The 10 year long-stop period under the Building Act 2004 – what does it mean for you?

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Many of the New Zealandôs "leaky homes" were constructed in the late 1990s and through to the early 2000s. As a result, houses built during this period are fast approaching, or are already passed, the end of the ten year "long-stop" period for bringing a claim. It is expected that there will be significant judicial attention on the effect of the "long-stop" period over the next few years with particular consideration as to when the time period actually commences and ends.

Section 393 of the Building Act 2004 provides for the 10 year long-stop limitation period and specifically provides that civil proceedings in respect of building work are time-barred if they are brought more than ten years from the date of the "*act or omission on which the proceedings are based*ò. Both the Courts and the Weathertight Homes Tribunal have had opportunity to consider the application of this section in a number of recent cases.

The obvious answer is that the time starts running when the house is built. However, the answer is not so simple where there are various subcontractors involved, whose works may have been completed well before the final contract is completed; where the contract has a maintenance period; or where the Council issues a Code of Compliance Certificate sometime after actual completion of the building works.

This article considers the application of the long-stop period to full build contracts, sub-trades and independent contractors, and Building Consent Authorities.

Application of long stop period to full build contracts

In *Johnson v Watson*[1] the Court of Appeal suggested that it was arguable that a builder could remain liable until the end of the contract and that it did not matter that the defective works were undertaken at an earlier stage in that contract. The suggested argument by the Court of Appeal was that where original building work is faulty the builder is under a continuing duty to remedy it right through until the date of completion, and there is a continuing ñomissionòuntil that date.

The Limitation Act 2010 introduces a ñlate knowledgeò test meaning that even if the six year limitation period has passed a claim may still be made if the claimant can show late knowledge. The claimant has three years from the date that they knew or ought to have known all the relevant facts to make a claim against the defendant and loss/damage has occurred (if loss/damage is required for the defendant to be liable). It is a defence to the claim if the claim is made more than three years after the late knowledge date or outside the 15 year long-stop period. However, the Limitation Act 2010 only applies to acts or omissions after 1 January 2011. Accordingly, the Limitation Act 1950 will continue to apply for some time.

The Limitation Act 1950 provides for a six year limitation period for breach of contract from the date of the breach (i.e. the act or omission relevant for the purposes of the long-stop period under the Building Act). Actions commenced after 1 January 2011 that are based on acts or omissions committed under the Limitation Act 1950 are now subject to the long-stop period in the Limitation Act 1950. The long-stop period prevents an action being commenced

[1] [2003] 1 NZLR 626. In *O'Callaghan & Ors v Drummond & Ors (*High Court Christchurch, CIV-2007-409-001441, 21 October 2008, French J) Justice French considered that an argument that a developerôs duty was a continuing duty was ñcertainly tenableò

after 31 December 2015 or 15 years after the date of the act or omission on which the action is based whichever is the last to end. However, the long-stop period in the Building Act limits the period for bringing claims to ten years for civil proceedings for building work. Therefore, for claims to which the Building Act applies the long-step period is ten years. As claims for breach of contract that arose before 1 January 2011 only have six years to be brought, the ten year long-stop period in the Building Act 2004 will only be relevant to claims of negligence.

The relevance of this is that where there is no ability to claim for breach of contract it will be important to establish a concurrent claim in negligence, thereby relying on the principle of reasonable discoverability that does not apply to contract cases[2].

It is generally accepted that there is a concurrent duty of care in respect of the construction of residential dwellings. However, commercial construction cases need to be considered on the basis of their particular facts, having regard to the relationship between the parties and wider policy considerations[3].

On the presumption therefore, that the 10 year long-stop period for a concurrent claim in negligence does not commence until the completion of the contracted works by the builder, the question arises as to when the contracted works are completed. The suggestion by the Court of Appeal is that there is an available argument that the ñomissionò arises from the failure to remedy through to the date of completion. This suggests that the source of the duty of care and accordingly, the ñomissionò relied on, is the builderôs contractual obligations and when those obligations cease. This, in turn, raises an argument as to whether the completion of the works is the date of practical completion, actual completion, or conclusion of the maintenance period. Where a contract entitles a builder to return and search for defects during the maintenance period then arguably the obligation to remedy does not end until the end of the maintenance period. However, in a standard residential contract with no retentions the builderôs obligations are arguably concluded when the works are completed and the builder has no further cause to return to the job.

