clear jurisdiction to grant judgment by default in relation to the plaintiff's claim for possession of the land described in the statement of claim.

[25] This leads me to the conclusion that Mr Matley here would be entitled to judgment in one of two ways. First, summary judgment; second, judgment by default. I do not have a judgment by default application in front of me. Therefore, I deal only with the summary judgment procedure.

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[11] *Andrews v Trustee Advisors Limited* [2015] NZHC 2934.
[12] *Andrews v Trustee Advisors Limited* [2015] NZHC 2934 at [14].

[26] The plaintiff has satisfied me that summary judgment should be awarded. An order will be made for possession of the land in favour of the plaintiff. The details of the description of that land are stated in the pleadings as follows: Property at [address deleted] Hawke's Bay Registry.

[27] There will also be an award of costs in favour of Mr Matley on a 2B basis plus fees and disbursements as fixed by the registrar.

[28] Judgment for the plaintiff accordingly.

W P Cathcart
District Court Judge