HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number:	B55/2020
File Title:	Matthew Ward Price as Executor of the Estate of Alan Leslie P
Registry:	Brisbane
Document filed:	Form 27F - Outline of oral argument
Filing party:	Appellants
Date filed:	03 Mar 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY No. B55 of 2020

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND

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

First Appellant

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

Second Appellant

Allanna Marcia Price

Third Appellant

James Burns Price

Fourth Appellant

Gladys Ethel Price by her litigation guardian Erin Elizabeth Turner

Fifth Appellant

and

Christine Claire Spoor as trustee

First Respondent

Kerry John Spoor as trustee

Second Respondent

Marianne Piening

Third Respondent

Frederick Piening

Fourth Respondent

Joyce Higgins

Fifth Respondent

Cheryl Thompson

Sixth Respondent

10 **Joyce Mavis Coomber**

Seventh Respondent

Angus Macqueen and Angus Macqueen as trustee

Eighth and Ninth Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

PART I – CERTIFICATION

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

PART II – OUTLINE OF ORAL SUBMISSIONS

2. In the table that follows, these abbreviations are used:

   (a) **AS** refers to the appellants' written submissions filed 30 October 2020;

   (b) **AR** refers to the appellants' written submissions in reply filed 17 December 2020.

APPELLANTS' PRIMARY SUBMISSIONS		
#	**Proposition**	**Submissions Reference**
1	Statement of facts	AS [5]-[11]
2	Clause 24 incorporated into the mortgages	AS [12]
3	Approach of primary judge (Dalton J)	AS [9]-[10]
4	Approach of Gotterson JA in Queensland Court of Appeal (Sofronoff P and Morrison JA concurring)	AS [11]
5	Preferable construction of clause 24	
5(a)	Contracting out of a statute is not permitted where those arrangements will defeat or circumvent a statutory purpose or policy according to which rights are conferred in the public interest	AS [21]-[30]
5(b)	In order to contract out of a statute effectively, the language of the contract must use "strong words"	AS [16]
5(c)	Clause 24, understood according to its objective meaning, does not use words that contract out of the Limitation Act effectively and, in any event, does not use "strong words" to do so	AS [15]-[17] AR [3]-[6]
5(d)	The language of clause 24 is ambiguous and, as such, recourse to the *contra proferentem* canon is justified, so that the clause should be construed against the interests of the respondents for whose benefit it was inserted	AS [19] AR [9]
5(e)	The use of the word "defeat" by different judges in different matters to describe the effect of the Limitation Act is neither relevant to, nor determinative of, the preferable construction of clause 24	AR [7]
5(f)	The provisions of the Limitation Act do not "defeat"	AS [43]-[45]

	the respondents' rights or remedies; to the contrary, it is only the appellants' pleading of the limitation defence created by that Act, and the right to plead it conferred upon them, that "defeats" the rights or remedies	AR [3]-[6]
5(g)	The respondents' construction of clause 24 that the respondents' pleading of the limitation defence "indirectly" defeats the respondents' rights or remedies should be rejected because the words "direct or indirect" do not appear in the clause and this court should not rewrite it	AR [3]-[6]
5(h)	The whole of the language of clause 24 must be considered, which includes the concluding words "insofar as this can lawfully be done", such that even if the respondents' construction of the preceding words of that clause is accepted, because such contracting out is contrary to the public policy, the clause is not engaged	AS [18] AR [8]
5(i)	Given that no provision of the Limitation Act could be lawfully contracted out of, the Limitation Act applied according to its terms, and Gotterson JA was wrong to conclude, first, that clause 24 validly contracted out of section 13 of the Limitation Act and, second, that because section 13 thereby did not apply, no time period ran that could expire for the purposes of section 24 of the Limitation Act, so that the respondents' title was not extinguished	AS [13](c), [65]
6	*Verwayen* does not supply the answer to this question and the *obiter* statements in that case are not binding	AS [20]
7	The purpose and scheme of the Limitation Act should be understood by reference to its progenitor, the 1623 Jacobean Statute, and, understood in that way, the right to plead limitation defences are conferred on defendants in the public interest, which is directed to achieving the statutory policies identified by McHugh J in *Taylor*	AS [31]-[39]

8	The judgment of the Privy Council in *East India Co v Oditchurn Paul* stands for the proposition that, despite any agreement to the contrary, a defendant may plead a limitation defence and have judgment entered in its favour, even if this causes the defendant to be in breach of its promise not to do so (and to be liable to that end)	AS [52]-[55]
9	*Paul* is good law for Australia, unless and until this Court chooses to depart from it if it thinks fit to do so, but there are no compelling reasons to do so	AR [12]-[15]
10	Even if *Paul* is not good law for Australia, the proposition for which the appellants contend should be adopted by this court, for sound reasons of policy	AR [16]
11	The respondents' approach should be rejected because it would reinstate the mischief that Parliament sought to remedy by enacting Limitation Acts and, in doing so, would render the legislation nugatory	AS [28] AR [16]
12	At common law, there was no limitation period, and the successive limitation statutes up to and including the Limitation Act reveal the legislative intention that such limitation periods should be in place	AS [32]-[39]
13	Additionally, separate and apart from the public policy manifested in the Limitation Act itself, clause 24 is contrary to the public policy (in the sense described by Isaacs J in *Wilkinson v Osborne*) against allowing litigants (or prospective litigants) to arrogate to themselves control over court resources	AS [40]-[41]

Dated: 3 March 2021

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