IN THE DISPUTES TRIBUNAL **[2013] NZDT 36**

BETWEEN	**ABS Ltd**
	APPLICANT
AND	**ZYL**
	FIRST RESPONDENT
AND	**ZYK**
	SECOND RESPONDENT

Date of Order:	15 March 2013
Referee:	Referee Edison

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the claim against ZYL and ZYK is dismissed.

Facts

[1] ABS Ltd owns 18 acres of land adjacent to land jointly owned by ZYL and ZYK. The boundary was fenced with a 7-wire fence. In the claim form, ABS Ltd stated that ZYL's cattle trespassed onto its property in July 2006, causing damage to native plants in an area of approximately 150 metres by 30 metres. On the day in question, ZYL spoke to MB, a tenant in a house on ABS Ltd's property. The cows were subsequently removed by ZYL.

[2] ABS Ltd filed its claim in the Disputes Tribunal on 29 June 2012. At the hearings, ABS Ltd presented evidence concerning (amongst other things) the condition of the fence around the time of the trespass, and the cost of purchasing and planting replacement plants. Other losses were also claimed, but the alleged cost of replanting alone exceeded the Tribunal's jurisdiction of $15,000.00.

Issues and Law

[3] My order of 27 August 2012 (at paragraph 3) set out the law relevant to the claim, and (at paragraph 4) set out the relevant issues. The second issue was whether the claim had been brought in time under the Limitation Act 1950. Because of my findings in relation to that issue, it has not been necessary for me to make findings in respect of the remaining issues.

[4] The Limitation Act 1950 applies despite its repeal. Section 59 of the Limitation Act 2010 provides that the 1950 Act continues to apply to a cause of action based on acts or omissions prior to 1 January 2011. The limitation period in tort is six years. This is a claim in tort, in cattle trespass and private nuisance. The limitation period begins to run in trespass when the trespass is committed, in nuisance from the date of injury or damage to the right or enjoyment of the land. It follows in either case in my view that the cause of action accrued on the date of the trespass.

Decision

[5] Before considering my findings on the limitation issue I set out a brief summary of the witness evidence, so far as relevant to that question:

Evidence of FG (Caretaker of ABS Ltd's Property)

[6] In his letter on behalf of ABS Ltd to ZYL dated 2 February 2008, FG (the caretaker of ABS Ltd's property and its representative) stated:

> In 2005 substantial losses of native plants occurred which appeared to me to be eaten down to the ground. The tenant of the property I oversee recently advised me that you approached him on the property that I oversee in 2005.

[7] ZYL replied on 12 February 2008, confirming that two of his stock "…did go through an unsatisfactory boundary fence".

[8] In his affidavit of 20 August 2012, FG stated that:

> Approximately two months after ABS Ltd planting was damaged, MB advised me of the cattle damage incident that occurred and what conversation had occurred between ZYL and himself.

[9] In his email to the Tribunal dated 22 August 2012, FG said he was not entirely sure whether the cattle damage occurred in 2005 or 2006.

[10] In his affidavit of 13 November 2012, FG stated that the cattle damage occurred in 2005 (page 9) and was discovered in about August 2005 (page 3). He referred to a conversation with MB in approximately February 2006 (page 3):

> Approximately February 2006 – I had [a] discussion with FB on the fenceline one day[.] I advised FB that planting people would return this coming planting season to carry out more planting as I had suffered mass plant damage which I have just been advised was caused by cattle and I was at a loss to know where cattle had gained access from. FB advised me that it was ZYL's cattle that had been in ABS Ltds' planting for three days.

[11] At the first hearing on 27 August 2012, FG stated that the cattle damage took place in 2005, and the remediation planting took place in 2006. Looking at Appendix 9 to FG's affidavit dated 13 November 2012, the replanting probably commenced in May that year.

Evidence of MB (ABS Ltd's Tenant)

[12] In his affidavit of 28 June 2012, MB stated that the cattle trespass took place in July 2006, and that ZYL came to his house to advise him that the cattle had entered the property. In his statement of 25 August 2012, ZYL confirmed this date, and at the hearing on 25 February 2013 he confirmed he thought the trespass happened in July 2006. MB said that he told FG a few weeks after the event about the incident and that he had spoken to ZYL (MB may not have known ZYL's name at that stage, but he accepted in evidence that ZYL had told him where he lived).

Evidence of MV (Inspector of Damage)

[13] In his statement of 30 April 2012, MV said he inspected cattle damage alongside ABS Ltd's southern boundary in the "2006 planting season". When he gave evidence, MV confirmed that he was contracted to DEF Nurseries (owned by RE) to do the replanting and that in 2006 the damage was inspected by CD (RE's late husband).

Evidence of RE (Owner of DEF Ltd)

[14] In her statement of 3 July 2012, RE (who owned the nursery which provided the replacement plants) said that ABS Ltd's conservation planting was damaged by cattle in 2006. When RE gave evidence, she said she was shown around the planting by her late husband in 2005 or 2006. Later she said it was probably 2006, closer to the time when CD became ill.

Evidence of ZYL

[15] In his undated email to the Tribunal (but filed in about August 2012 prior to the first hearing), ZYL stated that two cattle made their way through the boundary fence in late

July 2005. At the hearing on 25 February 2013, ZYL said the trespass occurred in July or August 2005, based on the age of his cows.

