IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA460/2021
[2022] NZCA 624

BETWEEN	BECA CARTER HOLLINGS & FERNER LIMITED Appellant
AND	WELLINGTON CITY COUNCIL Respondent

Hearing:	23 and 24 May 2022 (further submissions received 25 May 2022)
Court:	Miller, Clifford and Katz JJ
Counsel:	M G Ring KC, J A McKay and K C Grant for Appellant L J Taylor KC, B J Sanders and B A Mathers for Respondent
Judgment:	14 December 2022 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a complex appeal on a band B basis and usual disbursements.

REASONS OF THE COURT

(Given by Clifford J)

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Introduction

[1] In October 2006 CentrePort Ltd, the operator of the port at Wellington, contracted with Bank of New Zealand (BNZ) to construct a building (the Building) on land owned by it on Waterloo Quay. CentrePort in turn contracted with Beca Carter Hollings & Ferner Ltd (Beca) for engineering and design consultancy services, and with Fletcher Construction Company Ltd for design and construction services.

[2] Following construction of the Building, and pursuant to its contractual arrangements with CentrePort, BNZ entered into a long-term lease of the Building in February 2011. The Building suffered irreparable damage in the Kaikōura earthquake

of November 2016. BNZ was never able to return to the Building thereafter. The Building was ultimately determined uneconomic to repair and has now been deconstructed.

[3] On 2 August 2019 BNZ filed proceedings against the Wellington City Council (the Council) seeking damages of some $101 million to recover losses for business interruption and property damage, and related fees, caused by the effects of that earthquake on the Building. BNZ alleges the Council is liable to it in negligence as a result of the circumstances in which the Council issued the building consents and code compliance certificates (CCCs) for the Building's substructure and superstructure. BNZ's claim focuses on negligence in the design of the superstructure.

[4] The Council denies liability in negligence, has pleaded standard limitation defences under the Limitation Acts 1950 and 2010 (the LA 1950 and the LA 2010 respectively), and the 10-year "long-stop"[1] limitation under the Building Act 2004 (the BA 2004), and has filed third party proceedings against Beca:

(a) under the Law Reform Act 1936 (the LRA 1936), for contribution from Beca as a joint tortfeasor with the Council if, contrary to the Council's denial, it is found liable to BNZ;

(b) in tort, for negligence, alleging that Beca breached the duty of care it owed the Council on a continuing basis, by preparing design documents otherwise than in conformance with the Building Code and/or New Zealand Standards, by representing negligently to the contrary and by failing to correct those errors and advise the Council of their existence; and

(c) in tort, for negligent misstatement, for misrepresenting non-conforming design documents to be conforming, knowing the Council would rely on those documents when issuing building consents and CCCs relating to the Building.

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[1] A "long-stop" limitation imposes a complete bar on the commencement of legal proceedings. Such a limitation restricts the effect of provisions which allow standard limitation periods to be extended in certain circumstances.

[5] Beca denies any liability to the Council. It says: (i) it did not breach its duty of care to BNZ and so is not a joint tortfeasor with the Council; (ii) to the extent it owed duties of care to the Council directly it did not (for the same reason) breach those duties; and (iii) even if the design of the superstructure and the construction of the superstructure and the substructure were non-compliant, it was "off-duty" or "off-task" with respect to the same by 12 March 2008 at the latest.

[6] By way of affirmative defence to the Council's claim for contribution, Beca also pleads protection of the 10-year long-stop limitation under the BA 2004.

[7] Beca subsequently applied for strike out and summary judgment on the basis of that limitation defence (as regards all claims) and of that "off-duty/off-task" defence as regards the Council's negligence claims.

[8] In May 2021, Clark J in the High Court dismissed those applications.[2] Beca now appeals that decision with leave of the High Court.[3]

[9] Beca raises two issues of law. The first is whether the High Court was correct to find, contrary to Beca's argument, that the 10-year long-stop in the BA 2004 did not apply to the Council's claim for contribution from Beca. The second is whether the High Court was correct to find, again contrary to Beca's argument, that the facts were not sufficiently clear to grant Beca summary judgment dismissing the Council's "negligence" causes of action.

[10] We refer to the first as "the limitation issue" and the second as "the summary judgment issue". We address them separately.

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2 *BNZ Branch Properties Ltd v Wellington City Council* [2021] NZHC 1058 [Judgment under appeal].

3 *BNZ Branch Properties Ltd v Wellington City Council* HC Wellington CIV-2019-485-429, 12 July 2021 at [6].

The limitation issue

Background

[11] As is common in building disputes, the facts here are reflected in a long and complex narrative. In the context of the limitation issue, however, that narrative can be considerably simplified:

(a) The Building was constructed in stages between 2006 and 2010.

(b) Beca issued producer statements (PSs) for the design of the Building's substructure and superstructure on 4 October 2006 and 19 February 2007.[4] The Council issued the related building consents on 13 November 2006 and 23 February 2007.

(c) From 16 January 2007 until 12 March 2008 Beca monitored construction of the Building's substructure and superstructure. Beca issued PSs for building consents for the Building's substructure and superstructure on 12 March 2008. The Council issued CCCs for the superstructure on 27 March 2009 and for the substructure on 12 March 2010.

(d) Practical completion of the Building was achieved in August 2011.

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[4] Under the Building Act 1991 (BA 1991) PSs were defined to be "any statement supplied by or on behalf of an applicant for a building consent or by or on behalf of a person who has been granted a building consent that certain work will be or has been carried out in accordance with certain technical specifications" (s 2).
Section 33(5) of the BA 1991 provided:
> "Subject to section 34(3) of this Act, a territorial authority may, at its discretion, accept from the applicant a producer statement establishing compliance with all or any of the provisions of the building code."

As explained in Jonathan Kaye and Shanti Frater *Building Law in New Zealand* (Thomson Reuters, Wellington, 2022) at [BL19.11]:
> "Section 34(3) [of the BA 1991], now replaced by s 49(1), required a territorial authority to be satisfied on reasonable grounds as to compliance with the Building Code. Thus, s 33(5) … seems to have done no more than provide a producer statement was capable of being reasonable grounds on which a territorial authority may be so satisfied. What amounts to reasonable grounds will always be a question of fact in all the circumstances of any particular case, so that s 33(5) … seems to have added little if anything to the general law."

There is no mention of PSs in the BA 2004. Notwithstanding, and on the basis of the significance of PSs under the BA 1991, they can, in appropriate circumstances, still be a factor on which reliance can be placed by a territorial authority.

(e) The Seddon earthquake occurred on 21 July 2013.

(f) The Kaikōura earthquake occurred on 14 November 2016.

(g) BNZ commenced proceedings against the Council on 2 August 2019.

(h) The Council commenced:

(i) its claim for contribution from Beca as a joint tortfeasor on 26 September 2019; and

(ii) its claims against Beca in negligence, on 9 March 2020.

[12] As the pleadings reflect, limitation provisions found in three enactments are of relevance: the LA 1950, the LA 2010 and the BA 2004.

[13] As regards the Council's claim for contribution from Beca, Beca relies on the 10-year long-stop limitation period found in s 393(2) of the BA 2004. As relevant s 393(2) modifies the applicability of the LA 1950 and the LA 2010 to civil proceedings relating to building work by providing that:

> … no relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.

[14] Beca says the Council's claim for contribution from it is a civil proceeding relating to building work based on Beca's allegedly negligent acts in issuing PSs on 19 February 2007 and 12 March 2008. Hence, when commenced by the Council on 26 September 2019, that proceeding was out of time.

[15] The Council says s 393(2) of the BA 2004 does not apply to its claim for contribution. Rather, the Council says the applicable provision is s 34 of the LA 2010, which — as relevant — provides:

> **34 Claim for contribution from another tortfeasor or joint obligor**
>
> (1) This section applies to a claim under section 17 of the Law Reform Act 1936—

> (a) by a tortfeasor (**A**) liable in tort to another person (**B**) in respect of damage; and
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> (b) for contribution from another tortfeasor (**C**) who is, or would if sued in time by B have been, liable in tort to B (whether jointly with A or otherwise) in respect of that damage
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> …
>
> (4) It is a defence to A's claim for contribution from C if C proves that the date on which the claim is filed is at least 2 years after the date on which A's liability to B is quantified by an agreement, award, or judgment.

[16] On that basis the Council says that as a tortfeasor claiming contribution from Beca its liability in tort to BNZ is yet to be quantified. Accordingly the two-year limitation period established by s 34(4) has not begun, and its claim for contribution from Beca is not out of time.

The High Court decision

[17] In the High Court Beca principally relied on a line of High Court decisions which have found that the BA 2004's 10-year long-stop limitation period, as regards contribution claims between joint tortfeasors, is in effect coextensive with that period as it applies between (i) the plaintiff (here BNZ) and (ii) the tortfeasor facing the contribution claim (here Beca). On that basis, and as Beca argues here, the Council's claim for contribution from Beca would be barred by the long-stop limitation period on and from the same date as claims by BNZ against Beca would be barred by that stipulation.

[18] The Council acknowledged that line of authority, but argued those decisions were wrong. It based that argument on what it said was the proper interpretation of the relevant legislation as particularly demonstrated by the legislative history.

[19] In agreeing with the Council on that issue, and dismissing Beca's strike out application, the Judge concluded:[5]

> [77] The High Court decisions Beca relies on have proceeded on the assumption that had Parliament intended to exclude claims for contribution from the longstop in s 393(2) it would have said so expressly.

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5 Judgment under appeal, above n 2 (footnotes omitted).

> But there are limitations on the application of such an approach to statutory interpretation. The principle that general provisions do not derogate from specific provisions is applicable here. That principle, generalia specialibus non derogant, has been defined in the following way:
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> > [W]here there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words without any indication of a particular intention to do so.
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> [78] In considering the reach of s 393(2) the principle is justifiably applied particularly in light of Parliament's purposeful amendment to the Law Reform Act following *Merlihan v A.C Pope Limited* in order to consolidate a defendant's right to seek contribution from a joint tortfeasor. It is unlikely that, without express words, Parliament intended "by a sweeping general provision to alter a rule passed to regulate a specific situation that was carefully considered and formulated at the time.
>
> [79] For the foregoing reasons I am unable to conclude that the Council's claim for contribution is so clearly statute barred that it must be struck out.

[20] The Judge further supported her reasoning with reference to the distinction made in s 4 of the LA 2010 between an "original claim" and an "ancillary claim". On the Judge's analysis, the phrase "civil proceedings" in s 393(2) of the BA 2004 only applied to original claims, not ancillary claims. As (on the Judge's analysis) a claim for contribution was an "ancillary claim", the two-year limitation period in s 34 of the LA 2010 applied, rather than the 10-year long-stop in s 393(2) of the BA 2004.[6]

The appeal

[21] On appeal as regards the limitation issue, and by reference to the High Court judgment, both Beca and the Council repeated and enlarged upon the submissions the Judge recorded they had made to her.

[22] For Beca Mr Ring KC argued that both aspects of the Judge's reasoning were flawed:

(a) First, the Judge had erred in applying the principle that an earlier specific provision may survive a later more general one to find that the 10-year long-stop first enacted as s 91 of the Building Act 1991

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6 At [68]–[69].

(the BA 1991) was a general provision and so should not derogate from the special approach to contribution claims then found in s 14 of the LA 1950.

