IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-6299

	BETWEEN	FIFER RESIDENTIAL LIMITED Plaintiff
	AND	LOWNDES ASSOCIATES Defendant

Hearing: 3 August 2009

Appearances: Mr C Walker for Plaintiff
Mr Ring QC and Ms P Fee for Defendant

Judgment: 31 August 2009 at 12.30 p.m.

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

This judgment was delivered by me on
31.08.09 at 12.30 p.m*, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Counsel:
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Background

[1] In this proceeding, Fifer has sued its former solicitors Lowndes Associates (LA), alleging negligence in relation to instigating or continuing certain legal proceedings brought by Fifer against various parties. Fifer claims that the proceedings served no useful purpose and had no realistic prospect of success. Its claim is for wasted expenditure totalling about $1.8m, including financing costs. LA, the defendant in these proceedings now seeks summary judgment against Fifer.

[2] Much of the factual background is not in dispute.

[3] The claims arise out of the development by Parkbrook Holdings Limited of the six-floor (above ground) Gladstone Apartments in Parnell. Parkbrook, then 50% owned by Mr Alexander's interests, was the developer. Subsequently, his interests acquired 100% of Parkbrook. Then, pursuant to assignments or agreements in June 2000, November 2003 and December 2004 respectively, Fifer acquired all Parkbrook's rights.

[4] Sales of units in the development commenced in June 1997, on a standard form of agreement for sale and purchase drafted by Knight Coldicutt (KC). The unit titles were issued in April 2000 and, in May 2000, and the original sales of units settled. KC ceased acting in about December 2000.

[5] According to Fifer (but disputed by KC), KC owed duties to ensure that, after the completion of construction, Parkbrook would have the right to create a seventh floor of apartments on top of the building, without requiring the consent of the other unit title holders. In August 2003 Fifer obtained the last regulatory consent required for this seventh floor. By then, it had started lodging caveats against some of the unit titles based on this right.

[6] The unit title holders challenged the validity of the caveats. A third legal firm, Palmer & Associates, with Mr Rod Thomas as counsel, represented Fifer when it applied for orders that the caveats did not lapse. By February 2004 they had issued three caveat proceedings for Fifer – Gieseg, Catsicas & Unkovich (caveat).

[7] Gieseg came on for hearing in early March 2004. In a reserved judgment delivered a few weeks later Master Lang (as he then was) held that Fifer had an arguable case for its asserted caveatable interest. He ordered Fifer to issue substantive proceedings to establish this interest, which Fifer did in May 2004 – also through Palmer & Associates/Mr Thomas.

[8] In the meantime, Lowndes took over responsibility for the Catsicas & Unkovich (caveat) proceedings, as well as the Gieseg substantive proceeding after it had been issued by Palmer & Associates/Mr Thomas in May 2004, as directed by Master Lang. Following delivery of Master Lang's decision, between March and September 2004, Lowndes also issued three more proceedings – Unkovich (summary judgment), Unkovich (substantive) & Kline (caveat).

[9] The Gieseg & Kline proceedings were heard together from 30 May 2005 to 1 June 2005, with Lowndes acting for Fifer. Fifer argued that the terms of the agreement for sale and purchase, a memorandum of encumbrance executed by Fifer under a power of attorney pursuant to the agreement and/or the Body Corporate rules gave it the right to redevelop the seventh floor, despite any objections of the other unit title holders. Fifer sought declarations which would recognise its claimed entitlement to add a further floor to the apartment building and to maintain caveats registered against the titles of some apartments to protect its right to do so. In a judgment given on 15 June 2005 Hansen J declined to make the declarations sought by Fifer and directed the removal of the caveats.

[10] In May 2005, in anticipation of this outcome, Lowndes issued legal proceedings against KC in negligence for failing to preserve for Parkbrook this right which, by then, Parkbrook had assigned to Fifer. KC applied to strike out the claim on limitation grounds. By the time that this application came on for hearing, Fifer had engaged senior counsel, Brian Keene QC, who led Fifer's case from then on, including drafting amended pleadings before the hearing relying, among other allegations, on Parkbrook's cause of action against KC accruing based on reasonable discoverability.

