IN THE HIGH COURT OF AUSTRALIA
BRISBANEREGISTRY

No. B47 of 2018

BETWEEN:

BRISBANE CITY COUNCIL
Appellant

and

EDWARD AMOS
Respondent

APPELLANT'S SUBMISSIONS

Part I: Publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Statement of the issues

2. The issues are whether:

   (a) section 10(1)(d) of the *Limitation of Actions Act 1974* (Qld) (**the *Limitations Act***) applied in the circumstances so as to give the respondent a good defence to any action by the Appellant to recover overdue rates and charges levied pursuant to the *City of Brisbane Act 2010* (Qld) (***City of Brisbane Act***) including the proceedings by the Appellant to recover a principal sum of money secured by charge on land being a charge created pursuant to the *City of Brisbane Act*; or

   (b) section 26(1) of the *Limitations Act* was the specific provision which was to be applied and not, or in preference to, s10(1)(d) of the *Limitations Act* in respect of the proceedings by the Appellant to recover a principal sum of money secured by charge on land being a charge created pursuant to the *City of Brisbane Act*;

   (c) the expression 'principal sum of money secured by mortgage or other charge on property' in s26(1) of the *Limitations Act* included amounts accrued previously as

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interest on overdue rates and charges, which total sum was the rates the subject of the charge created by the *City of Brisbane Act*.

Part III: Judiciary Act, s78B

3. The Appellant certifies that it has considered whether any notice should be given to the Attorneys-General in compliance with s78B of the *Judiciary Act* 1903 (Cth) and has concluded that no such notice need be given.

Part IV: Reports of decisions below

4. The decision at first instance is reported at (2016) 216 LGERA 312 and the medium neutral citation is [2016] QSC 13 (**Trial Judgment**).

10 5. The subsequent judgment making the final Orders is not reported and its medium neutral citation is [2016] QSC 140.

6. The decision of the Supreme Court, Court of Appeal is reported at (2018) 230 LGERA 51 and the medium neutral citation is [2018] QCA 11 (**Appeal Reasons**).

Part V: Factual Background

7. The Appellant commenced proceedings on 24 June 2009 for overdue and unpaid rates and charges, levied on and over land owned by the Respondent.

8. The rates and charges claimed in the proceedings were levied pursuant to the *City of Brisbane Act* and the *City of Brisbane (Finance, Plans and Reporting) Regulation 2010* (Qld) (***Regulations***) and prior to 1 July 2010, pursuant to the *City of Brisbane Act 1924*
20 (Qld) (**the 1924 Act**).[1]

9. The overdue rates and charges sought to be recovered in the proceedings are a charge on the land to which they relate.[2]

10. The Respondent disputed the rates and charges levied on a number of bases,[3] including, the applicable limitation period. The Appellant contended that s26 of the *Limitations*

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1 Core Appeal Book at 9, [7]; Also included were amounts levied pursuant to the *Fire and Rescue Service Act 1990* and the *Fire and Rescue Service Regulations 2001*, however, it was common ground that the amounts levied for the fire service levy would rise and fall with the other amounts, such that separate consideration was not required.

2 Core Appeal Book at 8, [5].

3 Core Appeal Book at 9, [7]-[8], the issues were narrowed and analysed under five headings.

Act applied so that the relevant limitations period was 12 years, whereas the Respondent contended that s10(1)(d) applied and hence the limitation period was only 6 years.

11. In the Trial Judgment it was observed that:[4]

> "*The Council **may** recover overdue rates or charges by bringing court proceedings for a debt against a person who is liable to pay them. But, **additionally**, overdue rates and charges are made a charge on the land to which they relate, ...*"
>
> (emphasis added)

12. The trial Judge held that s26 of the *Limitations Act* applied so that the relevant limitation period was 12 years, and that applied to the exclusion of s10(1)(d)[5] of the *Limitations Act*.

