HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, NETTLE AND EDELMAN JJ

BRISBANE CITY COUNCIL APPELLANT

AND

EDWARD AMOS RESPONDENT

Brisbane City Council v Amos
[2019] HCA 27
4 September 2019
B47/2018

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Queensland

Representation

S L Doyle QC with A L Wheatley for the appellant (instructed by Brisbane City Council)

F L Harrison QC with P G Jeffery for the respondent (instructed by Keller Nall & Brown Solicitors)

CATCHWORDS

Brisbane City Council v Amos

Limitation of actions – Debts created by statute – Debts secured by charge – Where Council commenced proceeding against respondent for overdue rates and charges – Where overdue rates and charges secured by charge – Where respondent argued claim was an action to recover a sum recoverable by virtue of an enactment under s 10(1)(d) of *Limitation of Actions Act 1974* (Qld) – Where Council argued claim was an action to recover a principal sum of money secured by a charge and subject to s 26(1) of the Act – Where proceeding falls within both ss 10(1)(d) and 26(1) – Whether s 26(1) applies to exclude operation of s 10(1)(d).

Words and phrases – "*Barnes v Glenton*", "claim in rem", "limitation of actions", "overlap between limitation periods", "personal claim", "real claim", "sums secured by mortgage or charge", "what claims are within limitation statutes".

Limitation of Actions Act 1974 (Qld), ss 10(1)(d), 26(1).

KIEFEL CJ AND EDELMAN J.

Introduction

1 The appellant, the Brisbane City Council ("the Council"), is responsible for the local government of Brisbane. The respondent, Mr Amos, was the registered owner of rateable land on which the Council levied various rates and charges. The Council acted pursuant to its statutory duties and powers to levy rates and charges[1]. Legislation also provides that "overdue rates and charges are a charge on the land"[2]. The Council brought this proceeding relevantly to recover overdue and unpaid rates, with interest, levied upon Mr Amos' rateable land by rates notices issued in the period 30 April 1999 to 9 January 2012. Mr Amos resisted the Council's claim for a number of different reasons. Only one remains in this Court. It is which of two potentially applicable limitation periods, a six year limitation period or a 12 year limitation period, applies to the Council's claims. If the Council is correct that the only limitation period that applies is a provision that creates a 12 year limitation period, then there is a second question concerning the manner of operation of that provision in relation to the Council's claim for interest.

2 The question of statutory interpretation on this appeal arises from two provisions in the *Limitation of Actions Act 1974* (Qld) ("the 1974 Limitation Act"). The first provision is s 26(1), which contains a 12 year limitation period that applies to an action "to recover a principal sum of money secured by a mortgage or other charge on property". This provision applies to a wide range of debts including debts created by simple contract and secured by a mortgage or other charge, or vendor's lien[3], whether over realty or personalty and debts created by covenant and secured by charge or mortgage; and historically it also applied to judgment debts, which were treated as charges upon land and "payable

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1 *City of Brisbane Act 1924* (Qld), ss 48, 62; *City of Brisbane Act 2010* (Qld), s 96 and s 98, empowering *City of Brisbane (Finance, Plans and Reporting) Regulation 2010* (Qld), s 59(1)(a), (b), now *City of Brisbane Regulation 2012* (Qld), s 119(1)(a), (b). Rates levied under the earlier *City of Brisbane Act 1924* (Qld) prior to the commencement of the *City of Brisbane Act 2010* (Qld) are continued in force as if levied under the later Act: see *City of Brisbane Act 2010* (Qld), s 257.

2 *Local Government Act 1993* (Qld), s 1037A(1). See, now, *City of Brisbane Act 2010* (Qld), s 97(2).

3 Williams, *A Treatise on the Law of Vendor and Purchaser*, 2nd ed (1911), vol 2 at 1046-1047.

out of any land"[4]. The provision also encompasses, relevantly to this appeal, debts created by statute and secured by charge.

3 The second provision, which overlaps with s 26(1), is s 10. Section 10 creates overlapping limitation periods for a number of the debts relevant to s 26(1): a six year limitation period for an action founded on a simple contract[5]; and a 12 year limitation period for an action on a specialty[6], including a covenant, and also for an action upon a judgment[7]. And, relevantly to this appeal, s 10(1)(d) provides a six year limitation period for "an action to recover a sum recoverable by virtue of any enactment".

4 The correct approach to the overlap between s 26(1) and s 10(1)(d) of the 1974 Limitation Act cannot be understood without an appreciation of the history of interpretation of the predecessor provisions and the late nineteenth century solution to the issue of overlap, which had been settled for a century when the 1974 Limitation Act was enacted. As the reasons below explain, until the late nineteenth century the overlap between the provisions was resolved by confining the first limitation period, namely for sums of money secured by charge, to real or proprietary claims. The second group of limitation periods applied only to personal claims. This approach of separate pigeonholes was ameliorated from the late nineteenth century when it was held that the limitation period for sums of money secured by charge would also bar personal claims. In 1899, in *Barnes v Glenton*[8], it was effectively held that the application of both limitation periods to personal claims meant that a defendant could plead the shorter limitation period.

5 In oral submissions, the Council accepted that its claim was a personal claim. It was not "in rem" or a real claim. The Council urged this Court to depart from the decision in *Barnes v Glenton*. That submission should not be

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4 *Real Property Limitation Act 1833* (UK) (3 & 4 Will IV c 27), s 40; *Real Property Limitation Act 1874* (UK) (37 & 38 Vict c 57), s 8. See *Henry v Smith* (1842) 4 Ir Eq Rep 502 at 504-505, 507; *M'Donnell v Fitzgerald* [1897] 1 IR 556 at 561. See, now, the same period specifically for judgments: 1974 Limitation Act, s 10(4), following *Limitation Act 1939* (UK), s 2(4), which was "tidying up existing law": See United Kingdom, *Parliamentary Debates*, House of Commons, 2 February 1939, vol 343, col 489.

5 1974 Limitation Act, s 10(1)(a).

6 1974 Limitation Act, s 10(3).

7 1974 Limitation Act, s 10(4).

8 [1899] 1 QB 885.

accepted. *Barnes v Glenton* has been consistently followed by judicial authority and textbook writers, and hence practitioners, for more than a century. It was part of the understood fabric upon which the 1974 Limitation Act was enacted. It is a coherent approach. It was followed by a majority of the Court of Appeal of the Supreme Court of Queensland. The appeal must be dismissed.

The overlap between s 10 and s 26 of the 1974 Limitation Act

6 Section 10 of the 1974 Limitation Act relevantly provides as follows:

"**Actions of contract and tort and certain other actions**

(1) The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action arose –

(a) subject to section 10AA, an action founded on simple contract or quasi-contract or on tort where the damages claimed by the plaintiff do not consist of or include damages in respect of personal injury to any person;

...

