HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY No. B55 of 2020

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF QUEENSLAND

BETWEEN: **Matthew Ward Price as Executor of the Estate of Alan Leslie Price (deceased)**

First Appellant

**Daniel James Price as Executor of the Estate of Alan Leslie Price (deceased)**

Second Appellant

**Allanna Marcia Price**

Third Appellant

**James Burns Price**

Fourth Appellant

**Gladys Ethel Price by her litigation guardian Erin Elizabeth Turner**

Fifth Appellant

and

**Christine Claire Spoor as trustee**

First Respondent

**Kerry John Spoor as trustee**

Second Respondent

**Marianne Piening**

Third Respondent

**Frederick Piening**
Fourth Respondent

**Joyce Higgins**
Fifth Respondent

**Cheryl Thompson**
Sixth Respondent

**Joyce Mavis Coomber**
Seventh Respondent

**Angus Macqueen and Angus Macqueen as trustee**
Eighth and Ninth Respondent

## APPELLANTS' SUBMISSIONS

### PART I – CERTIFICATION

1. We certify that this submission is in a form suitable for publication on the internet.

### PART II – CONCISE STATEMENT OF ISSUES

2. The issues that arise in this appeal are:
   (1) whether, on its correct construction, clause 24 has the effect of obliging the appellants to not plead a defence otherwise available under the *Limitation of Actions Act* 1974 (Q) (**1974 Act**) in an action brought by the respondents;
   (2) if so, whether such an obligation is contrary to either the public policy manifested in the 1974 Act, or the public policy of the common law itself, such that the obligation is rendered void and/or unenforceable;
   (3) if so, whether the respondents should be permitted to pursue an "alternative" claim of damages for breach of clause 24 by reason of the appellants' pleading of a defence under the 1974 Act.

### PART III – SECTION 78B NOTICE

3. We certify that the appellants have considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* and that no such notice is required.

## PART IV – CITATIONS

4. *Spoor v Price* [2019] QSC 53 (Dalton J) (**PJ**); *Spoor v Price* (2019) 3 QR 176; [2019] QCA 297 (Sofronoff P, Gotterson JA, Morrison JA) (**CA**)

## PART V – STATEMENT OF FACTS

5. The respondents commenced proceedings in the Supreme Court of Queensland seeking monies due and recovery of possession under mortgages.[1] The respondents and the appellants filed respective applications for summary judgment.[2] Each turned upon whether the respondents' claims were barred by the 1974 Act.[3] "No factual matters arose", and the applications raised "matters of construction and law only".[4]

6. The primary judge summarised the state of the pleadings.[5] On 25 June 1998, Alan Price and Alanna Price,[6] and James Price and Gladys Price,[7] each executed a mortgage in favour of Law Partners Mortgages Pty Ltd (**LPM**). On 9 May 2017, James Price died and his interest in the mortgaged land passed to Gladys Price.[8] The respondents are the successor-in-title to LPM.[9]

7. The mortgages secured the advance of $320,000 by LPM to all four of the Prices.[10] The loan advanced was repayable on 2 July 1999 (that is, one year thereafter).[11] In about 1999, it was agreed to extend the date for repayment to 2 July 2000.[12] The loan was not repaid by that date.[13] In November 2000, some of the land was sold and, following deductions, the proceeds of sale were paid to the respondents and reduced the principal by $50,000.[14] As at 20 April 2001, the amount outstanding was $270,000.[15] There have been no further repayments or acknowledgements.[16]

8. By their originating process, the respondents claimed an amount of over $4 million from the appellants.[17] The respondents asserted that this amount was due by reason of

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[1] PJ at [1]; Core Appeal Book (**CAB**) at 8.
[2] PJ at [1]; CAB at 8.
[3] PJ at [1]; CAB at 8.
[4] PJ at [1]; CAB at 8.
[5] PJ at [2]-[11]; CAB at 8-10.
[6] PJ at [2]; CAB at 8.
[7] PJ at [2]; CAB at 8.
[8] PJ at [2]; CAB at 8.
[9] PJ at [2]; CAB at 8.
[10] PJ at [3]; CAB at 8.
[11] PJ at [3]; CAB at 8.
[12] PJ at [3]; CAB at 8.
[13] PJ at [3]; CAB at 8.
[14] PJ at [3]; CAB at 8.
[15] PJ at [3]; CAB at 8.
[16] PJ at [3]; CAB at 8.
[17] PJ at [4]; CAB at 8.

interest that accrued on a compounding monthly basis at a rate of 16.25 per cent.[18] On 28 June 2017, the respondents served notices on Alan, Alanna and Gladys Price (the surviving mortgagors) under s 84 of the *Property Law Act* 1974 (Q).[19]

9. Before the primary judge, Allanna Price was represented separately from Alan Price[20] and Gladys Price. By their defences, the appellants pleaded that the respondents' claim was statute barred by ss 10, 13 and 26 of the 1974 Act.[21] Alan and Gladys Price also pleaded that the respondents' right and title under the mortgages had been extinguished.[22] Alan and Gladys Price counterclaimed for declarations to that effect.[23] All appellants sought orders that they be released from the mortgages.[24]

10. In reply, the respondents relied upon clause 24 as a covenant that the appellants would not plead a limitation defence.[25] They alleged that the appellants' pleading of the limitation defences breached that covenant and, as such, they were estopped from pleading those defences.[26] Despite that pleading, as the primary judge made clear, the allegation of estoppel "confuse[d] legal principles",[27] and the applications were conducted on the basis of an allegation of contracting out of the 1974 Act.[28]

11. The primary judge entered judgment for the appellants and dismissed the respondents' application.[29] The respondents appealed to the CA.[30] The appellants filed a notice of contention.[31] The CA rejected the appellants' contentions,[32] allowed the appeal and set aside the primary judge's orders.[33] On 11 September 2020, the appellants were granted special leave to appeal to this Court by Kiefel CJ and Nettle J.[34]

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[18] PJ at [4]; CAB at 8.
[19] PJ at [4]; CAB at 8.
[20] Alan Price died on 18 March 2018 and his executors had been substituted as the named party.
[21] PJ at [5] (Alan and Gladys Price); [7]-[8] (Allanna Price); CAB at 8-9.
[22] PJ at [6]; CAB at 9.
[23] PJ at [6]; CAB at 9.
[24] PJ at [6] (Alan and Gladys Price); [9] (Allanna Price); CAB at 9.
[25] PJ at [10]; CAB at 10.
[26] PJ at [10]; CAB at 10.
[27] PJ at [21]; CAB at 12.
[28] PJ at [20]-[21]; CAB at 12.
[29] PJ at [55]-[56]; CAB at 19. The formal orders are at CAB at 23-24.
[30] CAB at 26-30.
[31] CAB at 32-34.
[32] CA at [27]-[46]; CAB 46-50.
[33] CA at [80]; CAB at 54. The formal orders are at CAB at 56-57.
[34] CAB at 70-71. See also [2020] HCATrans 142.

