SUPREME COURT OF QUEENSLAND

CITATION:	*Fearnley v Finlay* [2014] QCA 155
PARTIES:	**PAUL ROBERT FEARNLEY** (appellant) **v** **ADRIAN ROSS FINLAY, ANDREW FREDERICK FINLAY, BARBARA RUTH FINLAY AND GRAHAM ROSS FINLAY TRADING AS "A.R. FINLAY & SONS"** (respondent)
FILE NO/S:	Appeal No 2137 of 2014 DC No 1 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	27 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	1 May 2013
JUDGES:	Holmes and Morrison JJA and Jackson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. The orders of the primary Judge are set aside.** **3. Paragraphs 1(d), 7 and the claim for a declaration of a lien and injunctive relief are struck out of the statement of claim.** **4. The respondent pay the appellant's costs of the appeal and of the application to strike out the relevant parts of the statement of claim.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – where the respondent alleged the appellant had a contract for agistment of his cattle on the respondent's properties – where the agistment contract was not limited to storage of the cattle – where the respondent sought a declaration of a lien over the appellant's cattle under the *Storage Liens Act* 1973 (Qld) – whether the agistment of cattle constituted goods deposited with a storer for storage *Acts Interpretation Act* 1954 (Qld), s 14A, s 14B *Bills of Sale and Other Instruments Act* 1955 (Qld) *Disposal of Uncollected Goods Act* 1967 (Qld) *Possessory Liens Act of 1942* (Qld) *Storage Liens Act* 1973 (Qld), s 3

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41, cited
Allianz Australia Insurance Ltd v GSF Australia Pty Ltd (2005) 221 CLR 568; [2005] HCA 26, cited
Attorney-General (NT) v Emmerson (2014) 88 ALJR 522; [2014] HCA 13, cited
Bell v Clare (1989) 23 FCR 274; [1989] FCA 483, cited
Big Top Hereford Pty Ltd v Thomas (2006) 12 BPR 23,843; [2006] NSWSC 1159, cited
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384; [1997] HCA 2, cited
Clunies-Ross v The Commonwealth (1984) 155 CLR 193; [1984] HCA 65, cited
Coastal Rutile Management Ltd v Majeau Carrying Co Pty Ltd [1973] Qd R 68, referred to
Federal Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 87 ALJR 98; [2012] HCA 55, cited
Grant v YYH Holdings Pty Ltd [2012] NSWCA 360, cited
Helton v Sullivan [1968] Qd R 562, cited
Lacey v Attorney-General (Qld) (2011) 242 CLR 573; [2011] HCA 10, cited
Lee v New South Wales Crime Commission (2013) ALJR 1082; [2013] HCA 39, cited
Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd (1973) 129 CLR 48; [1973] HCA 22, referred to
R v C [2002] QCA 156, considered
R v Galvin [1987] QB 862, disapproved
Sinclair v Judge [1930] St R Qd 220, cited
Streatfield v Winchcombe Carson Trustee Co (Canberra) Ltd [1981] 1 NSWLR 519, cited
Thiess v Collector of Customs (2014) 88 ALJR 514; (2014) 306 ALR 594; [2014] HCA 12, cited
Watkinson v Hollington [1944] 1 KB 16, referred to

COUNSEL: R Derrington QC, with S Forrest, for the appellant
D O'Brien QC, with B van de Beld, for the respondent

SOLICITORS: SK Lawyers for the appellant
Neil Sullivan & Bathersby for the respondent

[1] **HOLMES JA:** I agree with the reasons of Jackson J and the orders he proposes.

[2] **MORRISON JA:** I have read the reasons of Jackson J and agree with those reasons and the orders his Honour proposes.

[3] **JACKSON J:** The question for decision in this appeal is whether a person who is engaged in the business of agisting cattle on their land has a storer's lien on the cattle for their lawful charges for storage, preservation and other expenses in relation to the cattle, under s 3 of the *Storage Liens Act* 1973 (Qld) ("SL Act").

[4] The appellant is the defendant to a claim brought by the respondent in the District Court of Queensland. The respondent claims a declaration that, under s 3, he has a lien on the appellant's cattle, which are being agisted on the respondent's properties

known as "Pikes Creek" and "Blangy" ("the properties"). The claim is founded on an oral contract that the respondent would agist cattle on the properties in consideration for the payment of agistment fees by the appellant.

[5] Paragraph 1(c) of the statement of claim alleges that the respondent carried on a farming and grazing business, which included agisting cattle on the properties as a bailee for reward. Paragraph 1(d) of the statement of claim alleges that the respondent was a "storer" within the meaning of that term as used in the SL Act.

