HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, EDELMAN AND STEWARD JJ

MATTHEW WARD PRICE AS EXECUTOR OF
THE ESTATE OF ALAN LESLIE PRICE
(DECEASED) & ORS APPELLANTS

AND

CHRISTINE CLAIRE SPOOR AS TRUSTEE & ORS RESPONDENTS

Price v Spoor
[2021] HCA 20
Date of Hearing: 4 March 2021
Date of Judgment: 23 June 2021
B55/2020

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Queensland

Representation

T Matthews QC with D D Keane and J K Carter for the appellants (instructed by MA Kent & Associates)

N Andreatidis QC with A F Messina and S J Gibson for the respondents (instructed by Mullins Lawyers)

CATCHWORDS

Price v Spoor

Limitation of actions – Exclusion by agreement – Where mortgages over land secured loan – Where mortgagors failed to repay loan – Where mortgagees brought proceedings to recover monies owing and possession of land secured by mortgages – Where mortgagors contended mortgagees statute-barred from enforcing rights under mortgages as a result of expiry of relevant time period under *Limitation of Actions Act 1974* (Qld) ("Act") – Where mortgagors contended mortgagees' title under mortgages extinguished by operation of s 24 of Act – Where mortgagees contended that mortgagors agreed not to plead any defence under Act by virtue of cl 24 of mortgages – Whether cl 24 effective to prevent mortgagors from pleading any defence under Act – Whether agreement not to plead any defence under Act unenforceable as contrary to public policy – Whether s 24 of Act operated automatically to extinguish mortgagees' title at expiry of relevant time period – Whether mortgagees' remedy confined to damages for mortgagors' breach of cl 24 of mortgages.

Words and phrases – "action", "agreement", "agreement not to plead", "benefit", "breach of contract", "contracting out", "defeated", "defence", "defence of limitation", "expiry", "extinguishment of title", "finality of litigation", "jurisdiction of the court", "limitation period", "limitations defence", "plea", "public interest", "public policy", "reasonable business person", "remedy", "shall not be brought", "statute-barred", "statute of limitations", "statutory bar", "statutory right", "waiver".

Limitation of Actions Act 1974 (Qld), ss 10, 13, 24, 26.

1 KIEFEL CJ AND EDELMAN J. The *Limitation of Actions Act 1974* (Qld) ("the Limitation Act") contains provisions which prescribe the time within which actions founded upon simple contract or for the recovery of land or monies secured by a mortgage over land shall be brought. The principal question on this appeal is whether the parties to a mortgage may agree that the mortgagor will not plead the statutory limitation by way of defence to an action brought by the mortgagee or whether such an agreement is unenforceable as contrary to public policy. A second question concerns the operation of a provision of the Limitation Act respecting extinguishment of title. A third concerns the terms of a clause in the mortgages in question and whether they are effective to prevent the appellants from pleading the statutory time limitation.

2 These questions arose in proceedings brought in 2017 in the Supreme Court of Queensland by the respondents as mortgagees in which they claimed more than $4 million as monies owing under and secured by two mortgages, together with recovery of possession of land the subject of the mortgages.

3 By way of defence and counterclaim, the appellants alleged that the respondents were statute-barred from bringing the action for debt pursuant to ss 10, 13 and 26 of the Limitation Act. The respondents were in consequence said to be barred from enforcing any rights under the mortgages. Two appellants further alleged that the respondents' title under the mortgages had been extinguished. In reply, the respondents relied on cl 24 of each mortgage, which they contended amounted to a covenant on the part of the appellants not to plead a defence of limitation. As a result it was said that the appellants were estopped from pleading it. The respondents might have described the abandonment of reliance on the statutory right which they allege was effected by the agreement as a waiver by the appellants of that right[1].

4 On the hearing of their application for summary judgment or for a strike out of the defences the respondents conceded that if the Limitation Act applied their claims would be defeated. The primary judge (Dalton J) dismissed the application and entered judgment for the appellants[2]. The Court of Appeal allowed the appeal from that decision and subsequently gave judgment for the respondents and made other orders[3].

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1 *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at 315 [30]; see also *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 406-407 per Mason CJ.

2 *Spoor v Price* [2019] QSC 53.

3 *Spoor v Price* (2019) 3 QR 176.

The Limitation Act provisions and their effect

5 Section 10(1)(a) of the Limitation Act in its relevant part provides that:

> "(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) … an action founded on simple contract …"

6 Section 13 provides:

> "An action shall not be brought by a person to recover land after the expiration of 12 years from the date on which the right of action accrued to the person or, if it first accrued to some person through whom the person claims, to that person."

7 The provision which relates to the extinguishment of title upon which the appellants rely is s 24(1), which relevantly provides:

> "… where the period of limitation prescribed by this Act within which a person may bring an action to recover land … has expired, the title of that person to the land shall be extinguished."

8 Section 26 deals with actions to recover money secured by a mortgage or to recover proceeds from the sale of the land.

9 In *WorkCover Queensland v Amaca Pty Ltd*[4], five members of this Court explained the effect of statutes of limitation by reference to what had been said by Gummow and Kirby JJ in *The Commonwealth v Mewett*[5]. In *Mewett*, their Honours said that in the case of a statute of limitations in the traditional form a statutory bar does not go to the jurisdiction of the court to entertain the claim but rather to the remedy available, and therefore to the defences which may be pleaded. The cause of action is not extinguished by the statute and unless a defence relying on the statute is pleaded, the statutory bar does not arise for the consideration of the court.

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4 (2010) 241 CLR 420 at 433 [30] per French CJ, Gummow, Crennan, Kiefel and Bell JJ.

5 (1997) 191 CLR 471 at 534-535; see also *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 404 per Mason CJ.

10 What was said in *Mewett* accords with the reasons of Mason CJ in *The Commonwealth v Verwayen*[6]. Speaking there of then s 5(6) of the *Limitation of Actions Act 1958* (Vic)[7] ("the Victorian Limitation Act"), his Honour said that although the terms of that provision are capable of being read as going to the jurisdiction of the court, limitation provisions of this kind have not been held to have that effect. Instead they have been held to bar the remedy but not the right and thereby create a defence to the action which must be pleaded[8]. These statements have been applied with approval on a number of occasions in this Court[9].

11 Mason CJ went on to observe[10] that since the right to plead a limitations defence is conferred by statute a contention that the right is susceptible of waiver "hinges on the scope and policy" of the Victorian Limitation Act. The same may be said of the question whether a person may abandon the statutory right to plead a defence of limitation, by agreement.

Public policy

12 In *Westfield Management Ltd v AMP Capital Property Nominees Ltd*[11] it was accepted that a person upon whom a statute confers a right may waive or renounce that right unless it would be contrary to the statute to do so. Most clearly

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6 (1990) 170 CLR 394 at 405.

7 Section 5(6) provided: "No action for damages for negligence …, where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries to any person, shall be brought after the expiration of three years after the cause of action accrued."

8 Citing *Dawkins v Lord Penrhyn* (1878) 4 App Cas 51 at 58-59; *The Llandovery Castle* [1920] P 119 at 124; *Dismore v Milton* [1938] 3 All ER 762; *Ronex Properties Ltd v John Laing Construction Ltd* [1983] QB 398; *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 219.

9 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305; *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364 at 372 [20], 373-374 [24]-[25]; *Brisbane City Council v Amos* (2019) 266 CLR 593 at 615-616 [49]; *Minister for Home Affairs v DMA18* (2020) 95 ALJR 14 at 18 [4], 23 [30]; 385 ALR 16 at 19, 26.

10 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 405.

11 (2012) 247 CLR 129 at 143-144 [46] per French CJ, Crennan, Kiefel and Bell JJ.

this may be the case where the statute contains an express prohibition against "contracting out" of rights or where the statute, properly construed, is inconsistent with a person's power to forgo statutory rights. The joint judgment continued:

> "It is the policy of the law that contractual arrangements will not be enforced where they operate to defeat or circumvent a statutory purpose or policy according to which statutory rights are conferred in the public interest, rather than for the benefit of an individual alone. The courts will treat such arrangements as ineffective or void".

13 As the Court of Appeal observed[12], a similar approach has been taken by courts in the United Kingdom[13], Canada[14] and New Zealand[15].

14 The appellants rely upon the public interest in the finality of litigation as the policy which the Limitation Act pursues. The finality of litigation, they contend, was the mischief to which the Jacobean statute of 1623[16], which is the origin of statutes such as the Limitation Act, was directed. Tracing the 1623 Act to the Limitation Act of 1974, in *Brisbane South Regional Health Authority v Taylor*[17], McHugh J said that a motive for the legislature to impose a limitation period was that "the public interest requires that disputes be settled as quickly as possible"; and that a limitation period "represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period".

15 There can be no doubt that a policy of finality of litigation accounts for the provision made by the legislatures for limiting the period within which certain actions should be commenced in the courts. Provisions of this kind are conducive to the orderly administration of justice and are in the public interest, as it may be expected many statutes are. But as Mason CJ explained in *Verwayen*, the issue

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12 *Spoor v Price* (2019) 3 QR 176 at 188 [37] per Gotterson JA, Sofronoff P and Morrison JA agreeing.

13 *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 881.

14 *Tolofson v Jensen* [1994] 3 SCR 1022 at 1073.

15 *Auckland Harbour Board v Kaihe* [1962] NZLR 68 at 87-88.

16 21 Jac I c 16.

17 (1996) 186 CLR 541 at 551-553.

concerning whether a statutory right is capable of waiver[18], or abandonment by other means[19], is not whether the provisions in question are beneficial to the public, but rather whether they are "not for the benefit of any individuals or body of individuals, but for considerations of State"[20]. The "critical question", he said, "is whether the benefit is personal or private or whether it rests upon public policy or expediency"[21].

16 Mason CJ concluded[22] that by giving defendants a right to plead the expiry of the relevant time period as a defence, rather than imposing a jurisdictional restriction, the purpose of the Victorian Limitation Act could be discerned as one to confer a benefit on individuals "rather than to meet some public need which must be satisfied to the exclusion of the right of access of individuals to the courts". It was therefore possible, in his Honour's view, to "contract out" of statutory provisions of that kind.

