LEVEL TWENTY SEVEN CHAMBERS

Price v Spoor [2021] HCA 20

Nicholas Andreatidis QC, Anthony Messina & Sophie Gibson

July 2021

Introduction

The High Court of Australia has affirmed the proposition that a person can contract away the right to plead a statutory limitations defence. An agreement to do so is enforceable whether it is entered into prior to or after the accrual of the cause of action. And if a covenant not to plead the defence is breached, a plaintiff is not limited to damages for breach of warranty. The High Court also affirmed the proposition that if a time bar does not expire because it is excluded by contract, a mortgagee's title is not extinguished under s 24 of the Queensland limitations statute.

Issues

This appeal to the High Court raised for consideration four issues:

1. Whether a contractual promise made in a mortgage and before the accrual of a cause of action to not plead a limitations defence was compatible with public policy and enforceable (**public policy issue**).

2. Whether, on the proper construction of cl 24 of the mortgage, the operation of the *Limitations of Actions Act 1974* (Qld) (**Limitations Act**) was expressly excluded (**construction issue**).

3. Whether, on its proper construction, s 24 of the *Limitations Act* operated to extinguish the respondents' title notwithstanding the promise not to plead a limitations defence (**extinguishment issue**).

4. If the answers to issues one, two and three were yes, yes and no respectively, whether the respondents were limited to damages for breach of the covenant not to plead a limitations defence (**remedy issue**).

Kiefel CJ and Edelman J delivered reasons and dismissed the appeal with costs. Gageler, Gordon and Steward JJ agreed with those reasons and the outcome of the appeal, but their Honours gave further reasons on the construction issue.

Overview

Well after the expiration of the limitation period, the respondents as mortgagees brought a claim in the Supreme Court of Queensland seeking payment of $4 million as monies owing under and secured by two mortgages, together with recovery of possession of land the subject of the mortgages. By way of defence and counterclaim, the appellants as mortgagors alleged that the respondents were statute-barred pursuant to ss 10, 13 and 26 of the *Limitations Act* from bringing an action for debt and enforcing any rights under the mortgages. In reply, the respondents relied on cl 24 of each mortgage, which they contended amounted to a covenant on the part of the appellants not to plead a defence of limitation; consequently, it was said, the appellants were estopped from pleading it.

The respondents brought an application for summary judgment or to strike out the limitations defences (the appellants also sought summary judgment in their favour). At the hearing of the application, the respondents conceded that if the *Limitations Act* applied, their claims would be defeated. The primary judge dismissed the respondents' application and entered judgment for the appellants. The Court of Appeal allowed an appeal from this decision.

Public policy issue

The High Court affirmed that the effect of time bars in statutes of limitation does not go to the jurisdiction of the court to entertain a claim but rather to the remedy available, and therefore to the defences which may be pleaded. The cause of action is not extinguished by the statute unless a defence relying on the statute is pleaded; the time bar does otherwise arise for consideration by the court.[1]

[1] *Price v Spoor* [2021] HCA 20 [9] (Kiefel CJ and Edelman J, with whom Gageler, Gordon and Steward JJ agreed); citing *The Commonwealth v Mewett* (1997) 191 CLR 471, 5340535; *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420, 433 [30]; *The Commonwealth v Verwayen* (1990) 170 CLR 394, 404 (Mason CJ).

Kiefel CJ and Edelman J referred to comments made by Mason CJ in *The Commonwealth v Verwayen*, where his Honour observed[2] that because the right to plead a limitations defence is conferred by statute, a contention that the right is susceptible of waiver 'hinges on the scope and policy' of the *Limitations of Actions Act 1958* (Vic). Their Honours held that the same may be said of the question whether a person may abandon the statutory right to plead a defence of limitation by agreement.[3]

Their Honours affirmed that a person upon whom a statute confers a right may waive or renounce that right unless it would be contrary to the statute to do so.[4] This may be the case where there is an express prohibition against 'contracting out' of rights or where the statute, properly construed, is inconsistent with a person's power to forgo statutory rights; it was observed that a similar approach has been taken by courts in the United Kingdom,[5] Canada,[6] and New Zealand.[7] Here, as Gageler and Gordon JJ observed,[8] the *Limitations Act*, does not expressly prohibit waiver or renunciation of a right to contract out; a reading of the *Limitations Act* as a whole does not compel a different conclusion.