(b) Secondly, the Judge had erred in the way she had interpreted the phrase "civil proceedings" as used in the BA 1991 and the BA 2004 as including only "original", and not "ancillary", claims — as those terms are defined in the LA 2010.[7]

[23] In doing so Mr Ring again referred to the line of High Court cases that support Beca's position.

[24] For the Council Mr Taylor KC supported and expanded upon the analysis of the High Court.

[25] We consider the arguments of the parties in detail in the analysis which follows.

Analysis

Overview

[26] The common law does not impose any time limit within which a civil claim must be commenced. To encourage the bringing of legal actions in a timely fashion, and to protect against the difficulty of defending claims based on long past events, the period within which a person may commence civil proceedings against another has, however, long been limited by a variety of enactments.

[27] Over time different limitation periods applied to different classes of proceedings, and different dates or events were stipulated for the commencement of limitation periods, depending on the class of claim in question. At the same time, provision was made for limitation periods to be extended in a variety of circumstances, for example, in cases of disability, fraud and mistake.

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7 Limitation Act 2010, s 4.

[28] The LA 1950 consolidated and amended the general enactments which up to then had dealt with the limitation of the main classes of civil actions and a number of others which prescribed special periods of limitation for special classes of action. The LA 1950 followed substantially the Limitation Act 1939 (UK), but differed to take account of New Zealand circumstances including, for example, matters involving general, Crown and Māori customary land.

[29] Part 1 of the LA 1950 prescribed limitation periods for various classes of action and the dates on which those periods commence. Those periods range from one year (in the case of actions brought for acts done pursuant to an Act of Parliament) to 60 years (where the Crown sought to recover certain land).[8]

[30] Those limitation periods generally commenced on "the date on which the cause of action accrued", without that phrase being further defined. Thus, s 4(1) provided:

> **4 Limitation of actions of contract and tort, and certain other actions**
>
> (1) Except as otherwise provided in this Act … the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say,—
>
> (a) actions founded on simple contract or on tort:
>
> (b) actions to enforce a recognisance:
>
> (c) actions to enforce an award, where the submission is not by a deed:
>
> (d) actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.

[31] A cause of action is said to have accrued when every fact the proof of which is necessary to entitle judgment on a claim has come into existence. At the time of the passage of the LA 1950 it was well understood that causes of action accrued and limitation periods began:

> (a) for breach of contract, on the occurrence of the breach;

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8 Limitation Act 1950, ss 7 and 23.

(b) for torts (wrongful acts) actionable per se, on the date of the wrongful act; and

(c) for torts actionable only on proof of damage, as is the case for most torts including negligence, on the occurrence of the damage.

[32] Consistently with the general concept, s 14 of the LA 1950 specified that claims for contribution accrued when all essential facts to establish that claim had "happened".

[33] On that basis the law as to when limitation periods began was regarded as generally satisfactory.

[34] In a series of decisions in the 1970s and 1980s, in cases involving latent defects in buildings and as we explain below, this Court moved to recognise a later date than that of the occurrence of the damage on which the limitation period for a claim for negligent damage might begin: namely, the date upon which a reasonable plaintiff became aware of the occurrence of that damage. This approach is known as that of discoverability. That development had significant implications for the operation of the LA 1950. In particular, the possibility a limitation period might not commence until damage was discovered — or discoverable — was seen as creating uncertainty and potential unfairness for defendants.

[35] The Law Commission, in a number of reviews of the limitation regime beginning in the 1980s, in part responding to those concerns, recommended reform, including moving away from limitation periods generally commencing on "the accrual of the cause of action" to the "date of the act or omission on which the claim is based". At the same time the Commission recommended retention of the traditional approach to the commencement of limitation periods for contribution claims: namely, as of the date on which the liability of the tortfeasor claiming contribution to the plaintiff was quantified, as had been the position since the LA 1950.

[36] The facts here are illustrative of the issues involved. As a preliminary point, it is to be noted that the LA 1950 continues to apply in respect of BNZ's claims against

the Council in negligence because the LA 2010 only applies to "acts or omissions" from 1 January 2011.[9]

[37] In its claim against the Council BNZ pleads the dates of the Council's negligence as being 27 March 2009 and 12 March 2010: the dates of issue of the relevant CCCs. It also pleads that "[o]n or about 14 November 2016 the Building suffered irreparable damage during the magnitude 7.8 Kaikoura earthquake, and in particular to its superstructure". That would appear to be a pleading it was on 14 November 2016 that the damage caused by the Council's negligence either occurred or was discoverable, and that it was therefore not until that date BNZ's cause of action accrued and the applicable limitation period began. Hence, under the LA 1950 — and applying the discoverability approach — no time-bar arose as between BNZ and the Council until 14 November 2022. Its claim against the Council, filed on 2 August 2019, was therefore in time.

[38] But, and as can be seen, without that later "discoverability" date being the date on which the limitation period began, BNZ's causes of action would have accrued by 12 March 2010 at the latest and accordingly would have been time-barred from 12 March 2016, well before BNZ issued its proceedings against the Council.

[39] That brings us to the 10-year long-stop in s 393(2) of the BA 2004, as pleaded here by both of the Council and Beca, and to the dispute as to the applicability of that provision in the context of the Council's claim for contribution from Beca.

[40] By reference to the chronology, the 10-year long-stop dates as between BNZ and the Council would appear to be 27 March 2019 (superstructure) and 12 March 2020 (substructure), the relevant act or omission being in terms of s 393(2), the issue of CCCs. The Council therefore pleads the s 393(2) long-stop to defeat the discoverability commencement date which would otherwise favour BNZ if that period did not begin until the date of the Kaikōura earthquake, 14 November 2016.

[41] Taking a similar approach Beca argues here the long-stop limitation period applicable to the Council's claim for contribution from it began on the date of Beca's

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9 Limitation Act 2010, s 59.

tort, that is its act or acts in breach of its duty to BNZ. Beca says the issue by it of the PSs for building consents negligently in breach of its duty to BNZ — if it is a tortfeasor — are, in terms of s 393(2) of the BA 2004, the acts or omissions on which the Council's claim for contribution is based. Thus the long-stop dates are 19 February 2017 (superstructure) and 12 March 2018 (substructure), before the Council made its claim for contribution.

[42] But — the Council argues — properly understood the Council's claim for contribution from Beca is based neither on the fact of its own negligence nor the fact of Beca's negligence. Rather, that claim is based on a finding of liability owed by the Council to BNZ: it is only then that its cause of action for contribution accrues. Therein lies our issue: how, and in what way, should s 393(2) be applied to the Council's claim for contribution?

[43] In our view, the key to the resolution of that question of statutory interpretation is the significance of the distinct legal and conceptual basis for a claim for contribution between two tortfeasors as opposed to a claim in negligence for damages by a plaintiff from a tortfeasor.

[44] As Elias CJ explained in *Hotchin v New Zealand Guardian Trust Company Ltd*, the enactment in s 17(1)(c) of the LRA 1936 of the statutory right, on which the Council relies, to contribution between tortfeasors was an expansion of the position at common law:[10]

> [133] When two parties are liable to a third for the same harm (whether equally or proportionally), the principle of equitable contribution applied by the common law as an aspect of natural justice[11] has long permitted contribution.[12] Although a principle of general application, applied by

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10 *Hotchin v New Zealand Guardian Trust Company Ltd* [2016] NZSC 24, [2016] 1 NZLR 906 (footnotes in original). See also at [161]–[162] per William Young J.

11 *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at 350 per Kitto J, citing Lord Mansfield in *Godin v London Assurance Co* (1758) 1 Burr 489, 97 ER 419 (KB) and *Newby v Reed* (1763) 1 BL W 416, 96 ER 237 (KB).

12 *Dering v Earl of Winchelsea* (1787) 1 Cox 318, 29 ER 1184 (Exch); *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397 at [5] per Lord Bingham, at [27] per Lord Steyn, and at [46] per Lord Hope. For the history of equitable contribution see the judgments of Kitto J in *Albion Insurance Co Ltd v Government Insurance Office (NSW)*, above n 11, and Lord Bingham in *Royal Brompton*. The ability to apportion responsibility is discussed in *Burke v LFOT Pty* (2002) 209 CLR 282 from 292 per Gaudron ACJ and Hayne J and was touched on in *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [57]–[58] per Elias CJ, at [75] per Blanchard J, from [124] per Tipping J and from

> common law courts as well as the courts of equity, the decision in *Merryweather v Nixan* denied its application to tortfeasors until statutory reform, now contained in New Zealand in s 17(1)(c) of the Law Reform Act.[13]

[45] Section 17(1)(c) did not, however, address the question of when such claims accrue, or their limitation. When that issue did arise New Zealand law, reflecting the distinct conceptual basis of claims for contribution between tortfeasors as opposed to the basis for claims by a plaintiff against one or more of those tortfeasors, recognised that the claim for contribution arose, and the limitation period for such a claim began, when the law recognised the liability of the claimant to the plaintiff which, when discharged, would enrich the claimee tortfeasor. As Lord Wright MR explained in *Brook's Wharf and Bull Wharf Ltd v Goodman Bros*:[14]

> The essence of the rule is that there is a liability for the same debt resting on the plaintiff and the defendant and the plaintiff has been legally compelled to pay, but the defendant gets the benefit of the payment, because his debt is discharged either entirely or pro tanto, whereas the defendant is primarily liable to pay as between himself and the plaintiff. The case is analogous to that of a payment by a surety which has the effect of discharging the principal's debt and which, therefore, gives a right of indemnity against the principal.

[46] Thus in these circumstances it is not the fact that both BNZ and Beca have committed torts against BNZ that gives rise to the right of contribution. Rather, such a right only arises here when Beca is here enriched by the Council being liable to discharge more than its own proper share of the losses incurred by BNZ as caused by the tortious acts of them both.

[47] The view we have reached, based on the words of the relevant legislation and the legislative history, and agreeing with the High Court, is therefore that the 10-year long-stop found in s 393(2) of the BA 2004 does not preclude the Council from commencing its claim for contribution as it has now done. Rather, and in terms of the applicable transitional provisions, it is the terms of s 34 of the LA 2010 that are determinative of that issue.

[48] In the result, since the Council's (alleged) liability to BNZ has not yet been quantified, time has not yet started to run and accordingly the Council's claim for

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[210] per McGrath J.

13 *Merryweather v Nixan* (1799) 8 D & E 186, 101 ER 1337 (KB).

14 *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534 (CA) at 544.

contribution against Beca was in time. We uphold the High Court's conclusion on that point.

[49] However, we respectfully differ from the High Court in two respects:

(a) First, we accept that contribution proceedings in this case are " proceedings relating to building work" for the purposes of s 393 of the BA 2004.

(b) Secondly, we do not think the terms of s 393 apply only to original, and not ancillary, claims as those terms are defined in the LA 2010. In any event, we consider contribution claims are more accurately characterised as original claims.

[50] We now set out the detail of our analysis. We first describe the approach to statutory interpretation before undertaking our review of the legislative history. That history starts with the origin of the statutory right to contribution, then turns to the treatment of contribution claims under limitation provisions, the common law developments as regards the accrual of the cause of action in negligence for latent defects, and the Law Commission's work on the limitation regime in New Zealand.

