SUPREME COURT OF QUEENSLAND

CITATION:	*Spoor & Ors v Price & Ors* [2019] QSC 53
PARTIES:	**CHRISTINE CLAIRE SPOOR AND KERRY JOHN SPOOR AS TRUSTEES & ORS** (plaintiffs) **v** **MATTHEW WARD PRICE AND DANIEL JAMES PRICE AS EXECUTORS OF THE ESTATE OF ALAN LESLIE PRICE, DECEASED** (first defendant) AND **ALLANNA MERCIA PRICE** (second defendant) AND **JAMES BURNS PRICE** (third defendant) AND **GLADYS ETHEL PRICE BY HER LITIGATION GUARDIAN ERIN ELIZABETH TURNER** (fourth defendant)
FILE NO:	8069 of 2017
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 April 2019
DELIVERED AT:	Brisbane
HEARING DATE:	17 October 2018; last written submission 5 April 2019
JUDGE:	Dalton J
ORDERS:	**1. Judgment for the first, second and fourth defendants against the plaintiffs.** **2. Plaintiffs' application dismissed.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – LIMITATION OF ACTIONS – MORTGAGES – RECOVERY OF POSSESSION BY MORTGAGEE – where the defendants mortgaged land as security for a loan from the plaintiff – where the defendants failed to repay monies owing under the mortgages – where the plaintiff claimed monies due and recovery of possession

under mortgages – where defendants pleaded ss 10, 13 and 26 of *Limitation of Actions Act 1974* (Qld) – where the plaintiff in reply to the defences relied on a clause of the mortgage as excluding the operation of the *Limitation of Actions Act* – whether it is possible to contract out of the *Limitation of Actions Act* – whether s 24 of the *Limitation of Actions Act* does more than bar a remedy but extinguishes title

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – whether the relevant clause was ambiguous – where regard can be properly had to the *contra proferentum* rule – whether the plaintiffs are entitled for recovery of possession

Land Title Act 1994 (Qld), s 74
Limitation of Actions Act 1974 (Qld), s 5, s 10, s 13, s 24 and s 26
Property Law Act 1974 (Qld), s 84
Real Property Act 1861 (Qld), s 60

Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99
Commonwealth v Verwayen (1990) 170 CLR 394
English, Scottish & Australian Bank Ltd v Phillips (1937) 57 CLR 302
Figgins Holdings v SEAA Enterprises (1999) 196 CLR 254
Levy v Williams [1925] VLR 615
Lindsay v Smith [2002] Qd R 610
Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749
McKain v RW Miller & Co (SA) Pty Ltd (1991) 174 CLR 1
Newton, Bellamy & Wolfe v State Government Insurance Office (Qld) [1986] 1 Qd R 431
Owen v Owen (1981) ANZ ConvR 14
Perpetual Trustees Victoria Ltd v English [2010] NSWCA 32
Sardon Pty Ltd v The Registrar of Titles [2004] WASC 56
Cameron v Blau & Anor [1963] Qd R 421
Szymonowski & Co v Beck & Co [2013] EWCA Civ 38
The National Bank of Tasmania Ltd (in liquidation) & Anor v McKenzie [1920] VLR 411
The Sauria and The Trent [1957] 1 Lloyds Rep 396
The Seaspeed America [1990] 1 Lloyds Rep 151
Western Australian Bank v Royal Insurance Co (1908) 5 CLR 533

COUNSEL: N Andreatidis with A F Messina for the plaintiffs
T Matthews QC with D Keane for the first and fourth defendants
C J Crawford for the second defendant

SOLICITORS: Mullins Lawyers for the plaintiffs

M A Kent & Associates for the first and fourth defendants
McNamara & Associates Solicitors for the second defendant

[1] This matter came before me on the applications list. The plaintiffs claimed monies due and recovery of possession under mortgages. They claimed summary judgment, or that the defences of the defendants be struck out. The defendants, for their part, also claimed summary judgment, or that the plaintiffs' claim be struck out. The point at issue was the application of the *Limitation of Actions Act 1974* (Qld). The plaintiffs conceded that if the Limitations Act applied it would defeat their claims.[1] I was assured by all parties that no factual matters arose as to the limitation points. These points, I was assured, were matters of construction and law only, and thus the matters were suitable to be heard summarily.

