

Article Information

Author: Valerie Blacker

Service: Dispute Resolution & Litigation, Litigation Funding

Can defendants avoid or limit their liability through contractual provisions?

Applicants often confront the proposition, which respondents typically use in their defense, that terms in consumer contracts will effectively exclude or restrict the claims that have been brought. The High Court of Australia recently weighed in on this issue, deciding that a mortgage contained an enforceable promise by the borrowers not to raise a statutory limitation defense in relation to a claim by the lenders, which was commenced out of time.

***Price v Spoor* [2021] HCA 20**

In a slight twist to the typical scenario, the lenders were the plaintiffs who brought recovery proceedings after the expiry of the period stipulated in Queensland's *Limitation of Actions Act 1974*. The borrowers argued no monies were owed because the claim was well and truly statute barred. Proceedings should have been brought by 2011, but the lender did not file a claim until 2017. In reply, the lender relied on this clause in the contract:

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

The effect of which was said to be a promise not to take the limitation point. The lender's argument failed at first instance (before Dalton J) but was overturned on appeal (by Gotterson JA on behalf of Sofronoff P and Morrison JA) and then ultimately vindicated by the High Court (Kiefel CJ and Edelman J, with whom Gageler, Gordon and Steward JJ agreed).

The public policy principle

Part of their Honours' reasoning was that what is conferred by a limitations statute is a right on a defendant to plead as a defense the expiry of a limitation period. A party may contract for consideration not to exercise that right, or to waive it, as a defendant. That is not contrary to public policy. This, in our view, is akin to agreements frequently entered between prospective parties to a litigation to toll a limitation period (suspend time running) for an agreed amount of time.

That can be contrasted with a clause in an agreement that imposes a three- year time limit instead of six, for bringing a claim for misleading and deceptive conduct under the Australian Consumer Law.^[1] Clauses of that kind are unenforceable based on a well-established principle that such clauses impermissibly seek to restrict a party's recourse to his or her statutory rights and remedies, contrary to law and public policy.

The "public policy principle" was first identified by the Full Court of the Federal Court in *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546. *Henjo* has been referred to and applied in numerous cases since, and cited with approval in the High Court.^[2]

This is not to say that contractual limitations can never be effective in limited circumstances – this much was shown in *Price v Spoor*. The question of whether commercial parties to a contract can negotiate and agree on temporal or monetary limits while not completely excluding the statutory remedies for misleading and deceptive conduct claims under section 18 of the ACL remains debatable^[3] – but those specific circumstances do not arise here.

[This article was originally published in the *Litigation Finance Journal* on 15 March 2022 \(Click here to view original article\).](#)

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[1] For example in *Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd* [2018] VSC 246

[2] For example in *IOOF Australia Trustees (NSW) Ltd v Tantipech* [1998] FCA 924 at 479-80; *Scarborough v Klich* [2001] NSWCA 436 at [74]; *MBF Investments Pty Ltd v Nolan* [2011] VSCA 114 at [217]; *JJMR Pty Ltd v LG International Corp* [2003] QCA 519 at [10]; *JM & PM Holdings Pty Ltd v Snap-on Tools (Australia) Pty Ltd* [2015] NSWCA 347 at [55]; *Burke v LFOT Pty Ltd* [2002] HCA 17 at [143].

[3] For example in *G&S Engineering Services Pty Ltd v Mach Energy Australia Pty Ltd (No 3)* [2020] NSWSC 1721.