Statutory interpretation principles

[51] The correct approach to problems of statutory interpretation is well established. Section 10 of the Legislation Act 2019 provides:

> **10 How to ascertain meaning of legislation**
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> (1) The meaning of legislation must be ascertained from its text and in the light of its purpose and its context.
>
> (2) Subsection (1) applies whether or not the legislation's purpose is stated in the legislation.
>
> (3) The text of legislation includes the indications provided in the legislation.
>
> (4) Examples of those indications are preambles, a table of contents, headings, diagrams, graphics, examples and explanatory material, and the organisation and format of the legislation.

[52] As Tipping J put it:[15]

> … text and purpose [are] the key drivers of statutory interpretation … the meaning of the text … should always be cross-checked against purpose … In determining purpose the Court must obviously have regard to both the immediate and general legislative context. Of relevance too maybe the social, commercial or other objective of the enactment.

[53] Here our task is to interpret, and by so doing to resolve any inconsistency that may exist between, s 393 of the BA 2004 and s 34 of the LA 2010. We set out those provisions again now, as relevant:

> **393 Limitation defences**
>
> (1) The Limitation Act 2010 applies to civil proceedings against any person if those proceedings arise from—
>
> (a) building work associated with the design, construction, alteration, demolition, or removal of any building; or
>
> (b) the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building.
>
> (2) However, no relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.
>
> …
>
> **34 Claim for contribution from another tortfeasor or joint obligor**
>
> (1) This section applies to a claim under section 17 of the Law Reform Act 1936—
>
> (a) by a tortfeasor (**A**) liable in tort to another person (**B**) in respect of damage; and
>
> (b) for contribution from another tortfeasor (**C**) who is, or would if sued in time by B have been, liable in tort to B (whether jointly with A or otherwise) in respect of that damage.
>
> …
>
> (4) It is a defence to A's claim for contribution from C if C proves that the date on which the claim is filed is at least 2 years after the date on which A's liability to B is quantified by an agreement, award, or judgment.

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[15] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22] (footnotes omitted).

[54] Beca points to the plain meaning of s 393(2). "Civil proceedings" include claims for contribution. The Council's claim against it for contribution relates to "building work", that is building work undertaken by Beca. Beca finished that work more than 10 years ago. Beca says Parliament could not have been plainer in the words it used in s 393. The long-stop of 10 years applies. Moreover this interpretation accords with the clear policy behind the enactment of s 393, and hence Parliament's intention.

[55] The Council points to the specific context of developments, over a considerable period of time, in New Zealand law as regards contribution between joint tortfeasors. It says those developments resulted in a specific statutory framework which permits one joint tortfeasor, sued by a plaintiff, to claim contribution from another. That is recognised to be, as a cause of action, independent from that of the plaintiff to claim against both it and the other tortfeasor. There is, furthermore, as regards that cause of action, specific provision as to when that cause of action arises, namely the time at which the defendant is found liable to the plaintiff. Its limitation period, the Council says, is two years from that same time. That statutory regime, and the long process of relevant law reform that led to its establishment, makes it clear the Council's claim for contribution from Beca is within time.

[56] The law has developed a number of general principles by reference to which inconsistencies within particular statutes, and between quite different statutes, can be approached. Of most relevance for our purposes is the principle generalia specialibus non derogant, applied by the High Court Judge, by which, as noted, earlier specific provisions can survive later more general ones.[16] Before we apply those principles, we consider the legislative history. The Law Commission, and its work in this area, features prominently in that background. Reports of the Law Commission are valuable interpretative materials in general terms.[17] We recognise that care has to be taken with such material generally, and that the views of the Law Commission in this area have not always been taken up by Parliament.

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16 See above at [19] and [22](a)].

17 See for example *Sheehan v Watson* [2010] NZCA 454, [2011] 1 NZLR 314.

[57] The legislative history involves a number of statutory provisions. The principal ones are:

(a) Section 17(1)(c) of the LRA 1936 as enacted.

(b) Section 14 of the LA 1950 and s 17(1)(c) of the LRA 1936 as amended by the LA 1950.

(c) Section 91 of the BA 1991.

(d) Section 393 of the BA 2004.

(e) Section 34 of the LA 2010.

[58] The terms of those provisions, and of the legislation in which they appear, reflect significant developments in both the substantive common law of liability for negligence and the essentially procedural statutory provisions for limitation of actions. Those developments occurred over a long period of time in New Zealand, most particularly in the period from the publication by the Law Commission of its report *Limitation Defences in Civil Proceedings* (Report 6) in 1988 up to and including the enactment of the LA 2010.[18] As will become apparent, various cases and Law Commission reports from that period provide important background for a proper understanding of those provisions.

Section 17(1)(c) of the LRA 1936

[59] The right to claim contribution between tortfeasors was created by s 17(1)(c) of the LRA 1936, an enactment based directly on the Law Reform (Married Women and Tortfeasors) Act 1935 (UK). On enactment, s 17 of the LRA 1936 provided:

> **17 Proceedings against, and contribution between, joint and several tortfeasors**
>
> (1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—
>
> …

[18] Law Commission *Limitation Defences in Civil Proceedings* (NZLC R6, 1988).

> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

[60] Prior to the enactment of s 17, the position at common law had been that a plaintiff could choose which of a number of persons liable to it in tort it would sue. That person was liable, without any right to seek contribution from others also liable to the plaintiff but not sued, for 100 per cent of the plaintiff's losses.[19] One English case explained the background to the impetus for the Law Reform (Married Women and Tortfeasors) Act:[20]

> Before the passing of the Act it was left to the claimant to choose his victim. The person sued, whether he was a joint or a separate tortfeasor, if he was implicated as being partly responsible for the accident, had to abide by that choice. The person damnified might sue one joint tortfeasor alone and so lay the whole burden of the wrongdoing on him, or, in the case of separate tortfeasors, might sue them one by one and recover from one alone or from such as he chose to execute judgment against, provided that he did not recover more than the greatest sum awarded or, against any defendant, more than was awarded in the action against him. The object of the Act was to cure this evil and to enable those upon whom the burden had been placed to recover a just proportion from those who shared the blame.

[61] More recently, in a 2015 decision, Fogarty J also explained that background:[21]

> [29] The history of contribution can be reliably taken from the Australian text, *Equity Doctrines and Remedies*, by Meagher Gummow and Lehane. The opening sentences of the chapter are as follows:
>
> > The application by the Court of Chancery of the doctrine of contribution is an example of its concurrent jurisdiction with the common law courts. Both equity and law came to share the view that, in the words of Kitto J in *Albion Insurance Co Ltd v GIO (NSW)* (1969) 121 CLR 342 at 350; [1970] ALR 441 at 446, "persons who are under *co-ordinate liabilities* to make good the one loss (eg sureties liable to make good

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19 See *Merryweather v Nixan*, above n 13. In *Hotchin*, above n 10, at [162] William Young J noted there were limited exceptions to this rule, and referred to *Belan v Casey* [2003] NSWSC 159, (2003) 57 NSWLR 670 at [88]–[101] and [135]–[137] where it was said those exceptions were "ones where the tortfeasor had a legal liability, but arising from circumstances where the conduct of the tortfeasor was not so reprehensible that a court would not help him".

20 *George Wimpey & Co Ltd v British Overseas Airways Corporation* [1955] AC 169 (HL) at 181 per Lord Porter.

21 *Body Corporate 330324 "City Gardens Apartments" v Auckland City Council* [2015] NZHC 995 (footnote omitted).

> a failure to pay the one debt) must share the burden pro rata" (emphasis supplied). There were a number of relationships cognisable both at law and in equity which involved co-ordinate liabilities in this sense. … Joint tortfeasors were long in a different position. For the common law turned its face against contribution between joint tortfeasors in *Merryweather v Nixan* (1799) 8 TR 186; 101 ER 1337, and equity followed the law, with the result that the right as it exists today rests upon statutes modelled after the ambiguously phrased Imperial Law Reform (Married Women [and] Tortfeasors) Act 1935.
>
> [30] The New Zealand Law Reform Act 1936 followed the Imperial Law Reform.

[62] Reflecting the equitable origin of the right, s 17(2) provides:

> (2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the Court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

[63] *Todd on Torts* explains the nature of the right:[22]

> This right to recover contribution is a right sui generis: it is a statutory right in the nature of an action for damages. It resembles a plaintiff's claim for money paid by him to the use of the defendant, who has been relieved, pro tanto, of his direct liability to the victim of the tort.

[64] At the time the LRA 1936 was enacted limitation provisions in New Zealand were found in any number of separate pieces of legislation and no specific attention was paid to limitation issues as regards the newly recognised right.

Section 14 of the LA 1950

[65] Limitation issues as regards claims for contribution were first addressed by the LA 1950, in response to the Kings Bench Division decision *Merlihan v A C Pope Ltd*.[23] The case involved a collision on 15 March 1943 between two motor vehicles. An injured passenger from the first vehicle (P) sued the driver of the second (D1).

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22 Stephen Todd (ed) "Multiple Tortfeasors and Contribution" in *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [24.3.01] (footnotes omitted).

23 *Merlihan v A C Pope Ltd* [1946] KB 166 (KB).

That claim was commenced on 17 May 1944. In March 1945, shortly before judgment finding him liable, D1 commenced a third-party claim against the driver of the first vehicle (D2) under the English equivalent of s 17(1)(c).

[66] At the time, the limitation period applying as between P and D1 was 12 months from the date of the accident. D2 claimed the protection of that limitation period. His proposition was that to make the section work as D1 wanted, the words "in time" needed to be added to s 17(1)(c), so that a right of contribution could arise where D2 "if sued *in time*, would have been liable" as joint tortfeasor.[24] In the absence of those words, he contended the limitation defence was available because, if sued by P on or after the time D1 claimed contribution, he would have had no liability to P.

[67] Of significance for our purposes is the approach taken in *Merlihan* as to when the limitation period for a claim for contribution began. The question was whether the cause of action represented by the claim for contribution arose, as D1 argued, when he had been found liable to P or, as claimed by D2, on the date of the accident when D2 had become a tortfeasor. It can be seen that question is closely related to the limitation issue involved here.

[68] Birkett J found in favour of D2. D1's cause of action for contribution from D2 had arisen on the date when D2 had become a tortfeasor, namely the date of the accident. Therefore, D1's third party claim was out of time.[25]

[69] That decision was roundly criticised. In a further King's Bench decision of the following year, *Hordern-Richmond Ltd v Duncan*, Cassels J doubted whether *Merlihan* was correct.[26] In doing so he emphasised:

(a) A third party proceeding (that is, between D1 and D2) is in the nature of a separate action from that action as between P and D1:[27]

> The cause of action which brings a plaintiff and a defendant before the court in such a case as may arise of this accident

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24 At 170.
25 At 170.
26 *Hordern-Richmond Ltd v Duncan* [1947] KB 545 (KB). See also *Morgan v Ashmore, Benson, Pease & Co Ltd* [1953] 1 WLR 418 (KB).
27 At 552.

> is negligence. The cause of action which entitles a defendant to bring a third party before the court is the liability of the third party to make contribution or to pay an indemnity.