The Pleadings

[2] The plaintiffs are trustees of a small pension fund which is the successor in title to Law Partners Mortgages Pty Ltd. It is pleaded that on 25 June 1998 the first and second defendants mortgaged land in favour of Law Partners Mortgages (Mortgage 703635657). On that same day, the third and fourth defendants mortgaged land in favour of Law Partners Mortgages (Mortgage 702810173). On 9 May 2017 the third defendant died and his interest in the mortgaged land passed to the fourth defendant.

[3] The mortgages were to secure one advance in an amount of $320,000 made to all four defendants on 2 July 1998. By the terms of the mortgages all monies secured were due and payable 12 months after the initial advance; that is on 2 July 1999. The money was not repaid on 2 July 1999. A new agreement was entered into between the mortgagee and the four defendants whereby a lower rate of interest (11.25 per cent) was to apply to the loan and the repayment date was extended until 2 July 2000. The money was not repaid on 2 July 2000. In November 2000 some of the mortgaged land was sold for the sum of $116,157, and that amount was paid to the mortgagee. Once interest and fees were taken into account, that payment reduced the principal outstanding by $50,000. There were some other small adjustments so that the sum outstanding as at 30 April 2001 was $270,000. From that date there have been no further repayments or acknowledgments.

[4] The plaintiffs now claim an amount of over $4 million, having regard to interest which they say has accrued, on a compounding monthly basis, at a rate of 16.25 per cent under the original terms of the advance. On 28 June 2017 the plaintiffs served notices pursuant to s 84 of the *Property Law Act 1974* (Qld) on the three surviving defendants, requiring payment of that amount. It has not been paid.

[5] The first and fourth defendants plead by way of defence that:

> "The plaintiffs are statute barred from pursuing the action for debt or enforcement of Mortgage 703635657 or Mortgage 702810173 by operation

---

[1] Paragraph 20 of the plaintiffs' original outline of argument, 27 September 2018.

> of sections 10, 13 and 26 of the *Limitation of Actions Act* 1974 the right of action having accrued no later than 2 July 1999 and the last acknowledgment having occurred on 30 April 2001 any right to recover was statute barred no later than 30 April 2013."[2]

And further that:

> "The plaintiffs are statute barred from enforcing any rights under either Mortgage 703635657 or Mortgage 702810173 by operation of sections 10, 13 and 26 of the *Limitation of Actions Act* 1974."[3]

[6] It is pleaded that as a consequence there is no extant debt, and that "the Defendants' right and title under Mortgage 703635657 and Mortgage 702810173 has been extinguished".[4] The first and fourth defendants seek, by way of counterclaim, declaratory relief to this effect and that the plaintiffs execute a release of mortgage.

[7] The second defendant pleads that the allegations of monies due:

> "… are untrue because no monies are owing by the second defendant pursuant to ss 10, 13 and 26 of the *Limitation of Actions Act 1974* (Qld). Under clause 3 of the Schedule to Mortgage 703635657, interest is only payable for the term of mortgage."[5]

[8] Further, the second defendant denies that the plaintiffs are entitled to exercise their rights under the mortgage, "pursuant to ss 10, 13 and 26 of the *Limitation of Actions Act 1974* (Qld)"[6] and pleads that, "the plaintiffs are not entitled to recover possession of the [land] pursuant to ss 10, 13 and 26 of the *Limitation of Actions Act 1974* (Qld)."[7]

[9] In a counterclaim the second defendant pleads:

> "1. Any right that the plaintiffs had to receive moneys secured by Mortgage 703635657 accrued no later than 2 July 1999.
>
> 2. In the premises, the plaintiffs are statute barred from enforcing any rights under Mortgage 703635657 pursuant to ss 10, 13 and 26 of the *Limitation of Actions Act 1974* (Qld)."[8]

The relief claimed by way of counterclaim is an order that the plaintiffs execute a release of Mortgage 703635657.

