REAL PROPERTY LIST – AN OVERVIEW

Paper delivered at the UNSW Property Law Intensive on 15 March 2023

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1 I was pleased to accept the invitation to speak to you today. I would like to commence by acknowledging the Gadigal of the Eora Nation, the custodians of the land on which we meet and pay my respects to their elders past, and present and all First Nations people here today.

2 I have been asked to speak about the Real Property List and common themes and issues.

History and development of the List

3 For a very long time courts have been dealing with diverse issues of real property.[1]

4 For example, in feudal times between the time of Conquest and the reign of Henry II,[2] Manorial Courts were convened by lords and had civil jurisdiction over lord-tenant and tenant-tenant disputes. Those courts then diverged into the Court Baron with localised jurisdiction over the lord's freeholders and the Customary Court with jurisdiction over copyholders (so named because they

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* Real Property List Judge, Supreme Court of New South Wales. This is a revised version of a paper delivered at the UNSW Property Law Intensive on 15 March 2023. I acknowledge my Tipstaff, Mr Alan Zheng, and my Associate, Mr Harrison Thomas, for their assistance and research in the preparation of this paper.

1 See, eg, K E Digby, *An Introduction to the History of the Law of Real Property* (Clarendon Press, 2nd ed, 1876); A W B Simpson, *An Introduction to the History of the Land Law* (Clarendon Press, 1st ed, 1961) 2. More recent developments have seen the need for a specialised property list *usually* but not always as a part of a commercial court. The Supreme Court of Victoria introduced a "Property List" in the Common Law Division in 2016: Supreme Court of Victoria, *Annual Report 2015-16* (August 2017) 32; Overseas, England and Wales consolidated a wide variety of commercial and property cases under the banner of the Business & Property Courts in 2017: Sir Geoffrey Vos, 'A View from the Business and Property Courts in London' (2019) 1 *Erasmus Law Review* 10.

2 K E Digby, *An Introduction to the History of the Law of Real Property* (2nd ed, 1876, Clarendon Press) 7-8. Criminal jurisdiction was a different matter and more often administered by a "Court Leet" with a grant from the Crown: 53-54.

were tenants of mesne lords who held *copies* of the deed). Those copyholder tenants occupied the lord's land at the lord's pleasure and were obliged to follow the lord's customs.[3]

5 In time, the real actions arrived, and, with them, the centralised jurisdiction administered by the royal courts over real property matters. A uniform land law developed.[4]

6 There has been a constant overlap in the development of property law, contract and equitable doctrine. However, it is often the state of the local economy that drives disputes in the property context that impacts on contract and equity also.[5] For example, an economic downturn brings more mortgagee sales. A period of economic growth may bring more building developments, together with an increase in off the plan contracts, easement applications, and lodging of caveats. Specific kinds of economic growth like agricultural developments may lead to particular property interests such as more profits à prendre.[6] Various disputes that arise in relation to property then are agitated in equity courts all over the world, as has been the case for centuries.[7]

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3 K E Digby, *An Introduction to the History of the Law of Real Property* (Clarendon Press, 2nd ed, 1876) 52. See also Edward Coke, *Three Law Tracts; The Compleat Copyholder* (General Books. 2012) xxxi; John Bryson, *Bar, Bench and Land Law* (Svengali Press, 1st ed, 2016) 105-107, 161-168.

4 William Holdsworth, *An Historical Introduction to the Land Law* (Oxford University Press, 1st ed, 1927) 11-16; K E Digby, *An Introduction to the History of the Law of Real Property* (Clarendon Press, 2nd ed, 1876) 71-72. A W B Simpson, in *An Introduction to the History of the Land Law* (Clarendon Press, 1st ed, 1961) 20. Simpson set out the form of one of the writs, the *Breve de Recto* which initiated litigation in the court of a mesne lord: "The King to Lord X, greetings! We order you that without delay you do full right to D concerning one messuage with its appurtenances in the Manor of Dale which he claims to hold of you by the free service of a rose at midsummer for all service, of which T deforces him. And unless you do so, the Sheriff of … will do so, lest we hear further complaint on the matter for want of right."

5 See generally James W Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (Oxford University Press, 2007).

6 A W B Simpson, *A History of the Land Law* (Clarendon Press, 1st ed, 1961) 243-246.

7 One example is Chancery's increasing intervention in mortgage cases and the development of the equity of redemption: A W B Simpson, *A History of the Land Law* (Clarendon Press, 1st ed, 1961) 226-229.

7 The *Uniform Civil Procedure Rules 2005* (NSW) (*UCPR*) provide that proceedings under particular statutes are assigned to either the Common Law or Equity Division.

8 Proceedings under the *Real Property Act 1900* (NSW), the various strata legislation, and unconscionable conduct provisions of the *Retail Leases Act 1994* (NSW) are examples of matters allocated to the Equity Division. Possibly less well known is the fact that matters concerning the registration of beekeepers and compensation for loss of bees, amongst other things pursuant to the *Apiaries Act 1985* (NSW), were assigned to the Equity Division, before the Act's repeal in 2017.

