HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B55 of 2020

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 Mercia Price

Third Appellant

Gladys Ethel Price by her litigation guardian Erin Elizabeth Turner

Fourth 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

Joyce Mavis Coomber

Seventh Respondent

Angus Macqueen

Eighth Respondent

Angus Macqueen as trustee

Ninth Respondent

RESPONDENTS' SUBMISSIONS

10 **Part I: Certification**

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

Part II: Statement of Issues

2. The issues on this appeal are as follows:

(1) On the proper construction of cl 24 of the mortgages, were the appellants entitled to plead a defence under the *Limitations of Actions Act 1974* (Qld) (***Limitations Act***) in answer to the respondents' claim (the **Proper Construction Issue**).

(2) If not, is such an agreement unenforceable for offending public policy (the **Public Policy Issue**).

20 (3) If 'no' is the answer to issues (1) and (2), were damages for breach of warranty the respondents' only remedy (the **Remedy Issue**).

Part III: *Judiciary Act*, s78B

3. The respondents certify that they have considered whether any notice should be given to the Attorneys-General in compliance with s78B of the *Judiciary Act* 1903 (Cth); notice need not be given.

Part IV: Factual Background

4. The respondents do not contest the factual background set out in the appellants' submissions at [5] to [11].

Part V: Argument

Issue 1: Proper Construction Issue

The text of cl24 supports the respondents' construction

5. The express language of cl 24 provides that a statutory provision to which it applies is one 'whereby or in consequence whereof any o[r] all of the powers rights and remedies … may be … defeated'. To fall within the clause, the statutory provision must be a direct or indirect means by which the respondents' powers, rights or remedies are defeated.

6. In this sense, cl24 has two fields of operation. By the use of the conjunctive 'or', it is only necessary for one of the two fields of operation to be satisfied for cl24 to be engaged.

7. Similarly, to fall within the operation of cl24, it is only necessary for one of the verbs to aptly describe the effect (direct or indirect) of the *Limitations Act*.

8. The dictionary meaning of 'defeat' is to 'to frustrate, to thwart'.[1] It is not a term of art with an ascertained legal meaning; it has a range of meanings according to ordinary usage.

9. Having a range of meanings does not lead to ambiguity. If one of the ordinary meanings is plainly the meaning the parties intended it to have when used in cl24, then this is the meaning it has.[2]

10. As Gotterson JA observed below,[3] the past participle 'defeated' accommodates conduct by the appellants to trigger the operation of the statutory provision with the result that the respondents' powers, rights or remedies might be defeated.

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1 Macquarie Dictionary, Fifth Edition.
2 *Spoor & Ors v Price & Ors* (2019) 3 Qd R 176; [2019] QCA 297 [59]; CAB38.
3 *Spoor & Ors v Price & Ors* (2019) 3 Qd R 176; [2019] QCA 297 [62]; CAB38.

11. The result is described by the words 'may be' rather than the word 'is'. These words have flexibility, which comprehend a decision of the appellants whether or not to plead the statutory provision; the pleading of which brings about the result that the respondents' powers, rights or remedies are 'defeated' by operation of cl24.

12. The verb 'defeated' is apt to describe the effect of the appellants pleading a limitations defence under the *Limitations Act* in answer to the respondents' claim brought out of time.

13. Notably, in *Commonwealth v Verwayen*,[4] Justices Brennan (dissenting in the result) and McHugh observed that statutes of limitation confer on a defendant a right to 'defeat' a claim brought outside the time limited by a limitations statute.[5]

14. There are a number of case examples where the courts have used the term 'defeat' to articulate the effect of pleading a limitations defence.[6]

15. On its proper construction, cl24 applied to provisions of the *Limitations Act* by which the enforcement of a right, power or remedy of the respondents might be defended by the appellants and thereby defeated. The respondents' claim for remedies arising under the mortgages, brought out of time, was 'defeated' by the appellants' pleas under the *Limitations Act*.