[10] In reply to both defences the plaintiffs rely upon clause 24 of Mortgage 703635657 as a covenant that the defendants would not plead a limitation defence;[9] say that the pleading

---

2 Paragraph 5(a), Court Document 9.
3 Paragraph 5(c), Court Document 9.
4 Paragraph 5(d)(ii), Court Document 9.
5 Paragraph 4, Court Document 24.
6 Paragraph 5, Court Document 24.
7 Paragraph 7, Court Document 24.
8 Paragraphs 1 and 2 of counterclaim, Court Document 24.
9 Paragraph 1(c), Court Document 31.

of the limitations defence by the defendants is a breach of that covenant,[10] and conclude, "… in the premises, the … defendant[s are] estopped from pleading a defence under the *Limitation of Actions Act 1974* (Qld)".[11]

[11] Additionally, and apparently non-responsively, the reply also pleads that Mortgage 703635657 was registered giving the plaintiffs a legal interest in the mortgaged land under the Torrens system and that, in those premises, s 24 of the *Limitation of Actions Act 1974* (Qld) did not apply because it "is only concerned with the extinguishment of title arising because of *inter alia* a general law mortgage and not a Torrens system mortgage"[12] (sic).

The Mortgages

[12] The mortgage documents provided that the monies advanced would be repaid and provided for interest to be paid on outstanding monies.[13]

[13] Clause 24 of both mortgages was as follows:

> "RESTRICTIVE LEGISLATION
>
> 24. 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."

[14] Clauses 31 and 32 of the mortgages provided:

> "POWER OF SALE
>
> 31. Upon the mon[ies] hereby secured becoming payable the Mortgagee may exercise the power of sale conferred by the Property Law Act (after following the regular true [sic - regulatory] procedure in Section 84 thereof together with all incidental powers conferred by the said Act and hereunder).
>
> POWER OF DEFAULT
>
> 32. The Mortgagor covenants with the Mortgagee that upon any of the events of default occurring the Mortgagee may at any time and from time to time without giving any notice to the Mortgagor do all or any or more [sic] of the following:
>
> (a) enter upon and take possession of the mortgaged premises;
>
> …"

---

[10] Paragraph 1(d), Court Document 31.
[11] Paragraph 1(e), Court Documents 30 and 31.
[12] Paragraph 1(b)(iii)(E), Court Document 31.
[13] See cll 2 and 6 of the Form 20 Schedule.

Limitation of Actions Act 1974 (Qld)

[15] Section 10(1)(a) of the *Limitation of Actions Act* 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) … an action founded on simple contract …"

[16] Section 5(5) of the *Limitation of Actions Act* provides:

> "A reference in this Act to a right of action to recover land includes a reference to a right to enter into possession of the land …"

[17] Section 13 of the *Limitation of Actions Act* provides:

> "**13 Actions to recover land**
>
> An action shall not be brought by a person to recover land after the expiration of 12 years from the date on which the right of action accrued to the person or, if it first accrued to some person through whom the person claims, to that person."

[18] Section 24 of the *Limitation of Actions Act* provides:

> "**24 Extinction of title after expiration of period of limitation**
>
> (1) Subject to section 17, subsection (2) of this section and the *Real Property Act 1861*,[14] where the period of limitation prescribed by this Act within which a person may bring an action to recover land (including a redemption action) has expired, the title of that person to the land shall be extinguished.
>
> …"

[19] Section 26 of the *Limitation of Actions Act* provides:

> "**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 a mortgage or other charge on property whether real or personal nor to recover proceeds of the sale of land after the expiration of 12 years from the date on which the right to receive the money accrued.
>
> …

[14] It was not argued that any of these three pieces of legislation were relevant, and that seems correct.

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

(5) An action to recover arrears of interest payable in respect of a sum of money secured by a mortgage or other charge or payable in respect of proceeds of the sale of land or to recover damages in respect of such arrears shall not be brought after the expiration of 6 years from the date on which the interest became due.