## PART VI – ARGUMENT

### Overview of argument

12. The issues in this case turn upon the proper construction of clause 24,[35] which states:

> "*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.*"

13. The appellants' argument may be summarised as follows:

(a) clause 24, on its proper construction, did not constitute an agreement to not plead the 1974 Act in defence to any action brought by the respondents because the words of that clause:

(i) by their meaning, ascertained by applying the ordinary canons of construction, do not constitute an agreement to not plead the 1974 Act;[36]

(ii) are ambiguous and, applying the *contra proferentum* rule, the ambiguity must be resolved in favour of the construction most preferable to the appellants;[37]

(b) if, to the contrary, clause 24 did constitute the relevant agreement, the clause is contrary to the public policy manifested in the 1974 Act against the contracting out of its terms, or the public policy of the common law itself;[38]

(c) the consequences of clause 24 being contrary to public policy, if it did constitute the relevant agreement, are that:

(i) the respondents' remedies to enforce that mortgage are barred by ss 10(1)(a), 13 and/or 26 of the 1974 Act, and/or their title was extinguished by s 24;[39]

(ii) the clause is void and/or unenforceable as against the appellants;[40]

(iii) the appellants are at liberty to plead, in answer to the respondents' claims against them, defences under the 1974 Act;[41]

(d) if, to the contrary,[42] clause 24:

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[35] Clause 24 was contained in a memorandum filed with the Registrar of Titles that is incorporated into the mortgages by clause 7(a) thereof: PJ at [13]; CAB at 10; CA at [14]; CAB at 42-43.
[36] Ground 1 of the Notice of Appeal; CAB at 74-76.
[37] Ground 7 of the Notice of Appeal; CAB at 74-76.
[38] Ground 1 of the Notice of Appeal; CAB at 74-76.
[39] Ground 4 of the Notice of Appeal; CAB at 74-76.
[40] Ground 2 of the Notice of Appeal; CAB at 74-76.
[41] Ground 3 of the Notice of Appeal; CAB at 74-76.

(i) constitutes an agreement to not plead the 1974 Act; or

(ii) is not contrary to public policy; or

(iii) is not void and/or is enforceable as against the appellants;

then upon the appellants pleading defences under the 1974 Act in this proceeding:

(iv) the respondents had a claim against the appellants for damages for breach of that clause as a warranty, but they did not choose to make that claim;

(v) the respondents elected an alternative remedy inconsistent with that claim;

(vi) the respondents failed unreasonably to make any such claim for damages, such that they are now estopped from making such a claim in the future.

10 **(a) Construction of clause 24**

14. The CA construed clause 24, but particularly the word "*defeat*",[43] so that it applies to ss 10(1)(a), 13 and 26(1) of the 1974 Act.[44] Despite submissions being made in relation to the *contra proferentum* rule,[45] the CA did not address this point. For the reasons that follow, the CA was wrong in both respects.

***"Strong words" and the conventional approach to contractual construction***

15. The respondents bear the onus of establishing the construction of clause 24 for which they contend. The plain meaning of the words in clause 24 does not support the conclusion that the appellants are thereby obliged to not plead the statutory bar.

16. If a contract does purport to contract out of a statute, then strong words are necessary to
20 indicate an intention to give up the rights conferred by the statute.[46] There is nothing in the language of clause 24 that discloses that intention, let alone "*strong words*" to that effect. The 1974 Act is not mentioned by name or class. In the absence of express exclusion or waiver, it is doubtful that any such intention of the parties should be implied.[47] There is a lack of particularity in what clause 24 purports to do; it may be too vague to be understood, so as to be of no effect.[48]

17. In particular, to the extent that the respondents' case is that clause 24 obliges the appellants to not plead the statutory bar, it is apparent that the language of the clause is not promissory at all. It is questionable whether a clause that merely states a statement

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[42] Grounds 5 and 6 of the Notice of Appeal; CAB at 74-76.
[43] CA at [59]-[65]; CAB at 52-53.
[44] CA at [66]; CAB at 53.
[45] CA at [52], [56]; CAB at 51.
[46] *Equitable Life Assurance of the United States v Bogie* (1905) 3 CLR 878 at 911 per O'Connor J.
[47] *Admiralty Commissioners v Valverda (Owners)* [1938] AC 173 at 186 per Lord Wright (Lord Atkin, Lord Russell, Lord Maugham and Lord Roche concurring).
[48] *In re Clarke; Coombe v Carter* (1887) 36 Ch D 348 at 355 per Bowen LJ.

of fact, and not a "*performative utterance*", can be construed as promissory.[49] Clause 24 merely recites a state of affairs that does not, on its face, oblige any party to do (or not do) anything. It does not oblige the appellants to not plead the 1974 Act.

18. In any event, clause 24 itself contains words of limitation; that is, "*insofar as this can lawfully be done*". Whatever impact the respondents contend clause 24 has upon the right of the appellants to plead the statutory bar, the clause does not purport to restrict that right any more than the law allows.

***Consequences of the* contra proferentum *rule in construing clause 24***

19. If there is ambiguity in clause 24, then as a rule of construction (albeit one of last resort),[50] the *contra proferentum* rule applies to compel a construction against the interests of the party that inserted the clause.[51] The plain meaning of the words do not compel a construction that the appellants have given up their right to plead the statutory bar. If the language is ambiguous, then that ambiguity tells against the respondents.

**(b) Public policy of 1974 Act and its impact on clause 24**

20. The CA acknowledged that there was no binding authority on whether the 1974 Act can be contracted out of,[52] but it was guided by considered observations in *Verwayen v Commonwealth*,[53] to conclude that it was compatible with the public policy of that Act for its terms to be contracted out of.[54] *Verwayen* has no precedential value in this respect.[55] For the reasons that follow, the CA was wrong in its conclusion.

***Contracting out of the benefit of a statute: generally***

21. "Contracting out" may take many forms,[56] but any "*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*

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[49] *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at [392]-[304] per Campbell JA (in the context of a recital).
[50] *Lindus v Melrose* (1858) 3 H&N 177 at 182; 157 ER 434 at 436 per Coleridge J for the Court.
[51] *Fowkes v Manchester and London Life Assurance and Loan Association* (1863) 3 B&S 917 at 929-930; 122 ER 343 at 348 per Blackburn J; *Western Australian Bank v Royal Insurance Co* (1908) 5 CLR 533 at 559 per Barton J; *Maye v Colonial Mutual Life Assurance Society Ltd* (1924) 35 CLR 14 at 26-27 per Isaacs ACJ.
[52] CA at [34]; CAB at 47.
[53] (1990) 170 CLR 394.
[54] CA at [38]-[40]; CAB at 49.
[55] Cf *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 188 per Barwick CJ.
[56] *Caltex Oil (Australia) Pty Ltd v Best* (1990) 170 CLR 516 at 522 per Mason CJ, Gaudron and McHugh JJ.