17 In the present case the Court of Appeal observed that there appears to be no authority in Australia dealing directly with the question whether a contractual provision not to plead a limitations defence, entered into for consideration before a cause of action to which it might be pleaded, is void against public policy. As a result the Court turned to what Mason CJ had said in *Verwayen* as a "judicial observation[] at the highest level" and concluded that such a provision is not, for that reason, void[23]. The appellants contend that the Court of Appeal were wrong in so concluding but they do not point to any error in the reasoning of Mason CJ which was adopted by the Court. They submit that his Honour's reasons in this respect lack precedential value.

18 It may be accepted that what was said by Mason CJ respecting waiver or contracting out of the statutory right given by s 5(6) of the Victorian Limitation Act was not necessary to the ultimate decision in *Verwayen*, that the Commonwealth was estopped from disputing its liability to the plaintiff and that it

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18 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 405.

19 See *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 406.

20 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 405, citing *Admiralty Commissioners v Valverda (Owners)* [1938] AC 173 at 185.

21 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 405.

22 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 405-406.

23 *Spoor v Price* (2019) 3 QR 176 at 186-187 [34].

should be held to the state of affairs it had created by the application of an earlier policy not to contest liability or plead a limitations defence. In the passages referred to above, Mason CJ was dealing with the plaintiff's alternative argument, that the Commonwealth had waived the benefit of the statutory right to defend on the basis of the time limitation[24]. This was an argument to which the Commonwealth responded[25]. It follows that what was said by Mason CJ in *Verwayen* on the subject was no "mere passing remark, or a statement or assumption on some matter that has not been argued"[26]. It was a considered judgment on a point argued by the parties, one which fulfils Sir Robert Megarry's description as having "a weight nearer" to ratio decidendi than an obiter dictum[27].

19 There was only one aspect of Mason CJ's reasons which had not been dealt with in the authorities concerning limitation provisions of the kind in question. It was the conclusion that his Honour reached that such provisions are not dictated by public policy to the exclusion of individual rights and that the benefit conferred by statute on a defendant was of a nature that it could be given up.

20 Both propositions are clearly correct and have since been cited by intermediate courts[28]. The first follows from the way in which the legislatures have dealt with the public interest in the finality of litigation, by leaving it to a defendant to raise the application of a statute's time-bar. On this topic there is no dispute amongst the decided cases. The second follows from what has been said about the right or benefit which limitation statutes give to a defendant and the fact that the defendant may choose whether to plead a statute.

Extinguishment

21 Section 24 of the Limitation Act provides, in effect, that where the time prescribed by the Act within which a person "may bring an action" to recover land has expired, the person's "title" to that land "shall be extinguished". The time for bringing such an action is prescribed by s 13. The title to the land here in question is that of a registered mortgagee of land. "[L]and" is defined to include "any legal

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24 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 402, 404.

25 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 399-400.

26 *Brunner v Greenslade* [1971] Ch 993 at 1002-1003 per Megarry J.

27 *Brunner v Greenslade* [1971] Ch 993 at 1003 per Megarry J.

28 *Beba Enterprises Pty Ltd v Gadens Lawyers* (2013) 41 VR 590 at 608 [81]-[82]; *Rae & Partners Pty v Shaw* [2020] TASFC 14 at [131].

or equitable estate or interest therein"[29], which encompasses a registered mortgagee's interest.

22 By contrast with provisions such as s 13, s 24 operates to extinguish rights, not create them. The appellants contend that the respondents' title to the land was extinguished by the operation of s 24 before the proceedings in the Supreme Court were commenced. The argument was not fully developed but the appellants may be understood to suggest that s 24 operated automatically at the end of the limitation period to extinguish the respondents' interest in the land as mortgagee regardless of whether the appellants pleaded the limitation period by way of defence. That is to say, s 24 is to be understood to operate independently of s 13, rather than providing for what follows from a successful plea.

23 Textually there are strong indications that s 24 operates by reference to the plea. Section 13 says that "[a]n action shall not be brought" to recover land after the expiration of 12 years. Consistently with the authorities earlier referred to, in *Brisbane City Council v Amos*[30], Keane J observed that the term "shall not be brought" has been given a special meaning by the courts, one which is to be understood to refer to the defence provided by the statute, but which must be pleaded if effect is to be given to the limitation on bringing the action. The point presently to be made is that s 24, in its terms, proceeds upon the same footing. It also refers to the limitation period as that within which a person "may bring an action" to recover land. It contemplates a plea of the time-bar being made under s 13 and being given effect.

24 There is also some historical support for this construction. The words "bringing any ... [a]ction" were used in the English *Real Property Limitation Act 1833*[31], in the provision which was the precursor to s 24[32]. Prior to that provision being re-enacted in the *Limitation Act 1939* (UK), the report of the Law Revision Committee spoke of the need for "clearing the title" as being of importance with

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29 Limitation Act, s 5(1).

30 (2019) 266 CLR 593 at 615-616 [49].

31 3 & 4 Wm IV c 27.

32 s 34.

respect to the land[33]. There would be no need to clear a title if the provision took effect without the defence of limitation being raised.

25 Further support for the view that s 24 is not intended to operate automatically and independently of s 13 at the expiry of the limitation period is provided by considerations of utility. If a provision such as s 24 automatically extinguished title there would seem to be no utility to the requirement affecting s 13 that a defendant must raise the defence in order to defeat a claim. If s 24 operated in the way contended for, there would remain no right or title in respect of which a remedy could be given. This appears to be the point made by the New South Wales Law Reform Commission in its 1971 Report on the Limitation of Actions[34].

The construction of cl 24

26 Clause 24 of each mortgage provides:

> "The Mortgagor covenants with the Mortgage[e] that the provisions of all statutes now or hereafter in force whereby or in consequence whereof any o[r] all of the powers rights and remedies of the Mortgagee and the obligations of the Mortgagor hereunder may be curtailed, suspended, postponed, defeated or extinguished shall not apply hereto and are expressly excluded insofar as this can lawfully be done."

27 An objective approach is required to determine the rights and liabilities of a party to a commercial contract, by reference to its text, context and purpose. The meaning to be given to its terms is determined by reference to what a reasonable business person would have understood those terms to mean[35].

28 Clause 24 is expressed to apply to all statutes affecting the mortgagee's rights and remedies and the obligations of the mortgagor. The effects spoken of include the defeat or extinguishment of rights. Where this occurs, the parties agree

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33 Law Revision Committee, *Fifth Interim Report (Statutes of Limitation)* (1936) Cmd 5334 at 34-35.

34 New South Wales Law Reform Commission, *Second Report on the Limitation of Actions*, LRC 12 (1971) at 11 [14].

35 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656-657 [35]. See also *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85 at 111 [78]; *Ecosse Property Holding Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544 at 551 [16]-[17], 554-555 [24]-[25].

that the statute "shall not apply hereto" and shall be regarded as "expressly excluded".

29 The word "defeat" is apt to capture the effect of limitation provisions, as the Court of Appeal observed[36]. It is often used in this context. In *Verwayen*[37], Brennan J spoke of whether the limitation provision had been abandoned so that it was beyond the capacity of the Commonwealth to "defeat" the plaintiff's claim by invoking the provision. McHugh J[38] likewise framed the question as whether the Commonwealth could rely on the statute to "defeat" the plaintiff's claim.

30 The fact that the Limitation Act does not of itself have the effect of defeating the respondents' rights to claim under the mortgages and that a plea by the appellants is required to do so does not take the matter outside the purview of the clause. It is clear that the parties intended that it have a wide operation and that it extend to any consequences flowing from a statutory provision ("whereby or in consequence whereof") which would defeat the mortgagee's rights. It was clearly intended that provisions which might have that result were not to apply to affect the rights and obligations of the parties. It is not difficult to infer that it was intended to apply to a benefit given by statute to a defendant by which the mortgagee's right could be defeated. By agreeing to the terms of cl 24 the appellants effectively gave up the benefit provided by the Limitation Act.

31 The appellants' reliance on the concluding words of the clause, "insofar as this can lawfully be done", takes the matter no further. As has been explained, an agreement that the appellants not rely upon the benefit given by the Limitation Act is enforceable.

Damages only?

32 The appellants also submit that an agreement not to plead the statute may give rise to an action for breach of the agreement, but the agreement will not itself "prevent the pleading, and the operation, of the statute of limitations". The submission relies upon the decision of the Privy Council in *East India Company v Oditchurn Paul*[39].

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36 *Spoor v Price* (2019) 3 QR 176 at 192 [64].

37 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 426.

38 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 504.

39 (1849) 7 Moo PC 85 [13 ER 811].

33 That case concerned the non-delivery of salt which had been purchased by the respondent. Rather than commence an action for breach of contract the purchaser sought to negotiate a refund and the matter became the subject of inquiries, instigated by the appellant, over the course of some years. When the purchaser finally sued for breach of contract the appellant pleaded the Statute of Limitations, although it had been largely responsible for the delays.

34 The question for the Privy Council was when the cause of action arose. Lord Campbell observed[40] that nothing in the circumstances of the case could affect the operation of the statute. The purchaser, however, contended that the subsequent negotiations and inquiries had the effect of suspending the operation of the statute for a time but could point to no authority in support of that contention. In the passage on which the appellants rely[41], Lord Campbell said:

> "There might be an agreement that in consideration of an inquiry into the merits of a disputed claim, advantage should not be taken of the Statute of Limitations in respect of the time employed in the inquiry, and an action might be brought for breach of such an agreement; but if to an action for the original cause of action the Statute of Limitations is pleaded, upon which issue is joined … the Defendant, notwithstanding any agreement to inquire, is entitled to the verdict."

35 There was no such agreement between the parties concerning the Statute of Limitations and Lord Campbell's observation about the effect of the hypothetical agreement on the operation of the statute forms no part of the decision of the Privy Council. As to the correctness of its implication, that even a binding agreement cannot prevent the statute taking effect, no explanation is given as to why such an agreement could not be enforced. It appears to proceed from a misapprehension about the operation of a limitations provision. At an earlier point in the judgment[42], his Lordship said that once the cause of action "began to run ... nothing could stop it", even if there was fraud on the part of the defendant. Such an opinion does not acknowledge, in accordance with more modern authority, that the statutory bar is not raised for the court's consideration unless and until a defence is pleaded and

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40 *East India Company v Oditchurn Paul* (1849) 7 Moo PC 85 at 111 [13 ER 811 at 821].

41 *East India Company v Oditchurn Paul* (1849) 7 Moo PC 85 at 112 [13 ER 811 at 821-822].

