# The enforceability of extended contractual warranties for contract works – can the hurdles of applicable limitation periods be overcome?

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*The practice has arisen in bespoke contracts for infrastructure projects for contractors to provide extended warranties for works. Such warranties can be staggered depending upon the element the warranty is provided for. While such clauses have been included for presumably appropriate consideration, there is an issue as to their enforceability as they may run foul of applicable limitation periods. For example, sections 14 and 16 of the Limitation Act 1969 (NSW) prescribe limitation periods of, respectively, six years for actions in tort and for breach of contract, and 12 years for actions founded on a deed. Section 109ZK of the Environmental Planning and Assessment Act 1979 (NSW) precludes bringing a building action beyond 10 years after the issue of a final occupation certificate. This article explores how the US, UK and Australia have grappled with this issue and considers whether it is possible to contract out of limitation periods to ensure the enforceability of extended contractual warranties.*

## INTRODUCTION

The practice has arisen in bespoke contracts for infrastructure projects for contractors to provide extended warranties for the works. Such warranties can be in the order of 10, 20, 50 years or even longer and are particular to bespoke contracts. None of the standard contracts in Australia includes such warranties. While such clauses have been included in these contracts for presumably appropriate consideration, enforceability is an issue. Limitation periods, on their face, can affect the enforceability of such clauses. For example, either ss 14 or 16 of the *Limitation Act 1969* (NSW)[1] (***Limitation Act***

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[1] *Limitation Act 1969* (NSW) s 14 provides:

> 14 General
>
> (1) An action on any of the following causes of action is not maintainable if brought after the expiration of a limitation period of six years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims:
>
> (a) a cause of action founded on contract (including quasi contract) not being a cause of action founded on a deed,
>
> (b) a cause of action founded on tort, including a cause of action for damages for breach of statutory duty,
>
> (c) a cause of action to enforce a recognizance,
>
> (d) a cause of action to recover money recoverable by virtue of an enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.
>
> (2) This section does not apply to:
>
> (a) a cause of action to which section 19 applies, or
>
> (b) a cause of action for contribution to which section 26 applies.
>
> (3) For the purposes of paragraph (d) of subsection (1), enactment includes not only an enactment of New South Wales but also an enactment of the Imperial Parliament, an enactment of another State of the Commonwealth, an enactment of the Commonwealth, an enactment of a Territory of the Commonwealth and an enactment of any other country.

*Limitation Act 1969* s 16 provides:

> An action on a cause of action founded on a deed is not maintainable if brought after the expiration of a limitation period of twelve years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims.

***1969***) or s 109ZK of the *Environmental Planning and Assessment Act 1979* (NSW)[2] (***Environmental Planning and Assessment Act***) can preclude the enforceability of such clauses.

## An extended contractual warranty

An example of an extended contractual warranty that purports to secure its enforceability by utilizing two different techniques, is:

> The minimum design life of the Tunnel shall be:-
> (i) for the structure, 100 years;
> (ii) for major mechanical & electrical items, pavement (except as noted below) and tunnel finishes, 20 years;
> (iii) for the road surface, 10 years; and
> (iv) for all renewable items, a reasonable life. A schedule of such items, with life at handover, is to be agreed with the owner (collectively, **the Warranty**).
>
> The contractor agrees to carry out all rectification works within a reasonable time after receipt of written notification from the owner particularizing all alleged breaches of the Warranty (**First technique**).
>
> The contractor agrees not to plead either s 14 of the *Limitation Act 1969* (NSW) or s 109ZK of the *Environmental Planning and Assessment Act 1979* (NSW) in defence to any proceedings brought in connection with the enforcement of the Warranty (**Second technique**).

In the First technique, the drafter has attempted to delay the accrual of the cause of action in contract by manipulating the variables and the time for performance. If effective then this will prevent the clause running foul of the ultimate bar in s 51 of the *Limitation Act 1969* which provides that proceedings are not maintainable 30 years after the accrual of the cause of action.[3]

In the Second technique, the drafter has attempted to expressly contract out of the limitation period at the outset of the contract and prior to the accrual of a cause of action.

The enforceability of extended contractual warranties depends upon the utility and efficacy of the two drafting techniques employed in the Warranty. The first technique employed is a manipulation of the variables by attempting to delay the accrual of a cause of action in contract. The Warranty is framed in terms that the contractor promises to remedy defects upon receipt of written notification, which would create a cause of action only upon the failure of the contractor to rectify the defects within a reasonable period once placed on notice. However, a cause of action for breach of contract of this promise, may not be enforceable as the cause of action may run foul of s 109ZK. In particular, while enforcement of this breach of contract would not contravene s 14, it may nonetheless offend s 109ZK if the cause of action arises more than 10 years after the s 109ZK period.

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[2] *Environmental Planning and Assessment Act 1979* (NSW) s 109ZK provides:

> 109ZK Limitation on time when building action or subdivision action may be brought
> (1) Despite any Act or law to the contrary, a building action may not be brought in relation to any building work:
> (a) more than 10 years after the date on which the relevant final occupation certificate is issued, or
> (b) in a case where no final occupation certificate is issued, more than 10 years after:
> (i) the last date on which the building work was inspected by a certifying authority, or
> (ii) if no such inspection has been conducted, the date on which that part of the building in relation to which the building work was carried out is first occupied or used.
> (1A) Despite any Act or law to the contrary, a subdivision action may not be brought in relation to any subdivision work more than 10 years after:
> (a) in the case of work completed before the relevant subdivision certificate is issued, the date on which the relevant subdivision certificate is issued, or
> (b) in the case of work completed after the relevant subdivision certificate is issued, the date on which the compliance certificate that certifies that the work has been completed is issued.
> (2) This section does not operate to extend any period of limitation under the *Limitation Act 1969*.

[3] *Limitation Act 1969* (NSW) s 51 provides:

> (1) Notwithstanding the provisions of this Part, an action on a cause of action for which a limitation period is fixed by or under Part 2 is not maintainable if brought after the expiration of a limitation period of thirty years running from the date from which the limitation period for that cause of action fixed by or under Part 2 runs.
> (2) This section does not apply to a cause of action in relation to which an order has been made under Subdivision 3 of Division 3 (Discretionary extension for latent injury etc).

The enforceability of the Warranty therefore turns upon whether an action for enforcement of the Warranty falls within the ambit of s 109ZK and if so, the efficacy of the express agreement between the parties not to invoke any limitation defences in any proceedings brought to enforce the Warranty. To maximize the prospects of an enforceable extended contractual warranty, the parties should also agree at the outset to refrain from raising any limitation period defences in any actions for enforcement.

### The scope of the article

Using the framework of the Warranty, this article will explore whether it is possible to contract out of limitation periods prior to the accrual of the cause of action by the parties agreeing not to invoke limitation period defences in any enforcement proceedings.[4] The case law reveals that the issue of whether it is possible for a party to contract out of the provisions in these pieces of legislation is primarily determined by a consideration of the legislative intention and public policy behind ss 14, 16 and 109ZK. This approach is generally unanimous across the United Kingdom, the United States and Australia. However, the application of these principles has possibly led to different outcomes in each of these jurisdictions.

An exploration of these issues will also touch upon the impact in law of the expiry of the limitation period and any relevant qualifications within the respective pieces of legislation.

## THE PROBLEM IDENTIFIED

### Nature of the claim

The definition of a building action in the *Environmental Planning and Assessment Act 1979* is broad[5] and is likely to cover any enforcement proceedings for the Warranty. By its very nature, any action to enforce the Warranty may be brought no more than 10 years after the issue of the final occupation certificate[6] or 10 years after the building work was inspected by a certifying authority[7] or 10 years after the building on which the building work was carried out was occupied.[8]

### The length of the applicable limitation periods

Section 14 of the *Limitation Act 1969* imposes a limitation period of six years from the date of the accrual of the cause of action in contract and tort. Section 16 of the Act imposes a limitation period of 12 years for a cause of action founded on a deed. Within this framework, s 109ZK of the *Environmental Planning and Assessment Act 1979* sets a 10-year limitation period by precluding the bringing of a building action more than 10 years after the issue of (or when it ought to have been issued) a final occupation certificate. The interplay between ss 14, 16 and 109ZK gives rise to some problematic scenarios. This is illustrated in the context of causes of action in relation to latent defects.

### Accrual of the cause of action

A cause of action in contract accrues at the date of the breach of contract. In the context of building actions for latent defects absent the employment of any drafting techniques that manipulate the variables, a cause of action would generally accrue at the date of practical completion or at the very

[4] It is uncontroversial that parties can contract out of limitation periods after the accrual of the causes of action. See below.

[5] *Environmental Planning and Assessment Act 1979* (NSW) s 109ZI defines:

> **building action** [to mean] an action (including a counter-claim) for loss or damage arising out of or concerning defective building work.
>
> **building work** [to include] the design, inspection and issuing of a Part 4A certificate or complying development certificate in respect of building work.

Pursuant to *Environmental Planning and Assessment Act 1979* s 109C(c), a Part 4A certificate includes an Occupation Certificate.

[6] *Environmental Planning and Assessment Act 1979* (NSW) s 109ZK(1)(a).

[7] *Environmental Planning and Assessment Act 1979* (NSW) s 109ZK(1)(b)(i).

[8] *Environmental Planning and Assessment Act 1979* (NSW) s 109ZK(1)(b)(ii).

latest, a reasonable period after the end of the defects liability period to allow the contractor an opportunity to rectify the identified defects. Latent defects by their very nature would not be manifest at the date of practical completion. However, the cause of action for breach of contract for latent defects would have accrued at the date of practical completion and the limitation period may well be exhausted prior to the date of the defect eventually manifesting. In this scenario, the six-year limitation period pursuant to s 14 would be exhausted well before the 10-year period in s 109ZK. This scenario is catered for in s 109ZK(2) of the *Environmental Planning and Assessment Act 1979* which provides that the "section does not operate to extend any period of limitation under the Limitation Act 1969".

