W+K CASE ALERT

Court of Appeal decides on construction contribution claims

Beca Carter Hollings & Ferner Ltd v Wellington City Council

MAR23

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At a glance

- The Court of Appeal in *Beca Carter Hollings & Ferner Ltd v Wellington City Council*[1] has ruled that contribution claims are not subject to the 10-year longstop in the Building Act.
- This outcome upholds a recent High Court decision that departed from a settled line of authority and prolonged the litigation exposure of construction professionals and their insurers.
- The Court of Appeal's ruling in *Beca* removes some practical problems for defendants. However, it also eliminates the certainty for third parties provided by the 10-year longstop.

The issue

Section 393(2) of the Building Act 2004 prevents a person from bringing "civil proceedings relating to building work" against another person, where the proceedings are based on acts or omissions that occurred more than 10 years ago (known as the 10-year longstop).

Since 2006, the High Court has ruled on numerous occasions that the 10-year longstop applies to contribution claims brought by defendants against third parties under s 17 of the Law Reform Act 1936. *Beca* was the first appellate authority to consider whether the 10-year longstop applies to contribution claims and whether those authorities were correctly decided.

Background

CentrePort Ltd operates the port in Wellington. In October 2006, CentrePort Ltd engaged the Bank of New Zealand (BNZ) to construct a building on Waterloo Quay. It also engaged Beca to provide engineering and design services for the building. Beca issued design and construction monitoring producer statements for the building on 19 February 2007 and 12 March 2008. Wellington City Council (the Council) issued building consents and code compliance certificates for the building.

BNZ leased the building from CentrePort after its completion. In 2016, the Kaikoura earthquake caused irreparable structural damage to the building, which was ultimately demolished.

[1] [2022] NZCA 624 (*Beca v WCC*).

In August 2019, BNZ issued proceedings against the Council for its losses due to the earthquake damage. In September 2019, the Council joined Beca to the proceeding seeking contribution. Beca applied to dismiss the contribution claim on the basis that its material acts or omissions occurred before September 2009, more than 10 years before the contribution claim was brought.

High Court[2]

The High Court declined to strike out the Council's contribution claim. Departing from a long line of High Court authority, it held that contribution claims could be issued against a third party 10 years after the alleged wrongdoing occurred, provided they were commenced within the two-year period (contribution period) imposed by s 34(4) of the Limitation Act 2010, which provides:

> "*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.*"

The High Court essentially concluded that s 17(1)(c) of the Law Reform Act 1936 and the contribution period in the Limitation Act created a code to bring contribution claims, which could not be affected by the 10-year longstop in the Building Act.[3]

Court of Appeal

The Court of Appeal upheld the High Court's decision, concluding that the 10-year longstop did not apply to, and did not bar, the Council's contribution claim against Beca. In reaching its view, the Court of Appeal placed great weight on the legislative history, which it said supported its view. It also relied on the fact that contribution claims arise, and the limitation period for such claims begin, when the liability of the claimant seeking contribution is determined. The Court of Appeal acknowledged its decision departed from established authorities, but emphasised such authorities had not thoroughly considered the full legislative history and bespoke approach taken by Parliament to contribution claims, which was evident from the two-year contribution period.

The Court of Appeal also drew support from the interpretive principle *generalia specialibus non derogant* (i.e. general provisions do not detract from specific provisions). It asserted that if Parliament had intended to do away with the bespoke approach to claims for contribution, it would have said so in clear and unambiguous terms. Instead, Parliament did not, confirming the bespoke approach in s 34(4) of the Limitation Act.

The mixed news for insurers and building professionals

The consensus view that had prevailed in the High Court since 2006 carried some practical problems for building professionals who were defending leaky building litigation. Homeowners would often discover water damage to their property long after building work had been completed and would file proceedings just before the 10-year longstop kicked in. These "11th hour" claims left defendant building professionals with very little time – sometimes no time – to assess whether others were culpable and to bring contribution claims.

The Court of Appeal's ruling in *Beca v WCC* removes those practical problems for defendants. However, it also eliminates the finality and certainty provided to third parties by the 10-year longstop. As a result, construction professionals, not joined as defendants, are now potentially exposed to contribution claims arising from projects more than 10 years old. That uncertainty could result, among other things, in construction PI policies becoming more difficult or expensive to obtain.

That said, it is likely that Beca has applied for leave to appeal to the Supreme Court and that the Supreme Court will grant leave given the significant public importance of the issue and its wide application. It remains to be seen what the Supreme Court will decide. Ultimately though, it is arguable that Parliament may be best placed to determine the issue through legislation based on policy.

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

[3] Separately, the Court also held that contribution claims did not amount to 'civil proceedings' for the purpose of s 393(2) of the Building Act, though the Court of Appeal did not agree with this aspect of its judgment.

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