SUPREME COURT OF QUEENSLAND

CITATION:	*Amos v Brisbane City Council* [2018] QCA 11
PARTIES:	**EDWARD AMOS** (appellant) **v** **BRISBANE CITY COUNCIL** (respondent)
FILE NO/S:	Appeal No 7247 of 2016 SC No 6709 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2016] QSC 131
DELIVERED ON:	20 February 2018
DELIVERED AT:	Brisbane
HEARING DATE:	3 March 2017
JUDGES:	Fraser and Philippides JJA and Dalton J
ORDERS:	**1. Allow the appeal.** **2. Set aside the orders made in the Queensland Supreme Court on 20 June 2016.** **3. Judgment for the respondent in accordance with minutes of judgment produced by the parties to the Registrar.** **4. The respondent is to pay the appellant's costs of the appeal.**
CATCHWORDS:	LIMITATION OF ACTIONS – LIMITATION OF PARTICULAR ACTIONS – ACTIONS TO RECOVER MONEY RECOVERABLE BY VIRTUE OF AN ENACTMENT – where the respondent brought an action to recover overdue rates and charges – where the rates and charges were a charge on the land – whether the primary judge erred in holding that the 12 year limitation in s 26(1) *Limitation of Actions Act* 1974 (Qld) applied to the exclusion of the six year limitation period in s 10(1)(d) and s 26(5) REAL PROPERTY – RATES AND CHARGES – WATER SEWERAGE AND DRAINAGE RATES AND CHARGES – RATEABLE LAND – where the service was provided to a structure – where the primary judge found the appellant implicitly asked for the service to be provided – whether the primary judge erred in finding the appellant liable for utility

charges levied by the respondent on rateable land owned by the appellant

Acts Interpretation Act 1954 (Qld), s 32A
City of Brisbane Act 2010 (Qld), s 93(1), s 93(2), s 94(1), s 97(2), s 257
City of Brisbane (Finance, Plans and Reporting) Regulation 2010 (Qld), s 59, s 64, s 65(1), s 65(3), s 66(1)
Limitation of Actions Act 1974 (Qld), s 10(1)(d), s 10(3), s 26(1), s 26(5)
Real Property Limitation Act 1874 (UK), s 8

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2009) 239 CLR 27; [2009] HCA 41, cited
Australia and New Zealand Banking Group Ltd v Douglas Morris Investments Pty Ltd [1992] 1 Qd R 478, explained
Bank of New South Wales v Brown (1983) 151 CLR 514; [1983] HCA 1, considered
Bank Officials' Association (South Australian Branch) v Savings Bank of South Australia (1923) 32 CLR 276; [1923] HCA 25, cited
Barnes v Glenton [1898] 2 QB 223, considered
Barnes v Glenton [1899] 1 QB 885, explained
Brisbane City Council v Amos (2016) 216 LGERA 312; [2016] QSC 131, related
Bristol and West plc v Bartlett [2003] 1 WLR 284; [2002] EWCA Civ 1181, cited
Dennerley v Prestwich Urban District Council [1930] 1 KB 334, considered
Equuscorp Pty Ltd v Lloyd [1999] 1 VR 854; [1998] VSC 171, considered
Federal Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503; [2012] HCA 55, cited
Gotham v Doodes [2007] 1 WLR 86; [2007] 1 All ER 527; [2006] EWCA Civ 1080, considered
Hornsey Local Board v Monarch Investment Building Society (1899) 24 QBD 1, considered
Master Education Services Pty Ltd v Ketchell (2008) 236 CLR 101; [2008] HCA 38, applied
Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom (2006) 228 CLR 566; [2006] HCA 50, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
Securum Finance Ltd v Ashton (No 1) [1999] 2 All ER (Comm) 331, considered
Sutton v Sutton (1882) 22 Ch D 511, explained
West Bromwich Building Society v Wilkinson [2005] 1 WLR 2303; [2005] UKHL 44, cited

COUNSEL: F L Harrison QC, with P G Jeffery, for the appellant
S L Doyle QC, with A L Wheatley, for the respondent

SOLICITORS: Keller Nall & Brown for the appellant
Brisbane City Legal Practice for the respondent

[1] **FRASER JA:** On 24 June 2009, the respondent ('the Council') commenced proceedings in the Trial Division for the recovery, with interest, of overdue and unpaid rates levied upon the appellant's rateable land by rates notices issued in the period 30 April 1999 to 9 January 2012. There were many issues in those proceedings, but only two questions are raised in this appeal. The first question turns upon the construction of the *Limitation of Actions Act* 1974 (Qld) and of provisions of legislation relating to the rates, charges and interest claimed by the Council. It is whether the primary judge erred in holding that the limitation period of 12 years in s 26(1) of the *Limitation of Actions Act* 1974 (Qld) applied to the exclusion of the six year limitation period in s 10(1)(d) or, in relation to the claim for interest on the rates and charges, the six year limitation period in s 26(5). The second question turns upon the construction of a regulation. It is whether the primary judge erred in finding that the appellant is liable for utility charges levied by the Council upon rateable land described as "the Sandgate Rd property" which the appellant owned when the charges were levied.

The limitation provisions

[2] The directly relevant limitation provisions are ss 10(1)(d), 26(1), and 26(5) of the *Limitation of Actions Act* 1974 (Qld), which I have emphasised in the following quotations.

[3] Section 10(1) of the *Limitation of Actions Act* 1974 (Qld) provides:

> "(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) subject to section 10AA, an action founded on simple contract or quasi-contract or on tort where the damages claimed by the plaintiff do not consist of or include damages in respect of personal injury to any person;
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> (b) an action to enforce a recognisance;
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> (c) an action to enforce an award, where the agreement to arbitrate is not by an instrument under seal;
>
> (d) **an action to recover a sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of a penalty or forfeiture**."

[4] Section 26 provides:

> "(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.**
>
> (2) A foreclosure action in respect of mortgaged personal property shall not be brought after the expiration of 12 years from the

date on which the right to foreclose accrued, but if after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property that was in the mortgagee's possession shall, for the purposes of this subsection, be deemed not to have accrued until the date on which the mortgagee's possession discontinued.

(3) The right to receive a principal sum of money secured by the mortgage or other charge and the right to foreclose on the property subject to the mortgage or charge shall be deemed not to accrue so long as that property comprises a future interest or a life assurance policy that has not matured or been determined.

(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.**

(5A) Notwithstanding subsection (5)—

(a) where a prior mortgagee or encumbrancee has been in possession of the property charged and an action is brought within 1 year of the discontinuance of such possession by the subsequent encumbrancee—the subsequent encumbrancee may recover by that action all the arrears of interest that fell due during the period of possession by the prior encumbrancee or damages in respect thereof, although the period exceeded 6 years; or

(b) where the property subject to the mortgage or charge comprises a future interest or life assurance policy and it is a term of the mortgage or charge that arrears of interest be treated as part of the principal sum of money secured by the mortgage or charge—interest shall be deemed not to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued.

(6) This section does not apply to a mortgage or charge on a ship."

The statutory basis of the Council's claims

[5] The Council's relevant rights and powers relating to rates and charges are found in Ch 4, Pt 1 of the *City of Brisbane Act* 2010 (Qld) ("the 2010 Act") and Pts 11 and 12 of the *City of Brisbane (Finance, Plans and Reporting) Regulation* 2010 ("the 2010 Regulation")[1].

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[1] Some parts of the Council's claim arose prior to the commencement of the 2010 Act. The primary judge's reasons referred to the preceding legislation as containing relevantly indistinguishable

[6] Section 93(1) of the 2010 Act states that Part 1 of Chapter 4 "is about rates and charges". Section 93(2) provides that "[r]ates and charges are levies that the council imposes … on land … for a service, facility or activity that is supplied or undertaken by … the council … or … someone on behalf of the council (including a garbage collection contractor, for example)." Section 94(1) identifies "4 types of rates and charges": "general rates (including differential rates)", "special rates and charges", "utility charges", and "separate rates and charges". Section 95 describes the "rateable land" upon which rates may be levied. Section 96 obliges the Council to levy general rates on all rateable land within Brisbane and empowers the Council to levy special rates and charges, utility charges and separate rates and charges.

[7] Section 97(1) provides that s 97 applies "if the owner of rateable land owes the council for overdue rates and charges". Section 97(2) provides that "overdue rates and charges are a charge on the land". Section 97(3) empowers the council to register the charge over the land by lodging identified documents with the registrar of titles. Under s 97(4), once the charge is registered it has priority over any other encumbrances over the land other than encumbrances in favour of the State or a government entity. By s 97(5), upon payment of the overdue rates and charges the council is obliged to lodge with the registrar of titles a request to release the charge over the land and a certificate signed by the chief executive officer stating that the overdue rates and charges have been paid. Section 97 does not limit any other remedy the council has to recover the overdue rates and charges: s 97(6).

[8] Each of the words "rates" and "charges" is defined in Sch 1 of the Act to include "any interest accrued, or premium owing, on" the rates or charges. The schedule also includes the entry, "**rates and charges** see section 93(2)".

[9] Section 98 empowers the Council to make regulations providing "for any matter connected with rates and charges", including "the process for recovering overdue rates and charges". The 2010 Regulation commenced on the day the 2010 Act commenced. Section 59(1) of the 2010 Regulation specifies the persons liable to pay rates and charges: "(a) for rateable land – the current owner of the land…" and "(b) for a service that is supplied to a structure, or to land that is not rateable land – the entity who asked for the services to be supplied…" Section 64 relevantly provides:

> "(1) ***Overdue*** rates or charges are made up of—
>
> (a) either of the following—
>
> (i) subject to subparagraph (ii), rates or charges that are not paid by the due date for payment stated in the rates notice;
>
> (ii) if a rate payer is granted a concession for rates or charges of a type mentioned in section 53(b) or (c) —rates or charges that are not paid by the due date stated in the agreement to which the concession relates; and

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provisions. Neither party took issue with that analysis. Each party's submissions referred to the 2010 Act to the exclusion of the preceding legislation.

(b) if the council takes the rate payer to court to recover rates or charges and the court orders the rate payer to pay the council's costs—the costs; and

(c) the interest, if interest is payable, on the rates or charges, or costs.

(2) Subject to subsection (3), the rates or charges mentioned in subsection (1)(a)(i) become ***overdue*** on the day after the due date for payment of the rates or charges stated in the rates notice.

(3) Subject to subsections (4) to (6), the rates or charges mentioned in subsection (1)(a)(ii) become ***overdue*** on the day after the due date for payment of the rates or charges stated in the agreement to which the concession relates..."

[10] Section 65(1) of the 2010 Regulation makes interest payable on overdue rates or charges "at the percentage, of not more than 11% a year, decided by the council…from the day the rates or charges become overdue or a later day decided by the council". Section 65(3) provides that interest must be calculated in a specified way, which comprehends "compound interest…or…another way the council decides, if an equal or lower amount will be obtained." Section 66(1) empowers the Council to "recover overdue rates or charges by bringing court proceedings for a debt against a person who is liable to pay the overdue rates or charges". Division 3 of Pt 12 of the 2010 Regulation regulates the Council's power to sell or acquire land for overdue rates or charges. In the preceding Division, s 67 provides that "If the council sells or acquires land for overdue rates or charges, the council can not start or continue any court proceedings to recover the overdue rates or charges."