16. The Court of Appeal was correct in determining that, according to its ordinary usage, the verb 'defeated' aptly describes the effect of pleading a defence under the *Limitations Act*.[7] The text of cl24 supports the construction for which the respondents contend.

Strong words in favour of the respondents' construction are evident in cl24

17. The appellants contend that 'strong words' are necessary to indicate an intention to give up the rights conferred by a statute. The words 'shall not apply hereto and are

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4 (1990) 179 CLR 394.

5 *Commonwealth v Verwayen* (1990) 179 CLR 394, 425, 504.

6 *Belgravia Nominees Pty Ltd v Lowe Pty Ltd* (2017) 51 WAR 341 [46]; *Evans v Braddock* [2015] NSWSC 249 [20]; *Faraday v Rappaport* [2007] NSWSC 34 [102]; *McNally v Commonwealth Bank of Australia (No 2)* [2018] WASC [11]; *Kambarbakis v G and L Scaffold Contracting Pty Ltd* [2008] QCA 262 [4]; *Cassis & Anor v Kalfus* [2001] NSWCA 460 [53].

7 *Spoor & Ors v Price & Ors* (2019) 3 Qd R 176; [2019] QCA 297 [63]-[65]; CAB38.

expressly excluded' are sufficient in this sense and evidence an intention to give up the rights conferred by statutory provisions to which the clause is directed.

No need for the Limitations Act to be mentioned by name

18. Although the *Limitations Act* is not mentioned by name, the class of statutes to which cl24 is directed is readily discernable from the text of the clause; (relevantly) any statute whereby the powers, rights and remedies of the respondents may be defeated.

19. No statute is mentioned. The parties intended the clause to have some meaning and purpose. If, as contended, the text of cl24 supports the construction urged by the respondents, there is no reason to exclude the *Limitations Act* from its operation. Notably, the appellants have not identified what cl24 was intended to achieve, were it not to capture the operation of the *Limitations Act*.

The purpose or objects of the mortgages support the respondents' construction

20. The commercial purpose or objects of the mortgages included to allow the respondents to recover from the appellants the moneys which were lent (plus interest). This is consistent with the appellants being prevented, by the words of cl24, not to plead a defence under the *Limitations Act* if the respondents brought a claim out of time.

Contra proferentem is a principle of last resort with no role to play

21. The appellants fairly acknowledge[8] that the contra proferentem maxim is a principle of last resort.[9]

22. A consideration of the words actually used in cl24 as applied to the circumstances of the case allows this Court to reach a logical conclusion as to the clause's proper construction; there is no ambiguity which would warrant the Court turning to the rule of last resort.

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8 Appellants' Submissions, [19].
9 (2000) 203 CLR 579; [2000] HCA 65 [74].

Onus of proof

23. Despite the appellants' submission to the contrary,[10] the respondents did not 'bear the onus' of establishing the construction of cl24 for which they contend (and, indeed, neither do the appellants):

    a. The proper construction to be given to a legal document is a question of law;[11]

    b. neither party bears a legal or evidential burden of proof; construction is inevitable;[12]

    c. the court's role in construing a written contract is to give effect to the common intention of the parties;[13] this involves the objective consideration of the text, context and commercial purpose or objects evidently intended to be secured by the contract.[14]

Issue 2: The Public Policy Issue

Question of construction

24. Whether a party may, by contract, waive or renounce rights, duties or benefits conferred by a statute is a question of construction of the statute to identify whether there is an express prohibition or whether the provisions, read as a whole, are inconsistent with a power to do so or to identify whether the purpose or policy of the statute is not given for the parties benefit alone, but also in the public interest.[15]

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10 Appellants' Submissions, [15].

11 *Deane v City Bank of Sydney* (1904) 2 CLR 198, 209.