13. Judgement was given for the Appellant for $807,148.28 (which included interest).[6]

14. The Respondent appealed[7] against part of the Order of the Trial Judgment, seeking to agitate the limitation issue.[8]

15. All members of the Court of Appeal[9] and the primary judge[10] held that the Appellant's claim for rates and charges fell within s26(1) of the *Limitations Act*, being an action to recover a principal sum of money secured by a charge on property. All members of the Court of Appeal observed that the Appellant's claim also fell within s10(1)(d), being a sum recoverable by virtue of any enactment.[11]

16. However, the majority in the Court of Appeal (Philippides JA and Dalton J) preferred a construction[12] of the *Limitations Act* that was although both s10(1)(d) and s26(1) could be applicable:

    (a) the provisions do not deal with the same subject matter;

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4 Core Appeal Book at 8, [5].
5 Core Appeal Book at 17-19, [56]-[67].
6 *Brisbane City Council v Amos* [2016] QSC 140.
7 Core Appeal Book at 34-35.
8 The Respondent also sought to appeal the utility charges in relation to the property at Sandgate Road, which was unsuccessful before the Court of Appeal, for the reasons of Fraser JA, there is no cross-appeal in relation to this issue; see Core Appeal Book at 55-56, [49]-[54] and at 71, [122].
9 Core Appeal Book at 48, [28] per Fraser JA and at 58, [64] and 59, [74] per Dalton J, with whom Philippides JA agreed at 57, [57].
10 Core Appeal Book at 18, [64].
11 Core Appeal Book at 48, [28] per Fraser JA and at 57, [61] and 59, [74] per Dalton J, with whom Philippides JA agreed at 57, [57].
12 Core Appeal Book at 69-70, [115]-[119].

(b) one is not specific and the other general;

(c) the resolution of which provision is applicable should not be governed by the application of the maxim *generalia specialibus non derogant*;

(d) because limitations legislation prohibits proceedings, once the shorter time period has passed, the Respondent had a good defence to '*any action*'[13] which the Appellant then began.

17. As such, the majority held that the shorter limitation period in s10(1)(d) of the *Limitations Act* applied so as to preclude the Appellant's claim in the proceedings for recovery of the sum claimed including as the principal sum of money secured by the statutory charge on the land.

18. The Appellant filed an application for special leave on 20 March 2018, which was granted on 14 September 2018.[14]

Part VI: Argument

Summary

19. The Appellant's submissions may be summarised as follows:

(a) An action by the Appellant to recover unpaid rates due under the *City of Brisbane Act* would likely be one characterised as an action within s10(1)(d) of the *Limitations Act* and a limitations defence available to the Respondent.

(b) However, if, as is the case here, the action the Appellant has taken is (or also is) an action to recover a principal sum secured by charge on property (in this case the Respondent's land) whether there is a limitations defence available to the Respondent to bar such an action is to be determined by reference to s26(1) of the *Limitations Act*.

(c) The *Limitations Act* does not operate such that where two provisions might apply, any action (however characterised) must be commenced within the shorter limitation period provided for in order to avoid the limitation defence. The decision of the majority below to the contrary effect is wrong; contrary to authority; and would render provisions (especially s26(1)) of the *Limitations Act* otiose.

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13 Core Appeal Book at 70, [119].
14 Core Appeal Book at 79.

(d) The correct construction of the *Limitations Act* calls for the characterisation of the action in respect of which the defence of statute bar is being raised. But the same outcome is achieved by treating the specific provision which deals with claims to recover the principal sum under a mortgage or charge as applying in place of the more general provisions in s 10(1) and (3) which might otherwise have applied. This too is well established law.

(e) Further, in this case the court should hold that interest on overdue rates and charges which itself forms part of the 'rates' made the subject of the charge on property, falls within s26(1) as part of the 'principal sum' to be recovered and not s26(5) of the *Limitations Act* (for which a shorter limitation period is prescribed).

The Construction of the *Limitations Act*

20. Section 10(1)(d) provides:

> ***10 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) ....*
>
> *(d) an action to recover a sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of a penalty or forfeiture.*
>
> *(2) ...*

21. Section 26(1) of the *Limitations Act* states:

> ***26 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 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.*

22. Both of these provisions relate to an "*action*" and identify the action which cannot be brought after the stated time. An "*action*" is defined in s5 of the *Limitations Act* such that it "*includes any proceeding in a court of law.*" The definition is wide and inclusive. The *Acts Interpretation Act* 1954 (Qld) defines *proceeding,* **to mean** *a legal or other action or proceeding.*

