EDITORIAL NOTE: NO SUPRESSION APPLIED.

IN THE DISTRICT COURT
AT MANUKAU

CIV-2016-092-2912
[2017] NZDC 4271

UNDER	Section 146 of the Land Transfer Act 1952
BETWEEN	TE KAUWHATA DEVELOPMENTS LIMITED Plaintiff
AND	TRUSTEES EXECUTORS LIMITED Defendant

Hearing: 28 February 2017

Appearances: Mr Sills for the Plaintiff
Mr Gee for the Defendant

Judgment: 13 March 2017

DECISION OF JUDGE R McILRAITH
On Interlocutory Application to Strike Out Claim

---

[1] Te Kauwhata Developments Limited (**TKD**) claims compensation pursuant to s 146 of the Land Transfer Act 1952 (**the Act**). TKD alleges that Trustees Executors Limited (**TEL**) lodged a caveat on the title to a property it owns at 114 Travers Road, Te Kauwhata without reasonable cause.

[2] TEL has applied to strike out TKD's claim in its entirety on the basis that it is statute-barred and, accordingly, frivolous or vexatious and/or otherwise an abuse of the process of the Court.

[3] The key issue to be determined in this application is whether the 6 year limitation period for a proceeding claiming compensation under s 146 of the Act runs from the date the caveat was lodged by TEL on 23 February 2010 or from when TEL says it sustained damage (from a date in late 2012 onward). If the former, the claim is statute-barred; if the latter, it is not.

Background

[4] It is common ground that the matter in issue arises out of a large mortgage fraud scheme perpetuated by a Mr Malcolm Mayer. The scheme involving a number of Auckland city and city fringe properties, involved some $50 million in loan advances obtained from TEL by fraud. Mr Mayer has been convicted of fraud and sentenced to a substantial term of imprisonment.

[5] It is said that a part of Mr Mayer's scheme was preserving the proceeds of the fraud by the acquisition of other land assets held in the names of associates. TEL maintained that the registered proprietors of those properties held properties and/or the free equity so created as trustee of an institutional constructive trust for its benefit.

[6] Among other properties, TEL asserted that the proceeds of the fraud committed against it had been used to acquire equity in the property owned by TKD at Travers Road, Te Kauwhata. It therefore lodged a caveat on the title to the property. The caveat in issue was lodged on 23 February 2010.

[7] Prior to the entry of the caveat on the title, TEL wrote to TKD setting out its case for the claimed equitable interest in the property. In addition, TKD was notified of the lodging of the caveat by the Registrar General of Land.

[8] In due course TKD acted to have the caveat removed by a lapse application to the Registrar General under s 145A of the Act. That application proceeded to a defended hearing in the High Court. The High Court declined to make a final order that the caveat not lapse and the caveat lapsed accordingly in 2013.

[9] Correspondence was entered into in 2015 when TKD wrote to TEL to advance a claim for damages under s 146 of the Act. The correspondence is attached to the affidavit of Mr Robert Russell in support of TEL's application to strike out.

[10] Of particular importance was the letter from TKD's then barrister on 8 April 2016 in which TKD set out its claim for alleged damages and requested payment from TEL. TEL responded putting TKD on notice of what it said was a limitation

bar that arose. The current proceedings were then commenced on 28 September 2016 and served on TEL on 17 October 2016. As it had indicated in correspondence, TEL promptly applied to strike out the claim as statute-barred under s 4(1)(d) of the Limitation Act 1950.

Strike Out Application

[11] TEL applies to strike out TKD's claim in its entirety in reliance upon rule 15.1(1)(c) and/or (d) of the District Courts Rules 2014. Pursuant to those rules the Court may strike out all or part of a pleading if it is frivolous or vexatious, or is otherwise an abuse of the process of the Court.

[12] This rule corresponds to rule 15.1 of the High Court Rules 2008. It is well established law that a clear case of a limitation defence is a good ground to strike out a proceeding on the basis that it is frivolous, vexatious and an abuse of process. Counsel referred to *Trustees Executors Limited v Murray*[1]:

> If the defendant demonstrates that the plaintiff's proceeding was commenced after the period allowed for the particular cause of action by the Limitation Act, the defendant will be entitled to an order striking out that cause of action unless the plaintiff shows that there is an arguable case for an extension or postponement which would bring the claim back within time.