In tort, by way of contrast and mere illustration, as it is unlikely that a contractor will be found to owe the principal concurrent duties of care in contract and tort in large commercial or infrastructure projects,[9] the cause of action accrues when damage is suffered. This can be at a later point in time to the date of the breach of contract. For instance, in the context of latent defects, the date of damage is generally the date of discovery of the defect. By its very nature, this can occur either before the expiration of the 10-year period in s 109ZK or after. If the cause of action accrues before the expiration of the 10-year period in s 109ZK and the defect is discovered at that time then the s 109ZK limitation may not pose a problem. However, if the defect does not manifest itself so that the cause of action in tort does not accrue within 10 years of the issue of the final occupation certificate then s 109ZK operates to preclude the bringing of a building action to recover damages in tort.

## CONTRACTING OUT OF LIMITATION PERIODS PRIOR TO THE ACCRUAL OF CAUSES OF ACTION

The current approach of the courts in New York and many of the other States of the United States is that one cannot extend limitation periods because it is against public policy.[10] The New York courts even go so far as to say that it is not always possible to impose time bars.[11] Some time bars may be so restrictive that they are not in line with the public policy of the legislation.[12]

The English courts[13] and the Law Commission[14] seem to accept without analysis that it is possible to contractually extend limitation periods where there has been valuable consideration. A close look at the case law on this issue reveals that the courts do not consider the public policy behind the various Limitation Acts but merely approach each case with an acceptance that it is possible to vary limitation periods by agreement. It is unclear whether this acceptance arises from the authority of *Lade v Trill*[15] as the Law Commission seems to suggest.[16] However, in that case, the contract to vary the limitation period was only entered into after the accrual of the cause of action and cannot, under scrutiny, be the jurisprudential basis for the approach seemingly taken by the English courts on this issue.

[9] See *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 and *Brookfield Multiplex Ltd v Owners Corporation SP 61288* (2014) 254 CLR 185 where the High Court has held that the existence of a duty of care in tort is determined by identifying the salient features of the case, in particular vulnerability, and carrying out a balancing exercise of those salient features.

[10] *John J Kassner & Co Inc v City of New York*, 46 NY 2d 544, 550–551 (1979).

[11] *John J Kassner & Co Inc v City of New York*, 46 NY 2d 544, 551 (1979).

[12] *John J Kassner & Co Inc v City of New York*, 46 NY 2d 544, 551 (1979).

[13] *Oxford Architects Partnership v Cheltenham Ladies College* [2007] PNLR 18; *Inframatrix Investments Ltd v Dean Construction Ltd* [2012] All ER (D) 27 (Feb); [2012] EWCA Civ 64; *Ener-G Holdings plc v Phillip Hormell* [2012] EWCA Civ 1059; *Elvanite Full Circle Ltd v AMEC Earth & Environmental Ltd* [2013] EWHC 1191 (TCC); *Larkfleet Limited v Allison Homes Eastern Ltd* [2016] EWHC 195.

[14] The Law Commission, *Limitation of Actions: Item 2 of the Seventh Programme of Law Reform: Limitation of Actions*, 9 July 2001, [2.96].

[15] *Lade v Trill* (1842) 11 LJ Ch 102.

[16] The Law Commission, *Limitation of Actions: Item 2 of the Seventh Programme of Law Reform: Limitation of Actions*, 9 July 2001, [2.96].

The Australian courts have not extensively addressed this issue. There appears to be only one authority squarely on point. In *Huepauff & Ors v Inter-Continental Travels P/L No SCCIV-01-70*,[17] the South Australian Supreme Court had to consider whether a case in relation to breach of an extended warranty was a building action which contravened s 73 of the *Development Act 1993* (SA) (the equivalent of s 109ZK).[18] Without rigorous analysis, the South Australian Supreme Court held that the extended warranty was enforceable because enforcement of the extended warranty was not a building action. The Victorian Supreme Court has also considered this issue in the context of the Victorian legislation in *Brirek Industries Pty Ltd v McKenzie Group Consulting Pty Ltd*.[19] *Brirek* is, however, of limited utility as the Victorian legislation seems to expressly preserve the limitation periods of any other enactment.

Guidance is provided in the context of the *Corporations Act 2001* (Cth) where the High Court recently considered the circumstances in which parties may contract out of legislation.[20] In addition, issues of voluntary assumption of responsibility and reliance, estoppel or waiver, as well as the misleading or deceptive conduct and unconscionability provisions in the *Australian Consumer Law* may have a role to play on a case by case basis.

Because of this dearth of binding authority in New South Wales, the issue of whether a party can contractually extend a limitation period in a building action prior to the accrual of the cause of action, should be determined by an examination of the public policy behind s 109ZK of the *Environmental Planning and Assessment Act 1979*, and ss 16 and 14 of the *Limitation Act 1969*. The public policy must be closely examined to determine whether the policy behind the two pieces of legislation was to protect public rights so as to trump the private right to contract.

## THE US POSITION ON CONTRACTING OUT OF LIMITATION PERIODS

The United States' position on the impossibility of a party effectively contracting out of limitation periods is founded upon a consideration of the public policy objectives of the statutory provisions that have been enacted in the various States. The purpose behind statutes of limitation is uncontroversial. They are designed to provide defendants with finality, repose and avoidance of stale claims and stale evidence. The statutes reflect a policy of law, as declared by the legislature, that after a given length of time, a defendant should be sheltered from liability and they also further the public policy of allowing people, after the lapse of a reasonable time, to plan their affairs with a degree of certainty, free from the disruptive burden of protracted and unknown potential liability. Related to this latter consideration, the public policy also seeks to avoid the difficulty in proof and record keeping which is imposed by suits involving older claims. Statutes of limitation promote repose by giving security and stability to human affairs.[21]

In *Daniel B Shapley v Samuel S Abbott*,[22] the plaintiff sought to collect on a bill after the expiration of the six-year statutory limitation period. However, prior to the expiration of the cause of action, the defendant had agreed not to plead the limitation defence. Section 110 of the New York Code required, however, that:

> [N]o acknowledgement or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby.

The Court of Appeals of New York drew a parallel between s 110 of the New York Code and the Statute of Frauds. The Court held that the defendant could not, in advance of the expiration of the

[17] *Huepauff & Ors v Inter-Continental Travels P/L No SCCIV-01-70* [2001] SASC 119.

[18] *Huepauff & Ors v Inter-Continental Travels P/L No SCCIV-01-70* [2001] SASC 119.

[19] *Brirek Industries Pty Ltd v McKenzie Group Consulting Pty Ltd* [2014] VSCA 165.

[20] *Westfield Management Ltd v AMP Capital Property Nominees Ltd and anor* (2012) 247 CLR 129.

[21] *Beebe v East Haddam*, 48 Conn App 60, 67 (1998); *Haggerty v Williams*, 84 Conn App 675, 679 (2004).

[22] *Daniel B Shapley v Samuel S Abbott*, 42 NY 443 (1870).

limitation period, make a valid promise that a statute founded in public policy shall be inoperative. This could only be done without trenching upon public policy by omitting to set up the defence when sued.[23]

In *John J Kassner & Co Inc v City of New York*,[24] the plaintiff had entered into a services contract with the defendant. The agreement stated that payment would be made in percentage instalments in reference to the work completed, "subject to audit and revision by the Comptroller of the City". The agreement also provided that:

> No action shall be maintained against the City upon any claim based upon this contract or arising out of this contract unless such action shall be commenced within six (6) months after the date of filing in the office of the Comptroller of the City of the certificate of the final payment hereunder … None of the provisions of Article 2 of the Civil Practice Laws and Rules shall apply to any action against the City arising out of this contract.

In December 1967, the plaintiff submitted a statement to the City with balance due of $39 523.69. Upon an audit of the Comptroller, the City contended $38 423.69 of the balance and authorized a final payment of $1100 instead. The plaintiff was aware of the results of the audit by 1 July 1968. In July 1968, the plaintiff sent a letter of protest and demanded the full amount. Nothing further occurred until September 1974 when the plaintiff submitted a requisition for final payment of the undisputed amount of $1100. This amount was paid.

In April 1975, the plaintiff sought to claim the remaining $38 423.69 from the City. The City argued that Art 2 of the Civil Practice Laws and Rules stipulated that a contractual claim must be brought within six years of the cause of action accruing. The City alleged that the cause of action had accrued no later than July 1968 and the proceedings were now time barred. Further, the City argued that the disputed provision in the contract had no effect because it sought to waive, shorten or extend the statutory limitation period. The plaintiff countered by saying that the cause of action did not accrue until the issue of the final certificate and that the contractual clause did not waive, shorten or extend the statutory limitation period. Instead, it had merely selected the contingency upon which the cause of action would accrue and when the statute would start to run.

At first instance, the Supreme Court held that the contractual limitation provision was enforceable. On appeal, the Court of Appeals of New York considered two issues. First, when did the cause of action accrue? Second, whether a contractual limitations clause could effectively extend a statutory limitation period?

Pursuant to the agreement, the final payment was conditional upon an audit by the Comptroller. The Court held that once the plaintiff had been informed of the results of the audit and of the City's refusal to pay the final amount, the City was in breach of the contract.

Critically, the Court of Appeals held that the contractual limitations provision offended the public policy intentions of the statute of limitations and was inoperative.

> Although the Statute of Limitations is generally viewed as a personal defense to "afford protection to defendants against defending stale claims", it also expresses a societal interest or public policy "of giving repose to human affairs"… Because of the combined private and public interests involved, individual parties are not entirely free to waive or modify the statutory defense.[25]

The Court of Appeals also applied the principle in *Shapley v Abbott*:[26]

> If the agreement to "waive" or extend the Statute of Limitations is made at the inception of liability it is unenforceable because a party cannot "in advance, make a valid promise that a statute founded in public policy shall be inoperative"… Of course at that state there is a greater likelihood that a "waiver" or extension of the defense, as part of the initial contract or obligation, was the result of ignorance, improvidence, an unequal bargaining position or was simply unintended.

[23] *Daniel B Shapley v Samuel S Abbott*, 42 NY 443, 452 (1870).

[24] *John J Kassner & Co Inc v City of New York*, 46 NY 2d 544 (1979).

[25] *John J Kassner & Co Inc v City of New York*, 46 NY 2d 544, 550 (1979).

[26] *John J Kassner & Co Inc v City of New York*, 46 NY 2d 544, 551 (1979).