[11] On 27 August 2007, Gendall AJ dismissed KC's strike- out application. On 21 December 2007, on review, Hugh Williams J struck out Fifer's claim. He held that the causes of action in contract and in tort had both accrued by about June 1997 once Parkbrook had started to enter into agreements with purchasers on the form of agreement for sale and purchase drafted by KC.

[12] Initially, Fifer sought to appeal this decision. However, the appeal was later abandoned.

[13] On 17 July 2009, Fifer filed and served an amended statement of claim and reply. It added an alternative cause of action in breach of fiduciary duty to the existing cause of action in negligence, but directed solely at the affirmative defence of prior settlement.

[14] In 2002 Parkbrook was placed into receivership and the following year into liquidation. It had earlier assigned its rights to undertake the development of the proposed seventh floor to Fifer. Subsequently the liquidator assigned Parkbrook's rights under the sale and purchase agreements to Fifer.

[15] On 24 December 2004 Parkbrook assigned to Fifer any rights it might have to claim against KC and any remaining rights of Parkbrook under the agreements for sale and purchase for units in the building relating to the development of airspace above level 6.

[16] On 4 May 2005, on the advice of the defendant, Fifer issued proceedings based on negligence against KC. Fifer claimed in those proceedings that Lowndes was negligent in advice it gave about enforcing the supposed right to develop the airspace above the 6th floor of the apartment building.

[17] In September 2008 Fifer issued the present proceedings against Lowndes. It claims that Lowndes gave it inadequate advice concerning:

a) Whether it should pursue Court proceedings to enforce the rights to develop the airspace.

b) Claims of negligence against KC.

[18] As to the first group of claims in "(a)", Fifer says LA were negligent in advising that it was necessary to pursue claims to enforce the airspace development "as a step to making a claim against [KC], in particular to establish the respects in which [KC] had been negligent; and to mitigate the plaintiff's loss". It claimed that the proceedings concerning the airspace served no useful purpose, and could not, or were unlikely to, succeed; and that even if the enforcement claims succeeded, the plaintiff would not be able to lodge the necessary re-development plan for the proposed seventh level.

[19] The advice LA gave was also said to be flawed because:

a) It told Fifer that the proceedings against KC were in time when that was not so;

b) Parkbrook had not suffered any loss (and so the assigned claims it had against KC were of no value);

c) Any loss that the plaintiff suffered could not be recoverable at the suit of Parkbrook.

[20] As Mr Walker put it in his submissions, in essence, Fifer pleads that Lowndes breached the standard of a reasonably competent solicitor by:

> (a) Advising Fifer that it was appropriate to pursue the caveat proceedings in order to establish the respects in which KC had been negligent and in mitigation of the loss (Amended Statement of Claim, 48(a);
>
> (b) Failing to advise Fifer that the caveat proceedings served no useful purpose because: (i) they would not succeed or were unlikely to succeed; (ii) even if they succeeded, Fifer would not be able to build the seventh floor; and (iii) it was unnecessary to pursue the caveat proceedings as a step to suing KC (Amended Statement of Claim, 48(b);
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> (c) Advising Fifer that the proceedings against KC were in time and that Fifer had good prospects of recovering substantial damages (Amended Statement of Claim, 48(c); and

(d) Failing to advise Fifer that the claim against KC was or might be time-barred and that Fifer would not or might not recover substantial damages (Amended Statement of Claim, 48(d-e).

Summary judgment principles

[21] The relevant High Court Rule is r 12.2, which provides:

> 12.2 Judgment when there is no defence or when no cause of action can succeed
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> (1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to [a cause of action in the statement of claim or to a particular part of any such cause of action].
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> (2) The court may give judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed.

