

NEGLIGENCE CLAIM SUCCEEDS AFTER EXPIRATION OF LIMITATION PERIOD

SEPTEMBER 19, 2018 | LAWYERS' NEGLIGENCE

A solicitor from the New South Wales South Coast has been ordered to pay damages for failing to advise an elderly client to lodge a caveat on a property promptly upon learning the client's long-term romantic relationship had ended. The claim was brought six years and one day after the alleged negligent omission occurred.

IN ISSUE

- Whether the solicitor had a duty to advise a caveat be lodged.
- Whether the failure to lodge a caveat resulted in the loss of opportunity to retain a half interest in the property.
- Whether the claim was statute barred having been commenced one day after the six year limitation period expired.

THE BACKGROUND

William McLaren, afflicted with early stage dementia, retained a solicitor, Hugo White, to prepare a new will in favour of his children, to revoke a power of attorney, and other matters. The existing power of attorney had been granted to Mr McLaren's ex partner, Ms Finlay (a pseudonym).

The judge accepted that Mr White had received complaints from the McLaren family about dishonest conduct by Ms Finlay in relation to Mr McLaren's real and personal property.

In the course of his performance of these services, Mr White obtained a title search of an unencumbered property owned by Mr McLaren in Warrandyte. About a month later, Ms Finlay lodged a transfer for registration, making her and Mr McLaren registered proprietors as joint tenants of the Warrandyte property. It transpired that Mr McLaren had previously made he and Ms Finlay joint tenants in common by a handwritten transfer of land document but this was not registered on the title search.

Mr McLaren and his children did not become aware of the registered transfer for some months, until about three weeks before he died. By his death, Ms Finlay became the sole owner through survivorship. Proceedings by the estate against Ms Finlay were unsuccessful.

Mr McLaren's daughter, as the executrix of his estate (the Executrix), sued Mr White and his firm for the value of the lost Warrandyte property relying principally on the failure of Mr White to take steps to lodge a caveat on the title to Warrandyte property after he obtained the title search.

The Executrix commenced proceedings on 28 May 2014, six years and one day after Ms Finlay became registered as a joint owner on 27 May 2008. Mr White pleaded a limitation defence.

THE DECISION AT TRIAL

The court held that the action in damages based on Mr White's failure to lodge a caveat to prevent Ms Finlay becoming registered as joint owner accrued at the latest on 27 May 2018 and was therefore out of time by reason of s14 of the *Limitation Act 1969*. Accordingly, the Estate could not recover the full value of the Warrandyte property.

The court found that had Mr White acted to lodge a caveat over the Warrandyte property in late May 2008, Mr McLaren would have severed the joint tenancy meaning Mr McLaren's half interest in the property would not have devolved upon Ms Finlay upon survivorship.

He found that had the caveat been lodged, the joint tenancy would have been severed in around August 2008, leaving Ms Finlay and Ms McLaren each with a one half share in the property. The court found another cause of action due to Mr White's negligence accrued at this point, and awarded the Executrix damages assessed as the value of a half interest in the property.

IMPLICATIONS FOR YOU

This case is a reminder that a lawyer's duty of care extends to taking steps to ensure the client's interests are protected even with respect to matters that may appear to be technically outside of the scope of the retainer.

It is also a good example of a case where a thorough consideration of the likely chain of events that would have transpired if the negligent omission had not occurred can result in a viable cause of action where, on the face of it, a claim is statute barred.

Ms Kirsty McLaren (in her capacity as executrix of the estate of Mr William George McLaren) v Hugo White Pty Ltd trading as Sautelle White Lawyers [2018] NSWDC 226

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