9 Proceedings that are assigned to Common Law include disputes about the *Residential Tenancies Act 2010* (NSW) and mortgagees' claims for possession.[8]

10 Although the *UCPR* expressly assigns some property matters to the Equity Division, the *UCPR* only specifically assigns matters to some lists,[9] and further envisages such allocation will occur.[10]

11 Cases prior to 2015 which concerned real property were variously dealt with in the General Equity and Commercial Lists, and many cases were heard by a subset of Equity judges and masters.[11]

12 In 2015 Chief Justice Bathurst introduced a specialist Real Property List ('*RPL*') into the Equity Division following a wide consultation. The announcement stated:

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8 *Uniform Civil Procedure Rules 2005* (NSW) Sch 8 Pt 1 ('*UCPR*').

9 That can be contrasted with the *UCPR* expressly assigning proceedings for a possession of land to the Possession List in the Common Law Division: *UCPR* r 45.4.

10 *UCPR* rr 1.16, 45.8.

11 Justice Bryson (as his Honour then was), Justice Young (as the Chief Judge then was), Justice Hamilton, and Justice Hodgson as Chief Judge in Equity are recurring names in the NSW Conveyancing Reports of the 1990s and 2000s. Supreme Court Masters also played a substantial role in caveat jurisprudence in the late 20th century.

> The establishment of the Real Property List coincides with a booming property market and a changing property landscape. This includes increases in apartment dwelling in the major cities and suburbs of the State and greater need for and establishment of aged care facilities. It also coincides with recent legislative reforms governing the operation and management of owners' corporations.

13 Until October 2022, my colleague Justice Rowan Darke managed the RPL with great skill. I owe him a debt of gratitude for providing me with a List that has been so efficiently and effectively managed.

14 While a booming property market was a major consideration for the creation of the RPL in 2015, the market is not constantly in that state. However, the other consideration of a "changing property landscape" continues today. For example, recent changes include the following:

(1) The further rise of high-density living, urban consolidation and continued population growth has increased strata developments.[12] Statistics from 2020 provide that one in five Australians was living in a strata-titled property.[13] Therefore it is not surprising that now more proceedings involve owners' corporations and strata financiers. Strata issues also often interact with construction issues arising in the Technology and Construction List and may involve some complexity such as in the Mascot Towers case.[14] Decision-making by owners' corporations through by-laws also incorporates questions of rule-making powers, legality and reasonableness.[15] Of course some strata matters will continue to be heard in NCAT.

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[12] Proceedings concerning "the legislation governing the creation and management of strata schemes and community schemes" are matters which can be heard in the Real Property List: Practice Note SC Eq 12, [2(d)]. But see *Strata Schemes Management Act 2015* (NSW) pt 12, div 4.

[13] University of New South Wales City Futures Research Centre, *Australasian Strata Insights* (Report, June 2020).

[14] Jimmy Thomson, 'Mascot Towers saga a sorry reminder to keep strata records', *Australian Financial Review* (online, 24 June 2022).

[15] See, eg, *Cooper v The Owners – Strata Plan No 58068* [2020] NSWCA 250.

(2) There are evolving conceptions of real property ownership. For example, the popularity of listings on Stayz and AirBNB has led tribunals (and courts hearing appeals) to reconsider settled principles such as the lease-licence distinction.[16] At the same time, more novel forms of housing appear to be on the rise. For example, in the United Kingdom "legal squatting" is occurring, where people pay a licence fee to reside in a vacant building, often not a residential building.[17]

(3) The use of digital technology in property transfers is a recent phenomenon. In 2017, the Registrar-General considered whether an 'end-to-end' electronic conveyancing process could be developed.[18] The COVID-19 pandemic further emphasised the role of e-conveyancing. Since 2021, electronic lodgement network operators, Property Exchange Australia (PEXA) and Sympli, have been used for the financial settlement and lodgement stages of a property transaction.[19] There is some suggestion that there will be a transition to "100% eConveyancing" in the short-term future.[20] Whereas historically a rogue would need to steal a physical certificate of title, going forward that will no longer be an issue but new technology may generate new problems.[21] A rogue might now need to be more inventive and procure the PIN of a subscriber[22]

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[16] See, eg, *Swan v Uecker* (2016) 50 VR 74; Bill Swannie, 'Trouble in Paradise: Are Home Sharing Arrangements "Subletting" under Residential Tenancies Legislation?' (2016) 25(3) Australian Property Law Journal 183; Callum Ritchie and Brendan Grigg, 'No Longer Unregulated, But Still Controversial: Home Sharing and the Sharing Economy' (2019) 42(3) *University of New South Wales Law Journal* 981.

[17] 'The downside of being a property guardian', *BBC News* (online, 29 January 2016). See also *Camelot Guardian Management Limited v Heiko Khoo* [2018] EWHC 2296 (QB).

[18] Office of the Registrar General, *Removing Barriers to Electronic Land Contracts* (Report, December 2017) 4.

