IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY No. B47 of 2018

BETWEEN: BRISBANE CITY COUNCIL

Appellant

and

EDWARD AMOS

Respondent

RESPONDENT'S SUBMISSIONS

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Part I: Publication

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

Part II: Statement of the issues

2 The issues stated in paragraphs 2(a) and 2(b) of the Appellant's submissions, arise from the grounds stated in the notice of appeal.

3 However, the Respondent would restate those issues as being:

(a) whether the Appellant's claim is statute barred as being an action to recover a sum recoverable by virtue of an enactment within s 10(1)(d) of the *Limitation of Actions Act 1974* (Qld) (as more than six years have passed since the cause of action arose) even though it is secured by a charge on land and, absent s 10(1)(d), would be barred under s 26(1) only after 12 years; and

(b) whether s 26(1), although not framed as authorizing the bringing of an action for the relevant period, should, in effect, be interpreted as a code for dealing with moneys secured by charge on land.

4 The issue identified in paragraph 2(c) of the Appellant's submissions, and argued in paragraphs 53 to 68, namely whether the "principal sum" referred to in s 26(1) includes interest, does not arise from the grounds stated in either the draft notice of appeal furnished to the Court on the hearing of the application for special leave to appeal or the notice of appeal actually filed, and therefore is in not issue before this Court. In the absence of an amendment to the notice of appeal pursuant to an order under rule 42.02.2(e) or other relevant rule, the Respondent does not propose to respond to those submissions.

Part III: Judiciary Act, s 78B

5 The Respondent certifies that he has considered whether any notice should be given to the Attorneys-General in compliance with s 78B of the *Judiciary Act 1903* (Cth), and has concluded that no such notice need be given.

Part IV: Factual Background

6 The factual background is set out in the Appellant's submissions at paragraphs 7 to 18, which the Respondent generally adopts, but to which the Respondent

adds the following.

7 As to the decision below, the majority of the Court of Appeal (Philippides JA and Dalton J):-

(a) observed[1] that in both *Sutton v Sutton*[2] and *Barnes v Glenton*[3] the shorter limitation period was held, in the absence of a specific exclusion, not to be excluded by the existence of a longer period for secured debts coming also within the provision applicable to the shorter period, and observed that this recognised that "the limitation periods establish prohibitions; they do not set periods within which a suit is permitted... the prohibition is in favour of the debtor; at the time the first limitation periods ends, the debtor accrues the right to plead the statutory defence";

(b) found that this was not an appropriate case to apply the maxim of *generalia specialibus non derogant*; in that ss 10(1)(d) and 26(1) did not deal with the same subject matter, neither of which was more specific than the other, and that the legislative history and case law made it inappropriate to resolve the case by way of maxim;[4]

(c) observed that, even if the maxim did apply, maxims "are no substitute for consideration of the whole of the particular text, the construction of which is disputed, and its subject, scope and purpose";[5]

(d) held that the limitation periods do not permit an action to be brought within a certain time limit, but rather, prohibited the bringing of an action after a certain time has passed;[6] and

(e) as a result, held that some, but not all, of the Appellant's claims were time barred.[7]

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[1] Core Appeal Book at 64, [90].

[2] (1882) 22 Ch D 511.

[3] [1899] 1 QB 885.

[4] Core Appeal Book at 69-70, [115]-[118].

[5] Core Appeal Book at 60, [76].

[6] Core Appeal Book at 70-71, [119]-[120].

[7] Core Appeal Book at 71, [123].

Part V: Argument

(a) Summary

8 The Respondent supports the reasons of the majority of the Court of Appeal (Dalton J, Philippides JA agreeing) and submits that those reasons accord with both *Barnes v Glenton*[8] and *Equuscorp Pty Ltd v Lloyd.*[9]

9 The Respondent's position may be summarised as follows:

(a) both ss 10(1)(d) and 26(1) are framed in terms "An action shall not be brought", so at the end of 6 years, because of s 10(1)(d), the present action *cannot* be brought, and there is no conflict with s 26(1), because s 26(1) does not say that an action to which it relates *can* be brought for 12 years;

(b) when 12 years have passed, there are two provisions barring an action but that does not make them in any way inconsistent;

(c) it is wrong to characterise one of these provisions as specific and one as general, as neither s 10(1) nor s 26(1) describes a class of actions which is more specific than that which the other describes; and

(d) it is wrong for the Appellant to say that the decision of the majority below would render s 26(1) otiose[10], as that provision is capable standing on its own in certain circumstances, including the case of charges arising by operation of law, and cases where s 10(1) does not apply by operation of s 10(6)(b).