(d) an action to recover a sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of a penalty or forfeiture.

...

(3) An action upon a specialty shall not be brought after the expiration of 12 years from the date on which the cause of action accrued.

(3A) Subsection (3) does not affect an action in respect of which a shorter period of limitation is prescribed by any other provision of this Act."

7 Although s 10(1) is expressed in terms that the action "shall not be brought", this has long been understood as barring the "remedy", that is, as permitting a good defence to be pleaded but not as extinguishing the underlying rights[9]. It has been accepted throughout this litigation that the Council's "action",

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9 *Courtenay v Williams* (1844) 3 Hare 539 at 551-552 [67 ER 494 at 500]; *In re Rownson; Field v White* (1885) 29 Ch D 358 at 364; *Jones v Bellgrove Properties Ltd* [1949] 2 KB 700 at 704. See also *The Commonwealth v Mewett* (1997) 191 CLR 471 at 534-535; [1997] HCA 29.

defined in s 5(1) of the 1974 Limitation Act as "any proceeding in a court of law", for unpaid rates will fall within s 10(1)(d), and thus permit a good defence to be pleaded by Mr Amos after the expiration of six years, unless that provision is excluded[10]. The issue is whether s 26, where it applies, excludes the operation of each of the limitation periods in s 10.

8 Section 26 of the 1974 Limitation Act relevantly provides as follows:

> "**Actions to recover money secured by mortgage or charge or to recover proceeds of the sale of land**
>
> (1) An action shall not be brought to recover a principal sum of money secured by a mortgage or other charge on property whether real or personal nor to recover proceeds of the sale of land after the expiration of 12 years from the date on which the right to receive the money accrued.
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> ...
>
> (5) An action to recover arrears of interest payable in respect of a sum of money secured by a mortgage or other charge or payable in respect of proceeds of the sale of land or to recover damages in respect of such arrears shall not be brought after the expiration of 6 years from the date on which the interest became due."

9 It is also common ground that s 26(1) and (5) of the 1974 Limitation Act apply to the Council's claim for overdue rates and charges, which are a charge on the land[11].

The treatment of the overlap between the antecedent provisions before 1874

10 Historically, there were two areas of apparent overlap between the antecedent provisions to ss 10 and 26. The first area of overlap was in relation to an action to recover the principal sum of money in respect of a debt secured by a charge and created by specialty. The limitation provision for a specialty[12]

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10 *Brisbane City Council v Amos* (2016) 216 LGERA 312 at 325 [59]; *Amos v Brisbane City Council* (2018) 230 LGERA 51 at 63 [28], 72 [61], 75 [74].

11 *Amos v Brisbane City Council* (2018) 230 LGERA 51 at 59 [14], 75 [73]. See also *Hornsey Local Board v Monarch Investment Building Society* (1889) 24 QBD 1 at 7, 11.

12 *Civil Procedure Act 1833* (UK) (3 & 4 Will IV c 42), s 3.

included not merely covenants but also, until 1939[13], a debt created by statute[14]. The second area of overlap arose where arrears of interest were sought in respect of a debt created by covenant or specialty and secured by a mortgage or other charge. Prima facie, the antecedent provisions to ss 10 and 26 both appeared to be applicable to a claim for principal or interest, since the claim in each case appeared to be both an action to recover money on a covenant or specialty and an action for a sum secured by a mortgage or other charge.

The apparent overlap in relation to claims to the principal

11 The origins of the limitation period for an action to recover a principal sum of money secured by a mortgage or other charge lie in s 40 of the *Real Property Limitation Act 1833* (UK)[15] ("the 1833 Limitation Act"), which prescribed a 20 year limitation period for a mortgage debt from the time that the cause of action arose. This limitation period was the same period as that for actions of ejectment[16] and was based upon the previous judicial assumption that if a mortgagor remained in possession of the land for more than 20 years without acknowledging the mortgage then that mortgage was deemed to have been satisfied[17].

12 If a debt was created by simple contract there was some overlap between the 20 year limitation period in s 40 of the 1833 Limitation Act and the six year limitation period in s 3 of the *Limitation Act 1623* (21 Jac I c 16) in relation to claims to the principal sum of money. In those cases, the overlap was resolved by recognising a difference between a "real" claim and a "personal" claim. As Lightwood observed, "[w]ith respect to sums charged on land, there may be a real remedy against the land, and at the same time a personal remedy against the debtor"[18]. The real claims to recover money were by sale of the land or by rent

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13 *Limitation Act 1939* (UK), s 2(1)(d). See Great Britain, Law Revision Committee, *Fifth Interim Report* (1936) Cmd 5334 at 9.

14 *The Cork and Bandon Railway Co v Goode* (1853) 13 CB 826 at 835-836 [138 ER 1427 at 1431-1432]; *Shepherd v Hills* (1855) 11 Ex 55 at 67 [156 ER 743 at 748].

15 3 & 4 Will IV c 27.

16 *Sutton v Sutton* (1882) 22 Ch D 511 at 515.

17 Wood, *A Treatise on the Limitation of Actions at Law and in Equity*, 4th ed (1916), vol 1 at 130, fn 53. See also *Sutton v Sutton* (1882) 22 Ch D 511 at 515.

18 Lightwood, *A Treatise on Possession of Land* (1894) at 190. See also *Kibble v Fairthorne* [1895] 1 Ch 219 at 224.

obtained from occupation of the land[19]. It was held that the shorter six year limitation period applied to any personal action, with the longer 20 year limitation period applying to any real claims[20].

13 In the most common scenario of possible overlap, namely a debt created by covenant and secured by charge or mortgage, there was no issue before 1874. This was because a 20 year limitation period applied to both a claim to recover a principal sum of money secured by a mortgage or other charge under s 40 of the 1833 Limitation Act and a claim on a covenant under s 3 of the *Civil Procedure Act 1833* (UK)[21].

The apparent overlap in relation to claims to arrears of interest

14 In the nineteenth century the issue that arose from the apparent overlap in relation to arrears of interest was that there was a six year limitation period for real claims – that is, claims "against the land"[22] – in s 42 of the 1833 Limitation Act and a 20 year limitation period for personal claims on a covenant in s 3 of the *Civil Procedure Act*[23]. This overlap was again resolved by treating the different provisions as concerned with different remedies. The six year limitation period for those claims in s 42 of the 1833 Limitation Act applied to real claims in Chancery. By contrast, the 20 year limitation period in s 3 of the *Civil Procedure Act*[24], passed by Parliament only three weeks later[25] "to deal with ... the personal

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19 *Levy v Williams* [1925] VLR 615 at 625.

20 *Toplis v Baker* (1789) 2 Cox 118 at 123 [30 ER 55 at 57]. See also *Brocklehurst v Jessop* (1835) 7 Sim 438 at 442 [58 ER 906 at 907]; *Barnes v Glenton* [1899] 1 QB 885 at 890.