…"

Construction of clause 24

[20] The plaintiffs' pleading by way of reply is that the defendants promised not to take the limitation point; have breached that promise, and are now estopped from taking a limitations defence – see [10] above.

[21] This pleading confuses legal principles. There is no room for the operation of estoppel in this case. It is not said that the defendant mortgagors have conducted themselves in any way so as to be estopped from raising a limitations point. Nor is there any plea of election, or, if it is a separate concept, waiver. Here, in truth, the plaintiffs rely upon a contracting out of the Limitations Act, not election, estoppel or waiver.[15] The application was conducted on that basis.

[22] The second defendant argued that, as a matter of public policy, it was not possible to contract out of the provisions of the Limitations Act. Reliance was placed on American cases.[16] I have found one brief statement of *obiter* in an English case to the same effect.[17] This passage was cited with approval in a later English case,[18] also *obiter*. The original passage, and indeed the wider basis for decision in that case, was not followed in the Queensland case of *Newton, Bellamy & Wolfe v State Government Insurance Office (Qld)*.[19]

[23] In my view, the position in Australia, and England,[20] is determined according to conventional common law reasoning and principles, rather than individual ideas about what public policy is, or should be. Chief Justice Mason discussed this issue in detail in

---

15 See Brennan J in *Commonwealth v Verwayen* (1990) 170 CLR 394, p 421: "Election, estoppel and waiver are cognate concepts: each relates to the sterilization of a legal right otherwise than by contract". See also Mason CJ to the same effect, "In these cases, unless consideration is present, something in the nature of an election or an estoppel is required", p 406, my underlining in both quotations.

16 Calvin W. Corman, Limitation of Actions, Volume 1, paragraph 3.2.1; *R.W. Hirtler v Jack Hirtler,* 566 P.2d 1231, No. 14916, Supreme Court of Utah, June 27, 1977; *Marilyn M. Haggerty v Lynn C. Williams,* 84 Conn. App. 675, 855 A.2d 264, Appellate Court of Connecticut, August 24, 2004, Atlantic Reporter 21 Series; *M. Abraham Ahmad v Eastpines Terrace Apartments, INC., et al,* 2000 Md. App. 362, 28 A.3d 1.

17 *The Sauria* and *The Trent* [1957] 1 Lloyds Rep 396, 400, see [39] and [40] below.

18 *The Seaspeed America* [1990] 1 Lloyds Rep 151, 153.

19 [1986] 1 Qd R 431.

20 *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, cited by Mason CJ in *Verwayen.*

Verwayen, and Justices Gaudron and McHugh expressly dealt with it as well.[21] While discussion may not have been express in the other judgments, and while Mason CJ and McHugh J were dissentients, the majority judges must have concluded that it was possible either to waive the benefit of a limitations defence, or act in such a way that one was estopped from relying upon it. I cannot see that the question of whether or not one could contract out of the limitations provisions could be determined differently to this having regard to the principles which I think are best enunciated by Mason CJ:

> "Undoubtedly, some statutory rights are capable of being extinguished by the person for whose benefit they have been conferred … However, some statutory rights may also operate as a condition precedent to a court's jurisdiction … More importantly, some rights may be conferred for reasons of public policy so as to preclude contracting out or abandonment by the individual concerned … It is therefore necessary to examine the statutory provision in this case in order to ascertain whether it is susceptible to extinguishment in this way.
>
> …
>
> Although the terms of [the relevant limitation provision] are such that it is susceptible of being read as going to the existence of the jurisdiction of a court to hear and determine an action of the kind described, limitation provisions similarly expressed have not been held to limit the jurisdiction of courts. Instead, they have been held to bar the remedy but not the right and thus create a defence to the action which must be pleaded …
>
> On the footing that the right to plead the statute as a defence is a right conferred by statute, the respondent's contention that the right is capable of waiver hinges on the scope and policy of the particular statute … The issue is not whether the relevant provisions are beneficial to the public, but whether they are 'dictated by public policy' and enacted 'not for the benefit of any individuals or body of individuals, but for considerations of State'. Although, in one sense, all statutes give effect to some public policy … the critical question is whether the benefit is personal or private or whether it rests upon public policy or expediency …
>
> In this case there is the public policy that there should be finality in civil litigation. However, the Parliament has seen fit to implement this policy, not by imposing a jurisdictional restriction, but by conferring on defendants a right to plead as a defence the expiry of the relevant time period. In these circumstances and having regard to the nature of the statutory defence, I conclude that the purpose of the statute is to confer a benefit upon persons as individuals rather than to meet some public need which must be satisfied to the exclusion of the right of access of individuals to the courts. On that basis, it is possible to 'contract out' of the statutory provisions, and it is equally possible to deprive them of effect by other means such as waiver. Put differently, the provisions are procedural rather than substantive in nature, which suggests that they are capable of waiver ..."[22]