(b) A cause of action brought by D1 against D2 does not arise until D1's liability to P has been ascertained.[28]

[70] That reasoning found favour in the English Court of Appeal's decision in *Littlewood v George Wimpey & Co Ltd* (*Wimpey's* case),[29] and was assumed to be correct on appeal to the House of Lords.[30]

[71] In *Wimpey*, P had sued D1 within time but D2 out of time. At trial the Judge found D1 was two-thirds to blame and D2 was one-third to blame, but ordered D1 to compensate P for the full amount because P's claim against D2 was time barred. The question was whether D1 could nevertheless sue D2 for contribution.

[72] As a preliminary point, the Court of Appeal heard argument as to whether time ran from the commission of the tort or from the moment D1's liability to P was ascertained by judgment. By majority, the Court held it was the latter, in a repudiation of *Merlihan*. Denning LJ, who dissented in the result but agreed with Singleton LJ[31] on this point, explained:[32]

> This depends on when the cause of action for contribution arises. If it arises at the date of the accident (as Birkett J. held in *Merlihan v. A. C. Pope Ld., Pagnello Third Party*) then the remedy would be barred; but I do not think that that is correct. It seems to me clear that a tortfeasor cannot recover contribution until his liability is ascertained. If he has not been sued and has paid nothing and admitted nothing, he can have no cause of action for contribution, for the simple reason that he may never be called on to pay at all. The damaged plaintiff may go against the other tortfeasor only. Once the liability of the first tortfeasor has, however, been ascertained by judgment against him or by admission, then he has a cause of action for contribution against the second tortfeasor. He can obtain a declaration of his right to contribution and a prospective order under which, whenever the first tortfeasor has paid any sum more than his share, he can get it back from the second tortfeasor.

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28 At 552.

29 *Littlewood v George Wimpey & Co Ltd* [1953] 2 QB 501 (CA) at 511 per Singleton LJ and 519–520 per Denning LJ (Morris LJ dissenting at 523).

30 *George Wimpey & Co Ltd v British Overseas Airways Corporation*, above n 20, at 177 per Viscount Simonds, 182–183 per Lord Porter, and 193 per Lord Keith.

31 *Littlewood v George Wimpey & Co Ltd*, above n 29, at 511.

32 At 519–520 (footnotes omitted).

> A close analogy is the right of one surety to contribution from a co-surety. His right at law did not accrue until he had paid more than his share, *Davies v. Humphreys*; but his right in equity (which now prevails) arose when his liability was ascertained and the Statute of Limitations then began to run. (*Wolmershausen v. Gullick*; *Robinson v. Harkin*). In cases where a writ is issued against the first tortfeasor and he serves a third-party notice against the second tortfeasor, the notice is convenient machinery, but it does not mean that he has then a cause of action. His cause of action only arises when judgment is given against him ascertaining his liability.

[73] As noted that position was assumed to be correct in the House of Lords.

[74] The New Zealand response to *Merlihan* was to amend s 17(1)(c) of the LRA 1936 by adding the words "in time" and, anticipating the position finally reached by the English courts in *Wimpey*, to include s 14 in the LA 1950.[33] Section 14 provided:

> For the purposes of any claim for a sum of money by way of contribution or indemnity, however the right to contribution or indemnity arises, the cause of action in respect of the claim shall be deemed to have accrued at the first point of time when everything has happened which would have to be proved to enable judgment to be obtained for a sum of money in respect of the claim.

[75] As a result it was clear thereafter the LA 1950's limitation period of six years "from the date on which the cause of action accrued" applied to the statutory right to claim contribution, such a claim being, in terms of s 4(1)(d), a claim to recover sums "recoverable by virtue of any enactment". Moreover, that limitation period commenced on the date stipulated in s 14 — the date liability crystalised — not the date on which P's cause of action against the joint tortfeasor in question accrued. As regards limitation and contribution, there the matter stood for some time.

Case law

[76] Case law developments in New Zealand in the late 1970s regarding liability for latent defects in buildings brought limitation issues to the fore. It is those developments which explain the original enactment of a 10-year long-stop period found in s 91 of the BA 1991.

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[33] For further discussion of the case law around this period, see Glanville Williams "Tort—Contribution between Tortfeasors—Limitation" (1954) 12 CLJ 50; Glanville Williams "Tort—Contribution Between Concurrent Tortfeasors" (1956) 14 CLJ 15; and *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* [1998] HCA 78, (1998) 159 ALR 268 at [66]–[68] per Kirby J (dissenting, but with whom McHugh J agreed).

[77] First, in *Bowen v Paramount Builders (Hamilton) Ltd* this Court recognised a general duty of care owed by those involved in the construction of buildings to persons who subsequently become the owners of those buildings.[34]

[78] Then, in *Mount Albert Borough Council v Johnson*, this Court confronted the issue of when the cause of action for negligence causing a latent defect accrued.[35] The property had been built in 1966. The trial Judge, Mahon J, made unchallenged findings that the existence of the defects, on the basis of which proceedings were commenced in December 1973, had not become apparent to the plaintiff until the end of 1970. She had had no reasonable opportunity of suspecting their existence earlier. Applying English authority the Judge held the action was not barred, taking the then applicable English approach that the cause of action accrued when the damage was, or should have been, discovered.[36]

[79] Whilst this Court did not expressly disagree with the "discoverability" approach taken by Mahon J, it reached the same conclusion in a slightly different way. Based on the facts, the majority, Cooke and Somers JJ, and Richardson J who wrote separately, found the damage had occurred, and hence the owner's cause of action had accrued, in 1970. On that basis, no question of limitation arose. The case was seen, however, as recognising the possibility at least of the commencement of the limitation period depending not on when the damage occurred, but when in fact it was first discovered.

[80] The uncertainty in New Zealand as to the correct approach was compounded by the House of Lords's 1983 decision in *Pirelli General Cable Works Ltd v Oscar Faber & Partners*.[37] *Pirelli* turned its back on the "discoverability" approach,

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34 *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA).

35 *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA). Other cases in which these issues were considered during this period include: *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA); *Gabolinscy v Hamilton City Corporation* [1975] 1 NZLR 150 (HC); *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] QB 858 (CA); *Anns v Merton London Borough Council* [1978] AC 728 (UKHL); *Batty v Metropolitan Property Realisations Ltd* [1978] QB 554 (CA); *Acrecrest Ltd v W S Hattrell & Partners* [1983] QB 260 (CA); *Dennis v Charnwood Borough Council* [1983] QB 409 (CA); *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1 (HL); *Askin v Knox* [1989] 1 NZLR 248 (CA); and *Jones v Stroud District Council* [1986] 1 WLR 1141 (CA).

36 *Mount Albert Borough Council v Johnson*, above n 35, at 237–238.

37 *Pirelli General Cable Works Ltd v Oscar Faber & Partners*, above n 35.

reinstating the traditional approach that limitation periods commenced on the accrual of the cause of action.[38] This Court chose to confront that uncertainty in *Askin v Knox*, a case that itself did not involve limitation questions as it was decided on the basis that negligence had not been established.[39]

[81] The Court, in a judgment delivered by Cooke P, supported the reasonable discoverability approach. The Court agreed with commentators that the approach in *Pirelli* could cause injustice. It noted the passage of the English Latent Damage Act 1986 in response to *Pirelli*, categorising that legislation as having substantially the same effect as *Bowen* and *Johnson*. On that basis it concluded a New Zealand court might not necessarily follow the approach in *Pirelli*. At the same time, it said that if the discoverability approach to accrual was taken, a long-stop period would be necessary to achieve the right balance between justice for plaintiffs and certainty for defendants. But that would be require legislation.[40]

[82] Those observations aside, the specific issue of the accrual of claims for contribution, and hence the commencement of applicable limitation periods, had not been addressed in the cases.

Report 6

[83] In October 1988 the Law Commission published Report 6.[41] Report 6 was the first of a number of reports on questions of limitation, contribution and related issues which led to the eventual passage of the LA 2010.

[84] In Report 6 the Commission paid particular attention to the limitation issues raised by claims involving latent defects, including in what it described as the "building cases". It supported this Court's response in *Askin v Knox* to the "discoverability" approach to accrual of causes of action and commencement of limitation periods in such cases.[42] But it was concerned the law should develop in such a way so as to limit the uncertainties which could be associated with that

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38 At 18.
39 *Askin v Knox*, above n 35.
40 See Cooke P's observations at 253–256.
41 Law Commission *Limitation Defences in Civil Proceedings*, above n 18.
42 At [182].

approach, given both the variability of the way in which the law determined when a cause of action accrued and the significance the law attributed to the time when knowledge of damage was acquired by a claimant.[43]

[85] On that basis, in Report 6 the Law Commission recommended a shorter general limitation period of three years commencing on a new standard commencement date: "the date of the act or omission on which the claim is based". In doing so the Commission noted the difficulties associated with the LA 1950's accrual approach:[44]

> [T]he facts required to be proved may differ depending on the nature of the legal claim made. Thus the claim for breach of contract accrues on the date of breach, irrespective of whether the breach has caused actual loss. On the other hand, a claim in negligence does not accrue until there is damage resulting from a breach of duty. The distinction is of major importance in cases – such as those involving building subsidence – where there can be a significant delay between a breach and resulting damage or injury. Where there is a continuing series of events which infringe the rights of a claimant, there is a separate accrual for each event and a separate limitation period applies in relation to each event. In such cases (copyright infringement is an example) the limitation period acts as a limit on recovery as damages (and interest) will normally only be available back as far as the six years preceding the commencement of litigation.

[86] On the Commission's proposed approach, limitation periods would not commence on the uncertain dates of discovery, nor — for tort claims — of the occurrence of damage. But, responding to the issues that had prompted the courts to recognise the discoverability approach, the proposed standard three-year period could be extended where a claimant proved lack of specified knowledge relating to the claim. A general long-stop period of 15 years would control the uncertainty created by that "knowledge" extension.[45] As will become apparent, that basic structure came to be adopted for most claims — called "money claims" in the LA 2010.

[87] However, the Commission recognised its proposed new standard commencement date would not always be clear:[46]

> In most cases the date of the "act or omission" will be clear. It refers to that conduct of the defendant of which the claimant complains. In relation to a contract, it will usually be the date of breach and thus correspond with the

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43 At [168]–[170].
44 At [43].
45 At [182].
46 At [169] and [171].

> present rule as to the date of accrual. In other cases, the act or omission may be an earlier date than accrual – in negligence, for example, where a delay in the occurrence of damage would relate to our proposed extension provisions rather than the date of accrual. In some categories of cases, such as those where questions of status are involved, there may be no relevant act or omission and no limitation point will arise.
>
> …
>
> As may be seen most clearly in the draft new statute we recommend (set out in Chapter XV), we have provided special provisions dealing with claims based on demands, conversion, contribution, indemnity and certain intellectual property claims.

[88] In the case of claims for contribution, the standard three-year limitation period would apply but with a bespoke specification of the date of the act or omission which formed the basis of such claims.[47] Clause 20(3) of the Law Commission's draft Bill provided:

> When a claim for a sum of money by way of contribution or indemnity is made, the "date of the act or omission" on which the claim is based, for the purposes of this Act, is the date on which the sum of money in respect of which the claim is made is quantified by decision of a court or arbitrator or by agreement.

[89] In effect, therefore, the Law Commission recommended the continuation of the approach found in s 14 of the LA 1950.

Section 91 of the BA 1991

[90] The legislative response to Report 6 would be a long time coming. In the meantime, and following an extensive review, the BA 1991 was enacted, completely overhauling the regulation of the building industry. As introduced into Parliament, however, the Bill made no mention of limitation issues, notwithstanding the considerable attention that had by then been paid by this Court to the question of the accrual of claims for liability for latent defects in buildings.