The primary judge's reasons

[11] The primary judge considered that the applicable provision of the *Limitation of Actions Act* 1974 (Qld) was s 26(1) because s 97 of the 2010 Act made the overdue rates and charges a charge on the relevant land and, unlike legislation in some other states, the *Limitation of Actions Act* 1974 does not exclude charges on land by way of rates from the operation of s 97. The primary judge rejected the appellant's argument that the expression "principal sum of money" indicated that s 26 provided a 12 year limitation period only for an action to recover a primary or capital sum lent upon the security of a mortgage or charge. The primary judge considered that the language of s 26 was sufficiently general to comprehend actions to recover a principal sum secured by mortgage or charge on real or personal property whether or not the action arose out of a lending transaction. The primary judge applied the Full Court's decision in *Australia and New Zealand Banking Group Ltd v Douglas Morris Investments Pty Ltd*[2] that s 26(1), as the "specific and therefore governing" provision applies to the exclusion of s 10(1)(d).

[12] The primary judge also rejected the appellant's argument that, if s 26(1) applies, s 26(5) nonetheless provides a six year limitation period for the Council's claim for interest on unpaid rates. The primary judge considered that s 26(5) has no operation because the "overdue rates and charges" charged on the land by s 97 of the 2010

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2 [1992] 1 Qd R 478 at 482-483 (McPherson J, Connolly and Williams JJ agreeing); see also *Brisbane City Council v Amos* [2016] QSC 131 [64].

Act were effectively defined by s 64(1) of the 2010 Regulation as comprehending rates or charges not paid by the due date for payment, court costs and interest. The primary judge considered that the result of those provisions was to make interest payable on unpaid rates and charges part of the principal sum secured by a charge on the land.

Does s 26(1) apply to the Council's claims for rates and charges?

[13] The appellant argued that the language of s 26(1) was not apt to comprehend the Council's claim for rates and charges because the expression "principal sum of money secured by a mortgage or other charge on property", and the reference in s 26(5) to "arrears of interest payable in respect of" the principal sum, contemplated only a transaction of, or in the nature of, a loan secured by a mortgage or charge.[3] Various dictionary definitions were cited in support of and against this proposition. It is sufficient to mention that the definition of "principal" in the Chambers Dictionary, 11th Edition, comprehends "a capital sum or principal" and "the sum of money on which interest is paid". The appellant argued that this and other dictionary definitions supported his construction because a debt for rates is a tax imposed under statute rather than a principal or a capital sum of money. The argument does not persuasively explain why the amount of a tax upon which interest is payable under a statute may not itself be regarded as a "principal sum". The word "principal" does limit the application of s 26(1), but it does not confine the provision to lending transactions.

[14] Section 8 of the *Real Property Limitation Act* 1874 (UK) enacted a 12 year limitation period for a proceeding "to recover any sum of money secured by any mortgage, judgment or lease, or otherwise charged…out of any land" and drew a distinction between "principal money" and "interest thereon" in a proviso that allowed a proceeding to be brought within 12 years after the payment of any part of the principal money or interest. In *Hornsey Local Board v Monarch Investment Building Society*[4] the Court of Appeal (Lord Esher MR, Lindley LJ and Lopes LJ) held that s 8 applied to a local authority's action to enforce a statutory charge for the cost of certain street works. That decision supplies some support for the Council's submission that s 26(1) does comprehend its claims for rates and charges. The appellant sought to distinguish the case on the ground that the expression "any sum of money secured by any mortgage … or otherwise charged …" was broader than the corresponding expression in s 26(1), but it is not broader in a way that is presently material. As the primary judge considered, the very general language of s 26(1) is apt to comprehend the Council's claim for rates and charges.

Does the charge created by s 97(2) of the 2010 Act secure the payment of interest on rates and charges?

[15] The parties presented competing arguments upon the question whether the provisions in the 2010 Regulation to which the primary judge referred could be taken into account in support of the conclusion that the charge created by s 97(2) of the 2010 Act secured the repayment of interest. It is not necessary to consider that question because, for the reasons given in the following paragraphs, the 2010 Act

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3 The appellant abandoned other arguments, including an argument that the rates and charges were not secured by a charge on the appellant's property before the charge was registered over that property by lodging the relevant documents with the Registrar of Titles, pursuant to the Council's power to do so conferred by s 97(3) of the 2010 Act.

4 (1899) 24 QBD 1.

itself brings interest on rates and charges within the charge created by s 97(2), but two points should be mentioned. First, although in some cases it may be appropriate to read an Act, and regulations made under the Act, together to identify the nature of a legislative scheme, the general rule is that regulations may not be taken into account in construing the Act itself.[5] I am inclined to the view that the general rule applies here. Secondly, the effect of s 64 of the 2010 Regulation seems to be to identify the content of "overdue rates or charges" only for the purposes reflected in that regulation of fixing the date from when interest runs and bringing interest within the Council's powers to bring recovery proceedings or sell the land. Upon that view, the 2010 Regulation could not define the meaning of "overdue rates and charges" in s 97(2) of the 2010 Act even if it were legally permissible to use the regulations for such a purpose.

[16] The Council argued that, by virtue of the inclusion of "any interest accrued … on the" in each of the definitions of "rates" and "charges" in the 2010 Act, the expression "overdue rates and charges" in s 97(2) of the 2010 Act includes unpaid interest accrued on rates and charges. The appellant argued that the definitions in the 2010 Act of "rates" and "charges" should not be applied in that subsection. The appellant argued that: the definition of "rates and charges" in the schedule with reference to s 93(2) does not comprehend interest, and interest is not mentioned in s 97(2); the term "overdue" is not defined in the 2010 Act but it is defined in the 2010 Regulation, in s 64 with reference to the expression "*overdue* rates **or** charges"; if the words "rates" and "charges" had been intended to be used on an "alternating 'and/or basis'" the Act would not have defined the term "rates and charges" in the schedule by reference to s 93(2) because there would have been no utility in doing so.

[17] Some of the appellant's arguments appeared to suggest that the difference between the expressions "rates or charges" and "rates and charges" is itself significant. None of those arguments suggest a reason for not applying the definitions in the 2010 Act of "rates" and "charges". The fact that the word "and" appears between those defined terms in sections of the 2010 Act could hardly justify not applying the definitions. It is necessary, however, also to take into account the appellant's more substantial arguments: s 94(1) reveals a legislative purpose that the definitions of "rates" and "charges" are not applicable in Part 1 of Chapter 4; to read into s 97(2) the several definitions of "rates" and "charges" would be contrary to the legislative purpose manifested in the schedule and ss 93 and 94 to provide separate definitions or descriptions of the terms "rates", "charges", and "rates and charges"; s 93 makes it plain that Part 1 of Chapter 4 of the 2010 Act (which includes s 79) was only about those "rates and charges" that constitute levies imposed by the Council on the land for services, facilities, or activities supplied or undertaken by or on behalf of the Council; and interest accrued on rates or charges does not fall within that description.

[18] Section 32A of the *Acts Interpretation Act* 1954 (Qld) provides that definitions in an Act "apply except so far as the context or subject matter otherwise indicates or requires". The question raised by the appellant's arguments is whether the statutory context upon which he relies amounts to an indication that the definitions of "rates" and "charges" in the schedule of the 2010 Act should not be applied to those

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5 *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at 109-110 [19]; and see Statutory Interpretation in Australia, 8th Ed, Pearce and Geddes, para [3.41].

defined words in s 97(2). In that respect it is significant that the definitions of "rates" and "charges" refer to "any" interest accrued. Reading the definitions of "rates" and "charges" into ss 93 and 94 would not produce the incongruous result that, at the time the rates and charges are levied and imposed by the Council, those terms must be regarded as comprehending interest even though interest is not levied or imposed by the Council when it levies and imposes rates. The circumstance that those sections, and also ss 95 and 96, use the defined terms in a context in which the inclusion of interest might be thought to be inappropriate therefore does not necessarily indicate that the definitions are not applicable in those sections.

[19] In any event, whether or not the definitions should be applied in ss 93 – 96, there is nothing inappropriate about applying them in s 97(2) so as to bring any interest accrued on rates and charges within the charge created by that subsection. The term "overdue" is not defined in the 2010 Act. Presumably it connotes sums that have not been paid after they have become due and payable, and it is presumably appropriate to have regard to the regulations upon that topic contemplated by s 98 of the 2010 Act, but those details are not significant for the resolution of the present question. Because s 97(2) is concerned only with overdue rates and charges, it seems unsurprising that the legislative purpose extends to securing the payment of any interest that accrues upon the rates and charges. There is also such a close connection between interest and the rates and charges upon which the interest has accrued that the inclusion of interest upon rates and charges in the amounts secured by the statutory charge does not prevent s 97 from being regarded as a provision "about rates and charges" in terms of s 93(1). In this context, the mere fact that the 2010 Act defines the expression "rates and charges" by referring to s 93(2), in which that expression is used, does not indicate that the defined terms should not be applied to the words "rates" and "charges" within the same expression where it is used in s 97(2).

[20] The better construction of the 2010 Act is that the charge created by s 97(2) secures the payment both of overdue rates and charges and of overdue interest accrued on rates or charges.

Does s 26(1) apply to the Council's claim for interest?

[21] The appellant argued that the primary judge erred by holding that s 26(1) applies the limitation period of 12 years in relation to interest accrued upon rates or charges. In the appellant's submission, if s 10(1)(d) does not apply then s 26(5) applies a limitation period of six years to the claim for interest.

[22] The Council supported the primary judge's decision. It argued that the "principal sum of money secured by" its charge comprehends both the rates and charges and interest on those rates and charges. It submitted that the statutory purpose of the definitions making interest part of "rates" and "charges" should prevail; the question under s 26(1) concerns the identification of the secured money as a "principal sum", rather than the provenance of the secured money. In that context there was said to be no warrant for separating interest from rates. The Council argued that s 26(5) does not suggest a contrary conclusion because it is directed to "arrears" of interest rather than to interest which forms part of the "principal sum of money secured by…charge" under s 26(1). *Bank of New South Wales v Brown*[6] was

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6 (1983) 151 CLR 514.

cited for the proposition that where interest is capitalised or compounded it is converted into capital and usually treated as principal.

[23] The appellant's argument on this point should be accepted. The construction of s 26(1) should take into account the influence upon its meaning of s 26(5). The word "principal" in s 26(1) does not comprehend "interest" within the meaning of s 26(5). The statutory scheme is that different limitation periods, with differently expressed starting points, are specified for the principal sum of money secured by a mortgage or charge (12 years from when the right to receive the money accrued) and for interest payable in respect of a sum of money secured by a mortgage or charge (6 years from when the interest became due).