Support for this view is arguably found in the decision of *Auckland Christian Mandarin Church Trust Board v Canam Construction (1955) Limited & Ors*[4]. Without expressing a definitive view, in this case the Court found that the builder had completed its contractual obligations by the date of practical completion and that the obligations of the builder from that date were limited to rectifying notified defects. However, the Court did note that the latest date to which the contractual obligations could possibly run was the date on which further information was provided to the Council to enable a Code Compliance Certificate to be issued.

In *Te Whau Vineyard Ltd v Auckland City Council & Ors*[5] there was a defects liability period of three months and the builder returned to remedy defects for over 18 months after the date of practical completion. Whilst this case involved a strike out application on the basis of a contractual limitation period, the arguments presented by both parties were interesting.

Counsel for the builder referred to the authors of *Hudson's Building and Engineering Contracts* (11th Edition) and the suggestion that the defects liability period simply imposes an additional obligation to the primary obligation to build in accordance with the plans and to a proper standard. Accordingly, the primary obligations are complete as at the date of practical completion.

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[2] *Murray v Morel & Co Ltd* [2007] 3 NZLR 721

[3] *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA).

[4] High Court Auckland, CIV-2008-404-8526, 25 June 2010, Priestley J.

[5] High Court Auckland, CIV-2004-404-00539, 8 August 2008, Abbott AJ.

Counsel for the principal argued that the contractual obligations continued and the cause of action did not accrue until the last date on which the relevant duty existed and could have been fulfilled. In this case it was argued that the earliest that this occurred was when the builder completed work on the building.

Unfortunately the Court provided no direction on this issue in this particular case as it was considered that the factual circumstances needed to be determined at trial. However, it appeared relevant as to whether there was a link between the defects subsequently complained of and the period within which they arose, i.e. whether the defects arose prior to practical completion or during the defects liability period. If the defects were constructed prior to practical completion and not notified or raised during the defects liability period then arguably the date of the act or omission is the date of practical completion, not the end of the defects liability period.

Each case is likely to be considered on its own factual circumstances and it will be interesting to see how the Courts approach these issues if or when any substantive case arises.

Application of long-stop period to sub-trades/independent contractors

The limitation period will commence against a sub-trade when that contractor completes its specific part of the works. For example, if a roof is completed in March 1999 and the full building contract is not completed until November 1999 then the time expires for bringing a claim against the roofer in March 2009, even though there may still be an ability to bring a claim against other subcontractors and/or the main contractor for a further period. In a recent decision in the High Court Associate Judge Bell considered the operation of section 393 in respect of independent contractors:

"The relevant acts or omissions of a contractor that might give rise to liability are those which are performed by the contractor in the course of carrying out certain tasks on site. When the contractor completes the relevant tasks, whether he carries out the work adequately or not, whether he has effectively "completed" the particular task and from that time onwards he is then "off duty" or "off task". It is when a contractor goes "off duty" or "off task" that it is the latest point from which time would begin to run against that particular contractor.

There can be useful signposts when a contractor may go "off task". For example, if the contractor stops work on the site, leaves the site and does not return, that would be a sign that he was "off task". Another sign might be when someone in supervision (such as an engineer) provides a producer statement to show that the work has been carried out and completed. That also would be a signal that by then time has started to run as regards the person actually carrying out the work in the producer statement."

The reasoning behind this is that any negligence on behalf of that sub-trade arises through that contractor's acts or omissions and such acts or omissions can generally only occur at such stage that the contractor is actually involved in the building works. The situation may not be so clear if the sub-trade's works are partially completed and then not finally completed until the end of the building project. This may occur where, for example, a roofer is required to return to complete flashings on a roof sometime after the roof itself has been substantially installed.

An issue arises in these circumstances as to whether the defect that exists occurred (by act or omission) in the earlier stages of the work, or the latter stages. If the defect occurred in the latter stages and is still within the ten year period, then any claim against the contractor

will still be in time. However, if the defect arose in the earlier stages then it must be considered whether the failure to rectify that defect prior to final completion of the works is the "omission" for the purpose of the "long-stop" period.

Whilst there is an available argument that there is a continuing duty based on the obiter comments of the Court of Appeal in *Johnson v Watson* (discussed above), the factual circumstances of a particular sub-trade or independent contractor may differ from a full contract builder, particularly where there are distinct stages for the work or no connection between the earlier stages and the latter stages.

In *Aldridge v Boe*[6] the labour only builder sought a determination from the High Court (following a decision of the Weathertight Homes Tribunal) that the claim against him was time-barred. The builder had completed his work on the main part of the dwelling outside the limitation period, but returned to erect a pergola afterwards and within the limitation period.