21 3 & 4 Will IV c 42.

22 *Kibble v Fairthorne* [1895] 1 Ch 219 at 224.

23 3 & 4 Will IV c 42.

24 3 & 4 Will IV c 42.

25 Although, with retroactive operation, coming into effect earlier: see *Civil Procedure Act 1833* (UK) (3 & 4 Will IV c 42), s 44; *Paget v Foley* (1836) 2 Bing NC 679 at 689 [132 ER 261 at 266].

action only"[26], applied to personal actions on the covenant or specialty. Those actions were brought at common law and were not available in Chancery[27].

15 The leading case that recognised the different universes in which the two provisions operated was *Hunter v Nockolds*[28]. The issue arose in that case in relation to a real action brought against an alienee of the land[29]. The Lord Chancellor recognised that the generality of the words "action or suit" in s 42 of the 1833 Limitation Act[30] was capable of encompassing both common law actions and Chancery suits, which suggested that the provision concerning claims to recover sums charged on land was a "general enactment"[31] covering both real and personal claims. But the Lord Chancellor held that it was well established, in England and in Ireland[32], that s 42 of the 1833 Limitation Act was concerned only with a real claim, and that the separate limitation period in s 3 of the *Civil Procedure Act*[33] applied to a personal action[34]. Hence, the real claim in *Hunter v Nockolds* was subject to the six year limitation period[35]. By contrast, any

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26 *Hunter v Nockolds* (1850) 1 Mac & G 640 at 652 [41 ER 1413 at 1417].

27 *In re Turner; Turner v Spencer* (1894) 43 WR 153 at 154.

28 (1850) 1 Mac & G 640 [41 ER 1413].

29 (1850) 1 Mac & G 640 at 648 [41 ER 1413 at 1416].

30 (1850) 1 Mac & G 640 at 652 [41 ER 1413 at 1417].

31 *Paget v Foley* (1836) 2 Bing NC 679 at 690 [132 ER 261 at 266].

32 (1850) 1 Mac & G 640 at 653-654 [41 ER 1413 at 1418]. In Ireland see the decisions of Lord St Leonards in *Harrisson v Duignan* (1842) 2 Dr & War 295 and *Hughes v Kelly* (1843) 5 Ir Eq Rep 286.

33 3 & 4 Will IV c 42.

34 (1850) 1 Mac & G 640 at 653 [41 ER 1413 at 1417-1418]. See also *Paget v Foley* (1836) 2 Bing NC 679 [132 ER 261]; *Strachan v Thomas* (1840) 12 A & E 536 [113 ER 916].

35 (1850) 1 Mac & G 640 at 654 [41 ER 1413 at 1418]. See also *Harrisson v Duignan* (1842) 2 Dr & War 295 at 303, 305-306; *Hughes v Kelly* (1843) 5 Ir Eq Rep 286 at 292-293.

personal action on a covenant or specialty would be subject to a 20 year limitation period[36].

The treatment of the overlap in relation to claims to the principal after 1874

16 In 1874, s 8 of the *Real Property Limitation Act 1874* (UK)[37] ("the 1874 Limitation Act") reduced the limitation period for actions to recover a sum secured by a mortgage or other charge, previously in s 40 of the 1833 Limitation Act. The reduction was from 20 years to 12 years. In *Jay v Johnstone*[38], Lindley LJ said that one "key" to the 1874 Limitation Act was to be found in the preamble, which provided that "it is expedient further to limit the times within which actions or suits may be brought for the recovery of land or rent, and of charges thereon". This was consistent with the object of the 1833 Limitation Act to "relieve land from arrears of charges beyond six years"[39]. Nevertheless, despite this view of the limited change effected by s 8 of the 1874 Limitation Act, within a decade of the passage of that Act the English Court of Appeal revisited the question of overlap in relation to claims to the principal within s 8 of the 1874 Limitation Act.

17 This question of overlap was revisited in *Sutton v Sutton*[40]. The issue in that case was whether s 8 of the 1874 Limitation Act applied only to real actions to recover a sum secured by mortgage or other charge, leaving other limitation periods to apply to personal actions. The appellant relied upon the 12 year limitation period in a personal action for recovery of a principal sum secured by mortgage or other charge. The respondent demurred to that defence, alleging that the applicable limitation period was the 20 year limitation period for an action on a covenant. The Court of Appeal held that the 12 year limitation period applied. The Master of the Rolls pointed out that the opening words of s 8 of the 1874 Limitation Act stated that "[n]o action or suit or other proceeding shall be brought". This encompassed actions at common law (the personal actions) as

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36 See *Paget v Foley* (1836) 2 Bing NC 679 at 690-691 [132 ER 261 at 266]; *Strachan v Thomas* (1840) 12 A & E 536 at 558-559 [113 ER 916 at 924]; *Manning v Phelps* (1854) 10 Ex 59 at 61-62 [156 ER 355 at 356-357]. See also Lightwood, *The Time Limit on Actions* (1909) at 156-157.

37 37 & 38 Vict c 57.

38 [1893] 1 QB 189 at 191.

39 *Hunter v Nockolds* (1850) 1 Mac & G 640 at 651 [41 ER 1413 at 1417].

40 (1882) 22 Ch D 511.

well as suits in equity (the real claims)[41]. Although this reasoning applied equally to claims for arrears of interest, *Hunter v Nockolds* was distinguished by Cotton LJ on the basis that the overlapping provisions concerning interest had been, and were still, located in two different Acts that had been passed only three weeks apart[42]. The consequence of the decision in *Sutton v Sutton* for claims to a principal sum, as Cotton LJ later explained, was to expand the operation of s 8 to personal claims[43].

18 The decision in *Sutton v Sutton* was said to have come as "a surprise to the profession generally"[44]. As the trial judge in *Sutton v Sutton* later observed, one reason why no appeal was brought to the House of Lords may have been that the respondent was nevertheless able to obtain payment of the money due under the covenant by way of amendments to the statement of claim[45]. Although the decision in *Sutton v Sutton* might have been controversial in applying a provision such as s 8 to personal claims, it would have been far more controversial if it had also disapplied any other, shorter, limitation period. It did not do this. In the words of Stirling J, the decision did not interpret s 8 as though it said that "an action or suit or other proceeding to recover money charged on land may be brought up to the end of twelve years, but not afterwards"[46]. If a shorter limitation period applied to the personal claim then, as Monroe J said in *In re Conlon's Estate*[47], "the mere fact that the personal claim cannot be enforced does not deprive the creditor of his remedy against the land". Section 8 would apply a 12 year limitation period to that real claim.

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41 (1882) 22 Ch D 511 at 516.