---

[21] Respectively at pp 404-406, 486-487 and 496.

[22] *Verwayen,* above, pp 404-406, authorities and footnotes omitted. The same principles were applied in *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 247 CLR 129, 143-4.

[24] In fact there are numerous case examples of the Court upholding contracts not to plead the limitation period. In Queensland the case of *Newton* (above) in the Full Court is one such example. *Lindsay v Smith*[23] is another example from the Queensland Court of Appeal. That the position is well established is shown by the following statement in a well-known textbook on limitation of actions:

> "The parties may agree not to plead a limitation period. Such an agreement, if supported by consideration, will be binding as a contract and will have the effect of allowing the plaintiff to proceed after the limitation period has expired."[24]

[25] It is true that the cases cited by Handford in support of the above quoted proposition, and the cases of *Newton* and *Lindsay*, above, involved agreements which were made at a time when a cause of action had arisen, and it was foreseeable that a particular limitation period would come to an end. In that sense this case is distinct, for here it is contended that the contracting out occurred when the mortgage agreements were made, well in advance of any cause of action arising, much less the limitation time for that cause of action impending. Counsel could not find another case of this sort, and nor have I found one. However, as a matter of principle I cannot see that this distinction makes any difference. If a right is capable of being surrendered by contract, it cannot matter when that surrender takes place.

[26] In my view then, there is no reason to doubt the validity of a borrower's promise in a loan or mortgage document never to raise a limitations defence to an action to recover monies due to the lender. I think the position is different in relation to a promise not to raise a limitations defence in an action to recover possession of land.

Section 24 of the Limitations Act, Recovery of Possession

[27] In my view, having regard to the passage of Mason CJ's judgment in *Verwayen* which I have extracted at [23] above, because s 24(1) of the Limitations Act does more than simply bar a remedy, and provides for the extinction of title, it is not possible to exclude its operation by contract.

[28] It was argued by the plaintiffs that s 24 of the Limitations Act had no application here, but only applied to old system land because a mortgagee of Torrens land had no title. I reject that argument.

[29] Section 74 of the *Land Title Act 1994* (Qld) provides:

> "**74 Effect of registration of a mortgage**
>
> A registered mortgage of a lot or an interest in a lot operates only as a charge on the lot or interest for the debt or liability secured by the mortgage."

---

[23] [2002] 1 Qd R 610.

[24] Handford P, *Limitation of Actions,* 2nd ed, Thomson Law Book Co, p 79.

[30] That is, a mortgage is a separate interest in land, but it involves no ownership of the land the subject of the security.[25] As Sackville AJA put it in *Perpetual Trustees Victoria Ltd v English,* "Upon registration, the land becomes liable as security in [a] manner and subject to the covenants set forth in the mortgage …".[26] I accept that a Torrens system mortgagee has something which can be described as a title in respect of its statutory interest in land.[27]

[31] The Queensland, Tasmanian and Victorian limitation statutes provide no specific provision dealing with the right to take possession of land under a mortgage,[28] hence the need for the definition at s 5(5) of the Queensland Act (see above at [16]), which effectively deems the mortgagee's right to go into possession to be an action to recover possession.[29]

[32] It may be accepted in this case that, before this proceeding was commenced, the relevant periods of limitation for recovery of possession had passed. In my view then, because of the operation of s 24 of the Limitations Act, the mortgagee's title to the mortgaged land was extinguished before the proceeding was commenced. As explained above, my view is that clause 24 of the mortgages was incapable of altering that position. The result is that so far as the plaintiffs' claims are for recovery of possession, the defendants have a good defence and summary judgment ought to be given in favour of the defendants.