The appellants sought to establish that the *Limitation Act* aims to pursue the policy of public interest in the finality of litigation.[9] It was said that, in the interest of the public, disputes are to be settled as expeditiously as possible. The Court of Appeal and then the High Court referred to the comments made by Mason CJ in *Verwayen* that the relevant consideration is not whether the provisions are beneficial to the public, but whether they are 'not for the benefit of any individuals or body of individuals, but for considerations of State'.[10] The 'critical question', his Honour said, 'is whether the benefit is personal or private or whether it rests upon public policy of expediency'.[11]

Ultimately, the High Court held that because it was for the defendant to raise the defence individually, contracting out is not contrary to public policy. Further, the High Court highlighted an inability to contract out of the Limitations Act would be incompatible with the principle of freedom to contract.[12]

Extinguishment issue

In effect, s 24 of the *Limitations Act* provides that where a time bar in which a person 'may bring an action' to recover land has expired, the person's 'title' to that land 'shall be extinguished'. The time bar arises under s 13. The term 'land' is defined to mean 'any legal or equitable estate or interest therein'.[13]

The appellants argued that ss 13 and 24 operated independently of one another in the sense that s 24 automatically extinguished the respondents' title. They argued it was unnecessary for there to be an effective plea of the time bar in defence. The High Court rejected this construction of s 24.

Kiefel CJ and Edelman J observed[14] strong textural indications that s 24 operates by reference to the plea of a limitations defence. Their Honours noted that s 13, which is the source of the time bar, says that '[a]n action shall not be brought' after the expiration of the time bar. This has been given special meaning – it gives rise to a limitations defence, but only if pleaded.[15] It was held that s 24 proceeds on the same footing by reference to the time in which a person 'may bring an action' to recovery land; it contemplates a plea of the time bar under s 13 and the time bar being given effect.

Their Honours went on to observe[16] that considerations of utility support the view that s 24 is not intended to operate automatically and independently of s 13 at the expiry of the limitation period – if s 24 was intended to automatically extinguish title, there would be no utility to the requirement of s 13 to plead a limitations defence to defeat a claim; there would also be no right or title in respect of which a remedy could be given.

Construction issue

Clause 24 of each mortgage provided as follows:

> The Mortgagor covenants with the Mortgage[e] that the provisions of all statutes now or hereafter in force whereby or in consequence whereof any o[r] all of the powers rights and remedies of the Mortgagee and the obligations of the Mortgagor hereunder may be curtailed, suspended, postponed, defeated or extinguished shall not apply hereto and are expressly excluded insofar as this can lawfully be done.

---

[2] *The Commonwealth v Verwayen* (1990) 170 CLR 394, 405.
[3] *Price v Spoor* [2021] HCA 20 [11] (Kiefel CJ and Edelman J).
[4] At [12], referring to *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 247 CLR 129, 143-144 [46] (French CJ, Crennan, Kiefel and Bell JJ).
[5] *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, 881.
[6] *Tolofson v Jensen* [1994] 3 SCR 1022, 1073.
[7] *Auckland Harbour Board v Kaihe* [1962] NSLR 68, 87-88.
[8] At [40].
[9] This was the mischief to which the Jacobean statute of 1623 21 Jac I c 16 (the origin of statutes of limitation); see *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 551-553.
[10] *The Commonwealth v Verwayen* (1990) 170 CLR 394, 405; citing *Admiralty Commissioners v Valverda (Owners)* [1938] AC 173, 185.
[11] *The Commonwealth v Verwayen* (1990) 170 CLR 394, 405.
[12] The High Court referenced *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656, 669 [32] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ) and highlighted that 'exceptions from freedom of contract necessitated good reason to attract judicial intervention'.
[13] *Limitations of Actions Act 1974* (Qld), s 5(1).
[14] At [23].
[15] See *Brisbane City Council v Amos* (2019) 266 CLR 593, 615-616 [49].
[16] At [25].