This decision now represents New York law[27] and has been applied at least in Connecticut, Utah, Washington DC, Arkansas, Alaska, Arizona, Kentucky, Ohio and Texas.[28] Prior to the decision of *John J Kassner & Co Inc v City of New York*, the position had been unclear as to whether it was possible to contractually extend limitation periods. In Arkansas, courts have found that an indefinite waiver of the limitation period is unenforceable.[29] In Minnesota, its courts will only uphold the waiver of a statute of limitations if it is for a reasonable time.[30] The position in Louisiana is governed by Art 3471 of the Louisiana Civil Code which provides that:

> [A] juridical act purporting to exclude prescription [statute of limitations], to specify a longer period than that established by law, or to make the requirements of prescription more onerous, is null.[31]

Art 360.5 of the California Code of Civil Procedure allows a four-year waiver of limitations period.[32]

## THE UK APPROACH TO CONTRACTING OUT OF LEGISLATION GENERALLY

In *Admiralty Commissions v Valverda (Owners)*,[33] the House of Lords had to consider whether s 557 of the *Merchant Shipping Act 1894* (UK) could be contracted out of.[34] In holding that s 557 could not be contracted out of, Lord Wright (with whom Lord Maugham agreed) looked at the public policy behind that section. Lord Wright determined that s 557 was inserted for considerations of State to prevent officers and crews from bringing improper claims.[35]

Lord Wright did not hold that the benefit of a statute may not be contracted out of or waived in appropriate cases but he was satisfied that *Admiralty Commissions* was not such a case. On a true construction of the agreement, Lord Wright held that the agreement did not in terms purport to exclude or waive s 557.[36]

In addition, Lord Wright also considered that the *Merchant Shipping Act* could not be construed without ascertaining the state of the law at the time when the section was originally enacted in 1853.

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[27] *Lehman XS Trust & ors v GreenPoint Mortgage Funding Inc*, 2014 US Dist LEXIS 47888 (2014); *West Gate Village Association v Joseph W Dubois, Jr*, 145 NH 293, 298–299 (2000); *Abiele Constr v NY City Sch Constr Auth*, 648 NYS 2d 468 (contract provision purporting to extend statute of limitations from four to six months was invalid because limitation periods could not be extended prior to the accrual of the cause of action); *T & N PLC v Fred S James & Co*, 29 F 3d 57, 62 (2d Cir, 1994) (a standstill agreement between an insurer and insured was held to be invalid as it purported to indefinitely extend the statute of limitations); *Bayridge Air Rights Inc v Blitman Constr Corp*, 587 NYS 2d 269, 270 – 271 (NY, 1992) (a contractual provision which purported to indefinitely extend the statute of limitations for disputes arising out of the agreement was held to be invalid).

[28] *Haggerty v Williams*, 84 Conn App 675, 680 (2004).

[29] *First Nat Bank of Eastern Arkansas v Arkansas Development Finance Authority*, 870 SW 2d 400, 402 (Ark Ct Appeal, 1994) which was followed by *Haggerty v Williams*, 84 Conn App 675 at 680 (2004) and *T & N PLC v Fred S James & Co of New York Inc*, 29 F 3d 57 (2d Cir, 1994) which has been recently applied in *Clarendon Nat'l Ins Co v Culley*, 2012 US Dist LEXIS 58067.

[30] *Collins v Environmental Systems Co*, 3 F 3d 238, 241–242 (8th Cir, 1993).

[31] Applied in *Smith v Cutter Biological*, 770 So 2d 392, 409 (La App 4th Cir, 2000) to render void a provision in a settlement agreement of a national class action purporting to toll the periods of limitation from a date before the class action suit was filed until a plaintiff opted out of the class.

[32] *California First Bank v Braden*, 264 Cal Rptr 820, 822 (Cal Ct App, 1989) and see generally Christine Lipsey, "For Whom Does the Statute of Limitations Toll?" (2001) *Commercial & Business Litigation* 10.

[33] *Admiralty Commissions v Valverda (Owners)* [1938] AC 173.

[34] *Merchant Shipping Act 1894* (UK) s 557(1) provided:

> Where salvage services are rendered by any ship belonging to [His] Majesty … no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture or for the use of any stores or other articles belonging to [His] Majesty, supplied in order to effect those services, or for any other expense or loss sustained by [His] Majesty by reason of that service, and no claim for salvage services by the commander or crew, or part of the crew of any of [His] Majesty's ships shall be finally adjudicated upon, unless the consent of the Admiralty to the prosecution of that claim is proved.

[35] *Admiralty Commissions v Valverda (Owners)* [1938] AC 173, 185.

[36] *Admiralty Commissions v Valverda (Owners)* [1938] AC 173, 185–186.

The state of the law at that time made it clear to Lord Wright that s 557 was intended to exclude all claims for salvage by the Admiralty and required that it should be so construed.[37] Lord Wright satisfied himself that the consistent and unbroken authority of the Admiralty Court and the Court of Appeal was to the effect that s 557 excluded all claims whatsoever for salvage by the Admiralty.[38] While Lord Wright acknowledged that it was open to the House of Lords to overrule even a long established course of decisions provided it had not itself determined the question, the House would only do that in plain cases where serious inconvenience or injustice would follow from perpetuating an erroneous construction or ruling of law. The present was not such a case.[39]

The position in the UK is therefore similar to that in the US. Determining whether it is possible to contract out of a piece of legislation requires an examination of the public policy behind the particular piece of legislation.

## THE UK POSITION ON CONTRACTING OUT OF LIMITATION PERIODS

In the United Kingdom, the position appears to be that a party may contract out of statutory limitation periods. The reasons in the cases reviewed below are noteworthy in that none of them refers to the public policy behind the various *Limitation Acts* but approach the cases as a matter of contractual construction.

In *Lade v Trill*,[40] Lade and Trill had frequently lent each other money in exchange for promissory notes. Upon their death, the executors of the estates agreed in 1837 to meet and balance their accounts without recourse to the length of time that had run since the notes were given. In 1838, the executors of Trill's estate discovered a promissory note dated 1811 for £250 given by Lade. The executors insisted that the sum plus interest be set off against the amount that the estate owed to Lade. However, the executors of Lade's estate contended that the claim was barred by the statute of limitations. VC Knight Bruce gave the following judgment, which is reproduced here in its entirety:[41]

> I think this is an agreement, for valuable consideration, on both sides, to waive the benefit of the statute, and that it ought to be enforced. This note may have been discharged, and may be productive of no advantage to the defendants, but it gives a case for inquiry. The accounts must be taken in both suits. Let it be referred to the Master to take an account of all transactions between Trill and Lade, the Master not to disturb any account that he shall find to be settled before or after the decease of Trill, and particularly the account of 1837; either party to be allowed to surcharge or falsify; and neither party to be at liberty to take advantage of the Statute of Limitations.

In *Board of Trade v Cayzer, Irvine & Co*,[42] this issue of whether the claim had been brought within the limitation period was sidestepped. The Crown had requisitioned the plaintiff's steamship and undertook liability for war risks only, under a pro forma charter party marked T99. In July 1917, the steamship was lost allegedly due to war risks and the plaintiff proceeded to arbitration in December 1923. The Crown, as the defendant, argued that because arbitration was commenced six years after the steamship was lost, the claim was barred by the *Limitation Act 1623*.

Clause 31 of the charter party provided:

> Any dispute arising under this charter shall be referred, under the provisions of the Arbitration Act, 1889, or any amendment thereof, to the arbitration of two persons … and it is further mutually agreed that such arbitration shall be a condition precedent to the commencement of any action at law.[43]

Lord Atkinson held that the charter party clearly stated that arbitration was a condition precedent to the bringing of any action as between the parties. As such, no right of action could have accrued

[37] *Admiralty Commissions v Valverda (Owners)* [1938] AC 173, 190–194.

[38] Lord Roche carried out a similar analysis and came to the same conclusion at 201.

[39] *Admiralty Commissions v Valverda (Owners)* [1938] AC 173, 194.

[40] *Lade v Trill* (1842) 11 LJ Ch 102.

[41] *Lade v Trill* (1842) 11 LJ Ch 102, 103.

[42] *Board of Trade v Cayzer, Irvine & Co* [1927] AC 610.

[43] *Board of Trade v Cayzer, Irvine & Co* [1927] AC 610, 618–619.

until the arbitrators had made their decision and the claim was not barred under the *Limitation Act 1623*.[44] The Court were unanimous in applying the principle in *Scott v Avery*[45] and *Caledonian Insurance Co v Gilmour*[46] that the contract was one on which no cause of action could accrue until the amount to be paid had been determined by arbitration, and by arbitration as provided by the contract. Lord Atkinson was satisfied that in the context of such contracts, no question arose as to ousting the jurisdiction of the Court.[47] Lord Atkinson held:

> With regard to the Statute of Limitation (21 Jac 1, c 16) it has no application, I think, to actions or suits which, by the contracts of the parties to them, are placed in such a position that they cannot be commenced, begun, or enforced. The whole purpose of this Limitation Act, is to apply to persons who have good causes of action which they could, if so disposed, enforce, and to deprive them of the power of enforcing them after they have lain by for the number of years respectively and omitted to enforce them. They are thus deprived of the remedy which they have omitted to use. I think it is obvious that the Act cannot apply to a cause of action which the person entitled to it cannot, because of his own contract, enforce against any one.[48]

Clause 31 of the charter party had therefore effectively delayed the accrual of the cause of action.

In *Oxford Architects Partnership v Cheltenham Ladies College*,[49] Oxford Architects Partnership (the **Architects**) had been appointed to provide services for Cheltenham Ladies College (the **College**) in relation to a new art and technology block at the College. The agreement was subject to the RIBA Conditions of Engagement. Article 5 of the Conditions of Engagement provided that:

> No action or proceedings for any breach of this Agreement or arising out of or in connection with all or any of the Services undertaken by the Architect in or pursuant to this Agreement, shall be commenced against the Architect after the expiry of [six] years from completion of the Architect's Services, or, where the Services specific to building projects Stages K–L are provided by the Architect, from the date of Practical Completion of the Project.

Practical Completion of the building works was certified as taking place on November 25, 1998.