[22] In *Westpac Banking Corporation v MM Kembla New Zealand Ltd* [2001] 2 NZLR 298, Elias J (as she then was) said:

> [61] The defendant has the onus of proving on the balance of probabilities that the plaintiff cannot succeed. Usually summary judgment for a defendant will arise where the defendant can offer evidence which is a complete defence to the plaintiff's claim. Examples, cited in McGechan on Procedure at HR 136.09A, are where the wrong party has proceeded or where the claim is clearly met by qualified privilege.
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> [62] Application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits. It may also be inappropriate where ultimate determination turns on a judgment only able to be properly arrived at after a full hearing of the evidence. Summary judgment is suitable for cases where abbreviated procedure and affidavit evidence will sufficiently expose the facts and the legal issues. Although a legal point may be as well decided on summary judgment application as at trial if sufficiently clear (*Pemberton v Chappell* [1987] 1 NZLR 1), novel or developing points of law may require the context provided by trial to provide the Court with sufficient perspective.
>
> [63] Except in clear cases, such as a claim upon a simple debt where it is reasonable to expect proof to be immediately available, it will not be appropriate to decide by summary procedure the sufficiency of the proof of the plaintiff's claim. That would permit a defendant, perhaps more in possession of the facts than the plaintiff (as is not uncommon where a plaintiff is the victim of deceit), to force on the plaintiff's case prematurely before completion of discovery or other

interlocutory steps and before the plaintiff's evidence can reasonably be assembled.

[23] I intend to be guided by the above remarks.

Issues

[24] Mr Ring QC, for the defendant, submitted:

> 1.4 […] In summary, [the defendant] says that Fifer's claims of causative negligence in instigating or continuing the various legal proceedings cannot succeed when:
>
> If successful, the legal proceedings would have had obvious benefits for Fifer (and did, in relation to the various Unkovich proceedings from which Fifer made a profit); and
>
> High Court judicial officers have held, Fifer's other legal advisers obviously also considered and/or the available authorities at the relevant time showed, that the legal proceedings did have a realistic prospect of success.

[25] The defendant further submitted:

> 3.3 Fifer's claims distil down to the twin allegations that Lowndes was causatively negligent in failing to advise Fifer that these proceedings "served no useful purpose" and "could not succeed or were unlikely to succeed" – such that Lowndes should have advised Fifer against pursuing them. So Fifer's case is no reasonably competent practitioner could have thought otherwise.

[26] He further said:

> 3.11 The purpose of the KC proceeding was to obtain damages from KC for its alleged negligence in failing to protect Parkbrook's rights to redevelop the seventh floor with additional apartments, without first obtaining the consent of the other unit title holders. Fifer issued these proceedings through Lowndes in May 2005.
>
> 3.12 Fifer says that KC was negligent in advising Fifer that the claim:
>
> (1) Was in time – the time bar issue;
>
> (2) Did have good prospects of success – the assignment issue;
>
> or failing to advise Fifer in the negative.
>
> 3.13 Again, Fifer cannot show causative negligence in either respect. Essentially, this is because, on the state of the authorities at the relevant time, Fifer could not establish that no reasonably competent solicitor in Lowndes' position could possibly have reached the conclusion that the claim was tenable in both or either respects.

The advice concerning the necessity to commence and continue the proceedings

[27] The plaintiff's claim is (in part) that LA breached the standard of reasonably competent solicitors in advising Fifer that it was appropriate to pursue the caveat proceedings in order to establish the grounds for KC's alleged negligence and in mitigation of the loss.

[28] Essentially the applicant/defendant's case is that the negligence proceedings, which Fifer has brought against Lowndes, cannot succeed. In response, one of the grounds outlined in the plaintiff's notice of opposition is to the following effect:

> (g) Assuming the evidence supports the plaintiff's claim, it is at least arguable that no reasonably competent solicitor would advise a client to pursue useless proceedings, expecting them to fail and knowing that the seventh floor cannot be built in any case, including in the mistaken belief that it was necessary to do so before suing Knight Coldicutt or as an act of mitigation.

