IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B47 of 2018

BETWEEN:

**Brisbane City Council**
Appellant

and

**Edward Amos**
Respondent

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## APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

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**Part I: Certification**

This outline is in a form suitable for publication on the internet.

**Part II: Oral Outline**

1. The Appeal concerns the proper construction of s 10 (especially ss10(1)(d)) and s 26 of the *Limitations of Actions Act 1974 (Qld)* (**Limitations Act**) (vol 1, tab 3) and their application to proceedings brought by the Appellant to recover overdue rates and charges where that overdue sum was a charge on the Respondent's land (AS [7]-[14] and [20]-[21]).

2. These sections provide materially different periods of limitation and the circumstances of this case can be described as falling within the language of both sections (AS [23]).

3. The majority below (Philippides JA agreeing with Dalton J) held that where the circumstances of the case fall within the language of both sections (AS [15]-[17])-

   a. the proper construction is that both apply with the effective result that the shorter limitation defence is available to defeat any action brought by the Appellant: Reasons [74], [90], [119] (CAB 59, 64 and 70);

   b. it was not appropriate to describe either provision as general or specific, so as to exclude the operation of one in favour of the other: Reasons [115]-117] (CAB 69-70).

4. That is not the correct construction of the Limitations Act. The correct construction is-

   a. that the limitations defence under s 10(1) applies to bar an action of the description stated it that section, but not all actions or any actions that also answer the description of another provision of the Limitations Act (and in particular not an action of the description encompassed by s 26). (AS [44]-[45] and [51]-[52]);

   b. alternatively, s 26 is to apply to provide the required period of limitation for an action of the kind described in it to the exclusion of s 10(1) (and also s 10(3)). It is the specific provision providing for actions to recover a principal sum of money secured by mortgage or charge on property, whatever (and not limited by) the nature of the underlying cause of action (AS [46]-[48]).

5. The Appellant's approach is drawn from the language (AS [25]-[32]) of the Limitations Act (that being the proper starting point: "*the text of the provision considered in light of its context and purpose.*" (AS [50] and AR [5])).

   a. A number of sections of the Limitations Act differentiate between an 'action' and a

'cause of action'. The former focuses on the description of the proceedings taken. Section 26 in particular does not refer at all to a cause of action but rather to an action meeting a particular description (or characterisation) and is indifferent as to the nature of the underlying cause of action (AS [22], [42] and AR [12]).

b. Parliament has made specific provisions in the Limitations Act identifying the precedence one section has over others: s 10(3) and (3A); s 10(1)(a) and 10AA; s 10A and ss 10(1)(d) and (5). This would be unnecessary if (on the majority's approach) where an action can fall within two provisions the shorter will, by default, apply (AS [31]).

c. The majority approach deprives s 26 of any meaningful operation (given that actions founded on simple contracts, specialties and enactments are provided for elsewhere and differently) (AS [32], [49] and AR [14]).

d. The majority undertook no real examination of the language of these provisions.

6. The Appellant's approach is also supported by authority (AS [33]-[43])-

a. The following three cases (which do not concern the scope of provisions the analogue of s 26) construe limitation provisions as applicable only to the kind of action described in the section and not to all actions (and in particular actions which fall within the description of other limitation provisions): see *Williams -v- Milotin* (1957) 97 CLR 465 (vol 2, tab 46); *Slaveska -v- State of Victoria* (2015) 49 VR 131 (vol 2, tab 43); *Zhang -v- NSW* [2012] NSWSC 606 (vol 2, tab 48). This approach is inconsistent with the majority's approach.

b. Three cases which do concern the scope of provisions the analogue of s 10 and 26: *West Bromwich Building Society -v- Wilkinson* [2005] 1 WLR 2303 (vol 2, tab 45); *Bristol and West plc -v- Bartlett* [2003] 1 WLR 284 (vol 1, tab 33); *ANZ Banking Group Limited -v- Douglas Morris Investments Pty Ltd* [1992] 1 Qd R 478 (vol 1, tab 28). The majority does not deal with the first, wrongly dismisses the second on the bases that the relevant point did not arise and wrongly dismisses the observations in the third as obiter.

7. The authorities principally relied on by the majority are of no real assistance (AR [6]-[10])-

a. As to *Barnes -v- Glenton* [1899] 1 QB 885 (vol 1, tab 31), the reasoning is not uniform and in many respects difficult to accept, but in any event it arises in a different

statutory context (whether one statute can be taken to have repealed an earlier one): see Fraser JA at [40] (CAB 52) and Dalton J at [114] (CAB 69).

b. Both *Dennerley -v- Prestwick Urban District Council* [1930] 1 KB 334 (vol 2, tab 36) and *Equuscorp Pty Ltd -v- Lloyd* [1999] 1 VR 854 (vol 2, tab 38) are distinguishable but particularly in each because there was no existing enforceable charge. The precondition for the operation of the analogue of s 26 did not exist.

8. The 'presumption' upon which the majority relies (that where Parliament re-enacts a provision using words with a judicially settled meaning is to be taken to intend that meaning) is inapplicable or alternatively, supports the Appellant's contentions (AR [6]).

10 a. There is no re-enactment of the statutes considered in *Barnes -v- Glenton*;

b. That case is not a judicially settle view of the meaning of these sections; or

c. Alternatively, the Queensland Parliament has amended the Limitations Act (and s10(1) in particular) after the Full Court decision in *ANZ -v- Douglas Morris* without altering the operation of that section and s 26 as decided in that case. This can be taken into account in construing the Act and is contrary to the majority's construction: *Platz -v- Osbourne* (1943) 68 CLR 133 at 140-141 and 145-147.

9. There is a further issue as to the operation of s 26(5) concerning interest (AS [53]-[68] and AR [2]-[5]). The respondent has not made any substantive submissions on this issue. The proper construction of the *City of Brisbane Act* (vol 1, tab 4) and Regulations (vol 1 tab 7)
20 is that the sum of money charged on the land is the overdue rates and charges. This expression includes not only rates and charges but interest on those sums. In terms of s 26(1) of the Limitations Act it is that aggregate sum which is the principal sum secured by charge and it is wrong to disaggregate the sum into an amount within s 26(1) and an amount, being interest, which falls within s 26(5); cf Fraser JA at [29] (CAB 49). There was no action to recover arrears of interest, there was an action to recover overdue rates and charges (as defined), where that overdue sum was a charge on the Respondent's land.

10. The appeal should be allowed, the decision of the Court of Appeal set aside with costs.

Dated: 9 April 2019

30 Shane Doyle QC
*Senior legal practitioner*
*presenting the case in Court*