42 (1882) 22 Ch D 511 at 518-519. See also Carson and Bompas, *Shelford's Real Property Statutes*, 9th ed (1893) at 199; Lightwood, *A Treatise on Possession of Land* (1894) at 191.

43 *In re Frisby; Allison v Frisby* (1889) 43 Ch D 106 at 116.

44 *In re Frisby; Allison v Frisby* (1889) 43 Ch D 106 at 108. See also *National Bank of Tasmania Ltd (In liq) v McKenzie* [1920] VLR 411 at 419.

45 *In re Turner; Turner v Spencer* (1894) 43 WR 153 at 154.

46 *Firth v Slingsby* (1888) 58 LT 481 at 483.

47 (1892) 29 LR Ir 199 at 209. See also *London and Midland Bank v Mitchell* [1899] 2 Ch 161 at 165.

19 This limited effect of *Sutton v Sutton* was confirmed in *Barnes v Glenton*[48]. In that case, a loan was given by simple contract and secured by a charge on land. No action was brought during the six year limitation period under the *Limitation Act 1623*[49] for a simple contract without specialty. However, the lender argued that the limitation period that governed the simple contract was the 12 year limitation period for actions to recover a sum secured by charge. The Court of Appeal unanimously rejected this submission.

20 Each of A L Smith and Collins LJJ explained that *Sutton v Sutton* was concerned with a covenant (so that s 8 of the 1874 Limitation Act would provide a shorter limitation period) rather than a simple contract (which had a shorter limitation period than s 8 of the 1874 Limitation Act)[50]. This difference was material because the limitation period for an action on a covenant (20 years) was longer than the limitation period for an action to recover a sum secured by mortgage (12 years). The shorter limitation period of 12 years had been applied. As Collins LJ said in *Barnes v Glenton*[51]:

> "The words of the section debar the creditor from proceeding after twenty years; they do not confer any right of suit upon him which he did not before possess. The statutory prohibition against taking proceedings after the period named is not a statutory permission given to take them within that period".

21 The same point was made by Romer LJ in *Barnes v Glenton*, who added that the two Acts did not conflict: the shorter limitation period of six years applied to personal actions to enforce a simple contract debt and the limitation period of 12 years applied to any claims against the land or on a covenant for a sum of money secured by a mortgage or other charge on land[52].

22 The effect of the decision in *Barnes v Glenton* was thus to confirm that in personal claims to recover a sum secured by mortgage or other charge there could be overlapping limitation periods, but any longer limitation period would not extend a shorter limitation period. However, the potential application of both the shorter and the longer limitation periods to a personal claim to recover a

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48 [1899] 1 QB 885.

49 21 Jac I c 16, s 3.

50 [1899] 1 QB 885 at 888, 890.

51 [1899] 1 QB 885 at 889.

52 [1899] 1 QB 885 at 891.

principal sum secured by a charge did not mean that the longer limitation period was redundant. The longer limitation period would still apply to a real action "against the land", such as an action for an order for sale of the land. It might also apply if an exception such as disability or acknowledgement of the debt applied to the shorter limitation period but not to the longer limitation period[53].

23 As A L Smith LJ had observed in *Barnes v Glenton*, the concurrent operation of shorter limitation periods for personal claims was supported by the textbooks as well as judicial authority[54]. And for more than a century after *Barnes v Glenton*, until this litigation, judges and academic authors consistently took the same view. The effect of the decision in *Barnes v Glenton* was stated judicially in 1899[55], 1929[56], and 2004[57]. And prior to the 1974 Limitation Act it was reiterated by all the leading authors, including: in 1899 by Williams and Crowdy[58], and also by Jackson and Gosset[59]; in 1904 by Edwards[60], and also by Whitcombe and Cherry[61]; in 1906 by Brown[62]; in 1909 by Harnett[63], and also by Lightwood[64]; in 1910 by Davidson and

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53 Sykes and Walker, *The Law of Securities*, 5th ed (1993) at 935; *National Bank of Tasmania Ltd (In liq) v McKenzie* [1920] VLR 411 at 423-424.

54 [1899] 1 QB 885 at 888.

55 *London and Midland Bank v Mitchell* [1899] 2 Ch 161 at 165.

56 *Dennerley v Prestwich Urban District Council* [1930] 1 KB 334 at 343, 351.

57 *Wilkinson v West Bromwich Building Society* [2004] EWCA Civ 1063 at [31].

58 Williams and Crowdy, *Goodeve's Modern Law of Personal Property*, 3rd ed (1899) at 348.

59 Jackson and Gosset, *Investigation of Title*, 2nd ed (1899) at 219.

60 Edwards, *A Compendium of the Law of Property in Land and of Conveyancing relating to such Property*, 4th ed (1904) at 425.

61 Whitcombe and Cherry, *Prideaux's Precedents in Conveyancing*, 19th ed (1904), vol 1 at 559.

62 Brown, *The Law of the Limitation of Actions*, 3rd ed (1906) at 201.

63 Harnett, *A Handbook on the Law of Mortgages* (1909) at 216.

64 Lightwood, *The Time Limit on Actions* (1909) at 158, 356.

Wadsworth[65]; in 1911 by Webster[66], and also by Williams[67]; in 1912 by Stephenson[68]; in 1927 by Law[69], and also by Ramsbotham[70]; in 1931 by Lightwood[71]; in 1936 by Ball[72]; in 1959 by Franks[73]; and in 1973 by Sykes[74].

The 1974 Limitation Act

24 When Parliament enacts legislation by adopting words that have an established and understood meaning in predecessor provisions, then it will generally be assumed that Parliament has intended the words to have that meaning[75]. This is particularly so if the legislation adopts a model in which those words have been given an established meaning, and other provisions, or other parts of the provision, are amended but the relevant words are not[76].

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65 Davidson and Wadsworth, *Concise Precedents in Conveyancing*, 19th ed (1910) at 242, fn (e).

66 Webster, *Ashburner's Concise Treatise on Mortgages, Pledges, and Liens*, 2nd ed (1911) at 604-605.

67 Williams, *A Treatise on the Law of Vendor and Purchaser of Real Estate and Chattels Real*, 2nd ed (1911), vol 2 at 1046-1047.

68 Stephenson, *A Study of the Law of Mortgages*, 2nd ed (rev) (1912) at 85.

69 Law, *Carson's Real Property Statutes*, 3rd ed (1927) at 219.

70 Ramsbotham, *Coote's Treatise on the Law of Mortgages*, 9th ed (1927), vol 2 at 1004.

71 Lightwood, *Fisher and Lightwood's Law of Mortgage*, 7th ed (1931) at 330.

72 *Halsbury's Laws of England*, 2nd ed (1936), vol 20 at 657 [838]. See also *Halsbury's Laws of England*, 3rd ed (1958), vol 24 at 264 [510]. See further *Halsbury's Laws of England*, 5th ed (2016), vol 68 at 330 [1103].