[24] In *Bank of New South Wales v Brown* the issue was whether a proof of debt lodged by the bank with a liquidator of the customer included interest at a higher rate than eight per cent for the purposes of s 112 of the *Bankruptcy Act* 1966 (Cth). Under that provision, so much of the debt as represents interest at a rate higher than eight per cent is recoverable by a creditor only after the claims of all other creditors have been satisfied. The bank's case was that, for the purposes of s 112, amounts that represented interest became capital when the bank debited them and added them to the principal sum due on the account in accordance with the usual practice of banks, which secured for themselves the benefit of compound interest. The High Court rejected that case. Gibbs CJ concluded that third parties' rights were to be determined on the footing that the interest retained its character as such, even though, "as between the banker and the customer, and those who stand in their shoes, the interest is treated as capital."[7] Gibbs CJ observed that no legal principle required the Court to treat a payment which in truth included interest as though it did not for the purposes of s 112: "A banker and a customer cannot, by agreement between themselves, affect the statutory priority which s. 112 affords."[8] Mason and Wilson JJ concluded that the fact that there was a settled account between the bank and the customer was of no significance because the proper construction of s 112 was that it prohibited the inclusion in a proof of debt of claim for interest at a rate exceeding eight per cent per annum, the word "interest" referring to the original character of the amount notwithstanding that it was subsequently capitalised by arrangement between the parties.[9] Brennan J accepted that if a debt for interest was discharged by an account stated, payment, or other means, a liability which took its place would be of a different character, but the character of a debt for interest was not altered when it was capitalised in accordance with a previous agreement which merely authorised the bank to add accrued interest to the principal so that the total sum should be secured or bear interest: "[t]he total sum may appropriately be described as 'principal', but capitalization in this sense is no legal alchemy for changing the character of a debt for interest."[10] Dawson J observed that whilst interest may be capitalised for purposes other than calculating further interest, and whilst that may be of importance, including in relation to the application of an limitation period, "compound interest does not, of itself, involve the capitalization of interest for any purpose other than the calculation of further interest"[11] and even "if the total sum formed by the addition of interest might be said to have been

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7 *Bank of New South Wales v Brown* (1983) 151 CLR 514 at 523.
8 *Bank of New South Wales v Brown* (1983) 151 CLR 514 at 523.
9 *Bank of New South Wales v Brown* (1983) 151 CLR 514 at 532-533.
10 *Bank of New South Wales v Brown* (1983) 151 CLR 514 at 545-546.
11 *Bank of New South Wales v Brown* (1983) 151 CLR 514 at 549.

capital, that does not mean that it did not include amounts which were identifiable in their origin as interest and remained identifiable as such".[12]

[25] I do not find it necessary to discuss the relatively minor differences in reasoning in that case. This is a much clearer case. The fact that the definitions of "rates" and "charges" in the 2010 Act include any accrued interest within the "overdue rates and charges" secured by the charge created by s 97(2) does not justify the treatment of that interest as "principal" for the purposes of s 26(1) of the *Limitation of Actions Act* 1974 (Qld). If one reads the definitions into s 97(2) (which would be in accordance with the conventional approach to statutory definitions), the references in those definitions to "interest" does not disappear. The evident purpose of the definitions is only to ensure that interest is also secured by the charge. There is no indication in the 2010 Act that the interest is to be treated as having been transformed into principal for any purpose, including the application of a statutory limitation period. Similarly, s 64 of the 2010 Regulation does not require interest to be treated as principal for any purposes other than the purposes of the regulations. Indeed the provision in s 65(3) for the compounding of interest might be thought to make it clear that interest, including compound interest, must be treated as retaining its character as interest throughout, including for the purposes of ss 26(1) and (5) of the *Limitation of Actions Act* 1974 (Qld).

[26] The case for applying s 26(5) rather than s 26(1) is also clearer here than it was in *Australia and New Zealand Banking Group Limited v Douglas Morris Investments Pty Ltd*.[13] In that case interest secured by a scrip lien accrued from day-to-day, in the absence of demand it was payable half-yearly, and if it was not paid on the half-yearly day the interest might "be turned into principal and shall thenceforth be deemed part of the principal money intended to be secured and carry interest…".[14] McPherson J held that s 26(5) "operates to preclude recovery of amounts of interest six years after each half-yearly instalment of interest fell to be capitalised with unpaid principal owing to the bank".[15] The Council sought to distinguish the decision upon the grounds that the issue there was whether interest was statute-barred because it accrued on principal that was itself statute-barred and that s 26(5) refers to "arrears" of interest rather than interest which is "secured by charge". Neither point is a valid ground of distinction. McPherson J regarded s 26(5) as imposing a time limit that commenced to run as soon the interest became payable (on the half-yearly day for payment, in the absence of an earlier demand), and his Honour held that s 26(5) applied despite the contractual provision for the capitalisation of interest. His Honour held that arguments turning upon the question whether the principal was statute-barred were irrelevant, the general terms of s 26(5) being "the governing provision for determining the appropriate limitation period in respect of interest payable on the principal secured by the scrip lien".[16]

[27] The better construction is that s 26(1) comprehends the unpaid rates and charges levied by Council and s 26(5) comprehends interest, including any compound interest payable upon the overdue rates and charges, all of which are secured by the statutory charges in favour of the Council.

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12 *Bank of New South Wales v Brown* (1983) 151 CLR 514 at 555.
13 [1992] 1 Qd R 478.
14 [1992] 1 Qd R 478 at 491.
15 [1992] 1 Qd R 478 at 492.
16 [1992] 1 Qd R 478 at 492.

Do both or only one, and if so, which, of s 10(1)(d) and ss 26(1) apply to the Council's claims?

[28] It is not in contest in this appeal that each of the Council's claims for rates, charges, and interest fall within the literal meaning of the expression "a sum recoverable by virtue of any enactment" in s 10(1)(d) of the *Limitations of Actions Act* 1974 (Qld). Because I have concluded that s 26 is also potentially applicable to the Council's claims, it is necessary to decide whether both provisions apply or whether only one of them applies, and (in the latter event) which one of them applies.

[29] Upon this point the primary judge accepted the Council's argument that s 26(1) applied to the exclusion of s 10(1)(d).[17] His Honour applied the following passage in McPherson J's reasons in *Australia and New Zealand Banking Group Limited v Douglas Morris Investments Pty Ltd*:[18]

> "I am in no doubt that, in an action on the scrip lien to recover the amount due to the bank, s. 26(1) is the applicable limitation provision to the exclusion of those specified in s. 10(1) and s. 10(3).[19] Both s. 10(3) and s. 26(1) do, in any event, prescribe a 12 year period, but the latter is the specific and therefore governing provision. Cf. *Barnes v. Glenton* [1898] 2 Q.B. 223. It has its source in s. 40 of the *Real Property Limitation Act* 1833; 3 & 4 Will IV, c. 27, later re-enacted in England in the *Real Property Limitation Act* of 1874. As such it was, in *Sutton v. Sutton* (1882) 22 Ch.D 511, held to apply to an action on the personal covenant in a mortgage of land. Section 26(1) of the Queensland Act of 1974 is in substantially the same terms as the provision considered in *Sutton v. Sutton* except that it and s 40 of the original Act of 1833 were confined to charges on land. Section 26(1) of the Act of 1974 now extends to a charge on any property "whether real or personal". It therefore includes within its terms an action brought to recover the principal sum of money secured on shares by a charge like that created by the scrip lien in the present case."

The appellant's argument

[30] The appellant argued that McPherson J was wrong in considering that the correct approach is to identify a limitation provision which applies to the exclusion of another limitation provision that is also apparently capable of operation. Sections 10(1)(d) and 26(1) are not inconsistent and for that reason the court is not required to decide, as McPherson J did, that one provision applies to the exclusion of the other. Different, applicable provisions are capable of concurrent application, with the result that an action governed by both of them could not be brought after the expiration of the shorter of the two limitation periods. The appellant noted that the first instance decision in *Barnes v Glenton*[20] cited by McPherson J in the quoted passage was overruled by the Court of Appeal.[21] The Court of Appeal's decision is

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17 The parties' arguments at trial and on appeal focussed upon the relationship between s 10(1)(d) and s 26(1), doubtless because six years is the limitation period specified in s 10(1)(d) and s 26(5) (although those provisions arguably identify different starting points for the commencement of the limitation period).

18 [1992] 1 Qd R 478 at 482-483.

19 Section 10(3) of the *Limitation of Actions Act* 1974 (Qld) provides that "[a]n action upon a specialty shall not be brought after the expiration of 12 years from the date on which the cause of action accrued".

20 [1898] 2 QB 223.

21 *Barnes v Glenton* [1899] 1 QB 885.

consistent with the approach advocated by the appellant. The same approach was approved by Warren J in *Equuscorp Pty Ltd v Lloyd*.[22] The appellant also argued that s 26(1) is no more specific than s 10(1)(d), because the former covers liabilities that are secured but which may or may not be sourced in statute and the latter covers statutory liabilities which may or may not be secured. McPherson J was concerned with the relationship between ss 10(3) (actions upon a speciality) and 26 (which, the appellant submitted, McPherson J apparently assumed covered the same ground as s 26).

[31] The appellant argued that McPherson J's starting point was history, but recent authorities emphasise the necessity to start the task of statutory construction with a consideration of the text itself: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)*.[23]

[32] The appellant also argued in an outline of submissions that because his obligation to pay rates and charges was a "speciality" (being an action under statute to recover a sum of money due by the statute),[24] s 10(3) would have provided a limitation period of 12 years, but for the operation of s 10(3A). (Section 10(3) provides that, "[a]n action upon a speciality shall not be brought after the expiration of 12 years from the date on which the cause of action accrued". Section 10(3A) makes s 10(3) subject to any "shorter period of limitation…prescribed by any other provision of this Act.") The appellant submitted that it followed from these provisions that s 10(1)(d), which does provide a shorter period of limitation, must apply to the exclusion of s 26(1). Ultimately this argument did not seem to be pressed. In any event, if, which I doubt, any relevant implication could be drawn from s 10(3A), it would appear to be that the absence of a similar provision in s 26 suggests that it applies despite a potentially applicable shorter limitation period in s 10(1).

The respondent's argument

[33] The respondent argued that the authorities were opposed to the approach of applying s 10(1)(d) and s 26(1) concurrently, with the result that the limitation period of six years in s 10(1)(d) would apply in practice; if a claim falls within s 26, that section sets the limitation period, rather than some other limitation period being prescribed by another section which otherwise might have operated. For these propositions the respondent cited *Australian and New Zealand Banking Group Limited v Douglas Morris Investments Pty Ltd*,[25] *West Bromwich Building Society v Wilkinson*,[26] and *Bristol and West Plc v Bartlett*.[27] The Council also argued that the appellant's construction should be rejected because, upon that construction, the limitation in s 26(1) would be otiose, or substantially otiose, because of the concurrent periods of limitation in ss 10(1)(a) and (d) and s 10(3).

Consideration

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22 [1999] 1 VR 854.

23 (2009) 239 CLR 27 at 46-47 [47].

24 The appellant cited *R v Williams* [1942] AC 541 at 554-555, *Hill v Spread Trustee Co Ltd* [2007] 1 WLR 2404, and *Nolan v Wright* [2009] 3 All ER 823.

25 [1992] 1 Qd R 478.

26 [2005] 1 WLR 2303.

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

[34] In *Barnes v Glenton*,[28] the Court of Appeal reversed the first instance decision, cited by McPherson J in *Australian and New Zealand Banking Group Limited v Douglas Morris Investments Pty Ltd*,[29] that the effect of s 8 of the *Real Property Limitation Act* 1874 (UK) was to "take out of 21 Jac.1, c.16, for all purposes all actions of debts secured by mortgage or otherwise charged upon or payable out of land".[30] (Section 8 of the *Real Property Limitation Act* 1874 (UK) is reflected in ss 26(1) and (5) (and, in relation to the accrual of the right of action where there is an acknowledgement of title or part-payment of a mortgage debt, ss 35 and 36) of the *Limitation of Actions Act* 1974 (Qld)). The statute 21 Jac 1, c.16 (the *Statute of Limitations* of 1623) prescribed a limitation period of six years for all actions of debt grounded upon any lending or contract without speciality. It is the earliest antecedent of the much broader provision in s 10(1)(a) of the *Limitation of Actions Act* 1974 (Qld).