Conclusion on Limitation Issue

[16] I find that the claim is statute-barred under the Limitation Act 1950. All of the witnesses apart from MB thought the cattle trespass occurred in 2005, or at least, before the replanting in 2006. I find on the balance of probability that the cause of action in trespass and in nuisance accrued in 2005 when ZYL's stock caused damage to native plants on ABS Ltd's property. That cause of action was time-barred in 2011 – that is, six years after the damage occurred. The cause of action was thereby time-barred prior to the commencement of these proceedings.

[17] I have considered FG's view that he only knew for certain in February 2008, when he wrote to ZYL, that the damage had been caused by cows owned by ZYL. However, the evidence of MB was that he told FG about the incident a matter of weeks afterwards, and in his affidavit of 13 November 2012 FG appeared to indicate that he knew about the trespass, and knew it may have involved ZYL's cows, in February 2006. In his affidavit of 20 August 2012, FG said he was advised of the incident by MB about two months afterwards. I think it follows from FG's evidence that he (and therefore ABS Ltd) knew about the stock trespass, and knew whose cattle may have been involved, by February 2006. Therefore, even if the cause of action accrued then, being a date of knowledge later than the trespass itself, ABS Ltd is still time-barred because the proceedings were commenced after February 2012.

[18] Further, and in any event, I consider that there is no "reasonable discoverability" test in the law of trespass and nuisance. It has been applied to cases concerning defective buildings (*Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC)), and also to cases involving bodily injury or psychological harm. I can find no legal authority for extending the test beyond those boundaries. Indeed, in *Trustees Executors Ltd v Murray* [2008] NZCCLR 11, the Supreme Court said that there should be no "general adoption" of reasonable discoverability for limitation purposes. Further, even assuming hypothetically that reasonable discoverability applies, I do not think that accrual of the cause of action can be put off until ABS Ltd knew for certain whose animals had caused the damage. Following general principles, the state of ABS Ltd's knowledge about who committed the wrongdoing

does not determine when the cause of action accrued. At best, I consider that the limitation period would not start to run until the damage was discovered. The damage was discovered by MB, ABS Ltd's tenant, on or about the day that it occurred. Even if ABS Ltd did not know until February 2008 whose cattle had been involved, in my view the cause of action had already accrued because the damage was discovered in about August 2005, and with reasonable diligence ABS Ltd could then have found out who owned the cattle.

[19] I have considered whether the Limitation Act 2010, which contains "late knowledge" provisions (s 14), would have changed the outcome in this case. The general scheme of the 2010 Act is that a six-year limitation period applies, which can be extended by up to three years in the case of late knowledge (s 11). However, ABS Ltd had knowledge of the damage and whose cattle had caused it by February 2008 at the latest. The claim was not brought within the six-year "primary period" running from the date of the trespass/nuisance. Nor was it brought within the three-year "late knowledge period" running from February 2008. I conclude that, even if the Limitation Act 2010 had applied, the outcome would be the same.

[20] I have considered FG's reliance on ss 4, 28 and 31 of the Limitation Act 1950. As to section 4, FG said the cause of action did not accrue until ABS Ltd knew ZYL's cows had been involved. I have expressed my views about this point above. As to s 28, FG said that his uncertainty about ZYL's involvement in the plant damage was a "mistake" for the purpose of the section. My understanding of s 28 is that it applies only where the mistake is an essential ingredient of the cause of action – for example, a payment under a mistake of fact or law. In the Court of Appeal case of *Vanvi Ltd v Dawson* [1980] 1 NZLR 513, Cooke J said that the same provision in the Limitation Act 1939 (UK) had been regarded as applying to actions in quasi-contract for the recovery of money paid by mistake of fact, and to claims in equity based on mistake of fact or law. ABS Ltd's claim was not based on mistake but on the tort of cattle trespass and/or nuisance. I conclude that there is no relevant mistake here postponing commencement of the limitation period. Finally, s 31 appears to relate to equitable remedies and is irrelevant.

[21] I have considered FG's view that s 18(6) of the Disputes Tribunals Act 1988 permits the Tribunal to rule on matters outside the six-year limitation period. That subsection requires me to determine the dispute on its substantial merits and justice having regard to the law. I bear in mind as well that, absent the limitation issue, ABS Ltd appeared to have a

claim with good prospects of success: cattle trespass is a tort of strict liability subject to s 26 of the Impounding Act, as to which, there was evidence that the boundary fence was stock-proof. It is, however, clear from section 10(5) of the 1988 Act that limitation defences apply in the Tribunal as they apply in the court system generally. FG explained in his written evidence why ABS Ltd was unable to commence proceedings earlier. One of those reasons was the ongoing dispute with ZYL about boundary fencing and subdivision issues, including an application by FG to the Disputes Tribunal in April 2008 over a gap in the boundary fence. FG said that his priority was to get the fence issue dealt with, because otherwise there was a risk that the plantings would be damaged again. For his part, ZYL said that ABS Ltd could have addressed the trespass issue in 2008. He also mentioned that he no longer had his diary which may have contained relevant evidence.

[22] There are clear reasons of public policy justifying limitation statutes. One is the desirability that litigation is brought to an end so that families and businesses can be sure of their finances. There are evidential reasons, for instance, as time passes memories fade, witnesses become unavailable, or documents are lost. I consider that the Tribunal would be left with an impossible task if it had to decide, in any particular case, whether s 18(6) of the Disputes Tribunals Act and a consideration of the substantive merits and justice mandated the non-application of a limitation period. Further, the deliberate non-application of a statute might well result in an (impermissible) failure to consider the law. Ultimately, I must have regard to what I perceive to be the relevant law to determine the substantive merits and justice of any dispute, including the relevant limitation provisions. Unfortunately this may sometimes mean that otherwise meritorious claims become statute-barred, as regrettably it does here.