Section 24 of the Limitations Act, Monies Claim

[33] Counsel for the first and fourth defendants argued that s 24 of the Limitations Act had a more devastating impact on the plaintiffs' claims; it was argued that the section put an end to the plaintiffs' money claims. It was argued that when the 12 year period prescribed by s 26(1) of the Limitations Act expired, all the mortgagor's rights which derived from the mortgages were extinguished, including any right to assert that the Limitations Act did not apply. This was said to flow from the words of s 24 of the Limitations Act that where the period of limitation prescribed by the Limitations Act for recovery of land expired, "the title of that person to the land shall be extinguished". I reject this argument.

[34] There is abundant authority to the effect that the personal rights of a mortgagee to recover monies are not extinguished by provisions such as s 24 of the Limitations Act.[30] In my view, the mortgagee's personal rights to rely upon the promises contained in

---

[25] *English Scottish and Australian Bank Ltd v Phillips* (1937) 57 CLR 302, 321. See also the predecessor provision, s 60 of the *Real Property Act 1861.*

[26] [2010] NSWCA 32, [68].

[27] *Perpetual Trustees,* above, [68].

[28] Handford, (above), p 209.

[29] See Handford (immediately above).

[30] *The National Bank of Tasmania Ltd (in liquidation) & Anor v McKenzie* [1920] VLR 411, 422-424; *Levy v Williams* [1925] VLR 615, 623-624; *Owen v Owen* (1981) ANZ ConvR, 14 at p 16 and the authorities cited there, and *Sardon Pty Ltd v The Registrar of Titles* [2004] WASC 56 [98]ff and particularly at [129] and [130], and see Sykes EI and Walker S, *The Law of Securities: An account of the law pertaining to securities over real and personal property under the laws of Australian jurisdictions,* 5th ed, Law Book Co, p 932, cited in Handford P, above, p 215 . The case of *Cameron v Blau & Anor* [1963] Qd R 421 is not any authority to the contrary. It concerned only the extinguishment of a right to recover land, see pp 424, 425 and 429.

clauses 24 of the mortgages are not extinguished simply because title is extinguished. I have not found any authority on that point; certainly none was cited by counsel for the first and fourth defendants. However, it seems to me that the right to rely upon clause 24 of the mortgages is a personal right and that it would survive extinguishment of title in the same way the personal right to recover monies survives.

Contractual Limitation Period

[35] It was further argued by the first and fourth defendants that if clause 24 of the mortgages did have effect, it was itself subject to the operation of the Limitations Act, and that the time for reliance upon it had run. This argument was based on dicta of McPherson J in *Newton*, above.

[36] In *Newton* a road accident occurred in 1979. In February 1981 the defendant's solicitors corresponded with the plaintiff's solicitors. They agreed that, "Liability is not an issue". The agreement was made for consideration (forbearance to sue). That is, the defendant made a contractual promise not to take a limitations defence.

[37] A writ issued claiming damages for negligence in May 1982. A statement of claim was delivered in September that year, and in February 1983 a defence was delivered which claimed that the action was statute-barred.

[38] In October 1984 a second writ was issued by the plaintiff claiming a declaration that the plaintiff and defendant had agreed that the Limitation Act did not apply to the first action. Summary judgment was given, by way of the Chamber Judge making such a declaration.