[35] The appellant relied upon the following passages in the Court of Appeal's decision in *Barnes v Glenton*. A L Smith LJ said:

> "It is clear that the statute of James was passed in favour of debtors, because by it they were allowed to plead the lapse of six years as a bar to an action. Where is to be found, in the statutes of William IV. and of the Queen, that this right is taken away? I cannot find anything to that effect; and, in my opinion, the case of a simple contract debt is not affected by the later statutes. The Real Property Limitation Act, 1833, enacted that no action or suit should be brought to recover any sum of money charged upon land 'but within twenty years' after the right of action has accrued. That, upon the face of it, means the right to bring an action of the class enumerated in the section. Where in that section is there anything to be found as to actions for simple contract debts to which, I may point out, the statute of James is limited?"[31]

[36] Collins LJ said:

> "I am of the same opinion. The action is on a simple contract debt which is also charged on land, and the argument for the plaintiff is that under s. 8 of the Act of 1874 the period of limitation of that section now governs all claims, personal or against the land, where the debt is charged on land.
>
> …
>
> How can the later enactment, by imposing a limitation of twenty years over a larger area, enlarge the period already defined as the limitation for a particular part of that area, namely, simple contracts? The words of the section debar the creditor from proceeding after twenty years; they do not confer any right of suit upon him which he did not before possess. The statutory prohibition against taking proceedings after the period named is not a statutory permission

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28 [1899] 1 QB 885.

29 *Barnes v Glenton* [1898] 2 QB 223, cited in *Australia and New Zealand Banking Group Ltd v Douglas Morris Investments Pty Ltd* [1992] 1 Qd R 478 at 483.

30 [1898] 2 QB 223 at 230.

31 [1899] 1 QB 885 at 887-888.

> given to take them within that period, and it does not remove the existing fetter imposed in the case of simple contracts by the Act of James."[32]

[37] Romer LJ concluded:

> "The statutes do not say that debts may be recovered under certain conditions, but they negative the rights of creditors to bring actions after a certain time has elapsed. … These two statutes and the statute of James are general, and have a wide operation, and they can well stand together."[33]

[38] In *Equuscorp Pty Ltd v Lloyd*,[34] Warren J upheld a magistrate's decision, that a claim for a debt upon a simple contract was statute-barred, upon the ground the there was no evidence before the magistrate to establish the alleged mortgage upon which the plaintiff sought to rely to invoke the longer period of limitation in the provision of the *Limitation of Actions Act* 1958 (Vic) corresponding with s 26(1) of the *Limitation of Actions Act* 1974 (Qld).[35] Warren J held that the Court of Appeal's approach in *Barnes v Glenton* was not contradicted by the Victorian authorities, but her Honour did not decide whether or not that approach should be applied in relation to the Victorian provisions that correspond with s 10(1)(a) and s 26(1) of the *Limitation of Actions Act* 1974 (Qld). So far the research conducted by myself and the parties has revealed the Court of Appeal's decision in *Barnes v Glenton* has not been applied in any superior court decision upon the *Limitation of Actions Act* 1974 (Qld) or upon any Australian limitation statutes in a similar form.

[39] Section 20 of the English *Limitation Act* 1980 corresponds with s 26(1) of the *Limitation of Actions Act* 1974 (Qld). In *Bristol & West Plc v Bartlett*[36] the Court of Appeal held in respect of a mortgagee's cause of action to recover money secured by a mortgage that the subsequent sale of the secured property did not change the character of that cause of action and that *Sutton v Sutton*[37] was "an express authority that the specific limitation provisions relating to mortgages take precedence over the general provisions relating to specialities." The Court of Appeal summarised the resulting position as being that "in other than exceptional cases…claims for a mortgage debt will be governed by section 20 of the Limitation Act even if the mortgagee has exercised his power of sale before he issues proceedings" and "he has twelve years from the accrual of the cause of action to sue for the principal of the debt but only six years to sue for the interest."[38] The House of Lords approved that decision in *West Bromwich Building Society v Wilkinson*.[39] As the appellant argued, however, so far as those statements concerned the issue in this appeal they were not necessary for the decision in the Court of Appeal or the decision in the House of Lords.

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32 [1899] 1 QB 885 at 889.
33 [1899] 1 QB 885 at 891.
34 [1999] 1 VR 854.
35 [1999] 1 VR 854 at 860.
36 [2003] 1 WLR 284 at [27] (concerning the provisions analogous to s 26 and s 10(3) of the *Limitation of Actions Act* 1974 (Qld) in s 20 and s 8 of the *Limitations Act* 1980 (UK)).
37 (1882) 22 Ch D 511.
38 [2003] 1 WLR 284at [35].
39 [2005] 1 WLR 2303 at [10], in which Lord Hoffmann held that *Bristol & West Plc v Bartlett* [2003] 1 WLR 284 was rightly decided.

[40] More importantly, the statutory context in which the question arose in *Barnes v Glenton* was very different from the statutory context in which the question arises in this case. A L Smith LJ described the question as being "whether the Real Property Limitation Acts, 1833 and 1874, have repealed the provisions of 21 Jac. 1, c. 16, s. 3, which allows a debtor, in cases where the creditor has slept on his rights for six years, to set up the statute as an answer to the claim made against him."[40] Collins LJ framed the question as being how the later enactment of a limitation of 20 years "over a larger area" could "enlarge the period already defined as the limitation for a particular part of that area, namely, simple contracts?"[41] Romer LJ also addressed the question whether the later enactment repealed the earlier one and observed that the 1833 and 1874 Acts were intended "to give further rights to debtors to oppose the claims of creditors after the lapse of a certain time".[42] In short, the issue involved two separate enactments whereas the present issue requires reference to a variety of provisions within one statute. In these circumstances, although the Queensland Act is a consolidating statute and the old history of the enactment of English legislation from which the critical provisions in the Queensland Act ultimately were drawn may be considered for the purpose of resolving an ambiguity in that Act,[43] decisions upon the English legislation are not determinative of the meaning of corresponding Queensland provisions.

[41] The first Queensland Limitation Act was the *Statute of Frauds and Limitations* of 1867, in which s 18 reflected s 40 of the *Real Property Limitation Act* 1833 (UK), s 16 reflected s 3 of the *Limitation Act* of 1623, and s 22 included provisions similar to those in ss 10(3) and (3A) of the current Queensland legislation. The *Limitation Act* 1960 (Qld) modernised the limitation provisions. It included sections 9 and 24, upon which sections 10 and 26 of the *Limitation of Actions Act* 1974 (Qld) are based. Neither party submitted that assistance in construing the provisions in issue could be obtained by reference to this or the antecedent legislative history. The appellant disclaimed reliance upon that history as an aid to construction of the current provisions.

[42] As the appellant submitted, the focus must be upon the statutory text: "[t]he language which has actually been employed in the text of legislation is the surest guide to legislative intention".[44] Of relevance in this case are the related principles that "[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute" and "a court construing a statutory provision must strive to give meaning to every word of the provision…it [is] 'a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void or insignificant, if by any other construction they may all be made useful and pertinent'."[45]

[43] The most obvious kinds of cases caught by s 26(1) involve, in addition to an action to recover a secured sum recoverable under a statute, obligations in simple contracts

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40 [1899] 1 QB 885 at 887.

41 [1899] 1 QB 885 at 889.

42 [1899] 1 QB 885 at 891.

43 See *Equuscorp Pty Ltd v Lloyd* [1999] 1 VR 854 at 856 [11].

44 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ), referring to *Hilder v Dexter* [1902] AC 474 at 477-478 (Earl of Halsbury LC).

45 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] and 382 [71] (quoting Griffith CJ in *Commonwealth v Baume* (1905) 2 CLR 405 at 414).

or deeds to pay money secured by a mortgage or charge, but in all three categories of cases a limitation period is provided by ss 10(1)(a) or (d) (six years) or s 10(3) (12 years). Upon the appellant's construction s 26(1) would also apply, but with no consequence other than perhaps in some unusual cases. (The language describing the commencement of the limitation periods in these provisions is not uniform, so it is arguable that there may be different commencement dates under these differing provisions.[46] If so, the limitation period under s 26(1) conceivably might expire before the expiry of the limitation period under one of the other provisions, so that it would be that other provision which applied without producing any consequence.) In the category of cases in which both ss 26(1) and s 10(3) applied, upon the appellant's construction one of those provisions usually would apply without having any consequence. The appellant did not contend that upon his construction s 26(1) would have any field of operation that does not overlap with another limitation provision in the Act, with similar results. The construction adopted by the primary judge instead gives all of these provisions a generally harmonious operation.

[44] Contrary to one of the appellant's arguments, McPherson J correctly concluded in *Australia and New Zealand Banking Group Ltd v Douglas Morris Investments Pty Ltd* that s 26 is more specific than ss 10(1) and (3). The latter provisions prescribe limitation periods for generally described claims with reference to specified causes of action, whereas ss 26(1) and (5) prescribe limitation periods by reference to the specific character of the claims ("a principal sum" or "arrears of interest payable in respect of a sum of money") without reference to the cause of action and they turn upon the additional, distinctive requirement of a charge securing the obligation to pay the specified kind of sum.

[45] For the reasons I have given, I would respectfully adopt McPherson J's description of s 26(1) as being "the specific and therefore governing provision" in the circumstances considered by his Honour. McPherson J was concerned with the possibility of concurrent application of s 26(1) or s 26(5) with 10(1)(a) or s 10(3), but the same reasoning is applicable in relation to the suggested concurrent application of s 10(1)(d). The better view is that the Act does not contemplate any concurrent application of s 26(1) or s 26(5) with s 10(1)(d).

[46] I would add that this view may derive support from other subsections of s 26, concerning claims in respect of mortgaged personal property and excluding from its application cases involving a mortgage or charge on a ship. It is true that no limit is prescribed in relation to claims to enforce a charge over land such as in issue in this case but the appellant's construction would appear to apply equally in relation to common law mortgages of personal property, even though the presence of all these provisions in one section derived from one antecedent enactment suggests a relationship between the limitation periods prescribed for personal actions to recover the principal sum and interest and those prescribed for claims directly relating to mortgages of personal property (s 26(2)) and land (s 26(4), referring to s 13). (These provisions did not depart in any material way from those in s 24 of the *Limitation Act* 1960 (Qld), but s 18 of the *Statute of Frauds and Limitations* of 1867 (Qld) originally provided the limitation period of 20 years both for actions at law and for suits in equity.)

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46 In *Hornsey Local Board v Monarch Investment Building Society* (1889) 24 QBD 1 the Court of Appeal found that there was a material difference, but in *Australia and New Zealand Banking Group Ltd v Douglas Morris Investments Pty Ltd* [1992] 1 Qd R 478 McPherson J appears to have treated the different expressions as having the same effect: see [1992] 1 Qd R 478 at 484 line 10 et seq.

[47] It is necessary to mention one other point. In *Securum Finance Ltd v Ashton (No 1)*,[47] a Deputy High Court judge in the Chancery Division treated the Court of Appeal's decision in *Barnes v Glenton* as an example of a case where the only operative covenant to pay lay outside the mortgage,[48] and as applying only in such cases. That view is consistent with the decision in *Australia and New Zealand Banking Group Ltd v Douglas Morris Investments Pty Ltd*, and it is capable of explaining why McPherson J referred to the first instance decision in *Barnes v Glenton*[49] rather than the Court of Appeal's decision: the report of the first instance decision[50] suggests that Lord Russell of Killowen CJ treated the claim as being for a debt upon an implied covenant in the same deed that charged the land with repayment of the debt, which would be analogous with the scrip lien in *Australia and New Zealand Banking Group Ltd v Douglas Morris Investments Pty Ltd*, whereas the Court of Appeal held that the claim was for a debt secured by the deed but arising upon a simple contract. Neither party advocated the view expressed in *Securum Finance Ltd v Ashton (No 1)*. Its application here would not affect the result, because the 2010 Act, particularly in ss 97(1) and (2), makes it clear that the statutory charge on the rateable land secures the owner's obligation under the Act, and expressed in detail in the 2010 Regulation made thereunder, to pay overdue rates, charges, and interest accrued thereon.