73 Franks, *Limitation of Actions* (1959) at 164.

74 Sykes, *The Law of Securities*, 2nd ed (1973) at 763-764.

75 *Attorney-General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 531; [1908] HCA 94. See also *Aubrey v The Queen* (2017) 260 CLR 305 at 323 [34]; [2017] HCA 18.

76 *Platz v Osborne* (1943) 68 CLR 133 at 141, 146-147; [1943] HCA 39. See also *Thompson v Judge Byrne* (1999) 196 CLR 141 at 157 [40]; [1999] HCA 16.

25 Section 26(1) of the 1974 Limitation Act re-enacted in Queensland, in relevantly identical form, s 24(1) of the *Limitation Act 1960* (Qld). In turn, s 24(1) of the *Limitation Act 1960* (Qld) had re-enacted s 18(1) of the *Limitation Act 1939* (UK). And, with one substantive change to the expression concerning a "sum of money secured by any mortgage ... or otherwise charged upon or payable out of any land", the 1939 provision was in essentially the same terms as that part of s 8 of the 1874 Limitation Act and s 40 of the 1833 Limitation Act and its colonial Queensland derivative[77]. The change was that prior to 1939, s 8 had been applied only to charges on land; an extension by analogy had been denied to charges over personalty[78]. The provision was extended to personalty in 1939 following a recommendation by the Law Revision Committee, which had noted the anomaly of excluding personalty, particularly since charges were sometimes given over a mixed fund of land and personalty[79].

26 The consistent interpretation and understanding of s 8 of the 1874 Limitation Act and its successor provisions over nearly a century formed part of the fabric upon which s 26(1) of the 1974 Limitation Act was enacted with amendments that did not affect that understanding. It was understood that although s 26(1) applied to both real and personal claims, it did not extend other applicable limitation periods for personal claims. Indeed, the Law Revision Committee recommended a change to the predecessor provision to s 26(5) so that this provision would operate in the same way[80]. Prior to 1939, the decision in *Sutton v Sutton* had not been applied to the predecessor provision to s 26(5). Hence, the six year limitation period under s 42 of the 1833 Limitation Act for actions to recover arrears of interest payable in respect of a sum of money secured by a charge was confined only to real claims, with the longer limitation period of 20 years under s 3 of the *Civil Procedure Act* applying to personal claims to arrears by an action on the covenant[81]. The Law Revision Committee

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77 *Statute of Frauds and Limitations 1867* (Qld), s 18.

78 *Weld v Petre* [1929] 1 Ch 33 at 48. See also *In re Powers; Lindsell v Phillips* (1885) 30 Ch D 291 at 295, 296, 297-298; *Mellersh v Brown* (1890) 45 Ch D 225 at 229.

79 Great Britain, Law Revision Committee, *Fifth Interim Report* (1936) Cmd 5334 at 15.

80 Great Britain, Law Revision Committee, *Fifth Interim Report* (1936) Cmd 5334 at 14.

81 *Darley v Tennant* (1885) 53 LT 257 at 258. See also Lightwood, *A Treatise on Possession of Land* (1894) at 191-192. Compare Fisher, *The Law of Mortgage and other Securities upon Property*, 4th ed (1884) at 900-901.

described this as an anomaly and recommended that a six year limitation period should apply to both the real and the personal claim[82]. That was the origin of the provision that became s 10(3A) in the 1974 Limitation Act[83].

27 The interpretation consistently adopted since *Barnes v Glenton* is also reflected in the decision concerning the overlap between s 10(3) and s 26(1) of the 1974 Limitation Act by the Full Court of the Supreme Court of Queensland in *Australia and New Zealand Banking Group Ltd v Douglas Morris Investments Pty Ltd*[84]. In that case, a building construction company owed money to the bank. The building construction company became insolvent. Douglas Morris Investments had undertaken to pay, on written demand by the bank, the balance owing or unpaid by the building construction company or itself. The debt of Douglas Morris Investments was secured by instruments described as scrip liens, executed by Douglas Morris Investments in favour of the bank. The bank demanded payment from Douglas Morris Investments. When Douglas Morris Investments did not pay, the bank brought an action for various declarations including declarations that the scrip liens were valid and that the bank was entitled to possession of share certificates and a cash sum, which were consideration for a takeover of some of the secured shares by the third defendant. The trial judge declared that the scrip liens were effective to charge the shares and that the bank was entitled to possession of the share certificates[85].

28 When the Full Court considered whether the declarations should have been made, an issue arose as to whether "the bank's right to the share scrip is statute-barred"[86]. The expression of this issue by the Full Court, the terms of the declarations sought, and the joinder of the third defendant make it plain that the bank's underlying claim was a proprietary claim on the charge, to enforce its entitlement to the scrip. The bank was seeking to recover a principal sum of money, and interest, secured by a charge as a "real" claim to the share scrip. Following the approach consistently recognised in relation to land since at least 1850 in *Hunter v Nockolds*, and undisturbed by *Sutton v Sutton*, such a "real" claim would fall within the antecedents to s 26(1) but not within the antecedents

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82 Great Britain, Law Revision Committee, *Fifth Interim Report* (1936) Cmd 5334 at 14.

83 Originally contained in s 10(3) of the 1974 Limitation Act.

84 [1992] 1 Qd R 478 ("*Douglas Morris Investments*").

85 [1992] 1 Qd R 478 at 481.

86 [1992] 1 Qd R 478 at 482.

to s 10, which were concerned with personal claims. This was the conclusion of the Full Court.

29 In the Full Court, McPherson J, with whom Connolly and Williams JJ agreed, held that the relevant limitation period provision for "an action on the scrip lien" was s 26(1), "to the exclusion of those [provisions] specified in s 10(1) and s 10(3)"[87]. The reason the personal claims in s 10(1)(a) (simple contract) and s 10(3) (covenant) were excluded was that the claim was a real claim: McPherson J referred to the first instance decision in *Barnes v Glenton*[88], in which Lord Russell of Killowen CJ had characterised the claim as a real claim "payable out of land"[89]. Although that decision was overturned by the Court of Appeal, which characterised the claim as a personal claim, the Court of Appeal did not cast any doubt upon the long-standing position that real claims were governed only by the equivalent of s 26. The character of the claim in *Douglas Morris Investments* as a real claim was made even plainer when McPherson J described the consequences of a lapse in time barring actions for the principal or interest. His Honour said that because the limitation period barred the personal *action* but not the underlying *right*: "[t]he barring of proceedings to recover the debt which the charge was intended to secure does not touch that [equitable proprietary] interest"[90]. Later, he concluded that the action "is more akin to an action for recovery of possession, or for specific performance of an agreement that the bank shall have possession"[91].