[19] There are calls for greater interoperability between the electronic lodgement network operators. See generally Peter Rosier, 'Electronic Conveyancing in Australia: Recent Developments' (2020) 94(3) *Australian Law Journal* 172.

[20] Deloitte, *The Future of the Australian Conveyancing Industry 2025 and 2030* (Report, June 2018) 6.

[21] Some of which are described in Robert Angyal and Brendan Edgeworth, 'E-Conveyancing: Legal Underpinning and Some Practical Aspects' (2018) 92(8) *Australian Law Journal* 582, 582-583.

[22] In most cases, they will be representative subscribers under cl 5.1 of the *NSW Participation Rules for Electronic Conveyancing* (Version 6) who are generally licensed conveyancers or legal practitioners.

and log into a workspace impersonating them. The rogue could then apply the subscriber's digital signature and act in a manner attributable to the subscriber.[23] Standards of verification of identity are obviously critical.

15 The RPL is a relatively busy list. Between 2017 and 2021 filings in the List have been around 400 annually.[24] That is a comparable number of filings to the Commercial and Technology and Construction Lists.[25]

16 Research published in October 2018 by the Law and Justice Foundation of NSW[26] profiled 245 cases in the RPL and identified the following features:

(1) Parties are a mix of individuals, corporations and government bodies such as local councils. First plaintiffs are more often individuals (around 60%). First defendants are more often organisations, including corporations and government bodies (65%).[27] These are statistics comparable to the General Equity List but with slightly more organisations in the Real Property List.

(2) There is a higher rate of litigants in person and often they are defendants. 94.3% of RPL cases had a represented plaintiff compared to 64% of defendants.[28] This is a higher rate than the Corporations, Commercial, Family Provision and General Equity lists in the Equity Division.

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[23] *Electronic Conveyancing (Adoption of National Law) Act 2012* (NSW) s 12(1). See, eg, Anthony Colangelo, 'Help at hand as victims of online conveyancing theft live "worst nightmare"', *Sydney Morning Herald* (online, 23 June 2018).

[24] Supreme Court of New South Wales, *2021 Annual Review* (Report) 53.

[25] Those lists had a total of 389 filings in 2021.

[26] Law and Justice Foundation of New South Wales, *Data Insights in Civil Justice* (Report, October 2018) ('*LJF Report*').

[27] Ibid 47.

[28] Ibid 73.

(3) Efficient completion of matters. The average number of listings in each case is 5.2, sitting between the Protective List and the Corporations List.[29] The RPL is one of the lists with the "shortest average case lengths" at 4.3 months between case creation and case closure.[30]

(4) Motions are less common. There are 1.5 "proceedings" per case in the Real Property List, meaning there is likely to be about 1 motion in 50% of cases.[31]

17 More than four years later, those statistics are not current, but do reflect the perspective I have noticed to date.

18 Turning away from statistics, I propose to speak to you about five real property issues.

(1) First, an emerging issue with the proper identification of caveatable interests on PEXA.

(2) Secondly, recurring issues in the drafting of effective charging clauses.

(3) Thirdly, clauses seeking to oust limitation periods operate by reference to the recent High Court decision in *Price v Spoor*.[32]

(4) Fourthly, some recurring issues in s 66G *Conveyancing Act* 1919 (NSW) proceedings for appointment of trustees for sale of jointly owned property.

(5) Lastly, I will provide some observations about the practical issues which often arise for practitioners operating in the RPL.

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29 Ibid 82.

30 Ibid 118-119.

31 Ibid 80.

32 (2021) 270 CLR 450; [2021] HCA 20.

The Rise of E-Conveyancing and Caveats

19 Caveats are a powerful "self-help tool". Bryson J summarised the situation in 2003:[33]

> In effect a caveat operates as an interlocutory injunction which the caveator grants to himself. In fact it has more powerful operation than an injunction, because it even prevents a transfer of title by registration by a registered proprietor who is prepared to disobey an injunction.

20 Therefore, the force of a caveat is not to be drawn upon casually. As Kunc J has observed:[34]

> As New South Wales' conveyancing system moves to a completely electronic platform, the role of conveyancers, solicitors and others as persons qualified to prepare and lodge caveats becomes all the more important. Ordinary members of the public are, in practical terms, no longer able to lodge caveats without the intervention of a "Subscriber", who in many cases will be a solicitor or licensed conveyancer. The requirement to give the requisite representations and certifications operates to confer on them the role of a guardian at the gate.

21 A prospective caveator must ensure its alleged caveatable interest is clearly expressed to anyone who searches the Register.

22 Since October 2021, in New South Wales, a caveat *must* be lodged through an Electronic Lodgement Network (ELN).[35] Recent cases have highlighted some complications in how caveatable interests are to be described through these electronic systems.

23 PEXA's online "Community" page reveals a wide variety of practitioner queries, including:

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[33] Justice John Bryson, 'Caveats Against Dealings under the Real Property Act 1900' (Speech, 29 March 2003).

[34] *Guirgis v JEA Developments Pty Limited* [2019] NSWSC 164, [39].