[91] That matter, however, was considered when the Bill was before the Internal Affairs and Local Government Select Committee. As a result the responsible Minister first recommended a 10-year long-stop limitation period be placed on negligence

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47 At [166] and [180].

claims against territorial authorities and building certifiers for negligence in the issuance of building consents and CCCs. Subsequently, and having received proposals from the Minister of Justice, the responsible Minister recommended that a 15-year negligence long-stop limitation period be introduced applying to all parties who could be defendants in a building liability case.

[92] In making that recommendation the Minister noted there had been widespread concern within the building industry about the uncertain nature of the liability regime as it applied to latent faults in buildings. The introduction of a "defined liability regime" would make it easier for the insurance industry to underwrite professional liability indemnity requirements of building design professionals and builders.

[93] Given the scope of what was proposed, the Minister also recommended that specific provision be made in the Bill for the commencement of that long-stop period: in the case of territorial authorities, 15 years from the date of issue of the building consent, in the case of other parties 15 years from the date of their negligent acts.[48]

[94] As a result, a new cl 73B was included in the Bill as reported back. As relevant here, it provided:

> **73B Limitation defences**
>
> (1) Except to the extent provided in subsection (2) of this section, the provisions of the Limitation Act 1950 apply to civil proceedings against any person where those proceedings arise from—
>
> (a) The construction or alteration of any building; or
>
> (b) The exercise of any function under this Act relating to the construction or alteration of that building.
>
> (2) Civil proceedings may not be brought against any person 15 years or more after the date of the act or omission on which the proceedings are based.
>
> …

[48] The background contained in the preceding three paragraphs is derived from correspondence between the Minister and the Department of Internal Affairs in August and October 1991. That correspondence was received by the Select Committee as submissions. We have obtained it from the Parliamentary Library and have summarised it here as part of the historical legislative record.

[95] The Law Commission supported that development.[49] The use of the "date of the act or omission on which the proceedings are based" as the commencement date for the long-stop limitation period reflected the Law Commission's general approach in Report 6 to the commencement of limitation periods. That said, it is to be remembered that in Report 6 the Law Commission had, as already noted, also made express provision in its draft legislation deeming "the date of the act or omission" on which contribution claims were based as being the same as the accrual approach taken in s 14 of the LA 1950.[50]

[96] The Bill was enacted without further amendment of that provision, except that the long-stop limitation period was reduced after the second reading debate to 10 years.[51] No particular consideration would appear to have been given to the relationship between the stipulation in s 14 of the LA 1950 as to the accrual of claims for contribution under s 17(1)(c) of the LRA 1936 and the date stipulated by s 91 as the commencement of the limitation period for civil proceedings generally, namely the date of the act or omission on which those proceedings are based.

[97] In its March 1992 Preliminary Paper No 19, *Apportionment of Civil Liability*, the Law Commission focused particularly on the rules concerning multiple liability disputes, where the issue of contribution most frequently arises.[52] As relevant here, the Commission agreed with the policy reflected in s 17(1)(c) of the LRA 1936, as confirmed by the LA 1950 amendments. On that basis it included cl 14 in the "Civil Liability and Contribution Act" it proposed, which would have been a specific Act complementing the more general LA 1950.[53] Clause 14 provided as relevant:

> **14 Limitation in contribution proceedings**
>
> (1) A defence under the *Limitation Act 1950*, or similar defence under another enactment, in equity or under an agreement, that is available to a concurrent wrongdoer in respect of a claim for damages against

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49 As noted in *Klinac v Lehmann* HC Whangarei AP15-01, 6 December 2001 at [17], the Law Commission had assisted the Select Committee in drafting cl 73B of the Bill.

50 See above at [88].

51 Building Act 1991, s 91.

52 Law Commission *Apportionment of Civil Liability* (NZLC PP19, 1992). Most of the Commission's report concerned the choice between the *in solidum* basis of liability, where each defendant is liable for the whole of the plaintiff's loss, and the proportionate apportionment of liability between defendants based on contributing fault.

53 The Commission explained this Act would replace a number of other statutory provisions: see [197].

> that concurrent wrongdoer is not a defence in respect of a claim for contribution against the concurrent wrongdoer.
>
> …
>
> (3) This section does not affect the availability to a concurrent wrongdoer of any defence under the *Limitation Act 1950*, or a similar defence under another enactment, in equity or under an agreement in respect of a claim for contribution in its own right.

[98] The Commission's commentary explained:[54]

> Subsection (1) ensures that a limitation defence of any kind (ie, a bar against bringing proceedings because of a time limitation) available to D2 against P does not prevent D1 from claiming contribution against D2. It preserves and extends to all kinds of civil claims the rule now applying to contribution claims between tortfeasors under s 17(1)(c) of the *Law Reform Act 1936*. …
>
> Subsection (3) relates to the limitation period applicable to the contribution claim itself (see s 14 *Limitation Act 1950* and paras 253 and 254 of the paper) and indicates that the section does not affect it.

[99] The Commission subsequently confirmed the approach taken in that proposal for a separate Civil Liability and Contribution Act in a further report, *Apportionment of Civil Liability*.[55]

Hamlin and discoverability

[100] In September 1994, by majority decision, this Court in *Invercargill City Council v Hamlin* adopted the "discoverability" approach which had earlier been discussed.[56] It did so, in general terms, on the basis that approach was now the "established New Zealand approach", and the issue for the Court was whether more recent decisions of the House of Lords, in particular *Murphy v Brentwood District Council*,[57] should be followed so as to change that approach.[58] In answering that question in the negative, the majority noted Parliament had seen fit to introduce

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54 At 95.
55 Law Commission *Apportionment of Civil Liability* (NZLC R47, 1998).
56 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) (McKay J dissenting) at 524 per Cooke P, 529 per Richardson J, 533 per Casey J, and 534 per Gault J.
57 *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL).
58 *Hamlin*, above n 56, at 516 per Cooke P.

a long-stop defence into the BA 1991, but had not otherwise changed relevant New Zealand law.[59] Drawing the issues together, Cooke P concluded:[60]

> For these reasons I would hold that a cause of action for negligence against the local authority arose when the allowance of defective foundations was discovered by the plaintiff, not having been reasonably discoverable by a reasonable house-owner before then …

[101] At the same time, the majority recognised that characterising the damage associated with a latent defect as economic damage assisted that conclusion. It was only when the defect became apparent that the market value of the property would be diminished by its consequences.[61]

[102] Dissenting, McKay J endorsed the *Pirelli* approach. In doing so, and as to the status of the "discoverability" approach in New Zealand, he observed:[62]

> In New Zealand, the test of reasonable discoverability had been adopted at first instance in *Bowen*, but did not require decision in this Court. It was favoured by two members of this Court in the *Mount Albert Borough Council* case, but no decision was required on that question.

[103] He then went on:[63]

> The different view decided in *Pirelli* was considered and discussed, again obiter, by Cooke P in giving the judgment of five Judges of this Court in *Askin v Knox*. Reference was made to the unfairness to a plaintiff if his claim were to be held to be statute-barred before he either knew or ought reasonably to have known that damage had occurred. This is a view which had been expressed by Lord Reid in *Cartledge v E Jopling & Sons Ltd* and by Lord Fraser of Tullybelton in *Pirelli*, but they regarded it as a matter for legislation. Statutes of limitation may in such circumstances appear unfair to plaintiffs, but the question is when did the cause of action arise, not whether the period for bringing proceedings should be calculated from some different date. The statute is clear that time runs from the accrual of the cause of action.

[104] He concluded:[64]

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59 *Hamlin* itself was not affected by that change as the proceedings had been commenced before 1 July 1993 (see *Hamlin*, above n 56, at 518 per Cooke P, and Building Act 1991, s 91(5)). Nor did *Hamlin* involve contribution issues.

60 At 524.

61 At 522.

62 At 543.

63 At 543.

64 At 544.

> … the reasoning in *Pirelli* and in *Cartledge v E Jopling & Sons Ltd* is in my view compelling. The statute provides that time runs from the accrual of the cause of action. That has always meant the time when all the facts necessary to establish the claim are in existence, whether or not they are known or ought to have been discovered. …

[105] As will become apparent McKay J's approach later found favour with some members of the Law Commission and influenced the LA 2010.

[106] Notwithstanding that, on appeal to the Privy Council, this Court's decision was upheld.[65]

Further Law Commission reports and s 393 of the BA 2004

[107] In February 2000, and a legislative response to its 1988 Report 6 still having not been forthcoming, the Law Commission returned to the topic. In Preliminary Paper No 39 *Limitation of Civil Actions* it noted that Report 6 had not been received with enthusiasm.[66] It went on:[67]

> While *Hamlin* effectively settled New Zealand law, some members of the Commission consider that the decision was wrong, and that as a matter of statutory interpretation the dissenting judgment of McKay J is to be preferred.

[108] From this point onward — and for some time — the Commission followed a different path. Rejecting a "discoverability" approach, the Commission preferred the approach that the cause of action accrued not when the defect is discovered but when all the elements of the cause of action are in existence, whether or not the claimant knows that they have a cause of action.[68] Consequently, it also abandoned Report 6's recommendation that the standard commencement date be the "date of the act or omission on which the claim is based". That approach had by then, we note, been adopted on materially identical terms in s 91 of the BA 1991.[69] Rather, and without explaining why, the Commission reverted to the approach taken in the LA 1950: that is the standard commencement date for limitation periods would continue to be that of

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65 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

66 Law Commission *Limitation of Civil Actions* (NZLC PP39, 2000) at [1].

67 At [27].

68 See [104] above.

69 The only word that is different is "proceedings" in place of "claim", but as this Court noted in *Gedye v South*, Report 6 was the likely source of the BA 1991 wording: [2010] NZCA 207, 3 NZLR 271 at [36].

the accrual of the cause of action. Hence the expression of the limitation commencement date for contribution claims could also continue unchanged.

[109] Notwithstanding that, the Commission did adopt Report 6's proposed general approach of having a primary limitation period, with the possibility of an extension for late knowledge, and an overarching long-stop period. It summarised its recommendations as follows:[70]

> We recommend that the Limitation Act 1950 be amended to:
>
> - make it clear that the cause of action accrues when all the elements of the cause of action are in existence, whether or not the claimant knows that they have a cause of action;
>
> - introduce a "reasonable discovery" test, which allows the limitation period to be extended beyond the normal six year period if the claimant can show that he or she (or his or her predecessor in title) could not reasonably have known within the six year period that they had a cause of action. This makes it clear that the reasonable discovery test is an exception to the usual rule and the onus is on the claimant to prove its entitlement;
>
> - introduce a "long-stop" of 10 years from [the] time a cause of action accrues, beyond which a claim may not be brought (except in the case of fraudulent concealment under section 28(a) or (b) of the Limitation Act 1950);
>
> …

[110] Yet again, however, the Commission's invocation of a legislative response fell on barren ground.

[111] The Commission confirmed its views in its Report No 61 *Tidying the Limitation Act* published in July 2000, including as to its preference for the accrual date as the standard commencement date for limitation purposes.[71]

[112] In doing so it noted the continuing significance of s 14 of the LA 1950, but commented:[72]

> Because there are many circumstances in which "the first point of time when everything has happened which would have to be proved to enable judgment

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70 Law Commission *Limitation of Civil Actions*, above n 18, at [85].
71 Law Commission *Tidying the Limitation Act* (NZLC R61, 2000).
72 At [27] (footnote omitted).

