

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C.P. NO. 173/86

BETWEEN

R.J. HAY

Plaintiff

AND

LAURENT CONSTRUCTION
LIMITED & ORS

Defendants

Date of Hearing: 13 October, 1987

Counsel: J.M. Priestley for Plaintiff
G.M. Harrison for Defendants

Judgment: 13 October, 1987

(ORAL) JUDGMENT OF HILLYER J

This is an application for an order striking out the plaintiff's action on the grounds that the plaintiff's action is barred by the provisions of Section 4 of the Limitation Act 1950.

On 10 January, 1973 the plaintiff entered into an agreement for sale and purchase of land with the three defendants. The defendants were described as "Lang Utah Laurent Consortium". Of those defendants Utah Contracts Limited has gone into liquidation but an order has been obtained giving leave to proceed against that company in these proceedings.

The agreement provided that a piece of land, which I

gather was in the name of the defendant Hector William Lang, as part of a much larger piece owned by the defendant would be purchased by the plaintiff. .It was described as land containing 24 perches being Lot 43 of the vendors approved scheme of subdivision of Lang's Beach.

The plaintiff was to pay the sum of \$8,700 for it. Of that sum the sum of \$1,000 was paid as a deposit and the balance was to be paid at the rate of \$154 per month, the first of such instalments to be due and payable at the expiration of one month from the date of possession. The date of possession was stated to be 1 March, 1973. The plaintiff paid only the first of the \$154 instalments.

He deposes that on or about 28 May, 1973 he received a letter from Utah Contracts Limited advising that an appeal had been lodged against the subdivision. It said no further payments were required until after the appeal Board's decision. On 19 December, he says, he received a further letter which he exhibits advising that the Board of Directors of Utah Contracts Limited was making every effort to resolve the town planning requirements. There was apparently an enquiry in 1975 by the plaintiff's solicitors, as a result of which the solicitor noted his file that no action was required until the consortium sorted out the question of planning permission with the Whangarei County Council.

On 25 February, 1977 a letter was sent from Barr, Burgess & Stuart, Accountants, to the plaintiff asking for confirmation that the plaintiff had paid the total sum of \$1,154. On 30 June, 1982 the plaintiff wrote to Messrs Chapman Tripp & Company, solicitors, who apparently were or had been acting for the defendants asking whether the development was going to proceed. That firm replied on 5 July saying that it no longer acted for any member of the consortium but that to the best of its knowledge the development would not be proceeding.

On that same date the plaintiff wrote to Mr Lang asking the position and on 27 July, 1982 he received from Mr Lang a reply saying that there was a dispute between the members of the consortium and advising him to ask for his money back. The plaintiff wrote again to Mr Lang asking the name or names of the people he needed to contact to get his money back but I have no information as to what happened as a result of that letter.

On 12 November, 1985 the plaintiff served notice requiring the consortium to settle and on 16 December 1985 tendered a cheque for \$7,546, being the balance required to settle. That cheque was returned.

Proceedings were issued on 4 March, 1986 in the High Court claiming specific performance of the contract or damages.

A statement of defence was filed pleading the Limitation

Act and further alleging that the contract had been frustrated by the inability of the defendants to obtain the planning consent necessary to complete the subdivision referred to in the agreement.

The affidavits are in conflict on the question of the ability of the defendants to obtain the planning consent to the subdivision proposed. The plaintiff alleges that in 1982 he "learnt through a friend of the Whangarei County Engineer that there was no planning impediment to the scheme proceeding". That allegation was answered by a substantial affidavit from Mr Lang saying that the information was totally incorrect and that for reasons he set out in his affidavit neither the piece of land referred to in the agreement with Mr Hay nor any of the other proposed sections within the subdivision could be formed because of changes to the District scheme.