[35] *Real Property Act 1900* (NSW) s 12E; *Conveyancing Rules* (Version 6, 11 October 2021) r 8.8.

(1) the applicable categories for caveats claiming an equitable interest as a purchaser under a contract of sale,[36] or as grantees of a put and call option,[37] and

(2) whether a caveat can be lodged over property in Tasmania using PEXA (online answer provided: no).[38]

24 In February 2022, user "BrookeB" asked:

> What estate/interest needs to be selected from the dropdown and claim category needs to be selected from the dropdown for claiming an equitable interest pursuant to constructive trust relating to monetary contributions to purchase price by spouse?
>
> I understand particulars need to be set out in the future details supporting the claim but it is not clear what estate/interest and claim needs to be deleted as there are no "equitable" options.
>
> Thanks.

25 A PEXA employee replied:[39]

> Thank you for your question.
> Unfortunately, we cannot provide legal or lodgement advice.
> Kindly email the eConveyancing Team at NSW LRS for advice – econveyancingnsw@nswlrs.com.au[40]

26 Equity Duty Judges have recently engaged with the issues in BrookeB's query.

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[36] PEXA, Ask the PEXA Community, 'Re: Caveat Claim Category' (Forum Post, 5 May 2017) <https://community.pexa.com.au/t5/Ask-the-PEXA-Community/CAVEAT-CLAIM-CATEGORY/m-p/4073>.

[37] PEXA, Ask the PEXA Community, 'Caveat' (Forum Post, 10 August 2018) <https://community.pexa.com.au/t5/Ask-the-PEXA-Community/Caveat/m-p/11653>.

[38] PEXA, Ask the PEXA Community, 'Re: Caveat' (Forum Post, 10 August 2018) <https://community.pexa.com.au/t5/Ask-the-PEXA-Community/Re-Caveat/m-p/11905>.

[39] Some of the queries are answered by PEXA staff; and it appears some by fellow practitioners.

[40] PEXA, Ask the PEXA Community, 'NSW caveat – constructive trust (Forum Post, 21 February 2022) <https://community.pexa.com.au/t5/Ask-the-PEXA-Community/NSW-caveat-constructive-trust/m-p/24032>.

27 In June 2022 in *COMSERV (No 210) Pty Ltd v Robert Ristevski,*[41] the plaintiff approached Williams J, as Duty Judge, seeking the extension of a caveat over a property in North Richmond under s 74K of the *Real Property Act 1900* (NSW). The caveat stated that the estate or interest claimed was an "Estate in Fee Simple" and that was "by virtue of: Beneficial Interest in Trust".

28 Counsel for the plaintiff informed Williams J that it was the beneficiary of a constructive trust by reason of contributions to construction costs and development of the property under a joint venture agreement.[42]

29 The plaintiff accepted that the interest was wrongly described, but submitted that it could be otherwise disregarded under s 74L of the *Real Property Act 1900* (NSW) because there was still *sufficient* identification of the claimed interest.[43]

30 Williams J first considered the statement of Brereton J (as his Honour then was) in *Sutherland v Vale*:[44]

> The characterisation and description of the nature of the estate, interest or right claimed by a caveator is more than a mere formal requirement of the provisions of the Act, but goes to the heart and substance of their operation, because without a description of the estate, interest or right claimed, neither the Registrar-General nor a person reading the caveat can know whether a dealing would adversely affect the estate claimed, nor can the Court tell whether the caveator's claim has or may have substance.

31 Her Honour concluded that the effect of the plaintiff's misdescription of the interest would be that a person examining the register would need to form their own opinion about the nature of the caveator's interest. Such an outcome, her Honour considered, was absurd and could be abused; extensions of caveats ought not be granted if they are misleading on their face. Accordingly, the misdescription was a matter of substance which was beyond the cure of s

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41 [2022] NSWSC 821.

42 [2022] NSWSC 821, [4].

43 Citing *Mayrin DM Pty Ltd v Kaiyu Deng* [2019] NSWSC 1552, [47].

44 [2008] NSWSC 759, [12].

74L,[45] which allows a court to disregard a caveator's failure to *comply strictly* with the requirements concerning the *form* of a caveat.

32 In December 2022 in *Brose v Slade,*[46] Kunc J, as Duty Judge, considered a similar factual situation. The plaintiffs sought to extend two caveats over farming land near West Wyalong owned by the defendants. The plaintiffs were the daughter and son-in-law of the defendants. The plaintiffs' primary case was that the defendants held the lands under a common intention constructive trust arising out of a deed of family arrangement. This, it was said, allowed for a transfer of the fee simple to the plaintiffs. The caveats were registered in the same terms as in *COMSERV.*

33 The defendants submitted that the claim to an estate in fee simple was plainly wrong, because a constructive trust does not confer an estate in fee simple so as to enable a transfer of the land and, as a matter of substance, this could not be rectified under s 74L of the *Real Property Act*.[47]

34 The plaintiffs' responsive submission was that the Court need only be satisfied that the caveator's claim "has or may have substance" under s 74K(2).[48]

35 Kunc J reached a different conclusion to Williams J, finding there was no difficulty with the description of the caveat if it was read with the attached information provided. Accordingly, there was no need to rely on s 74L. His Honour noted several differences with *COMSERV*:

(1) First, counsel for the caveator in *COMSERV* had conceded that the interest was wrongly described.