*the benefit of an individual alone.*"[57] The refusal to enforce such contracts "*is a striking illustration of the subordination of private right to public interest*".[58]

22. The maxim, *quilibet potest renunciare juri pro se introducto*, as translated by Broom means, "*Anyone may at his pleasure, renounce the benefit of a stipulation or other right introduced entirely in his own favour*".[59] This Court itself has drawn attention to the necessity that the benefit to be foregone must be one exclusively to that party's benefit.[60] In the words of Lord Hailsham: "*If there is a public as well as a private interest a contrary Latin maxim applies*."[61]

23. It is significant that *Great Eastern Railway Co v Goldsmid*,[62] a case often cited in this regard, itself involved a royal charter in the nature of a private Act of Parliament;[63] albeit less common today,[64] this was for the exclusive benefit of a named person. The principle is not limited to such laws, but it developed in that context, where it was readily applicable. An attentive reading of the maxim reflects the shifts in the attitude of the common law to freedom of contract. It should be kept within its precise limits.

24. It is the policy and presumption of the common law that there should be freedom of contract, and that contracts freely entered into should be enforceable.[65] In 1875, Jessel MR had championed "freedom of contract" as the paramount policy of the law,[66] but as Lord Simon explained, even before 1875, "*the law began to back-pedal*",[67] such that "*it was apparently no longer accepted by the law that freedom and sanctity of contract were conclusive of the public interest.*"[68] In support of that back-pedalling, Lord

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[57] *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 247 CLR 129 at [46] per French CJ, Crennan, Kiefel and Bell JJ.
[58] *A v Hayden* (1984) 156 CLR 532 at 559 per Mason J.
[59] *National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd* [1972] AC 785 at 808.
[60] *Equitable Life Assurance of United States v Bogie* (1905) 3 CLR 878 at 892-893 per Griffith CJ, at 897, 902-903 per Barton J, and at 905-906 per O'Connor J.
[61] *Johnson v Moreton* [1980] AC 37 at 58.
[62] (1884) 9 App Cas 927.
[63] Earl of Selborne LC described the instrument as "*at the most in the nature of what at this day we call a private or personal Act, a parliamentary assurance*": (1884) 9 App Cas 927 at 936. Bowen LJ explained the distinction them and public Acts of Parliament in *R v London County Council* [1893] 2 QB 454 at 462.
[64] *Acts Interpretation Act* 1954 (Q), s 11. Sections 12 and 12A of that Act contemplate that private Acts might still be enacted by Parliament, but it is seldom done.
[65] *Johnson v Moreton* [1980] AC 37 at 57-58 per Lord Hailsham.
[66] *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465.
[67] [1980] AC 37 at 66.
[68] [1980] AC 37 at 66.

Simon cited the statement by Alderson B in *Graham v Ingleby*,[69] that "*an individual cannot waive a matter in which the public have an interest.*"[70]

25. This principle is established firmly in English jurisprudence,[71] and in judgments of this Court.[72] The critical question, therefore, is whether the public has an interest in the imposition, by and under the 1974 Act, of periods of limitation within which an action may be brought. If, on the proper consideration of the 1974 Act, any such benefit or interest of the public is revealed, then the 1974 Act cannot be contracted out of.

26. The proper approach to determining whether or not the 1974 Act prohibits contracting out is exemplified by the decision in *Salford Union Guardians v Dewhurst*.[73] Astbury J concluded that the *Poor Law Officers' Superannuation Act* 1896, which created a compulsory scheme for superannuation pensions, but that did not prohibit contracting out expressly, could be contracted out of.[74] The Court of Appeal reversed.[75]

27. Before the House of Lords,[76] which affirmed the Court of Appeal's decision,[77] the following propositions emerged as key to the relevant inquiry:

    (a) Although not conclusive as to the question, it is important to consider the purpose and scheme of the Act.[78]

    (b) It is necessary to read and consider the Act as a whole.[79]

    (c) It is necessary to consider the effect of the language of the Act, including any "*imperative words, words of command*".[80]

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[69] (1848) 1 Ex 651.
[70] (1848) 1 Ex 651 at 657.
[71] *Hunt v Hunt* (1862) 31 LJ Ch 161 at 175 per Lord Westbury; *Anctil v Manufacturers' Life Insurance Co* [1899] AC 604 at 609 per Lord Watson; *Equitable Life Assurance Society of United States v Reed* [1914] AC 587 at 595 per Lord Dunedin; *Johnson v Moreton* [1980] AC 37 at 58 per Lord Hailsham.
[72] *Equitable Life Assurance of United States v Bogie* (1905) 3 CLR 878 at 892-893 per Griffith CJ, at 897, 902-903 per Barton J, and at 905-906 per O'Connor J; *Wirth v Wirth* (1918) 25 CLR 402 at 408 per Rich J for the Court; *Davies v Davies* (1919) 26 CLR 348 at 355 per Isaacs J, at 362 per Higgins J, and at 364-365 per Gavan Duffy J.
[73] [1926] AC 619.
[74] *Dewhurst v Salford Guardians* [1925] Ch 139 at 147-148.
[75] *Dewhurst v Salford Guardians* [1925] Ch 655.
[76] *Guardians of the Poor of Salford Union v Dewhurst* [1926] AC 619. See also *Soho Square Syndicate Ltd v E Pollard & Co* [1940] Ch 645-646 per Farwell J; *Bowmaker Ltd v Tabor* [1941] 2 KB 1 at 7 per Goddard LJ (Scott and MacKinnon LLJ concurring).
[77] Lord Sumner, at [1926] AC 619 at 629-634, dissented.
[78] [1926] AC 619 at 624 per Viscount Cave LC (Lord Shaw, Lord Parmoor and Lord Blanesburgh concurring), and at 636 per Lord Parmoor. See also *Admiralty Commissioners v Valverda (Owners)* [1938] AC 173 at 185 per Lord Wright (Lord Atkin, Lord Russell, Lord Maugham and Lord Roche concurring).
[79] [1926] AC 619 at 627 per Lord Shaw.
[80] [1926] AC 619 at 624 per Viscount Cave LC (Lord Shaw, Lord Parmoor and Lord Blanesburgh concurring), and at 634 per Lord Parmoor.