[6] Paragraph 3 of the statement of claim alleges the terms of the contract. They are that cattle belonging to the appellant would graze on Pikes Creek from about October 2009 and on Blangy from about February 2010 and that the appellant would pay for the agistment at agreed rates. The rates are: $3.50 per cow and calf per week; $3 per dry cow and bull per week; $2.50 per heifer and young bull per week; and 50 cents per calf per week for a period of four months from the completion of the yearly muster. Further alleged terms are that the respondent would charge the agreed fees in advance at the end of each calendar month, except for the calves, which would be charged at the end of each relevant calendar month after the muster, and that the appellant would pay the agreed fees monthly in advance. Lastly, it is alleged that a term is that the muster would usually be undertaken on or about 1 February of each year when the appellant and the respondent would determine the number of calves that have been born since the previous muster and the appellant would brand the calves.

[7] By paragraph 6 of the statement of claim, the respondent alleges that since about October 2009 he has agisted the appellant's cattle on the properties and continues to do so.

[8] He claims outstanding fees at the agreed rates for the period between 24 March 2010 and 30 April 2013 in the sum of $225,437.65 including interest.

[9] Paragraph 7 of the statement of claim is as follows:

> "In the premises pleaded in paragraphs 1, 3 and 6 above, at all material times since about October 2009 the Defendant's cattle agisted on Pikes Creek and Blangy have been subject to a lien in favour of the Plaintiff pursuant to s. 3 of the Act."

[10] The appellant applied under the *Uniform Civil Procedure Rules* ("UCPR") r 171 to strike out pars 1(d) and 7 of the statement of claim and the claim for relief based on the allegation of the lien. The particular ground is that the statement of claim does not disclose a cause of action for a declaration of a lien, or consequential injunctive relief, because the SL Act does not apply to the agistment of the appellant's cattle on the respondent's land. On 6 February 2014, the District Court dismissed the application. This appeal is brought from that order.

[11] The defence admits the allegations made in the statement of claim that the respondent was a "storer" within the meaning of the Act and that the appellant's cattle were subject to a lien in favour of the respondent. Inconsistently with that, the application challenged at least the second of those conclusions. It is convenient to put the effect of those admissions to one side. The only question the appellant seeks to agitate in the appeal is a question of law as to the proper construction of the SL Act, in particular s 3, applied to the facts alleged in the statement of claim. If the appellant's contention is correct, the admission of the lien will have been

wrongly made on a question of law only. If the paragraphs of the statement of claim and claim for relief are struck out because as a matter of law the statement of claim does not disclose a reasonable cause of action for a claim of the existence of a lien under s 3, the relevant paragraphs of the defence would not continue to operate as an admission of anything in that respect. The respondent did not submit that further evidence would have to be called if the admission were withdrawn.

Relevant provisions

[12] It is convenient to set out the long title and ss 1 to 4 of the SL Act in full:

> **"An Act to amend the law relating to warehousing of goods**
>
> **1 Short title**
>
> This Act may be cited as the *Storage Liens Act 1973*.
>
> **2 Interpretation**
>
> In this Act—
>
> ***goods*** includes personal property of every description (save a motor vehicle) that may be deposited with a storer as bailee.
> ***motor vehicle*** means a motor car, motor carriage, motor cycle, tractor or other vehicle propelled or designed to be propelled, wholly or partly by a volatile spirit, steam, gas, oil or electricity or by any means other than by human or animal power.
> ***storer*** means a person lawfully engaged in the business of storing goods as a bailee for reward.
>
> **3 Declaration of storer's lien**
>
> Subject to section 5, every storer shall have a lien on goods deposited with the storer for storage, whether deposited by the owner of the goods or by the owner's authority, or by any person entrusted with the possession of the goods by the owner or by his or her authority.
>
> **4 Charges covered by lien**
>
> The lien shall be for the amount of the storer's charges, that is to say—
>
> (a) all lawful charges for storage and preservation of the goods; and
> (b) all lawful claims for money advanced, interest, insurance, transportation, labour, weighing, coopering, and other expenses in relation to the goods; and
> (c) all reasonable charges for any notice required to be given under this Act, and for notice and advertisement of sale, and for sale of the goods where default is made in satisfying the storer's lien."

The parties' contentions

[13] The appellant's submissions focussed on the text of s 3. He conceded that that a contract to agist cattle may constitute a contract of bailment for reward. However, he submitted that delivery and agistment of cattle on an agister's land, even by way of bailment, does not constitute "goods deposited with the storer for storage" within the meaning of s 3. In support of that submission, he developed submissions that

cattle are not "goods" within the meaning s 2, that delivery and agistment do not amount to goods being "deposited with" a storer and that delivery and agistment are not goods deposited with a storer "for storage".

[14] The respondent challenged each of those contentions as a matter of the ordinary meaning of the text. First, he submitted that goods, as defined, include cattle. Second, he submitted that delivery to an agister under a contract of bailment constitutes "goods deposited". Third, he submitted that the alleged contract of agistment had storage as a primary purpose and, therefore, the goods were deposited "for storage".