A claim for breach of contract and negligence was made against the Architect. The dispute was referred to arbitration within six years of practical completion but more than six years after the completion of the Architect's services. The limitation period under the *Limitation Act 1980* (UK) had therefore expired. The dispute went to arbitration and an arbitrator found against the Architects. On appeal to the High Court, the College argued that Art 5 defined the date when a cause of action accrued for the purpose of the contract and as the *Limitation Act 1980* was silent on that point there was no inconsistency between Art 5 and the *Limitation Act 1980*. The College did not press an argument that while parties could agree to a shorter period than that in the *Limitation Act 1980*, they could not agree to a period longer than six years as this would be contrary to the *Limitation Act 1980*.[50]

Ramsey J held without analysis that:

> A party is not obliged to rely on a statutory limitation defence but is generally entitled to do so. It is possible for a party to agree that it will not rely on a statutory limitation defence or for the parties to agree that a statutory limitation defence will apply from an agreed date, for instance in a standstill agreement. In certain circumstances a party may be precluded from relying on a statutory defence because of an estoppel. However, absent such an agreement or an estoppel a party is entitled to rely on

[44] *Board of Trade v Cayzer, Irvine & Co* [1927] AC 610, 624.

[45] *Scott v Avery* (1856) 5 HLC 811.

[46] *Caledonian Insurance Co v Gilmour* [1893] AC 85.

[47] *Board of Trade v Cayzer, Irvine & Co* [1927] AC 610, 627–628.

[48] *Board of Trade v Cayzer, Irvine & Co* [1927] AC 610, 628.

[49] *Oxford Architects Partnership v Cheltenham Ladies College* [2007] PNLR 18.

[50] *Oxford Architects Partnership v Cheltenham Ladies College* [2007] PNLR 18, [14].

> a statutory limitation defence. In common with all other such rights any provision which seeks to exclude a party's right to rely on a statutory limitation defence must do so in clear terms.[51]

The Architects argued that Art 5 acted as an additional contractual limit on proceedings but did not otherwise affect the question of whether a cause of action was statute barred under the *Limitation Act 1980*. The Architects accepted that if under the *Limitation Act 1980*, including any provision for extension, the limitation period lasted for more than six years after Practical Completion, the contractual limit would apply to preclude the commencement of proceedings. Depending upon the period of limitation and the period chosen in Art 5, the Architects submitted that a shorter or longer contractual period could be imposed than that under the *Limitation Act 1980*. No authority was cited in support of these arguments.

The Court accepted the argument of the Architects. The Court held that Art 5, if drafted properly, could have had the effect of precluding the Architects from relying upon the statutory limitation defence. However, the article as drafted did not have this effect. The Conditions failed to expressly exclude the right of the Architects to rely on the limitation defences under the *Limitation Act 1980*. Such an outcome can only be achieved by express words. Instead, Art 5 as drafted merely imposed an additional contractual limitation on the College to bring a claim.[52]

In *Inframatrix Investments Ltd v Dean Construction Ltd*,[53] the Court of Appeal accepted without reference to any legal authorities or to the public policy behind the *Limitation Act 1980*, the legality of a limitation clause in the agreement between the owner and the contractor. The clause provided:

> 17.4 No action or proceedings under or in respect of this Agreement shall be brought against the contractor after:
> (a) the expiry of 1 year from the date of Practical Completion of the Services or;
> (b) where such date does not occur, the expiry of 1 year from the date the Contractor last performed Services in relation to the Project.

The Court of Appeal noted that while it was a very short limitation period, the period had to be seen in the context of the length of the construction period for the project which was only eight weeks long. The Court of Appeal held that cl 17.4 was intended to provide an easily ascertainable limitation period for a claim against the defendant.[54]

In *Ener-G Holdings plc v Philip Hormell*,[55] the Court of Appeal had to consider whether service of the claim had been affected in accordance with the following clause:

> [T]hat claim should be deemed to have been irrevocably withdrawn and lapsed unless … proceedings in respect of that claim have been issued and served on the seller not later than the expiry of the period of twelve months after the date of that notice.

It was implicit in the judgment that the clause had effectively modified the limitation period. Once again there was neither analysis nor any reference to the public policy behind the *Limitation Act 1980*.

In *Elvanite Full Circle Ltd v AMEC Earth & Environmental Ltd*,[56] Coulson J held, again without analysis and without reference to the public policy behind the *Limitation Act 1980*, that parties to a contract can vary the ordinary six-year limitation period.[57] Coulson J cited the authorities of *Inframatrix Investments Ltd v Dean Construction Ltd*[58] and *Ener-G Holdings v Philip Hormell*.[59] Coulson J held that cl 11, which provided that "All claims by the CLIENT shall be deemed

[51] *Oxford Architects Partnership v Cheltenham Ladies College* [2007] PNLR 18, [15].

[52] *Oxford Architects Partnership v Cheltenham Ladies College* [2007] PNLR 18, [16]–[19].

[53] *Inframatrix Investments Ltd v Dean Construction Ltd* [2012] All ER (D) 27 (Feb); [2012] EWCA Civ 64.

[54] *Inframatrix Investments Ltd v Dean Construction Ltd* [2012] All ER (D) 27 (Feb); [2012] EWCA Civ 64, [19].

[55] *Ener-G Holdings plc v Philip Hormell* [2012] EWCA Civ 1059.

[56] *Elvanite Full Circle Ltd v AMEC Earth & Environmental Ltd* [2013] EWHC 1191 (TCC).

[57] *Elvanite Full Circle Ltd v AMEC Earth & Environmental Ltd* [2013] EWHC 1191 (TCC), [293].

[58] *Inframatrix Investments Ltd v Dean Construction Ltd* [2012] All ER (D) 27 (Feb); [2012] EWCA Civ 64.

[59] *Ener-G Holdings plc v Philip Hormell* [2012] EWCA Civ 1059.

relinquished unless filed within one (1) year after substantial completion of the Services", was effective and had been designed to provide some form of certainty.[60]

While *Inframatrix Investments Ltd v Dean Construction Ltd*,[61] *Ener-G Holdings plc v Philip Hormell*[62] and *Elvanite Full Circle Ltd v AMEC Earth & Environmental Ltd*[63] were all cases that were concerned with contractual clauses that purported to limit the limitation periods, the Court of Appeal and the High Court did not draw a distinction between clauses that purported to extend limitation periods and those clauses that purported to restrict the limitation period. This approach is consistent with the approach in *Larkfleet Ltd v Allison Homes Eastern Ltd*[64] in which the High Court had to construe the following clause:

> The Employer will register the site with NHBC [National Homes Building Council] under the Employer's registration and the contractor warrants to accept responsibility for any defect and any expense incurred due to defective work for the period of 10 Years for the NHBC warranty.

The scope of the contractor's responsibilities to the NHBC under the NHBC Scheme were different to, and wider than, any responsibilities to the Employer under a non-amended standard building contract. In effect, buildings sold with NHBC cover provided a purchaser with protection for building defects for 10 years from completion.

The High Court dealt with the case purely as a matter of construction and held that as a matter of construction, the contractor would be responsible under the NHBC warranty for all valid claims made within the 10-year period. The NHBC would look to the Employer if any claims were made within the 10-year period and the Employer would pass those onto the contractor. The Court held that this was a contractual assumption of responsibility by the contractor to the Employer of the Employer's responsibilities to the NHBC.[65] The cause of action for breach of the clause accrued when the contractor refused to accept responsibility for the defects or alternatively when the contractor failed to accept responsibility within a reasonable time after having been asked to do so.[66] The Court also held that the clause did not operate to preclude claims for defects (whether in contract or in tort) from being brought against the contractor after the expiry of the 10-year NHBC warranty period.[67]

The position in the UK therefore seems to be that via the vehicle of a well-drafted clause, it is possible to contract out of limitation periods prior to the accrual of the cause of action. However, this issue has not been the subject of detailed judicial analysis. It is also worth noting that The Law Commission in 2001 in its report on Limitation of Actions cites *Lade v Trill*[68] as the authority for the proposition that the limitation period may be excluded by agreement, express or implied.[69] There was no analysis accompanying this statement of principle. Further, while no reference is made in that report to whether that agreement may be made prior to the accrual of the cause of action, given that *Lade v Trill* deals with the validity of an agreement entered into after the accrual of the cause of action, that decision can therefore only be authority for the proposition that limitation periods may be excluded by agreement, express or implied, entered into after the accrual of the cause of action and not before.

Nevertheless, the United Kingdom courts seem to accept that it is possible to either contractually extend or severely restrict a limitation period. However, given the state of the direct authorities on this

[60] *Elvanite Full Circle Ltd v AMEC Earth & Environmental Ltd* [2013] EWHC 1191 (TCC), [300].

[61] *Inframatrix Investments Ltd v Dean Construction Ltd* [2012] All ER (D) 27 (Feb); [2012] EWCA Civ 64.

[62] *Ener-G Holdings plc v Philip Hormell* [2012] EWCA Civ 1059.

[63] *Elvanite Full Circle Ltd v AMEC Earth & Environmental Ltd* [2013] EWHC 1191 (TCC).

[64] *Larkfleet Ltd v Allison Homes Eastern Ltd* [2016] EWHC 195 (TCC).

[65] *Larkfleet Ltd v Allison Homes Eastern Ltd* [2016] EWHC 195 (TCC), [45].

[66] *Larkfleet Ltd v Allison Homes Eastern Ltd* [2016] EWHC 195 (TCC), [59], [61].

[67] *Larkfleet Ltd v Allison Homes Eastern Ltd* [2016] EWHC 195 (TCC), [61].

[68] *Lade v Trill* (1842) 11 LJ Ch 102.

[69] The Law Commission, *Limitation of Actions: Item 2 of the Seventh Programme of Law Reform: Limitation of Actions*, 9 July 2001, [2.96].

issue, there is utility in undertaking a closer consideration and analysis of the UK approach to contracting out of legislation generally as well as of the public policy behind the UK Limitation Acts.

## The public policy behind the UK Limitation Acts

By way of background, the first statute of limitations was passed in England in 1623. It was premised on the notion that if you let your rights sleep for too long then you must not wake them. Subsequent statutes of limitation in the UK have been enacted based upon the same premise.[70] The theory behind limitation periods is that they are "an act of peace" as "long dormant claims have often more of cruelty than of justice in them".[71] The defendant might have lost the evidence to disprove a stale claim,[72] and persons with good causes of action who are able to enforce them should pursue them with reasonable diligence.[73] This is consistent with the policy behind the limitation statutes in the United States.