(d) The answer, arrived at by that process,[81] may be tested by asking whether it was the intention of Parliament that the application of the statute can be excluded.[82]

28. The House of Lords, in *Admiralty Commissioners v Valverda (Owners)*,[83] ruled invalid a contract that purported to contract out of s 557(1) of the *Merchant Shipping Act* 1894, which excluded any claim any expense sustained by His Majesty by reason of the provision of salvage services. The Admiralty sought to recover remuneration, under a standard form contract, which it contended had overridden the exclusion in the Act. Lord Wright stated, "*Such a conclusion would ... afford a simple and easy way of evading or nullifying s 557 and make it a wonder why the Act of 1916 was necessary.*"[84] Griffiths CJ made the same point about the statute at issue in *Bogie*.[85]

29. In *Lieberman v Morris*,[86] this Court applied both *Dewhurst* and *Valverda* to determine that it was contrary to the public policy of the *Family Maintenance and Guardianship of Infants Act* 1916 (NSW) to contract out of its terms. Such an approach also accords with the statements of this Court in the context of "illegality" of contracts.[87] This approach, therefore, should be applied by this Court in determining whether or not the public policy of the 1974 Act precludes the contracting out of its terms.

30. For the reasons that follow, applying the foregoing approach, this Court should conclude that the 1974 Act does not permit the contracting out of its provisions.

***The legislative history of the 1974 Act***

31. The progenitor of the limitations statutes in the traditional form is the 1623 *Statute of Limitations* (21 Jac 1 c 16) (**the Jacobean Statute**).[88] The 1974 Act repealed a variety of legislation,[89] but most notably the *Law Reform (Limitation of Actions) Act* 1956 (Q), the *Limitation Act* 1960 (Q) (**1960 Act**), and the *Limitation (Persons under*

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[81] [1926] AC 619 at 626 per Viscount Cave LC (Lord Shaw, Lord Parmoor and Lord Blanesburgh concurring).
[82] [1926] AC 619 at 625 per Viscount Cave LC (Lord Shaw, Lord Parmoor and Lord Blanesburgh concurring).
[83] [1938] AC 171.
[84] [1938] AC 171 at 184 (Lord Atkin and Lord Russell concurring). The *Merchant Shipping (Salvage) Act* 1916 made specific provision for when salvage claims could be made by the Admiralty.
[85] *Equitable Life Assurance of United States v Bogie* (1905) 3 CLR 878 at 892-893.
[86] (1944) 69 CLR 69.
[87] *Fitzgerald v FJ 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 [71] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; *Miller v Miller* (2011) 242 CLR 446 at [25] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at [23] per French CJ, Crennan and Kiefel JJ.
[88] There were earlier statutes in relation to real actions: *Statute of Merton* 1237 (20 Hen III c 8), *Statute of Westminster* 1275 (3 Edw I c 39), and *Act of Limitation* 1540 (32 Hen VIII c 2).
[89] *Limitation of Actions Act* 1974 (Q), s 4, Sch.

*Disabilities) Act* 1962 (Q). The 1960 Act modernised the limitation provisions that were prescribed by the *Statute of Frauds and Limitations Act* 1867 (Q).[90]

***The purpose and scheme of the 1974 Act***

32. The public policy manifested in the 1974 Act has its origins in the Jacobean Statute. The 1974 Act is merely the latest iteration of that statute, and its objects and purposes are directed to the similar mischiefs that it sought to combat. The fundamental public policy manifested in legislation dealing with the limitation of actions remains constant.

33. At common law, there is no limitation upon the time within which an action has to be commenced.[91] Where a legislature has passed laws imposing a period limiting the time within which to bring an action, these are laws of procedure and, as such, *lex fori*.[92] Justice Story, in *Le Roy v Crowninshield*,[93] explained that, viewed in that way in the conflict of laws discourse, such statutes are inherently manifestations of public policy because they "*are regulated by [a state's] own views of justice and propriety, and fashioned by its own wants and customs.*"[94]

34. In *Cholmondeley v Clinton*,[95] Plumer MR articulated the "*wisest policy*" of statutes of limitation thus: "*The public have a great interest, in having a known limit fixed by law to litigation, for the quiet of the community.*"[96] It was said of the Jacobean Statute that "*the security of all men*" depended upon it.[97] Limitation statutes are "*an act of peace*".[98] That the public interest does and ought prevail (even in occasional, specific cases of injustice)[99] itself supports the idea that Parliament has preferred the benefit to the public over an individual plaintiff. Otherwise, like Damocles, a putative defendant is prejudiced by "*having an action hanging over his head indefinitely*".[100]

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[90] *Amos v Brisbane City Council* (2018) 230 LGERA 51 at [41] per Fraser JA.
[91] *Blackmore v Tidderley* (1790) 2 Ld Raym 1100 at 1100; 92 ER 228 at 228 per Holt CJ; *Williams v Jones* (1811) 13 East 439 at 449; 104 ER 441 at 445 per Lord Ellenborough CJ.
[92] *Lopez v Burslem* (1843) 4 Moo PC 300 at 305; 13 ER 318 at 320 per Lord Campbell.
[93] 2 Mason 151.
[94] 2 Mason 151 at 3.
[95] (1820) 2 Jac & W 1; 37 ER 527.
[96] (1820) 2 Jac & W 1 at 140; 37 ER 527 at 577. Lewison LJ elaborated upon the modern societal benefits of limitation periods in *RE v GE* [2015] EWCA Civ 287 at [75].
[97] *Green v Rivett* (1795) 2 Salk 422; 91 ER 367.
[98] *A'Court v Cross* (1825) 3 Bing 329 at 332 per Best CJ. Or, sometimes, "*statutes of repose*": *Doe v Jones* (1791) 4 TR 301 at 308; 100 ER 1031 at 1035 per Lord Kenyon CJ.
[99] *Hawkins v Clayton* (1988) 164 CLR 539 at 589-590 per Deane J.
[100] *Biss v Lambeth, Southwark & Lewisham Health Authority* [1978] 2 All ER 125 at 131 per Lord Denning MR.