> to be obtained for a sum of money in respect of the claim" is the obtaining of a judgment against the claimant to contribution or indemnity, such claims can in practice be brought and if need be litigated a very long time after the occurrence of many of the events on which they turn. We recommend that there be added to section 14 [of the LA 1950] some such words as:
>
> > and such a claim shall not be brought after the expiration of 2 years from the date on which the cause of action accrued.

[113] By the time the BA 2004 was passed, s 91 of the BA 1991 had been amended to clarify its application.[73] It maintained the relevant date for long-stop purposes as being that of the act or omission, but the very open textured wording of the original provision had been clarified by the incorporation of references to "building work", a phrase defined in the BA 1991.[74] Section 393 of the BA 2004 continued that provision unamended. Thus it provided:

> **393 Limitation defences**
>
> (1) The provisions of the Limitation Act 1950 apply to civil proceedings against any person if those proceedings arise from—
>
> (a) building work associated with the design, construction, alteration, demolition, or removal of any building; or
>
> (b) the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building.
>
> (2) However, civil proceedings relating to building work may not be brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.

The 2007 Update Report and s 34 of the LA 2010

[114] The Law Commission returned to these issues in its June 2007 Update Report *Limitation Defences in Civil Cases*.[75] The Commission, in essence, went back to the approach recommended in Report 6. In doing so, it recognised the inter-relationship of the act or omission approach to the commencement of limitation periods generally and the introduction of a discoverability/knowledge extension and the particular approach to contribution claims.

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73 See s 19 of the Building Amendment Act 1993.

74 Building Act 1991, s 2.

75 Law Commission *Limitation Defences in Civil Cases: Update Report for the Law Commission* (NZLC MP16, 2007).

[115] In particular, it recommended the standard commencement date as being the date of the act or omission on which the claim is based:

> 59. [Report 6] recommended a universal start date – the date of the act or omission on which the claim is based. This [is] a sound start date for most claims based on a definite breach of contract or of some other legal or equitable obligation where something happened on a precise date that matters. It is sound in most cases where at present the start date is the date the cause of action accrues.
>
> 60. The start date recommended in [Report 6] may be adopted for all cases which at present are covered by the date the cause of action accrues. Except for the torts of negligence and nuisance, this reform will not alter in substance the time within which a claim in contract or tort is to be brought. For negligence and nuisance time will run from the date of the defendant's act or omission, not from the date damage occurs.
>
> (Footnote omitted.)

[116] But it again explained that commencement date could not apply universally to all claims:

> 61. [Report 6] recommended six modifications to the start date prescribed as "the date of the act or omission on which the claim is based". In effect [Report 6] recognised that its recommended general start date does not fit all cases.
>
> 62. The formula recommended by [Report 6] is not sound for all civil claims. Some claims for relief are not necessarily based on any act or omission, although sometimes they appear to be. Although an act or omission may be involved, the essence of some claims is the seeking of relief from circumstances that have arisen or emerged. The relief is not sought because an act or omission has caused loss, but because an omission, often a continuing omission, calls for relief. … It [is] also unsound for claims which have had specially defined start dates in the Limitation Act 1950.
>
> …
>
> 64. Special start dates will be needed for not only an action to set aside a will for want of capacity, but for claims to personal estate of a deceased person, for interest and rent, contribution and for set-off and counterclaim. Relating a start date to a particular cause of action is less confusing than attempting to mould the definition of "the date of the act or omission on which the claim is based" to cover matters it does not accurately cover at all. It is recommended that special start dates be specified when the expression "the date of the act or omission on which the claim is based" is not appropriate. …
>
> (Footnote omitted.)

[117] Thus the Commission again confirmed its support for a bespoke approach to contribution claims so that limitation periods for those claims commenced on the accrual of the cause of action. It also recommended a general long-stop commencing from the "act/omission" date, with the proviso that:[76]

> An ultimate period must be modified in the case of contribution claims. When a plaintiff's primary claim against a contribution claimant is not started until close to the expiration of the ultimate period, the contribution claimant may be barred by the ultimate period from bringing a contribution claim before the contribution claimant can bring a claim against a contribution defendant. In that case there should be a limited extension to the ultimate period to enable the claim for contribution to be brought. The extension should be as of right rather than discretionary.

[118] It described the operation of that ultimate period and "extension" as "15 years; plus extension when primary claim not fixed within 14 years from act/omission date".[77]

[119] Ultimately, the LA 2010 enacted that bespoke approach for contribution claims, but without the proposed long-stop. We again set out the terms of s 34 for convenience:

> **34 Claim for contribution from another tortfeasor or joint obligor**
>
> (1) This section applies to a claim under section 17 of the Law Reform Act 1936—
>
> (a) by a tortfeasor (**A**) liable in tort to another person (**B**) in respect of damage; and
>
> (b) for contribution from another tortfeasor (**C**) who is, or would if sued in time by B have been, liable in tort to B (whether jointly with A or otherwise) in respect of that damage.
>
> …
>
> (4) It is a defence to A's claim for contribution from C if C proves that the date on which the claim is filed is at least 2 years after the date on which A's liability to B is quantified by an agreement, award, or judgment.

[120] As can be seen a two-year limitation period was adopted, starting from the date the contribution claimant's liability is quantified by an agreement, award or judgment.

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76 At [84].
77 At 68.

[121] That approach was an exception to the general one taken by the LA 2010. The general approach is set out in s 11 of that Act. There, "money claims" have a six-year limitation period commencing from the "date of the act or omission on which the claim is based". There is also a three-year late knowledge period, and a 15-year long-stop commencing from the same act or omission date.

Our assessment of the legislative history

[122] In our view, the legislative history provides very strong support for the conclusion that, as in effect the High Court found, neither the enactment of s 91 of the BA 1991 nor of s 393 of the BA 2004 altered the law enacted in s 14 of the LA 1950: that is, the cause of action for a claim to contribution under the LRA 1936 accrues when the liability to the original plaintiff of the tortfeasor claiming contribution is determined, and not when the liability to that plaintiff of the tortfeasor from whom contribution is claimed accrued. As the Law Commission explicitly recognised in its proposed legislative approach in Report 6, in the case of contribution claims, the phrase "the act or omission on which the proceedings are based" (as used in s 393(2) of the BA 2004) is inapt in some categories of cases, including contribution claims. As outlined above, the Law Commission recognised that such cases called for a bespoke approach, and that specific dates be specified when the expression "the date of the act or omission on which the claim is based" is not appropriate. In relation to contribution claims, this bespoke approach is reflected in s 34 of the LA 2010.

[123] Hence, in relation to the limitation period applying to contribution claims, the bespoke provisions in LA 1950 and LA 2010 apply, rather than s 393(2) of the BA 2004. We reach that conclusion because, in our view, the legislative history shows that:

(a) Properly understood, the cause of action for contribution accrues on the finding of liability, which has been the position since the enactment of s 17(1)(c) of the LRA 1936 — see the English cases, culminating in *Wimpey* in both the Court of Appeal and the House of Lords.[78]

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78 See above at [70]–[73].

(b) In New Zealand, the enactment of s 14 of the LA 1950 removed any ambiguity as regards that matter.

(c) The Law Commission has, since Report 6 in 1988, constantly affirmed its preference was to maintain that approach. That the Law Commission did so in 1988, shortly before it supported the introduction of a long-stop provision in the BA 1991 based on the limitation period starting date formulation "the date of the act or omission on which the proceedings are based", suggests it did not see that change as altering the start date of limitation periods for contribution claims. Given the long history associated with that approach by then, and the Law Commission's very recent endorsement of it, it is in our view difficult to argue the contrary.

(d) Whilst the legislative response to the Law Commission's continued advocacy of that approach was a long time coming, when Parliament did that approach was endorsed in its entirety, and more. The LA 2010 approached the issues of latency and uncertainty as regards money claims, including in building cases, by:[79]

(i) fixing the start of applicable limitation periods as the date of the act or omission on which the claim is based;

(ii) providing the six-year primary period from that date and a three-year late knowledge period from the knowledge date; and

(iii) subjecting the three-year late knowledge period to a 15-year long-stop.

[124] But a separate and quite different regime was enacted for contribution claims. The relevant commencement date was the accrual date — the date upon which the person claiming contribution had been found liable to the original plaintiff.[80]

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79 Limitation Act 2010, s 11.
80 Section 34(4).

A two-year limitation period, beginning on that date, would apply. Moreover, and despite the Commission's view expressed in its 2007 Update Report, no long-stop period would be involved.

[125] The approach taken in the LA 2010 was one, in our view, intended to avoid the very outcome that Beca argues for here: that is, a limitation defence available to it against the Council's claim for contribution before the cause of action for that claim had arisen.

Previous High Court decisions

[126] Notwithstanding that, we face a line of High Court authority which has reached the opposite conclusion. For Beca, three cases were of particular significance: *Klinac v Lehmann*,[81] *Dustin v Weathertight Homes Resolution Service*[82] and *Minister of Education v James Hardie New Zealand*.[83] We discuss each in turn now.

Klinac

[127] *Klinac* was an appeal to the High Court from a decision of the District Court. It was a procedurally complicated affair.[84] As relevant here, Mr Klinac was suing for unpaid purchase monies. The defaulting purchaser raised defences and counterclaims based on pre-contractual representations and contractual warranties to the effect the building in question complied with all regulatory requirements when it did not. The District Court decision was to the effect that the defence based on contractual warranties was statute-barred, but that the misrepresentation defence was not. There was no appeal against the first part of the decision, but only the second.

[128] The High Court agreed with the District Court that the pre-contractual misrepresentation claim was not statute-barred, on the basis the BA 1991, s 91 long-stop, being a response to the problems associated with the discoverability approach, applied to claims in negligence but not in contract.[85] On that basis, that

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81 *Klinac v Lehmann*, above n 49.
82 *Dustin v Weathertight Homes Resolution Service* HC Auckland CIV-2006-404-276, 25 May 2006.
83 *Minister of Education v James Hardie New Zealand* [2018] NZHC 22.
84 *Klinac v Lehmann*, above n 49.
85 At [61].

limitation period did not apply to a claim for pre-contractual misrepresentation: moreover, and contrary to the finding in *Hamilton City Council v Rogers*,[86] nor did it apply to a claim based on a contractual warranty.[87]

[129] The case is relied on, more generally, as containing an accurate summary of the legislative history of the enactment of s 91 of the BA 1991. The Judge, Glazebrook J, reviewed that history at [13] to [26] of her judgment. We acknowledge, as the legislative history makes clear, that the enactment of the long-stop was a response to the uncertainties associated with the discoverability approach. As noted, there were two essential elements to that long-stop: the specification of the date of the relevant act or omission as the commencement of that period, and the term of ten years chosen.

[130] What in our view is also significant, however, is the importance recognised in the Judge's analysis of the role of the Law Commission in the enactment of s 91, and of the policy background provided by Report 6. As we have already noted, the close involvement of the Law Commission in the enactment of BA 1991, and s 91 specifically, supports the conclusion reached by Clark J in the judgment under appeal.

