HIGH COURT OF AUSTRALIA

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Details of Filing

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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

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

Allanna Marcia Price
Third Appellant

Gladys Ethel Price by her litigation guardian Erin Elizabeth Turner
Fourth Appellant

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and

Christine Claire Spoor as trustee
First Respondent

Kerry John Spoor as trustee
Second Respondent

Marianne Piening
30 Third Respondent

Frederick Piening
Fourth Respondent

Joyce Higgins
Fifth Respondent

Cheryl Thompson
Sixth Respondent

Joyce Mavis Coomber
Seventh Respondent

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Angus Macqueen
Eighth Respondent

Angus Macqueen as trustee
Ninth Respondent

APPELLANTS' REPLY

PART I – CERTIFICATION

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

PART II – REPLY TO RESPONDENTS' SUBMISSIONS

2. The headings below identify the paragraphs of the respondents' submissions (**RS**) to which the appellants reply. To the extent the appellants do not address separately matters raised in the RS, the appellants rely upon their primary submissions (**AS**).

RS [8]-[12]: clause 24 operates by reference to statutory provisions only

3. The text of cl 24 does not support the respondents' construction. Clause 24 states that certain things "*shall not apply hereto and are expressly excluded*". The things to which this disapplication and exclusion are directed are "*the provisions of all statutes*" falling within the description that follows. That is, only those provisions "*whereby or in consequence whereof*" *inter alia* the rights of the mortgagee may be defeated. By its terms, the integer by reference to which the clause operates is a provision of that kind.

4. RS at [5], [7] submit that the provision "*must be a direct or indirect means*" of that defeat of the mortgagee's rights, but this appears to be a gloss on the language of cl 24. The words "*direct*" and "*indirect*" do not appear within it. The critical question is whether or not either of the two causation tests set out in the clause are satisfied by reference to the application or operation of the provisions of a particular statute.

5. The provisions at issue in the present case are not of that kind. As PJ at [44] stated, these phrases are directed, respectively, to the effect of the statutes and the consequences of their operation. As RS [32] accepts, it is only upon a defendant raising a plea of a limitation period in its defence that the question arises. The provisions of the 1974 Act itself are neither the means by which, nor in consequence of which, the rights of the mortgagee would be defeated. Any such defeat is dealt by the defendant's plea, not the statute, such that cl 24 has no application whatsoever.

6. That the appellants' plea of limitation periods has defeated the respondents' claims does not mean that, by their so doing, the appellants have breached cl 24. Clause 24 is not a warranty to the respondents against any and all defeats of their rights, but only defeats of the kind described by its terms. Clause 24 is directed only to the defeating of rights by the provisions of statutes, and not by the exercise of rights conferred by them.

RS [13]-[14]: reasons for judgment should not be construed like statutes

7. Reasons for judgment are not the words of a statute, and they are not to be construed as if they were.[1] The circumstance that particular Judges have used the word "defeat" in this context does not, without more, assist this Court "*with gaining an understanding of the concepts to which expression was sought to be given*".[2] Close attention to the judgments cited by the respondents at fn 6 reinforces this point: it is not the provisions of the statute that "*defeat*" the powers, rights and remedies of the respondents, but the exercise by the appellants of a right conferred upon them by a statute. On that construction, cl 24 simply is not engaged in the circumstances of this proceeding.

10 **RS [15]-[16]: the entirety of clause 24 must be considered**

8. The respondents do not come to grips with the words "*insofar as this can lawfully be done*" in cl 24. Those concluding words of cl 24 make clear that the contracting parties had determined between themselves that the operation of the clause – whatever the ultimate effect of it might be – remained always subject to "*insofar as this can lawfully be done*". If this Court does not accept the construction submitted at [3]-[7] above, then this Court should conclude that, for the reasons submitted in the AS, the disapplication or exclusion of the provisions of the 1974 Act cannot "*lawfully be done*", such that cl 24 did not operate to preclude the appellants from pleading a limitation defence if, except for that language, they were otherwise precluded.

20 **RS [21]-[22]: ambiguity justifying recourse to *contra proferentem***

9. Having regard to the respective constructions advanced by the parties, it is clear that the language of cl 24 is ambiguous. A comparison between the parties' basic contentions demonstrate that this is so. The respondents submit (at RS [5], [7]) that the clause contemplates a provision of a statute being the "*direct or indirect means*" by which their rights are defeated. The appellants submit (at AR [3]-[6]) that, in the absence of those words appearing in the clause and upon the preferable construction of its terms, cl 24 disapplies or excludes only statutory provisions that *inter alia* defeat the respondents' rights, and nothing else. Further, PJ and CA have each construed this language in these different ways which, of itself, tends to suggest ambiguity.