23. The sections operate to give rise to a defence to an action. The thing barred is an action of a particular kind. Accordingly, an action for recovery of the principal sum secured by a charge on land is barred only after the expiry of 12 years from the date on which the right to receive the money accrued: s26(1). An action to recover a sum recoverable

by virtue of an enactment is barred on the expiry of 6 years from the date on which the cause of action arose: s10(1)(d). While the circumstances giving rise to these two kinds of action can overlap (and do in this case) the *Limitations Act* is not to be construed so that all actions which could be brought (for all causes of action) are barred by the expiry of the shorter of the times provided for in relation to any one of those causes of action. Where the action is to recover the principal sum secured by a mortgage or charge on the land, a defence to that action arises only after the expiration of 12 years pursuant to s26(1) even if an action by the creditor to recover the money pursuant to a personal contractual obligation, or on a speciality or statute would be barred at some different, earlier, time pursuant to ss10(1)(a), or (3).

24. This conclusion follows from:

    (i) the language used in the *Limitations Act*;

    (ii) from the circumstance that the contrary approach (adopted by the majority below) renders some provisions of the *Limitations Act* otiose;

    (iii) is supported by authority both in Queensland and elsewhere.

The Language Used

25. The *Limitations Act* employs the language generally of stating what *action* may not be brought after the expiry of a stated period from a date (often but not always the date when a cause of action arose). Examples of this are in sections 10(1)(a), (b), (c) and (d), (2), (3), (4), (5), 10AA, and 26.

26. There is scope for overlap of the circumstances in which these provisions may operate. So, for example, a principal sum secured by a mortgage or other charge will usually (if not always) arise pursuant to a charge created by a simple contract, a speciality or statute.

27. The structure of the *Limitations Act* is to require a characterisation of the action (proceedings). If the action is to recover money under a simple contract, then it is an action to which the limitation in s10(1)(a) applies. If it is to recover a sum under a charge on property, then it is an action to which the limitation in s26(1) applies. The

language employed is directed to the nature of the particular action relied upon and not to all bases on which the action might have been or even has been, commenced.

28. As was explained by Gummow and Kirby JJ in *Commonwealth v Mewett*:[15]

> "*(A) statutory bar, at least in the case of a statute of limitations in the traditional form, does not go to the jurisdiction of the court to entertain the claim but to the remedy available and hence to the defences which may be pleaded. The cause of action has not been extinguished. Absent an appropriate plea, the matter of a statutory bar does not arise for the consideration of the court. This is so at least where the limitation period is not annexed by statute to a right which it creates so as to be of the essence of that right.*"

29. Their Honours continued:

> "*These latter considerations may not bear upon the facts of the particular case, being but illustrations of the proposition that the existence of direct curial remedy is not co-existence with the judicial existence of the right.*"

30. This characterisation approach is supported by the distinction drawn (in many instances) between the action (the proceedings) and the date when the cause of action arose: see for example s10(1). The section operates to bar the action not the cause of action, indicating that something narrower than the whole of the underlying entitlement of the plaintiff is that which the defence bars.

31. Support for this approach is also found in ss10(3) and (3A) and s10A where Parliament has made specific provisions dealing with possible overlap of potentially applicable provisions. Section 10(3A) and the opening words of s10A would not be necessary if, even without them, the shorter limitation period applied where two possible provisions might apply.

32. Unless that approach is taken some provisions of the *Limitations Act* will have little if any work to do; especially s26.

Support from Authority

33. The approach the Appellant urges is well established by authority including (in a relevantly analogous situation) in this Court.

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15 (1997) 191 CLR 471 at 534, also see the illustrations therein referred.