The more recent English authorities

30 The Council relied upon the decision in *Douglas Morris Investments* and two English decisions that were said to be directly applicable. The first English decision is *Bristol and West Plc v Bartlett*[92]. In each of three cases heard together, borrowers defaulted on loans. The loans were secured by charges over their houses so that upon default of payment the lender obtained possession of and sold the properties. Although there was a shortfall, the lenders delayed in service of claims for the outstanding amounts. In the lead case in the Court of

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87 [1992] 1 Qd R 478 at 482.

88 [1898] 2 QB 223.

89 [1898] 2 QB 223 at 230.

90 [1992] 1 Qd R 478 at 493.

91 [1992] 1 Qd R 478 at 496.

92 [2003] 1 WLR 284; [2002] 4 All ER 544.

Appeal, that of the Bartletts, the delay was for more than six years[93]. The limitation period for an action to recover a sum of money secured by a charge, in the equivalent of s 26(1), was 12 years. The limitation period for an action on a specialty, including a debt created by deed[94], in the equivalent provision of s 10(3), was 12 years. And the limitation period for a simple contract, in the equivalent provision to s 10(1)(a), was six years[95].

31 The Court of Appeal, in reasons delivered by Longmore LJ, rejected the submission that the sale of the land meant that the debt became only a simple contract debt[96]. So the remaining question was whether the relevant limitation period was that for an action upon a specialty or that for a sum of money secured by a charge[97]. Although both provisions contained a limitation period of 12 years for the principal, the limitation period for an action to recover interest in respect of money secured by a charge, in the equivalent of s 26(5), was only six years. The lenders argued that the equivalent of s 26(5) did not apply because the money was no longer secured by a charge[98]. The Court of Appeal rejected that submission, concluding that the shorter limitation period in s 26(5) applied to the claims for interest because the limitation period for an action in respect of a sum of money secured by a mortgage or other charge applied to charges existing at the date when the right accrued, not the date when the action was brought[99].

32 The Court of Appeal applied the limitation period in the equivalent of s 26(5) rather than the limitation period with respect to specialties because it considered that the "specific" limitation period in respect of a sum of money secured by a mortgage or other charge took "precedence over the general provisions relating to specialties"[100]. This assumption was precisely the opposite of the position that had prevailed before 1874, where the "general enactment"

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93 [2003] 1 WLR 284 at 290-291 [7]; [2002] 4 All ER 544 at 548.

94 *In re Compania de Electricidad de la Provincia de Buenos Aires Ltd* [1980] Ch 146 at 186.

95 [2003] 1 WLR 284 at 289-290 [4]; [2002] 4 All ER 544 at 547.

96 [2003] 1 WLR 284 at 294 [18]; [2002] 4 All ER 544 at 551.

97 [2003] 1 WLR 284 at 296 [27]; [2002] 4 All ER 544 at 552.

98 [2003] 1 WLR 284 at 296-297 [29]; [2002] 4 All ER 544 at 553.

99 [2003] 1 WLR 284 at 297 [30]-[31]; [2002] 4 All ER 544 at 553.

100 [2003] 1 WLR 284 at 296 [27]; [2002] 4 All ER 544 at 553.

concerning a sum of money secured by charge did not apply to the circumstances of a personal claim based upon a covenant or specialty, which was said to be "so express and clear in its language" and "so plain and unequivocal that it must prevail"[101]. But this point had not been argued in the Court of Appeal, was not in issue, and was therefore not necessary for the conclusion. The same result would have ensued whether the limitation period in respect of interest on a sum of money secured by a charge (six years) took precedence over the limitation period in respect of a specialty (12 years) or whether they both applied so that the action was limited by the shorter period.

33 The other English decision relied upon by the Council was *West Bromwich Building Society v Wilkinson*[102]. In that case, the Wilkinsons defaulted on a loan from the West Bromwich Building Society. The loan was secured by a mortgage over their property so the building society obtained possession and sold the property. Although there was a shortfall, the building society did not serve a claim for the outstanding amount for more than 12 years. The Wilkinsons relied upon the 12 year limitation period for a sum of money secured by a mortgage. The building society submitted that the applicable limitation period was the 12 year period for a specialty and its main submission, repeating the unsuccessful argument from *Bristol and West Plc v Bartlett*, was that the period ran only from the time when the property was sold.

34 The House of Lords unanimously rejected this submission. Lord Hoffmann, with whom the others agreed, observed that it might make little difference whether the limitation period is that for a claim to a debt secured by mortgage or a claim upon a specialty[103]. In both cases the limitation period was 12 years. Consistently with *Sutton v Sutton*, Lord Hoffmann approached the submissions on the basis that either limitation period might apply. In either case, he rejected the submissions of the building society[104]. Lord Hoffmann also rejected the submission of the building society that sought to overturn *Bristol and West Plc v Bartlett*. He said that if the cause of action "when it arose was a claim to a debt secured on a mortgage" then the lender cannot "stop time running by his own act in exercising the power of sale"[105]. There was no issue, and nothing was

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101 *Paget v Foley* (1836) 2 Bing NC 679 at 690-691 [132 ER 261 at 266].

102 [2005] 1 WLR 2303; [2005] 4 All ER 97.

103 [2005] 1 WLR 2303 at 2305 [6]; [2005] 4 All ER 97 at 100.

104 [2005] 1 WLR 2303 at 2309 [21]; [2005] 4 All ER 97 at 104.

105 [2005] 1 WLR 2303 at 2306 [10]; [2005] 4 All ER 97 at 101.

decided, about whether the limitation period for a specialty also ran from that time.

The decisions of the primary judge and the Court of Appeal in this case

35 At the heart of the reasons of the majority of the Court of Appeal of the Supreme Court of Queensland (Dalton J, with whom Philippides JA agreed) was the statutory history of s 26(1) of the 1974 Limitation Act. As explained above, the history of s 26(1) is one in which the provision and its antecedents have been understood for a century as applying concurrently with limitation periods for personal claims in s 10 and its antecedent provisions. This means that, where both limitation periods apply, it is open to the defendant to plead the shorter period. In this way, the provisions operate consistently with their historical foundations and coherently.