[48] It follows that I would hold that the primary judge did not err in finding that s 26(1) of the *Limitation of Actions Act* 1974 (Qld) applied and s 10(1)(d) of that Act did not apply to the Council's claim for rates and charges, but I would hold that the primary judge erred in finding that s 26(5) of the *Limitation of Actions Act* 1974 (Qld) did not apply to the Council's claim for interest on the rates or charges.

Is the appellant liable for utility charges for the Sandgate Rd property pursuant to s 59(1)(b) of the 2010 Regulation?

[49] The primary judge's findings of fact concerning the utility charges for the Sandgate Rd property are not in issue. The appellant was the registered owner of the Sandgate Rd property between October 2000 and April 2015 inclusive. The property was an old worker's cottage which had a residence upstairs and business premises downstairs. It was unoccupied when the appellant was the registered owner. The appellant rented the upstairs residence to others and used the downstairs premises as a real estate agency and office. Water and sewerage services were connected to the cottage when the appellant became the registered owner. Those services stayed connected and were used by the occupiers during that period. The Council levied the water and sewerage charges in issue in its claim between 2001 and 2010. The charges are for water and sewerage access and consumption. It is also not in issue that the effect of s 257 of the 2010 Act is that rates levied before the commencement of the 2010 Act, under the *City of Brisbane City Act* 1924 (Qld), continue in force as if levied under the 2010 Act.

[50] Section 59 of the 2010 Regulation provides:

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47 [1999] 2 All ER (Comm) 331.

48 See [1899] 1 QB 885 where the Court of Appeal described the claim as being for a simple contract debt, and at 888 AL Smith LJ distinguished *Sutton v Sutton* (1882) 22 Ch D 511 upon the ground that it concerned a case of covenant.

49 See [29] of these reasons.

50 *Barnes v Glenton* [1898] 2 QB 223 at 227, 229.

> "(1) Subject to section 94, the following persons are liable to pay rates and charges—
>
> (a) for rateable land—the current owner of the land, even if that owner did not own the land during the period to which the rates or charges relate;
>
> (b) for a service that is supplied to a structure, or to land that is not rateable land—the entity who asked for the service to be supplied;
>
> (c) for previously rateable land—the owner of the land immediately before it stopped being rateable land.
>
> (2) ***Previously rateable land*** is land that was, but has stopped being, rateable land because—
>
> (a) the tenure of a holding is terminated; or
>
> (b) the land is surrendered or forfeited to the State; or
>
> (c) the land is acquired by the State or the Commonwealth; or
>
> (d) the land is exempted from rating; or
>
> (e) the property description of the land no longer exists.
>
> (3) If more than 1 person is liable to pay rates or charges, all the persons are jointly and severally liable to pay the rates or charges."

[51] The primary judge found that the appellant must be regarded as having asked for the service to be supplied because, on the evidence, there was an implicit request by the appellant for continued supply of the water and sewerage services. His Honour held that nothing in the scheme of the 2010 Act required that the request for the supply of the services be an explicit request. The primary judge also held that it was not the scheme of s 59 that there be no overlap between the different cases mentioned in the three subparagraphs of s 59:

> "Structures are obviously capable of being built on land which is rateable and on land which is not rateable, yet s 59(1) simply uses the term 'structure' without differentiation. *Moreover*, s 59(3) evidently contemplates the possibility that the outcome of the application of the rules in s 59 might be that there is more than one person made liable."[51]

[52] The appellant argued that the primary judge's construction of s 59(1)(b) was wrong because that provision clearly required a service to be "asked for", the word "asked" did not comprehend an implicit request, and there was not intended to be any overlap between (a), (b) and (c). Because the appellant was not the current owner of the land, the effect of s 59(1)(a), upon the appellant's submission, was that he was not liable.

[53] As to the last proposition, it seems very clear that the three paragraphs of s 59(1) provide non-exclusive alternatives for the reasons given by the primary judge. As to the appellant's first argument, the appellant has not established any basis for

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51 [2016] QSC 131 at [51].

overturning the primary judge's finding of fact that the appellant implicitly asked the Council to supply the relevant services. No reason appears to construe s 59(1)(b) as requiring a formal or express request to the exclusion of an implicit request.

[54] This ground of appeal fails.

Proposed orders

[55] The notice of appeal seeks orders allowing the appeal, setting aside the order and judgment in the Trial Division giving judgment for the respondent in a sum to be calculated, and ordering the respondent to pay the appellant's costs of the appeal and the proceeding in the Trial Division. The result of my reasons is that the judgment for the respondent should be set aside to the extent that it includes interest that is time-barred under s 26(5) of the *Limitation of Actions Act* 1974 (Qld). The parties should have the opportunity of agreeing both upon the figures for interest that should be substituted for those set out in the orders made in the Trial Division, and upon any consequential orders, including orders about costs in the Trial Division and on appeal. In default of agreement, directions should be made for the exchange of written submissions concerning those topics.

[56] The appropriate orders are:

(a) The appeal is allowed insofar as the judgment in the Trial Division includes interest on rates or charges, the recovery of which interest is barred by s 26(5) of the *Limitation of Actions Act* 1974 (Qld).

(b) If the parties are unable to agree upon the appropriate orders to be made consistently with these reasons, including orders as to costs in the Trial Division and in the appeal:

(i) The appellant is to lodge and serve written submissions about those orders by 4.00 pm on 6 March 2018, such submissions to not exceed five pages and otherwise to be in accordance with the Practice Direction.

(ii) The respondent is to lodge and file written submissions not exceeding five pages about those orders by 4.00 pm on 13 March 2018, such submissions to not exceed five pages and otherwise to be in accordance with the Practice Direction.

[57] **PHILIPPIDES JA:** I have had the advantage of reading the reasons of Fraser JA and of Dalton J. I agree with the reasons of Dalton J and with the orders proposed by her Honour.

[58] **DALTON J: Limitation of Actions Point** This proceeding was brought by the Brisbane City Council for "the following amounts for overdue and unpaid rates and interest, as a debt, namely: …"[52] The primary judge described the limitation point raised by the ratepayer as follows:

> "[56] The proceeding was commenced in 24 June 2009. It encompasses claims in respect of overdue and unpaid rates and interest the subject of rates notices issued in the period 30 April 1999 to 9 January 2012. If a 12 year limitation period applies, then no

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52 Prayer for relief, amended statement of claim.

> difficulty arises (except, possibly insofar as the amounts claimed by the Council include opening balances for rates which predate the period pleaded). But if a 6 year limitation period applies, then some of the Council's claims will be statute barred, unless a relevant acknowledgment or part payment of debt has occurred."

[59] The primary judge found that a 12 year limitation period applied. The point is not an easy one, but I have come to the opposite conclusion. I give my reasons why.

[60] The relevant periods of limitation are set out by Fraser JA. Section 10 of the *Limitation of Actions Act* 1974 (Qld) provides that neither actions founded on simple contract, nor actions to recover sums recoverable by virtue of an enactment, may be brought after the expiration of six years from the date on which the cause of action arose. Then at s 26(1) of the Queensland limitation statute, it is provided that an action to recover "a principal sum of money secured by a mortgage or other charge on property" shall not be brought after the expiration of 12 years from the date on which the right to receive the money accrued.

[61] **Action for debt** Regulation 66(1) of the *City of Brisbane (Finance, Plans and Reporting) Regulation* 2010 provides that the respondent Council may recover overdue rates or charges by Court proceedings for debt. In my view the Council's proceeding against Mr Amos clearly fell within this description, and also within the description at s 10(1)(d) of the *Limitation of Actions Act* 1974, that is, the proceeding was to recover sums (rates, charges and interest) recoverable by virtue of enactment.

[62] **Not a specialty** The appellant argued that the proceeding was an action to recover monies due on a specialty, so that ss 10(3), 10(3A) and consequently s 10(1)(d) of the *Limitation of Actions Act* 1974 (Qld) applied. Acts of Parliament are sealed and for that reason actions for amounts due under statute were traditionally regarded as actions on a specialty.[53] However, where the statute in question specifically provides, as this one does, that the sum is recoverable as a debt, s 10(3) and its analogues do not apply.[54]

[63] **Charge on property** Section 97 of the *City of Brisbane Act* 2000 provides in part:

> "(1) This section applies if the owner of rateable land owes the Council for overdue rates and charges.
>
> (2) The overdue rates and charges are a charge on the land.
>
> (3) The Council may register the charge over the land by lodging the following documents with the registrar of titles –
> …"

[64] In my view the appellant's argument that the words "or other charge on property" at s 26(1) of the *Limitation of Actions Act* 1974 were not apt to include the charge created by s 97(2) of the *City of Brisbane Act* 2010 (Qld) must be rejected. A

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53 "Limitation Periods", McGee, Condon, Sweet & Maxwell, 1990 and "The Modern Law of Limitation", Prime and Scanlan, London, Butterworths, 1993, p 119.

54 *Hornsey* (below), and *Dennerley* (below), p 342, and the authorities cited there.

similar argument was rejected in *Gotham v Doodes*.[55] The reasoning there is applicable here: there is a security created which involves property being made liable to the discharge of a debt and the Council is given rights to a realisation of the property to recover the debt. In my view the plain language of s 97(2) creates a charge within the meaning of s 26(1) of the *Limitation Act*. Further, the charge is created by force of the statute when rates or charges become overdue. While there is provision for the Council to register the charge, the charge comes into existence at the time the rates and charges become overdue. This is a matter which flows from the language of the section, and is how similar statutes have been construed – cf. *Hornsey Local Board v Monarch Investment Building Society*.[56]

[65] **Principal sum** Then the defendant says that an action brought pursuant to Regulation 66(1) to recover overdue rates or charges is not an action to recover "a principal sum of money" within the meaning of s 26(1) of the *Limitation of Actions Act* 1974. The appellant relied largely on dictionary definitions of the word principal, particularly in its commercial context, as being, for example, "a capital sum, as distinguished from interest or profit"[57] or, "constituting the original sum invested or lent".[58] In my view this argument must be rejected.

[66] The original statutory analogue to s 26(1) was s 40 of the *Civil Procedure Act* 1833. That was replaced by s 8 of the *Real Property Law Act* 1874. Both these Acts contained two sections relevant to consideration of this point. The sections are identical as between the 1833 Act and the 1874 Act, except that s 8 of the 1874 Act contained a limitation period of 12 years, rather than the 20 year period contained in s 40 of the 1833 Act.

[67] Neither s 40 of the 1833 Act nor s 8 of the 1874 used the words "principal sum". They prohibited an action brought to recover:

> "any sum of money secured by any mortgage, … or otherwise charged upon or payable out of any land after a present right to receive the same shall have accrued to some person capable of giving a discharge for [it] … unless in the meantime some part of the principal money, or some interest thereon, shall have been paid …" (my underlining).

[68] It can be seen that the language and meaning of the 1833 and 1874 sections were close to that of s 26(1) in the sense that they contemplated a sum of money owing which could be described as principal and upon which interest was payable.