34. In *Williams v Milotin*[16] an action was brought to recover damages for personal injuries. The occurrence of the event was claimed to be 7 May 1952 and the writ of summons was issued on 19 July 1955 (more than three years but less than 6 years after the cause of action arose). The cause of action could be either an action on the case or for trespass.[17] The appellant there submitted that "*If the case falls both within* [two relevant limitation sections] *the shorter period prescribed is that applicable.*"[18] The Court rejected that approach observing that:[19]

> "*... An interpretation of this statute which would result in an action on the case being barred in four years if the plaintiff might have sued in trespass as an alternative to an action on the case can have no foundation in reason or probability and the text givens no real support to it.*"

35. The Court continued:

> *..the problem is reduced to the simple position that on the same set of facts two causes of action arose to which different periods of limitation were respectively affixed. In saying that two causes of action arose no more is meant that that two tradition categories continue to exist in the contemplation of the material provisions of the* [the relevant Limitations legislation] *and that there is no difficulty in distinguishing between the categories either notionally or historically.*
>
> ...
>
> *... Why should the plaintiff's action be limited by any other period of time than that appropriate to the cause of action on which he sues? The two causes of action are not the same now and they never were. When you speak of a cause of action you mean the essential ingredients in the title to the right which it is proposed to enforce. The essential ingredients in an action of negligence for personal injuries include the special or particular damage – it is the gist of the action of negligence – and the want of due care. Trespass to the person includes neither. ... But it does not mean that trespass is the same as actionable negligence occasioning injury. It happens in this case that the actual facts will or may fulfil the requirements of each cause of action. But that does not mean that within the provisions of the* [the relevant Limitations legislation] *only one "cause of action" is vested in the plaintiff.*

36. In *Slaveska v State of Victoria*[20] the plaintiff claimed damages in respect of claims of assault and battery, false imprisonment, malicious prosecution, defamation, trespass, conversion, detinue and negligence. There was overlap between the claims. Although the relevant limitation legislation is different, the plaintiff claimed that some of her actions for damages did not relate to personal injuries and hence should not have been

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16 (1957) 97 CLR 465 per Dixon CJ, McTiernan, Williams, Webb and Kitto JJ.
17 (1957) 97 CLR 465 at 469.
18 (1957) 97 CLR 465 at 467.
19 (1957) 97 CLR 465 at 473.

dismissed (at [107]). The question was "*whether, if such damages are claimed,* (does) *PtIIA of the Limitations Act bar all other relied founded upon the same cause of action, regardless of how any other heads of damages that are claimed may be characterised.*" (at [109]). The Victorian Court of Appeal rejected the approach that by claiming personal injury damages, a plaintiff could find all of his or her damages claims founded upon the same cause of action time barred, even if those claims would have been within time had personal injury damages not been sought (at [111]). Applying principles from *Williams v Milotin* and *New South Wales v Williamson*[21] the Court of Appeal considered that the claims for other relief would survive (at [112]-[117]).

10 37. The Victorian Court of Appeal endorsed and applied the reasoning of Schmidt J in *Zhang v State of New South Wales.*[22] In that case the claim was only in tort (at [16] and [22]) and was for false imprisonment. The particulars of damage included injury to reputation, deprivation of liberty, loss of dignity and other losses. Some of these claims, it was accepted, were for personal injuries. Schimdt J observed that "*(t)he same set of facts may, of course, give rise to more than one cause of action*" (at [39]). The defendant submitted that because some of the relief related to personal injuries, to which a 3 year limitation period applied, that limitation period applied to the entirety of the proceedings (at [41]). Schmidt J did not accept that submission, stating (at [42]):[23]

> ".. *It would be an absurd outcome, if the result of an error in the pursuit of one claim*
> 20 *which was time barred, in the same proceeding in which other claims which were not time barred were pursued, was that the entirety of the proceedings had to be dismissed.*"

38. In *Chesworth v Farrar*[24] the Court was considering whether the set of circumstances gave rise of a 'cause of action in tort'. The matter involved duties of the bailee. The Court observed that if the circumstances could be said to be equally advanced in contract and in tort, then "*the plaintiff could rely upon that aspect which put him in the more favourable position both under the Statutes of Limitation and under the action personalis rule.*" (at 1079).[25]

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20 (2015) 49 VR 131 per Warren CJ, Tate JA and Ginnane AJA.
21 (2012) 248 CLR 417.
22 [2012] NSWSC 606.
23 Applied in *Slaveska v State of Victoria* (2015) 49 VR 131 at [110]-[111].
24 [1966] 1 QB 406 at 416; [1966] 2 WLR 1073.
25 See also *Wilson v Horne* (1999) 8 Tas R 363 at [22], in relation to the express recognition that a plaintiff is entitled to pursue whichever cause of action he or she may prefer.