42 *East India Company v Oditchurn Paul* (1849) 7 Moo PC 85 at 111 [13 ER 811 at 821].

that a defendant has a choice whether to do so. A defendant may bargain away the statutory right and that bargain may be enforced.

Orders

36 The appeal should be dismissed with costs.

37 GAGELER AND GORDON JJ. We agree that the appeal should be dismissed, substantially for the reasons given by Kiefel CJ and Edelman J.

38 The principal question in this appeal is whether cl 24 of each mortgage is void and unenforceable as contrary to the public policy underpinning the *Limitation of Actions Act 1974* (Qld) ("the *Limitation Act*"). That question raises a preliminary point of contractual construction and a subsidiary question about the appropriate relief if a party breaches a covenant not to rely upon a limitation defence.

39 The question of construction is whether cl 24, properly construed, means that ss 10 and 13 of the *Limitation Act* do "not apply ... and are expressly excluded". Whether a party may, by contract, forbear or renounce rights conferred by a statute directs attention to the proper construction of the statute in issue to identify whether there is "an express prohibition against 'contracting out'"; or whether "the provisions of the statute, read as a whole, are inconsistent with a power to forgo its benefits"; or whether "the policy and purpose of the statute may [show] that the rights which it confers on individuals are given not for their benefit alone, but also in the public interest, and are therefore not capable of being renounced"[43].

40 The *Limitation Act* contains no express prohibition against contracting out. And the *Limitation Act*, read as a whole, does not compel a different conclusion. Section 13, in its terms, provides that "[a]n action shall not be brought by a person to recover land after the expiration of 12 years from the date on which the right of action accrued to the person ...". It is in a form which, as has long been settled by judicial decision, is not to be taken literally but merely provides a defence to an action that must be pleaded by a defendant if the expiration of the limitation period is to be given effect[44]. It is a provision by which the remedy is barred, but not the right of the plaintiff to bring the cause of action[45]. Section 10 is to a similar effect.

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43 *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432 at 456. See also *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 247 CLR 129 at 143-144 [46].

44 *Brisbane City Council v Amos* (2019) 266 CLR 593 at 615-616 [49]. See also, eg, *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364 at 372 [20]; *Minister for Home Affairs v DMA18* (2020) 95 ALJR 14 at 18 [4], 23-24 [30]-[31]; 385 ALR 16 at 19, 26-27.

45 *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; *Ketteman v Hansel Properties Ltd* [1987] AC 189

Concluding that it is for the defendant to raise a limitation defence does not cut across the public policy at which limitations of actions statutes are directed, namely "finality in civil litigation"[46].

41 The way that ss 10 and 13 of the *Limitation Act* give effect to the Act's legislative purpose of ensuring finality in litigation – a legitimate public policy objective – is by conferring a *right* on an *individual defendant* in a particular case to *elect* to plead a limitation period. Once this is properly understood, enforcing a contractual agreement not to plead a limitation period is entirely compatible with the terms of the *Limitation Act* and the policy underpinning it: because it is always left to an individual to choose whether to forgo the right conferred by statute.

42 The question which then arises is whether by cl 24 the parties contracted out of ss 10 and 13 of the *Limitation Act*. The construction of cl 24 of each mortgage is to be determined objectively by what reasonable persons in the position of the parties can be taken by adopting the words to have meant[47]. That requires consideration, not only of the text of the mortgage, but also of the surrounding circumstances known to the Mortgagee and the Mortgagor, and the purpose and object of the transaction[48].

43 Under each Bill of Mortgage identified land was charged "with the repayment to the Mortgagee of all sums of money" listed under an item which read "Description of debt or liability secured". The Mortgagor's covenants with the Mortgagee were set out in a Schedule attached to the Bill of Mortgage and in a document numbered L342365R (filed in the office of the Registrar of Titles)

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at 219; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 405; *The Commonwealth v Mewett* (1997) 191 CLR 471 at 534-535; *Amos* (2019) 266 CLR 593 at 599 [7].

46 *Verwayen* (1990) 170 CLR 394 at 405-406.

47 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461-462 [22], citing *Gissing v Gissing* [1971] AC 886 at 906; *Christopher Hill Ltd v Ashington Piggeries Ltd* [1972] AC 441 at 502; *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540. See also, eg, *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656-657 [35]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 116 [46].

48 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 350. See also, eg, *Pacific Carriers* (2004) 218 CLR 451 at 461-462 [22]; *Mount Bruce Mining* (2015) 256 CLR 104 at 116 [46].

("the Memorandum"). That is consistent with the Bill of Mortgage being a registrable instrument operating as a security and not as a transfer of the land charged[49].

44 The Schedule to the Bill of Mortgage, headed "Mortgagor's Covenant", recorded that the Mortgagee advanced the Principal Sum to the Mortgagor on the terms and conditions set out in the Schedule. Clauses 2 to 6 set the due date for payment being the first day of each month, that the mortgage was for 12 months from the advance of the Principal Sum and that the Mortgagor had a right to repay the Principal Sum earlier than the due date upon certain conditions.

45 By cl 7, the Mortgagor covenanted and agreed with the Mortgagee that the provisions in the Memorandum were deemed to be incorporated in and form part of the mortgage as if fully set out in the Schedule and that each provision of the mortgage (including those in the Memorandum) was deemed to be a covenant and condition between the Mortgagee and the Mortgagor within the meaning of s 76A of the *Real Property Act 1861-1985* (Qld)[50]. The Mortgagor also covenanted and agreed to duly and punctually observe and perform each and every provision of the mortgage (including those in the Memorandum) and agreed that prior to executing the mortgage, the Mortgagor had received a copy of the mortgage and the Memorandum and read and understood the provisions. Section 76A of the *Real Property Act* provided for the incorporation of provisions in a registered memorandum. The Memorandum was such a registered memorandum, being a document prepared and delivered by an identified firm of solicitors in Queensland and which, when incorporated into the Bill of Mortgage, contained the standard terms and conditions of the mortgage[51]. The Memorandum relevantly defined "Mortgage" to mean the mortgage created by the Bill of Mortgage, the Schedule to the Bill of Mortgage and the Memorandum, which were to be "read together as a whole". The Memorandum expressly recognised that not all provisions, including for example those relating to a trustee mortgagor, where the mortgaged land was agricultural land or the guarantor provisions, were intended to apply to every Bill of Mortgage which incorporated the Memorandum.

46 The Memorandum comprised numerous provisions, of which cl 24 was just one, covering a broad range of matters in which the Mortgagor covenanted with the Mortgagee for the benefit of the Mortgagee and to the detriment of the Mortgagor. The primacy of the Memorandum is evident on the face of the

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49 *Land Title Act 1994* (Qld), s 61.

50 Section 76A provided for the incorporation of provisions in a registered memorandum.

51 *Real Property Act*, s 76A(1).

document. Clause 38, for example, headed "Statutory Provisions", provided that the Mortgagor covenanted with the Mortgagee "that the covenants powers and provisions implied in mortgages by virtue of statute for the time being in force shall for the purposes hereof be negatived or varied only so far as they are inconsistent with the provisions hereof and are otherwise hereby modified varied or extended so as to become consistent herewith".

47 Consistent with that structure and purpose, by cl 24, headed "Restrictive Legislation", the Mortgagor covenanted with the Mortgagee that "the provisions of all statutes now or hereafter in force" being statutes "whereby or in consequence whereof":

> "any o[r] all of the powers rights and remedies of the Mortgagee and the obligations of the Mortgagor hereunder may be *curtailed*, suspended, postponed, *defeated* or extinguished *shall not apply hereto and are expressly excluded insofar as this can lawfully be done*". (emphasis added)

48 On its proper construction, cl 24 is a generic "contracting out" of any statutes that would operate to limit the obligations of the Mortgagor or the powers, rights and remedies of the Mortgagee. As is apparent from the words "insofar as this can lawfully be done", the contracting out is to the maximum extent permitted by law. Exactly how the clause operates will vary from statute to statute[52].

49 In its application to ss 10 and 13 of the *Limitation Act*, cl 24 could not operate as an immediate renunciation or abandonment of the statutory rights of the Mortgagor to plead those sections in defence of an action by the Mortgagee. The maximum extent it could operate was as a contract not to rely on the limitation provisions, a stipulation by the Mortgagor not to plead the statute at any time up to judgment[53].

50 Contrary to the contention of the appellants, relying on the decision of the Privy Council in *East India Co v Oditchurn Paul*[54], the Mortgagee is not confined to an action in damages in the event of the Mortgagor breaching cl 24 by pleading the sections of the *Limitation Act* in defence of an action by the Mortgagee.

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52 *Caltex Oil (Australia) Pty Ltd v Best* (1990) 170 CLR 516 at 522.

53 See, eg, *Verwayen* (1990) 170 CLR 394 at 427; *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at 590 [61], 599 [88]; cf *Newton, Bellamy and Wolfe v State Government Insurance Office (Qld)* [1986] 1 Qd R 431 at 441, 444, 445-446.

54 (1849) 7 Moo PC 85 at 112 [13 ER 811 at 821-822].

Rejecting a contention that certain negotiations and inquiries "suspended the operation" of the limitations statute applicable to a common law action in an appeal from the discharge of an order nisi for a new trial on the "plea side" of the Supreme Court of Judicature at Calcutta[55], the Privy Council in *Paul* referred only to the remedy available at common law had there been a breach of a contract not to rely on a limitation provision. The Privy Council did not go on to address the relief that would have been available in equity. *Paul* therefore did not contradict the prior holding of the Court of Chancery in *Lade v Trill*[56] that such a contract ought to be enforced in equity.

51 Although damages was and remains a remedy for breach of a contract not to rely on a limitation period at common law, equitable relief in the form of injunction to restrain a breach of contract was and is also an available remedy to restrain a breach of the contractual promise – in effect, a negative stipulation[57]. As the Court stated in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*[58], where a clear legal duty is imposed by contract to refrain from some act, then, prima facie, an injunction should go to restrain the doing of that act. Put in different terms, if there is a breach of such a contractual promise, specific performance of the contract may be ordered where damages would be inadequate[59]. Under the Judicature system which has existed in Queensland since 1876[60], where equity would restrain by injunction the making of a claim or the raising of a defence, the injunction need not issue. The equitable basis for the injunction can instead be pleaded directly in answer to the making of the claim or the raising of the defence[61].

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55 (1849) 7 Moo PC 85 at 111 [13 ER 811 at 821].