[15] Both parties relied on various contextual matters as aids to the construction of s 3. The appellant relied on the long title that the purpose of the SL Act was "to amend the law relating to warehousing of goods" as not extending to the law relating to agistment of cattle. The appellant relied on the history of the SL Act, including amendments made in 1995, and earlier legislation in this and another State. The appellant also relied on the second reading speech for the Bill that became the SL Act. The respondent relied on the purpose of the SL Act as the creation of a lien for a storer's lawful charges for storage and preservation and other expenses in relation to the goods, as provided in s 4.

[16] Both parties made submissions as to the appropriate application of the principles of the law of statutory interpretation. In particular, the appellant relied on ss 14A and 14B of the *Acts Interpretation Act* 1954 (Qld) ("AIA") and the contention that "a parliamentary intention to remove the common law right of the owner of cattle subject to an agistment agreement to remove those cattle on demand should not be inferred without express observation in the words of the statute".

The operation of the text

[17] The method of the modern law of statutory interpretation requires that the "task of statutory construction must begin with a consideration of the text itself"[1] and "[s]o must the task of statutory construction end",[2] whilst also not forgetting that the "the modern approach to statutory interpretation...insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise".[3]

[18] Two central concepts, on which s 3 operates, are contained in the words "goods" and "storer" within the phrase "goods deposited with the storer for storage". It is on the "goods", as defined, that s 3 imposes a lien in favour of a "storer", as defined. The lien is for "the amount of the storer's charges" as set out in s 4. As defined, "goods" include personal property of every description. That is wide enough to include cattle. Livestock are goods within the general legal conception of goods, as illustrated by the operation of the *Sale of Goods Act* 1894 (Qld). There is no real scope for any argument that the definition of goods cannot extend to cattle.

[19] The ordinary meaning of the word "storer" is a person "who stores or keeps [something] in store".[4] However, the definition of "storer" in s 2 expressly limits that meaning.

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1 *Alcan (NT) Alumina Pty Ltd v Commissioner of Revenue (NT)* [2009] HCA 41; (2009) 239 CLR 27, 46 [47] (citations omitted).

2 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 87 ALJR 98, 107 [39].

3 *CIC Insurances Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384, 408.

4 Oxford English Dictionary Online. The entry was first published in 1917. Neither party sought to employ the concept conveyed by the idiomatic use of the expression "store" cattle.

As defined, "storer" only extends to a person who is in the business of storing goods for reward as a bailee.

[20] Because s 3 uses the terms "goods" and "storer" within the phrase "goods deposited with the storer for storage", prima facie the section should be read with the text of the definitions interpolated.[5] Thus, *mutatis mutandis*, the phrase would read:

> "goods including personal property of every description ... that may be deposited with a storer as bailee deposited with the person lawfully engaged in the business of storing goods as a bailee for reward for storage".

[21] One effect of that interpolation is to make it clear that the deposit which engages s 3 is a deposit by way of bailment.

[22] Nevertheless, the textual analysis so far demonstrates that s 3 is capable of being applied to a bailment of cattle with a person lawfully engaged in the business of storing cattle as a bailee for reward. On the ordinary meaning of the text, it is capable of application to some bailments of cattle.

[23] It is not an every day usage of language to describe an agistment of cattle as "goods deposited ... for storage". Yet, it is by no means impossible to deposit cattle for storage. For example, cattle may be put into and kept in yards for a short time for a number of different purposes, such as sale or transport. Pending their removal, it might be said, as a matter of ordinary language, that the person keeping them is keeping them for storage. However, those arrangements would not always engage s 3. That is because it is only if the person keeping the cattle under those sorts of arrangements is engaged in the business of storing goods as a bailee for reward and is, therefore, a "storer" that s 3 could be engaged.

[24] In my view, a powerful consideration in the present case is that the purpose of the pleaded agistment contract was not confined to a storage arrangement. The alleged fee structure expressly contemplated that the cattle to be agisted would include cows and bulls and that the cows would produce calves. In other words, the cattle were to be agisted as producing beef cattle. The respondent alleges that it was agreed that the fees could be paid by the appellant out of proceeds received from cattle sales. Such an agistment contract is neither exclusively nor primarily "for storage". As a matter of ordinary meaning, the cattle are not "deposited with the storer for storage".

Purpose

[25] The requirement of s 14A(1) of the AIA is that, in the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.

[26] For both s 14A and the common law of statutory interpretation, purpose and intention are objective concepts, for "[o]bjective discernment of statutory purpose is integral to contextual construction".[6] "[The] statutory purpose...[of a legislative provision] may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction."[7]

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5 *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* [2005] HCA 26; (2005) 221 CLR 568, 574-575 [12].

6 *Thiess v Collector of Customs* [2014] HCA 12; (2014) 306 ALR 594, 599-600 [23].

