Victorian Court of Appeal resolves conflict over limitation period for building claims

Section 134 of the Victorian Building Act says:

- *"Despite any thing to the contrary in the Limitation of Actions Act 1958 or in any other Act or law, a building action cannot be brought more than 10 years after the date of issue of the occupancy permit in respect of the building work …"*

For a number of years now, this apparently straightforward provision has been the subject of conflicting interpretations in Victorian courts.

Many building claims are put in both contract and negligence. The *Limitation of Actions Act* provides for a 6 year limitation period for both. For a claim under the building contract, the 6 year period starts from when the defective work was performed. For a claim in tort or negligence, where the owner alleges the builder breached a duty of care owed to the owner, the 6 year period runs from when defects become manifest, even though they may have lain dormant (latent defects) for many years.

In the 2011 case of *Brirek Industries v McKenzie Group [2011] VCC 294*, the Victorian County Court held that despite the wording of section 134, the 10 year period in the Building Act does not replace the normal 6 year limitation period in the *Limitation of Actions Act* – instead, it acts as a "longstop", or an extra or an absolute cap on the limitation period. It held that section 134 does not extend any periods, and in certain circumstances – especially latent defects – it may shorten the time within which a party might sue.

This directly contradicted the approach in the Victorian Civil & Administrative Tribunal. In *Thurston v Campbell [2007] VCAT 340 and Hardiman v Gory [2008] VCAT 267 VCAT* held that the 10 year period in section 134 replaces the 6 year period for all building claims. Under the "replacement" theory, owners have 10 years from occupancy permit to sue in all building cases.

Brirek appealed to the Victorian Court of Appeal, which handed down judgment in the appeal on 6 August 2014 *(Brirek Industries v McKenzie Group [2014] VSCA 155).*

The Court of Appeal unanimously backed the replacement theory. It held that the intent of Parliament in enacting section 134 was to replace the Limitations Act in relation to building actions. The judges said (paragraph 115):

- *"The words '[d]espite any thing to the contrary in the Limitation of Actions Act 1958 or in any other Act or law' have work to do in s 134. The Limitation of Actions Act and other Acts provide for different periods of limitation. The period provided for in s 134 operates despite those different periods."*

And at paragraph 96 the Court explained the problem, and the rationale for the replacement theory, very succinctly:

- *"Time limits in contract could be very hard on owners; time limits in tort could be very hard on building professionals. In enacting s 134, Parliament had struck a balance: it had extended the time for bringing claims in contract; but it had placed a bar on all claims in tort, notwithstanding that they may not have become manifest until after the expiry of 10 years."*

Whatever else might have been said for the longstop interpretation, it made it more difficult to determine when the limitation period for particular defects expired. The beauty of the replacement theory is that it is much simpler to apply: find the date of the occupancy permit; add 10 years; that's your period. And no need to disentangle contract and tort claims.

My prediction: McKenzie won't appeal to the High Court over this. One has the feeling that the Court of Appeal has got it exactly right.

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