[69] More compelling still is the fact that s 42 of the 1833 Act (and a cognate section in the 1874 Act) imposed a six year limitation time on the recovery of arrears of interest "in respect of any sum of money charged upon or payable out of any land …" The historical distinction between principal and interest was based on old thinking connected with land tenure in England at that time. The 1833 Act defined an interest in land as including a share in the proceeds of real estate.[59] Thus, the principal monies due under a mortgage were regarded as something very closely analogous to land and a long limitation period was imposed; interest was a mere

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55 [2007] 1 All ER 527, [26]ff and the authority cited there.
56 (1889) 24 QBD 1, 5, followed in *Gotham v Doodes* (above).
57 Macquarie Dictionary, 5th ed, 2009.
58 Australian Oxford Dictionary, 1999.
59 "Time Limit on Actions" Lightwood, John M, Butterworths, 1909, p 178.

money claim and like other actions for debt had a limitation period of six years. For present purposes, it is clear that while s 40 of the 1833 Act and s 8 of the 1874 Act may not have used the words "principal sum of money", it was necessarily implied in them that they dealt only with the principal sum of money, for a separate section dealt with interest secured on land.

[70] Section 8 of the 1874 Act was the one considered in *Hornsey Local Board* (above). There was no argument raised in that case that a Council's statutory charge for monies owing by a ratepayer did not fall within the section because a statutory debt did not fall within the description of "monies secured by mortgage … or otherwise charged upon … land …". However, several other points about the words of the section were taken and the Court carefully considered the language used in the provision.

[71] The same legislation was considered in *Dennerley v Prestwich Urban District Council*.[60] The Court of Appeal considered the same statutory charging provision and considered whether or not the analogue to s 26(1) of the Queensland Act applied to it. There is some *obiter* consideration of the point (see below) and no suggestion that the Court of Appeal thought that the charge was not within the s 26(1) analogue because there was no lending transaction.

[72] A point regarding the words "principal sum of money"[61] was taken in *Gotham v Doodes* – [29]ff of that case. That case was a mortgage case, but it is noteworthy, and significantly against the appellant, that the judgment in that case examined this point, and *Hornsey*; approved *Hornsey*,[62] and preferred a wide, indeed romantic, construction of the phrase "principal sum of money":

> "The word 'principal' in relation to a sum of money is used to differentiate the original sum or 'tree' from the interest or 'fruit' which it may yield …" – [29].

[73] Having regard to the legislative history outlined, and these three cases, I reject the appellant's argument that the language of s 26(1) does not apply to the statutory charge in this case. In my view the words of s 26(1) are wide enough to comprehend a sum of money consisting of overdue rates and charges as a "principal sum of money".

[74] **Action within description at ss 10(1)(d) and 26(1)** The point is then reached where it may be accepted that the proceeding brought by the respondent Council against the appellant falls within the description of actions found both at ss 10(1)(d) and 26(1) of the *Limitation of Actions Act* 1974. I have not found any case deciding the question of whether it is s 10 or s 26 (or their analogues in other jurisdictions) which applies when action is taken to recover a sum owing by virtue of a statute in circumstances where that sum is secured by a charge on real property. There are however several cases and a well-established position in the textbooks dealing with the closely analogous situation of an action for monies secured by a mortgage. Such an action is based upon the mortgagor's promise to repay. Where this promise is contained in a deed, it is unlikely that any limitation question will arise, for the limitation period for actions based on a deed, is usually the same as the limitation

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60 [1930] 1 KB 334.

61 The language used in the *Limitation Act* 1980 (UK).

62 *Hornsey* has also been cited without disapproval in the House of Lords in *West Bromwich Building Society v Wilkinson* [2005] 4 All ER 97.

period for actions brought to recover a principal sum of money secured by mortgage or charge.[63] There are cases where the promise to pay is not made by deed. All the case authority, and all the textbooks, which I have been able to find on this point, are to the effect that the limitation period is six years – the action is one treated as founded on simple contract or quasi-contract within an analogue to s 10(1)(a) of the *Limitations of Actions Act* 1974 (Qld). I shall now review those authorities; an exercise which involves some history.

[75] **Caution** Before embarking I acknowledge the High Court's statement in *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd*:[64]

> "'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text' (67). So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself."

A case to which reference was there being made was *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)*[65] in which Hayne, Heydon, Crennan and Kiefel JJ said:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention."

[76] The High Court is not saying that context and history are not useful considerations. Here, starting (and finishing) with the text, creates a difficulty because the action commenced by the respondent Council falls within the plain meaning of both ss 10(1)(d) and 26(1) of the *Limitation of Actions Act* 1974. As explained below, I do not believe that the maxim *generalia specialibus non derogant* applies here, but even if it did, maxims such as that "are no substitute for consideration of the whole of the particular text, the construction of which is disputed, and its subject, scope and purpose".[66]

[77] In *Equuscorp Pty Ltd v Lloyd*[67] Warren J dealt with a point analogous to that which arises in this case and interpreted the legislation having regard to history. In doing so she remarked:

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63 Between 1874 and 1939 in England the periods were different, viz., 20 years for the action founded on a specialty and only 12 years to recover principal monies secured by a mortgage. It was this difference which gave rise to the then controversial decision in *Sutton v Sutton*, see below.

64 (2012) 250 CLR 503, 519, [39].

65 (2009) 239 CLR 27, [47].

66 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (above), p 586-7; see also Halsbury's Laws of Australia, 2013, Thomson Reuters, (above) at footnote 5 and the cases cited there. See also *Purcell v Electricity Commission of New South Wales* (1985) 60 ALR 652, 657.

67 [1999] 1 VR 854.

> "There is ample authority that where ambiguity or conflicting interpretation arises in an Act, the common law and the course of the statute may be considered: (see *R v Schloss* [1897] QCR 337; *Miller v Commonwealth* (1904) 1 CLR, 668). … Further, there is a presumption that where a provision has been the subject of judicial consideration before re-enactment, Parliament is presumed to have accepted the judicial interpretation previously made: see *Public Service Association (NSW) v Industrial Commission of NSW* (1985) 1 NSWLR 627 (per Kirby P)." – p 856.

[78] Here, there is a unanimous judicial and academic interpretation of a point which is indistinguishable from the point in issue which favours the appellant's contention that a six year limitation period applied to the City Council's action for rates and charges. Throughout this history there have been Law Reform Commission reports into the limitation statutes in both the United Kingdom and Queensland which have not recommended any change to the received interpretation of the provisions, and limitation statutes enacted after consideration by Law Reform Commissions which have not changed the relevant sections. In those circumstances, I do not think it is open to this Court to construe the 1974 Queensland Act as though it were a piece of legislation without any history.

[79] **History: Statute, Case Law and Textbooks** The *Limitation of Actions Act* 1974 (Qld) is based on the 1960 Queensland Act which was in turn based on English *Limitation Act* 1939.[68] The 1939 Act was the first consolidated limitation statute in the United Kingdom. Relevantly here, it consolidated provisions from 1623 and 1833. After a major review by the English Law Reform Commission, the 1939 Act was re-enacted in 1980 with very few changes and no change relevant to the provisions with which I am concerned.

[80] In England, from 1623[69] "all actions of debt grounded upon any lending or contract without specialty" were to be commenced within six years after the cause of action arose and not later.[70] Then in 1833, s 40 of the *Civil Procedure Act* was enacted. The text of that section can be found in *Doe v Williams*.[71] It introduced a limitation period of 20 years for actions to recover monies secured by a mortgage or charge. By the same Act, the limitation period prescribed for actions to recover money owing pursuant to a specialty was also 20 years.[72] There was little opportunity for conflict between the two provisions, for most mortgages were made by deed.

[81] In 1874, s 8 of the English *Real Property Limitation Act* amended s 40 of the 1833 Act, changing the limitation period from 20 to 12 years. In all other respects the provision remained identical.[73] However, because the limitation periods for actions

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68 See the preamble to the 1960 Act in the Annotated Statutes of Queensland and the Queensland Law Reform Commission Report of 1972, p 3.

69 21 Jac 1, c 16.

70 See the original text of the 1632 provision in Lightwood (above), p 191.

71 (1836) 5 A&E, 291, 294: "No action or suit … shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien or otherwise charged upon or payable out of any land … but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or sum interest thereon, shall have been paid … to the person entitled thereto … and in such case no such action, suit or proceeding shall be brought but within twenty years after such payment or acknowledgment …".

72 3 & 4 Will 4, c 42, *Civil Procedure Act* 1833, s 3, set out at p 194 of Lightwood.

73 The original text of that section is in Lightwood, p 154.

on deeds, and actions for monies secured by mortgage, were now different, the question was "raised afresh" whether or not the 1874 section "barred the remedy against the land only, leaving the remedy on the covenant to the twenty years of the Civil Procedure Act, 1833".[74]

[82] ***Sutton v Sutton*** It is against that background that the decision in *Sutton v Sutton*,[75] "surprised the legal world".[76] Sutton advanced monies to the defendant by deed. More than 12 years after the last repayment pursuant to that deed, Sutton sued on the deed, for monies owing. The defence was that the deed was in fact a deed of mortgage and that therefore the *Real Property Limitation Act* 1874 applied and the action was out of time. Sutton demurred that this defence was bad in law, relying upon the 20 year limitation period in the *Civil Procedure Act* of 1833, and the fact that the action was a personal action for monies owing, not a real action against the land. Chitty J agreed.

[83] Jessel MR, sitting with Cotton and Bowen LJJ in the Court of Appeal, reversed the decision. Jessel MR relied very much on the plain words of the section saying:

> "[The plaintiff's] construction puts words there which are not to be found in the section; and more than that, it gives no meaning to words which are to be found in the section. …" – p 516.

And:

> "Now the words that are material are, 'No action, suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage.' It is impossible to say that those words do not include this sum of money. It is a sum of money secured by a mortgage." – p 516.

[84] ***Barnes v Glenton*** Then came the case of *Barnes v Glenton*.[77] The question of statutory construction in that case was closely analogous to the question in this case. The documentation in that case was convoluted. The plaintiffs took an assignment of some mortgages. Then, separately, a deed of trust was executed which recited that the mortgages belonged in equity to the defendants and that the plaintiffs, at the request of the defendants, had advanced money to the defendants. It was further recited that it had been agreed that the repayment of those monies was to be secured as a first charge on the transferred mortgages. Nowhere in the documentation was any express covenant by the defendants to repay. There was a late suit for monies owing.

[85] The defendants (like the appellant here) claimed that the six year limitation applied because there was no covenant or specialty requiring repayment. Lord Russell of Killowen CJ took the view that the respondent Council urges here. He thought that s 8 of the *Real Property Limitation Act* 1874 applied. Even though the agreement to repay was in a simple contract, he did not think the six year limitation period applied; he thought the money sought to be recovered was money secured by a charge. He said:

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74 Lightwood, above, p 157.
75 (1882) 22 Ch D 511.
76 "The Law of Securities", Edward I Sykes, 4th ed, The Law Book Company Limited, p 892.
77 [1898] 2 QB 223 at first instance, and [1899] 1 QB 885 in the Court of Appeal.

> "I think the effect of this s 8 [1874] is to take out of 21 Jac 1, c 16 [1623], for all purposes all actions of debt secured by mortgage or otherwise charged upon or payable out of land." – p 230.

[86] That decision was reversed in the Court of Appeal. Against the history of the legislation, the decisions of the judges of the Court of Appeal are easily understood. The judgments in my view have a formidable logic. AL Smith LJ said:

> "There is no controversy in this case as to the facts. The action was brought upon a simple contract debt. The loan was secured by a charge on land, and the action was not brought within six years after the right of action first accrued. The question is whether the Real Property Limitation Acts, 1833 and 1874, have repealed the provisions of 21 Jac 1, c 16, s 3, which allows a debtor, in cases where the creditor has slept on his rights for six years, to set up the statute as an answer to the claim made against him. It is clear that the statute of James was passed in favour of debtors, because by it they were allowed to plead the lapse of six years as a bar to an action. Where is to be found, in the statutes of William IV [1833 Act] and of the Queen [1874 Act], that this right is taken away? I cannot find anything to that effect; and, in my opinion, the case of a simple contract debt is not affected by the later statutes."