56 (1842) 11 LJ Ch 102.

57 *Doherty v Allman* (1878) 3 App Cas 709 at 720; *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 at 293, 299, 307; *McDermott v Black* (1940) 63 CLR 161 at 187-188; *Dalgety Wine Estates Pty Ltd v Rizzon* (1979) 141 CLR 552 at 573; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at 285 [12].

58 (2009) 236 CLR 272 at 285 [12] fn 58.

59 See, eg, *J C Williamson* (1931) 45 CLR 282 at 297; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 119, 138, 173.

60 *Judicature Act 1876* (Qld), s 4; *Supreme Court Act 1995* (Qld), s 244; *Civil Proceedings Act 2011* (Qld), s 7.

61 See, eg, *Newton, Bellamy and Wolfe* [1986] 1 Qd R 431 at 445-446.

Hence cl 24 was available to be pleaded by the respondents in answer to the appellants' reliance on ss 10 and 13 of the *Limitation Act*.

52 STEWARD J. I agree substantially with the reasons of Kiefel CJ and Edelman J as well as the reasons of Gageler and Gordon JJ, and agree further that this appeal should be dismissed. However, I wish to express my own reasons for dismissing the appeal.

53 Secured by mortgages over three plots of land, Law Partners Mortgages Pty Ltd ("LPM") lent $320,000 to the appellants in 1998. The date for repayment was ultimately fixed to be 2 July 2000, but the loan was not repaid on that date. A partial repayment was made in November 2000 which reduced the principal owing by $50,000. In August 2017, the respondents, as successors in title to LPM as mortgagee, sued the appellants for repayment of $4,014,969.22 ("the money claim") and to recover possession of the three plots of land ("the possession claim"). The appellants pleaded as a defence that the claims were statute-barred pursuant to ss 10, 13 and 26 of the *Limitation of Actions Act 1974* (Qld) ("the *Limitation Act*"). It was not in dispute that, if it were open to the appellants to so plead, the respondents' claims were statute-barred. Two appellants further pleaded that the respondents' titles under the mortgages had been extinguished. The respondents replied that the appellants had covenanted, pursuant to cl 24 of the Bill of Mortgage ("the Mortgage"), as entered into by LPM and the appellants, that they would not plead any defence under the *Limitation Act* in proceedings to enforce the respondents' rights as mortgagees. The primary judge (Dalton J), for the purposes of dealing with applications for summary judgment made by both the appellants and the respondents, held that cl 24, correctly construed, could not aid the respondents in respect of the money claim or the possession claim, and that, in respect of the possession claim, s 24 of the *Limitation Act* had extinguished the respondents' title to the three plots of land[62]. The Court of Appeal of the Supreme Court of Queensland (Sofronoff P, Gotterson and Morrison JJA) disagreed[63].

54 On appeal to this Court, the appellants identified the following three issues for determination:

(a) What is the correct construction of cl 24 of the Mortgage?

(b) If, correctly construed, cl 24 prevented the appellants from relying upon the defences available to them under the *Limitation Act*, is that clause contrary to public policy and thus void or unenforceable?

(c) In any event, should the respondents' proper remedy be confined to damages for breach of contract, and if so, should the respondents be precluded from pursuing any such claim?

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62 *Spoor v Price* [2019] QSC 53 at [54]-[56].

63 *Spoor v Price* (2019) 3 QR 176.

55 A further and related issue also arises concerning the application of s 24 of the *Limitation Act*.

56 For the reasons set out below, the Queensland Court of Appeal was correct.

The correct construction of cl 24

57 Clause 24 of the Mortgage should be set out in full. It provides:

> "RESTRICTIVE LEGISLATION
>
> The Mortgagor covenants with the Mortgage[e] that the provisions of all statutes now or hereafter in force whereby or in consequence whereof any o[r] all of the powers rights and remedies of the Mortgagee and the obligations of the Mortgagor hereunder may be curtailed, suspended, postponed, defeated or extinguished shall not apply hereto and are expressly excluded insofar as this can lawfully be done."

58 This clause has obvious shortcomings. Nonetheless, in the Queensland Court of Appeal, Gotterson JA, with whose reasons Sofronoff P and Morrison JA agreed, was of the view that the primary judge had correctly concluded that the words "suspended", "postponed" and "extinguished" in cl 24 were "inapt" to describe the effect of invoking a defence that a claim had been statute-barred by the *Limitation Act*[64]. However, his Honour was also of the view that the word "defeated" in that clause did sufficiently describe that effect[65]. This was consistent with the use of the word "defeat" by Australian courts, including this Court, to describe the consequence of a plea that a claim was statute-barred[66].

59 The appellants made four points. First, they submitted that "strong words" are necessary to contract out of a benefit conferred by a statute[67]. Here, the

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64 *Spoor v Price* (2019) 3 QR 176 at 191 [57].

65 *Spoor v Price* (2019) 3 QR 176 at 193 [66].

66 *Spoor v Price* (2019) 3 QR 176 at 192 [63]-[65], quoting *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 426 per Brennan J, 504 per McHugh J and *Belgravia Nominees Pty Ltd v Lowe Pty Ltd* (2017) 51 WAR 341 at 354 [46(f)] per Martin CJ, Murphy and Mitchell JJA.

67 *Equitable Life Assurance of the United States v Bogie* (1905) 3 CLR 878 at 911 per O'Connor J.

language deployed by cl 24 was said to be too vague[68]; the *Limitation Act* is not expressly named in it, nor is that Act identified by reference to some specified "class" of enactments. Rather, the clause seeks to defeat in relevant circumstances "the provisions of all statutes". Such generalised language should not be used, it was said, to defeat the defences available to the appellants under the *Limitation Act*, especially when the "onus" was on the respondents to show that the clause was efficacious. Secondly, it was contended that the language of cl 24 is not promissory at all, but merely recites a state of affairs. It was contended that cl 24, by its terms, did not oblige the appellants not to plead available defences under the *Limitation Act*. Thirdly, it was submitted that because cl 24 is ambiguous, that ambiguity should be resolved against the respondents in accordance with the principle *verba chartarum fortius accipiuntur contra proferentem*[69]. This was the view of the primary judge, who applied that doctrine in favour of the appellants[70]. Finally, the appellants submitted that it was not the *Limitation Act* "whereby or in consequence whereof", to use the language of cl 24, the respondents' claims were defeated. Rather, it was the act of the appellants in pleading the limitation defence that barred the respondents' claims. Clause 24, it was said, is directed only to the defeating of rights by provisions of statutes, and not by the exercise of rights conferred by them.

60 Three propositions are applicable. First, it was never suggested that the Mortgage was anything other than the product of free negotiation between parties contracting at arm's length[71]. Clause 24 was part of that bargain. Its inclusion may possibly have affected decisions concerning whether to advance monies to the appellants, or what interest rate should be set. Secondly, notwithstanding arguable deficiencies in a contract, a court must strive to give meaning and effect to all of its clauses[72]. Here, it is more than possible to do so with respect to cl 24. Thirdly, because the Mortgage is a commercial contract, the meaning of its terms is to be determined objectively by what a reasonable business person would have

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68 cf *In re Clarke; Coombe v Carter* (1887) 36 Ch D 348 at 355 per Bowen LJ.

69 *Western Australian Bank v Royal Insurance Co* (1908) 5 CLR 533 at 554 per Griffith CJ.

70 *Spoor v Price* [2019] QSC 53 at [51]-[54].

71 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 660 [44] per French CJ, Hayne, Crennan and Kiefel JJ.

72 *Metropolitan Gas Co v Federated Gas Employees' Industrial Union* (1925) 35 CLR 449 at 455 per Isaacs and Rich JJ; *Chapmans Ltd v Australian Stock Exchange Ltd* (1996) 67 FCR 402 at 411 per Lockhart and Hill JJ.

understood them to mean[73]. This requires the court to consider the language used by the parties, the circumstances known to them and the commercial purpose or objects which the contract was intended to secure[74].

61 Turning to the language of cl 24, the phrase "provisions of all statutes" plainly includes the *Limitation Act*. Then there are the words "powers rights and remedies". There is no reason to doubt that these words encompass the respondents' right to possession of the three plots of land. As Gotterson JA observed, the word "defeated" invites consideration, in a given case, as to what is to happen, or has happened, to those "powers rights and remedies" of a mortgagee. Where they have, by statute, been denied, they have in such a case been "defeated". As Gotterson JA said[75]:

> "It is the past participle 'defeated' in the passive voice that is used in cl 24 to describe the requisite result, namely, that the power, right or remedy may be defeated. In that way, the clause accommodates conduct by the mortgagor to trigger the operation of the statutory provision with the result that the mortgagee's power, right or remedy might be defeated. As well, the

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73 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656 [35] per French CJ, Hayne, Crennan and Kiefel JJ, citing *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 589 [22] per Gleeson CJ, *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 462 [22] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ and *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 160 [8] per Gleeson CJ. See further *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at 188 [11] per Gleeson CJ, Gummow and Hayne JJ, citing *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912 per Lord Hoffmann (Lords Goff, Hope and Clyde agreeing); [1998] 1 All ER 98 at 114. See also *Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715 at 737 [10] per Lord Bingham.

74 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656-657 [35] per French CJ, Hayne, Crennan and Kiefel JJ, citing *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461-462 [22] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ, *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ, *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 160 [8] per Gleeson CJ, 174 [53] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ and *Byrnes v Kendle* (2011) 243 CLR 253 at 284 [98] per Heydon and Crennan JJ. See also *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at 326, 350; *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at 2906-2907 [14]; [2012] 1 All ER 1137 at 1144.

75 *Spoor v Price* (2019) 3 QR 176 at 192 [62].

> words 'may be', rather than the word 'is', are used to describe the result. Those words have a flexibility that comprehends a decision on the part of the mortgagor whether or not to plead a statutory provision in order for the mortgagee's power, right or remedy to be defeated by operation of the provision."

62 Further, it is also pursuant to the provisions of the *Limitation Act* "whereby or in consequence whereof" the appellants may plead that a claim has been defeated. The phrase "shall not apply hereto and are expressly excluded" aptly expresses the appellants' promise, to the extent they can perform it, not to invoke various statutory protections or defences available to the appellants, including defences under the *Limitation Act*. Finally, the phrase "insofar as this can lawfully be done" at the end of cl 24 probably adds little to the content of the appellants' covenant, but it does highlight that not every statute adversely affecting the respondents' "powers rights and remedies" could lawfully be excluded by the Mortgage.