35. In *Brisbane South Regional Health Authority v Taylor*,[101] McHugh J traced the historical throughline from the Jacobean Statute to the 1974 Act,[102] and highlighted four influences that motivated the legislatures to impose limitation periods, including that "*the public interest requires that disputes be settled as quickly as possible*".[103] Limitation periods, which are by their terms imperative and mandatory,[104] endeavour to compel plaintiffs to bring their claims as soon as they have arisen, insofar as time begins to run once the action ripens, and a plaintiff who sits on its rights risks them being taken away by some intervening event.[105] "*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.*"[106]

36. In considering the scheme created by the 1974 Act, the legislature has clearly turned its mind to the circumstances in which the limitation period might be extended or lifted. Those provisions are located in Part 3 of the 1974 Act. The extension provisions are "*a legislative recognition that general conceptions of what justice requires in particular categories of cases may sometimes be overridden by the facts of an individual case*".[107] The legislature has itself determined the circumstances in which the statutory bar ought not to rise, and it has not included among them that the parties have contracted out of the statute. If the legislature had so intended, then it could have done so by express words, as legislatures in other jurisdictions have done in similar statutes.[108]

37. "*Legislation rarely pursues a single purpose at all costs.*"[109] The 1974 Act balances the competing interests of plaintiffs and defendants.[110] The basic object of the 1974 Act is that putative defendants should not be vexed by claims of the kind described by its terms. That basic object, however, is not pursued absolutely by the Act. The raising of the statutory bar operates necessarily to the benefit of defendants, but the 1974 Act also makes provision in the extension provisions that, in particular cases set out in the

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[101] (1996) 186 CLR 541.
[102] (1996) 186 CLR 541 at 551-552.
[103] (1996) 186 CLR 541 at 553.
[104] Sections 10(1), 13, 24(1) and 26(1) of the 1974 Act use the word "*shall*".
[105] *Cox v Morgan* (1801) 2 B&P 398 at 412; 126 ER 1349 at 1357 per Heath J; *Re Benzon; Bower v Chetwynd* [1914] 2 Ch 68 at 76 per Channell J (Cozens-Hardy MR and Buckley LJ concurring); *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 at 782 per Lord Pearce.
[106] (1996) 186 CLR 541 at 553 per McHugh J.
[107] (1996) 186 CLR 541 at 553 per McHugh J.
[108] Such foreign developments were discussed in CA at [41].
[109] *Carr v Western Australia* (2007) 232 CLR 138 at [5] per Gleeson CJ. This Court approved Gleeson CJ's statement in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [51] per Hayne, Heydon, Crennan and Kiefel JJ.
[110] *Brunton v D O'Bryan & Co Pty Ltd* (unreported, NSWCA, 4 August 1988) at 1 per Kirby P.

Act, the interests of a plaintiff might override the interests of a defendant.[111] Even then, however, a plaintiff is ordinarily subject to the discretion of the Court under Part 3 of the Act.[112] In exercising that discretion, the defendant's interests are not irrelevant; in an appropriate case, the Court may prefer that the plaintiff should pursue a remedy against its solicitors instead (if one is available).[113]

38. Lord Millett has stated that limitation acts are beneficial enactments and, as such, are to be construed liberally.[114] Given the foregoing exposition, it might be asked rhetorically to whose benefit such statutes are directed,[115] but it is evident that such statutes should be construed in favour of the defendant.[116] Despite this, the better approach is that, by the 1974 Act, Parliament has struck a balance between the competing interests of plaintiffs and defendants, and the very purpose of that Act was to strike that balance. It is not a balance that can be disturbed by the courts outside of the express terms of the statute.[117] Similarly, it is not a balance that can be disturbed by the parties themselves.

39. For the foregoing reasons, the public policy of the 1974 Act is, therefore, against contracting out. This position results from a consideration of the policy manifested in the Act as at the date of its enactment.[118] If the Act did not allow contracting out in 1974 (and, it is submitted, it did not), then it does not allow contracting out now.

40. If the Court concludes, to the contrary, the 1974 Act manifests a public policy in favour of contracting out,[119] then clause 24 may nonetheless be contrary to the public policy of

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[111] In any event, in seeking to bring a claim outside a limitation period, a plaintiff may "*in a very clear case*" be struck out as frivolous, vexatious or an abuse of process: *Ronex Properties Ltd v John Laing Construction Ltd* [1983] QB 398 at 404-405 per Donaldson LJ.

[112] Sections 31, 32 and 32A of the 1974 Act; cf ss 29, 38 thereof. The QLRC preferred a discretion, in contrast to the UK position in the 1939 Act, so that "*actions of a speculative or fraudulent nature may well be discouraged or excluded*": Queensland Law Reform Commission, *Report 14: Bill to amend and consolidate the law relating to limitation of actions* (1972) at 8.

[113] *Donovan v Gwentoys Ltd* [1990] 1 WLR 472 at 479 per Lord Griffiths (Lord Oliver and Lord Lowry concurring). Similarly, a defendant who overlooks a limitation defence available to it may have a remedy against its solicitors: *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 291 per Lord Griffiths.

[114] *Cave v Robinson Jarvis & Rolf* [2003] 1 AC 384 at 390.

[115] Scrutton LJ raised this point in *Harnett v Fisher* [1927] 1 KB 402 at 422.

[116] Dr Phillimore and Mr Coleridge are reported as making the point during argument that constructions of statutes of limitation "*have always been in favour of the limitation*": *Ditcher v Denison* (1857) 11 Moo PC 324 at 333; 14 ER 718 at 722.

[117] That is, s 9 of the 1974 Act makes the application of Pt 2 subject to Pt 3, which provides for the extension of periods of limitation. Section 31(2), for example, confers a discretion to order that the period be extended.

[118] *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432 at 457 per Windeyer J.

[119] Although, in the absence of an express prohibition in a statute, it will be the public policy of the common law that the court will regard a contract contrary to that public policy as unenforceable (*Fitzgerald v FJ 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 [71] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; *Miller v Miller* (2011) 242 CLR 446 at [25] per French CJ, Gummow, Hayne,

the common law for the purposes of testing the validity of a contract which, as Isaacs J has explained, must derive from "*some definite and governing principle which the community as a whole has already adopted either formally by law or tacitly by the general course of corporate life*".[120] Unlike the 1974 Act itself, the public policy by which the common law might render a contract invalid is "*a variable thing*".[121] Even if the 1974 Act does not manifest the stated policy, the community has tacitly adopted it.

41. The litigation environment within which the 1974 Act operates has, informed by legislative developments, changed markedly since 1974. The extent to which litigants and their representatives can control how court resources are to be used has diminished markedly.[122] The notion that the parties to a dispute might pry open the doors of the courts, perhaps for some indeterminant period of time (as, it appears, is suggested in this case), when the legislature has declared that they shall be shut, is contrary to modern ideas about litigation.[123] For those reasons, the common law should, irrespective of the position manifested by the 1974 Act, render clause 24 invalid.