10 Further, some of the narrowing of the class of cases now covered by s 26(1) arises from the reduction of the period in s 26(1) from that originally provided in its predecessors.

11 In effect the Appellant is asking the court to redraft ss 10(1)(d) and 26(1) of the *Limitation of Actions Act* respectively in terms such as:

> "An action to recover a sum recoverable by virtue of any enactment may be brought within 6 years"

and

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[8] [1899] 1 QB 885 at 888, 889, 891.

[9] [1999] 1 VR 854; [1998] VSC 171. Cited in the text of the judgments (in addition to footnotes) at Core Appeal Book at 49 [30], at 51-52 [38], at 61 [77], at 65 [95]-[96].

[10] Appellant's submissions, p 4, para 19(c), p 6, para 24(ii).

"An action may be brought to recover a principal sum of money secured by a mortgage or other charge within 12 years".

12 That would give the Appellant the result it wants, namely that the longer period applies even though its case does not come within the provision relating to the shorter period.

13 But here, each provision is framed in terms of "An action shall not be brought".

14 It is submitted that the effect of the Appellant's interpretation is to add, impermissibly, the words "other than where the case comes within s 26(1)" to the words of s 10(1). But where the legislature has sought to carve out an exception from s 10, it has done so specifically, as in s 10(6)(b) discussed below.

(b) UK legislative history before Barnes v Glenton

15 Section 3 of the *Limitation Act 1623*[11] (An Act for Limitation of Actions, and for Avoiding of Suits in Law) included:-

> "3 ... all actions of debt, grounded upon any lending or contract without specialty ..., or any of them, which shall be sued or brought at any time ... shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say), the said actions upon the case ..., and the said actions for ... debt ... within six years next after the cause of such actions or suit, and not after; ...".

16 It did not deal with actions to recover a sum recoverable by virtue of an enactment, nor did it deal with an action on a specialty.[12]

17 Section 40 of the *Real Property Limitation Act 1833*[13] (An Act for the Limitation of Actions and Suits Relating to Real Property, and for simplifying the Remedies for trying the Rights thereto) included:

> "40. ... No action or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of, any land ... but within 20 years next after a present right to receive the same shall have accrued ... ."

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[11] 21 Jac. 1, c. 16.

[12] See Blanshard *A Treaties on the Statutes of Limitation* (1826), pp 91, 102, and the cases cited there.

[13] 3 and 4 Will. 4, c. 27.

18 Section 3 of the *Civil Procedure Act 1833*[14] (An Act for the Further Amendment of the Law, and the Better Advancement of Justice) included:

> **"Limitation of Action of Debt on Specialties, &c.**
>
> "3. And be it further enacted, That ... all Actions of Covenant or Debt upon any Bond or other Specialty, and all Actions of Debt ..., and all Actions for Penalties, Damages, or Sums of Money given to the Party grieved, by any Statute now or hereafter to be in force, ... shall be commenced and sued within the Time and Limitation herein-after expressed, and not after; that is to say, the said Actions of ... Covenant or Debt upon any Bond or other Specialty ... within Twenty Years after the Cause of such Actions or Suits, but not after; the said Actions by the Party grieved, ... within Two Years after the Cause of such Actions or Suits, but not after; ... provided that nothing herein contained shall extend to any Action given by any Statute where the Time for bringing such Action is or shall be by any Statute specially limited."

19 Other periods were provided for other causes of action.

20 Section 8 of the *Real Property Limitation Act 1874*[15] (An Act for the Further Limitation of Actions and Suits Relating to Real Property) included:-

> "WHEREAS it is expedient further to limit the times within which actions or suits may be brought for the recovery of land or rent, and of charges thereon:
>
> Be it enacted ... as follows:
>
> ...
>
> 8. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land ... but within twelve years next after a present right to receive the same shall have accrued ...".

21 It may be noted that the decision in *Barnes v Glenton* was reached notwithstanding the absence of a proviso in s 40 of the *Real Property Limitation Act 1833* or in s 8 of the *Real Property Limitation Act 1874* corresponding to that in s 3 of the *Civil Procedure Act 1833*.