[45] [2022] NSWSC 821, [67]-[68].

[46] [2022] NSWSC 1785.

[47] [2022] NSWSC 1785, [66].

[48] [2022] NSWSC 1785, [63].

(2) Secondly, the attached explanation of the interest was more extensive than in *COMSERV* and more clearly identified the plaintiffs' interest.

(3) Finally, there was evidence before Kunc J that the reason for the claim of an "Estate in Fee Simple" was because of limited options available on the PEXA system[49] and further details could not be adequately entered into the lodgement system because of the 300-text character limit.[50] That evidence was unchallenged.

36 In the alternative, his Honour found that s 74L could operate where there was no alternative for the caveator but to use the PEXA system, and no alternative existed on the PEXA system to claim other than an "Estate in Fee Simple";[51] it was not possible for the caveator to strictly comply with identifying the interest.

37 His Honour subsequently referred the judgment to PEXA, the Registrar-General and the Minister for Customer Service to consider the inclusion of "beneficial estate or interest" as an estate or interest claimed.

38 Practically, whether a caveatable interest is sufficiently expressed to allow resort to s 74L is a question of fact that will turn on the details of a particular caveat. While there may be other "workarounds", if there are technological limitations in adequately describing the caveatable interest, an attachment ought to detail that interest more fully. The caveator ought also be ready to prepare evidence of the particular technological limitation, as in *Brose*. Preparing such evidence may take additional time and preparation ought not be left to the final days before the expiry of a lapsing notice.

39 The obvious concern for courts, the Registrar General and the public is that if the task of precisely describing the caveatable interest is impossible because

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49 [2022] NSWSC 1785, [70], [75].

50 [2022] NSWSC 1785, [75].

51 [2022] NSWSC 1785, [76].

of technological difficulties, then it will be difficult to know whether a dealing would be affected.[52]

40 I note that parties continue to seek injunctions in lieu of caveats where caveats are not extended, and the usual requirements apply.

Effective Charging Clauses

41 Some disputes concern whether a clause in a loan contract grants a lender a caveatable interest. Since the High Court's decision in *CPT Custodian Pty Ltd v Commissioner of State Revenue*,[53] it is accepted that these disputes involve a determination of the proper construction of the relevant clause in the context of the contract as a whole.

42 Some lenders submit that any clause permitting a caveat to be lodged provide a proprietary interest in a property justifying the retention of that caveat relying on *Troncone v Aliperti.*[54] However, at its highest, *Troncone* provides that there is an available implication that a contractual right to caveat *may* grant an equitable interest in property. That implication can be supported by some constructional maxims such as "Whoever grants a thing is deemed also to grant that without which the grant itself would be of no effect"[55] and the presumption against surplusage.[56]

43 However, all constructional factors must be considered. For example, the clause may not contain any words indicative of security over the property, such as "security", "charge" or "protection of interest".[57] Further, regard will be had to

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52 *Circuit Finance Pty Ltd v Crown and Gleeson Securities Pty Ltd* [2005] NSWSC 997, [17]-[27] (Brereton J, as his Honour then was).

53 (2006) 224 CLR 98, 115 (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ).

54 (1994) 6 BPR 13,291.

55 *Troncone v Aliperti* (1994) 6 BPR 13,291, 13,292-3 (Mahoney JA, with whom Priestley JA and Meagher JA agreed).

56 Thomas Prince and Perry Herzfeld, *Interpretation* (2nd ed, Lawbook Co, 2020) 485-486; Peter Butt, 'The Conveyancer: Bootstrap Caveats' (1994) 68(10) *Australian Law Journal* 752.

57 *Ta Lee Investment Pty Ltd v Antonios* [2019] NSWCA 24, [94]-[114] (Bathurst CJ, Beazley P and Macfarlan JA)

whether the contract includes supplementary clauses which might be expected if security is being granted, such as when such security would be released, and certainty as to what assets are to be the subject of the charge.[58]

44 Where a court finds that such a clause does not give rise to a proprietary interest, that is not necessarily the end of the matter. The clause is not meaningless. As a contractual right, equity's auxiliary jurisdiction may be enlivened.[59] It is also possible to envisage a scenario where a party is induced into the contract by a representation that it will have a caveatable interest in property, such that other equitable remedies may flow.

Contracting out of statutes of limitations in the mortgage context

45 Mortgagees generally attempt to draft mortgage terms to maximise their benefits and minimise their risks in recovery.

46 The High Court recently considered the proper construction of a mortgage term in *Price v Spoor.* Clause 24 provided:

> 24 Restrictive Legislation
>
> 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.