[87] Collins LJ made a similar explanation:

> "In order to appreciate the point, it is necessary to see how the law stood before the Act of William IV, for the Act of 1874 only cuts down the period named in the earlier Act. Under the statute of James, in case of a simple contract debt, the period of limitation was six years. At the time the statute of William IV was passed the claim of a creditor was barred on a simple contract debt after six years. That [1833] Act was passed to cut down and not to extend the rights of creditors. In a compendious section, which I will assume is large enough to embrace a simple contract to pay a sum charged on land, it limits to twenty years the period in which all proceedings covered by the section must be brought. But a certain class of the proceedings covered are already subject to the six years' limitation of the Act of James. How can the later enactment, by imposing a limitation of twenty years over a larger area, enlarge the period already defined as the limitation for a particular part of that area, namely, simple contracts? The words of the section [1833 Act] debar the creditor from proceeding after twenty years; they do not confer any right of suit upon him which he did not before possess. The statutory prohibition against taking proceedings after the period named [in the 1833 Act] is not a statutory permission given to take them within that period, and it does not remove the existing fetter imposed in the case of simple contracts by the Act of James. The debtor is entitled to the benefit of either Act whenever the case falls within it." – p 889.

[88] Romer LJ was of the same mind:

> "Consider how matters stood prior to the statute 3 & 4 Will 4, c 27 [1833]. If an action was brought on a simple contract debt the statute

> of James could be pleaded. The money sought to be recovered, though charged on land, could not be enforced, against the person who had undertaken to pay it, after the expiration of six years; but the remedy against the land would not have been barred under that statute. There could, therefore, have been a case in which the personal remedy was barred, but not the remedy against the land. That this was the position of things is clear from the cases of *Toplis v Baker* and *Brocklehurst v Jessop.* Then came the statute of William IV, altered as to the period of limitation by the statute of 1874, … Now it is to be observed that the Acts of William IV and of 1874 were not intended to take away from debtors any rights, or to give any additional rights to creditors. On the contrary, the intention was to give further rights to debtors to oppose the claims of creditors after the lapse of a certain time. The statutes do not say that debts may be recovered under certain conditions, but they negative the rights of creditors to bring actions after a certain time has elapsed. They were not intended to repeal the statute of James, and do not repeal it, so far as relates to simple contract debts charged on land, either expressly or impliedly." – pp 890-891. (citations omitted)

[89] All three judges distinguished *Sutton v Sutton* on the basis that it related to a covenant in a mortgage deed, not a simple debt. And this can be seen to be correctly based when the facts of the two cases are compared.

[90] **Shorter Period Applied** It might be remarked that the fundamental similarity between *Sutton v Sutton* and *Barnes v Glenton* is that both applied the shorter period of limitation in circumstances where a cause of action fell within the description in two limitation provisions. That is in my view a recognition of, and a consequence of, two matters raised in the judgments of the Court of Appeal in *Barnes v Glenton*. First, the limitation periods establish prohibitions; they do not set periods within which a suit is permitted. Secondly, the prohibition is in favour of the debtor; at the time the first limitation periods ends, the debtor accrues the right to plead the statutory defence.[78]

[91] **Case Law Established** The law, as expounded in *Sutton v Sutton* and *Barnes v Glenton* has stood until the present day. It has rarely been challenged, but I will now review those cases where relevant points have been raised.

[92] The precise matter for decision in this case was almost raised by the facts in *Dennerley v Prestwich Urban District Council* (above). There, when a ratepayer failed to pay an amount due under statute, the defendant Council became entitled to a statutory charge on the land. The statute gave the right to recover the amount "as a simple contract debt". It was argued that this meant that the six year limitation period applied.[79] The Court, however, was relieved from deciding whether the six year limitation period, or the 12 year limitation period, applied (by reason that the legislation gave a charge on the land). It was determined that no cause of action accrued until demand was made. That decision meant that the choice between the six year and 12 year limitation periods did not arise. However, all three members of

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78 - p 887. Note the similar statement in the 1972 Queensland Law Reform Commission Report to the effect that the law of limitations is "principally for the benefit of defendants" – p 7.

79 Otherwise an amount due under statute was regarded as based on a specialty and having a 12 year limitation period – see *Dennerley*, p 342 and the authorities cited there.

the Court made *obiter* statements accepting the position established in *Barnes v Glenton*, ie., in favour of the appellant's position.

[93] Scrutton LJ noted that the plaintiff contended for the application of a 12 year period on the basis of *Sutton v Sutton*. In a way which is dismissive of that point he said, "The decision of *Sutton v Sutton* was treated by the Court of Appeal in *Barnes v Glenton* as deciding a very limited point." – p 343. Greer LJ expressed the view that the six year limitation period, not the 12 year limitation period, applied on the basis of what was said in *Barnes v Glenton* in the Court of Appeal – p 346. Slesser LJ gave quite full consideration to the point, p 349ff. His view was that the statute created a simple debt without specialty. The question then arose whether or not the six year or 12 year limitation period applied. Slesser LJ said:

> "… I have come to the conclusion that the sum here due as a simple contract debt is not a sum of money charged on or payable out of land. The personal remedy on a simple contract debt charged on land is still given by the Limitation Act of 1623 and the period of limitation is six years from the accrual of the cause of action: *Barnes v Glenton*, distinguishing *Sutton v Sutton.* ...[T]he Statute of Limitations of James I and no other can properly be applied in this case." – pp 350-351.

[94] *Sutton v Sutton* was reaffirmed in *Bristol and West plc v Bartlett & Anor*.[80] There the Court of Appeal dealt with three cases each concerning a mortgage made by deed – [6], [8] and [10]. So the point at issue in this case did not arise: the limitation period was 12 years whichever section applied.

[95] In *Equuscorp Pty Ltd v Lloyd* (above) Warren J dealt with a case of a simple debt charged on land. She interpreted the legislation in that state having regard to the history which I have outlined; followed *Barnes v Glenton* in the Court of Appeal, and decided that a six year limitation period applied.

[96] Other than this there has been little consideration of the point in the cases. There is early Victorian authority which is considered by Warren J in *Equuscorp*, but it is really beside the point which arises here. Tipping J retraced the history from *Sutton v Sutton* in *DFC New Zealand Ltd v McKenzie*.[81] However, once again, the point for determination there was a slightly different one to the point with which this Court is concerned. I turn to the position as described in the textbooks.

[97] **Textbooks** In 1909 Lightwood summarised the position as follows:

> "The doctrine of *Sutton v Sutton* is based upon the express language of sect. 8 of the RPLA, 1874. The limitation of that section is upon all actions to recover money charged upon land, and hence it applies to an action upon a covenant for payment of money so charged, and it reduces to twelve years the period of twenty years which would otherwise be allowed on the covenant. But when a simple contract debt is charged on land, the limitation on the personal remedy is six years under the Limitation Act, 1623, and this is not extended to the twelve years of sect. 8 in analogy to *Sutton v Sutton, Barnes v*

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80 [2003] 1 WLR 284.

81 [1993] 2 NZLR 576, 585.

> *Glenton.* ... Nor is the remedy against the land reduced to six years. The two remedies have different periods of limitation …"[82]

[98] Michael Franks' book "Limitation of Actions"[83] was published in London in 1959. He states the law this way:

> "**Promise to pay.** In many cases the mortgagor or chargor expressly undertakes to pay, and such undertaking will often be by covenant. An action on such a covenant would fall both within the present category [principal sums secured on property] and within that comprising actions upon specialties; but the overlap causes no serious conflict since the limitation period in both cases is twelve years. Where, however, the undertaking to pay is not under seal, being a simple contractual obligation (for which the limitation period is six years only), the position seems to be that though the action on the contract will be barred after that period, the mortgagee or chargee will have twelve years to pursue his other remedies."

The authority cited for the last proposition is *Barnes v Glenton* in the Court of Appeal.

[99] By the time Franks was writing in 1959 the English Acts had been consolidated into the *Limitation Act* 1939, upon which the Queensland Act is based. The English Act was replaced in 1980, but with few changes, and no changes material to the present point.[84]

[100] Halsbury's Laws of England in 1911 said:

> "**142.** The personal remedy on a simple contract debt charged on land is still governed by the Limitation Act, 1623, and the period of limitation is six years from the accrual of the cause of action, but the remedy against the land is governed by the Real Property Limitation Act, 1874, and the period of limitation is twelve years."[85]

[101] The 1958 and 2016 editions said:

> "It seems that the twelve-year period of limitation under [the provision dealing with principal sums secured by mortgage or charge] does not extend to the personal remedy in simple contract, as distinct from any remedy to enforce the charge, where payment of a simple contract debt is secured on property without any document under seal; in the ordinary case of a charge by deed no such question can normally arise as the periods of limitation on the contract and on the security are both twelve-year periods."[86]

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82 Above, pp 157-158, citations omitted.

83 London, Sweet & Maxwell, 1959, pp 163-164 (citations omitted).

84 See the history of the English legislation in "Preston and Newsom's Limitation of Actions", 4th ed, John Weeks QC, Longman, 1989. Incidentally, Weeks QC describes Franks' 1959 book as the only general text on limitations in the United Kingdom at that point. Even more incidentally, Weeks' book contains the epigraph: "A man's gotta know his limitations", Eastwood C.

85 Halsbury's Laws of England, 1st ed, Butterworth & Co, 1911, p 84, citations omitted.

86 Halsbury's Laws of England, 3rd ed, Butterworth & Co, 1958, p 264, and Halsbury's Laws of England, 5th ed, LexisNexis, 2016, p 330, citations omitted.

[102] Coote's Law of Mortgages published in 1927 says of the limit on recovery of principal moneys charged on lands:

> "This enactment is not applicable to actions to recover the land itself, but to actions brought to recover the money; and these actions, in the case of mortgages, are brought either upon the covenant inserted in the mortgage deed, or upon the bond which accompanies the deed, or, in the absence of any such covenant or bond, by action of debt."[87]

[103] Further, still dealing with the same limitation section:

> "Thus, in the case of a security on land by simple deposit of deeds, or of a mortgage deed not containing any covenant to secure payment, the mortgagee can only bring against the mortgagor personally an action for debt on simple contract, which latter action must be brought within six years after the cause of action has arisen, except in cases of disability, or unless the debt has been admitted by part payment or acknowledgment in writing. But though the personal remedy is barred, the remedy against the land continues."[88]

[104] Fisher and Lightwood's Law of Mortgage, published in 1969, said:

> "… An action on the mortgagor's covenant for payment of the principal money secured by the mortgage may not be brought after twelve years from the date when the cause of action accrued, if the mortgage is by deed, or after six years if the mortgage is not by deed."[89]

[105] More clearly still, in 2002:

> "Accordingly, so far as the mortgagee's remedy in simple contract, as distinct from enforcement of the charge, is concerned, a claim on the mortgagor's covenant for payment of the principal money secured by the mortgage may not be brought after 12 years from the date when the cause of action accrued, if the mortgage is by deed, or after six years if the mortgage is not by deed."[90]

[106] **Law Reform Commissions** The Law Reform Committee of the United Kingdom reported on limitation of actions in 1974.[91] Under the heading "Mortgages" this report included the following paragraphs:

> "3.65 Under section 18 of the Limitation Act 1939 there is a 12-year limitation period for an action to recover the principal sum secured by a mortgage and a six-year limitation period applicable to an action to recover arrears of interest. In our consultative document we asked for views on the appropriateness of these two limitation periods; we also enquired whether any of the provisions of the Limitation Act relevant to mortgages caused particular difficulty.