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[14] 3 and 4, Will 4, c. 42.

[15] 37 & 38 Vict. c. 57.

(c) Barnes v Glenton

22 In *Barnes v Glenton.*[16] the Court of Appeal held that the six year period of limitation for a simple contract debt imposed by s 3 of the *Limitation Act 1623* had not been enlarged to twenty years for secured simple contract debts by s 18 of the *Real Property Limitation Act 1874.* A L Smith LJ said[17]:

> "It is clear that the Statute of James was passed in favour of debtors, because by it they were allowed to plead the lapse of six years as a bar to an action. Where is it to be found, in the Statutes of William IV and of the Queen, that this right is taken away? I cannot find anything to that effect; and, in my opinion, the case of a simple contract debt is not affected by the later statutes. The *Real Property Limitation Act, 1833*, enacted that no action or suit should be brought to recover any sum of money charged upon land 'but within twenty years' after the right of action has accrued. That, upon the face of it, means that the right to bring an action of the class enumerated in the section. Where in that section is there anything to be found as to actions for simple contract debts to which, I may point out, the Statute of James is limited?"

23 Collins LJ said[18]:

> "I am of the same opinion. The action is on a simple contract debt which is also charged on land, and the argument for the plaintiff is that under s. 8 of the *Act of 1874* the period of limitation of that section now governs all claims, personal or against the land, where the debt is charged on land."

24 And after summarising out the effect of the two sections his Lordship continued[19] (underlining added):

> "How can the later enactment, by imposing a limitation of twenty years over a larger area, enlarge the period already defined as the limitation for a particular part of that area, namely, simple contracts? The words of the section debar the creditor from proceeding after twenty years; they do not confer any right of suit upon him which he did not before possess. The statutory prohibition against taking proceedings after the period named is not a statutory permission given to take them within that period, and it does not remove the existing fetter imposed in the case of simple contracts by the Act of James."

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[16] [1899] 1 QB 885; this reasoning was affirmed in *Wilkinson v West Bromwich Building Society* [2004] EWCA Civ 1063 [31].

[17] At 887-888.

[18] At 889.

[19] At 889.6 (underlining added).

25 Romer LJ started by examining the legislative history:-[20]

> "... This is an action to enforce payment of a simple contract debt charged upon land. The point is whether the defendant can plead the statute 21 Jac. 1, c. 16, as a defence. Consider how matters stood prior to the statute 3 & 4 Will. 4, c. 27. If an action was brought on a simple contract debt the statute of James could be pleaded. The money sought to be recovered, though charged on land, could not be enforced, against the person who had undertaken to pay it, after the expiration of six years; but the remedy against the land would not have been barred under that statute. There could, therefore, have been a case in which the personal remedy was barred, but not the remedy against the land. That this was the position of things is clear from the cases of *Toplis v. Baker*[21] and *Brocklehurst v. Jessop*[22]. Then came the statute of William IV., altered as to the period of limitation by the statute of 1874, though in other respects the two statutes may practically, for present purposes, be treated as one".

26 And later[23]:

> "The Statutes do not say that debts may be recovered under certain conditions, but they negative the rights of creditors to bring actions after a certain time has elapsed. ... These two Statutes and the Statute of James are general, and have a wide operation, and they can well stand together."

27 In *Equuscorp Pty Ltd v Lloyd*[24], Warren J said, speaking of the corresponding Victorian legislation said[25]:

> "24 On behalf of the defendant, Lloyd, it was submitted that *Barnes v Glenton* did not support a proposition that s 5 of the *Limitation of Actions Act 1958* contradicted s 20. The argument was developed to the effect that the provisions of ss 5 and 20 are not exclusive. ...
>
> 25 In my view there is nothing in the Victorian authorities said against or indeed to contradict the approach taken by the Court of Appeal in *Barnes v Glenton*. Furthermore, in *Barnes v Glenton* there was not a direct inconsistency between the legislation, rather, effect could be given to both Acts. ..."

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[20] At 890.

[21] 2 Cox, 118.

[22] 7 Sun. 38.

[23] At 891.

[24] [1999] 1 VR 854; [1998] VSC 171.

[25] At 859-860.