36 The contrary view was expressed clearly in the judgments of the primary judge (Bond J) and Fraser JA in dissent in the Court of Appeal. Their Honours relied upon the decision of the Full Court of the Supreme Court of Queensland in *Douglas Morris Investments* to conclude that s 26(1), as the more "specific" provision, had excluded s 10(1)(d), which is the more "general" provision, in the sphere of operation of s 26(1)[106]. The *Douglas Morris Investments* decision was properly afforded considerable weight. In the Court of Appeal, the submissions had treated that decision as turning upon the difficult question of how to apply the maxim *generalia specialibus non derogant*, a general language convention that applies to resolve an inconsistency[107] by preferring the specific provision to the general provision. However, it had not been argued before the Court of Appeal that, as explained above, the description by McPherson J of s 26(1) as the "specific" provision should be better seen not as an invocation of the maxim but as a reference to the operation of s 26(1) in the specific circumstances of a "real" claim to the exclusion of the personal claim in s 10(3). Understood in that way, the Council is not assisted by either the maxim or the *Douglas Morris Investments* case. A related submission, also contrary to the approach of the majority of the Court of Appeal, was urged by the Council in oral submissions on this appeal. The Council submitted that ss 10(1)(d) and 26(1) should be interpreted to apply to actions that meet different descriptions even if the same facts were pleaded, in the same way that although the same pleaded facts could constitute an action for negligence or trespass those actions could have different

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106 *Brisbane City Council v Amos* (2016) 216 LGERA 312 at 326 [64]; *Amos v Brisbane City Council* (2018) 230 LGERA 51 at 69 [45].

107 *Purcell v Electricity Commission of NSW* (1985) 59 ALJR 689 at 692; 60 ALR 652 at 657; [1985] HCA 54.

limitation periods[108]. This attempt to create wholly distinct spheres of operation for ss 10 and 26(1) is the same as the approach that was taken to the antecedents to ss 10 and 26(1) before the decision in *Sutton v Sutton*. At that time, the antecedents to s 26(1) were confined to real claims and the antecedents to s 10 applied to personal claims. The Council sought to draw a different, but novel, division between personal actions that involved a mortgage or other charge and other personal actions. Whatever the merit of this approach, it is too late now to turn back the clock. The 1974 Limitation Act was enacted against a long history of acceptance that both sections apply to personal claims. That approach is coherent.

Conclusion

37 The Council's submission that s 26(1) excludes the operation of s 10(1)(d) is not supported by the language of s 26(1). Nor is there anything in the history of the provision to support such a proposition. The proposition would contradict almost every decision and every text that has considered the point for more than a century. The one suggestion to the contrary is a sentence of obiter dicta in *Bristol and West plc v Bartlett* which was not the subject of argument. The appeal must be dismissed with costs. In light of this conclusion it is unnecessary to consider the second issue, concerning the claim for interest.

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108 See *Williams v Milotin* (1957) 97 CLR 465 at 473-474; [1957] HCA 83.

38 GAGELER J. The determinative question in this appeal from a decision of the Court of Appeal of the Supreme Court of Queensland[109] is whether the majority in that Court was correct to hold that an action in debt[110] by Brisbane City Council against a registered owner of land to recover overdue rates and charges levied under the *City of Brisbane Act 2010* (Qld) is subject to the limitation period of six years applicable under s 10(1)(d) of the *Limitation of Actions Act 1974* (Qld) to "an action to recover a sum recoverable by virtue of any enactment". The contention of the Council that the majority was incorrect reduces to the proposition that the circumstance that overdue rates and charges are made a charge on rateable land by s 97 of the *City of Brisbane Act* has the result that the limitation period of 12 years applicable under s 26(1) of the *Limitation of Actions Act* to "[a]n action ... to recover a principal sum of money secured by a ... charge on property" applies to the exclusion of that imposed by s 10(1)(d) of the *Limitation of Actions Act*.

39 To support the proposition that the 12-year limitation period under s 26(1) of the *Limitation of Actions Act* applies to the exclusion of the six-year limitation period under s 10(1)(d), the Council relies on two mutually reinforcing arguments. First, it argues that the structure of the *Limitation of Actions Act* requires that for any action there can be only one applicable limitation period. Second, it argues that the category of actions that are subject to a 12-year limitation period under s 26(1) is a more specific category of actions than those referred to in s 10(1)(d).

40 The first argument sits uncomfortably with the traditional understanding that a limitation period of the kind imposed by the *Limitation of Actions Act* operates only as a defence to an action and only if invoked at the option of the defendant[111]. Nothing said in *Williams v Milotin*[112], on which the Council principally relies, supports the argument. The question asked rhetorically in that case was "Why should the plaintiff's action be limited by any other period of time than that appropriate to the cause of action on which he sues?"[113]. The question was framed to emphasise the ability of a plaintiff, on a given set of facts, to

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109 *Amos v Brisbane City Council* (2018) 230 LGERA 51.

110 Section 66(1) of the *City of Brisbane (Finance, Plans and Reporting) Regulation 2010* (Qld).

111 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 534-535; [1997] HCA 29; *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420 at 433 [30]; [2010] HCA 34.

112 (1957) 97 CLR 465; [1957] HCA 83.

113 (1957) 97 CLR 465 at 474.

choose from the range of available causes of action to rely on a cause of action to which a shorter limitation period is inapplicable. The framing of the question within the context of *Williams v Milotin* cannot be taken to suggest that only one limitation period can ever be applicable to one cause of action.

41 What *Williams v Milotin* usefully illustrates is that a plaintiff is free to choose to rely on that cause of action which is most advantageous to the plaintiff. In the event that more than one limitation period is applicable to the cause of action on which the plaintiff chooses to rely, a defendant is correspondingly free to choose to invoke by way of defence that limitation period which is shortest and therefore most advantageous to the defendant.

42 The reasons for judgment of Kiefel CJ and Edelman J demonstrate that the second argument is belied by an understanding of the scope of the actions to which ss 10(1)(d) and 26(1) respectively refer. Just as the actions founded on simple contract, quasi-contract and tort to which s 10(1)(a) refers and the actions on specialties to which s 10(3) refers are personal actions as distinct from real actions, so the actions to which s 10(1)(d) refers are confined to actions to recover sums recoverable by virtue of enactments that are personal actions. The actions to which s 26(1) relevantly refers extend to actions that are either personal or real actions to recover a principal sum of money secured by a charge on property. The actions referred to in s 26(1) overlap with the actions referred to in s 10(1)(d); neither category of actions is a mere subset of the other; neither is more specific.

43 Significantly, both arguments are contradicted by the holding in *Barnes v Glenton*[114] to the effect that the English progenitor of s 10(1)(a)[115] was available to be invoked as a defence to a personal action to recover a debt that was secured by a charge over property notwithstanding that the English progenitor of s 26(1)[116] was in terms applicable. As the reasons for judgment of Kiefel CJ and Edelman J again demonstrate, the holding in *Barnes v Glenton* appears never to have been the subject of significant criticism, and nothing in the legislative history of the *Limitation of Actions Act* gives the slightest hint of a legislative intention to depart from it.

44 Although I had initially thought otherwise, the reasons for judgment of Kiefel CJ and Edelman J and of Keane J combine to persuade me that the result in *Australia and New Zealand Banking Group Ltd v Douglas Morris Investments*

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114 [1899] 1 QB 885.