[131] The two High Court decisions which Beca argues are of direct relevance are those in *Dustin*[88] and *James Hardie*.[89] Both, albeit as obiter in *Dustin*, considered the issue of whether s 91(2) of the BA 1991 did apply to claims for contribution.

Dustin

[132] *Dustin* was an application for judicial review of a decision of the Weathertight Homes Resolution Service. As relevant, an adjudicator had followed the decision in *Cromwell Plumbing Drainage & Services Ltd v De Geest Brothers Construction Ltd* in which John Hansen J found that, whilst a homeowner's case against an architectural designer was subject to the long-stop, the same was not the case for the Council's claim for contribution against that same person.[90]

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86 *Hamilton City Council v Rogers* HC Hamilton, A92/97, 23 April 1998.
87 *Klinac v Lehmann*, above n 49, at [57] and [61].
88 *Dustin v Weathertight Homes Resolution Service*, above n 82.
89 *Minister of Education v James Hardie New Zealand*, above n 83.
90 *Cromwell Plumbing Drainage & Services Ltd v De Geest Brothers Construction Ltd* (1995) 9

[133] Courtney J resolved the application for judicial review in *Dustin* on the basis that, given John Hansen J's decision, which the adjudicator was bound to follow, no error of law was involved.[91] As a result, the Judge did not need to consider the argument she had heard that *Cromwell* was wrongly decided. Because of the possibility the issue, however, would be raised on appeal or in some other case, she understandably considered it appropriate to address the issue.[92] The argument she faced was that of Beca here:[93]

> … in any civil proceedings relating to building work s 91(2) imposes a long stop period of ten years or more after the date of the act or omission on which the proceedings are based. The claim for contribution by the Council against Mr Dustin is a civil proceeding that falls within the definition of "*building work*" under the Building Act 1991 and has been brought more than ten years after the alleged act or omission. Therefore it is time barred.

[134] The Judge accepted that interpretation meant that the cause of action underlying a claim for contribution could easily "accrue outside the long stop period".[94] But in *Cromwell* the Judge had gone too far in saying that would have rendered the right to claim contribution found in s 17(1)(c) meaningless. Nor was it an available objection to the application of s 91(2) of the BA 1991 to claims for contribution that the section did not specifically state it was intended to apply to such claims. The section was, as Beca emphasised in argument before us, in the Judge's assessment "as plainly worded as it is possible to be".[95]

[135] That conclusion was supported, the Judge reasoned further, by this Court's observations in *Johnson v Watson*.[96] Moreover, John Hansen J's implicit conclusion that the statutory cause of action for contribution was not a "civil proceeding" for the purposes of s 91 of the BA 1991 had been in error. Whether the cause of action arose at common law, by statute or by virtue of contract, its nature as a civil proceeding did not alter. It was perfectly clear that a claim for contribution under s 17(1)(c) of

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PRNZ 218 (HC) at 221.

91 *Dustin v Weathertight Homes Resolution Service*, above n 82, at [14] and [44(a)].

92 At [15].

93 At [16].

94 At [23].

95 At [24].

96 At [25], referring to *Johnson v Watson* [2003] 1 NZLR 626 (CA) at 629.

the LRA 1936 was a civil proceeding. And the claim was properly to be regarded as one relating to building work.[97]

[136] The Judge reasoned:

> [31] While the immediate subject matter of the [Auckland City Council's] claim for contribution is its own liability, rather than the building work itself, its liability does, in turn, relate to the building work as that is defined. It is well recognised that the phrase "… *in connection with* …" has a very wide meaning and requires merely a relationship between one thing and another … In my view it easily accommodates a claim for contribution that is based on the claimant's own liability for building work. I therefore consider that the [Auckland City Council's] claim must be viewed as a civil claim relating to building work for the purposes of s 91(2) [of the] Building Act 1991.

[137] The Judge also placed considerable emphasis on her understanding of the policy considerations that underpinned s 91(2). She wrote:

> [22] It is clear from this passage that [John Hansen J] was influenced in his decision by the perception that if s 91(2) [of the] Building Act 1991 applied it would truncate the statutory period allowed for claiming contribution so as to render s 17(1)(c) [of the] LRA meaningless in all cases relating to buildings. It is, of course, true that the effect of s 91(2) [of the] Building Act 1991 is to truncate the period within which claims relating to building work can be brought. But this is not a valid reason for not applying the section to claims for contribution. The objective of a long stop period is to create finality by preventing claims being brought outside it. The inevitable result is that some, otherwise valid, claims will be precluded. However, that result is inherent in the concept and operation of the long stop period. Its purpose is to ensure fairness to all parties, given the effect of time on the freshness of memories and availability of witnesses. Further, it gives certainty for intended defendants so that they can plan such things as document destruction and liability insurance. These issues are just as relevant in the context of a claim for contribution as in a primary claim.

[138] We agree with the Judge's conclusion that a claim for contribution in these circumstances is a civil proceeding relating to building work. We are, however, unable to endorse her substantive conclusion noting, in particular, she did not have the opportunity to review the legislative history in depth. Most importantly, the Law Commission's recognition — prior to its support of the s 91 long-stop — of the inaptness, in the case of contribution claims, of use of the phrase "the date of the act

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[97] At [28]–[30].

or omission on which the claim is based" was not brought to her attention. On that point she felt able to conclude, referring to the Commission's Report No 61:[98]

> There is no indication that the effect of the long stop period was specifically considered and in the absence of any such indication there is no reason to think that the Law Commission was concerned about its effect on claims for contribution.

[139] We do not think that conclusion can be supported by the full legislative history, which we have now had the opportunity to consider in detail, as did the High Court below.

[140] Rather the position is that the Law Commission, at the time of Report 6 in 1988 and thereafter, paid ongoing attention to limitation issues as regards claims for contribution. Throughout that period, and as reflected in the LA 2010, it supported and preserved the interpretation of s 17(1)(c) of the LRA 1936 as regards limitation issues (as upheld by the English Court of Appeal and the House of Lords in *Wimpey*), and which had been made clear in New Zealand by s 14 of the LA 1950.

[141] Nor do we think the decision of this Court in *Johnson v Watson* was, as the Judge thought, "helpful and apt".[99]

[142] As relevant, the issue there was whether s 28 of the LA 1950 operated so as to extend the 10-year long-stop limitation period in the BA 1991 in circumstances of fraud or concealment on the part of the defendant. Answering that question in the negative, this Court reasoned that s 28 operated to postpone the accrual of the cause of action when relevant fraud had occurred.[100] But, under s 91(2), the long-stop limitation period began on the date of the relevant act or omission. As the Court put it:[101]

> An act or omission occurs on a particular day. No question of extension of time can logically arise where the starting point is measured from the day of the occurrence of an act or omission.

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98 At [35], referring to Law Commission *Tidying the Limitation Act*, above n 71.
99 At [25].
100 *Johnson v Watson*, above n 96, at [8].
101 At [8].

[143] There can be no questioning those conclusions. But they do not call into question the more specific proposition regarding the commencement of limitation periods for claims for contribution with which *Johnson v Watson* was not concerned.

James Hardie

[144] In *James Hardie* Fitzgerald J adopted Courtney J's reasoning from *Dustin.*[102] In doing so, the Judge referred to decisions of Randerson J in *Carter Holt Harvey Ltd v Genesis Power Ltd (No 8)*;[103] Associate Judge Faire in *Davidson v Banks*;[104] Lang J in *Body Corporate 169791 v Auckland City Council*;[105] and Andrews J in *Perpetual Trust Ltd v Mainzeal Property and Construction Ltd*.[106] She cited the following reasoning of Lang J:[107]

> [40] The principal concern that I have about the reasoning in *Cromwell* is that it concentrates almost exclusively on the right of a defendant to seek a contribution from a concurrent tortfeasor, and the impact that application of s 91(2) would have on that right. It does not place any weight at all upon the plain and unambiguous wording used in s 91(2).
>
> [41] I consider that Parliament has worded s 91(2) and s 393(2) carefully. In using the phrase "civil proceedings", it has endeavoured to capture every form of civil proceeding regardless of its source or makeup. Similarly, in using the words "relating to building work" Parliament has attempted to capture every civil proceeding that arises out of building work as that term is defined in s 2 of the Act. If Parliament had intended s 91(2) or s 393(2) to apply only to claims between a plaintiff and a defendant, it would have used wording that would have made that fact clear.
>
> [42] That conclusion is supported by powerful policy considerations. The enactment of s 91(2) and s 393(2) signalled that Parliament intended that civil proceedings relating to building work were to be subject to a 10 year long stop period. That policy decision was taken in the interests of achieving a higher goal, and its implementation has necessarily been at the expense of some claims that would otherwise have been valid. I see no justification for distinguishing in this context between a primary claim by a plaintiff against a defendant and a claim for contribution by a defendant against a concurrent tortfeasor.

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102 *Minister of Education v James Hardie New Zealand*, above n 83, at [63].
103 *Carter Holt Harvey Ltd v Genesis Power Ltd (No 8)* HC Auckland CIV-2001-404-1974, 29 August 2008.
104 *Davidson v Banks* HC Auckland CIV-2006-404-6150, 23 March 2009.
105 *Body Corporate 169791 v Auckland City Council* HC Auckland CIV-2004-404-5225, 17 August 2010.
106 *Perpetual Trust Ltd v Mainzeal Property and Construction Ltd* [2012] NZHC 3404.
107 *Minister of Education v James Hardie New Zealand*, above n 83, at [61], quoting *Body Corporate 169791 v Auckland City Council*, above n 105.

[145] Acknowledging she had little to add to that reasoning Fitzgerald J concluded:

> [64] In my view, to exclude contribution claims which clearly relate to building work would be contrary to the plain wording of the longstop provisions in both the 1991 and 2004 Acts, as well as the clear Parliamentary intent which lies behind those provisions. As Andrews J noted in *Perpetual Trust*, there is no suggestion in the legislative history that cross-claims as between building professionals and/or territorial authorities, or third party contribution proceedings, were to be excluded from the finality and certainty which was sought through the longstop provision. Had such an important and broad exclusion been intended from the otherwise plain words used, one might have expected Parliament to have said so expressly.

Our conclusion on the limitation issue

[146] We acknowledge that the analysis above has been favoured by a considerable number of respected High Court Judges. In our view, however, that analysis took insufficient account of the long-standing approach to the date of the commencement of limitation periods applying to claims for contribution and the Law Commission's endorsement of that approach at all times and, therefore, of the inapplicability of s 393(2) of the BA 2004 to claims for contribution between tortfeasors.

[147] Given the specificity of the long-standing bespoke approach to contribution claims, and again in agreement with the High Court judgment under appeal, we do not consider that either the wording adopted by Parliament in s 91 of the BA 1991 and s 393 of the BA 2004 implied, from the plain words used, or by necessary inference or on any other basis, a change to the longstanding bespoke approach to limitation in the context of contribution claims. Rather, we consider the terms of ss 91(2) and 393(2) were not intended to apply to contribution claims, but instead contribution claims were to be governed by the then applicable LA 1950 or the LA 2010 in the ordinary way.