***"Waiver" of the right to plead the 1974 Act is limited to articulated cases***

42. Although the 1974 Act permits "waiver", it prohibits "contracting out". This Court has recognised these concepts as distinct.[124] There is nothing inconsistent in that position. The scheme of the 1974 Act, especially in relation to the extension provisions, demonstrates that the public policy that justified the imposition of the general rule by way of the limitation period might be displaced by fact-specific considerations apparent in the circumstances of a particular case. In this way, the public policy of the 1974 Act accommodates the availability of waiver when confronted by an articulated case, but it precludes the contracting out of its provisions.

43. In *WorkCover Queensland v Amaca Pty Ltd*,[125] this Court adopted unanimously the following statement by Gummow and Kirby JJ in *Commonwealth v Mewett*,[126] which itself is premised upon the reasons of Toohey J in *Verwayen*[127]:

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Crennan, Kiefel and Bell JJ), the appellants rely upon both the public policy as manifested in the 1974 Act, as well as the public policy of the common law itself separate and apart from the 1974 Act.

[120] *Wilkinson v Osborne* (1915) 21 CLR 89 at 97.

[121] *Naylor, Benzon & Co v Krainische Industrie Gesellschaft* [1918] 1 KB 331 at 342 per McCardie J. See also *In re Morris (deceased)* (1943) 43 SR (NSW) 352 at 355-356 per Jordan CJ (affirmed by this Court in *Lieberman v Morris* (1944) 69 CLR 69); *Stevens v Keogh* (1946) 72 CLR 1 at 28 per Dixon J.

[122] *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [95] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

[123] *UBS AG v Tyne* (2018) 265 CLR 77 at [38] per Kiefel CJ, Bell and Keane JJ.

[124] *Verwayen v Commonwealth* (1990) 170 CLR 394 at 406 per Mason CJ, and at 421 per Brennan J.

[125] (2010) 241 CLR 420 at [30] per French CJ, Gummow, Crennan, Kiefel and Bell JJ.

"*[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 the 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.*"

44. Curiously, this Court in *Amaca* did not endorse the final sentence of their Honours' statement of principle: "*Secondly, in the circumstances the defendant may be estopped from pleading the statutory bar or otherwise be deemed to have waived the right to do so.*"[128] In any event, it may be accepted for present purposes that those propositions are not controversial because this case concerns contracting out.

45. As Keane J observed recently, relying also on Toohey J's reasons in *Verwayen*,[129] this point has "*long been settled by judicial decision*".[130] That the statute might be waived has been accepted from at least 1770.[131] This, with respect, is not a reason to push that jurisprudence beyond its existing parameters; the long-settled availability of waiver may be preserved, but without expanding the judicial gloss so as to permit contracting out. The appellants maintain that these doctrines are separate and distinct.

46. In *Agricultural and Rural Finance Pty Ltd v Gardiner*,[132] this Court noted that the word "waiver" is "*applied in a variety of senses*",[133] and it is beset by "*uncertainties and difficulties*".[134] The doctrinal precision that this Court endeavoured to fashion in *Gardiner* is not apparent in the cases in this area. It is, therefore, necessary to "*identify the principles that are said to be engaged in the particular case*".[135] and it is prudent to clarify the sense in which the appellants use the word "waiver".

47. Toohey J, in the passage from *Verwayen* that has been endorsed by this Court in *Amaca*, described "*waiver as it exists in the adjudicative process*" as follows: "*Waiver*

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[126] (1997) 191 CLR 471 at 534-535.
[127] (1990) 170 CLR 394 at 473-474.
[128] (1997) 191 CLR 471 at 535.
[129] *Brisbane City Council v Amos* (2019) 93 ALJR 977 at fn 121. His Honour also cites Mason CJ at 405.
[130] *Brisbane City Council v Amos* (2019) 93 ALJR 977 at [49].
[131] *Quantock v England* (1770) 5 Burr 2628 at 2630; 98 ER 382 at 383 per Lord Mansfield.
[132] (2008) 238 CLR 570.
[133] (2008) 238 CLR 570 at [50] per Gummow, Hayne and Kiefel JJ.
[134] (2008) 238 CLR 570 at [53] per Gummow, Hayne and Kiefel JJ.
[135] (2008) 238 CLR 570 at [54] per Gummow, Hayne and Kiefel JJ.

*… may be found in the deliberate act of a defendant not to rely upon a defence available to him.*"[136]

48. In *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd*,[137] which involved the question of waiver of legal professional privilege in the context of litigation (and, to that extent, might be said to be "in the adjudicative process") this Court held unanimously described "waiver" in these terms:

> "*According to its strict legal connotation, waiver is an intentional act done with knowledge whereby a person abandons a right (or privilege) by acting in a manner inconsistent with that right (or privilege). It may be express or implied.*"[138]

10 49. The critical element that is present in the doctrine of waiver, that is not present in the doctrine of contracting out, is the mental element of "knowledge". A defendant may waive the right to plead the 1974 Act (that is, by not pleading it in defence to an action to which it might otherwise be available) because she has knowledge of the facts and circumstances being alleged against her in a claim articulated by the plaintiff.

50. In contrast, in the context of contracting out, the putative defendant is not possessed of any such knowledge at the time the contract is entered into. In those circumstances, the putative defendant is not confronted with the forensic choice of pleading the defence or running the case on its merits in the context of the plaintiff's articulated claim. The defendant's entry into the contract that purports to preclude her later reliance on the

20 statutory bar is not, and cannot be, "*an intentional act done with knowledge*".

51. To the extent that there are cases in which a defendant has been held to have waived the right to plead the statutory bar by reference to an agreement or contract, those cases should not be understood as examples of the court approving of the practice of contracting out of the relevant statute of limitations. To the contrary, those cases are merely examples of the doctrine of waiver, insofar as each arrangement was entered into by the defendant after being confronted by an articulated claim by the plaintiff.

***The decision in* <u>Paul</u> *and its subsequent consideration***

52. <u>The Privy Council decision in *Paul*:</u> In *East India Co v Oditchurn Paul*,[139] Lord Campbell, delivering the Board's judgment (and, in so doing, rejecting the arguments

30 advanced by the respective counsel), stated:

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[136] (1990) 170 CLR 394 at 472-473.
[137] (2013) 250 CLR 303.
[138] (2013) 250 CLR 303 at [30] per French CJ, Kiefel, Bell, Gageler and Keane JJ.

"*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 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 more than six years before the commencement of the suit—the Defendant, notwithstanding any agreement to inquire, is entitled to the verdict.*"[140]

53. Further, Sir Barnes Peacock, sitting as Chief Justice of the High Court of Calcutta, in relation to a limitation period imposed by the *Code of Civil Procedure*, stated: "*The Legislature must have had some object in limiting the period … and that object cannot be frustrated by any private agreement.*"[141] Any such agreement to postpone bringing an action, which Parke B described as "*an ingenious attempt to get rid of the Statute of Limitations*",[142] might at best be an executory accord,[143] but the limitation period would still run against the original action. As *Paul* makes clear, if an action lies for a breach of that accord then that may be brought by the plaintiff, but the accord itself will not prevent the pleading, and the operation, of the statute of limitations.

