IN THE HIGH COURT OF AUSTRALIA
BRISBANEREGISTRY

No. B47 of 2018

BETWEEN:

BRISBANE CITY COUNCIL
Appellant

and

EDWARD AMOS
Respondent

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APPELLANT'S REPLY

I. Publication

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

II. Reply to Respondent's Submissions

Alleged failure to raise the issues in 2(c) – whether s26(5) is applicable.

2. The majority in the Court of Appeal (Philippides JA and Dalton J) found it was not necessary to address s26(5) of the *Limitations of Actions Act 1974* (Qld) (**the *Limitations Act***), because of the conclusions as to the application of s10(1)(d).[1] However, if the Appellant is successful on this appeal such that s26 of the *Limitations Act* is the appropriate period of limitation, then consideration should be given to the application of s26(5) of the *Limitations Act*.

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3. The Appellant expressly stated in the Reply to the Response on the Application for Special Leave to Appeal (at [13]), that this issue would be developed if special leave was granted. Properly it flows from and is part of the application of s26(1) of the *Limitations Act*. Further, the Orders sought by the Appellant are that the Respondent's appeal, in the court below, be dismissed. Hence that will (effectively) re-instate the Orders of the primary judge, which held that s26(5) had no operation.[2]

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1 Core Appeal Book at 71, [121].
2 Core Appeal Book at 19, [66]-[67].

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4. As such, this issue does squarely arise for consideration and the Appellant relies on its primary submissions.

Legislative History, Texts and Statutory Construction

5. This Court has recently confirmed that "*(t)he starting point for ascertainment of the meaning of a statutory provision is, of course, the text of the provisions considered in light of its context and purpose.*"[3] That is the course the Appellant has followed.

6. Some caution should be exercised when relying upon the presumption that re-enactment of provisions after judicial consideration carry the same meaning. There can be circumstances when it is artificial to attribute to Parliament a consciousness of a particular judicial interpretation which might have been placed upon an expression, perhaps many years before and in a different context.[4] Further, an approach based on this presumption should not lead the Court to enshrine a construction of a statutory provision which is considered to be erroneous.[5] As such, even if *Sutton v Sutton*[6] and *Barnes v Glenton*[7] do stand for the principal relied upon by the Respondent (which as explained below is not the case), they should not be followed. However, as they do not support the Respondent's construction there is nothing meaningfully helpful to the Respondent in identifying the history of the enactments of the limitation provisions before and after those decisions.

Particular Authorities relied upon by the Respondent

7. *Sutton v Sutton*[8] is of no real assistance. There was only one limitation provision directly under consideration and the issue was whether it applied: not how its application was to be reconciled with any other statutory limitation period. The case decided that s 8 of the *Real Property Limitation Act 1874* (Eng), which provided that 'No action or suit or other proceedings shall be brought to recover any sum of money secured by any mortgage…or otherwise charged upon or payable out of any land' was not limited to recovery out of the rents from or proceeds of sale of the land but extended to bar recovery under the covenant to repay in the mortgage.[9] It contains no statement of principle relevant to the present case.

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3 *SAS Trustee Corporation v Miles* [2018] HCA 55; (2018) 92 ALJR 1064 at [20] per Kiefel CJ, Bell and Nettle JJ, also see Gageler J at [41].

4 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at [8]; *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 at [108].

5 *Georgopoulos v Silaforts Painting Pty Ltd* [2012] VSCA 179; 37 VR 232 at [40]. See also Pearce & Geddes *Statutory Interpretation in Australia* 8th edition at [3.43] and see the additional qualifications to the presumption at [3.45]-[3.50].

6 (1882) 22 Ch D 511.

7 [1899] 1 QB 885.

8 (1882) 22 Ch D 511.

9 *Sutton v Sutton* (1882) 22 Ch D 511 at 516-517 per Jessel MR; at 519 per Cotton LJ; and at 520 per

8. *Barnes v Glenton*,[10] is also of little assistance. In that case, each member of the Court of Appeal[11] stated in the opening paragraph of the reasons that the action was brought upon a simple contract debt. The judgment appealed was the one against Mr Lewis, who at the time the loan was effected and secured, was a trustee, but who had retired shortly thereafter. The case proceeded on the basis that any liability of Mr Lewis was pursuant to a simple contract for a loan[12] and hence the relevant limitation to that action applied; that was 6 years. As observed by Fraser JA in the present case, at [40][13] "... *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.'*

10 9. The Respondent's reliance on *Equuscorp Pty Ltd v Lloyd*[14] is misplaced. Warren J (as her Honour then was) described the issue as follows:

> *"[9] The issue for this court to determine is whether the learned magistrate was correct in characterising the claim as one for a simple contract debt under s5 of the Limitation of Actions Act and, therefore statute barred or whether he ought to have treated the claim as one for a sum of money secured by a mortgage on property and, therefore, within time."*

10. In *Equuscorp* the Court considered a loan agreement which contained a clause that the parties had agreed to enter into a mortgage. However (and importantly) that mortgage was never effected.[15] Accordingly Warren J concluded 'it was open to the learned
20 magistrate to find that s5 of the *Limitations of Actions Act* 1958 (Vic) was the relevant provision as there was no evidence before him to establish that there was, in any event, a mortgage that entitled the plaintiff, Equuscorp, to rely upon s20 of that Act'.[16] This observation is consistent with the approach urged by the Appellant here, but unnecessary on the Respondent's approach.[17]

11. The Respondent has also referred to *Australian and New Zealand Banking Group Limited –v– Douglas Morris Investments Pty Ltd* [1992] 1 Qd R 478 (***ANZ v Douglas Morris***), and suggests that what was there said as to the operation of ss 10(1), 10(3) and 26 was

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Bowen LJ.