[29] The plaintiff has filed affidavits from three persons, who say that Lowndes formed the view that it was necessary to pursue the caveat proceedings in order to establish that KC had been negligent and in order to mitigate loss they suffered.

[30] The plaintiff alleges that LA expected the caveat proceedings to fail and knew that there was no real prospect of adding the seventh floor because too many units had already been sold on without protection of the developer's right.

[31] In September 2004 Lowndes Associates wrote to Grove Darlow. In that letter they commented on the likelihood that the development of the seventh floor would be able to proceed. The letter said:

> There is significant opposition from apartment owners in the Gladstone Apartments to the Development. A unanimous vote in favour of the Development is unlikely. The rights are meant to force the owners to vote in favour of the Development however, legal proceedings have been issued by a number of owners alleging that the rights do not have this effect. Additionally, the rights do not appear to be enforceable on 32 % of the apartment owners. These inadequacies in the rights are part of the claim.
>
> …

[32] It was part of the substantive negligence proceedings that the plaintiff brought against KC, that in order to make the development work, it would have needed to be able to compel unit holders to co-operate in the addition of the seventh floor. As well, it needed to have the air rights above the sixth floor, which would be the space in which the seventh floor penthouse addition would be constructed.

[33] At the hearing before me it was common ground between the parties that the plaintiff would have needed the consent of a minimum of 80% of the owners before it could proceed to compel those other owners not to oppose the steps required to complete the seventh floor development.

[34] The plaintiff apparently considered that it had obtained the air rights by a process of assignment from the original owner, Parkbrook. It also considered that it had the rights to compel the owners not to oppose the necessary work to achieve the sub-division of the apartment building and the other steps required to get to the point where a seventh level could be constructed. In a letter that the solicitor acting on the matter in the defendant firm wrote to another law firm on 1 September 2004, the plaintiff's case concerning the above matters were set out in some detail.

> The reason why I was writing to that law firm was because that law firm acted for the receiver of Parkbrook and the plaintiff wanted to come to an arrangement which would either transfer the contractual rights vis-à-vis the other owners in the building and the negligence claim against KC to it or alternatively if it already owned those rights to obtain binding acknowledgement from Parkbrook that the plaintiff, and not it, was the party entitled to enforce those rights.

[35] LA, in other words, as its first priority was attempting repair the defects in the arrangements that had been KC's legacy. If it could not do that it would sue KC for those defects.

[36] A major issue in the present proceedings is why, in these circumstances, the plaintiff did not proceed directly to claim from KC. If KC had been negligent, then its negligence was the cause of the very problem that Fifer was facing, namely, that it could not control all of the owners or the necessary majority of the owners in order to clear away for the seventh level development.

[37] In my view, as an answer to the defendant's summary judgment application, the plaintiff must have an arguable case that a recommendation to start and then continue proceedings against the owners (that is, the litigation ultimately heard by Hansen J) was to involve them in complex and speculative litigation. Further the prospects of success in that litigation would have to be at best uncertain, and at worst, unlikely. At this summary judgment stage it is not appropriate to come to firm conclusions about the merits. It may be that despite the lack of a promising platform for a decision to recommend the litigation against the owners, LA as defendants in these proceedings can point to some feature of the case that explained why such an apparently undesirable course was one that the plaintiff must nonetheless follow. Just what the grounds for LA's advice to start, continue or not to stop these proceedings were is clear to me though.

[38] As to negligence, one would imagine it was arguable that the very fact that the legal structures which the plaintiff adopted, and which were the product of KC's advice, presented them with such an obvious quagmire of legal difficulties that further demonstration of those problems by taking proceedings designed to show how they would be resolved at a trial was unnecessary. That is, it is not correct to assert that where a solicitor's negligence has produced legal arrangements which are very likely to miscarry, a claim cannot be brought against the solicitor without first going through the process of testing by litigation whether the legal arrangements contrived are as defective as they appear to be.