Limitation periods can manifest in a harsh way, as is recognized in the *Limitation Act 1980* (UK) which has inbuilt mechanisms to ameliorate the harsh effects of its operation. For example, there are alternative limitation periods for personal injury claims. The *Limitation Act 1980* balances its own cruelty as against the threat of stale claims, which can impose serious evidential problems. There are also other mechanisms for the extension of limitation periods when it can be proven that the defendant had been on notice of the claims.[74]

In *Chagos Islanders v A-G*,[75] the claimants sought compensation for their compulsory deportation from the British Indian Ocean Territory to Mauritius and the Seychelles. During the 1960s, the United States Government declared that it required Diego Garcia, one of the islands, as a strategic military base. In order to achieve this, the United Kingdom Government realized that it needed to clear Diego Garcia and its neighbouring islands of their substantial population. The United Kingdom Government separated the islands from the British colony of Mauritius, creating a new colony known as the British Indian Ocean Territory (BIOT). In 1967, the United Kingdom bought out the freehold interest of the company which farmed copra on the BIOT and which employed virtually its entire population. Thereafter, between 1967 and 1973, the entire population of the BIOT was removed to Mauritius and the Seychelles, where they had neither homes nor work, without adequate provision for their resettlement.

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[70] *The Statute of Limitations* was replaced by the *Limitation Act 1939* (UK). During the second reading speech of the Limitation Bill, Lord Romer stated that its objective was not to radically change the law with respect to statutes of limitation, but rather to simplify it and make it more intelligible. The *Limitation Act 1939* (UK) has since been superseded by the *Limitation Act 1980* (UK). See also *A'Court v Cross* (1825) 3 Bing 329, 332 where Best CJ held:

> [I]t is a policy of the Limitation Acts that those who go to sleep upon their claims should not be assisted by the courts in recovering their property, but another, and, I think, equal policy behind these Acts, is that there shall be an end of litigation, and that protection shall be afforded against stale demands.

[71] *Halsbury's Laws of England* (5th ed, 2008) Vol 68, Lien [905]; *A'Court v Cross* (1825) 3 Bing 329, 332, and *Dobbie v Medway Health Authority* [1994] 4 All ER 450, 454 where Sir Thomas Bingham MR held:

> The ordinary rule is that time begins to run against a claimant when a common law cause of action arises, and the cause of action becomes unenforceable if proceedings have not been started before expiry of a period of years prescribed by statute. This rule may have the harsh effect of defeating what would otherwise be unanswerable claims. But such rules have existed for centuries. They are no doubt designed in part to encourage potential claimants to prosecute their claims with reasonable expedition on pain of being unable to prosecute them at all. But they are also based on the belief that a time comes when, for better or worse, defendants should be effectively relieved from the risk of having to resist stale claims.

[72] *Halsbury's Laws of England* (5th ed, 2008) Vol 68, Lien [905]; *Dobbie v Medway Health Authority* [1994] 4 All ER 450, 454, and *Jones v Bellgrove Properties Ltd* [1949] 2 KB 700, 704 per Goddard LCJ held:

> If a claim is made for payment of a debt many years after it has been incurred, there may be difficulty in proving that the debt ever was in fact incurred or that it has not already been paid and so forth.

[73] *Halsbury's Laws of England* (5th ed, 2008) Vol 68, Lien [905]; *Board of Trade v Cayzer, Irvine & Co* [1927] AC 610, 628.

[74] In *Jones v Bellgrove Properties* [1949] 2 KB 700, the Court held that the balance sheet presented to the plaintiff at the general meeting was sufficient acknowledgement of the debt for the purposes of ss 23 and 24 of the *Limitation Act 1939* (UK).

[75] *Chagos Islanders v A-G* [2004] EWCA Civ 997.

One issue that arose in *Chagos Islanders v A-G* was whether the claim had been brought out of time as proceedings were only commenced in 2002. The claimants raised three arguments to defeat the pleading of the limitation defence: unconscionability, disability; and concealment. Disability and concealment are covered under s 28(1) and s 32(1) of the *Limitation Act 1980* (UK). Section 28(1) prevents time from running if the plaintiff is "under a disability". Section 38(2) provides that "a person shall be treated as under a disability whilst he is an infant, or of unsound mind." During the course of the judgment the court held that the *Limitation Act 1980* was intended to provide a complete code, including the circumstances in which it is unconscionable for a defendant to seek to invoke limitation, and that it was simply not open to the courts to seek to circumvent the effect of the Act by adding fresh grounds.[76]

Despite this, Sedley LJ without analysis acknowledged the possibility for parties to contract out of statutory limitation periods:

> However, it is plainly possible for a defendant validly to contract not to take a limitation point, or to estop himself from taking a limitation point. Particularly bearing in mind the basis of estoppel, it is, we think, conceivable that a court may be prepared to hold that, by his conduct, a defendant had rendered it *so inequitable* for him to take the limitation point that the court will effectively not permit him to do so. In the present case, the claimants would seek to argue that, by the very actions complained of in these proceedings, namely removing them to Mauritius, and leaving them in a position where they were poor, ignorant, and without recourse to the courts, the UK government and its representatives cannot now be heard to say that the claimants have lost their right to seek relief promptly where the delay is due to these very circumstances.[77]

Further, Sedley LJ held that there was scope for argument that the definition in s 38(2) was not an exhaustive definition of disability. Sedley LJ rejected the argument of the defendants that *Yates v Thakeham Tiles Ltd*[78] and *Thomas v Plaistow*[79] were authority to the contrary.

Unfortunately, on the facts of the case, Sedley LJ held that these arguments faced insuperable difficulties. In 1975, one of the islanders had brought proceedings in the United Kingdom in which he claimed damages for his removal from Diego Garcia. The result of the proceedings was that the United Kingdom government in 1978 had offered to settle *all the claims of the Ilois* for £500 000 plus costs. In 1979, the Treasury Solicitor had paid for the claimant's solicitor (armed with an increased offer and the advice of Louis Blom-Cooper QC) to go to Mauritius and advise all the Ilois of the offer. The Ilois had appointed a committee to negotiate on their behalf. The committee had appointed a new firm of solicitors who sought the advice of a QC. The negotiations had culminated in the establishment of a Trust Fund which was set up for the benefit of the Ilois.

Given this background, Sedley LJ held that:

> [A]ny argument which might otherwise have a chance of stifling the defendants' limitation defence on grounds of unconscionability or of rebutting it on grounds of disability would be doomed to failure. The unconscionability argument could only prevent time starting to run so long as the effect of the events giving rise to the unconscionability continued to operate. Equally, it is clear from s 28(1) that any disability merely suspends the limitation period until the disability ceases. It appears to us that, given the events of 1975–1983, from the initiation of Mr Vencatessan's action to the setting up of the Trust Fund, there is no prospect at all of showing that the unconscionability or disability, assuming that either or both can be established, survived beyond 1983.[80]

As the foregoing demonstrates, the public policy behind the various UK Limitation Acts is no different to the public policy behind the Limitation Acts in the various US States. However, the approach of the courts in the UK and the US are markedly different. The UK courts seem to accept the legality of contracting out of limitation periods prior to the accrual of the cause of action, albeit

[76] *Chagos Islanders v A-G* [2004] EWCA Civ 997, [45].

[77] *Chagos Islanders v A-G* [2004] EWCA Civ 997, [46].

[78] *Yates v Thakeham Tiles Ltd* [1995] PIQR 135.

[79] *Thomas v Plaistow* [1997] PIQR 540.

[80] *Chagos Islanders v A-G* [2004] EWCA Civ 997, [49].

without analysis and without reference to the public policy behind the Limitation Acts. By contrast, the courts in the various US States referred to above are almost vehement in their refusal to accept the legality of such a course. Unfortunately, there is no real guidance within the judgments of the UK courts to explain the genesis of their attitude. It may well be that if this issue is ever fully ventilated in the UK Supreme Court that the Supreme Court may reach a decision more in line with the position taken by the various US State courts. However, until that happens, the foundation of the UK jurisprudence upon this issue remains untested.

## THE AUSTRALIAN APPROACH TO CONTRACTING OUT OF LEGISLATION GENERALLY

The courts recently considered the public policy behind s 601NB of the *Corporations Act 2001* (Cth)[81] to determine whether a contractual restriction was valid and enforceable.

In *Westfield Management Ltd v AMP Capital Nominees Ltd*,[82] Ward J had to consider whether two clauses in a Unitholders' and Joint Venture Agreement[83] which purported to preclude a unit holder from voting in favour of the proposed winding up of the scheme in the absence of the written consent of the unitholders, were valid and enforceable in light of s 601NB of the *Corporations Act*. Ward J construed cl 10.1(a) as not precluding an indirect sale on a winding up in accordance with a s 601NB resolution pursuant to s 601NE. After an exploration of the public policy behind s 601NB,[84] Ward J held that the clauses were enforceable. In coming to this conclusion, it was relevant that there was no general restraint on a member applying to wind up the scheme. Instead, there was a contractual requirement for unitholders to exercise voting rights in such a manner as to give full and complete effect to the intent of cl 10.1(a). There was no restriction on the unitholder moving to wind up the scheme in a manner that did not involve the exercise of voting rights.[85]

On appeal to the New South Wales Court of Appeal in *AMP Capital Property Nominees Ltd & Anor v Westfield Management Ltd*,[86] the appellants argued that those clauses were unenforceable to the extent that they purported to preclude a unitholder from voting in favour of the proposed winding up of the scheme in the absence of the written consent of the other unitholders. The appellants submitted

[81] *Corporations Act 2001* (Cth) s 601NB provides:

> If members of a registered scheme want the scheme to be wound up, they may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on an extraordinary resolution directing the responsible entity to wind up the scheme.

[82] *Westfield Management Ltd v AMP Capital Nominees Ltd* (2011) 255 FLR 1.

[83] 10. Sale of Property and acquisition of additional investments

Sale of premises

10.1

(a) AMPAM, in its capacity as responsible entity of the KSC Trust, shall not sell the Property or any substantial part thereof, without the written consent of the Unitholders.

(b) On completion of the sale of the Property, or if part of the Property has already been sold, the completion of the sale of the remainder of the Property, AMPAM, in its capacity as responsible entity of the KSC Trust, shall thereupon determine the Trust unless otherwise directed by the Unitholders.