54. The reasoning in *Paul* is, with respect, sound and compelling. This Court should adopt the advice of the Privy Council in *Paul* as the law for Australia. There is nothing, in the proper performance of this Court's duty in declaring the law for Australia,[144] which would compel it to depart from the approach set out by Lord Campbell in *Paul*.

55. The Australian cases: There has been little consideration of *Paul* in Australia, but that scant consideration has been supportive. In *Executor, Trustee & Agency Co of South Australia Ltd v Thompson*,[145] Isaacs J quoted the above passage from *Paul* without criticism.[146] The other judges did not refer to *Paul*. In *Haller v Ayre*,[147] Keane JA (as his Honour then was) applied the approach of Isaacs J in *Thompson* and stated, "*It is*

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[139] (1849) 7 Moo PC 85; 13 ER 811. The judgment is also reported in Moore's Indian Appeals at (1849) 5 Moo Ind App 43; 18 ER 810.
[140] (1849) 7 Moo PC 85 at 112; 13 ER 811 at 821-822.
[141] *Krishna Kamal Sing v Hiru Sirdar* (1870) 4 BLR FB 101 at 106 (Bayley, Kemp and Glover JJ concurring). Cf at 111-112 per Mitter J (dissenting).
[142] *Reeves v Hearne* (1836) 1 M&W 323 at 327; 150 ER 457 at 459.
[143] *McDermott v Black* (1940) 63 CLR 161 at 184 per Dixon J.
[144] *Barns v Barns* (2003) 214 CLR 169 at [98]-[101] per Gummow and Hayne JJ.
[145] (1919) 27 CLR 162.
[146] (1919) 27 CLR 162 at 168.
[147] [2005] QCA 224.

*apparent that the law does not readily conclude that a party is to be taken to have bargained away a good defence under the statute.*"[148]

56. The English cases: In *Wright v John Bangall & Sons Ltd*,[149] the limitation period at issue was created by s 2(1) of the *Workmen's Compensation Act* 1897, which required that a claim for compensation had to be made within six months after the relevant accident. The Court of Appeal found that, liability having been admitted with the amount of compensation remaining in dispute, there was an agreement that precluded the respondents from raising the statutory bar.[150]

57. Further, as a second reason for the conclusion reached,[151] Collins LJ stated, "*having allowed the six months to expire while the negotiations were still proceeding, they cannot then turn around and say that the time for claiming compensation has gone by.*"[152] Although the reasons do not mention estoppel expressly, the arguments of counsel make clear that this was the ground upon which the decision turned.

58. In *Lubovsky v Snelling*,[153] the Court of Appeal considered s 3 of the *Fatal Accidents Act* 1846, which required that an action be commenced within twelve months of the death. In that case, just as in *Wright*, there was an admission of liability with quantum remaining in dispute. Given that the Court of Appeal is bound by its own prior decisions,[154] the Court considered itself bound by *Wright*.[155]

59. In *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd*,[156] the House of Lords considered the effect of s 29(3) of the *Landlord and Tenant Act* 1954 that provided that no application to the court for a grant of a new tenancy "*shall not be entertained*" unless it was made "*not less than two nor more than four months*" after giving notice or making a request for a new tenancy from the landlord. The landlord filed an answer to the tenant's application, without objecting that it was made

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[148] [2005] QCA 224 at [49] (de Jersey CJ and Mullins J concurring).
[149] [1900] 2 QB 240.
[150] [1900] 2 QB 240 at 244 per Collins LJ (Vaughan Williams and Romer LJJ concurring).
[151] It is apparent that this estoppel ground did not form part of the ratio: *Lubovsky v Snelling* [1944] kB 44 at 47-48 per Goddard LJ citing *Rendall v Hill's Dry Docks* [1900] 2 QB 245.
[152] [1900] 2 QB 240 at 244 (Vaughan Williams and Romer LJJ concurring).
[153] [1944] KB 44.
[154] *Young v Bristol Aeroplane Co Ltd* [1946] AC 163 at 169 per Viscount Simon.
[155] [1944] KB 44 at 47 per Scott LJ (Mackinnon LJ concurring), and at 47 per Goddard LJ.
[156] [1971] AC 850.

prematurely, but later sought to object to the competence of the application. Their Lordships concluded that the landlord had waived its right to object.[157]

60. *Wright*, *Lubovsky* and *Kammins* have no application in cases like the present. The time period in each case was annexed to the right created by the statute and, on that basis, the cases are distinguishable immediately. In such cases, the temporal limitation "*imposes a condition which is of the essence of a new right*", such that the plaintiff bears the onus of establishing that it has complied with that condition.[158] The more liberal approach in the English cases is in stark contrast to the position that prevails in this country with respect to limitation periods annexed to statutory rights: "*No Court has any right or power to act in opposition to the express words of the statute.*"[159]

61. In *The Sauria and The Trent*,[160] Lord Evershed MR concluded as a matter of fact that no enforceable promise to waive the right to plead the statute was made.[161] His Lordship also distinguished the case from *Lubovsky* on the facts,[162] and opined whether, in point of principle, a party can contract out of a statute of limitations by binding itself not to plead the statutory bar "*however long after the cause of action [the plaintiff] may elect to start [its] proceedings*".[163] This Court should not follow *Wright*, *Lubovsky* or *Kammins*.

62. <u>The anomaly of *Lade v Trill*</u>: The UK Law Commission cites one case, *Lade v Trill*,[164] as authorising contracting out of the traditional form limitations statute.[165] The Western Australian Law Reform Commission cites it also.[166] Despite these references, counsels' research suggests that the judgment has never been later considered. It is, with respect, a very brief decision of a single judge, bereft of any jurisprudential analysis, and an historical anomaly that should not be embraced by this Court.

