



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-This is a corrected versio
Filing party: Respondents
Date filed: 03 Mar 2021

Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

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

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Allanna Mercia 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

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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 and Angus Macqueen as trustee

Eighth and Ninth Respondent

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RESPONDENTS' OUTLINE OF ORAL SUBMISSIONS

Part I: The respondents certify that this outline is in a form suitable for publication on the internet.

Part II: The appeal ought to be dismissed, for the following reasons.

The construction issue

1. On the proper construction of clause 24, a statute, which has the consequence of defeating the powers, rights and remedies of the mortgagees, 'shall not apply' and is expressly excluded, as far as can lawfully be done. A limitations defence (if pleaded) arises from the *Limitation of Actions Act 1974 (Qld)* (***Limitations Act***); it is a statute to which clause 24 is concerned.¹

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The public policy issue

2. The authorities provide that the policy and purpose which is reflected in the *Limitations Act* by way of the imposition of statutory bars:
 - a. affects procedural and not substantive rights;
 - b. does not go to the jurisdiction of the court to entertain a claim;
 - c. bars the plaintiff's remedy by permitting a good defence to be pleaded; and

¹ RS [5]-[16].

- d. does not extinguish the underlying right to make a claim².
3. The *Limitations Act* is expressed in permissive rather than obligatory terms. It permits an individual to make a choice about whether to plead a limitations defence if available³. If not pleaded, 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 need⁴.
4. The *Limitations Act* contains no express prohibition against the parties contracting away the choice to plead a limitations defence if available⁵. Nor is there anything in the language of the *Limitations Act*, read as a whole, that is incompatible with a power on the part of a defendant to forego the procedural choice conferred by the Act⁶.
5. There is a public interest in the policy reflected in the *Limitations Act*. However, Parliament has chosen to implement this interest by conferring a benefit on an individual rather than to meet some public need.
6. Individuals (such as the appellants) can be precluded from pleading that defence by way of estoppel, waiver or contract⁷. The appellants accept this is so for estoppel or waiver. But they seek to distinguish contract by contending that a defendant does not have knowledge of the facts being alleged against him or her in a claim articulated by the plaintiff⁸.
7. This contract is a simple one. It concerns the repayment of a debt secured by a mortgage. If clause 24 operates in the manner for which the respondents contend, the mortgagors knew at the time they entered into the contract that what they were giving up by virtue of clause 24 was the right to plead a limitations defence in response to any claim brought by the mortgagees to recover the debt out of time⁹.

The remedy available to the respondents

8. In order for this issue to be engaged, the Court must find that clause 24: (a) has the effect contended for by the respondents; and (b) is valid and enforceable.

² RS [27]-[31].
³ RS [28], [32]-[33].
⁴ RS [32].
⁵ RS [25].
⁶ RS [26].
⁷ RS [37].
⁸ AS [48]-[50].
⁹ RS [35]-[38].

9. The respondents are not limited to damages for breach. The authority relied upon by the appellants in support of this proposition¹⁰ is distinguishable on its facts and has never been applied in Australia in support of the proposition advanced by the appellants¹¹. Furthermore, there is no policy reason why such a result should follow¹².

10. If the Court finds that the respondents are limited to damages, the appropriate course is to remit the matter back to the Supreme Court. There, the respondents may seek leave to make that claim¹³. This is because:

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- a. the respondents’ cause of action for the appellants’ breach of clause 24 is not time-barred¹⁴;
- b. breach of clause 24 is pleaded in reply and has thus been raised as an issue;
- c. interest is a live issue between the parties (as to liability and quantum)¹⁵.

Dated: 4 March 2021

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N Andreatidis QC

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A F Messina

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S J Gibson

¹⁰ *East India Co v Odithurn Paul* (1849) 7 Moo PC 85; 13 ER 811. AS [52]-[54].
¹¹ RS [49].
¹² RS [52]-[54].
¹³ RS [55]-[58], [65].
¹⁴ RS [56].
¹⁵ RS [58].