12 See *Yap Don On v Ding Pei Zhen* [2016] SGCA 68. The Singapore Court of Appeal held (at [64]) '[i]t is well established that the party seeking the equitable remedy of rectification bears the burden of proving the facts essential for such relief to be granted. However, construction is inevitable whenever a contract is placed before the court and it does not make sense to say that either party bears a burden of proof, even though both of them will likely advance competing constructions (see McMeel at para 17-32)'.

13 *Toll (FGCT) Pty Ltd v Alphapharm* (2004) 219 CLR 165; [2004] HCA 52 [40].

14 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; [2015] HCA 37 [47] (French CJ, Nettle and Gordon JJ).

15 *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432, 456; See *Westfield Management Limited v AMP Capital Property Nominees Limited* (2012) 247 CLR 129, 143 [46].

Clause 24 is not incompatible with an express or implied prohibition in the Limitations Act

25. The *Limitations Act* contains no express prohibition against parties contracting away the choice to plead a limitations defence if available. The appellants do not contend otherwise.

26. Nor are the provisions of the *Limitations Act*, read as a whole, incompatible with a person having the right to choose, by contract, not to become entitled to plead a limitations defence or, if so entitled, to choose not to plea it. Again, the appellants do not contend otherwise.

Clause 24 is not incompatible with the policy and purpose of the Limitations Act

10 27. It is well established by authority that the policy and purpose, which is reflected in the *Limitations Act*, is one that does not impose jurisdictional restrictions on the court to determine a cause of action.

28. The right to plead a limitations defence is expressed in permissive rather than obligatory terms. It permits an individual to make a choice about whether or not to plead a limitations defence if available.

29. In *Workcover Queensland v AMACA Pty Ltd*,[16] French CJ, Gummow, Crennan, Kiefel and Bell JJ referred with implicit approval[17] to the following statement of Gummow and Kirby JJ in *The Commonwealth v Mewett* [footnotes omitted]:[18]

> *However, in The Commonwealth v Mewett, Gummow and Kirby JJ said of the*
> 20 *effect of the statutes of limitations*:
>
> > *"[A] statutory bar, at least in the case of a statute of limitations in the traditional form, does not go to the jurisdiction of the court to entertain the claim but to the remedy available and hence to the defences which may be pleaded. The cause of action has not been extinguished. Absent an appropriate plea, the matter of the statutory bar does not arise for the consideration of the court. This is so at least where the limitation period is*

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16 (2010) 241 CLR 420; [2010] HCA 34.

17 (2010) 241 CLR 420, 433 [30].

18 See *Commonwealth v Verwayen* (1990) 170 CLR 394, 473-474, 498-498; *Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471, 488-489; *Pedersen v Young* (1964) 110 CLR 162, 169; *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1, 43; *Queensland v Stephenson* (2006) 226 CLR 197.

> *not annexed by statute to a right which it creates so as to be of the essence of that right.*

30. And, more recently, in *Brisbane City Council v Amos*,[19] Keane J (with whom Kiefel CJ and Edelman J agreed[20]) observed, relevantly, as follows:[21]

> *It has, for example, long been settled by judicial decision that a legislative provision that an action "shall not be brought" is not to be taken literally, and that the provision merely provides a defence to the action that must be pleaded by a defendant if the expiration of the limitation period is to be given effect.*

31. Both *WorkCover Queensland* and *Amos* are, it is submitted, consistent with the underlying reasoning in *Verwayen*[22] and *Westfield Management Ltd v AMP Capital Property Nominees Ltd*.[23]

32. If a defendant, otherwise entitled to plead a limitations defence, chooses not to plead it, the matter of the statutory bar does not arise for consideration by the court. This is consistent with the policy and purpose of the *Limitations Act* being one for the benefit of an individual rather than to satisfy a broader public need.