Acquisition of additional investment

10.2 AMPAM, in its capacity as responsible entity of the KSC Trust, shall not without the written consent of the Unitholders acquire any investments other than the Property or for the short-term investment of liquid funds.

16. Exercise of rights

16.1 …

Exercise of Voting Rights

16.2 Each and all of the Unitholders mutually agree that they will so exercise their respective voting rights as unitholders under the Trust Deed so as to most fully and completely give effect to the intent and effect of the provisions of this deed.

[84] *Westfield Management Ltd v AMP Capital Nominees Ltd* (2011) 255 FLR 1, [124], [126]–[127].

[85] *Westfield Management Ltd v AMP Capital Nominees Ltd* (2011) 255 FLR 1, [127].

[86] *AMP Capital Property Nominees Ltd & Anor v Westfield Management Ltd* [2011] NSWCA 386.

that s 601NB is inconsistent with an ability to forgo or fetter a right to vote at such a meeting because the right to vote was not given solely for the benefit of a unitholder but was also given in the public interest and as a result is not capable of being bargained away.[87] Unfortunately, as the appeal was successful on other grounds, the Court of Appeal did not have to deal with this ground in substance. However, Meagher JA with whom Giles and Campbell JJA agreed, held that he would not have allowed the appeal on this ground.

In the High Court,[88] French CJ, Crennan, Kiefel and Bell JJ considered the authorities that dealt with the ability of a person to waive or renounce his or her statutory rights. Their Honours noted that Windeyer J had observed in *Brooks v Burns Philp Trustee Co Ltd*[89] that a person upon whom a statute confers a right may waive or renounce his or her rights unless it would be contrary to the statute to do so.[90] It will be contrary to the statute where the statute contains an express prohibition against "contracting out" of rights.[91] In addition, the provisions of a statute, read as a whole, might be inconsistent with a power, on the part of a person, to forego statutory rights. It is the policy of the law that contractual arrangements will not be enforced where they operate to defeat or circumvent a statutory purpose or policy according to which statutory rights are conferred in the public interest, rather than for the benefit of an individual alone. The courts will treat such arrangements as ineffective or void, even in the absence of a breach of a norm of conduct or other requirement expressed or necessarily implicit in the statutory text.[92]

French CJ, Crennan, Kiefel and Bell JJ held that some statutes may, by their nature and purpose, more readily suggest inconsistency with an individual's liberty to forego statutory rights. Some statutes which have a regulatory and protective purpose may fall into this category.[93] The High Court held, contrary to the finding of Ward J, that the agreement was contrary to the policy behind s 601NB of the *Corporations Act*. An agreement between the members of a scheme and the responsible entity which purports to deprive members of the rights given by Ch 5C of the *Corporations Act* would be prejudicial to their interests and contrary to the protective purposes which inform the regulatory scheme of Ch 5C.[94]

In the course of their judgment, French CJ, Crennan, Kiefel and Bell J referred to *Caltex Oil (Australia) Pty Ltd v Best*.[95] In that case, Mason CJ, Gaudron and McHugh JJ had to consider whether a clause in a franchise agreement to which the *Petroleum Retail Marketing Franchise Act 1980* (Cth) applied was void.[96] The clause provided that if the franchisee conducted the business in a manner which, in the reasonable opinion of Caltex was prejudicial or harmful to or detracted from the commercial reputation or goodwill association with Caltex then Caltex had the right to terminate the franchisee's license to use the trademarks of Caltex. The *Petroleum Retail Marketing Franchise Act* incorporated provisions that controlled the circumstances in which a franchise agreement could be terminated.[97]

Mason CJ, Gaudron and McHugh JJ held that the critical question was whether the *Petroleum Retail Marketing Franchise Act*, on its true construction, manifested a purpose or policy which was at

[87] *AMP Capital Property Nominees Ltd & Anor v Westfield Management Ltd* [2011] NSWCA 386, [24]. See also see *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432, 456–457; *Felton v Mulligan* (1971) 124 CLR 367, 386, 407; *Brown v R* (1986) 160 CLR 171, 208; and *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635, 645.

[88] *Westfield Management Ltd v AMP Capital Property Nominees Ltd and anor* (2012) 247 CLR 129.

[89] *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432.

[90] *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432, 456.

[91] *Westfield Management Ltd v AMP Capital Property Nominees Ltd and anor* (2012) 247 CLR 129, 143.

[92] *Westfield Management Ltd v AMP Capital Property Nominees Ltd and anor* (2012) 247 CLR 129, 143–144.

[93] *Westfield Management Ltd v AMP Capital Property Nominees Ltd and anor* (2012) 247 CLR 129, 145.

[94] *Westfield Management Ltd v AMP Capital Property Nominees Ltd and anor* (2012) 247 CLR 129, 145.

[95] *Caltex Oil (Australia) Pty Ltd v Best* (1990) 170 CLR 516.

[96] *Caltex Oil (Australia) Pty Ltd v Best* (1990) 170 CLR 516, 522–523.

[97] *Petroleum Retail Marketing Franchise Act 1980* (Cth) s 7(1) and (2) provided:

odds with the right which cl 17.4 purported to confer on Caltex. The Court was unanimous that the answer to the question was yes.[98] Toohey J held that the clear intent of s 7(1) of the Act was to avoid any provision of an agreement which in its terms purported to "exclude, limit or modify" or was otherwise inconsistent with the operation of a provision of the Act or "any right or remedy based on or arising out of a provision of the Act".[99] Clause 17.4 of the Agreement purported to permit conduct that was inconsistent with the Act and was therefore void.

The issue of whether a party can contractually extend a limitation period prior to the accrual of a cause of action must therefore be determined by an examination of the public policy behind ss 14 and 16 of the *Limitation Act 1969* and s 109ZK of the *Environmental Planning and Assessment Act*.

## THE AUSTRALIAN APPROACH TO LIMITATION PERIODS

In *The Commonwealth v Verwayen*,[100] one of the issues was whether the Commonwealth should be granted leave to plead a *Limitation of Actions Act 1958* (Vic) defence in circumstances where it had previously refrained from pleading such a defence in line with its then policy of not contesting liability and not pleading a limitation defence in relation to personal injury claims arising out of the collision of two warships. However, this policy was subsequently changed and the Commonwealth sought to reflect this change in their defence to the personal injury claim of Verwayen.

In considering the issue of whether the Commonwealth had waived its entitlement to plead a limitation defence, Mason CJ (in the minority) considered that the relevant question in relation to whether a person could waive a right conferred by statute, was whether the relevant provisions were "dictated by public policy" and enacted "not for the benefit of any individuals or body of individuals, but for considerations of State".[101] Alternatively, "the critical question is whether the benefit is personal or private or whether it rests upon public policy or expediency".[102]

Mason CJ held:

> In this case there is the public policy that there should be finality in civil litigation. However, the Parliament has seen fit to implement this policy, not by imposing a jurisdictional restriction, but by conferring on defendants a right to plead as a defence the expiry of the relevant time period. In these circumstances and having regard to the nature of the statutory defence, I conclude that the purpose of the statute is to confer a benefit upon persons as individuals rather than to meet some public need which must be satisfied to the exclusion of the right of access of individuals to the courts. *On that basis, it is possible to "contract out" of the statutory provisions, and it is equally possible to deprive them of effect*

(1) This Act applies notwithstanding any agreement to the contrary and, in particular, but without limiting the generality of the foregoing, a provision in any agreement is void to the extent that it purports to exclude, limit or modify, or is otherwise inconsistent with, the operation of a provision of this Act or any right or remedy based on or arising out of a provision of this Act.

(2) Nothing in this Act shall be taken to affect the operation of an agreement to the extent that the agreement is capable of operating consistently with this Act.

Section 16(1) provided:

> A franchisor may terminate the franchise agreement in accordance with the succeeding provisions of this section, but not otherwise.

[98] *Caltex Oil (Australia) Pty Ltd v Best* (1990) 170 CLR 516, 525, Mason CJ, Gaudron and McHugh JJ held that the object of the Act was to protect the interests of a class of persons who were at a disadvantage in negotiating a contract on fair terms with a class of corporations having superior bargaining power; Toohey J held at 531 that the clear intent of s 7(1) was to avoid any provision of an agreement which in its terms purported to exclude, limit or modify or was otherwise inconsistent with the operation of a provision of the Act or any right or remedy based on or arising out of a provision of the Act. Inconsistency was to be tested when the agreement is entered into.

[99] *Caltex Oil (Australia) Pty Ltd v Best* (1990) 170 CLR 516, 531.

[100] *Commonwealth v Verwayen* (1990) 170 CLR 394.

[101] *Commonwealth v Verwayen* (1990) 170 CLR 394, 405.

[102] *Commonwealth v Verwayen* (1990) 170 CLR 394, 405.

> *by other means such as waiver. Put differently, the provisions are procedural rather than substantive in nature, which suggests that they are capable of waiver.*[103]

The current position in Australia is that Limitation Acts are substantive in nature in that the cause of action is extinguished at the end of the limitation period. In *John Pfeiffer Pty Ltd v Rogerson*,[104] the High Court by majority endorsed the approach of Mason CJ in *McKain v RW Miller*[105] and held that procedural provisions or rules are ones "which are directed to governing or regulating the mode of conduct of court proceedings and all other provisions or rules are to be classified as substantive".[106] The majority held that matters:

> [T]hat affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure.[107]

Despite this, it is still open to a party in a NSW Court, not to plead a limitation defence. In that sense, the *Limitation Act 1969* is procedural as it is up to the parties to determine whether or not to raise a limitation defence. This approach prevails despite the fact that the causes of action are extinguished upon expiry of the requisite limitation periods.

## The Australian public policy behind Limitation Acts

McHugh J in *Brisbane South Regional Health Authority v Taylor*,[108] conveniently identified the rationale behind the imposition of limitation periods:

- evidence is lost in the sense that key witnesses may die and key documents may be lost;
- it is oppressive, "even cruel" to a potential defendant to be liable for a claim after a long period of time has elapsed;
- parties should be allowed to arrange their affairs in the knowledge of existing liabilities. Insurers, public institutions and businesses, especially limited liability companies, have a significant interest in knowing that they have no liabilities beyond a definite period; and
- it is in the public interest for disputes to be settled quickly.[109]

Limitation periods assist in ensuring determinate liability and the period selected:

> [R]epresents the legislature's judgment that the welfare of society is best served by causes of actions being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated.[110]

McHugh J recognised that "where there is delay the whole quality of justice deteriorates". This deterioration can be obvious, for example, arising from the death of witnesses or the loss of documents. In the other cases, the deterioration may not be palpable. Important or decisive evidence may disappear unknown to anyone. Time can also:

> [D]iminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose. A verdict may appear well based on the evidence given in the proceedings, but if the tribunal of fact had all the evidence concerning the matter, an opposite result may have ensued.[111]

A fundamental purpose of limitation periods is to ensure that disputes will be resolved in the context of all relevant evidence.