[13] There is no issue of extension or postponement in this case. It is common ground that TKDs claim has been bought more than six years after the caveat in issue was lodged by TEL. The issue is whether the limitation period began running from the time of lodgement of the caveat or a subsequent date.

[14] The approach to a strike out application in circumstances such as this was succinctly stated in *Murray*[2]:

> I consider the proper approach, based essentially on *Matai*, is that in order to succeed in striking out a cause of action as statute-barred, the defendant must satisfy the court that the plaintiff's cause of action is so clearly statute-barred that the plaintiff's claim can properly be regarded as frivolous, vexatious or an abuse of process.

[1] [2007] 3 NZLR 721 (SC) at 736 per Tipping J.
[2] Ibid at 721.

[15] Mr Sills also referred me to the observations of Tipping J in *Porter v NZ Guardian Trust Co Ltd*:[3]

> If the relevant law has not been settled at the highest level or if the case presents a novel point of law, the proceedings should be allowed to go to trial unless the Court is satisfied that the proposition of law advanced by the plaintiffs is completely unarguable.

[16] Mr Gee submitted that these observations were of limited assistance as they were made in the context of strike out applications made on the ground that a pleading discloses no reasonable cause of action. After careful consideration of this point I cannot agree. I consider that the principle is equally appropriate for an application of this nature where the central issue is one of statutory interpretation. As Mr Sills noted, there is also the general proposition that should be front of mind that a Court must be cautious in exercising the power to strike out and deprive a plaintiff of its opportunity to be heard.

Application to s 146 of the Land Transfer Act

[17] It was common ground that the key question for the Court on this application is when a plaintiff's cause of action against a caveator under s 146 accrues. Neither counsel had been able to locate any decision of the courts directly on point.

[18] It was also common ground that a cause of action accrues when every fact exists which it would be necessary for the plaintiff to prove in order to support its right to the judgment of the Court. The elements of the cause of action depend, of course, on the nature of the cause of action. When then can it be said that every fact exists which it would be necessary for a plaintiff to prove in order to support a claim for compensation pursuant to s 146?

[19] For TEL, Mr Gee submitted that on a plain reading of s 146, liability for a caveator arises as a consequence of their lodging a caveat without having reasonable cause to do so. He submitted strongly that the lodgement of the caveat is the unreasonable act and that triggers the potential liability. From that point in time the caveator stands exposed to a damages claim. Mr Gee submitted that the key words

[3] (1996) 7 NZCLC 261, 202 at 325.

in s 146(1) were "any person who may have sustained". He drew a distinction between the wording in s 146(1) and (2) where the words "has sustained damage" are used to define the person able to bring an action at law seeking compensation.

[20] In support of this proposition, Mr Gee submitted that the nature of a caveat and, in particular, its immediate and drastic effect on a registered proprietor, is such that a registered proprietor can be expected to act promptly and responsibly to bring a proceeding pursuant to s 146. The registered proprietor is of course notified by the Registrar General of Land of the lodgement of the caveat and, in Mr Gee's submission, "may have" sustained damage from the day that a caveat is lodged given the immediate and drastic effect.

[21] Mr Gee emphasised that it is the policy of the law that there should be an end to litigation and that stale demands should not proceed. He referred to a number of reasons which guide this policy of the law. They were:

(a) Defendants should be protected against claims being made on them after a long period of time, during which they may have lost the evidence available to them to rebut the claim;

(b) Plaintiffs should be encouraged not to sleep on their rights, rather to institute proceedings without unreasonable delay; and

(c) Defendants should be in a position to know that, after a given period of time, an incident which might have led to a claim against them has finally been closed.

[22] Mr Sills submitted that it is clear that a plaintiff claiming under s 146 must prove that it has sustained damage in order to obtain judgment. He submitted that this was explicit in the wording of s 146 itself. He further submitted that the word "may" in s 146(1) "any person who **may** have sustained damage", recognises that damage is not a necessary consequence of a caveat being lodged without reasonable cause. He placed particular emphasis upon the fact that the Courts have expressly recognised sustained damage as a necessary element of the cause of action.