7 *Lacey v Attorney-General (Qld)* [2011] HCA 10; (2011) 242 CLR 573, 592 [44].

[27] The purpose of the SL Act, in particular s 3, may be gathered from its text but its ascertainment also permits an examination of context, including the history of the SL Act, the state of the common law on the subject matter when the SL Act was passed into law and the mischief which the SL Act was intended to remedy, together with a close analysis of some other parts of the SL Act.

History of the SL Act

[28] There were similar Acts in all but one of the Australian States and Territories when the SL Act was passed into law. As well, it operates in the context of cognate State and Territory legislation.

[29] Historically, the legislative context begins with the *Warehousemen's Liens Act* 1935 (NSW). Sections 3 and 4 of that Act provided that a "warehouseman shall have a lien on goods deposited with him for storage" and that "the lien shall be for the amount of the warehouseman's charges... for storage and preservation of the goods...". Section 2 defined "goods" to "include personal property of every description that may be deposited with a warehouseman as bailee" and "warehouseman" to mean "a person lawfully engaged in the business of storing goods as a bailee for hire".

[30] The other States and Territories followed that model in enacting similar legislation as follows: *The Warehousemen's Liens Act of 1938* (Qld) ("the 1938 Qld Act"), ss 2, 3 and 4; *Warehousemen's Liens Act* 1941 (SA), ss 3, 4 and 5; *Warehousemen's Liens Act* 1952 (WA), ss 3, 4 and 5; *Warehousemen's Liens Act* 1958 (Vic), ss 3, 4 and 5; *Warehousemen's Liens Ordinance* 1969 (NT), ss 3, 4 and 5; *Mercantile Law Ordinance* 1962 (ACT), s 19.

[31] The *Possessory Liens Act of 1942* (Qld) provided that a person who had a lien upon goods other than livestock deposited with him for safe custody or the supply of any materials in relation to the same may sell the goods in certain circumstances.[8]

[32] In 1967, both the 1938 Qld Act and *Possessory Liens Act of 1942* (Qld) were repealed on the enactment of the *Disposal of Uncollected Goods Act* 1967 (Qld).[9] The latter Act applied in relation to the bailment of goods accepted by a bailee in the course of a business for "inspection, custody, storage, repair or other treatment" on terms for re-delivery, when ready, on payment of agreed charges.[10] It provided for a right on the part of the bailee to sell the goods, in certain circumstances.[11]

[33] Following the repeal of the 1938 Qld Act, the question arose whether a warehouseman had a lien for its charges under the general law. On 8 December 1972, this Court held that it did not in *Coastal Rutile Management Ltd v Majeau Carrying Co Pty Ltd.*[12] Not long afterwards, the Government introduced a Bill to re-enact the substance of the repealed 1938 Qld Act, still largely following the same model.[13] The second reading speech of the Minister for the Warehousemen's Liens Bill included the following:

> "Several requests have been made by warehousemen for the introduction of legislation to embrace the warehousing and storage

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8 *Possessory Liens Act of 1942* (Qld), s 3 and s 5.
9 *Disposal of Uncollected Goods Act* 1967 (Qld), s 24.
10 *Disposal of Uncollected Goods Act* 1967 (Qld), s 3.
11 *Disposal of Uncollected Goods Act* 1967 (Qld), Pt 2 and Pt 3.
12 [1973] Qd R 68, 74-75 and 77.
13 Warehousemen's Liens Bill 1973 (Qld).

> industry as it is claimed that the Disposal of Uncollected Goods Act of 1967 is mainly concerned with goods accepted for inspection, repair, or other treatment, as opposed to goods accepted for storage.
>
> ...
>
> Warehousemen accepting goods for storage... have no knowledge of the contents or value of the packages received for storage...
>
> The purpose of this Bill is to provide warehousemen with a lien for the amount of their charges on goods deposited with them for storage..."

[34] On 13 April 1973, the *Warehousemen's Liens Act* 1973 (Qld) ("1973 Qld Act") was assented to. There were some points of difference from the 1938 Qld Act, but none affects the disposition of this case. The definition of "warehouseman" was altered to refer to a business of storing goods as a "bailee for reward" where previously it had used the slightly archaic expression "bailee for hire". The immediate effect of the 1973 Qld Act was to reintroduce the warehousemen's lien which had been abolished on the repeal of the 1938 Qld Act. On 7 August 1973, the High Court upheld the decision that on the repeal of the 1938 Qld Act there was no warehouseman's lien at common law, in *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd*.[14]

[35] The 1973 Qld Act expressly provided for the relative operation of that Act and the *Disposal of Uncollected Goods Act* 1967 (Qld).[15] By s 4(2) of the latter Act, it does not apply to a bailment of goods with a warehouseman for storage "unless the bailment is in addition to storage for some other treatment of or in respect of the goods...".

