

STATE CHAMBERS

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IN THE SUPREME COURT OF NEW SOUTH WALES

Case No. 2016/38397

***Reliance Financial Services Pty Ltd v Pineiro* [2017] NSWSC 1739**

Before: Darke J

Date of Judgment: 14 December 2017

Case Note

The plaintiff sued, pursuant to section 66G of the *Conveyancing Act*, for the appointment of statutory trustees for sale because the first defendant had charged his joint interest in land to the plaintiff for payment of money, which he refused to pay.

The first defendant said that the document relied upon by the plaintiff, was a simple contract and by operation of section 14 of the *Limitation Act*, which provides a limitation period of 6 years, the claim was out of time.

The first defendant argued that the document, although styled Deed and said that it was signed sealed and delivered, was a simple contract because the person attesting the signature of the first defendant was an officer of the plaintiff. Section 38(1) of the *Conveyancing Act* provides that for a document to be executed as a Deed the attesting witness cannot be a party to the Deed.

Darke J held that an officer of the corporation, which is a party to the Deed, is not himself a party to the Deed. Accordingly, when an officer of a corporation, which is party to the Deed, attests the signature of the other party, the document, assuming all other requirements are met, takes effect as a Deed.

The plaintiff's claim was not dependent upon the characterization of the document as a Deed.

Section 42 of the *Limitation Act* provides a limitation of 12 years for actions on unregistered mortgages to recover the principal and other remedies in aid of recovering the principal.

The claim for appointment of statutory trustees was available because there was a debt for the principal amount owing. Appointing statutory trustees for sale was available because an unregistered mortgagee of the interest of a joint tenant is a co-owner within the meaning of section 66G of the *Conveyancing Act*. The appointment was a means of recovering the debt.

More problematic was the claim for interest.

Section 43 of the *Limitation Act* provides a limitation of 6 years. However the way the section is applied is to "work backwards" so that the plaintiff could obtain judgment for interest accruing in the 6 years immediately prior to judgment. This is because the debt for interest only arises when it is time for the interest to be paid. Each accrued right for payment of interest is a separate debt.

His Honour did not appoint trustees for sale, because the plaintiff had not attended to the formalities, time was to be given to the first defendant to pay the debt before trustees were appointed and there was an issue as to whether the registered mortgagee ought to be joined.

After judgment his Honour proceeded to assess costs payable under the unregistered mortgage, so that the debt could be paid in full without the appointment of trustees for sale. This costs issue was settled and the entire debt, as agreed between the parties, was paid.

Damien Allen

State Chambers

26 March 2018