(d) UK legislative history after Barnes v Glenton

28 The *Limitation Act 1939*[26] (An Act to Consolidate with Amendment Certain Enactments Relating to the Limitation of Actions and Arbitrations) may be relevant, since the *Limitation Act of 1960* (Qld) and the *Limitation of Actions Act 1974* (Qld) were both based on it. Among other things, it split the treatment of sums recoverable under an enactment into Section 2 enlarged the former s 3 of the *Limitation Act 1623* to include a limitation for actions to recover sums recoverable by virtue of an enactment. It included:

> **"Limitation of actions of contract and tort, and certain other actions**
>
> 2.- (1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:-
>
> (a) actions founded on simple contract or on tort;
>
> ...
>
> (d) actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture ..."
>
> (3) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued:
>
> Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.
>
> ...

29 Subsection (5) provided for a period of two years for an action to recover a penalty or forfeiture etc. Space has not allowed the inclusion of limitations for other causes of action in this and earlier legislation. Note that the proviso repeats the proviso to s 3 of the *Civil Procedure Act 1833*.

30 Section 18 of the 199 Act continued:

> **"Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land."**
>
> 18. - No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover proceeds of the sale of

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[26] 2&3 Geo. 6, c. 21.

land, after the expiration of twelve years from the date when the right to receive the money accrued.

..."

31 The *Limitation Act 1980*[27] (UK) does not appear to be relevant to any issues arising here, but it may be noted that the corresponding re-enacted sections of the 1939 Act are ss 5 and 20.

(e) Queensland legislative history

32 The first relevant Queensland legislation was the *Statute of Frauds and Limitations 1867*[28] (An Act to Consolidate and Amend the Laws relating to Frauds and the Limitation of Actions) (enacted after the UK 1623 and 1833 Acts, but before the UK Act of 1874). Section 16 was sidenoted:-

"The limitation of certain personal actions

21 Jac. 1c. 16. s. 3."

33 It included:

"*Statute of Limitations.*

16. ... all actions of debt grounded upon any lending or contract without specialty ... shall be commenced and sued within the time and limitation hereafter expressed and not after that is to say

... the said actions for ... debt ... within six years next after the cause of such actions or suits and not after ...".

34 Section 18 of the 1867 Act was sidenoted:-

"Money charged upon land ... to be deemed satisfied at the end of 20 years ...

3&4 Wm.IV. c. 27.s. 40."

35 It included:

"18. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage judgment or lien or otherwise charged upon or payable out of any land ... at law or in equity ..., but within twenty years next after a present right to receive the same shall have accrued ...".

36 Section 22 was sidenoted:

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[27] (1980) Chapter 58.

[28] 31 Vic. No. 22.

"Limitation of certain actions of debt & c. Same as 3 and 4 WmIV c. 42 s. 3."

37 It included:

22. ...

All actions of covenant or debt upon any bond or other specialty and ... and

all actions for penalties damages or sums given to the party grieved by any law now or hereafter in force in this Colony.

shall be commenced and sued within the time and limitation hereinafter expressed but not afterwards, that is to say:

the said actions of ... debt upon any bond or other specialty ... within twenty years after the cause of such actions.

the said actions by the party grieved within two years after the cause of such actions and

...

Provided that nothing herein contained shall extend to any actions given by any Act or statute where the time for bringing such action is or shall be thereby specially limited."

38 Section 9 of the *Limitation Act 1960* (Qld)[29] (an Act to Consolidate with Amendments Certain Enactments Relating to the Limitation of Actions and Arbitrations and for Other Purposes), enacted after the 1939 UK Act, was sidenoted:-

"Actions of contract and tort and certain other actions.

Cf. U.K., 1939, s 2. Cf. N.Z., 1950, s 4. Cf. Vic., 1958, s 5. Cf. 37 Vic., No. 22, ss. 16, 22."

39 It included:

"*Limitation of Actions of Contract and Tort, and Certain Other Actions*

9.(1.) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:-

(a) Actions founded on simple contract or on tort;

...

(d) Actions to recover any sum recoverably by virtue of any enactment, other than a penalty or forfeiture or sum by

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[29] 9 Eliz.II.no.7, 1960.

way of penalty or forfeiture

...

(3.) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued:

Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

..."

10

40 Section 24 of the 1960 Act was sidenoted:-

"Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of sale of land.

Cf. U.K. 1939, s 18. Cf. N.Z. 1950, s.20, Cf. Vic. 1958, s 20. Cf. 31 Vic., No. 16, s. 30."