[36] On 28 November 1995, the 1973 Qld Act was amended by the *Statute Law Revision Act (No 2)* 1995 (Qld) ("the Revision Act"), s 4 and Sch 1. Summarising, the short title was changed to the "*Storage Liens Act* 1973", the definition of "warehouseman" was omitted, the definition of "storer" was added, and "storer" was substituted for "warehouseman" in the relevant provisions, including s 3. However, the substance of the definition of "storer" remained the same as the definition of "warehouseman" in the 1973 Qld Act, and before that in the 1938 Qld Act.

[37] This historical conspectus serves to make four points. First, a warehouseman had no lien at common law at the time when the 1973 Qld Act was enacted.

[38] Second, the 1973 Qld Act was enacted to alter the law in that respect, consistently with the statement in part of the long title that it was "an Act to amend the law relating to warehousing of goods". The "mischief"[16] the 1973 Qld Act was intended to remedy was that, on the repeal of the 1938 Qld Act, a warehouseman did not have such a lien.

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14 (1973) 129 CLR 48.

15 *Warehousemen's Liens Act* 1973 (Qld), s 21.

16 *Alcan (NT) Alumina Pty Lt v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27, 46 [47], referring to *Heydon's Case*; "...the rule in *Heydon's Case*...[is] that it is the office of the Court, having ascertained **the mischief** and defect for which the law did not otherwise provide, and the remedy Parliament hath resolved and appointed, and the true reason of the remedy, "to make such construction as shall suppress **the mischief,** and advance the remedy, and to suppress subtle inventions and evasions for continuance of **the mischief**, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*." (emphasis added): *Hodge v The King* (1907) 5 CLR 373, 385 (per Isaacs J).

[39] Third, the amendments made by the Revision Act do not appear to amend the substance of the operation of the 1973 Qld Act. They were directed to replacing the references to "warehouseman" and "warehousemen" with "storer" and "storage", but without any other disclosed intention to affect the operation of the 1973 Qld Act.

[40] Fourth, the legislation in Queensland in this respect operated against the backdrop of a fairly consistent set of State and Territory comparator Acts.

Effect of the Revision Act

[41] There are relevant statutory provisions and common law principles which affect the meaning to be given to the amendments made by the Revision Act. Section 14C(b) of the AIA provides that if a provision of an Act expresses an idea in particular words and a provision later enacted appears to express the same idea in different words for the purpose of implementing a change in drafting practice, including the use of a clearer or simpler style or the use of gender neutral language, the ideas must not be taken to be different merely because different words are used.

[42] Given that the change from "warehouseman" to "storer" could be explained by an intention to widen the operation of s 4 of the 1973 Qld Act, there is also an ambiguity or obscurity in s 4 which permits consideration of extrinsic material under s 14B of the AIA. That material includes an explanatory note relating to the Bill that contained the relevant provisions. The explanatory note for the amendments to the 1973 Qld Act provided that the amendments were to update the language in accordance with current drafting practice. That supports the conclusion that no change in meaning was intended.

[43] In addition, at common law it has been said that it "might...be assumed from the fact that the amendments were made by [a Revision Act] that they were not intended to alter the then existing law".[17]

[44] In my view, the amendments made by the Revision Act did not alter the operation of the 1973 Qld Act.

Effect of the long title

[45] In part, that conclusion could also be supported by the operation of the relevant part of the long title to the 1973 Qld Act, which was not amended by the Revision Act.

[46] The long title still provides that the SL Act is an Act "to amend the law relating to warehousing of goods".

[47] In Queensland, the long title forms part of an Act. So much is recognised indirectly by s 22C(4)(a) of the AIA and more directly by the definition of the word "provision" in Sch 1 of the AIA. That definition provides that the provisions that form part of an Act include the long title.

[48] As well, highest authority supports the conclusion that, at common law, the long title is part of an Act which may be used as context in the construction of the text of a provision. So, in *Clunies-Ross v The Commonwealth*,[18] the plurality reasoned that

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17 *David v Grocon Ltd* [1992] 2 VR 661, 666 (per Hayne J) citing *Laird v Warden, Councillors and Electors of the Municipality of Portland* [1958] Tas SR 90.

18 (1984) 155 CLR 193.

"the long title, to which resort may properly be had in case [sic] of ambiguity for guidance on the intended scope of the Act (see, per Latham C.J., *Birch v Allen* (1942) 65 C.L.R. 621, at pp. 625-626)" could be utilised to support a view of the nature of a power conferred by an Act.[19] The same approach was followed by this Court in *R v C*:[20]

> "It is clear that the long title is part of a statute and resort may be had to it when construing the statute and determining the scope of its operation. (*Fenton v Thorley* (1903) AC 443 at 447, *Fielding v Morley Corporation* (1899) 1 Ch 1 at 3, *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 128, *Birch v Allen* (1942) 65 CLR 621 at 625-6, and *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 199)."