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[103] *Commonwealth v Verwayen* (1990) 170 CLR 394, 405–406. Emphasis added. In *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, the High Court adopted the approach taken by Mason CJ in *McKain v RW Miller* (1991) 174 CLR 1.

[104] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

[105] *McKain v RW Miller* (1991) 174 CLR 1.

[106] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 543–544.

[107] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 543–544.

[108] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541.

[109] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 552–553.

[110] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 553.

[111] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 551.

This is consistent with the public policy behind the legislative enactments in the United States and the United Kingdom.

## The public policy behind s 109ZK

It is of note that s 109ZK of the *Environmental Planning and Assessment Act* is not framed in absolute terms. It does not state in categorical and absolute terms that "a building action **must** not be brought in relation to any building work". Instead s 109ZK uses the phrase "may not". Further, s 109ZK(2) provides that the "section does not operate to extend any period of limitation under the Limitation Act 1969".

Whether the purpose of s 109ZK is public or private in nature is not necessarily a straightforward exercise, as personal and public policy benefits can sit together. The issue of whether the personal rights are incidental to the ultimate public policy purpose (or vice versa) is critical. If the former is the case then permitting the contracting out of those personal rights would frustrate the realisation of the public policy behind the legislation. Further, it is insufficient to merely consider general public policy based upon the general character of the *Environmental Planning and Assessment Act*.[112] A consideration of the scope and policy behind s 109ZK must be undertaken.

The legislative intention is discerned by reference to the "intention manifested by the legislation".[113] The words of the statute must be carefully construed to ascertain its meaning. Explanatory memoranda or second reading speeches are subordinate to this exercise and are not determinative of legislative intention. At best, they are an aid to interpretation.[114]

The purpose of s 109ZK is to restrict building action claims beyond 10 years from the date of the occupancy certificate. However, the language of s 109ZK provides little assistance in identifying the public policy behind the section.

Section 109ZK was introduced into the *Environmental Planning and Assessment Act* via the *Environmental Planning and Assessment Amendment Act 1997* (NSW) (the **Amending Act**). The explanatory note to the Amending Act provided that:

> The imposition of a limitation period of 10 years for any person's liability for damage arising from defective building work or subdivision work is designed to address the law concerning latent defects in which the current limitation period begins to run only when the defect becomes apparent.[115]

As stated above, limitation periods run from the date of breach of contract, whereas in tort the cause of action only accrues once damage is suffered or when the defect becomes manifest. It is this distinction that can cause limitation provisions to be hard on principals in contract and extremely burdensome on contractors in tort.[116] The insurance industry had been baulking at writing policies which potentially had open-ended liability and indeterminate losses.[117] Section 109ZK had therefore been enacted to limit the excessive liability of building contractors and construction professionals in tort. This is uncontroversial and it is generally accepted that this is the focus of such provisions.[118]

In the context of latent defects, s 109ZK therefore acts as a 10-year short-stop provision in that it precludes building actions being brought even when the period of limitation pursuant to s 14 in

[112] *Australian Horizons (Vic) Pty Ltd v Ryan Land Co Pty Ltd* [1994] 2 VR 463, 498; *Lieberman v Morris* (1944) 69 CLR 69, 82 (Latham CJ), 84 (Rich J).

[113] *Wik Peoples v Queensland* (1996) 187 CLR 1, 168–169.

[114] *Brirek Industries Pty Ltd v McKenzie Group Consulting Pty Ltd* [2014] VSCA 165, [111]; *Wik Peoples v Queensland* (1996) 187 CLR 1, 168–169 (Gummow J); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 264–265.

[115] Explanatory Note, *Environmental Planning and Assessment Amendment Bill 1997* (NSW) 11.

[116] *Brirek Industries Pty Ltd v McKenzie Group Consulting Pty Ltd* [2014] VSCA 165, [96]. See also *Deeming v Eig-Ansvar Ltd* [2013] NZHC 955, [25].

[117] *Brirek Industries Pty Ltd v McKenzie Group Consulting Pty Ltd* [2014] VSCA 165, [101].

[118] In *Brirek Industries Pty Ltd v McKenzie Group Consulting Pty Ltd* [2014] VSCA 165, [101], [103], the Court held that s 134 of the *Building Act 1993* (Vic) was enacted in the context of insurance companies threatening not to provide insurance cover for indeterminate losses of this type. Note that *Building Act 1993* (Vic) s 134 is in different terms to *Environmental Planning and Assessment Act* (NSW) s 109ZK. There is no equivalent to s 109ZK(2) in s 134 of the *Building Act 1993* (Vic).

negligence has not been exhausted. During the Second Reading debate on the *Environmental Planning and Assessment Amendment Bill 1997* (NSW) in the New South Wales Legislative Assembly, the Deputy Leader of the Opposition pointed out the financial risk that homeowners would be exposed to for latent defects as a result of the implementation of the 10-year limitation period.[119] However, this risk has to be balanced against indeterminate liability and the availability of affordable insurance for building professionals.

## Guidance from Australian case law

Unfortunately, there is very sparse authority on this issue in Australia. In *Hueppauff & Ors v Inter-Continental Travels Pty Ltd*,[120] the South Australian Supreme Court had to consider whether an extended contractual warranty was subject to the operation of s 73 of the *Development Act 1993* (SA), the South Australian equivalent of s 109ZK of the *Environmental Planning and Assessment Act*.

In *Hueppauff*, the plaintiffs had entered into a contract of sale with the defendants for the purchase of a house. Settlement had occurred in January 1994. The plaintiffs later discovered that the property had defective plumbing work. The plaintiffs claimed against the defendant for breach of a warranty in the contract of sale. The warranty read:

> The Vendor warrants that to the Vendor's knowledge, no building work has been carried out on the Land without all necessary consents and approvals having been obtained …

The house had been constructed in 1986. At that time, the defendant had submitted applications to the Council for planning and building approvals. The applications had included plans for the house to be serviced by an all-purpose septic tank situated at the front of the house. Contrary to those plans, a tank was installed at the rear of the house, requiring further approval of the South Australian Health Commission. The Court followed the reasoning of the Magistrate and found that the defendants had failed to obtain the necessary approval from the Health Commission and were therefore in breach of the warranty under the contract of sale.[121]

The defendants also contended that the claim was statute barred by the operation of s 73 of the *Development Act*. Section 73 stated:

> (1) Despite the Limitation of Actions Act 1936, or any other Act or law, no action for damages for economic loss or rectification costs resulting from defective building work (including an action for damages for breach of statutory duty) can be commenced more than 10 years after completion of the building work.
>
> …
>
> (3) The period prescribed by subs(1) cannot be extended.

The plumbing work at issue was building work for the purposes of s 73. The defendant had argued that because the remedy sought was for rectification costs, the claim was statute barred. In rebuttal, the plaintiff submitted that the claim was not for damages resulting from defective building work, but rather was from a breach of a contractual warranty as to approvals and consents. The Court found in favour of the plaintiff.[122] Martin J considered with approval the findings of Perry J in

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[119]

> Another obvious concern, is the 10-year limitation period on the liability of private certifiers. It would place homeowners at considerable financial risk if the integrity of their homes is guaranteed only for 10 years. Homeowners are entitled to expect protection from major structural faults, such as sinking foundations, for more than 10 years. The Opposition does not want home owners to be involved in litigation year after year for minor repairs to their homes, as there is normal wear and tear on homes and the weathering process causes problems.
>
> What protection does a person who has invested tens of thousands of dollars in a home, a villa or a townhouse have if after 10 years he finds that there is a major structural fault? Home owners need some sort of protection from major structural faults after that 10-year period.

New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 November 1997, 1657 (Ronald Phillips, Deputy Leader of the Opposition).

[120] *Hueppauff & Ors v Inter-Continental Travels Pty Ltd* [2001] SASC 119.

[121] *Hueppauff & Ors v Inter-Continental Travels Pty Ltd* [2001] SASC 119, [26].

[122] *Hueppauff & Ors v Inter-Continental Travels Pty Ltd* [2001] SASC 119, [38].

*Inter-Continental Travels Pty Ltd v Huepauff & Ors*:

> If a warranty had been given which expressly referred to the soundness of a building, in my opinion the section is hardly likely to apply so as to put a plaintiff out of court, even if the alleged breach of warranty is as a result of defective building work which had been completed more than ten years before the action was brought.
>
> To give the section such a construction would result in quite bizarre consequences. It would mean on Mr Manetta's argument that if an express warranty was given as to the soundness of a building as part of a contract of sale, the warranty could not be relied upon as a basis for the award of damages, if the unsoundness was as a result of building work which was more than ten years old. In my opinion, much clearer words in the section would be necessary before it could have such a strange result.[123]

Unfortunately, the reasoning in this case was superficial and the Court did not consider the public policy behind the *Development Act*. This could have been a function of the way the case was presented to the Court. Nevertheless, distinguishing the cause of action as a warranty claim as opposed to a building claim may well be a triumph of form over substance and may have been motivated by the desire of the Court to uphold the warranty.

In *Brirek Industries Pty Ltd v McKenzie Group Consulting*,[124] Brirek Industries Pty Ltd (**Brirek**) had engaged a builder and construction had commenced in October 2002. At issue was whether certain building permits had been properly issued by McKenzie Group Consulting (**McKenzie**). McKenzie pleaded a statutory defence under s 5 of the *Limitation of Actions Act 1958* (Vic), claiming that Brirek had initiated proceedings six years after the cause of action had accrued. Brirek argued that its claims were not statute barred by virtue of s 134 of the *Building Act 1993* (Vic) applying to both its claims in contract and in tort. Section 134 provided:

> **Limitation on time when building action may be brought**
>
> Despite any thing to the contrary in the Limitation of Actions Act 1958 or in any other Act or law, a building action cannot be brought more than 10 years after the date of issue of the occupancy permit in respect of the building work (whether or not the occupancy permit is subsequently cancelled or varied) or, if an occupancy permit is not issued, the date of issue under Part 4 of the certificate of final inspection of the building work.