[39] Further, the obligation to mitigate is to take reasonable steps to that end. What are reasonable efforts will depend on the circumstances. If a legal problem can be repaired by taking legal proceedings that enjoy reasonably good prospects of success and at a cost that bears a favourable proportion to the amount at stake, then perhaps such proceedings would be necessary. At the other end of the scale, to give advice which will set in train a client taking speculative proceedings which could conceivably (and eventually prove to) cost hundreds of thousands of dollars is likely to fall outside the category of reasonable mitigation.

[40] In 2004 Fifer, with Lowndes Associates acting for it, issued the substantive proceedings against Gieseg and Kline.

[41] The above letter was written in the year preceding the commencement of the negligence claim against Lowndes. It was also some months prior to the trial of the proceedings in which Hansen J gave his judgment. At the very least, there were serious doubts about whether the development of the seventh floor would ever be possible. Those doubts were in due course to be resolved against Fifer by the Hansen J judgment. That judgment closed off any prospect of the seventh floor development proceeding.

The judgments of Hansen J and Master Lang and the issue of negligence

[42] Mr Ring QC, for the defendant, placed considerable stress on the fact that Master Lang considered the legal propositions which the caveat case was based were at least arguable. He also referred to the fact that Hansen J, in dealing with costs in the wake of his judgment, declined to grant an uplift in costs and in doing so expressed the view that the arguments put forward by Fifer were not unreasonable.

[43] I do not consider that these two factors would bear the weight that Mr Ring expects them to. No competent practitioner would advise that, because his or her client had managed to convince the Court that there was an arguable case that they had an interest in land which supported the caveat, would then advise the client that they could regard such a conclusion as justifying them in commencing substantive proceedings to prosecute their claim to an interest in the land. That does not follow any more than it would for a client who has been successful in persuading the Court that there is a serious legal issue to be tried and who obtains an injunction, from concluding that he or she could now in confidence push on with substantive proceedings. I accept that in some cases caveat proceedings may be a better predictor of ultimate success than others may. Where the issue is essentially a legal one, obtaining the Court's view on whether there is a reasonably arguable basis for claiming an interest in land could be seen as being encouraging. On the other hand, where there are many issues of disputed fact – and such issues for the purposes of caveat proceedings will generally be resolved in favour of the caveator - the outcome of caveat proceedings may provide little guidance to the likely outcome of the substantive proceedings. It is still necessary for counsel advising to come to his or

her own judgment in the matter. Having come to that judgment, it is necessary for it to be fully explained to the client and the possible advantages and detriments with substantive proceedings explained. In my judgment, the caveat proceedings do not bear on the question of whether there has been negligence on the part of Lowndes. The adequacy of LA's advice still needs to be determined.

[44] I accept that Hansen J's comments about costs, while not amounting to a complete endorsement of the decision to take the proceedings, do lend some support to the defendant's case. But even taking them at their highest, they are not the basis for a firm conclusion that LA were not negligent.

[45] As I understand the case for the plaintiff, it is that they took the proceedings despite their solicitor considering they were unlikely to win. They did so because they thought they were obliged to, if they were to be successful against KC. That summary of the case is suggestive of negligent advice. It is different from a case where the solicitor advises that the prospects of success are not high but where so much hangs on the outcome of the case that the client elects to proceed anyway and loses.

[46] In my view there is a live issue in this case concerning the terms of the advice actually given. Some of the issues seem to be whether LA told Fifer that it was necessary to exhaust the caveat/substantive proceedings as a prelude to bringing a case against KC; whether that advise was correct; whether the client was induced to make a decision to proceed with the caveat/substantive proceedings as a result of been given the advice and whether it suffered loss. If, for example, the Court was to determine that had the solicitor told the client that the prospects of succeeding in the caveat/substantive litigation were not great and that therefore there was little prospect of being able to force through the seventh floor development, it is hard to see a client rationally agreeing to give the go ahead to such proceedings. If the solicitor also explained that it would not be necessary to exhaust the caveat/substantive proceedings as a preliminary to bringing a case against KC, it would also be inconceivable that the client would agree to proceed with the litigation.