33. The Court of Appeal was correct to infer that, in Queensland, the legislature regarded it compatible with public policy that an individual has complimentary rights to choose not to become entitled in the first place to plead a limitations defence or, if so entitled, to choose not to plead it.[24]

34. The appellants accept that it is compatible with public policy for a defendant to waive the right to plead a limitations defence under the *Limitations Act*. However, they argue[25] that a critical difference between waiver and contract is knowledge or state of mind; waiver is compatible with public policy because the defendant is said to have knowledge of the facts and circumstances being alleged in a claim.

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19 [2019] HCA 27 [49].
20 [2019] HCA 27 [7].
21 *Courtenay v Williams* (1844) 3 Hare 539 at 551-552 [67 ER 494 at 500]; *Dawkins v Lord Penrhyn* (1878) 4 App Cas 51 at 58-59; *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 219; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 405, 473-474; [1990] HCA 39.
22 *Commonwealth v Verwayen* (1990) 170 CLR 394, 404-406, 425-427, 431, 456, 471-474, 486-487.
23 (2012) 247 CLR 129,143-144.
24 *Spoor & Ors v Price & Ors* (2019) 3 Qd R 176; [2019] QCA 297 [40]; CAB38
25 Appellants' Submissions, [49].

35. The appellants contention ought to be rejected because:

    a. Whether the appellants (or any of them) had or did not have certain knowledge, or a particular state of mind, was not an issue pleaded in the defence or counterclaim; a condition of mind including knowledge or notice must be specifically pleaded.[26] There was no evidence before the first instance or intermediate appellant court about knowledge or notice and, equally, there is no evidence before this Court.

    b. The mortgage identifies the appellants' obligation to repay the principal sum plus interest; it outlines the powers, rights and remedies of the respondent on the happening of default.

    c. Upon entry into the loan and prior to the accrual of the cause of action, the appellants must be taken to have known the nature and extent of their obligations pursuant to the mortgages.[27] The appellants must be taken to have known the nature and extent of any potential claim to be brought against them in the event of default.

36. In the circumstances, it is submitted, that the appellants must be taken to have known that, by cl24, they agreed they would not be entitled to plead the *Limitations Act* in defence to the respondents' claim.

37. It is of no consequence whether the right to plead a limitations defence is sterilised by way of waiver, estoppel or contract. There is also no reason in principle or policy to distinguish between a choice not to plead a limitations defence made in the face of an articulated claim and one made prior to the accrual of a cause of action.

38. These propositions are consistent with the observations made by members of the Court in *Verwayen* and in *Westfield Management* (see [31] above). While *Verwayen* is not binding on this Court, the reasoning mentioned is persuasive and falls in favour of the respondents' arguments.

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26 *Uniform Civil Procedure Rules 1999* (Qld), r150(1)(k).

27 *Toll (FGCT) Pty Ltd v Alphapharm* (2004) 219 CLR 165, 180 [42] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

39. The appellants' contentions[28] about the origins of the *Limitations Act* resting in the *1623 Statute of Limitations* and the numerous historical English authorities do not assist their argument; of course, none of them expressly concern the policy and purpose of the *Limitations Act*. Further, the appellants' approach in this regard is contrary to authority.[29]

40. As noted by the appellants,[30] in considering the scheme created by the *Limitations Act*, the legislature 'clearly turned its mind to the circumstances in which the limitation period might be extended or lifted'. It is submitted that having done so, Parliament chose to enact the scheme conferring rights that are procedural and not substantive, and, are permissive and not obligatory.

41. If the public interest is best served by restricting the freedom to contract away the right to plead a limitation defence, it is for Parliament to legislate accordingly; as it stands, there is no express or implied prohibition.

42. And, for the reasons submitted above, it is compatible with the policy and purpose of the *Limitations Act* that an individual have complementary rights to choose, by contract, not to become entitled in the first place to plead a limitations defence or, if so entitled, to choose not to plead it.