[49] If it matters, I would observe that the statement in *R v C* is not expressed in terms which require that an ambiguity be discerned before the long title may be considered. That approach is certainly consistent with the many High Court cases in which a long title has been referred to without first identifying a relevant ambiguity. It is also consistent with the "modern approach" to statutory interpretation which "insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise".[21]

[50] In the present case, the appellant would seek to cut down the operation of s 3 by the long title. It has been suggested that it is "not... open to a court to use the title to restrict what is otherwise the plain meaning of the words of the statute simply because they seem to be unduly wide".[22] But in my view, that choice of language may be regarded as unfortunate, if it is to be read as meaning that a long title cannot have a cutting down effect against ordinary meaning.[23] That would be contrary to other cases.[24] And it would be contrary to the modern approach to statutory interpretation to erect a threshold about plain meaning against which the contextual effect of a long title may not be considered. On the other hand, if the passage is only to be understood as an expression that in some cases, perhaps many, the clear meaning of the text will outweigh the contextual effect of a long title, it is unexceptionable. The long title has no special status as such.

Features of a contract of agistment

[51] The question to be answered in this case must be considered by reference to the terms of the pleaded contract. Nevertheless, since that question turns on the extent of the operation of the SL Act on its proper meaning, it is relevant to make some brief observations about the features of a contract of agistment at common law.

[52] First, agistment contracts may be of different kinds.[25] Although the grazing of stock of the livestock owner[26] on land possessed by the agister describes most agistment contracts, the terms of the contract may be such that it confers a lease of or a licence

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19 (1984) 155 CLR 193, 199.

20 [2002] QCA 156, [20].

21 *CIC Insurance Ltd v Bankstown Football Club* [1997] HCA 2; (1997) 187 CLR 384, 408.

22 *R v Galvin* [1987] QB 862, 869.

23 As is the view of Bennion, Bennion on Statutory Interpretation: a code 5th ed Lexis Nexis, 2008, 731-732.

24 For example, *Watkinson v Hollington* [1944] 1 KB 16.

25 *Big Top Hereford Pty Ltd v Thomas* [2006] NSWSC 1159; (2006) 12 BPR 23,843 [36]-[37]; *Streatfield v Winchcombe Carson Trustee Co (Canberra) Ltd* [1981] 1 NSWLR 519, 526-528.

26 I use "livestock owner" here to denote the possessor of the cattle who contracts for their agistment.

to go onto the land of the agister. In either case, the livestock owner may retain possession of the livestock. It depends on the terms of the contract. On the other hand, where the agister retains possession of the land, the effect of the terms may be that the livestock are bailed to the agister. In some cases, the livestock owner may not be permitted to go onto the agister's land during the bailment of the livestock to the agister.

[53] There are two reported cases in Queensland where the terms of agistment contracts did not create a bailment.[27] But it is not contended by the appellant that there is a customary implied term of agistment contracts in Queensland to that effect.[28] In the present case, the respondent's claim as pleaded is predicated on there being a bailment of the appellant's cattle to the respondent as bailee.[29]

[54] Second, whether or not an agistment contract is one of bailment, case law denies the existence at common law of an implied general or particular lien under an agistment contract, at least in most circumstances.[30]

[55] Third, a possessory lien is a security interest in the subject goods to retain possession until payment, which in law may or may not have priority vis-à-vis the proprietary interests of another party, depending upon the kind of lien and the authority or implied authority given by or any estoppel operating against the other party.[31]

[56] Fourth, where an agistment contract relates to a producing herd of livestock, the progeny of the herd will be the property of the livestock owner in the absence of contrary agreement. The general rule or maxim is that the progeny of domestic animals belong to the owner of the mother, except where the mother is leased to another.[32]

Principle of legality

[57] The principle of legality in the law of statutory interpretation has been the subject of numerous recent statements by the High Court. Latest among them is the following, from a case concerned with forfeiture of proceeds of crime legislation, *Attorney-General (NT) v Emmerson*:[33]

> "Shortly stated for present purposes, legislation affecting fundamental rights must be clear and unambiguous, and any ambiguity must be resolved in favour of the protection of those fundamental rights. Statutory forfeiture abrogates fundamental property rights."

[58] A more detailed, although lengthy, statement appears in *Lee v New South Wales Crime Commission*:[34]

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27 *Helton v Sullivan* [1968] Qd R 562, 565; *Sinclair v Judge* [1930] St R Qd 220, 226.

28 As to terms implied by custom see *Con-Stan Industries v Norwich Winterthur Insurance (Aust) Ltd* (1986) 160 CLR 226.

29 Although the appellant made some submissions directed to showing that the contract may not have been one of bailment, I proceed on the assumption that it was.