[47] The quality of the advice is not a matter that can be assessed on a summary judgment application.

Limitation

[48] Fifer issued proceedings against KC in 2005. KC had performed the legal work on which Fifer's negligence claim centred in 1997. Fifer's position is that a reasonably competent solicitor ought to have advised Fifer that there was a chance that the limitation period had expired for bringing the claim against KC. Instead of doing that, Mr Alexander in an affidavit stated that Lowndes in fact gave affirmative unqualified advice that time started to run in 2004. Mr Walker submitted:

> 20. It must be arguable that a reasonably competent solicitor: (i) would, at the very least, have warned that the claim against KC might be time-barred; and (ii) would not have given affirmative, unqualified, advice that the claim was in time or that time started to run in 2004.

[49] Mr Ring QC's submissions were that based upon the law which has since been clarified in the Supreme Court decision of *Thom v Davys Burton* [2009] 1 NZLR 437. It is now clear that the limitation began to run from the time when the lawyers prepared the allegedly defective agreements, in 1997. However he submitted that, based upon the state of the authorities in May 2005, it was reasonable for LAC to conclude that limitation began to run from the point where the property owners declined to consent to the proposal that the seventh floor level should be developed. That occurred at a time that was within six years of the date when the negligence proceedings were issued against KC in May 2005. Specifically, the applicant/defendant relied upon a judgment of Salmon J in *Rabadan v Gale* [1996] 3 NZLR 220.

[50] Mr Ring QC further submitted that it is helpful to consider what the appropriate advice to the client on the limitation issue would have been, and then to consider what effect it would have had on the plaintiff's actions had such correct advice been given, rather than examining the advice that was actually given.

> 4.3 Based on the allegations and the law, the proper advice would have been along the following lines:
>
> (1) There is a case – *Rabadan v Gale* [1996] 3 NZLR 220 – the facts of which do not seem distinguishable from yours, in

> which an experienced Judge with a commercial background held that the limitation period would not start to run until the other owners had been asked for and refused their consent. If the Judge in your case follows this decision, there will be no limitation issue;
>
> (2) Alternatively, based on another recent decision – *Thom v Davys Burton* [2006] NZFLR 116 – the limitation period may not start to run until any factual contingencies to loss have materialised. These may include the obtaining of the necessary resource consents;
>
> (3) If those arguments fail, we may be able to argue that the limitation period does not start to run until you discovered or, with reasonable diligence, you could have discovered the loss. This may not be until 2003 when you first became aware that the agreements did not protect your redevelopment rights, when you first complained to Parkbrook's receivers/liquidators that Fifer did not get the rights that it expected, or when Rodney Hansen J delivered his decision. There are a number of authoritative judgments and articles in support of this, although there are also a number going the other way.
>
> 4.4 It is inconceivable that, in these circumstances and having regard to the nature and multimillion dollar quantum of the claim, that Fifer would have declined to proceed; and this is overwhelmingly confirmed by the absence of any such assertion by any Fifer deponent.

[51] I consider that the nub of the issue is contained in paragraph 4.4, which I have just quoted. Before the defendant can obtain summary judgment against the plaintiff the Court would have to be satisfied that there was an answer to the submission which Mr Ring QC has made. He drew my attention to the fact that the plaintiff had not made any assertion in affidavit form or to the contrary of what Mr Ring submitted in 4.4. In my assessment, there is considerable force in what Mr Ring QC says. I will attempt to place the limitation issue in context in the section of this judgment where I summarise matters.

[52] However, I do not believe that the argument is unanswerable. The fact that the plaintiff has not filed an affidavit does not preclude the Court from coming to a conclusion that differs from the submission. In my view, if full and complete advice had been given to Fifer it could well have come to the conclusion that, given the complexity of these proceedings and the element of uncertainty about the limitation point, it would think long and hard before committing significant funds to litigation,

notwithstanding the possibility of considerable financial benefits to Fifer. My belief is that the issue is not susceptible of resolution on a defended summary judgment.