The respondents' title was not extinguished by s24

43. The issue is one of construction of cl24. On this issue, the Court has stated, on many occasions, that the task of statutory construction must begin and end with a consideration of the statutory text.[31] Section 24 of the *Limitations Act* provides, relevantly, as follows:

> ***24 Extinction of title after expiration of period of limitation***
>
> *(1) Subject to section 17, subsection (2) of this section and the Real Property Act 1861, where the period of limitation prescribed by this Act within which a person may bring an action to recover land (including a redemption*

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28 Appellants' Submissions, [32].
29 *Brooks v Burns Philip Trustee Co Ltd & Anor* (1969) 121 CLR 432, 457.
30 Appellants' Submissions, [36].
31 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 [39] (the Court); *Alcan (NT) Aluminia Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

action) has expired, the title of that person to the land shall be extinguished …

44. Title is extinguished 'where the period of limitation prescribed by [the *Limitations Act*] within which a person may bring an action to recover land … has expired'. The 'period of limitation prescribed by' the *Limitations Act* is contained in s13; it provides, relevantly, as follows:

13 Actions to recover land

An action shall not be brought by a person to recover land after the expiration of 12 years from the date on which the right of action accrued to the person …

10 45. On the proper construction of s24, it must be read with s13.[32] Whether, for the purposes of s24, the period of limitation set out in s13 has expired is a question of fact in each particular case. Here, the Court of Appeal was correct in determining[33] that cl24 of the mortgages had the effect that the period of limitation provided for in s13 of the *Limitations Act* never applied; thus, it never expired.

Issue 3: The Remedy Issue

Paul

46. The appellants contend that if cl24 has the construction propounded by the respondents and is valid and enforceable, the respondents are limited to a claim for damages for breach of warranty. Not having run this below, the respondents are
20 not, it is said, now entitled to do so.

47. The appellants rely on the 19th century decision of *The East India Company v Oditchurn Paul*[34] in support of this proposition. One of the questions for the court's determination in *Paul* was whether a secondary agreement had been reached to suspend the operation of the limitations statute whilst an inquiry took place; the primary issue for the court's determination was when the cause of action had accrued.

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32 Cf *Commonwealth of Australia v Dixon* (1988) 13 NSWLR 601.
33 *Spoor & Ors v Price & Ors* (2019) 3 Qd R 176; [2019] QCA 297 [75]-[76]; CAB38.
34 (1850) 7 Moo PCC 811.

48. In obiter, Lord Campbell observed, relevantly, as follows:[35]

> *There might be an agreement that in consideration of an inquiry into the merits of a disputed claim, advantage should not be taken of the statute of limitations in respect of the time employed in the inquiry, and an action might be brought for breach of such an agreement; but if to an action for the original cause of action the Statue of Limitations is pleaded, upon which issue is joined – proof being given that the action did clearly accrue more than six years before the commencement of the suit – the Defendant, notwithstanding any agreement to inquire, is entitled to the verdict.*

10 49. *Paul* is distinguishable on its facts; it did not concern an agreement not to raise a limitations defence in an original bargain (as here). Further, neither party has identified any Australian jurisprudence where the decision has been applied in support of the proposition that the appellants advance[36].

50. As to the precedential value of decisions of the Privy Council, in *Cook v Cook*,[37] Mason, Wilson, Deane and Dawson JJ held, relevantly, as follows:[38]

> *The history of this country and of the common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts just as Australian courts benefit from the learning and reasoning of other great*
20 *common law courts. Subject, perhaps, to the special position of decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning* [emphasis added].

51. The obiter in *Paul* does not contain reasoning which is so persuasive that this Court ought to follow it; this Court is not bound to follow the Privy Council's decision in *Paul*.

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35 (1850) 7 Moo PCC 811, 821-822.

36 The decision has been referred to in the context of a dispute regarding an acknowledgement of debt: *Executor, Trustee & Agency of South Australia Ltd v Thompson* (1919) 27 CLR 162, 169 (Isaacs J) and *Haller v Ayre & Anor* [2004] QCA 224 [58] (Keane JA, as his Honour then was).