39. The House of Lords in *Wilkinson v West Bromwich Building Society*[26] considered whether the building society's claim brought to recover the shortfall after the sale of the property, the subject of the mortgage, fell within s20 of the *Limitation Act 1980* (UK) (**the English Act**) (which is equivalent to s26 of the *Limitations Act*) or whether it was a personal claim pursuant to a deed, the limitation period for which was governed by s8 of the English Act (which is equivalent to s10(3) of the *Limitations Act*). The House of Lords expressly endorsed the English Court of Appeal's approach in *Bristol and West Plc v Bartlett*[27] (***Barlett's case***) stating:

> *"I think that Bartlett's case [2003] 1 WLR 284 was rightly decided. Putting aside actions for the recovery of land, where questions of title are involved, English law attributes periods of limitation by reference to the cause of action which the claimant seeks to enforce. Thus there are periods of limitation for personal injury actions, defamation actions, other actions in tort, actions founded on simple contract, actions on a specialty and so on. This method of classification suggests that ordinarily time will run from the moment when the cause of action designated by the appropriate rule has arisen. It would be strange if the lender could then stop time running by his own act in exercising the power of sale. If, therefore, the cause of action when it arose was a claim to a debt secured on a mortgage, I do not think section 20 ceases to apply when the security is subsequently realised."*

40. In *Bartlett's case* three appeals were heard together to determine whether in proceedings for the shortfall amount, after a sale by a mortgagee, the 12-year limitation period applied or only the 6-year period, applicable to simple contract debts.[28]

41. The English Court of Appeal held that s20 was the applicable limitation period.[29] When the cause of action accrued, "*it was undoubtedly an action to recover money secured by a mortgage*"[30] and moreover there is express authority that "*the specific limitation provisions relating to the mortgages take precedence over the general provisions relating to specialties*".[31] This approach is something to which we shall return below.

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26 [2005] UKHL 44; [2005] 1 WLR 2303.

27 [2002] EWCA Civ 1181; [2003] 1 WLR 284.

28 *Bristol and West plc v Bartlett* [2003] 1 WLR 284; [2002] EWCA Civ 1181 at [2].

29 *Bristol and West plc v Bartlett* [2003] 1 WLR 284; [2002] EWCA Civ 1181 at [13]-[14] and [27]; Which was held to have been '*rightly decided*' by the House of Lords in W*ilkinson v West Bromwich Building Society* [2005] UKHL 44 at [10].

30 *Bristol and West plc v Bartlett* [2003] 1 WLR 284; [2002] EWCA Civ 1181 at [27].

31 *Bristol and West plc v Bartlett* [2003] 1 WLR 284; [2002] EWCA Civ 1181 at [27], which continues to endorse the approach *Sutton v Sutton* (1882) 22 Ch.D. 511, which was at least a basis for McPherson J's decision in *Douglas Morris*.

42. As explained in *Fischer v Nemeske,*[32] (considering the New South Wales limitation legislation) the relevant provisions "*speak of different 'actions' "* (at [204]). This approach is consistent with the approach urged by the Appellant that the scope of the relevant limitation provision is determined by characterising the relevant "*action*" and, if applicable, "*cause of action*" to determine whether it is captured by the relevant provision. This is so even if a particular set of facts may be characterised as falling within more than one "*action*" or "*cause of action*" and even though they have different limitation periods (and different commencement dates for the limitation periods). Further, the plaintiff is free to pursue whichever "*action*" or "*cause of action*" he or she wishes to peruse which is not barred according to its proper characterisation.

43. Applying this approach to the present case (and consistent with the above authorities) the Appellant's claim is to recover a principal sum secured by a charge, and is an action which the Appellant was able to commence, it not being barred by operation of s26 of the *Limitations Act*.

44. It is accepted that ultimately the origin of the charge is statutory as is the origin of the obligation to pay the rates and charges which (when unpaid) become the subject of the charge. But such overlap, does not disentitle the Appellant from relying on the "*action*" which is for the recovery of the principal sum the subject of the charge to which s 26(1) of the *Limitations Act* applies. The Appellant is entitled to rely on the relevant facts which places it in the more favourable position.