The assignment point

[53] A further allegation of negligence made against LA arising from the advise that it gave to the plaintiff concerns the subject matter of assignment to Fifer from Parkbrook of the rights to air space above the sixth level. There was included in the negligence proceedings (against KC) which LA initiated on behalf of Fifer a claim arising from an assertion that KC had been negligent when attempting to effect the assignment of the air space rights from Parkbrook to Fifer. The proceedings that were issued against KC allege negligence and loss arising from the failure to assure that assignment. The claim that LA drew up for Fifer claimed that the purported assignment of rights to the air space was valueless because Parkbrook, the assignor, had already disposed of them prior to the purported assignment.

[54] In the present proceedings, Fifer argues that suing KC for defects in the assignment could not have been to the advantage of Fifer because it had not suffered loss.

[55] As I understand the argument, it is that the assignment of rights to claim – for example in negligence - only carries with it the right to claim for loss which had accrued to the assignor prior to assignment. The argument was that the loss to Fifer vis-à-vis KC arose subsequent to the transfer. I am not clear just what loss is being referred to in this context, but I assume it is loss arising from Fifer's failure to get itself into the position where it could develop the airspace. I assume that it is contended for the plaintiff that that state of affairs did not accrue until after the judgment of Hansen J in 2005 (the assignment having occurred in either 2000, or 2004).

[56] In a further memorandum that Mr Walker filed, he appeared to modify the plaintiff's position. The plaintiff apparently now contends that Parkbrook did suffer loss because at least part of the air rights had already been transferred to third parties before the purported assignment of those rights to Fifer occurred in June 2000.

[57] Mr Ring QC did not accept that the plaintiff had correctly stated the law about the circumstances where there is an absence of provable loss having been sustained by the assignor. Moreover, he said that there were certain legal arguments that had prevailed when this type of situation had been encountered in UK cases that meant that Fifer would not have been prevented from claiming.

[58] But, Mr Walker said, the assignment difficulty represented a potential stumbling- block to Fifer's claim against KC, and that Lowndes were negligent because they did not spell out the potential difficulties – even if there were a solution available of the kind that Mr Ring QC asserted.

[59] This issue cannot possibly be resolved on a summary judgment argument. It has legal and factual difficulties about it, which make it quite unsuited for resolution after the necessarily limited consideration that it can receive at a summary judgment hearing.

Summary

[60] It seems to me that a robust and practical approach based on common sense is necessary in dealing with the present application. Unless the defendant can show that the plaintiff's cause of action as variously particularised could not succeed, the defendant's application for summary judgment must be dismissed.

[61] My conclusion is that far from the defendant having a good claim to now seek summary judgment, the limited amount of evidence and exposure of the legal issues and argument presented in the case before me leads to the view that, if anything, the plaintiff has a reasonably arguable claim against LA.

[62] I said earlier that it appeared that Mr Ring QC's submissions on the issue of limitation were persuasive. The defendant may not be liable for causative negligence in regard to the advice/lack of advice given to the client, if advice along the lines of that suggested by Mr Ring QC was actually given. But there is a dispute about what the solicitor said. Second, the solicitor had an obligation to provide comprehensive and balanced advice on the pro's and cons of proceeding. While the uncertainty about the limitation point on its own may not have been enough to dissuade the

plaintiff from proceeding, the overall uncertainties considered cumulatively may have been.

[63] Viewing this case overall, I do not consider that it can be said that the plaintiff's cause of action in negligence against LA cannot succeed. A judgment about whether the solicitor was negligent will only be possible after a trial with a full hearing of evidence and consideration of the issues in the context of a trial. This is not a case that falls within the exceptional category of cases described in *Kembler* and the application will be dismissed.

Consequential orders

[64] The parties should confer on the matter of costs and attempt to agree them. If they are unable to, I shall hear counsel at 9am on a suitable date to argue the matter.

[65] The Registrar is to allocate a further day's hearing to deal with the defendant's application for security for costs.

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J.P. Doogue
Associate Judge