[23] In this regard, Mr Sills referred to the observations regarding the elements of a claim in *Savill v Chase Holdings (Wellington) Limited* :

> A person claiming damages under this section must prove three things: firstly, that there has been a caveat lodged by the defendant, secondly that such caveat was lodged without reasonable cause and thirdly that he has sustained damage thereby: see Brinsden J in *Deputy Commissioner of Taxation v Coolwest Management Pty Limited* [1978] WAR129.[4]

[24] Mr Sills noted also that the elements of the cause of action are also set out in a leading text, Campbell on Caveats as follows:

> (a) The onus of proof in all respects is on the person seeking compensation under s 146. Such person **must prove** three things:
>
> (i) That there has been a caveat lodged by the defendant; and
>
> (ii) That such caveat was lodged without reasonable cause; and
>
> (iii) That he or she **has sustained damage** thereby.[5]

[25] As a result, Mr Sills says that it is a straightforward proposition that a cause of action under s 146 does not accrue until a claimant is able to prove that he or she has sustained damage. In this case, Mr Sills says that it was not until TKD had actually suffered loss that it could proceed.

[26] Mr Sills submitted that cases in which compensation has been awarded pursuant to s 146 have only done so for costs actually incurred by the registered proprietor as a result of the lodgement of the caveat. In this regard, he referred to *Gordon v Treadwell Stacey Smith:*[6]

> There are claims for general, aggravated and exemplary damages. Compensation can be awarded under s 146 for expenditure for loss actually incurred and is not restricted to the expense of obtaining removal of the caveat . . .

[4] [1989] 1 NZLR 257 at 287 per Tipping J.
[5] *Campbell on Caveats*, Lexis Nexis Wellington 2012 at page 110.
[6] *Gordon v Treadwell Stacey Smith* [1996] 3 NZLR 281 at 290.

[27] Mr Sill's primary submission on this strike out application was, accordingly, *that:*

(a) Damages are sustained by a registered proprietor in terms of s 146 when costs are actually incurred; and

(b) To the extent that a contrary position is arguable, there are no authorities on point and it is more appropriate to determine the issue at trial.

Limitation Act

[28] There was some disagreement before me as to whether the Limitation Act 1950 or the Limitation Act 2010 applies. TEL says that the 2010 Act must apply; TKD disagrees. Counsel agreed that it is not necessary for me to resolve that matter in disposing of this application. That must be so, given that this is essentially a matter to be determined following clear findings on the facts and, of course, the conclusion depends, given the wording of the sections in the statutes concerned, on the conclusion ultimately reached as to when events occurred on which a claim arises.

Determination

[29] Given the view that I have reached regarding the approach to be taken on a strike out application of this nature, I do not consider that the application to strike out TKD's claim should be granted unless I am satisfied that TKD's claim is clearly statute barred and that the proposition advanced by TKD is completely unarguable. I do not consider that the proposition submitted by Mr Sills is completely unarguable. As discussed with counsel, s 146 (1) and (2) are clearly capable of being interpreted in a number of ways.

[30] I am unable to conclude that Mr Sills submitted interpretation of the section, such that loss must have been sustained by TKD before a claim could be commenced, is unarguable. To the contrary, this submission appears to be supported by observations in case law and by the recognition of sustained damages as a

necessary element of the cause of action. It cannot therefore be said that TKD's claim is clearly statute barred.

[31] I note that Mr Gee for TEL submitted in the alternative that if I should accept the proposition advanced by TKD, then I should find that it suffered ascertainable damage prior to late 2012. Mr Sills submitted that this was a factual matter and would need to be determined at trial. I agree. At this point it is far from clear to me what loss, if any, had been suffered by TKD at that earlier point in time.

[32] The application to strike out is, accordingly, declined.

[33] TEL sought an order for an extension of time to file a statement of defence pending determination of this application. That was appropriate. TEL is now required to file a statement of defence within 25 working days of the date of this judgment.

[34] In relation to costs, Mr Gee encouraged me to reserve the question of costs on the basis that he had not addressed costs in his submissions and that the preferable approach would be for me to direct the parties to discuss costs, and to file submissions if unable to agree. I agree with that suggested approach and consider that in accordance with Rule 14.8 special reasons exist. I direct that the parties are to discuss costs in relation to this application. If they are not able to agree on costs, then memoranda are to be filed within 28 days.

R McIlraith
District Court Judge