[39] The Full Court dismissed an appeal made by the defendant. The Full Court examined whether or not there was evidence of an agreement made for consideration. It determined that there was such an agreement. In the course of that consideration there was a discussion of *The Sauria* and *The Trent*.[31] Lord Evershed MR, in the course of discussing the evidence in those cases found that there was no contract, "and went on to say that he had great difficulty in seeing how an agreement could be formulated having the effect of binding the defendant contractually not to plead the limitation in any action the plaintiffs might choose to bring in respect of the damage 'however long after the cause of action they may elect to start those proceedings'".[32]

[40] All members of the Full Court in *Newton* declined to follow *The Sauria* and *The Trent*. However, McPherson J made some comments upon which the first and fourth defendants rely. Having concluded that in the case before him there was a contract not to take the limitations point, McPherson J continued:

> "Once the conclusion is reached that such an agreement has been made, and that it is intended to be enforceable, the difficulty foreseen by Lord Evershed disappears. The limitation period in respect of an action on a

---

[31] [1957] 1 Lloyd's Rep 396, 400.
[32] *Newton,* above, p 443.

> simple contract is six years from the date on which the cause of action arose …
>
> The result, in my opinion, is that the limitation applicable to the contract in this case never was the three year period running from [the date of the accident], but the period of six years … running from the date of the contract made [between the plaintiff and the defendant's solicitors]." – p 445.

[41] With respect, I cannot see that the passage of time can defeat the plaintiffs' right to rely on clause 24 of the mortgages. A cause of action in contract arises when a contract is breached. The pleading of a limitation time, contrary to a contract not to do so, is a breach of contract. Time will run from that breach, not from the date the contract was made.

Construing Clause 24

[42] I have already dealt with s 24 of the Limitations Act which does extinguish some rights, and I do not consider it further in this context.

[43] Generally speaking, the attitude of the common law was that parties were free to enter into whatever contractual arrangements they chose and the Court would not interfere simply because one party had been foolish or improvident in contracting. Having said that, where it is contended that a clause has a draconian or unlikely result, courts will look carefully at the language used by the parties.[33]

[44] Here, cl 24 does not mention the *Limitation of Actions Act* specifically. It has two fields of operation in that it refers to the effect of the statutes ("whereby") and the consequences of this operation ("in consequence whereof"). That is, first it seeks to exclude provisions of statutes which curtail, suspend, postpone, defeat or extinguish either (a) the powers, rights and remedies of the mortgagee or (b) the obligations of the mortgagor. Secondly, it seeks to exclude provisions of statutes in consequence whereof the rights and remedies of the mortgagee or obligations of the mortgagor are curtailed, suspended, postponed, defeated or extinguished.

[45] I do not think that ss 10 and 26(1) of the *Limitation of Actions Act* can be properly characterised as provisions which suspend, postpone or extinguish obligations of the mortgagor or powers, rights and remedies of the mortgagee. These provisions do not suspend or postpone rights. Although by their terms they may appear to extinguish them, the High Court in *Verwayen* confirmed that the provisions have always been interpreted to operate only if the defendant pleads a limitation defence, see the passage quoted at [23] above. Thus I do not think the words suspend, postpone or extinguish can be interpreted as referring to the Limitations Act. That is so whether the first or second of the two fields of operation of cl 24 is considered.

---

[33] *Australian Broadcasting Commission v Australasian Performing Right Association* (1973) 129 CLR 99, 109-110; *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 776; see the discussion in Lewison K and Hughes D, *The Interpretation of Contracts in Australia;* Law Book Co, 2012, [2.09] ff where those cases are cited, *inter alia*.

[46] For the same reason I give at [45], I do not think the verb "defeated" can be read as referring to the Limitations Act, so far as the first field of operation of cl 24.

[47] There remains the verb "curtailed". Its primary dictionary meaning is "cut short", according to the Macquarie Dictionary. It has a secondary meaning of "diminished". None of these expressions – curtailed, cut short or diminished – seem appropriate in normal parlance, or legal parlance, to describe the direct effect of ss 10 and 26(1) of the Limitations Act. The Limitations Act does nothing more than make the mortgagee's remedy vulnerable to a limitations defence if it is pleaded by the mortgagor. Thus I do not think the word "curtailed" brings the Limitations Act within the first of the two fields of operation of cl 24.