45. It should be observed that is no complete overlap:

    (1) The relevant commencement of the 6 year period under s10(1)(d), would be from the date when the "*cause of action*" arose, being the date when the rate notice is issued. The *City of Brisbane Act* provides that the rates or charges are to be levied on all rateable land.[33] The *City of Brisbane Act* also provides that regulations may provide for any matter connected with rates and charges.[34] The sum due by the *City*

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32 [2014] NSWSC 203 at [193]-[208] per Stevenson J, an appeal to the Court of Appeal was dismissed, [2015] NSWCA 6 and to the High Court [2016] HCA 11, where the limitation argument was not pursued.

33 Section 96 of the *City of Brisbane Act.*

34 Section 98 of the *City of Brisbane Act.*

of Brisbane Act, is levied and made due by the rate notice, provided in the *Regulations*.[35]

(2) The relevant commencement of the 12 year period under s26(1) is different. This period commences, on the date on which the right to receive the secured money accrued, that being the principal sum became secured by charge. The charge, pursuant to s97(2) of the *City of Brisbane Act,* is imposed for rates and charges, as defined which are owing and overdue.

The Alternative Approach

46. Justice Fraser (and the trial judge) arrived at the same outcome by an alternative but acceptable analysis; following the approach in *Australian and New Zealand Banking Corporation Limited v Douglas Morris Investments Pty Ltd*[36] (***Douglas Morris***).

47. The Queensland Full Court in *Douglas Morris* held that a number of provisions of the Act were relevant to the proceedings, being ss10(1), 10(3) and s26(1), but that s26(1) was the '*applicable limitation provision to the exclusion*' of the others, as it '*is the specific and therefore governing provision.*'[37] This is by application of the maxim, *generalia specialibus non derogant.*

48. This rule of interpretation applies where there are two inconsistent provisions, which cannot be reconciled as a matter of ordinary interpretation. Section 26(1) is explicitly concerned with claims to recovery money (the principal sum) secured by a charge. It is the specific provision which is to be applied to provide the limitation defence to a claim of such a kind and in preference to the more general provision of s10(1)(d). This is the approach adopted in *Bartlett's case.*

Depriving Sections of Operation

49. As touched upon above, the majority approach leads to a construction which renders s26 impotent. On the majority's construction s26 would never apply, as it is likely that sums secured will arise under a statue, a speciality or a simple contract. All of those matters are provided for in s10. Such an approach, where it is possible that both

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35 Section 36 of the *Regulations.*

36 [1992] 1 Qd R 478, per McPherson J, with whom Connolly and Williams JJ agreed – it should also be noted that on 17 November 1989 the High Court refused special leave to appeal from this decision.

provisions could apply, does not leave any 'work' for s26(1). That, it is submitted, could not have been the Parliamentary intent; and is contrary to authority and principle.

Error and Inconsistency by the Majority

50. The majority described the approach to statutory construction in *Federal Commissioner of Taxation v Consolidate Media Holdings Ltd*[38] and in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)*[39] as a "caution" and embarked on an overly historical approach to the process of statutory construction. The correct approach to statutory construction is as follows:[40]

    (a) To "*...begin with a consideration on the text itself. Historical consideration and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of the legislation is the surest guide to legislative intention.*"[41]

    (b) To "*...begin with a consideration of the [statutory] text'. So must the task of statutory construction end. ... Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself. ...*"[42]

    (c) *"the interpretation that would best achieve the purpose or object of [an] Act (whether or not that purpose or object is expressly stated...) is to be preferred to each other interpretation.*"[43]

51. Further, the approach of the majority is not coherent. The majority considered that s10(1)(d) and s26(1) "*do not deal with the same subject matter*", observing the different requirements of each provision.[44] Their Honours also stated that "*(t)he point is then reached where it may accepted that the proceeding brought by the respondent Council*

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37 *Douglas Morris* at 482-483.
38 (2012) 250 CLR 503.
39 (2009) 239 CLR 27.
40 Footnotes from the quoted passages have been omitted.
41 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] per Hayne, Heydon, Crennan and Kiefel JJ (as the Chief Justice then was); recently referred to with approval in *Australian Building and Construction Commissioner v CFMEU* (2018) 92 ALJR 219 at [103] per Keane, Nettle and Gordon JJ, wherein it was stated that "*... it assist in the construction of s545(1) to have regard to its legislative history. But the starting point of the process must be the text of s545(1) read in the context of the Fair Work Act as a whole ...*"
42 *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39] per French CJ, Hayne, Crennan, Bell and Gageler JJ.
43 *Thiess v Collector of Customs* (2014) 250 CLR 664 at [23].
44 Core Appeal Book at 70, [116].