Whilst remitting the matter back to the Tribunal for reconsideration of the factual background, the Court did accept that if the work on the pergola was a discrete task unrelated to any defects that had at that stage manifested themselves, then *Johnson v Watson* will indeed be distinguishable on its facts.

Returning to site after completion of the works

In a recent case in the Weathertight Homes Tribunal[7], it was argued that a roofer who returned to the project (after completion) to attend to issues completely unrelated to the allegedly defective works, ought to have noticed that the original works were defective and that a failure to do so was the ñomissionò for the purposes of the limitation period. The original roofing work was outside the 10 year long-stop period. The argument was unsuccessful with the Tribunal acknowledging that whilst a contractor had a duty of care when returning for the purpose of effecting prevention work, that duty did not extend to re-examining all matters for which their particular trade relates, and which were unrelated to the specific tasks for which the roofer returned to the property.

Application of long-stop period to Building Consent Authorities

Section 393(3) of the Building Act 2004 expressly states that the relevant date of the ñact or omissionò for a claim arising in relation to the issuing of a Code Compliance Certificate (ñCCCò) will be the date that the CCC was issued.

Notwithstanding the apparent clear wording of section 393(3) we have encountered arguments from various Councils (Building Consent Authorities under the Building Act 2004) that the Councilôs role in issuing the CCC is administrative only and the acts or omissions for the purpose of section 393 are the dates of the prior negligent inspection(s). It is not uncommon for the relevant negligent inspections to be outside the limitation period and the date of issue of the CCC within time.

There is no authority on this issue. However, the Councilôs arguments do appear to conflict with the wording of section 393(3) and with the comments of Heath J. in *Sunset Terraces.* In that case he considered that the Code Compliance Certification was the ñ*end result of*

[6] High Court Auckland, CIV-2010-404-7805, 10 January 2012, Potter J.

[7] Procedural Order No. 6, *SL & KM Aldridge Family Trust v William & Ors* (TRI: 2009-100-000067)

information gathered by the Council through its inspections, as well as additional information provided through producer statements and other sources.[8] The Court found the Council liable for failing to take reasonable care in issuing the CCCs.

Right of contribution

It has not always been the case that contractors and Councils could breathe a sigh of relief once outside the ten year long-stop period. Previously, the law was that where a party was within the ten year limitation period, that party could join other parties on the basis that they were entitled to a contribution from other parties as joint tortfeasors. Such a situation occurred where various parties were liable for the same damage although caused by different acts of negligence.

It has not been uncommon for Councils to issue a CCC long after the building works were completed. The liability of the Council is then within the ten year limitation period and the Council previously would join other parties whose work was undertaken well outside the ten years. The joinder of other parties was on the basis of a previous High Court decision that held that the right to seek contribution did not commence until the first party had been held liable.

Recent authorities on this issue suggest however, that this is no longer good law and that if a party is outside the ten year long-stop period, then that is the end of the matter[9].

Claims that are not affected by the 10 year limitation period

There remain potential claims that survive longer than the 10 year long stop. Such claims arise not out of the building work itself, but rather actions in respect of the sale of the building or other such circumstances.

The vendor warranty in the standard Auckland District Law Society sale and purchase agreement (7th edition) has, unfairly in our view, caught many vendors. The vendor warranties place rather onerous obligations on the vendor and the law is quite clear that such warranties survive the ten year long-stop period that applied to building works[10]. If a vendor provides a warranty in a sale and purchase agreement then that warranty can be relied on for six years after the date of purchase, regardless of the age of the house or the date of construction. The 8th edition of the ADLS agreement has provided some amendments to those warranties (which only apply where the vendor has permitted building work to be carried out on the property) but still provides for a substantial amount of risk for the vendor.

Claims can also exist against a real estate agent and vendors for misleading or deceptive conduct under the Fair Trading Act and contractual misrepresentation under the Contractual Remedies Act. Such claims exist because the conduct complained of relates to statements that may be made during the sale process and therefore not to the building work itself.

Given that the limitation period will be causing problems with a number of houses, it is expected that some more novel arguments will be raised in the very near future.

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[8] *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479.

[9] *Body Corporate 169791 & Anor v Auckland City Council & Ors* (High Court Auckland, CIV-2004-404-5225, 17 August 2010, Lang J).

[10] *Gedye v South & Ors* [2010] NZSC 97.