63 Turning to the appellants' contentions, whatever might be meant by their submission that "strong words" are needed to contract out of a private benefit conferred by a statute, by reason of the foregoing, the language in cl 24 is sufficient to achieve that legal effect in relation to the defences that might be invoked under the *Limitation Act*.

64 Contrary to the appellants' submission, cl 24 contains language which is promissory in nature. It states that the mortgagor "covenants" with the mortgagee that statutes which have certain effects on the powers, rights and remedies of the mortgagee "shall not apply ... and are expressly excluded". Although the language is clumsy, it should not be read as some declaration concerning the legal reach of Acts of Parliament. Rather, the Mortgage should be construed "so as to avoid it 'making commercial nonsense ...'"[76]. Accordingly, these words should be read as a reference to a promise not to invoke a benefit conferred by statute which permits the mortgagor to defeat the powers, rights and remedies of the mortgagee.

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76 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 657 [35] per French CJ, Hayne, Crennan and Kiefel JJ, quoting *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 559 [82] per Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ. See also *Gollin & Co Ltd v Karenlee Nominees Pty Ltd* (1983) 153 CLR 455 at 464 per Mason, Murphy, Brennan, Deane and Dawson JJ.

65 The "seldom to be resorted to"[77] principle *verba chartarum fortius accipiuntur contra proferentem* does not have any dispositive effect here. That principle may be applicable where there are two equally competing constructions of a given clause[78]. However, it cannot apply here precisely because the appellants' argument that cl 24 of the Mortgage is ineffective or not applicable should not be preferred. Applying the ordinary rules of construction has resulted in cl 24 having a certain meaning that a court must enforce. There are no equally persuasive interpretations of cl 24. In any event, as Sir George Jessel MR observed in 1877, the "now established rules of construction" have rendered the principle as having no force "at the present day"[79]. His Lordship then said[80]:

> "The rule is to find out the meaning of the instrument according to the ordinary and proper rules of construction. If we can thus find out its meaning, we do not want the maxim. If, on the other hand, we cannot find out its meaning, then the instrument is void for uncertainty".

66 In that respect, and contrary to the submissions of the appellants, there was no onus on the respondents to establish that their construction of cl 24 is correct. The issue of construction is a question of law[81], to be objectively determined having regard to the text and context of the contract, and the commercial purpose or objects which it was intended to secure[82].

67 Finally, the cause of the potential defeat of the respondents' claims should not be characterised narrowly as the appellants' act of pleading a limitation defence. The ordinary and natural meaning of the phrase "whereby or in consequence whereof" in cl 24 of the Mortgage sufficiently embraces both the direct application of a statute, and its indirect effect, in defeating the rights of the

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77 *Western Australian Bank v Royal Insurance Co* (1908) 5 CLR 533 at 554 per Griffith CJ.

78 *University of Wales v London College of Business Ltd* [2015] EWHC 1280 (QB) at [105] per Judge Keyser QC, quoting *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] 2 Lloyd's Rep 216 at 223 [20] per Moore-Bick LJ.

79 *Taylor v Corporation of St Helens* (1877) 6 Ch D 264 at 270-271.

80 *Taylor v Corporation of St Helens* (1877) 6 Ch D 264 at 271.

81 *Deane v City Bank of Sydney* (1904) 2 CLR 198 at 209 per Griffith CJ, Barton and O'Connor JJ.

82 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 116 [46]-[47] per French CJ, Nettle and Gordon JJ.

respondents. Here, the appellants' plea of limitation could only have been effective because of the provisions of the *Limitation Act*.

Clause 24 and public policy

68 The appellants contended that a person cannot contract out of the defences conferred by the *Limitation Act*. They put their case in two ways. First, they submitted that it was Parliament's intention that a person should not have this freedom, and that this was discernible from the text, applicable context, and the purpose and scheme of the *Limitation Act*. Secondly, they submitted that a clause which purports to oust the defences available under the *Limitation Act* is, in any event, contrary to the public policy of the common law.

Relevant provisions

69 Section 10 of the *Limitation Act* relevantly provides:

"**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) ... an action founded on simple contract ..."

70 Section 13 provides:

"**Actions to recover land**

An action shall not be brought by a person to recover land after the expiration of 12 years from the date on which the right of action accrued to the person or, if it first accrued to some person through whom the person claims, to that person."

71 Section 24(1) relevantly provides:

"**Extinction of title after expiration of period of limitation**

(1) ... where the period of limitation prescribed by this Act within which a person may bring an action to recover land (including a redemption action) has expired, the title of that person to the land shall be extinguished."

72 Section 5(5) relevantly provides that "[a] reference in this Act to a right of action to recover land includes a reference to a right to enter into possession of the land".

73 Section 26 relevantly provides:

"**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.

...

(4) The provisions of this section do not apply to a foreclosure action in respect of mortgaged land, but the provisions of this Act with respect to an action to recover land apply to such an action.

(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."

74 To the extent of any overlap between the limitation periods in ss 10 and 13, no party disputed that it was open to the appellants to plead and rely upon the shorter period set out in s 10[83]. As it happens, the respondents brought both the possession claim and the money claim more than 12 years after these rights of action accrued to them.

The decision below

75 Before the Queensland Court of Appeal, the appellants relied upon certain decisions of the Supreme Court of Utah[84] and the Appellate Court of Connecticut[85] in support of the proposition that a person cannot contract out of a Statute of Limitations[86]. However, the appellants did not rely upon these cases before this

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83 *Brisbane City Council v Amos* (2019) 266 CLR 593 at 598 [4]-[5] per Kiefel CJ and Edelman J, 615 [46] per Gageler J, 615 [48] per Keane J, 617 [54]-[55] per Nettle J.

84 *Hirtler v Hirtler* (1977) 566 P 2d 1231.

85 *Haggerty v Williams* (2004) 855 A 2d 264.

86 *Spoor v Price* (2019) 3 QR 176 at 186 [30]-[32].

Court; they can therefore be put to one side. Notwithstanding the appellants' submissions, Gotterson JA decided that one could contract out of the defences conferred by the *Limitation Act*[87]. His Honour did so largely in reliance upon the judgments of Mason CJ and Brennan J (as his Honour then was) in *The Commonwealth v Verwayen*[88].

76 Two relevant propositions may be extracted from the reasons of Mason CJ in *Verwayen*. The first is not in dispute. Whether or not a person can waive the defences conferred by a particular Statute of Limitations depends on the scope and policy of that Act; the test is whether the applicable provisions are "dictated by public policy" and were enacted "not for the benefit of any individuals or body of individuals, but for considerations of State"[89]. If so, they cannot be excluded by contract. But if the benefit conferred by statute is otherwise private in nature, the law may permit the parties to exclude it. As Mason CJ said, "the critical question is whether the benefit is personal or private or whether it rests upon public policy or expediency"[90]. Gotterson JA also referred[91] to the more recent expression of that principle in *Westfield Management Ltd v AMP Capital Property Nominees Ltd*, where French CJ, Crennan, Kiefel and Bell JJ said[92]:

> "Windeyer J observed in *Brooks v Burns Philp Trustee Co Ltd*[93] that a person upon whom a statute confers a right may waive or renounce his or her rights unless it would be contrary to the statute to do so. It will be contrary to the statute where the statute contains an express prohibition against 'contracting out' of rights. In addition, the provisions of a statute, read as a whole, might be inconsistent with a power, on the part of a person, to forego statutory rights. It is the policy of the law that contractual

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87 *Spoor v Price* (2019) 3 QR 176 at 189 [43].

88 *Spoor v Price* (2019) 3 QR 176 at 187-188 [35]-[36], [38]-[39], quoting *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 404-406 per Mason CJ, 426 per Brennan J.

89 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 405, citing *Admiralty Commissioners v Valverda (Owners)* [1938] AC 173 at 185 per Lord Wright.

90 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 405, citing *Brown v The Queen* (1986) 160 CLR 171 at 208 per Dawson J.

91 *Spoor v Price* (2019) 3 QR 176 at 188 [36].

92 (2012) 247 CLR 129 at 143-144 [46].

93 (1969) 121 CLR 432 at 456.

> arrangements will not be enforced where they operate to defeat or circumvent a statutory purpose or policy according to which statutory rights are conferred in the public interest, rather than for the benefit of an individual alone. The courts will treat such arrangements as ineffective or void, even in the absence of a breach of a norm of conduct or other requirement expressed or necessarily implicit in the statutory text[94]."

77 Here, before both the Queensland Court of Appeal and this Court, the appellants contended that the defences conferred by the *Limitation Act* existed not for the personal benefit of individuals but in the pursuit of the public policy of finality in litigation.

78 The second proposition is that Parliaments have chosen to implement the public policy of finality in litigation by conferring on defendants a right to plead an applicable Statute of Limitations defence, rather than by imposing a restriction on jurisdiction[95]. In that respect, no party disputed that it had been long established that the language used in the *Limitation Act* – an action "shall not be brought" – was a reference to a defendant having the capacity to plead a defence of limitation and not to the extinguishment of any underlying rights of a plaintiff[96]. On that basis, Mason CJ in *Verwayen* concluded, for the purpose of considering whether the defences conferred by a Statute of Limitations[97] may be waived, as follows[98]:

> "I conclude that the purpose of the statute is to confer a benefit upon persons as individuals rather than to meet some public need which must be satisfied to the exclusion of the right of access of individuals to the courts. On that

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94 *Caltex Oil (Australia) Pty Ltd v Best* (1990) 170 CLR 516 at 522 per Mason CJ, Gaudron and McHugh JJ (Dawson J agreeing); *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215 at 227 per McHugh and Gummow JJ; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 179 [71] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; *Miller v Miller* (2011) 242 CLR 446 at 457-458 [25] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 513 [23] per French CJ, Crennan and Kiefel JJ.

95 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 405 per Mason CJ.

96 *Brisbane City Council v Amos* (2019) 266 CLR 593 at 599 [7] per Kiefel CJ and Edelman J.

97 The Court in *Verwayen* was concerned with the *Limitation of Actions Act 1958* (Vic).

98 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 405-406.

basis, it is possible to 'contract out' of the statutory provisions, and it is equally possible to deprive them of effect by other means such as waiver. Put differently, the provisions are procedural rather than substantive in nature, which suggests that they are capable of waiver".