against the appellant falls with the description of actions found both at ss10(1)(d) and 26(1) of the Limitation of Actions Act 1974."[45] However, no compelling reason is available to explain why provisions, which deal with different subject matters and where the proceedings which were commenced fall within both, operate such that one of those provisions (s10(1)(d)) is effective to give rise to a limitation defence to the proceedings which fall within the other provision (s26(1)); dealing as it does with a different subject matter.

52. The majority's reasoning continued, in effectively applying a practical inconsistency between these two provisions, on the basis that as limitation provisions prevent the bringing of an action, once "*time has passed*", ... that "*gave the appellant a good defence to any action which the Council then began*".[46] That however is to read into s10(1)(d) language which is not present. It is not *any* action which is barred but an action of the kind (and only of the kind) referred to in s10(1)(d) which is governed by the limitation period in that section.

Interest Accrued as part of the Principal Sum, not *in respect of* the sum secured

53. Section 26(5) provides:

> *(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.*
>
> (emphasis added)

54. Only Fraser JA considered the possible application of this section (and concluded that the time limit it provided for did apply to the Appellant's claim for interest even though it was a rate charged on the land). However, Section 26(5) is not applicable .

55. The "*action*" by the Appellant was not one for the recovery of interest, in respect of the sum of money secured. It was an "*action*" to recover a principal sum of money secured by a charge. The principal sum secured was the *overdue rates and charges* (s97(2) of the *City of Brisbane Act*).

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45 Core Appeal Book at 59, [74].

46 Core Appeal Book at 70, [119].

(a) By application of the definition in the *City of Brisbane Act, rates includes any interest* and hence the principal sum of money secured by charge was the entire amount of *overdue rates and charges* (which included interest);

(b) Alternatively, on a proper construction of the legislative scheme, which includes the *City of Brisbane Act* and the *Regulations*, *overdue rates and charges* includes rates and charges not paid by the due date for payment and interest.

56. The majority, given their approach to s26(1), did not consider the application of s26(5) of the *Limitations Act*.[47] However, the majority held that the expression in s26(1) is "*wide enough to comprehend a sum of money consisting of overdue rates and charges as a 'principal sum of money'.*"[48]

57. Fraser JA held that the *City of Brisbane Act* brings interest on the rates and charges within the statutory charge created by s97(2).[49] His Honour also held that the "*very general language*" of s26(1) was apt to comprehend the Appellant's claim for rates and charges. The majority[50] and Fraser JA[51] referred to the dictionary definitions for the meaning of "*principal*" in s26(1), with Fraser JA noting the definition includes "*the sum of money on which interest is paid*".

58. However, when considering s26(5), Fraser JA observed that there was no indication that the interest was to be treated as having been transformed into principal "*for any purpose*".[52] This narrow construction is not consistent with the breadth of the meaning his Honour recognised was to be given to "*principal sum of money*", in s26(1) of the *Limitations Act*. Moreover, it does not give effect to the statutory scheme by which the charge secures the composite sum of things identified as rates and charges.

59. Section 26(5) refers to "*an action to recover arrears of interest payable in respect of a sum of money secured*" and from "*6 years from the date on which the interest became due*". The *sum of money secured* by the charge is the overdue rates and charges. The interest to which s26(5) refers is something in addition to the sum of money secured by

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47 Core Appeal Book at 71, [121].
48 Core Appeal Book at 59, [73].
49 Core Appeal Book at 44, [15] and 46, [20]
50 Core Appeal Book at 58-59, [65]-[73].
51 Core Appeal Book at 43-44, [13]-[14].
52 Core Appeal Book at 47, [25].

the charge (as to which in this case there was no dispute). The statutory scheme under consideration here made the sum of money secured inclusive of interest; or put differently, interest on overdue rates itself was a rate such that the sum charged on the land was the total rate in its aggregate and consolidated form. As such, s26(5) has no application.