The trial judge found in favour of McKenzie and held that s 134 of the *Building Act* only applied to claims in negligence and did not speak to claims in contract. The judge relied heavily on the legislative intention behind the provision which had been enacted to counter the issue of open-ended liability in negligence.

On appeal, the Victorian Court of Appeal found in favour of Brirek and held that s 134 of the *Building Act* applied to claims in both tort and contract. The Court found nothing in the wording of s 134 of the *Building Act* to suggest that it operated differently as between tortious and contractual claims. The Court emphasised the importance of statutory construction preceding considerations of the context in which legislation was introduced:

> A solution is best understood with reference to the problem it was designed to solve; an answer with reference to the question that prompted it. However, although "context" may reveal the mischief which gave rise to the enactment of a particular statutory provision and, possessed of an understanding of that context, a court will be assisted in the interpretation of that provision, care must be taken not to exaggerate the significance of "context". Once the mischief or the problem is identified, various solutions to it may become apparent. The task of the court is to identify the solution that recommended itself to Parliament. To that end, it must strive to understand the meaning of the words and phrases in the provision to hand. The task is to construe the statutory provision, not the second reading speech. The court must be astute not to bend the words of the statute to accommodate some other solution to the problem that it may think the more desirable, or which some other jurisdiction has adopted.[125]

[123] *Inter-Continental Travels Pty Ltd v Huepauff & Ors* (2000) 206 LSJS 307, 309.

[124] *Brirek Industries Pty Ltd v McKenzie Group Consulting Pty Ltd* [2014] VSCA 165.

[125] *Brirek Industries Pty Ltd v McKenzie Group Consulting* [2014] VSCA 165, [108].

In *Brirek*, the Court found that the words "[d]espite any thing to the contrary in the Limitation of Actions Act 1958" in s 134 of the *Building Act*, were significant.[126] This is because s 33 of the *Limitation of Actions Act* has a savings provision which provides that:

> **Saving:**
>
> The periods of limitation prescribed by this Act shall not apply to any action or arbitration for which a period of limitation is prescribed by any other enactment including, without affecting the generality of the foregoing, and except as provided in Part IIA, the provisions of section twenty-nine of the Administration and Probate Act 1958 and section twenty of the Wrongs Act 1958.

Section 134 of the *Building Act* is such an enactment. By contrast, s 109ZK(2) of the *Environmental Planning and Assessment Act* provides:

> This section does not operate to extend any period of limitation under the Limitation Act 1969.

There is no equivalent section to s 33 of the *Limitation of Actions Act 1958* (Vic) in the *Limitation Act 1969* (NSW).

## THE VERDICT – A BALANCING EXERCISE

Arguments in favour of a strict application of s 109ZK of the *Environmental Planning and Assessment Act* are that it allows parties to assess their potential liabilities, which serves the public interest.[127] A party's knowledge of their freedom from potentially damaging claims allows them to make the "most productive and socially beneficial use of their resources".[128] Decisions with respect to future and current states of affairs are otherwise bound by the threat of financially crippling claims, which cause a disruptive effect upon "commercial intercourse" as a whole.[129] Powerful principals should not be able to isolate themselves from the general commercial and economic life of the community by writing their own rules and contracting themselves out of limitation periods that were enacted to protect contractors and other building professionals from indeterminate liability and crippling insurance premiums and to allow the wheels of commerce to turn relatively smoothly.

Section 109ZK was enacted to dictate that loss must in certain circumstances lie where it falls. A line is drawn in the sand beyond which commercial life may continue with a high degree of certainty for all concerned as to their financial position.[130] Commerce would be frustrated if parties were constantly faced with indeterminate liability and open ended financial uncertainty.

Nevertheless, policy and purpose aside, it is difficult to see why an extended contractual warranty should not be enforceable if the contractor has for consideration, voluntarily assumed responsibility for the warranty and the principal has relied upon the provision of that warranty when it entered into the contract.[131] This is particularly so where it can be proven the principal has paid handsomely for the warranty. Further, as the cause of action for breach of the warranty only accrues after the contractor has either refused to rectify the defects or fails to do so after a reasonable period after being served with notice, the issue becomes whether an action to enforce the warranty is in fact a building action. The South Australian Supreme Court in *Hueppauff & Ors v Inter-Continental Travels Pty Ltd*

[126] *Brirek Industries Pty Ltd v McKenzie Group Consulting* [2014] VSCA 165, [115].

[127] *Brisbane South Regional Health Authority v Taylor* (1997) 186 CLR 541, 552 (McHugh J); New South Wales Law Reform Commission, *Limitation of Actions for Personal Injury Claims*, Report No 50 (1986), [1.10].

[128] P J Kelley, "The Discovery Rule for Personal Injury Statutes of Limitations: Reflection on the British Experience" (1978) 24 *Wayne Law Review* 1641, 1644.

[129] "Developments in the Law, Statutes of Limitations" (1950) 63 *Harvard Law Review* 1177, 1185.

[130] *BP Australia Ltd v Brown & Ors* [2003] NSWCA 216, [114] (Spigelman CJ).

[131] See the discussion of McHugh J in *Woolcock St Investments v CDG Pty Ltd* (2004) 216 CLR 515, 558–559 where his Honour discusses the reasons why a tortious duty of care for pure economic loss should not exist in the context of commercial premises and refers to the rationales of statutes of limitations during the discussion.

says that it is not and that it is an action for breach of warranty.[132] This appears to accord with the approach of the High Court in England in *Larkfleet Ltd v Allison Homes Eastern Ltd*.[133]

It is suggested that the principles of estoppel, with their attendant issues of representation, reliance and detriment, as well as misleading or deceptive conduct pursuant to the *Australian Consumer Law*, may be of assistance in enforcement proceedings. If a contractor has represented that it will provide the warranty and that it will not plead s 109ZK in any enforcement proceedings then it is difficult to see why a principal who in reliance upon that representation has paid handsomely for the extended warranty should be precluded from relying upon the warranty. In the context of the former, the main issue should be whether the justice of the case supports the enforcement of the extended warranty. While the public policy behind s 109ZK is that in certain circumstances, the loss should lie where it falls so that commercial life may proceed with a high degree of certainty as to potential financial exposures, it is difficult to see how this policy is offended in the hypothetical scenario above where the contractor has knowingly provided this extended contractual warranty for reward.

In a scenario where a contract contains an express acknowledgement by the contractor of its rights pursuant to s 109ZK of the *Environmental Planning and Assessment Act* and s 14 of the *Limitation Act 1969*, but the contractor agrees to waive its rights pursuant to those sections for commensurate consideration in the context of independent legal advice, why should the extended warranty not be enforceable? If a fully advised contractor elects to provide an extended warranty for consideration then it should have the ability to arrange its affairs to ensure that documentary evidence is retained and not destroyed after 10 years. The same of course cannot be said of witnesses. In this regard it is inevitable that memories will fade and witnesses will die or otherwise become unavailable such that the resolution of any breach of extended warranty issue will likely be resolved in the context of imperfect evidence. However, if the contractor enters this arrangement fully informed with eyes wide open then it is suggested that the justice of the matter would support the enforcement of the extended warranty.

Further, it may be that any cause of action based upon the *Australian Consumer Law* is maintainable outside of the 10-year periods prescribed by s 109ZK. While it is outside the scope of this article, it is a real issue as to whether the period of limitation under the *Australian Consumer Law* (a federal law) would trump s 109ZK (a State law) such that the cause of action remains maintainable pursuant to the *Australian Consumer Law* even if the cause of action for breach of contract is not maintainable.

Ultimately, these issues can only be resolved on a case-by-case basis. The equity of the case may be that the principal ought to be able to enforce its extended warranty. Such warranties may also be in line with the applicable Australian Standards/Building Codes and therefore do no more than reflect the statutory obligations of the contractor. In these instances, the extended contractual warranties may operate to ensure that the contractor adopted best construction practices to deliver a quality product. In these circumstances, would the public purpose be better served by a strict application of s 109ZK in line with the approach in the United States? A court may take the view that private rights must always bow to public policy regardless of the particular circumstances or equity of the case. However, what is clear is that in such a context, it is difficult to see why the public policy behind 109ZK should automatically prevail. Such an approach is also consistent with the discretion that is available under the *Limitation Act 1969* to extend the limitation period on a case-by-case basis if the plaintiff can show that their case is a justifiable exception to the rule that the welfare of the State is best served by the limitation period in question.[134]

[132] *Hueppauff & Ors v Inter-Continental Travels Pty Ltd* [2001] SASC 119, [38].

[133] *Larkfleet Ltd v Allison Homes Eastern Ltd* [2016] EWHC 195 (TCC).

[134] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 553–544 (McHugh J).

## CONCLUSION

An analysis of the authorities in the United States, the United Kingdom and in Australia, starting with *Commonwealth v Verwayen*[135] and culminating with *John Pfeiffer Pty Ltd v Rogerson*,[136] indicates that the issue of whether parties should be able to contract out of s 109ZK of the *Environmental Planning and Assessment Act 1979* (NSW), involves an examination of the public policy behind that section. However, the answer to this dilemma only lies in part with the public policy behind s 109ZK, as it also depends on the particular circumstances of each individual case. There may be circumstances where the facts of the case support the enforcement of the extended warranty. However, such circumstances would be few and far between and more likely to meaningfully arise in the context of large infrastructure contracts where the contractors are of substance and do not engage in the practice of incorporating special purpose vehicles for every project with a view to limiting their liability.

At the very least, it would require the express contracting out of s 109ZK for consideration, with fully documented disclosure in the context of independent legal advice. An express acknowledgement of the obligation of the contractor to preserve documents for the duration of the warranty period would assist, as well a recognition of the consideration paid for the extended warranty would be beneficial. While these circumstances would create burdensome documentary management issues for the contractor, it should also encourage the contractor to adopt best practice and to avoid the cutting of corners to ensure that there is never a need for the warranty to be enforced.

[135] *Commonwealth v Verwayen* (1990) 170 CLR 394, 405.

[136] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.