63. <u>Resolving the competing positions:</u> Either by words or conduct, the courts have found that agreements or arrangements have come into existence that, by reference to various legal theories, have precluded defendants from pleading a statutory bar. Properly

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[157] [1971] AC 850 at 860 per Lord Reid, at 862 per Lord Morris, at 877 per Lord Pearson, and at 882 per Lord Diplock.
[158] *Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471 at 488 per Windeyer J.
[159] *The Crown v McNeil* (1922) 31 CLR 76 at 96 per Knox CJ and Starke J, and at 100-101 per Isaacs J.
[160] [1957] 1 Lloyd's Rep 396.
[161] [1957] 1 Lloyd's Rep 396 at 401 (Morris LJ concurring).
[162] [1957] 1 Lloyd's Rep 396 at 400-401.
[163] [1957] 1 Lloyd's Rep 396 at 400.
[164] (1842) 11 LJ Ch 102.
[165] UK Law Commission, *Limitation of Actions* (2001) at [2.96].
[166] WA Law Reform Commission, *Final Report on Limitation and Notice of Actions* (1997) at [18.1].

understood, those decisions are reconcilable as instances of estoppel or waiver, and not instances of contracting out. In every case, the particular claim to be made against the (putative) defendant had been articulated by the (putative) plaintiff, such that the agreement or arrangement attributed to the defendant was made in the knowledge of the circumstances of the particular claim to be advanced by the (putative) plaintiff.

64. If there is an agreement or arrangement (or, even, a contract) not to plead the limitation period that does not amount to estoppel or waiver (because, for example, the necessary element of intention or knowledge is absent), then the defendant remains at liberty to plead the statutory bar. In exercising that liberty, the defendant might put herself in breach of the contract (and, as such, expose herself to liability for that breach), but absent an action on the contract (which could only sound in damages), there is no basis upon which the law would intervene to prohibit the defendant so pleading.

**(c) Consequences of clause 24 being contrary to public policy**

65. The CA concluded that the provisions of the 1974 Act neither barred the respondents' remedies,[167] nor extinguished their title,[168] because clause 24 excluded their operation. If this Court concludes that clause 24 is contrary to public policy, then the consequences that follow are set out at [13](d) above.

66. As to the first proposition, if clause 24 is contrary to public policy, then ss 10(1)(a), 13 and 26(1) of the 1974 Act has barred the respondents' remedies because 12 years has expired from the date on which their rights of action accrued. Section 24(1) of that Act further provides that, therefore, their title to the relevant land is extinguished.

67. As to the second and third propositions, this Court in *Westfield Management* stated that "*[the] courts will treat such arrangements as ineffective or void*".[169] That is, having regard to the policy of the 1974 Act, clause 24 has no lawful effect.[170] It follows that, in those circumstances, the appellants remain at liberty to plead the statutory bar in answer to the respondents' actions.

**(d) Consequences of clause 24 being breached by pleading of limitation defences**

68. By s 32 of the *Judiciary Act* 1903, "*Parliament has done what it can to make this court a tribunal of justice, not one of formalism.*"[171] In determining what relief to grant, this

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[167] CA at [66]; CAB at 53.
[168] CA at [76]; CAB at 54.
[169] (2012) 247 CLR 129 at [46] per French CJ, Crennan, Kiefel and Bell JJ.
[170] See, however, *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at [124]-[125] per Gummow and Bell JJ.
[171] *New South Wales v Commonwealth* (1926) 38 CLR 74 at 86 per Isaacs J.

Court must seek to avoid any further legal proceedings, and to completely and finally determine the matters in dispute. This Court should bar any future damages claim.

69. Although the respondents alleged clause 24 had been breached,[172] they did not seek damages for that breach. Although they submit it "*is an alternative avenue that is open*",[173] they clearly chose not to pursue it and have, therefore, made an election.[174]

70. Further, the respondents are estopped because they failed unreasonably to make that claim in this proceeding.[175] The respondents "*thought [they] had got enough*"[176] in conducting their case in the way in which they did. They are bound by the way in which they have conducted their case.[177] It may be inferred that the decision to not make such a claim in this proceeding was a strategic choice or deliberate forensic decision.[178] The damages claim was open on the evidence and, having fought and been beaten on a different question, they cannot now take advantage of it.[179]

71. Rather than seeking summary judgment on the limitation point, which approach this Court has cautioned against,[180] the respondents should have raised any damages claim in this proceeding. They could have amended their process and statement of claim to include the cause of action as one having arisen after the proceeding was started,[181] rather than pleading the breach and estoppel in reply. The summary judgment finally determined the controversy between the parties,[182] such that *Anshun* estoppel attaches.

**PART VII – ORDERS SOUGHT**

72. The appellants seek the following orders:

(1) Appeal allowed.

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[172] PJ at [10]; CAB at 10.
[173] *Price v Spoor* [2020] HCATrans 142 at line 410-411.
[174] *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at [58]-[59] per Gummow, Hayne and Kiefel JJ.
[175] *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 602-603 per Gibbs CJ, Mason and Aickin JJ; *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at [22] per French CJ, Bell, Gageler and Keane JJ; *Timbercorp Finance Pty Ltd (in liq) v Collins* (2016) 259 CLR 212 at [27] per French CJ, Kiefel, Keane and Nettle J, and at [97] per Gordon J.
[176] *Nevill v Fine Art & General Insurance Co* [1897] AC 68 at 76 per Lord Halsbury LC.
[177] *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483 per the Court.
[178] *Seaton v Burnand* [1900] AC 135 at 145 per Lord Morris.
[179] *Martin v Great Northern Railway* (1855) 15 CB 179; 139 ER 724 (B); *Browne v Dunn* (1893) 6 R (HL) 67 at 75-76 per Lord Halsbury; *Rowe v Australian United Steam Navigation Co Ltd* (1909) 9 CLR 1 at 24 per Isaacs J.
[180] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 533 per Mason CJ, Dawson, Gaudron and McHugh JJ.
[181] This can always be done with the leave of the Court: *Uniform Civil Procedure Rules* 1999 (Q), r 375(2).
[182] The PJ and the CA are, and this Court's decision will be, final and conclusive on the merits: *Kuligowski v Metrobus* (2004) 220 CLR 363 at [25] per the Court.

(2) Set aside the orders of the Court of Appeal of the Supreme Court of Queensland made on 17 December 2019 and, in their place, order that the appeal to that Court be dismissed with costs.

(3) Declare that the respondents are barred from bringing any claim arising from any breach of clause 24 by the appellants.

(4) The respondents to pay the appellants' costs of the appeal, including as applicant for special leave to appeal.

**PART VIII: ESTIMATE OF HEARING**

73. We estimate that 2 hours will be required for the presentation of the appellants' oral argument in chief, plus 30 minutes in reply.

Dated: 30 October 2020

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## ANNEXURE – LIST OF CONSTITUTIONAL AND STATUTORY PROVISIONS

1. *Judiciary Act* 1903 (Cth) (Compilation No 47)
   (a) section 32
2. *Limitation of Actions Act* 1974 (Q) (Reprint current as at 1 March 2017)
   (a) section 9
   (b) section 10
   (c) section 13
   (d) section 24
   (e) section 26
   (f) Part 3 (includes sections 29 to 40)