41 It included:

"*Actions to Recover Money Secured by a Mortgage or Charge or to Recover Proceeds of the Sale of Land*

20 24.(1.) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover proceeds of sale of the land, after the expiration of twelve years from the date when the right to receive the money accrued

...".

42 Sections 10 and 26 of the *Limitation of Actions Act 1974* re-enacted ss 9 and 24 of the 1960 Act without any substantive alteration.

30 *(f) Re-enactment of judicially considered legislation*

43 Parliament may be taken, when it repeats without alteration, or with alterations only in the style used to express an idea, words which have been judicially construed, to have intended the words to bear the meaning already judicially attributed to them.[30]

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[30] *Re Alcan Australia Limited; Ex Parte Federation of Industrial Manufacturing and Engineering Employees* [1994] HCA 34; (1994) 181 CLR 96 at 106-107 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Electrolux Home Products Pty Limited v Australian Workers' Union* [2004] HCA 40; (2004) 221 CLR 309 at [7]–[8] (Gleeson CJ), [81] (McHugh J) and [161][162] (Gummow, Hayne and Heydon JJ); *Baini v The Queen* [2012] HCA 59; (2012) 246 CLR 469 at [43] (Gageler J). See also *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 at [108]-[109] (Tracey, Bromberg and Rangiah JJ). See also Pearce and Geddes *Statutory Interpretation in Australia*, 8th ed., paras 3.43 – 3.50.

44 As it was put in *Equuscorp*[31] it is to be presumed that in enacting the current provisions the legislature was aware of and had adopted the interpretation in *Barnes v Glenton*. In particular, as the High Court said in *Bitumen and Oil Refineries (Aust) Ltd v Commissioner for Government Transport*[32]:

> "The provision under consideration [contribution between joint tortfeasors] has been transcribed from the English Statute in a number of jurisdictions and it is highly convenient that it should be given the meaning and application which it has received in England."

(g) Texts

45 It is submitted that the text books which one may infer that the drafter of legislation would likely have consulted find no difficulty in the application of *Barnes v Glenton*.

46 Thus, one may infer that the drafter of the 1939 UK Act was familiar with the following in Volume XX of *Halsbury's Laws of England* (2nd ed)[33]:

> "**838.** The personal remedy on a simple contract debt charged on land is still governed by the *Limitation Act, 1623*, and the period of limitation is six years from the accrual of the cause of action, but the remedy against the land is governed by the *Real Property Limitation Act, 1874*, and the period of limitation is twelve years."

47 And that the drafter of the 1960 Queensland Act would have been familiar with the following in the third edition of *Halsbury* (1958) Volume 24[34]:

> "**510. General period of limitation relating to mortgages.** ...
>
> It seems that the twelve-year period of limitation under the foregoing enactment does not extend to the personal remedy in simple contract, as distinct from any remedy to enforce the charge, where payment of a simple contract debt is secured on property without any document under seal; in the ordinary case of a charge by deed no such question can normally arise as the periods of limitation on the contract and on the security are both twelve-year periods."

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[31] at 856[11], referred to by Dalton J, see Core Appeal Book at 61, [77].

[32] (1955) 92 CLR 200, 211.

[33] Footnotes omitted, but citing, *inter alia*, *Barnes v Glenton*.

[34] Footnotes similarly omitted, but referring, *inter alia*, to *Barnes v Glenton*.

48 Similarly, in Franks *Limitation of Actions* (1959) we find[35]:

> **"PRINCIPAL SUMS SECURED ON PROPERTY**
>
> The 1939 Act designates a separate category of actions to recover any principal sum of money secured by a mortgage or other charge on the property whether real or personal. ...
>
> **PROMISE TO PAY**
>
> In many cases the mortgagor or chargor expressly undertakes to pay, and such undertaking will often be by convenant. An action on such a covenant would fall both within the present category and within that comprising actions upon specialties; but the overlap causes no serious conflicts since the limitation period in both cases is twelve years. Where, however, the undertaking to pay is not under seal, being a simple contractual obligation (for which the limitation period is six years only), the position seems to be that though the action on the contract will be barred after that period, the mortgagee or chargee will have twelve years to pursue his other remedies."

