IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A. No. 536/83

N2LR

563

No Special Consideration

BETWEEN UTAH MORTGAGE INVESTMENTS LIMITED and UTAH NOMINEES LIMITED both duly incorporated companies having their registered office at Auckland

Plaintiffs

A N D THE NEW ZEALAND GUARDIAN TRUST COMPANY LIMITED as executor of the estate of S GALL late of Auckland, Company Director, Deceased

Defendant

Hearing: 28th May, 1984.

Counsel: G. J. Judd for Defendant in support.
A. Grove for Plaintiffs to oppose.

Judgment: 30 May 1984

JUDGMENT OF TOMPKINS, J.

The Defendant has moved for an order that this action be dismissed.

On the 1st June, 1983, the Plaintiffs issued a writ of summons and statement of claim seeking judgment for $56,800.25, being an amount the Plaintiffs claim to be due to them by the Defendant as the executor of the estate of S Gall, who died on the 1983. The Plaintiffs base their claim on a deed dated the 27th November, 1974, pursuant to which it is alleged the deceased covenanted with the Plaintiffs to repay certain monies which have not been paid.

The Defendant's statement of defence pleads a number of defences, one of which is that the action, not having been brought within six years from the date when the cause of action

accrued, is barred by the Limitation Act, 1950.

The grounds of the Defendant's motion are these:-

" (1) The cause of action in the statement of claim is founded upon the document, a copy of which is attached to the statement of claim, a document bearing date 27th November, 1974, alleged to be a deed.

(2) The person purporting to sign the document as witness to the signature of Stanley George Gall has not added to his signature his "calling or description" as required by s.4(1) of the Property Law Act, 1952.

(3) In the circumstances it is apparent on the face of the document, and thus on the face of the statement of claim, that the document relied on is not a deed.

(4) As the document is not a deed the action is not "an action upon a deed" in terms of s.4(3) of the Limitation Act, 1950, and is statute barred. "

Mr. Judd, for the Defendant in support, submitted that the document of the 27th November, 1974, could not be a deed because the requirements of s.4(1) of the Property Law Act, 1952, setting out the formalities of a deed had not been complied with. This was because the witness to the signature of the deceased had not added to his signature his place of abode and calling or description as required by s.4(1). In reliance on Hetherington v. Samson 4 N.Z.Jur.N.S.S.C. 84, he submitted that this requirement was imperative. If it were not fulfilled the document lacked the status of a deed. He also referred to other cases where this requirement had been considered, namely, Johnston v. Simeon (1883) 1 N.Z.L.R. S.C. 305; Te Aro Loan Co. v. Cameron (1895) 14 N.Z.L.R. S.C. 411, and Jellicoe v. Lomax (1923) N.Z.L.R. 21.

The deed, a photo-copy of which is annexed to the statement of claim, shows that it was signed by the deceased and attested by the witness in the following form:-

" SIGNED by the said STANLEY)
GEORGE GALL in the presence)   "S. G. GALL" (Signed)
of:-)

"R. PARRIS" (Signed)

Ray Parris, Q.S. 114 New Windsor Rd.,
Avondale. "

Mr. Judd submitted that the initials "Q.S." are not a calling or description. In response to an assertion contained in correspondence annexed to an affidavit filed in the proceedings that the initials stood for Quantity Surveyor, he submitted that they were not recognised as such. He contended that they were different from initials such as "J.P." or "M.P." which had a generally accepted meaning in the community. The initials, he said, did not appear in the Heineman N.Z. Dictionary published in 1979. For these reasons he contended that the mandatory provisions in s.4(1) of the Property Law Act, 1952, that were essential for a document to have the status of a deed had not been complied with.

Clause 3 of the deed required the amounts due thereunder to be paid "forthwith". Mr. Judd therefore submitted that the cause of action accrued on the 27th November, 1974, that since the document was not a deed any claim thereunder was an action founded on simple contract that, pursuant to s.4(1) of the Limitation Act, 1950, had to be brought within six years from the date on which the cause of action accrued. It was therefore, he contended, statute barred.

For the Plaintiffs, Mr. Grove emphasised that s.4(1) required the witness to add to his signature his calling or description, and also drew attention to the final phrase in subs.(1) "but no particular form of words shall be requisite for the attestation". He submitted that "Q.S." may be an adequate description of a person if evidence were to establish that this is how the occupation of quantity surveyor is commonly described in that profession or the building and allied trades. Alternatively

he submitted that if "Q.S." is not a calling it is a description. How a man describes himself must be judged subjectively. If a person describes himself as a "Q.S." that should be accepted if the evidence establishes that that is his description of himself.