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[1] *Benning v Wong* (1969) 122 CLR 249 at 299 per Windeyer J.
[2] Cf *Brennan v Comcare* (1994) 50 FCR 555 at 572 per Gummow J (approved in *Comcare v PVYW* (2013) 250 CLR 246 at [15]-[16] per French CJ, Hayne, Crennan and Kiefel JJ).

RS [35]-[36]: the appellants' knowledge does not arise absent a waiver case

10. It is unsurprising that no allegation of knowledge, or a particular state of mind, was pleaded by the appellants in their defences. A pleader should not anticipate her opponent's case, and had the appellants pleaded knowledge in anticipation of an assertion of waiver, they would have erred; the respondents pleaded only estoppel.[3] Despite the manner in which their case was pleaded, the respondents abandoned expressly the estoppel case before Dalton J at the summary judgment hearing.[4] No assertion of waiver was ever made by the respondents. It simply does not arise.

RS [37]-[38]: the respondents' conflation of doctrines should be rejected

10 11. Contrary to the respondents' apparent conflation of the doctrines of waiver, estoppel and contracting out, the mechanism by which a defendant's right to plead a limitation period is "*sterilised*" is fundamental. This is because each of those doctrines apply in separate and distinct circumstances as this Court has been at pains to emphasise.[5] The respondents' attempt to conflate those doctrines should be rejected. Further, as PJ at [21] recorded, the respondents conducted their case only upon the ground of contracting out, and not election, estoppel or waiver. This was not challenged in CA.

RS [39]-[42]: the public policy of the 1974 Act

12. The respondents' submission that the approach as to the timing of ascertaining the relevant public policy is contrary to authority, citing *Brooks*,[6] should be rejected. The
20 appellants advance alternative submissions: first, that the public policy manifested in the 1974 Act as at 1974 precludes contracting out (AS [32]-[39]); and, second, the tacit consent of the community in the decades since has, in any event, manifested that public policy (AS [40]-[41]).

13. Parliament is taken to know the interpretation put upon existing legislation by the courts.[7] That includes both the general principle that contracts will be void and of no effect if they offend the public policy implicit in a statute (AS [65]-[67]), as well as the decision in *Paul* (AS [52]-[54]). In enacting the 1974 Act, in which Parliament turned its mind to the exceptions to the limitation periods, it did not override that

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[3] Respondents' Book of Further Material filed 27 November 2020 (**RBFM**), Doc No 5 at [2](e) (p 31); RBFM, Doc No 6 at [1](e) (p 34).
[4] PJ at [20]-[21]; CAB at 12.
[5] See discussion in *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570.
[6] *Brooks v Burns Philip Trustee Co Ltd* (1969) 121 CLR 432 at 457 per Windeyer J.
[7] *Williams v Dunn's Assignee* (1908) 6 CLR 425 at 441 per Griffith CJ.

interpretation to make explicit that contracting out should be allowed. The proper inference is that Parliament did not want to disturb the principle established by *Paul*.

RS [46]-[51]: the status of the judgment in *Paul*

14. The appellants have canvassed the proper approach to the judgment in *Paul*: AS [52]-[64]. Contrary to the implicit suggestion in the respondents' submissions, a case does not cease to be good authority for a proposition of law by reason only of its age. Further, the respondents' reliance on this Court's statement in *Cook v Cook*,[8] with respect to "*the precedents of other legal systems*",[9] is wrong.

15. There is only one common law of Australia and this Court is the sole arbiter of that law.[10] This Court is not bound by any decisions of the Privy Council, but in delivering its advice in *Paul* in 1850, the Judicial Committee was stating the law for all colonies to the extent that the subject matter was governed by the same principle of law.[11] This Court may, if it feels that it should do so,[12] depart from the principle in *Paul* and disapprove it, but unless and until it does so, *Paul* is good law for Australia. Even if this Court disagrees with the appellants' submission that *Paul* is authority for the proposition that limitation periods cannot be contracted out of, this Court may accept that proposition as good law in stating and developing the common law of Australia.