That in turn has been answered by an affidavit from a solicitor on behalf of the plaintiff which is noteworthy again because of the hearsay nature of the evidence tendered. He simply says that an opinion was sought of a firm which have expertise as surveyors and managers as to whether there were any subdivisional Town and Country Planning Act impediments which would at any material time have prevented the defendants from transferring to the plaintiff the property which was the subject matter of the contract between the defendants and the plaintiff. He says that the advice received by the plaintiff's

solicitors is that on the determination of an appeal, the decision of which was delivered on 16 July, 1973 the defendants could if they so desired have proceeded with their scheme plan for subdivisional approval.

This is an interlocutory application and the difficulty of determining a question of that nature on affidavit evidence and hearsay affidavit at that is such that I would certainly not be prepared to embark upon that exercise. I cannot at this stage determine whether or not the subdivision could have proceeded.

Mr Harrison's principle submission on behalf of the defendants, however, is addressed to the question of the Limitation Act. He submitted that the plaintiff's claim was statute barred. I have difficulty in following his reasoning. His submission as set out in his written submissions is -

"That he (the plaintiff) failed to complete payments for the section by 1 April 1978 which amounted to a breach of the contract and that as six years has elapsed since the date without any action being taken in respect of the contract (these proceedings were issued on 4 March 1986), then this action is barred by virtue of the provisions of Section 4 (1) of the Limitation Act 1950."

Section 4 (1) of course deals with actions in contract and provides that an action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

Here the allegation is apparently that the plaintiff failed to complete payments for the section and that that failure was a breach of contract. It was more than 6 years before the writ was issued. If the defendant was endeavouring to claim against the plaintiff because of the plaintiff's breach of contract the plaintiff would be able to plead the Limitation Act, but in my view the defendant is not able to plead that because the plaintiff committed a breach of contract the plaintiff's claim is statute barred. If the plaintiff committed a breach of contract that would be a defence to the plaintiff's claim under the contract. The defendant, however, cannot rely upon the plaintiff's breach to say that the plaintiff's action is statute barred.

The plaintiff says his cause of action was the failure of the defendant to comply with the notice requiring the defendant to complete. That failure was at the end of 1985 and the action was clearly brought within 6 years of that time. Whatever may be the position as to whether the plaintiff was in breach of its contract its action was certainly not statute barred.

In the alternative Mr Harrison submitted as follows -

"If the plaintiff was not in breach of the contract it was frustrated on 1 November, 1978 when the scheme change came into effect. The plaintiff had 6 years from that date to take action pursuant to the Frustrated Contracts Act, 1944."

The defendant certainly in its Statement of Defence has pleaded that the contract was frustrated but the application before me does not seek any declaration that the contract was frustrated. If the plaintiff accepted that the contract had been frustrated but sought relief under the Frustrated Contracts Act it may be that such an application for relief could be statute barred. I cannot, however, on this application make a determination at the request of the defendant that the contract has been frustrated and that it is not possible now for the plaintiff to maintain any form of action on the contract because the six years' limitation period has expired. Again the limitation applies in an action on a contract from the date of the breach.

Whether a claim for relief under the Frustrated Contracts Act would be statute barred is not a matter that is before me. There is certainly no application by the plaintiff for relief and I would not be prepared in these proceedings to determine, without any formal application and with a doubtful factual basis, whether the contract had been frustrated so that I could then determine whether the remedies under the Frustrated Contracts Act would be barred by the Limitation Act.

Nothing that I have said is to be taken as suggesting that there has or has not been any breach of contract by the plaintiff or that the contract has or has not been frustrated. Those are matters which must be determined

at the substantive hearing. All I am saying is that this is an application to strike out the claim on the grounds that the plaintiff's action is barred by the provisions of s 4 of the Limitations Act. No such determination can be made and the application is dismissed.

I have heard submissions from counsel on the question of costs. This application has occupied a full half day and the plaintiff has been successful. I do not consider that the question that I have determined would be affected by the ultimate decision and the ordinary rule as to the incidence of costs, in my view, should be followed. The plaintiff will be allowed costs in the cum of \$850 and costs and disbursements to be fixed by the Registrar.

J. J. Kelly

Solicitors: Kendall Sturm & Foote, Auckland, for
plaintiff
McVeagh Fleming, Auckland, for defendants