30 *Bell v Clare* (1989) 23 FCR 274, 277-280.

31 For example, as to a carrier and warehouseman, see *Kilners Ltd v The John Dawson Investment Trust Ltd* (1935) 35 SR (NSW) 274. And see Tyler, Young and Croft, *Fisher and Lightwood's Law of Mortgage*, 2nd Australian ed, [2.40].

32 *Grant v YYH Holdings Pty Ltd* [2012] NSWCA 360, [37]; *Tucker v Farm and General Investment Ltd* [1966] 2 QB 421.

33 [2014] HCA 13 [86].

34 [2013] HCA 39; (2013) 87 ALJR 1082.

"The principle of construction now sought to be invoked can be traced to a statement of Marshall CJ in the Supreme Court of the United States in 1805:

> Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects.

That statement, amongst others, was relied on in successive editions of *Maxwell on the Interpretation of Statutes*, first published in 1875, in support of the existence of a 'presumption against any alteration of the law beyond the specific object of the Act'.

In Australia, the principle is generally traced to the adoption and application in *Potter v Minahan* of a passage in the fourth edition of *Maxwell*, published in 1905. After stating that '[t]here are certain objects which the Legislature is presumed not to intend' and that 'a construction which would lead to any of them is therefore to be avoided', the passage as quoted and applied continued:

> One of these presumptions is that the Legislature does not intend to make any alteration in the law beyond what it explicitly declares, either in express terms or by implication; or, in other words, beyond the immediate scope and object of the statute. In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used. (Footnotes omitted.)

The passage concluded:

> General words and phrases, therefore, however wide and comprehensive in their literal sense, must be construed as strictly limited to the actual objects of the Act, and as not altering the law beyond. (Footnote omitted.)

Modern exposition of the principle in this Court is to be found in the joint reasons for judgment in *Bropho v Western Australia* and the joint reasons of four Justices of the Court in *Coco v The Queen*. The joint reasons for judgment in *Bropho*, after referring to the existence of various '"rules of construction" which require clear and unambiguous words before a statutory provision will be construed as displaying a legislative intent to achieve a particular result', stated that '[t]he rationale of all such rules lies in an assumption that the legislature would, if it intended to achieve the particular effect, have made its intention in that regard unambiguously clear'. The joint reasons for judgment described the passage in *Maxwell* adopted and applied in

Potter as articulating 'the rationale of the presumption against the modification or abolition of fundamental rights or principles'.

The joint reasons for judgment in *Coco* repeated that rationale, adopting again the same quotation. Consistently with that rationale, the joint reasons for judgment in *Coco* introduced the principle by stating:

> The insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them.

Reflecting again the same rationale, the joint reasons for judgment made the additional observation that 'curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights'.

The additional observation in *Coco* was echoed in a later, and now frequently cited, statement of Lord Hoffmann which explains the principle of legality as meaning that 'Parliament must squarely confront what it is doing and accept the political cost' and goes on to explain that '[f]undamental rights cannot be overridden by general or ambiguous words ... because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process'.

More recent statements of the principle in this Court do not detract from the rationale identified in *Potter*, *Bropho* and *Coco* but rather reinforce that rationale. That rationale not only has deep historical roots; it serves important contemporary ends. It respects the distinct contemporary functions, enhances the distinct contemporary processes, and fulfils the shared contemporary expectations of the legislative and the judicial branches of government. As put by Gleeson CJ in *Electrolux Home Products Pty Ltd v Australian Workers' Union*, in terms often since quoted with approval, the principle:

> is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted.

Gleeson CJ pointed out that the principle is to be applied against the background that 'modern legislatures regularly enact laws that take away or modify common law rights' and that the assistance to be gained from the principle 'will vary with the context in which it is applied'.

Application of the principle of construction is not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable or otherwise protected at

> common law. The principle extends to the protection of fundamental principles and systemic values. The principle ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature."[35] (footnotes omitted)

[59] There is no question that the statutory curtailment of property rights may invoke the principle of legality.[36] However, the question in the present case is not whether the SL Act intends to interfere with property rights. By providing for a storer to have a lien when none would exist at common law, it plainly intends to do that where its provisions apply by interfering with the bailor's right to possession. The question in the present case is how widely the language of the Act operates in its application to particular facts, legal relationships and rights.

[60] The appellant's submission focussed on the interference with his property rights that the construction urged by the respondent would have. It is true that s 3 imposes a lien in favour of a storer without the agreement of the depositor or owner. That is, it operates in the absence of agreement of the parties that there will be a lien upon the cattle. However, in my view, a lien securing the charges of an agister, who is a bailee, against the interest of an owner, who is the bailor, of cattle, where those charges are for the benefit of grazing and feeding the owner's cattle, and where the owner has agreed to pay the charges, is not a great interference with a fundamental right of property of the owner of the cattle. The lien would operate to prevent the owner from accepting the benefit of the agistment without paying for it. Similar liens exist at common law in some situations, such as an artificer's lien.