49 The footnote at the end of that passage includes:

> "*e.g.,* appointing a receiver, sale by the court. (Distinguish foreclosure and taking possession, which need actions to recover land – though the period is also generally twelve years)."

50 As for the 1974 Queensland Act, the second (1973) edition of Sykes *The Law of Securities*[36] included[37]:

> "*Mortgages not under seal.* Where the debt arises out of simple contract, it has been held in England that the period of limitation is that provided by the *Statute of Limitations* of 1623, even though the debt is also charged on land. The court points out that s. 40 of the Act of 1833 merely says that no action to recover a sum of money charged on land shall be brought after 20 years and that it does not affect a provision that an action must be brought within six years."[38]

51 Turning to current texts, Fisher and Lightwood's *Law of Mortgage* (3rd Australian edition, 2014) includes, after a discussion of the English legislation

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[35] Pages 162-164 (footnotes omitted, but referring, *inter alia*, to *Barnes v Glenton*).

[36] 2nd ed., 1973.

[37] Pages 763-764 (footnotes omitted).

[38] The author, however, goes on to say that there could be some uncertainty in the case of an acknowledgement (now dealt with separately by s 37), and also appears to see some conflict between *Barnes v Glenton* and *National Bank of Tasmania Ltd (In liq) v McKenzie* [1920] VLR 411 (an acknowledgement case) notwithstanding that Cussen J at p 420 (with whom Schutt and Mann JJ agreed) referred to both *Sutton v Sutton* and *Barnes v Glenton* without adverse comment.

and its adoption in various Australian States, including Queensland[39]:

> "Victoria, Queensland and Tasmania have legislation based on the English *Limitation Act 1939* ... and the statutory provisions in those States likewise prescribe a period of limitation of six years for the bringing of an action 'founded on simple contract' ... . Even though the debt may be charged on land, if it is a simple contract debt, the period of limitation will be six years as provided by these Acts: *Barnes v Glenton* [1899] 1 QB 885."

10 52 The authors then go on to provide a detailed consideration of the specific provisions of each State relevant to the law of mortgages.

53 Finally, Dal Pont *Law of Limitation* (2016) includes[40]:

> "***Overlap with limitation provision applicable to 'actions founded on simple contract'?***
>
> **9.11** There can arise the question of whether, and if so the extent to which [the limitation provision relating to mortgages] overlaps with the general limitation provision applicable to 'actions founded on simple contract'. The issue arises because a mortgage is, after all, a contract, and a shorter (six year)
20 limitation period applies in contract. The provisions can, it has been held, operate in combination."

54 The author goes on to discuss that decision at some length and concludes[41]:

> "There is accordingly no assumption that, where both provisions could operate, one could knock out the other."

(h) The Respondent's false analogy with two causes of action

55 The present case, where there is but one cause of action, bears no analogy with
30 cases founded upon both contract and tort, where there are clearly two causes of action. A time limit for bringing an action for breach of contract says nothing of when one may bring an action founded on a tort, and vice versa. And in any event, in many cases where both such causes of action arise, they arise at different times. In the present case, the Appellant had only one cause of action.

56 Section 26(1) is not concerned to identify a different cause of action but, rather, it identifies an additional feature of a cause of action. So the Appellant's analogy with cases such as those in both contract and tort a false analogy. For

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[39] Para 16.17 at p 434.

[40] At p 208 (footnotes omitted, but citing, *inter alia*, *Barnes v Glenton*).

[41] At p 209.

that reason, the decision of this Court in *Williams v Milotin*[42] (a personal injuries case where the cause of action could either be an action on the case or for trespass) is distinguishable, as are the other tort cases referred to by the Appellant, including *Slaveska v State of Victoria*,[43] *Zhang v State of New South Wales*[44] and *Chesworth v Farrar*.[45]

57 Though a different terminology is used in the provisions, namely "cause of action" in s 10 and "right to receive the money" in s 26(1), the Appellant gives no example of where the two would be different.

58 It may be that the different terminology is because it might be argued that in some cases the cause of action was complete before the right to payment arose (a present claim to a future payment of money), or to avoid argument about whether equitable claims fall within the expression "cause of action" which was used in s 10, whereas the right to receive a sum of money is used in s 26. That explanation may be assisted by s 10(6)(b), which provides that s 10 does not apply to a claim for specific performance of a contract or for an injunction or other equitable relief except where the limitation periods are provided by analogy, which suggests that s 26 may have been framed as a catch-all for cases that are not caught by the specific provisions.