79 Brennan J reached the same conclusion. His Honour was of the view that, as the defences conferred by the *Limitation of Actions Act 1958* (Vic) were introduced "solely" for the benefit of a defendant, who must plead the applicable defence for it to be effective, the defence was capable of being waived[99].

80 Based on these authorities, Gotterson JA concluded that[100]:

(a) the *Limitation Act* did not expressly provide that a person could not contract out of pleading the defences conferred by that Act, a point undisputed by the parties before this Court; and

(b) no such limitation or restriction could be implied from the terms of the *Limitation Act*. His Honour inferred that Parliament intended for a defendant to have both an ability to plead a limitation defence and the capacity to give up that ability.

Submissions before this Court

81 The appellants relied upon two contentions to advance a contrary conclusion. The first was that a statutorily conferred advantage can only be excluded by contract if it operates *solely* for the benefit of a person[101], whereas, if the benefit serves a mix of public and private interests, it cannot be excluded by contract[102]. An individual, it was said, could thus not waive a matter "in which the public have an interest"[103]. The second was that the "freedom and sanctity of contract" are not conclusive of the public interest and should not here trump the

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99 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 426.

100 *Spoor v Price* (2019) 3 QR 176 at 188-189 [40].

101 Citing *Equitable Life Assurance of the United States v Bogie* (1905) 3 CLR 878 at 893 per Griffith CJ, 897 per Barton J.

102 Citing *Johnson v Moreton* [1980] AC 37 at 58 per Lord Hailsham.

103 Citing *Graham v Ingleby* (1848) 1 Exch 651 at 657 per Alderson B [154 ER 277 at 279].

public policy of finality in litigation; the law, it was said, began to "back-pedal" from freedom of contract in the nineteenth century[104].

Public benefit

82 For the first proposition, the appellants relied upon the reasons of McHugh J in *Brisbane South Regional Health Authority v Taylor*, where his Honour identified the following four "broad rationales" for the enactment of limitation periods in civil litigation[105]:

> "First, as time goes by, relevant evidence is likely to be lost[106]. Second, it is oppressive, even 'cruel', to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed[107]. Third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them[108] ... The final rationale for limitation periods is that the public interest requires that disputes be settled as quickly as possible[109]."

83 The final rationale was said to express a public benefit which could not be contracted out of as a matter of public policy, having regard to the text, purpose and object of the *Limitation Act*. In that respect, the appellants submitted that the Queensland Parliament had manifestly turned its mind to consider when the limitation periods should not apply by the enactment of a regime for obtaining extensions of time: Pt 3 of the *Limitation Act*. It followed that if Parliament had intended to permit someone to exclude by contract the benefits conferred by that Act, it would have done so expressly. An example of this may be found in s 45 of the *Limitation Act 2005* (WA), which relevantly provides that "[n]othing in this Act prevents a person from agreeing to extend or shorten a limitation period

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104 Citing *Johnson v Moreton* [1980] AC 37 at 66 per Lord Simon.

105 (1996) 186 CLR 541 at 552-553.

106 *Jones v Bellgrove Properties Ltd* [1949] 2 KB 700 at 704 per Lord Goddard CJ.

107 *R B Policies at Lloyd's v Butler* [1950] 1 KB 76 at 81-82 per Streatfeild J.

108 New South Wales Law Reform Commission, *Limitation of Actions for Personal Injury Claims*, LRC 50 (1986) at 3; Law Reform Commission of Western Australia, *Discussion Paper on Limitation and Notice of Actions*, Project No 36 Part II (1992) at 11.

109 New South Wales Law Reform Commission, *Limitation of Actions for Personal Injury Claims*, LRC 50 (1986) at 3; Law Reform Commission of Western Australia, *Discussion Paper on Limitation and Notice of Actions*, Project No 36 Part II (1992) at 11.

provided for under this Act". The existence of Pt 3 of the *Limitation Act* also demonstrated, it was said, that the Act expresses a series of legislative choices about balancing the rights of plaintiffs and defendants. That balancing of rights was not something which the parties could themselves adjust or disturb by contract.

84 The appellants did not, and could not, deny that a party may waive the defences conferred by the *Limitation Act*. However, they contended that the doctrine of waiver was separate and distinct from an asserted right to exclude by contract a benefit conferred by statute. There is, it was said, nothing inconsistent in that position. The appellants argued that the critical element that is present in the doctrine of waiver, which is not present in the doctrine of exclusion by contract, is the mental element of "knowledge". A defendant to a cause of action can waive the right to plead a limitation defence because at that point in time she or he is armed with knowledge of what is being claimed. In contrast, it was contended, a person does not have such equivalent knowledge when entering into a contract and covenanting not to rely upon the *Limitation Act* as a defence against any future causes of action.

85 The proposition that a Statute of Limitations confers benefits which are intractable, and which cannot be avoided, is unsustainable. The benefit of protection from a late claim that is not made within the times prescribed by the Statute of Limitations will not arise unless a defendant pleads it as a defence[110]. Its application thus turns upon a choice made by a defendant in a given proceeding. That is the starting point. It is a starting point of some antiquity. A failure to plead the limitation defence has been fatal to a defendant's ability to invoke a Statute of Limitations since at least the early seventeenth century[111].

86 Consistently with this, and as the appellants properly accepted, the benefit of the defences may be waived. But the attempt to distinguish this from contracting out based on a defendant's knowledge fails. It is not supported by authority and is logically unsustainable. The degree of "knowledge" said to be needed for the doctrine of waiver was never specified and it assumed that all defendants would, upon being served with a claim, have sufficient "knowledge" to be able to waive

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110 *Brisbane City Council v Amos* (2019) 266 CLR 593 at 616 [49] per Keane J, citing *Courtenay v Williams* (1844) 3 Hare 539 at 551-552 per Wigram V-C [67 ER 494 at 499-500], *Dawkins v Lord Penrhyn* (1878) 4 App Cas 51 at 58-59 per Earl Cairns LC, *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 219 per Lord Griffiths and *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 405 per Mason CJ, 473-474 per Toohey J.

111 *Thursby v Warren* (1628) Cro Car 159 [79 ER 738].

the benefits conferred by the *Limitation Act*. In reality, different defendants will have very different levels of knowledge about the claims being made against them. Accordingly, there is no principled basis for distinguishing between the waiver of a limitation defence in respect of a particular cause of action and an enforceable promise never to take a limitation defence against a counter-party to a contract. They are both legitimate ways of excluding the benefits conferred on a defendant by the *Limitation Act*. As Lord Diplock observed in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd*, waiving a right to a limitation defence[112]:

> "means that the party has chosen not to rely upon the non-compliance of the other party with the requirement, or *has disentitled himself from relying upon it either by agreeing with the other party not to do so* or because he has so conducted himself that it would not be fair to allow him to rely upon non-compliance."

87 The proposition that because the *Limitation Act* serves, in part, a public policy – *viz* finality in litigation – the effect of its provisions cannot be adjusted or disturbed by contract, is not correct. The contention ignores the legislative choice made to implement that policy, which is to confer, effectively, an option on defendants either to invoke or not to invoke the benefits of the *Limitation Act*. In other words, the legislature has chosen to serve the public policy through the conferral of purely private benefits. In that sense, the benefits of the *Limitation Act* can correctly be seen as purely private in nature[113].

88 Once it is accepted that the policy of finality in litigation is one that is statutorily entrusted to each defendant, it follows that the limitation defences may be waived. It also follows, as a matter of logic and principle, that a party may agree to promise not to invoke those defences as part of the contractual bargain. The *Limitation Act* neither expressly nor by implication justifies a contrary conclusion. In that respect, having accepted that limitation defences may be waived, the appellants' reliance upon the statutory power of extension in Pt 3 of the *Limitation Act*, as demonstrative of Parliament having expressly decided when the limitation periods should not apply, has little force. Evidently, the presence of Pt 3, on the appellants' own case, did not deny a person's ability to waive reliance upon a limitation defence.

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112 [1971] AC 850 at 881 (emphasis added).

113 cf *Graham v Ingelby* (1848) 1 Exch 651 at 655 per Pollock CB [154 ER 277 at 278-279], quoted in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 876-877 per Lord Pearson.

89 As it happens, the law has long recognised an ability to exclude limitation defences by contract. In *Lade v Trill*[114], Messrs Lade and Trill, a farmer and a bricklayer who were related and lived in the same area, frequently accommodated each other with money, for which promissory notes were given. They both died in 1835. The executors of their estates entered into a verbal agreement in 1837 that the old accounts of Messrs Lade and Trill were to be settled on a given day without regard to the length of time that had been running. Settlement then took place. Some time later, the executors of Mr Trill's estate discovered a promissory note that had been given by Mr Lade to Mr Trill for 250 pounds. They sought to enforce it. Knight Bruce V-C decided that neither party was to be at liberty to take advantage of the Statute of Limitations. That was because there had been an agreement for valuable consideration for both sides to waive the benefit of that statute, and this agreement "ought to be enforced"[115].

90 In *Wright v John Bagnall & Sons Ltd*[116], a defendant admitted liability under the *Workmen's Compensation Act 1897* (UK) in relation to a workplace accident. Under that Act, a person was required to make any claim for compensation within six months of an accident occurring. The parties reserved their respective rights to go to court to determine the quantum of damages. Whilst the parties were still negotiating, the six-month time limit ran out. Vaughan Williams LJ decided that there was an agreement that the defendant was liable to pay compensation and that if the parties could not agree as to the amount, they were then to obtain an adjudication of that issue from a court[117]. The defendant nonetheless raised the lapse of time as a defence. Because of that agreement, Vaughan Williams LJ said, this defence could not "be set up as a bar to the claim"[118]. Collins LJ similarly stated that the defendant was "debarred from raising the point that the statutory limitation applied"[119] because of the agreement. Romer LJ also agreed[120].

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114 (1842) 11 LJ Ch 102.

115 *Lade v Trill* (1842) 11 LJ Ch 102 at 103.

116 [1900] 2 QB 240.

117 *Wright v John Bagnall & Sons Ltd* [1900] 2 QB 240 at 244-245.

118 *Wright v John Bagnall & Sons Ltd* [1900] 2 QB 240 at 245.

119 *Wright v John Bagnall & Sons Ltd* [1900] 2 QB 240 at 244.