[61] However, the appellant's interest as owner is not the only property right that would be affected by the respondent's construction. When the 1973 Qld Act was enacted, it provided for a warehouseman who had the benefit of a lien to give notice of the lien to various parties within three months of the date of the deposit.[37] Importantly, he was required to notify a grantee of a bill of sale registered under the *Bills of Sale and Other Instruments Act* 1955 (Qld) ("BSOI Act"). It was also provided that a warehouseman's "lien, as against the person to whom he has failed to give notice, shall be void as from the period of expiration of three months from the date of the deposit of the goods".[38] The implication is that a warehouseman with a statutory lien under s 3 took in priority to the claim of the holder of a bill of sale over the relevant goods, if the required notice was given.

[62] At that time, each of a "bill of sale" and a "stock mortgage", as defined, was an "instrument" registrable under the BSOI Act (but a stock mortgage was not a "bill of sale"). Under the BSOI Act, an unregistered instrument was of no effect against a person other than the grantor and grantee, if unregistered.[39] The reason for the

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35 [2013] HCA 39; (2013) 87 ALJR 1082, 1151-1152 [307]-[313].

36 See the cases collected in Pearce and Geddes, Statutory Interpretation in Australia, 7th ed LexisNexis, Australia, 2011, 184-185.

37 *Warehousemen's Liens Act* 1973 (Qld), s 5(1).

38 *Warehousemen's Liens Act* 1973 (Qld), s 5(3).

39 *Bills of Sale and Other Instruments Act* 1955 (Qld), ss 6, 7 and 26.

requirement that the holder of a warehouseman's lien under the 1973 Qld Act give notice to the holder of a bill of sale registered under the BSOI Act was that the lien for the warehouseman's charges had priority over the secured rights in the goods of the holder of the bill of sale.

[63] These provisions reveal two points of relevance to the proper construction of the SL Act as derived from the 1973 Qld Act, if the SL Act extends to a bailment of cattle under an agistment contract. First, the rights of the warehouseman or storer who held a lien under s 3 may have operated in priority to the rights of the holder of a registered stock mortgage who may have known nothing of the arrangements or did not agree to them.

[64] Second, the holder of a registered stock mortgage was placed in a worse position than the holder of a registered bill of sale, because there was no requirement for a "warehouseman" or "storer" who had a lien to give notice to the holder of a registered stock mortgage over the relevant stock. That requirement expressly extended to the grantee or successor of a registered bill of sale under the BSOI Act but not to the grantee or successor of a registered stock mortgage.[40] The 1973 Qld Act could have operated in derogation of the secured interest in the cattle of a mortgagee under a registered stock mortgage in circumstances where they were not aware of the lien, because there was no obligation upon the "warehouseman" or "storer" to give notice.

[65] Those points are expressed in the past tense because the BSOI Act was repealed in 2010.[41] Accordingly, s 4A(1) of the SL Act now declares a storer's lien on goods to be a statutory interest given priority under s 73(1) of the *Personal Property Securities Act* 2009 (Cth) ("PPSA").

[66] The operation of the later enacted PPSA cannot affect the meaning of the SL Act. However, for completeness, I observe that the provisions of the PPSA are intended to permit creation of a priority interest for a security interest where the priority interest is granted to enable the livestock to be fed or developed, which would include an agreement to grant a charge over cattle on agistment.[42]

[67] In my view, both the first and second points made above are relevant to the question of the proper construction of s 3 having regard to the principle of legality. There is no apparent reason why the SL Act required notice in the case of a registered bill of sale but did not require it in the case of a registered stock mortgage.

Conclusion

[68] In my view, under the pleaded contract, the agistment of the appellant's cattle in the present case does not constitute goods "deposited... for storage" within the meaning of s 3 of the SL Act, on a close consideration of the text of s 3 in the context of the SL Act. The other matters discussed above support that conclusion.

[69] It follows that the appeal should be allowed, the orders of the primary Judge should be set aside and in lieu it should be ordered that paragraphs 1(d), 7 and the claim for a declaration of lien and injunctive relief are struck out of the statement of claim.

[70] The respondent should be ordered to pay the appellant's costs of the appeal and of the application to strike out the relevant parts of the statement of claim.

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40 However, if the warehouseman or storer has knowledge that another person has an interest in the goods before the expiration of two months after the date of the deposit, s 5(1)(c) requires the warehouseman to give notice of the lien to that person.

41 *Personal Property Securities (Ancillary Provisions) Act* 2010 (Qld), s 12.

42 *Personal Property Securities Act* 2009 (Cth) ss 12(1), 21 (noting s 21(2)(b) as relevant to agistment by way of bailment), 22(1)(b) and 86.