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87 Coote's Law of Mortgages, 9th ed, 1927, Vol 2, p 1001.

88 Above, pp 1004-1005.

89 "Fisher and Lightwood's Law of Mortgage", 8th ed, 1969, London Butterworths, p 237, citations omitted.

90 "Fisher and Lightwood's Law of Mortgage", 11th ed, LexisNexis, 2002, p 413, citations omitted.

91 The report is reproduced in Preston and Newsom (above), p 123, with the particular point of interest being at p 171.

> 3.66 The response we received to our enquiries showed that there was general approval of the 12-and six-year periods. The action to recover the principal was considered by those who expressed views on the point to be analogous to a claim for the recovery of land (though section 16 applies also to mortgages of personal property), while an action to recover interest was considered to be indistinguishable from a claim to recover any other debt. We agree with these views and therefore recommend that, as long as the limitation periods applicable to actions for the recovery of land and actions for the recovery of debts remain 12 and six years respectively, the same periods should apply to actions to recover the principal and interest due under a mortgage.
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> …
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> 3.70 Accordingly, we do not recommend that the law of limitation as it applies to mortgages should be in any way altered."

[107] The Law Reform Commission report does not mention the difficulty which arises in this case. However, its statement of the law at paragraphs 3.65 and 3.66 is consistent with both *Barnes v Glenton* and *Sutton v Sutton*.

[108] The potential difficulty of the interaction between analogues to s 10(1) and s 26(1) of the Queensland Act had been squarely raised in the case law before the 1939 English Act was passed. The position was settled in a way which favours the appellant. Against that background, the 1939 English Act left the position as it was. By way of contrast, it provided for the resolution of other potential conflicts at s 2(3),[92] which provision was included in the Queensland Acts of 1960 and 1974. The position remained settled both in the case law and the texts between 1939 and 1975 when the Law Reform Commission of the United Kingdom reported. The position was maintained in the *Limitation Act* 1980 (UK). The Law Reform Commission in Queensland reported in 1972 and did not mention the problem which arises in this case.

Generalia specialibus non derogant

[109] The respondent Council relied upon a comment made by McPherson J in *Australia and New Zealand Banking Group Ltd v Douglas Morris Investments Pty Ltd*.[93] That was a case in which there was a charge over shares given by deed. Whether s 10(3) or s 26(1) of the *Limitation of Actions Act* 1974 (Qld) applied, the limitation period was 12 years. Dowsett J was the trial judge and he recorded that the matter before him proceeded on the basis that the provision as to deeds – s 10(3) – applied, rather than s 26(1). McPherson J said:

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92 The English *Limitation Act* 1939 provided as follows at s 2:

"**2.** – (1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:-

(a) actions founded on simple contract …

(3) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued:

Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act." (my underlining)

93 [1992] 1 Qd R 478, 482-483.

> "I am in no doubt that, in an action on the scrip lien to recover the amount due to the bank, s 26(1) is the applicable limitation provision to the exclusion of those specified in s 10(1) and s 10(3). Both s 10(3) and s 26(1) do, in any event, prescribe a 12 year period, but the latter is the specific and therefore governing provision. Cf. *Barnes v Glenton* [1898] 2 QB 223."

[110] The decision in *Barnes v Glenton* to which McPherson J referred, was reversed on appeal and it seems that McPherson J was aware of that.[94] The result of the *Douglas Morris* case did not turn on this point, so the comment is *obiter*. It is unlikely that there was any detailed argument about the matter.

[111] As will be apparent from my review of the authorities, difficulties concerning the potential field of overlap between the analogues to s 10(1) and s 26(1) have not been resolved according to the rule *generalia specialibus non derogant*, but by overriding considerations as to history and purpose.[95] And indeed that is consistent with the nature and application of the *generalia specialibus* rule.[96]

[112] Halsbury's Laws of Australia[97] describes the maxim as expressing the "primacy of specific provisions over general ones" and as being based on ordinary English usage and common sense. In *Barker v Edger*[98] the rule was stated this way:

> "When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly."

[113] That statement of the rule was the starting point for discussion in the judgment of Knox CJ in *The Bank Officials' Association (SA Branch) v The Savings Bank of South Australia*.[99] From the continued discussion in that judgment it is clear that the rule was very much understood as meaning that later, general legislation was not meant to impliedly repeal or derogate from earlier legislation which was specific. Isaacs and Rich JJ were to similar effect, citing *Blackpool Corporation v Starr Estate Co*:

> "Wherever Parliament in an earlier statute has directed its attention to an individual case for and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the Legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the Legislature

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94 See his reference to the Court of Appeal decision at p 493 of *Douglas Morris*.

95 Although it must be admitted that the trial judge in *Barnes v Glenton* did so, as McPherson J recognised. In *Bristol and West plc* (above) it was said: "… *Sutton v Sutton* … is an express authority that the specific limitation provisions relating to mortgages take precedence over the general provisions relating to specialties." – [27]. In fact, *Sutton v Sutton* was not decided on the basis that one provision was more specific than the other, but on the basis that the action in question fell within the clear words of the provision which contained the shorter period of limitation and thus operated first to provide a defence to the debtor – see the reasoning extracted above.

96 See "Statutory Interpretation", Pearce, DC, Butterworths, 1974, [146]-[148].

97 Above, [25.1.1890].

98 [1898] AC 748, 754.

99 (1923) 32 CLR 276, 282.

had before provided for individually, unless an intention to do so is specially declared."[100]

[114] Then in *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation*[101] Dixon J recognised that the principle also applied "to the interpretation of a single statute containing a special and general provision". In *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*, Gummow and Hayne JJ go on to say that while it is a "large step" to read one statute as abrogated by another, where only one statute is being construed, it is another thing to say that one provision of that statute is "insusceptible of exercise in certain factual circumstances".[102] One can readily accept that is so.

[115] Before the maxim can apply, the two statutory provisions under consideration must deal with the same subject matter, and one must be more specific than the other.

[116] In my view this is not an appropriate case for the application of the maxim. First, s 10(1)(d) and s 26(1) do not deal with the same subject matter. Section 10(1)(d) deals with actions to recover sums "recoverable by virtue of any enactment". Section 26(1) deals with actions to recover principal sums of monies secured by a mortgage or charge on property and actions to recover proceeds of the sale of land. As this case illustrates, it may be that an action falls within both these descriptions. But I think it is wrong to conclude from that that the sections deal with the same subject matter.

[117] Secondly, I accept the appellant's submission that it is wrong to characterise one of these sections as specific and one as general. Again, I do not think the logical starting point for such conclusion can be the facts of this particular case, from where one might erroneously reason that actions to recover sums by virtue of statute must be a more general class than actions to recover sums by virtue of statute which sums are also charged on land. The starting point must be a consideration of each of the sections. The Council's argument must be that actions to recover sums by virtue of statute form a more general class than actions to recover principal sums of monies secured by a mortgage or charge. I do not know this. Nor do I know the reverse proposition to be true. I do not think it can be said that either section describes a class of actions which is more specific than the other describes.

[118] Thirdly, I do not think the resolution of issues in this case should be governed by application of a maxim in circumstances where the dispute is in the context of the legislative history and case law which I have set out above.[103]

[119] Lastly, I think the appellant is correct in emphasising that the point at issue is to be resolved by looking to the purpose of the limitation provisions in issue. The provisions do not permit action within a certain time limit; they prohibit the bringing of an action after a certain time has passed.[104] At a point six years after the right to recover the statutory sum accrued, s 10(1)(d) gave the appellant a good

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100 [1922] 1 AC 27, 34, cited at p 289 of *Bank Officials' Association*.

101 (1948) 77 CLR 1, 29, cited in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, 585 per Gummow and Hayne JJ.

102 Above, p 586.

103 See the authorities at footnotes 15 and 45 above.

104 See the statement per Romer LJ in *Barnes v Glenton* at p 891, "The Statutes do not say that debts may be recovered under certain conditions, but they negative the rights of creditors to bring actions after a certain time has elapsed."

defence to any action which the Council then began. In my view this is the reason for the matter I remarked upon at [90] above, viz., that in both *Barnes v Glenton* and *Sutton v Sutton* the common factor was that the shorter limitation period prevailed. In my view this was recognised in the judgment of Mummery LJ in *Wilkinson v West Bromwich Building Society*:[105]

> "Sutton decided two important general points.
>
> (1) It was recognised in the judgments (see pp515-516, 520), that, even if the mortgage deed did not contain an express covenant and there was no accompanying or collateral bond for payment, the court could, depending on the circumstances and as a matter of construction, imply a covenant to repay the amount advanced. Although a covenant is not implied from the mere fact of a charge on the land, it can be implied from, for example, the fact that the money is to be repaid on a certain day. In the case of an express or implied covenant to repay the principal the limitation period is 12 years. It was, however, held in a later case that, if the action was brought to recover a simple contract debt, which is also charged on the land, the limitation period was still the shorter period of 6 years specified for contract claims in s3 of the Limitation Act 1623 (now contained in s5 of the 1980 Act). The 6 year period for simple contract was not enlarged to 12 years by s 8 of the 1874 Act. That provision was prohibitory and was enacted to limit, not to enlarge, existing limitation periods relating to the recovery of debts charged on land: Barnes v Glenton [1899] 1 QB 885.
>
> …" (my underlining)

[120] And:

> "Encouraged by some remarks from the Bench when this appeal first came on for hearing on 3 March 2004 counsel have thoroughly researched the authorities on the impact of the previous Limitation Acts on the cumulative rights and remedies of mortgagees. While it is important never to lose sight of the provisions of this particular legal charge or of the 1980 Act, the general principles derived from authorities on the earlier Limitation Acts are relevant to the approach to the construction of the mortgage deed and to the interpretation of the 1980 Act and its application to the facts of this case. This is one of those areas of the law in which, without some reference to the earlier legislation and the decisions on its interpretation, it is not easy to understand the interaction of the current statutory provisions."

Interest and the Application of s 26(5) of the *Limitation of Actions Act* 1974

[121] Having regard to my conclusions as to the applicability of s 10(1)(d), it is not necessary for me to address this point.

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105 [2004] EWCA (Civ) 1063, [31], and [27].

[122] So far as this third ground of appeal is concerned I agree with the reasons expressed by Fraser JA.

Proposed Orders

[123] The effect of my view about the applicability of s 10(1)(d) of the *Limitation of Actions Act* 1974 (Qld) is that some, but not all, of the respondent Council's claims are time-barred. It is not clear from the material before this Court what precise result that would produce. No doubt for that reason the notice of appeal seeks orders: (1) allowing the appeal; (2) setting aside the judgment in the Trial Division, and (3) substituting judgment for the respondent Council in a sum to be calculated. In my view, this Court should make the first two of those orders and direct the parties bring in a minute of the judgment which should have been given, showing the sum which is calculated having regard to this Court's decision.

[124] The respondent ought pay the costs of this appeal. The question of what should become of costs of the proceeding the Trial Division is more difficult. I would be inclined to make no order as to those costs in view of the delay of the respondent Council both in collecting rates in the first instance, and prosecuting the proceedings once begun, and in view of the fact that it will only be partially successful as a result of that delay.