47 In 1998, the Price family borrowed $320,000, secured by mortgage over three plots of land. In 2017, in the Queensland Supreme Court the mortgagee commenced proceedings for possession and the recovery of $4 million (comprising the original sum and accrued interest of 16.25% compounding monthly[60]).

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[58] See, eg, *Nationlink Solutions Pty Ltd v FHT Nominees Pty Ltd* [2022] NSWSC 1479, [27].

[59] *Redglove Projects Pty Ltd v Ngunnawal Local Aboriginal Land Council* [2004] NSWSC 880, [26]-[27] (White J).

[60] *Spoor v Price* [2019] QSC 53, [4].

48 At trial, the Prices pleaded a 12 year limitation period defence[61] and sought to strike out the mortgagee's claim. By way of counterclaim, they also sought a declaration that any liability under the mortgage had been extinguished. The mortgagee argued that clause 24 prevented the Prices from relying on a limitations defence.[62] The Prices argued that such a "contracting out" was contrary to the policy of the statute of limitations.

49 At trial, Dalton J (as her Honour then was), was guided by Mason CJ's reasoning in *Commonwealth v Verwayen*[63] and found that parties can permissibly agree not to plead a limitation period, without such a contracting out being contrary to public policy.[64]

50 In her Honour's view, there was a distinction between contracting out of a limitations provision which conferred a benefit in the form of a statutory right to plead a certain defence (waivable) and a limitations provision which operated to extinguish rights as well (not waivable). Her Honour found that it was not open to parties to contract out of provisions of the latter kind.

51 Her Honour also considered that clause 24 was ambiguous on its face, particularly as to the meaning of "curtailed, suspended, postponed, defeated or extinguished". This is because the applicable limitations provisions could not be said to suspend or postpone rights. Further such rights were not extinguished or defeated because those consequences were conditional on the pleading of a limitations defence, rather than the statute itself. As clause 24 was ambiguous, her Honour applied the contra proforentum rule and concluded the

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61 Section 26 of the *Limitation of Actions Act 1974* (Qld) imposes a 12-year limitation period on actions to recover money secured by mortgage from accrual of the right to receive the money.

62 An unpleaded argument based on estoppel, waiver and election was not accepted: *Spoor v Price* [2019] QSC 53, [21].

63 *Commonwealth v Verwayen* (1990) 170 CLR 394, 404-406 (Mason CJ).

64 A point made by Peter Handford in *Limitation of Actions* (2nd ed, Law Book Co) 79. Her Honour considered that the case was different to other cases involving a similar clause such as *Lindsay v Smith* [2002] 1 Qd R 610 and *Newton, Bellamy & Wolfe v State Government Insurance Office (Qld)* [1986] 1 Qd R 431 because clause 24 had purported to contract out of the statute of limitations before any cause of action had accrued but her Honour did not see any meaningful difference as a result. This finding was otherwise affirmed on appeal: *Spoor v Price* [2019] QCA 297, [34] (Gotterson JA).

clause did not oust the operation of the applicable limitation legislation. Therefore, the limitation defence could be relied upon and succeeded.

52 The mortgagee appealed. The Queensland Court of Appeal unanimously allowed the appeal in favour of the mortgagee. Gotterson JA wrote the leading judgment (with whom Sofronoff P and Morrison JA agreed). His Honour found there was no public policy that contracting out of a limitations statute is necessarily void, and nothing in the limitation legislation suggested otherwise. Although finality is an important feature of civil litigation, limitations statutes give effect to that policy by allowing parties to bring proceedings after expiry but equipping the other party with a private right to plead a limitations defence.[65] Gotterson JA found that the phrase "defeated" was apt to capture the legislation, consistent with the use of the language of "defeat" by appellate courts referring to the effect of a limitation period. The phrase was also sufficiently wide to capture conduct by a mortgagor pleading a limitations defence even though such conduct was not directly defeated by the legislation.[66]

53 The Prices appealed to the High Court and the appeal was dismissed. There were three separate judgments. Kiefel CJ and Edelman J (with whom Gageler and Gordon JJ substantially agreed) construed clause 24 and found:

> The fact that the Limitation Act does not of itself have the effect of defeating the respondents' rights to 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 is clear that the parties intended that it have a wide operation and that it extend to any consequences flowing from a statutory provision ("whereby or in consequence whereof") which would defeat the mortgagee's rights. It was clearly intended that provisions which might have that result were not to apply to affect the rights and obligations of the parties. It is not difficult to infer that it was intended to apply to a benefit given by statute to a defendant by which the mortgagee's right could be defeated. By agreeing to the terms of cl 24 the appellants effectively gave up the benefit provided by the Limitation Act.[67]

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65 *Spoor v Price* [2019] QCA 297, [39]-[40] (Gotterson JA).

66 *Spoor v Price* [2019] QCA 297, [59]-[66] (Gotterson JA).

67 *Price v Spoor* [2021] HCA 20; 270 CLR 450, [30] (Kiefel CJ and Edelman J).