16. There are sound reasons of policy why this Court should not develop the common law of Australia so as to allow contracting out of traditional form statutes of limitations. Principal amongst those reasons is that, if contracting out is allowed, then the 1974 Act and its analogues will be rendered nugatory. There is little doubt that lenders, in particular, will insert such clauses in standard form contracts. Further, in the immense variety of cases in which the limitation periods otherwise applicable will be avoided by contract, there is potential for the courts to be burdened with disputes about the proper

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[8] (1986) 162 CLR 376.
[9] (1986) 162 CLR 376 at 390 per Mason, Wilson, Deane and Dawson JJ.
[10] *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 at 562-566; *Lipohar v The Queen* (1999) 200 CLR 484 at [50] per Gaudron, Gummow and Lehane JJ.
[11] "The Court is, of course, bound by directly apposite decisions of the Privy Council": *Skelton v Collins* (1966) 115 CLR 94 at 104 per Kitto J. This position was also reflected in the view held formerly that the common law was, and ought to be, uniform throughout the Commonwealth, which subsided (at least for Australia) in *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590 at 641 per Lord Morris of Borth-y-Gest. See also *Fatuma Binti Mohamed bin Salim Bakhshuwen v Mohamed bin Salim Bakhshuwen* [1952] AC 1 at 14 per Lord Simonds for the Board.
[12] *Viro v The Queen* (1978) 141 CLR 88 at 174 per Aickin J (approved by Gummow and Hayne JJ in *Barns v Barns* (2003) 214 CLR 169 at [101]).

construction of such clauses and, significantly, claims kept alive by contract that would otherwise be stale.

RS [52]-[54]: the appropriate form of relief

17. With respect to the proposition that the appellants' approach to relief "*is at odds with the orders made in* Verwayen", the orders in that case were that the appeal was dismissed.[13] It is not surprising that the appellants do not seek those orders.

18. Further, no question of this Court "*giv[ing] its imprimatur to the appellants' breach of contract*" arises: cf RS [54]. This Court is doing no more than quelling a controversy by the application of Australian law. If the appellants have breached cl 24, then Australian law gives to the respondents such relief as to which they can establish a right.

RS [55]-[65]: the respondents' forensic decision precludes remitter to QCA

19. This Court has the undoubted power under s 44 of the Judiciary Act to remit this matter or any part of it to the QCA. That provision confers a discretion to be exercised after due consideration of all the circumstances of the case,[14] and is to be liberally construed.[15] The power is "*wholly unfettered*" and is "*a large and general power*".[16] The ultimate object of the discretion, however, is to do justice between the parties.[17] Nothing in this case, however, warrants the remittal of the matter.

20. Contrary to RS [55], if this Court determines that the respondents' only remedy is an action for damages for breach of warranty, then the issue of damages will not be "*outstanding*". The respondents' claim for interest is referrable to the damages sought by way of the repayment of the principal.[18] As such, if this Court so determines, the respondents will be precluded from claiming the principal and the interest accruing thereto. There will, therefore, be nothing pending in the CA for determination.

21. Any claim for damages for breach of warranty is "*a separate cause of action*": RS [56]. It was, nonetheless, one that could, and ought to, have been brought in this proceeding: AS [68]-[71]. If the respondents had sought to preserve the proceeding without judgment being entered, then the appropriate procedure was to seek a separate decision

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[13] *Commonwealth v Verwayen* (1990) 170 CLR 394 at 463 per Dawson J.
[14] *Johnstone v Commonwealth* (1979) 143 CLR 398 at 402 per Gibbs CJ (Aickin J concurring).
[15] *Johnstone v Commonwealth* (1979) 143 CLR 398 at 402 per Gibbs CJ (Aickin J concurring), and at 407 per Murphy J.
[16] *Pozniak v Smith* (1982) 151 CLR 38 at 42 per Gibbs CJ, Wilson and Brennan JJ.
[17] *Pozniak v Smith* (1982) 151 CLR 38 at 54 per Mason J.
[18] RBFM, Doc 1, Orders 4, 5 and 6 (pp 4-5).

on questions.[19] That procedure gives the court powers, including but not limited to the giving of judgment,[20] in relation to a decision of any such questions.[21]

22. The respondents made a deliberate forensic choice to adopt an approach that could be determined only by giving judgment summarily, and they are responsible for the consequences of charting that course. It is noteworthy that the respondents' case before the PJ was based upon the third iteration of their statement of claim. If, by that choice, the respondents have lost something valuable, then their relief lies elsewhere.

Dated: 17 December 2020

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[19] *Uniform Civil Procedure Rules* 1999 (Q), Ch 13 Pt 5.
[20] Cf *Uniform Civil Procedure Rules* 1999 (Q), r 292(2).
[21] *Uniform Civil Procedure Rules* 1999 (Q), r 485.

ANNEXURE – LIST OF CONSTITUTIONAL AND STATUTORY PROVISIONS

1. *Judiciary Act* 1903 (Cth) (Compilation No 47)
   (a) section 44
2. *Uniform Civil Procedure Rules* 1999 (Q) (Current as at 12 July 2019)
   (a) rule 292
   (b) rule 485
   (c) chapter 13, part 5

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