ALERT

cornwallstodart
ENHANCING SUCCESS

18 SEPTEMBER 2014

The Victorian Court of Appeal holds that building owners have 10 years to bring a claim in a building dispute from the time the occupancy permit or certificate of final inspection is issued

The Victorian Court of Appeal has provided long-awaited guidance on the limitation period that applies to claims brought in building cases by holding that all actions, whether founded in tort or contract, must be brought within 10 years from the time the occupancy permit or certificate of final inspection is issued.

Background – limitation period

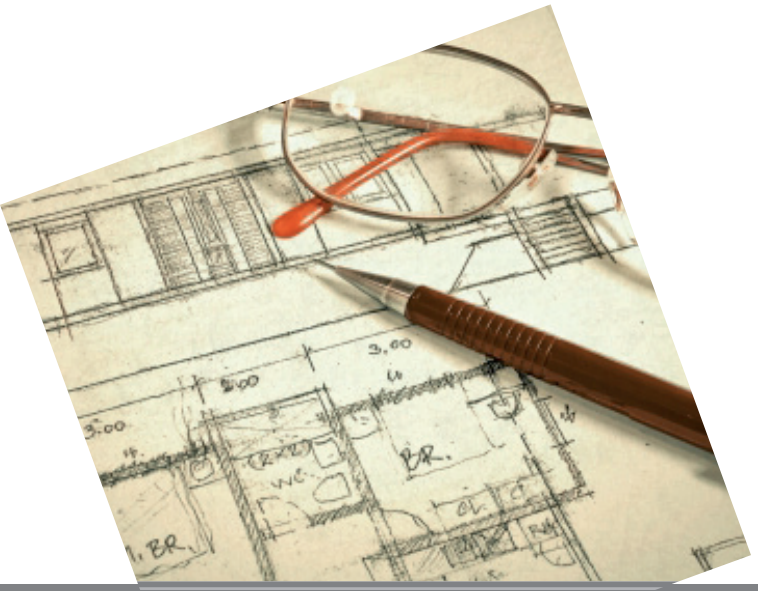
The dispute in this case arose between the purchaser and developer, Brirek Industries Pty Ltd (**Brirek**), and the building surveyor, McKenzie Group Consulting (Vic) Pty Ltd (**McKenzie**). Brirek alleged that McKenzie had breached its statutory obligations and contractual obligations by issuing building permits in a way that had caused Brirek to suffer loss. The key question was whether the claim was statute barred, because it had been brought more than 6 years after the alleged contractual breach but less than 10 years after the occupancy permit was issued.

In answering this question, the Victorian Court of Appeal (**Court**) was asked to deal with conflicting approaches to the meaning of s 134 of the *Building Act 1993* (Vic) (**Act**). This section is important for both builders and building owners because it deals with the time period in which owners may sue builders for failed or faulty building work.

Legislation – limitation period

Section 134 of the Act provides:

> ### Limitation on Time When Building Action May be Brought
>
> *Despite anything 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.*



Relevantly, the *Limitations of Actions Act 1958* (**Limitations Act**) provides at s 5(1)(a):

> ### Contracts and Torts
>
> (1) *The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued —*
>
> (a) *…actions founded on simple contract (including contract implied in law) or actions founded on tort including actions for damages for breach of a statutory duty.*

The conflicting approaches – limitation period

The Victorian Civil and Administrative Tribunal (**VCAT**) had taken the view that the 10 year limitation period in s 134 of the Act replaces the six year limitation period in the Limitations Act (**Replacement View**) insofar as building actions are concerned – and, therefore, applies in every building case. Brirek relied on this interpretation in arguing that its claim against McKenzie should be allowed because it was within the limitation period set out in the Act.

At first instance in this dispute, the County Court of Victoria took the contrary view when it held that the 10 year limitation period in s 134 of the Act only applies to negligence claims brought in building cases and not to other claims, including those brought in contract (**Long Stop View**). This interpretation was relied on by McKenzie in arguing that Brirek's contractual claim was statute barred, because it was a contractual claim brought outside the six year limitation period under the Limitations Act.

Court of Appeal's decision – limitation period

In August 2014, the Victorian Court of Appeal handed down its decision on the question.

The Court held that building owners have 10 years from the date the occupancy permit (or certificate of final inspection) is issued to bring all claims, whether founded in tort or contract. The decision overturned the County Court's decision and confirms the Replacement View favoured by VCAT.

Building surveyor's duty of care

Brirek also brought a negligence claim against McKenzie, which was rejected by the Court. Based on the facts, the Court held that the building surveyor did not owe a duty of care to Brirek to prevent it suffering loss and damage (namely, loss of profit by reason of delay).

In reaching its decision on this subsidiary issue, the Court emphasised the difference between this case – where the owner sought recovery for 'pure economic loss' – and other negligence cases involving a building surveyor, such as *Taitapanui v Moorabool Shire Council* (2006), which concerned defective domestic building work.

The Court agreed that the owner in this case was not relevantly vulnerable to the risk of loss, and that the building surveyor owed no duty to avoid causing the owner the claimed loss.

Impact

The Court's decision has provided long-awaited clarity to the interaction between the two limitation periods and should provide

greater certainty for building owners, building practitioners and their insurers. The decision attempts to balance the interests of building practitioners (by limiting their liability to a clearly defined period) against the interests of building owners (by allowing them a period of 10 years from the issue of an occupancy permit or certificate of final inspection to bring any claim).

While the decision has effectively extended the period of liability for building practitioners in contractual disputes, it has confirmed the limitation period for negligence claims. This should provide some comfort to industry participants – particularly building practitioners and their insurers – because the period of liability is now clearly defined.

For further information please contact:

Catherine Bell, Partner
Phone (direct) **+61 3 9608 2209**
Mobile **+61 410 451 634**
Email **c.bell@cornwalls.com.au**