Mr. Grove made a further submission based on clause 4 of the deed. It provides:-

> " THAT the Director (the deceased) will at the request of the Companies or any Director thereof give and execute security by way of mortgage, instrument by way of security or other charge over each and every asset of which he shall be possessed or to which he shall be entitled and will upon request by the Companies or a Director thereof transfer any asset to the Companies in satisfaction of his obligation for immediate repayment hereinbefore set forth. "

He submitted that this clause created an equitable mortgage in favour of the Plaintiff. Then he relied on s.20(1) of the Limitation Act, 1950, which provides:-

> " 20.(1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property whether real or personal or to recover proceeds of the sale of land (not being the proceeds of the sale of land held upon trust for sale) after the expiration of twelve years from the date when the right to receive the money accrued. "

In reply to this submission Mr. Judd contended that clause 4 did not create an equitable mortgage, that it was not a mortgage or other charge on property, and that it would be unenforceable under the Contracts Enforcement Act, 1956, because it did not specify the property to be charged. In any event, the Plaintiff's claim was based on clause 3 of the deed, not clause 4.

The basis upon which a court should exercise its inherent jurisdiction to strike out a statement of claim on the grounds that it disclosed no reasonable cause of action, or (as

was alleged here) that the action is an abuse of the court's procedure, are set out in the judgment of Kennedy, J. in Boundy v. Bennett (1945) N.Z.L.R. 460. He cited from the judgments of Williams and Denniston, JJ. in Mere Roihi v. Assets Co. Ltd. (1902) 21 N.Z.L.R. 449. Williams, J. had said:-

> " It may be that after argument the Court might decide that the statement of claim is demurrable, and that it discloses no facts which entitle plaintiffs to a legal remedy. That, however, is not sufficient to justify the Court in dismissing the action. On a motion of this kind it must at least appear that the claim is so bad in law that it is impossible under any circumstances that the plaintiff could recover. "

Denniston, J. said:-

> " But this is a jurisdiction which must be exercised with very great care, and only, as is said in one of the cases, where the claim is on its face so groundless in fact or law that no reasonable person could suppose that there was a chance of succeeding. "

The judgment of Kennedy, J., including these two citations, was approved by the Court of Appeal in Peerless Bakery Ltd. v. Watts (1955) N.Z.L.R. 339.

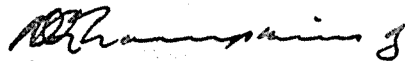
I have reached the conclusion that the Defendant's motion to strike out the Plaintiffs' statement of claim must be dismissed. Having done so it is probably inappropriate for me to give detailed reasons. It suffices to say that the matters raised by Mr. Grove in his submissions in reply are such that I do not consider that it is impossible under any circumstances that the Plaintiffs could recover. More particularly, I do not believe there can be excluded the possibility that a decision on whether or not the deed complies with s.4(1) of the Property Law Act, 1952, could be affected by evidence on matters of fact.

The Defendant has also filed a notice of motion for order that a question of law be argued before trial. This motion had not been dealt with when the motion to strike out came before me. The question in the motion is:-

> " Has the document dated 27th November, 1974, a copy of which is annexed to the statement of claim, been executed in the manner prescribed by s.4(1) of the Property Law Act, 1952, and if it has not been executed in the manner prescribed as aforesaid, is it capable of being a deed for the purposes of s.4(3) of the Limitation Act, 1950? "

Mr. Judd invited me to make an order that that question be argued before trial and then determine the question. Mr. Grove objected to this procedure. In the absence of consent I do not think it appropriate that, without a separate argument as to the suitability of the question, I should make the order sought and then determine the question. However, although I have not heard full argument on the question set out in the motion, I think it likely that determining it would give rise to the same difficulties as those to which I have referred in relation to the motion to strike out.

The motion to strike out is dismissed. The Plaintiffs are entitled to costs on the motion, which I fix at $250.



Solicitors:

Anthony Grove & Darlow, Auckland, for Plaintiffs.

Cairns, Slane, Fitzgerald & Phillips, Auckland, for Defendant.