54 Drafters will no doubt consider the impact of the decision when drafting mortgages and other contracts, and litigators will consider ways of challenging such clauses. For example, there was no suggestion in *Price v Spoor* that the mortgage was concluded on terms other than by free negotiation between the parties contracting at arms' length.[68] In New South Wales, a mortgagor could seek relief for unjust or unfair contract terms pursuant to various legislation such as the *Contracts Review Act 1980* (NSW).[69]

Section 66G

55 Section 66G proceedings remain a fixture of the RPL. There are some recurring issues.

56 First, the basis upon which parties hold their interests is important to a final distribution after a sale. Section 66G orders affect property held through co-ownership.[70] Co-ownership includes where parties hold as joint tenants or tenants in common, whether at law or equity.[71]

57 If two parties are joint tenants, any distribution as a result of s 66G will be to the effect of 50% each. However, joint tenants do not hold proportionate shares in land.[72] As Professor Edgeworth explained:

> [F]or the purpose of severance a joint tenant is regarded as having a *potential* share in the land commensurate with that of the other joint tenants. Where there are two joint tenants, it one-third, and so on. This potential share the joint tenant can deal with unilaterally during his or her lifetime. By so dealing with it, that share may be "severed" from the other shares and converted into an "aliquot" undivided share held in common, not jointly.[73]

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68 *Price v Spoor* [2021] HCA 20; 270 CLR 450, [60] (Steward J).

69 See also *Competition and Consumer Act 2010* (Cth) Sch 2; *Australian Consumer Law* pt 2-3.

70 *Conveyancing Act 1919* (NSW) s 66G(1).

71 *Conveyancing Act 1919* (NSW) s 66F(1).

72 *Cummins (Trustees of) v Cummins* (2006) 227 CLR 278, [56].

73 Brendan Edgeworth, *Butt's Land Law* (Lawbook Co, 7th ed, 2017) 268.

58 A joint tenant should therefore consider the possibility of severance prior to commencing s 66G proceedings or, if necessary, seek s 66G orders conditioned upon unilateral severance by the plaintiff/joint tenant.

59 Severance could be effected by unilateral transfer under s 97 of the *Real Property Act*. Where no unilateral action is undertaken, a joint tenant will need to establish an agreement between the joint tenants to convert their ownership into tenants in common.[74] Although such an agreement can be inferred in the context of a breakdown in an intimate relationship where the parties are choosing to informally divide their assets,[75] it may be difficult to easily provide cogent evidence. For instance, one partner may decide to move out of the property for a while,[76] or the parties may even agree to sell the property, but such steps may not rise to the level of demonstrating an agreement to sever if there is no evidence that the parties discussed distribution of the proceeds.[77]

60 Secondly, issues concerning the appointment of trustees commonly arise. Regard must be had to the express requirements in s 66G that if trustees are to be appointed, there must be:

(1) a trust corporation alone,

(2) a trust corporation with one or two individuals, *or*

(3) two or more individuals.[78]

61 Darke J has observed that it may be possible to have one trustee where the parties consent.[79]

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[74] *Wright v Gibbons* (1949) 78 CLR 313, 322 (Latham CJ).

[75] *Scott v Scott* [2009] NSWSC 567, [102] (Ward J, as the President then was).

[76] *Ibrahim v Ibrahim* [2022] NSWSC 1680, [39].

[77] *Valverde v Inch* [2018] NSWSC 366, [109] (Robb J).

[78] *Conveyancing Act 1919* (NSW) s 66G(3)(a).

[79] *Thistleton v Thistleton* [2022] NSWSC 101, [28].

62 Wherever possible, parties should seek to agree on the trustees. Where that is not possible, courts are motivated by concerns of cost and experience, such as:

(1) Are the trustees experienced only in residential transactions and are they selling a commercial property?

(2) Do the trustees need to be partners in major accounting firms if the property to be sold is a residential property worth $500,000?

(3) What is an appropriate cap on trustee fees? It is always possible for the trustees to be granted liberty to increase the amount if necessary.

Practical operation of the Real Property List

63 It is important to read three key documents when appearing in the RPL:

(1) Practice Note SC Eq 12 (Real Property List), which was last updated on 21 March 2019 and is under review.

(2) Real Property List Notice to Practitioners which is published on the NSW Supreme Court website 'Sittings' page,[80] and was updated on 14 February 2023.

(3) The list of dates where the Real Property List is not operating on the 'Sittings' page.[81]

64 The Notice to Practitioners currently provides that practitioners should confer in advance of any listing date and seek to agree on suitable consent orders. Consent orders should be sent to chambers by email in word document and

[80] Supreme Court of New South Wales, 'Court sittings' (Webpage) <https://www.supremecourt.justice.nsw.gov.au/Pages/sco2_courtlists/court_sittings.aspx>.

[81] Supreme Court of New South Wales, 'Court sittings' (Webpage) <https://www.supremecourt.justice.nsw.gov.au/Pages/sco2_courtlists/court_sittings.aspx>.

executed PDF form by 12 noon every Thursday. That deadline is a strict deadline and is enforced.