60. The overall statutory scheme is one which recognises that the *City of Brisbane Act* only lays down the main provisions leaving the regulations to work out the specific policy. The *Regulations* are properly regarded as ancillary to the *City of Brisbane Act*, to carry into effect what is enacted[53] by elaborating or filling-in on the provisions of the Act.[54] In this way, it is clear that *overdue rates and charges* the subject of the charge include any interest, both under the *City of Brisbane Act* of itself and together with the *Regulations*.

61. The *City of Brisbane Act* defines, in the schedule, *rates* as including *any interest accrued, or premium owing, on the rates*.

62. This intention in the *City of Brisbane Act*, to provide detailed regulations is clear when the Act is considered as a whole which has many provisions that provide for regulations being made. A power to make regulations may have a wide ambit,[55] which is the case under the *City of Brisbane Act*.[56]

63. Further support for this overall statutory scheme is gained from the regulation power in s98 provides: "*A regulation may provide for any matter connected with rates and charges, including for example...*".[57] As such reference can be made to s64 in the *Regulations* for what *overdue* rates and charges comprise. In this way, the general rule that delegated legislation made under an Act should not be taken into account for construing the Act itself,[58] is observed.

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53 *Shanahan v Scott* (1957) 96 CLR 245 at 250.
54 *Shanahan v Scott* (1957) 96 CLR 245 at 253-254.
55 *Morton v Union Steamship Company of New Zealand Ltd* (1951) 83 CLR 402 at 410 per Dixon, McTiernan, Wiliams, Webb, Fullager and Kitto JJ.
56 Section 252(1) of the *City of Brisbane Act*.
57 Both ss98 and 252(1) of the *City of Brisbane Act* provide examples, about which regulations may be made, however examples are not exhaustive and do not limit the meaning of the provision: Section 14D of the *Acts Interpretation Act* 1954 (Qld).
58 Pearce & Geddes, *Statutory Interpretation in Australia*, 8th edition, 2014, Lexis Nexis at [3.41] and the authorities cited therein.

64. Further, s64 of the *Regulations* provides what *overdue* rates and charges are made up of. The definition includes the three components (as accepted in the trial Judge (at [66])[59]) and all of those matters, including interest, comprise the principal sum of money secured by the charge, such that s26(1) of the *Limitations Act* applies.

65. The *Limitations Act* takes the characterisation of the sum charged as something given by or derived from the statute or instrument giving rise to the charge. If, pursuant to that instrument, the charge is created for the rates due, the *Limitations Act* does not mandate an analysis of how that was calculated. Section 26(5) does not apply where the interest is properly capitalised or compounded but applies when ordinary interest is applied.

10 66. As was accepted in the *Bank of New South Wales* case[60] the usual position where interest is capitalised (or compounded) it is converted into capital and is treated as principal.[61] It is the application of this usual position which applies in the circumstances of this case. The principal sum secured by the charge is the entirety of the *overdue rates and charges*.

67. The interest compounded daily[62] forms part of the rates (as defined) that are overdue. There is a clear legislative intent to capitalise the interest and each day there is a new *sum of money on which interest is paid* (to use the language of Fraser JA).

68. As such, s26(5) is not applicable and the Appellant's claim fall within s26(1) of the *Limitations Act*.

20 **Part VII: Orders**

69. The Orders which are sought are:

(1) The Appeal be allowed;

(2) The Orders of the Supreme Court of Queensland, Court of Appeal of 20 February 2018 be set aside and in lieu thereof it be ordered that:

(a) The appeal from the judgment of the Supreme Court of Queensland of 13 June 2016 be dismissed;

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59 Core Appeal Book at 19, [66].
60 *Bank of New South Wales v Brown* (1982) 151 CLR 514.
61 *Bank of New South Wales v Brown* (1982) 151 CLR 514 at 519 per Gibbs CJ, at 527 per Mason and Wilson JJ, at 538 per Brennan J, at 548 per Dawson J.

(b) The appellant pay the respondents costs of the appeal;

(3) The respondent pay the applicant/appellant's costs of the special leave application and the appeal.

Part VIII: Estimate of Time

70. The appellant estimates that it will require 2-3 hours to present the oral argument.

Dated: 2 November 2018

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62 Section 65 of the Regulations.