[48] The plaintiff referred me to several cases where the words "cut off" and "cut off point" were used in limitation cases.[34] Apart from the first of the cases noted in the footnote below, the words were not used as "cut off" could be used in cl 24 of the mortgages. Perhaps more significantly, the word "curtailed" was not used. However, a case cited by the first and fourth defendants[35] shows that "curtailed" could be used as the plaintiffs submit. I accept that, but it is not the most natural or clear word which could be chosen.

[49] When a limitations defence is taken by a mortgagor, the legal result could be described as bringing about a situation where remedies of the mortgagee were defeated or cut short "in consequence" of the Limitations Act. That is, the words "curtailed" and "defeated" might be read as referring to the Limitations Act when the second field of operation of cl 24 is considered. Strictly speaking however, the loss of remedy is a consequence of the election to plead the statute, not a consequence of the statute. Thus, to construe the clause as contended for by the plaintiff, the strict meaning of the words used has to be disregarded, and a less precise, more lenient, interpretation adopted.

[50] In my view, the clause as a whole is ambiguous:

- direct reference to the Limitations Act is avoided;
- five verbs are used, three of which are not apt to refer to the Limitations Act;
- one verb, "defeated", is not apt to refer to the direct effect of the Limitations Act but could be used, albeit somewhat imprecisely, to refer to the consequential effect of the mortgagor pleading a limitations defence;
- the verb, "curtailed", which is apt to refer to both the effect of the Limitations Act on the mortgagee's remedies, and (adopting an imprecise construction) the effect of the mortgagor's filing a limitations defence, is not the most obvious word to have used, and
- obvious words such as "barred" are not used.

---

[34] *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1, 41; *Charlton v WorkCover Queensland* [2007] 2 Qd R 421, [51]-[52]; *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203, [2005] NSWCA 83, [36]; *Hardcastle v Mitch Enterprises Pty Ltd* [2016] FCA 1569, [29]; *Davies v Nilsen* [2015] VSC 584, [5].

[35] *Figgins Holdings v SEAA Enterprises* (1999) 196 CLR 254, [14].

[51] Having concluded that the clause is ambiguous, I think that this is a case in which regard can properly be had to the *contra proferentum* rule. I quite accept that the rule is one of last resort[36] and has at times been criticised in the cases as uncertain in its application and as being a vehicle for judicial interference.

[52] The rule is often used in cases concerning exemption clauses but can be used more widely. I think the words of Scrutton LJ in *Szymonowski & Co v Beck & Co*[37] are applicable, "… if a party wishes to exclude the ordinary consequences that would flow in law from the contract that he [or she] is making he [or she] must do so in clear terms."

[53] In this case, the mortgage documents were prepared by the mortgagee, a law firm which engaged in the business of mortgage lending. Clause 24 works only to the benefit of that party, the mortgagee. The plaintiffs contend that it has a very unusual effect, very much to the detriment of the defendants. The clause could have expressed so that it clearly excluded the operation of the Limitations Act. Instead it used ambiguous words and on a strict construction does not favour the plaintiff.

[54] In all the circumstances, construing the clause *contra proferentum,* I am not prepared to construe the clause as referring to the *Limitation of Actions Act.*

Disposition

[55] In my view, s 24 of the Limitations Act operated to extinguish the mortgagee's title to the lands the subject of the mortgages before the proceeding was commenced. Accordingly, I give judgment for the defendants against the plaintiffs on the claim to recover possession of land.

[56] So far as the plaintiffs claim monies due pursuant to contract, that claim was made out of time and the defendants have raised a limitation defence. In my view, clause 24 of the mortgages does not prevent the defendants raising this defence. Accordingly, I give judgment for the defendants against the plaintiffs on the money claims. I dismiss the plaintiffs' applications.

[57] I will hear the parties as to costs.

---

[36] *Western Australian Bank v Royal Insurance Co* (1908) 5 CLR 533, 554; *AWB (International) Ltd v Tradesmen International (PVT) Ltd* [2006] VSCA 210, [24]; see the discussion in Lewison and Hughes, above at [7.08], where those cases are cited, *inter alia*.

[37] [1923] 1 KB 457, 467.