The appellants made four points. *First*, that cl 24 was too vague, and it lacked the 'strong words' that are necessary to contract away statutory rights. *Second*, that cl 24 was not promissory but merely recited a state of affairs. *Third*, that cl 24 was ambiguous and should be construed contra proferentem against the respondents. *Fourth*, that cl 24 was directed only to the defeating of rights by provisions of statutes, and not by the exercise of the rights conferred by them.

The Court reinforced the principle that an objective approach is required to determine the rights and liabilities of parties to a commercial contract, having reference to its text, context and purpose.[17] Furthermore, that meaning given to the terms be determined by reference to the understanding of a reasonable businessperson.[18]

Kiefel CJ and Edelman J held that the word 'defeat' is apt to capture the effect of limitations provisions; it is often used in this context.[19] Their Honours went on to observe[20] the fact that the *Limitations Act* does not of itself have the effect of defeating the respondents' rights to a claim under the mortgages, and that a plea by the appellants is required to do so does not take the matter outside the purview of the clause. It was held[21] that the provision clearly evidenced the parties' intention that it have wide operation, including to the consequences flowing from a statutory provision ('whereby or in consequence of') which would defeat the respondents' rights. This included a benefit arising under statute by which the respondents' rights could be defeated.

Their Honours concluded that, by agreeing to the terms of cl 24, the appellants effectively gave up the benefit provided by the *Limitations Act*.[22]

Remedy issue

Relying on *The East India Co v Oditchurn Paul*,[23] the appellants contended that if cl 24 was enforceable, the pleading of the statute by way of defence may give rise to an action for breach of the agreement, but the agreement will not itself prevent the pleading (or the operation) of the statute. It was argued that the respondents' remedy was limited to damages for breach of the covenant not to plead the defence and that the respondents were not entitled to seek orders for the enforcement of cl 24. The High Court rejected this contention.[24]

Gageler and Gordon JJ observed[25] that in *Paul*, the Privy Council dealt only with the common law remedy of breach of contract. It did not contradict the prior holding of the Court of Chancery in *Lade v Trill*[26] that such a contract ought to be enforced in equity.

Their Honours went on to observe[27] that, although damages remains a remedy for breach of a contract not to rely on a limitations defence at common law, equitable relief in the form of an injunction to restrain a breach of a contractual promise is also available. Their Honours concluded that where equity would restrain by injunction the making of a claim or the raising of a defence, an injunction need not issue; the equitable basis for the injunction can instead be pleaded directly in answer to the defence.[28]

Nicholas Andreatidis QC, Anthony Messina and Sophie Gibson appeared for the respondents, instructed by Mullins Lawyers.

[17] At [27] (Kiefel CJ and Edelman J); at [66] (Steward J).
[18] At [27] (Kiefel CJ and Edelman J); at [60] (Steward J); see *Electricity Corporation v Woodside Energy Limited* (2014) 251 CLR 640, 656-657 [35].
[19] At [29].
[20] At [30].
[21] At [30].
[22] At [30] (Kiefel CJ and Edelman J, with whom Gageler, Gordon and Steward JJ relevantly agreed).
[23] (1849) 7 Moo PC 85; 13 ER 811.
[24] At [35] (Kiefel CJ and Edelman J); at [50]-[51] (Gageler and Gordon JJ); at [104] (Steward J).
[25] At [50].
[26] (1842) 11 LJ Ch 201.
[27] At [51].
[28] *See Newton, Bellamy and Wolfe* [1986] 1 Qd R 431, 445-446.

NICHOLAS ANDREATIDIS QC
T +61 7 3008 3967
E ANDREATIDIS@LEVEL27CHAMBERS.COM.AU

SOPHIE GIBSON
T +61 7 3008 3962
E SOPHIE.GIBSON@LEVEL27CHAMBERS.COM.AU

ANTHONY MESSINA
T +61 7 3008 3998
E AMESSINA@LEVEL27CHAMBERS.COM.AU

Legal Updates

To stay updated with the latest legal developments register for upcoming events and publications from Level Twenty Seven Chambers via our website:

https://www.level27chambers.com.au/register-seminars-publications/