10 [1899] 1 QB 885.

11 *Barnes v Glenton* [1899] 1 QB 885 at 887, 889 and 890.

12 The mortgages over land were held initially in the name of a Mrs Barber and transferred to the plaintiffs by a deed to which Mr Lewis was not a party. The deed to which he was a party recited a first charge over the money or interest received under the mortgages: see first instance decision at [1898] 2 QB 223 at 224. The obiter remarks of Collins LJ at 889 and Romer LJ at 891 are to be read in light of their Lordships' characterisation of the action as one on a simple contract. Compare the reasons of AL Smith LJ at 888.

13 Core Appeal Book at 52.

14 [1998] VSC 171; [1999] 1 VR 854 per Warren J.

15 *Equuscorp Pty Ltd v Lloyd* [1998] VSC 171; [1999] 1 VR 854 at [4] per Warren J.

16 *Equuscorp Pty Ltd v Lloyd* [1999] 1 VR 854 at [25] page 860.

17 Which Fraser JA in minority accepted; Core Appeal book at 51, [38]. Also see Dal Pont, *Law of Limitation*, LexisNexis, 2016, at [9.11], p209.

obiter dicta.[18] That is not a proper reading of the decision. Justice McPherson (with whom Justices Connolly and Williams agreed) expressly adverted to the possible operation of each of those sections and concluded that s26(1) was 'the governing provision'.[19] His Honour then identified the date of the commencement of the limitation period by reference to the language of s26(1) and not s10(3).[20] Subsequently, his Honour applied s26(5), and not sections 10(1) or 10(3), to determine the recoverability of interest.[21] This reasoning cannot be dismissed as obiter. The *Limitations Act* has been subsequently amended without Parliament seeking to disturb this construction of the operation of s26.[22]

10 **The Correct Approach**

12. On a proper characterisation of the Appellant's *action,* it was one (at least) to recover a principal sum of money secured by charge, and hence s26 of the *Limitations Act* applied to determine if that action was barred. That a different or separate *action* may have been available to the Appellant by seeking to recover a sum by virtue of any enactment (which action would have been barred by s10(1)(d)) does not operate on the *action* within the express subject matter of s26 of the *Limitations Act.*

13. Contrary to the Respondent's suggestion,[23] this does not require any re-drafting of the *Limitations Act*, or for additional words to be read into the legislation. The approach is to identify whether the particular kind of action the subject of consideration is barred.

20 14. The error in the Respondent's approach (and that of the majority below) is that it starts (correctly) with the proposition that limitation periods do not permit an action to be brought, but prohibit an action being brought after a certain time has passed. However, it is then said that because two (or more) limitation periods can be applicable, you simply the apply the shorter period of limitation. That turns a prohibition applicable to a particular action into a prohibition on all possible actions. Parliament did not employ that language (and indeed such an approach renders s 26(1) largely, if not entirely, otiose).

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18 Respondent's Submissions at [64].
19 *ANZ v Douglas Morris* at 483.
20 *ANZ v Douglas Morris* at 483, line 15 and 490, line 36.
21 *ANZ v Douglas Morris* at 492.
22 *Limitation of Actions Amendment Act 1993* No. 64; *Choice of Law (Limitations Periods) Act 1996* No. 5; *Mental Health Act 2000* No. 16; *Justice and Other Legislation (Miscellaneous Provisions) Act 2002* No. 34; *Civil Liability (Dust Diseases) and Other Legislation Amendment Act 2005* No. 43; *Defamation Act 2005* No. 55; *Justice and Other Legislation Amendment Act 2007* No. 37; *Corrective Services and Other Legislation Amendment Act 2008* No. 53; *Civil Liability and Other Legislation Amendment Act 2010* No. 9; *Justice and Other Legislation Amendment Act 2010* No. 42; *Forensic Disability Act 2011* No. 13; *Mental Health Act 2016* No. 5; *Limitation of Actions (Child Sexual Abuse) and Other Legislation Amendment Act 2016* No. 59.
23 Respondent's Submissions at [11]-[14].

15. Indeed, merely to apply the shorter of two limitation periods is inconsistent with the Respondent's apparent acceptance that ss10(1)(d) and 26(1) do not deal with the same subject matter.[24] The orthodox approach to statutory construction in that situation would be to characterise the action and determine whether it falls within the subject matter of s 26(1) or s10(1)(d).

16. The Respondent submits that the present matter is one where there is only one *cause of action*.[25] Even assuming that is so, it does not afford a basis for concluding that an action which is of the kind contemplated by s26(1) pursued in furtherance of that cause of action is barred by the operation of s10(1)(d).

17. But in any event, while there is a body of overlapping facts giving rise to a claim for a sum due under an enactment and a claim for the principal sum secured by a charge (where the charge is of statutory origin) they comprise different causes of action. That overlap is not contrary to the notions of separate causes of action.[26] Only the latter depends on the existence of the charge, which secures the principal sum to be recovered. The actions the subject of s10(1)(d) and 26(1) also arise at different times.[27]

18. The Appellant seeks the Orders as set out in the Appellant's Submissions.

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24 As the Respondent seems to suggest at [68].
25 Respondent's Submissions at [55]-[56].
26 *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732 at [49].
27 Appellant's Submissions at [45].