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Construction Alert

7 August 2014

CASE SUMMARY: *Brirek Industries Pty Limited (ACN 005 807 090) v McKenzie Group Consulting (VIC) Pty Limited (ACN 093 211 977)* [2014] VSCA 165

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In breaking news, in a decision handed down yesterday[1], the Victorian Court of Appeal has determined that, pursuant to section 134 of the **Building Act 1993 (Vic)** (**BA**), the applicable limitation period for commencing a "*building action*", whether in contract or in tort, is 10 years from the date that the relevant occupancy permit (or certificate of final inspection) is issued.

There had previously been uncertainty as to whether section 134 of the BA operates so as to:

+ create a 10 year limitation period (**10 year approach**) which appeared at odds with section 5 of the **Limitation of Actions Act 1958 (Vic)** (**LoAA**); or

+ prevent a claim, normally in relation to latent defects, being made 10 years from the issuing of an occupancy permit or a certificate of final inspection (**long stop approach**).

This uncertainty had been exacerbated by the fact that the Victorian Civil and Administrative Tribunal (**VCAT**) had generally adopted the 10 year approach, whereas the County Court had applied the long stop approach.

In reaching its decision, the Court of Appeal provided a concise summary of the operation of the LoAA in relation to claims in contract and in tort, noting that:

+ under the the LoAA, causes of action are barred at a given time after they accrue;

+ claims arising from a breach of contract accrue at the time of the breach (with proof of damage not being an element of a claim for breach of contract); and

+ claims arising from the breach of a duty of care accrue when damage caused by the breach is sustained, or can be reasonably discovered or ascertained (as negligence is only actionable on proof of damage).

In considering the wording of section 134, the Court of Appeal placed significant emphasis on the words "*despite any thing to the contrary in the Limitation of Actions Act 1958 or in any other act or law*" stating that these words had "*work to do*" with the result being that the period provided for in section 134 operated "*despite*" the different periods provided for in the LoAA.

The Court of Appeal further noted that section 134 does not contain:

+ any express limitation that confines its application to cases in contract or in tort;

+ any reference to some distinction between limitation periods for actions in negligence as opposed to those in contract;

+ any reference to patent or latent defects;

+ any suggestion that its operation is limited to physical loss and damage.

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[1] In ***Brirek Industries Pty Limited (ACN 005 807 090) v McKenzie Group Consulting (VIC) Pty Limited (ACN 093 211 977)*** [2014] VSCA 165

The Court of Appeal concluded that:

+ the words of section 134 should not be read down so that they are confined in their operation to claims in tort in such a way that it is only those claims that have the benefit of, and are subject to, the 10 year limitation period stipulated;

+ the construction given to section 134 by the trial judge (being the long stop approach) imposed unwarranted limitations on the scope and applicability of the section;

+ actions founded in contract, independent of any tort claim, fall within the scope of section 134 and may be brought within 10 years from the date of issuing of the occupancy permit (or certificate of final inspection).

The decision also provides a useful analysis of a number of other matters including:

+ whether, from a limitation of action perspective, amendments to a claim can "*relate back*" to the date of the issuing of a writ in circumstances where new causes of action between existing parties are introduced to an existing claim by way of amendment; and

+ the extent of the duty of care owed by a building surveyor to an owner to avoid "*pure economic loss*" that was alleged to have been suffered by reason of the surveyor's conduct.

More to come.

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