120 *Wright v John Bagnall & Sons Ltd* [1900] 2 QB 240 at 245.

91 The later decision of *Lubovsky v Snelling*[121] concerned similar circumstances. During an interview between the plaintiff and the defendant's insurance company, liability under the *Fatal Accidents Act 1846* (UK) was admitted on the basis that the quantum of damages was to be fixed by a judge. Under s 3 of that Act, proceedings were required to be commenced within 12 months of death. A writ was issued after that time period had expired. The defendant pleaded s 3 of the Act. Scott LJ, with whom Mackinnon and Goddard LJJ agreed[122], was of the view that the parties had entered into a contract whereby liability was admitted and the defendant was precluded from putting forward any limitation defence. As his Lordship observed, "[i]t was just as much a contract not to plead s 3 of the Act"[123]. It followed that the "plea was not so open"[124]. Goddard LJ added that he could "see no distinction between this case and that of [*Wright*], which is binding on this court"[125].

92 The appellants submitted that *Lade v Trill* is an historical anomaly and should not be followed. Whilst the reasons of Knight Bruce V-C are scant, the Court was not taken to any contrary authority, and the appellants' contention ultimately rose no higher than an assertion that the case was wrongly decided.

93 The appellants also submitted that this Court should distinguish *Wright* and *Lubovsky* (as well as *Kammins*) on the basis that the time period in each case was annexed to the right created by the relevant statute. As Windeyer J explained in *Australian Iron & Steel Ltd v Hoogland*[126], such provisions may differ from a Statute of Limitations because they constitute an essential statutory condition for obtaining relief to be pleaded by a plaintiff, as distinct from a defence to be pleaded by a defendant. The appellants also submitted that Australia has not adopted the more liberal approach to limitation periods annexed to statutory rights found in the English cases. These submissions are not persuasive. As to the first reason, a principle that a court may enforce a contract which permits the positive exclusion of a statutory condition for the obtaining of relief does not deny, as a matter of logic, the arguably more modest proposition that a contract which excludes the defences arising under a Statute of Limitations may also be enforceable. As to the

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121 [1944] KB 44.

122 *Lubovsky v Snelling* [1944] KB 44 at 46-48.

123 *Lubovsky v Snelling* [1944] KB 44 at 46.

124 *Lubovsky v Snelling* [1944] KB 44 at 46.

125 *Lubovsky v Snelling* [1944] KB 44 at 47.

126 (1962) 108 CLR 471 at 488.

second reason, it was not supported by relevant authority; the case cited by the appellants for this proposition, *The Crown v McNeil*[127], did not concern an agreement that was held to have the effect of preventing a defendant from setting up a limitation defence. Rather, the issue in that case was whether certain fraudulent conduct could have had the effect of extending the time prescribed for suing the Crown pursuant to the *Crown Suits Act 1898* (WA).

94 The Court was then also asked not to follow *Kammins*, *Wright* and *Lubovsky*. In support of that proposition, the appellants cited an observation by Lord Evershed MR in *The "Sauria" and the "Trent"*, where his Lordship expressed his "greatest difficulty" with *Lubovsky* "[a]s a matter of principle"[128]. However, in that case no contract to exclude the relevant limitation period was found to exist. Moreover, Lord Evershed MR did not fully explain the basis for his difficulty, although it may have been a concern about the breadth of the exclusion in *Lubovsky*.

95 The foregoing authorities are illustrative of the common law's general tolerance of bargains which seek to exclude private benefits conferred by statute. Contrary to the submissions of the appellants, these authorities cannot be read as instances of estoppel or waiver. In each case, an agreement to exclude a statutory limitation period was found to be legally efficacious.

Freedom of contract

96 More significantly, the conclusions reached in the foregoing cases are consistent with the broad principle of freedom of contract. Courts may have, to an extent, "back-pedalled" from Sir George Jessel MR's classic expression of this principle in 1875[129], but it remains an important attribute of the law. In *Ringrow Pty Ltd v BP Australia Pty Ltd*, this Court observed[130]:

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127 (1922) 31 CLR 76.

128 [1957] 1 Lloyd's Rep 396 at 400.

129 *Printing and Numerical Registering Company v Sampson* (1875) LR 19 Eq 462 at 465.

130 (2005) 224 CLR 656 at 669 [32] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ, cited and approved in *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at 553 [54] per Kiefel J, 578 [156] per Gageler J, 604 [250] per Keane J.

> "Exceptions from that freedom of contract require good reason to attract judicial intervention to set aside the bargains upon which parties of full capacity have agreed."

97 In *Sidhu v British Airways Plc*, Lord Hope (with whom Lords Browne-Wilkinson, Jauncey, Mustill and Steyn agreed) said[131]:

> "Any person is free, unless restrained by statute, to enter into a contract with another on the basis that his liability in damages is excluded or limited if he is in breach of contract. Exclusion and limitation clauses are a common feature of commercial contracts".

98 It was open to the parties here to exercise their freedom of contract by the inclusion of cl 24. That clause represents a legitimate adjustment of the private statutory rights of the appellants, which they were free to include, amongst other clauses, in their original bargain with LPM in order to secure a loan of monies to them.

The common law

99 Alternatively, the appellants submitted that the common law recognises a public policy, independent of the *Limitation Act*, of finality in litigation. The community, it was submitted, had tacitly adopted it. It was said to be reflected in, for example, the decision of this Court in *Aon Risk Services Australia Ltd v Australian National University* and the concern there expressed about delay[132]. Clause 24 offended this policy and was accordingly void. The merits of this contention may be addressed briefly. It emerged from the submissions as no more than an assertion unsupported by direct authority. Moreover, given that the common law did not itself impose any limitations on the time within which to commence a suit[133], it is difficult to see why the common law should now recognise the public policy asserted by the appellants. The contention is rejected.

Breach of contract

100 The appellants finally submitted that if cl 24 operates to prevent them from relying upon s 13 of the *Limitation Act*, the respondents should nonetheless be

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131 [1997] AC 430 at 453.

132 (2009) 239 CLR 175 at 212 [95] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

133 *Blackmore v Tidderley* (1704) 2 Ld Raym 1099 at 1100 per Holt CJ [92 ER 228 at 228]; *Williams v Jones* (1811) 13 East 439 at 449 per Lord Ellenborough CJ [104 ER 441 at 445].

denied the remedy of possession because they should have sued the appellants for damages for breach of contract. The appellants further submitted that this Court should not remit the matter back to the Supreme Court of Queensland to permit the respondents to pursue such a claim, as they had made an election not to sue on this basis, or they are otherwise now estopped from doing so[134].

101 The appellants relied upon an 1849 advice of the Privy Council on appeal from the Supreme Court of Judicature at Fort William in Bengal: *The East India Company v Oditchurn Paul*[135]. In 1822, the respondent purchased salt, located in a warehouse, from the British East India Company (which at the time held a monopoly over salt in the former British India). Until 1831, the respondent received from time to time deliveries of salt from that warehouse. But in 1831, an inundation took place which destroyed all of the respondent's remaining salt. The respondent sought a refund of part of the purchase money. This was refused. The East India Company then convened an inquiry into the matter. A negative report was furnished in 1838, and the Company again refused to refund the respondent. The respondent then sued in *assumpsit* for recovery of an amount of purchase money corresponding to the salt that had not been delivered. However, the claim was found to be statute-barred; the fact of the inquiry did not suspend time for the purposes of the *Limitations Act 1623* (21 Jac 1 c 16)[136]. Lord Campbell, delivering the reasons of the Judicial Committee[137], said[138]:

> "There might be an agreement that in consideration of an inquiry into the merits of a disputed claim, advantage should not be taken of the Statute of Limitations in respect of the time employed in the inquiry, and an action might be brought for breach of such an agreement; but if to an action for the original cause of action the Statute of Limitations is pleaded, upon which issue is joined – proof being given that the action did clearly accrue

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134 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 602-603 per Gibbs CJ, Mason and Aickin JJ.

135 (1849) 7 Moo PC 85 [13 ER 811].

136 *The East India Company v Oditchurn Paul* (1849) 7 Moo PC 85 at 111-112 [13 ER 811 at 821-822].

137 Comprised of Lords Langdale and Campbell, the Rt Hon Dr Lushington and the Rt Hon T Pemberton Leigh.

138 *The East India Company v Oditchurn Paul* (1849) 7 Moo PC 85 at 112 [13 ER 811 at 821-822].

> more than six years before the commencement of the suit – the Defendant, notwithstanding any agreement to inquire, is entitled to the verdict."

102 The appellants relied upon the foregoing passage for the proposition that the respondents' remedy should be confined to damages for breach of cl 24. In that respect, they conceded that it was possible for parties to suspend by contract the *Limitation Act* for a specified or limited period, but contended that it was not possible to contract out of that Act entirely. This principle, it was said, explained why it might have been lawful for the parties in *Oditchurn Paul* to have suspended the operation of the Statute of Limitations pending the inquiry undertaken into the inundation of the salt.

103 *Oditchurn Paul* is not authority for the proposition advanced by the appellants. The existence of one remedy does not necessarily foreclose the possibility of other remedies. For example, in *Newton, Bellamy and Wolfe v State Government Insurance Office (Qld)*[139], a claim for damages was made arising out of a motor vehicle collision. In previous correspondence, the State Government Insurance Office had conceded liability. It subsequently claimed in its defence that the proceeding was statute-barred. The Full Court of the Supreme Court of Queensland decided that there had been an agreement that liability would not be an issue for determination and that, consequently, the insurer could not rely on this defence[140]. McPherson J recognised that the plaintiffs had an "option of suing for damages for breach of that contract, or of affirming the contract and relying upon it in answer to the defence"[141]. That observation was correct.

104 Here, the respondents chose to rely upon cl 24[142] in reply to the appellants' invocation of the *Limitation Act* in their defence. They were entitled to respond to that pleading by contending in their reply, as was apparently the case in *Wright* and *Lubovsky*, that the appellants were debarred from raising a defence under the *Limitation Act*[143]. There is no reason to doubt the legitimacy and effectiveness of

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139 [1986] 1 Qd R 431.

140 *Newton, Bellamy and Wolfe v State Government Insurance Office (Qld)* [1986] 1 Qd R 431 at 437 per Andrews A-CJ and Derrington J, 443-445 per McPherson J.

141 *Newton, Bellamy and Wolfe v State Government Insurance Office (Qld)* [1986] 1 Qd R 431 at 445-446.