59 The Appellant does not contend that *Sutton v Sutton*[46] and *Barnes v Glenton*[47] were wrongly decided, yet it attempts to overturn the accepted construction of the provisions supported by those decisions.[48]

60 The authorities relied on by the Appellant, including *Bristol and West Plc v Bartlett*[49] ("*Bartlett's case*") and *Wilkinson v West Bromwich Building*

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[42] (1957) 97 CLR 465.

[43] (2015) 49 VR 131.

[44] [2012] NSWSC 606.

[45] [1966] 1 QB 406.

[46] (1882) 22 Ch D 511.

[47] [1899] 1 QB 885.

[48] See Dal Pont *Law of Limitation*, LexisNexis Butterworths Australia, 2016 at para 9.11 pp 208-209.

[49] [2002] EWCA Civ 1181; [2003] 1 WLR 284.

Society[50] ("*Wilkinson*") which endorsed the Court of Appeal's approach in *Bartlett's case*, do not assist the Appellant for the following reasons:

(a) those authorities concerned mortgages, which are expressly covered by s 26(1);

(b) the courts did not say that one provision applied to the exclusion of the other;

(c) to the contrary, in *Bartlett's case* the Court of Appeal merely said that the "the specific limitation provisions relating to mortgages **take precedence over** the general provisions relating to specialties"[51] (emphasis added);

(d) in any event, the approach to statutory constructed relied on is contrary to that now prescribed by the High Court; and

(e) *Bartlett's case* was a case in which it made no difference which provision applied as far as the principal amount of the loan was concerned,[52] so that the observations relied on by the Appellant described by the House of Lords at [27] as being "academic", were obiter.

61 The Court of Appeal in *Wilkinson*[53] treated both limitation periods there as concurrently applicable. It is submitted that the approach taken was correct both by the literal wording of the Act, which nowhere states that the application of one section precludes the application of another, and by considering the historical origins of the two provisions, as explained by Collins LJ and Romer LJ in *Barnes v Glenton*.

(i) Douglas Morris Investments

62 It is submitted that the alternative approach of Fraser JA adopted by the Appellant is not correct, the Appellant relies on *Australia and New Zealand*

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[50] [2005] UKHL 44; [2005] 1 WLR 2303.

[51] At WLR 296 [27].
[52] At WLR 296 [27].

[53] At [50].

Banking Group Limited v Douglas Morris Investments Pty Ltd[54] ("*Douglas Morris*") in which McPherson J said[55]:

> "Both s 10(3) and s 26(1) do, in any event, prescribe a twelve year period, but the latter is the specific and therefore governing provision. Cf. *Barnes v Glenton* [1898] 2 QB 223."

63 But even though his Honour cites the decision of the Court of Appeal in *Barnes v Glenton*[56] elsewhere in his judgment[57], he has referred here to the judgment at first instance, reversed in the Court of Appeal. In any event, his Honour (McPherson J) continued[58] (our underlining):

> "It has its source in s 40 of the *Real Property Limitation Act 1833*; 3 & 4 Will IV, c. 27, later re-enacted in England in the *Real Property Limitation Act of 1874*. As such it was, in *Sutton v Sutton* (1882) 22 Ch.D. 511, held to apply to an action on the personal covenant in a mortgage of land. Section 26(1) of the *Queensland Act of 1974* is in substantially the same terms as the provision considered in *Sutton v Sutton* except that it and s 40 of the original *Act of 1833* were confined to charges on land. Section 26(1) of the *Act of 1974* now extends to a charge on any property 'whether real or personal'. It therefore includes within its terms an action brought to recover the principal sum of money secured on shares by a charge like that created by the scrip lien in the present case."

64 Thus his Honour's starting point was the history, rather than the actual text, of the current provision, which directly conflicts with the Appellant's position stated in ground 2(b) of the notice of appeal.

65 Dalton J (with whom Philippides JA agreed) (relating to an action or a specialty) rightly noted that in *Douglas Morris*, regardless of whether ss 10(3) or 26(1) applied, the limitation period was 12 years. So the result of the case did not turn on this point, so the comment was *obiter*. Further, it was unlikely that there had been any detailed argument about the matter.[59]

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[54] [1992] 1 Qd R 478.

[55] At 482-3.