37 (1986) 162 CLR 376; [1986] HCA 73.

38 (1986) 162 CLR 376, 390.

52. The respondents sought to enforce the bargain struck between the parties in an entirely conventional manner. In response to a plea of limitation by the appellants, the respondents pleaded reliance on cl24.

53. The appellants' contention is at odds with the orders made in *Verwayen*. By reason of waiver or estoppel, the Commonwealth was not free to plead the limitations statute; nor was Mr Verwayen limited to a claim in damages.

54. Further, if cl24 is held to be valid and enforceable, the court ought not, at least in a sense, give its imprimatur to the appellants' breach of contract, by allowing them to maintain the limitations defence.

10 *If the respondents are limited to a claim for damages for breach of warranty, the case should be remitted back to the first instance court to join the interest question*

55. If the Court finds in favour of the respondents' construction of cl 24, but determines that the respondents' only remedy is damages for breach of warranty, then, the respondents seek to have the case remitted to the first instance Court to join the outstanding issue of interest, so the respondents can pursue their damages claim.

56. If the appellants breached cl24 by pleading the limitations defence, this breach may give rise to a separate cause of action, which accrued at the time of breach (when the defence was pleaded); this cause of action is not out of time.

20 57. Both parties brought an application for summary judgment; the primary judge was assured that the limitation points involved matters of construction only, and thus the matters were suitable to be heard summarily.[39]

58. By the Court of Appeal's order dated 31 January 2020, summary judgment concerned principal only ($270,000) and the question of interest was remitted to the Trial Division of the Supreme Court of Queensland for determination.[40] It cannot fairly be said that the summary judgment aspect of the case was determinative of the entire litigation between the parties.

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39 *Spoor & Ors v Price & Ors* [2019] QSC 53 [1]; CAB5

40 CAB58-59.

59. A conclusion of this Court that the respondents were entitled only to damages for breach of warranty must result in the setting aside of the Court of Appeal's order for summary judgment. It is submitted that no issue of Anshun estoppel arises if the summary judgment is set aside.

60. The determination of the issues on this appeal proceed a summary process in the courts below; this is not a case in which the parties have conducted fulsome litigation to trial, followed by appeal.

61. It is also a case which sought to resolve question of law only; the question of interest, which may involve factual matters concerning delay, was put off until this determination.

62. As the appellants accept[41] that there has been little judicial consideration of *Paul* in Australia. They themselves describe that authority as 'scant'. The two authorities identified by the appellants in which *Paul* was considered are not factually analogous to this case; neither concerned an agreement not to raise a limitations defence.

63. The outcome in *Paul* was not so clear that it was unreasonable for the respondents not to seek damages for breach of contract upon the appellants plea at first instance, or that the respondents made a forensic decision not to do so.

64. In the circumstances, it is submitted that the respondents did not fail to make a claim for damages, which was so unreasonable so as to deny them the chance to pursue the remedy.

65. As submitted above, the determination of the issues on this appeal forms merely part of the case between the parties. It is submitted that, if the Court finds in favour of the respondents' construction of cl24, but determines that the respondents' only remedy is damages for breach of warranty, the appropriate course is to remit the matter to the Trial Division to allow the respondents to pursue a damages claim.

Part VI: Not applicable

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41 Appellants' Submissions, [55].

Part VII: Estimate of Time

66. The respondents estimate that 1 hour will be required for the presentation of their oral argument.

Dated: 30 November 2020

N Andreatidis QC **A F Messina** **S J Gibson**

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ANNEXURE – LIST OF CONSTITUTIONAL AND STATUTORY PROVISIONS

1. *Limitation of Actions Act 1974* (Qld) (reprint current as at 5 March 2017):

    a. Section 5

    b. Section 10

    c. Section 13

    d. Section 24

    e. Section 26.