142 The respondents' plea was ostensibly based on an estoppel arising from cl 24. However, as noted by the primary judge, the case below was conducted on the basis that the respondents relied upon that clause as effecting a contracting out of the *Limitation Act*: *Spoor v Price* [2019] QSC 53 at [20]-[21].

143 See Bosanquet and Marchant, *A Practical Treatise on the Statutes of Limitations in England and Ireland*, 2nd ed (1893) at 94-95.

such a reply. Given that it has been long established that the benefit of a Statute of Limitations is invoked by pleading it as a defence, it makes perfect sense for the validity of such an invocation to be raised in a reply to that defence. The respondents' reply here sufficiently put the appellants on notice that their answer to the appellants' reliance upon the *Limitation Act* would be cl 24 of the Mortgage. The issue of the validity of this defence was thus then engaged.

105 The submission that a distinction can be drawn between a clause limiting the application of the benefits conferred by the *Limitation Act* for a limited period only, and a clause like cl 24, should be rejected. If anything, this proposition, like the appellants' concession about waiver, fundamentally undermines their case. The distinction is not sustainable as a matter of principle.

106 Because the respondents are not confined here to a claim for damages for breach of cl 24, it is unnecessary to consider whether they had made an election not to sue on that basis or whether they should otherwise be estopped from pursuing such a claim.

Section 24 of the *Limitation Act*

107 In this matter, the respondents, amongst other remedies, seek possession of the three plots of land. They do not seek foreclosure. As noted earlier, s 5(5) of the *Limitation Act* relevantly provides that "[a] reference in this Act to a right of action to recover land includes a reference to a right to enter into possession of the land". It follows that in relation to the possession claim, ss 13 and 24 of the *Limitation Act*, which address actions for the recovery of land, apply.

108 The appellants did not contend that s 24 had any independent operation from s 13 of the *Limitation Act*. They appeared to accept that s 24 only applied to extinguish the respondents' title as mortgagees to the three plots of land if the respondents' claims were otherwise statute-barred.

109 Gotterson JA was of the same view. His Honour found that s 24 did not apply in the circumstances of this case[144]. That was because "the limitation period prescribed by the Act" for the purposes of s 24 was to be found in s 13, which in turn prescribed a 12-year limit within which to bring an action to recover land[145]. However, by reason of cl 24 of the Mortgage, "as between mortgagor and mortgagee, the period of limitation prescribed by s 13 has never applied and hence

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144 *Spoor v Price* (2019) 3 QR 176 at 193-194 [74]-[76].

145 *Spoor v Price* (2019) 3 QR 176 at 194 [75].

has never expired"[146]. The appellants did not challenge the correctness of this reasoning beyond their objection on public policy grounds.

110 Nonetheless, the possibility that s 24 has independent operation should be addressed. In that respect, it appears to have been accepted that s 24 is a substantive provision because it does more than bar a remedy; it extinguishes the title of a person to the land. It also appears to have been accepted that a party cannot exclude its application by contract because it serves a public need. The issue is whether, in such circumstances, s 24 automatically applies to extinguish title 12 years after the accrual of a cause of action to recover land. In other words, does the phrase in s 24 "the period of limitation prescribed by this Act within which a person may bring an action to recover land" relevantly refer to the 12 years prescribed by s 13, regardless of whether a party has invoked the *Limitation Act* as a defence? For the reasons given below, it does not.

111 The genesis of s 24 is to be found in s 34 of the *Real Property Limitation Act 1833* (UK) and in the doctrine of adverse possession. As Mr Strauss QC, sitting as a deputy High Court judge in England, observed in *Beaulane Properties Ltd v Palmer*, this enactment constituted "a radical change in the law"[147]. The change was described by Mr Strauss QC in the following way[148]:

> "Before [1833], lapse of time barred the owner's remedies, but did not transfer title. By section 34 of the Real Property Limitation Act 1833 (3 & 4 Will 4, c 27) the owner's rights were extinguished and the trespasser acquired title to the land.
>
> The reason for the change in the law, and other later changes, was that it was for the public good. It did away with burdensome enquiries and difficulties which were encountered in conveyancing transactions generally (not only those in which there was an issue about a possible possessory title), and made conveyancing less expensive."

112 By s 5 of the *Distress Replevin and Ejectment Act 1867* (Qld), an almost identical version of s 34 of the *Real Property Limitation Act 1833* (UK) became law in Queensland. In contrast, actions relating to personal property, and not land, were the subject of the *Statute of Frauds and Limitations 1867* (Qld). Section 5 of the *Distress Replevin and Ejectment Act 1867* (Qld) was essentially re-enacted in 1960 as s 22 of the *Limitation Act 1960* (Qld). Much of that Act was modelled on

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146 *Spoor v Price* (2019) 3 QR 176 at 194 [76].

147 [2006] Ch 79 at 102 [69(a)].

148 *Beaulane Properties Ltd v Palmer* [2006] Ch 79 at 102 [69(a)-(b)].

the *Limitation Act 1939* (UK), which, amongst other things, effectively merged the Acts dealing with limitations on actions relating respectively to real and personal property. Section 22 was then relevantly re-enacted in 1974 to become s 24 of the *Limitation Act*.

113 In *Beaulane Properties*, Mr Strauss QC also observed that under the Torrens system, it was initially not possible to acquire rights over registered land by adverse possession[149]. That was the position in Queensland until 1952[150]. Following that change, it may be accepted that s 24, together with Pt 6 Div 5 of the *Land Title Act 1994* (Qld)[151], is the legal means whereby the adverse possessor may obtain registered title to land in Queensland.

114 It is important to identify precisely what s 24 extinguishes. In *Fairweather v St Marylebone Property Co Ltd*[152], the land in question had been subject to a lease; part of the appellant's shed, from the neighbouring land, intruded onto it during the term of that lease. What was eventually extinguished by adverse possession was only the estate of a dispossessed lessee to that part of the shed which had intruded, and not the title of the landlord. As Lord Radcliffe observed, provisions like s 24 extinguish no more than "the title of the dispossessed against the dispossessor"[153]. In other words, whatever "title" is extinguished is not extinguished against the whole world. Rather, it is extinguished against the dispossessor.

115 The mortgages in this case were registered pursuant to the *Land Title Act 1994* (Qld) over Torrens land. When s 34 of the *Real Property Limitation Act 1833* (UK) was enacted, the title of the mortgagee was either legal title to the land, or,

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149 *Beaulane Properties Ltd v Palmer* [2006] Ch 79 at 102 [69(d)].

150 *Miscamble v Phillips and Hoeflich* [1936] St R Qd 136 at 149 per R J Douglas and Webb JJ. The law was changed by the *Real Property Acts Amendment Act 1952* (Qld); see now s 185(1)(d) of the *Land Title Act 1994* (Qld).

151 Division 5 sets out a process whereby an adverse possessor can apply for registered title over the relevant land with the result that the registered interest of the dispossessed owner of that land is cancelled.

152 [1963] AC 510.

153 *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510 at 539.

in the case of an equitable mortgage, an equitable interest in the land[154]. In contrast, the "title" held by the respondents here that is capable of being extinguished by s 24 is a species of statutory charge, giving them an interest but not an estate in land[155]. As such, it involves no ownership of the land[156]. No one disputed that this interest was a form of "title" for the purposes of s 24. Here, the respondents as mortgagees became "dispossessed" of their title, and the lands relevantly became subject to adverse possession as against them, upon the failure by the appellants to pay the principal and interest owing for the prescribed period of years[157].

116 Section 24 is relevantly here an ancillary provision intended to facilitate the better operation of s 13 of the *Limitation Act*. The reference in s 24 to the "period of limitation prescribed by this Act within which a person may bring an action to recover land" is a reference to s 13 and its operation. As such, the phrase "may bring an action to recover land" in s 24 must be read, as in the case of s 13, not literally, but as a reference to a defendant's ability to plead that a claim is statute-barred. As Keane J said in *Brisbane City Council v Amos*[158]:

> "[L]imitation 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. 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."

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154 *Santley v Wilde* [1899] 2 Ch 474 at 474 per Lindley MR, cited in *Cambridge Credit Corporation Ltd v Lombard Australia Ltd* (1977) 136 CLR 608 at 615 per Barwick CJ, Mason and Jacobs JJ.

155 *Swanston Mortgage Pty Ltd v Trepan Investments Pty Ltd* [1994] 1 VR 672 at 674 per Brooking J (Southwell and Teague JJ agreeing).

156 *English Scottish and Australian Bank Ltd v Phillips* (1937) 57 CLR 302 at 321 per Dixon, Evatt and McTiernan JJ.

157 Section 19 of the *Limitation Act*; see also *Cameron v Blau* [1963] Qd R 421 at 425 per Gibbs J (Mansfield CJ and Jeffriess J agreeing).

158 (2019) 266 CLR 593 at 615-616 [49] (footnotes omitted).

117 Limitation defences are often characterised as procedural rather than substantive in nature[159]. That is because they usually only operate to bar a remedy and do not extinguish a plaintiff's underlying right or rights[160]. Whether the terms "procedural" and "substantive" are apt may be put to one side so long as it is understood that the distinction is between provisions which offer a defence based on the expiration of a given time period, and those which extinguish the claim or title of a plaintiff[161].

118 If no defence of limitation is pleaded for whatever reason, the period within which to bring an action, here for the purposes of s 13 of the *Limitation Act*, will have never expired. And that is so for the purposes of both ss 13 and 24. Where, however, the defence is successfully pleaded that an action to recover land is statute-barred, the effect of s 13 is that the remedy of recovery of the land is barred, and the further effect of s 24 is that the "title" of the person seeking recovery of the land is "extinguished". Section 24 thus ensures that the issue of "title" is put beyond doubt where s 13 has applied, consistently with the reasons for the original enactment of s 34 of the *Real Property Limitation Act 1833* (UK). This conclusion is supported by the fact that s 24 does not extinguish a person's title against the whole world, but only against the dispossessor[162]. Its application is limited to the dispossessor and dispossessed because it is the dispossessor who has the option to plead the defence conferred by s 13, thus triggering a possible application of s 24.

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159 *Pedersen v Young* (1964) 110 CLR 162 at 166 per Kitto J, 166-167 per Menzies J.

160 *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 18-19 per Mason CJ.

161 *Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471 at 488 per Windeyer J.

162 *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510 at 539.