115 Section 3 of the *Limitation Act 1623* (21 Jac I c 16).

116 Section 8 of the *Real Property Limitation Act 1874* (37 & 38 Vict c 57).

Pty Ltd[117] is not inconsistent with *Barnes v Glenton*. The relevant claim in *Douglas Morris* having been real as distinct from personal, the case was one to which s 26(1) in terms applied and to which ss 10(1)(a) and 10(3) in terms had no application.

45 The stability of the law demands that re-enacted statutory provisions ordinarily be taken to retain judicially settled meanings absent some judicially cognisable indication that some different meaning was legislatively intended[118]. None is here present.

46 The limitation periods under ss 10(1)(d) and 26(1) are capable of concurrent operation in relation to the same action. Both provisions apply to the Council's action. The result is that the registered owner of rateable land who is the defendant to that action, Mr Amos, is free to invoke by way of defence that limitation period which is shorter and more advantageous to him.

47 The appeal must be dismissed with costs.

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117 [1992] 1 Qd R 478.

118 *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106; [1994] HCA 34; *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at 496 [3], 502-503 [15]-[16]; [2015] HCA 10.

48 KEANE J. I have had the advantage of reading in draft the reasons for judgment of Kiefel CJ and Edelman J. Their Honours' review of the legislative and judicial history of ss 26(1) and 10(1) of the *Limitation of Actions Act 1974* (Qld) ("the Queensland Act") supports the approach of Dalton J (with whom Philippides JA agreed) in the Court of Appeal[119]. It must be accepted that these provisions were enacted on the settled understanding that s 26(1) was concerned, as were its predecessors, with actions to recover a principal sum by recourse to rights against the property against which the debt was secured.

49 It may be said that to understand s 26(1) in this way is to gloss the actual language of the provision to an extent not consistent with the language used by the legislature. But limitation statutes have a long history, in the course of which the courts have glossed the statutory language to an extent that might not now be regarded as acceptable in terms of the separation of the roles of the legislature and judiciary[120]. It has, for example, long been settled by judicial decision that legislative provision that an action "shall not be brought" is not to be taken literally, and that the provision merely provides a defence to the action that must be pleaded by a defendant if the expiration of the limitation period is to be given effect[121]. When the Queensland Act was passed in 1974, it was well settled that s 26(1) was concerned to impose a limitation period applicable to actions to enforce rights against the property against which the debt was secured. No judicial decision concerning analogous provisions is inconsistent with this view.

50 Importantly, in this regard, the decision of the Full Court of the Supreme Court of Queensland in *Australia and New Zealand Banking Group Ltd v Douglas Morris Investments Pty Ltd*[122] did not involve a departure from the settled judicial view of the operation of provisions in the terms of s 26(1) of the Queensland Act. The appellant emphasised that in *Douglas Morris*, McPherson J (with whom Connolly and Williams JJ agreed) said[123]:

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119 *Amos v Brisbane City Council* (2018) 230 LGERA 51.

120 Compare *Pipikos v Trayans* (2018) 92 ALJR 880 at 894-895 [73]; 359 ALR 210 at 225; [2018] HCA 39.

121 *Courtenay v Williams* (1844) 3 Hare 539 at 551-552 [67 ER 494 at 500]; *Dawkins v Lord Penrhyn* (1878) 4 App Cas 51 at 58-59; *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 219; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 405, 473-474; [1990] HCA 39.

122 [1992] 1 Qd R 478.

123 [1992] 1 Qd R 478 at 482-483.

> "I am in no doubt that, in an action on the scrip lien to recover the amount due to the bank, s 26(1) is the applicable limitation provision to the exclusion of those specified in s 10(1) and s 10(3). Both s 10(3) and s 26(1) do, in any event, prescribe a 12 year period, but the latter is the specific and therefore governing provision."

51 It is to be noted that in *Douglas Morris* the plaintiff did not seek judgment for the repayment of the debt, but sought declarations that the scrip liens were valid, that the lienee was entitled to possession of the share certificates and cash sum, and that it had an equitable charge over the shares[124]. In that context, the statement by McPherson J was directed specifically to "an action on the scrip lien", and not to a personal action to recover payment of the debt. The question did not arise whether, the limitation period applicable under s 10(3) to an action for recovery of money under a specialty having expired, the plaintiff might still avail itself of the longer period provided by s 26(1) in relation to such an action as distinct from a claim against the secured property.

52 In addition, the review by Kiefel CJ and Edelman J of the legislative and judicial history of these provisions provides an answer to the query which might otherwise arise as to the intention of the legislature given the difficulty of discerning the utility of differentiating, in terms of the limitation period applicable to the action, between personal actions to recover payment of a debt and actions to enforce creditors' rights against secured property. While such utility as there is in the differentiation may not be readily apparent now, there can be no doubt that the differentiation was marked and acted upon by the courts prior to the enactment of the Queensland Act.

53 I agree with the orders proposed by Kiefel CJ and Edelman J.

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124 [1992] 1 Qd R 478 at 481, 501-502.

54 NETTLE J. I have had the advantage of reading in draft the reasons for judgment of Kiefel CJ and Edelman J. As their Honours demonstrate, most comprehensively, the construction which the majority in the Court of Appeal of the Supreme Court of Queensland attributed to ss 26(1) and 10(1)(d) of the *Limitation of Actions Act 1974* (Qld) accords to the long history and understanding of the legislative predecessors of those provisions, and so, therefore, to the evident statutory purpose of their enactment.

55 Consequently, although s 26(1) prescribes a limitation period of 12 years for actions to "recover a principal sum of money secured by a mortgage or other charge on property", and so, in terms, is capable of application to both real and personal actions for the recovery of statutory rates, upon the proper construction of s 26(1) – as informed by the history and understanding of its predecessor provisions[125] – s 26(1) does not exclude or enlarge the shorter limitation of six years applicable under s 10(1)(d) to "a sum recoverable by virtue of any enactment" that applies to personal actions for the recovery of statutory rates. Inasmuch as each provision sets a limit on the time in which action may be brought, as opposed to authorising the bringing of action at any time up to the limit, the shorter limit prevails.

56 That was the unquestioned understanding of the predecessor provisions of ss 26(1) and 10(1)(d) ever since *Barnes v Glenton*[126], and, until this matter arose, it was the unquestioned understanding of ss 26(1) and 10(1)(d). Properly understood, nothing held in *Australia and New Zealand Banking Group Ltd v Douglas Morris Investments Pty Ltd*[127] in any way gainsays that.

57 In the result, I agree in the orders proposed.

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125 See *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 324-325 [8] per Gleeson CJ; [2004] HCA 40; *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at 502-503 [15]-[16] per French CJ, Hayne, Kiefel, Gageler and Keane JJ; [2015] HCA 10.

126 [1899] 1 QB 885.

127 [1992] 1 Qd R 478.