65 Consent orders may be sent through before Thursday morning. Justice Black has elsewhere observed:

> There is a real question why so many matters are dealt with by practitioners attending in the longer directions lists and handing up consent orders, where judges would generally make consent orders submitted to chambers if asked to do so, typically up to the business day before the list. This may reflect the fact that these lists provide a scheduled time and place for practitioners to focus on the directions to be made, with a sense of urgency arising from the impending mention of the matter before the judge, and without other distractions.[82]

66 Competing orders sought by parties will not be adjudicated on the papers and parties must appear in the RPL for any dispute to be resolved. Parties ought only contact Chambers with consent orders, if they are exercising liberty to apply or have been asked a question by Chambers.

67 In addition, appropriate communication with the court is essential and required by the Solicitors' Conduct Rules.[83]

68 Even consent orders will not automatically be made. An explanation is likely to be required in some situations, for example, if the proposed timetable appears too leisurely. Some orders will not be made by consent, such as setting a matter down for hearing.

69 Unless you are otherwise advised that orders are made in chambers, you should assume that an in-person appearance is required, whether by the solicitor on the record, a local agent or counsel. AVL and dial-in details will not be provided other than in exceptional circumstances, because the efficiency of

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[82] Justice Ashley Black, 'Case Management: Innovations and Obstacles' (Speech, Sixth Judicial Seminar on Commercial Litigation, 14-16 February 2019) 5.

[83] See, eg, *Cadence (90) Investments Pty Ltd as trustee of the GDC Discretionary Trust v Simon Dougal Chalmers* [2019] NSWSC 1168; *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) r 22.5.

the busy list is compromised with the complications of remote appearances and difficulties “handing up” documents.

70 The Practice Note requires parties to seek leave before filing a motion. To seek leave parties should prepare the notice of motion and supporting documents, seek the consent of the other side where appropriate, and seek leave at a directions hearing on Friday or, where the matter is urgent, by email to Chambers. Motions are generally listed for directions at the beginning of the Friday list at 9.15am and given a hearing time for later in the day if appropriate. Where motions are complex and/or involve voluminous evidence, parties ought to consider consent orders for the orderly progression and hearing of the motion, including provision of written submissions.

71 However, certain applications must first be made to the Registrar in Equity. These applications include substituted service, security for costs, and setting aside subpoenas and notices to produce. The Registrar will, if appropriate, allocate a listing time before a registrar.[84]

72 Practitioners should check the list after 4:00 pm on Thursday to ascertain their precise listing time and number in the list. The precise numbering in the list may differ slightly on Friday. Matters are called by name and should also be mentioned by name.

73 Where a party is a litigant in person, practitioners ought assist the Court where possible, for example, by contacting the litigant in person and ensuring they understand what is being sought at a directions hearing, and providing copies of orders made to a litigant in person. The Court’s system will not automatically contain the litigant in person’s contact details, for example, where previous solicitors cease to act but do not ensure that the client’s *preferred*, *most recent* and *accurate* email address is provided to the Registry. The Court will also take appropriate steps to ensure procedural fairness is afforded to all parties.[85] Pro

[84] Real Property List: Practice Note SC Eq 12, [12].

[85] See, eg, *In Re F* [2001] FamCA 348 at [253].

bono referral orders under Part 7 Division 9 of the *UCPR*[86] may be raised with the parties. The purpose of that Division is to facilitate legal assistance where litigants are *otherwise unable to obtain it.*[87]

74 There are also some common mistakes in the Real Property List, that ought to be avoided:

(1) First, the scope of "Real Property", whilst broad and defined inclusively in the Practice Note,[88] *does not* include proceedings in, or to be commenced in the Possession List in the Common Law Division.[89] Orders for possession can be made in the Real Property List and may, for instance, be made ancillary to an order for judicial sale.[90] However, the Possession List has a very substantial Practice Note and requirements such as the Short Form Statement of Claim designed to facilitate understanding by a defendant of the practical consequences of the proceedings.[91] Proceedings only seeking orders for possession will be removed from the RPL in the Court's discretion.[92]

(2) Secondly, the Practice Note requires that parties at a first return date identify the real issues in dispute, devise a timetable and consider whether mediation is necessary particularly as Court-annexed mediation dates are generally not available on short notice.[93] Parties should seriously consider possible resolution without court involvement, particularly where the dispute involves family relations. Historically mediation orders in the Real Property List have been less than 1%,[94]

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86 *UCPR* rr 7.33-7.42.

87 *UCPR* r 7.33(2).

88 Real Property List: Practice Note SC Eq 12, [2(d)].

89 Ibid [3].

90 See, eg, *Morris Finance Ltd v Free* [2017] NSWSC 1417 at [124] (Ward CJ in Eq, as the President then was).

91 Possession List: Practice Note SC CL 6 (Possession List), [7]-[8].

92 Real Property List: Practice Note SC Eq 12, [6].

93 Ibid [9].

94 *LJF Report* (n 26) 98.

however, parties often choose to mediate and reach a resolution without an order to do so.

75 Thank you for your attention today.

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