[56] [1899] 1 QB 885.

[57] At 493.

[58] At 483.

[59] Core Appeal Book at 68 [109]-[110].

66 Her Honour also said that she had not found any case deciding the question of whether it is ss 10 or 26 (or their analogues in other jurisdictions) which applies when action is taken to recover a sum owing by virtue of a statute in circumstances where that sum is secured by a charge on real property.[60] Nor has the Appellant.

67 McPherson J framed the test as choosing the more specific, but it is submitted that that is not an accepted test of statutory interpretation; rather, the case is one first has to establish that the two provisions are inconsistent.[61] It is only when that happens that one makes a choice between which is the more specific and which is the less specific. In any event, McPherson J was considering s 10(3). We are concerned here with s 10(1), and in particular, s 10(1)(d).

68 As the majority below concluded, ss 10(1)(d) and 26(1) do not deal with the same subject matter, so it was wrong to say that s 10(1)(d) is general whilst s 26(1) is specific. Even if one adopted McPherson J's approach, it is submitted that a provision providing for a 12-year limitation for actions to recover a principal sum of money secured by a mortgage or other charge is less specific than a provision providing for a 6-year limitation for actions to recover a sum recoverable by virtue of an enactment. It is respectfully submitted that at worst for the Respondent Dalton J was correct in saying that one simply cannot tell which is the more specific.

69 Thus, if it is ultimately held that it is proper to depart from the literal meaning of the provisions of the statute by treating the more specific of two provisions partly covering the same ground as excluding the less specific, it is submitted that at worst for the Respondent this Court would be in the same position as Dalton J[62] (with whom Philippides JA agreed) of simply not knowing.

(j) Section 10(1)(d) is the more specific provision

70 Alternatively, it is submitted that s 10(1)(d) is more specific than s 26(1), the former being applicable to a sum recoverable by virtue of an enactment. There

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[60] Core Appeal Book at 59-60 [74].

[61] *Purcell v Electricity Commission of NSW* (1985) 60 ALR 652, 657 l. 40; (1985) 59 ALJR 689, 692 col. 1FG.

[62] Core Appeal Book at 70 [117].

is some authority supporting this view. For instance, in *Proctor v Jetway Aviation Pty Ltd*,[63] Cross J considered s 14(1)(d) of the *Limitation Act 1969* (NSW) (the equivalent of s 10(1)(d)) and said that:-

> "...I am of the view that s.14(1)(d) was intended to refer to cases such as a local council suing for a specific sum of money recoverable under a relevant statute..."

71 In *Dennerley v Preswich Urban District Council*,[64] referred to by Dalton J[65], Slesser LJ[66] came to the conclusion that the amount owed by a ratepayer under statute was a simple contract debt and not a sum of money charged on or payable out of land, preferring the 6-year limitation period over the 12-year limitation period.

72 Likewise, s 10(1)(d) is capable of covering claims under charges created by statute in respect of unsatisfied liabilities.[67]

(k) Conclusion

73 There is no error or inconsistency in the reasoning of the majority as alleged by the Appellant, in particular:-

(a) the criticism made by the Appellant at paragraph 51 of its submissions is misconceived; there is nothing incoherent or non-coherent about the reasoning identified; if one looks at it in terms of Venn diagrams, one has intersecting circles; there are cases that fall within one that may be cases that fall within the other provision, and cases that fall within both. If they fall within both they are not taken out of the former; they fall within both;

(b) the criticism made by the Appellant at paragraph 52 of its submissions is similarly misconceived. The majority was referring to "any action"

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[63] [1982] 2 NSWLR 264 at 276 (overturned on appeal in [1984] 1 NSWLR 166 but not on this point of law).

[64] [1930] 1 KB 334.

[65] Core Appeal Book at 64-65 [92]-[93].

[66] At pp 350-351.

[67] *Ceric v CE Heath Underwriting & Insurance (Aust) Pty Ltd* (1994) 4 NTLR 135 (a case in which the relevant provision of the *Law Reform (Miscellaneous Provisions) Act 1992* (NT) created a "notional" charge).

within s 10(1)(d).

74 By reason of the foregoing, the majority's decision was manifestly correct and the appeal should be refused with costs.

Part VI: Not Applicable

Part VII: Estimate of Time

75 Counsel for the Respondent will require 2-3 hours to present the oral argument.

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