[148] We agree with the High Court Judge that further support for that approach can be found in the interpretive principle of generalia specialibus non derogant. Strictly speaking, that principle involves the engrafting of an exception on to general words that, in their natural signification, readily extend to the situation at hand.[108] As we have explained, properly understood the terms of s 393(2) do not apply to contribution

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[108] Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 624.

claims and therefore there is no need for an exception to be engrafted. But we do consider the essence of that principle applies here — that is, if Parliament had intended to do away with that bespoke approach to claims for contribution, it would have said so in clear and unambiguous terms. Instead, Parliament confirmed that bespoke approach in the LA 2010.

[149] This interpretation, in our view, also produces an outcome which appropriately balances the competing policy considerations. As explained above, a right to claim contribution between tortfeasors was not available at common law, but was introduced to remedy the injustice that may arise if a plaintiff chooses to sue only one of several wrongdoers, and that tortfeasor is held liable for the entirety of the plaintiff's loss. As Lord Porter explained in *Wimpey's* case, the object of the legislation was to:[109]

> … cure this evil and to enable those upon whom the burden had been placed to recover a just proportion from those who shared the blame.

[150] Of note, however, contribution claimants face a significant disadvantage that other plaintiffs do not: the inability to commence an action without having been sued by (or having settled with) the original plaintiff. Fairness to such claimants requires that they be given a reasonable opportunity to commence proceedings before time runs out.

[151] The policy underpinning limitation provisions, on the other hand, is to promote certainty and finality in litigation.

[152] The legislative regime balances these competing interests by providing for finality between the original plaintiff and the defendant(s) they choose to sue (either via the ordinary limitation period or the long-stop period, if it applies). In addition, defendants who are successfully sued by the original plaintiff are provided with a limited period of two years to bring their contribution claim.

[153] We note finally on this issue that at the hearing counsel for the Council referred us to a number of English authorities which discuss aspects of the significance of the distinction between the basis for a claim in negligence by a plaintiff against one of a

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[109] *George Wimpey & Co Ltd v British Overseas Airways Corporation*, above n 20, at 181.

number of joint tortfeasors and a claim by that one tortfeasor against others for contribution.[110] They also provided a memorandum addressing those cases. We gave Beca an opportunity to consider those cases after the hearing and a helpful memorandum was provided by counsel for Beca also.

[154] In our view, those cases emphasise the procedural nature of applicable limitation periods, as between the plaintiff and a claimee tortfeasor. That is, whilst the plaintiff could not commence that claim, the substance of the claim remained. Accordingly, the defendant tortfeasor's claim for contribution, to the extent it relied on a liability to contribute based on the claimee's status as a joint tortfeasor, was not affected by the existence of that procedural bar. Those cases, therefore, are consistent with the approach we take in this judgment to the interpretation of the phrase "act or omission" in the context of claims for contribution.

The ancillary claims argument

[155] That said, we agree with Beca that the High Court analysis, to the extent it relied on the concept of ancillary claims, was not of any real assistance to the Council.

[156] Rather, the concept of an ancillary claim is best understood as having its origin in s 30 of the LA 1950. To explain, s 30 provided:

> **30 Provisions as to set-off or counterclaim**
>
> For the purposes of this Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.

[157] In other words, a defendant's claim for set-off or counterclaim against the plaintiff could not be defeated by a limitation defence where, by dint of the late date of the bringing of the plaintiff's claim, the limitation period arising as regards the claim for set-off or counterclaim could be argued to have run out before the defendant/counter-claimant had brought that claim.

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[110] *RG Carter Building Ltd v Kier Business Services Ltd* [2018] EWHC 729 (TCC), [2018] 1 WLR 4598; *Financial Services Compensation Scheme Ltd v Larnell (Insurances) Ltd* [2005] EWCA Civ 1408, [2006] QB 808; *South West Strategic Health Authority v Bay Island Voyages* [2015] EWCA Civ 708, [2016] QB 503; and *Bellefield Computer Services Ltd v E Turner & Sons Ltd* [2002] EWCA Civ 1823, [2002] All ER (D) 272 (Dec).

[158] In Report 6 the Law Commission favoured a more liberal approach. It said:[111]

> After proceedings have been commenced, ancillary claims (including counterclaims, third party claims, and additional or alternative causes of action) related to or connected with the act or omission on which the original claim is based should be determined free from any standard limitation defence (but not a "long stop" defence) unless the original claim is or could have been defeated by such a defence.

[159] In other words, the s 30 approach would no longer be limited to set-off or counterclaims only.

[160] That is, as best as we can tell, the origin of the term "ancillary claim" where it now appears in the LA 2010. But the LA 2010 does not go as far as the Law Commission concluded was appropriate in Report 6. Ancillary claims, including claims for set-off and counterclaim, are subject to the same limitation defences as for "original" claims.[112] However, where ancillary claims are barred by an applicable statutory limitation period, s 50 of the Act provides for discretionary relief from the operation of the statute bar where an original claim is not time-barred.

[161] We accept it may be possible to characterise claims for contribution as ancillary because they are "relate[d] to, … or connected with" the act or omission on which another (original) claim is based. However, it is more accurate to characterise them as original claims. First, a contribution claim is not listed in the enumeration of the classes of ancillary claims. Nor does s 34, in using the word "claim", expressly limit the categorisation of a claim for contribution to being ancillary. And, as we have said, a claim for contribution is a separate and distinct cause of action.

[162] Moreover, in circumstances in which the claim for contribution is filed before judgment on the original claim is determined, the contribution claim will never be out of time because time will not have started to run, and thus the discretion in s 50 will not be engaged.

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111 Law Commission *Limitation Defences in Civil Proceedings*, above n 18, at [11].

112 Limitation defences under the Act apply to a "claim", which is defined in s 4 as including ancillary claims. See also s 50(1)(b).

[163] If the claim is filed by D1 against D2 after judgment against D1 on the original claim has been determined, it would seem more apt to describe D1's claim as an original one, despite it being connected to the claim between P and D1. That is because the definition of "ancillary claim" in the LA 2010 appears to envisage D1's claim against D2 being lodged in the same proceeding as that between P and D1. In those circumstances the discretion under s 50, being available only for ancillary claims, is not engaged either.

[164] Hence our conclusion that the recognition in the LA 2010 of the concept and role of ancillary claims does not assist the Council here.

The claims in tort — the summary judgment issue

[165] The Council based its claims of negligence by Beca not only on the building work which Beca had undertaken before the Council issued its CCCs, but also on building work Beca carried out subsequently, including by:

(a) monitoring and supervising the construction of the Building up to its practical completion in August 2011; and

(b) designing, monitoring and supervising work between November 2013 and March 2014 after the Seddon earthquake damaged the Building, including the issue of various PSs associated with a review of aspects of the Building's seismic performance and subsequent remediation work.

[166] Beca does not deny it carried out that building work. Rather Beca sought summary judgment in its favour as regards the Council's claim on two bases. First, that continuing duties only apply in construction matters until the construction participant goes "off-task" or "off-duty", which Beca says it did when it issued the original PS4 for the Building on 12 March 2008. Secondly, Beca's uncontroverted evidence was that the work it did following the Seddon earthquake was unrelated to the design of the Building's superstructure, so that there could be no continuing duty owed by Beca to the Council in relation to that work.

[167] As regards its claims in negligence, the Judge noted the Council relied on further building work Beca had undertaken as regards not only the construction of the Building, but also the additional work undertaken by Beca after the Seddon earthquake. As to the former, the Council relied on various provisions of the contractual documentation as evidencing Beca's acceptance of an ongoing duty of care applying after, in effect, the issue of the PS4.[113]

[168] The Judge acknowledged certain interpretation difficulties with that argument. At the same time, the Judge accepted the Council's submission that the full extent of Beca's involvement with the Building after the Seddon earthquake would only become clear following discovery.[114] Moreover, and notwithstanding Beca's evidence, the Council relied on documents that indicated Beca's work at that time related to the seismic performance of the substructure and superstructure of the Building.[115] On that basis she concluded, after a relatively brief analysis:

> [87] In the end, Beca has not shown on the balance of probabilities that the Council cannot succeed. I am unable to be confident of material facts. In those circumstances, the summary judgment procedure is inappropriate.

[169] At the hearing of this appeal, the parties acknowledged the principal issue for them was that relating to the application or not of the long-stop limitation. In that circumstance, we can address succinctly the issues raised by the Council's claim of duties as regards its actions in negligence.

[170] The Council's claim against Beca under this head is, essentially, that Beca's duty of care to it did not cease on the issuance of the PS4 for the substructure and superstructure on 12 March 2008. Beca was not "off-task" or "off-duty", to use Beca's words, at that point. Rather, the Council says Beca's duty extended beyond that date, including in its monitoring and supervising of the Building's construction until practical completion in August 2011, and its work between November 2013 and March 2014 following the Seddon earthquake.

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113 Judgment under appeal, above n 2, at [82]–[83].
114 At [84]–[85].
115 At [86].

[171] As regards the continuing duty issue, Mr Ring submitted that Beca had provided "effectively unchallenged" evidence that showed the alleged continuing duties could not exist. In that context the Judge should have been satisfied on the evidence that Beca had discharged its summary judgment onus in respect of the Council's continuing duties claim.

[172] It is possible to divide the continuing duties allegations into three periods:

(a) First, up to 12 March 2008, which covers Beca's designing of the substructure and superstructure, issuing of the PS1 and subsequently its issuing of the PS4 when it finished monitoring construction of those elements.

(b) Secondly, between 12 March 2008 and August 2011, during which time Beca carried out the designing and monitoring of the installation of the fit-out leading up to the practical completion of the Building.

(c) Thirdly, between November 2013 and March 2014, during which time Beca provided regulatory upgrade services for in-ceiling seismic restraints following the Seddon earthquake.

[173] To the extent that the Council's claims are based on acts or omissions as between Beca and the Council, they will be statute-barred if those acts or omissions occurred more than 10 years before the issue of the proceeding (in negligence) on 9 March 2020. To the extent they are not, they will not be statute-barred, subject to ordinary Limitation Act provisions.[116]

[174] The Council accepts that if its claims were based only in respect of the first period, they would be barred by the long-stop. As its claims are not so based, questions of limitation depend on the precise factual circumstances of this case. We agree.

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[116] Building Act 2004, s 393(1). As noted, under s 59 of the LA 2010 causes of action based on acts or omissions occurring before 1 January 2011 are to be dealt with in accordance with the LA 1950.

[175] Moreover, there are issues of law which require determination, including the novel one as to whether there is such an ongoing duty of care as claimed in respect of the second period. Beca placed considerable emphasis on the submission that the Judge should have accepted "uncontradicted" evidence from a Mr Mathew Lander that the services Beca provided after 12 March 2008 were unrelated to the alleged superstructure defects because there was no contrary evidence from the Council. However, it seems to us that accepting that evidence now would be premature. Discovery is yet to be completed and the Council's claims could yet be amended.

[176] Like the High Court Judge, we simply do not have a sufficient understanding of the factual circumstances relating to those claims to reach the conclusion necessary to grant Beca summary judgment, whether or not those acts or omissions involved a breach of a continuing duty or of a duty which arose in the circumstances giving rise to the act or omission alleged to represent the breach of duty.

Result

[177] The appeal is dismissed.

[178] Reflecting the views on costs of both parties at hearing, we order that the appellant must pay the respondent costs for a complex appeal on a band B basis and usual disbursements.

Solicitors:
Chapman Tripp, Wellington for Appellant
Darroch Forrest Lawyers, Wellington for Respondent