Article Information

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Construction industry beware: Court overturns long stop interpretation of s134 of the Building Act 1993

A recent decision of the Victorian Court of Appeal in Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd [2014] VSCA 165 has clarified that the limitation period for building actions is 10 years from the issue of the occupancy permit or certificate of final inspection regardless of whether the action is brough in contract or tort. Partner, Megan Calder and Associate, Pei Yau, discuss the implications of this decision.

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Background

The case turned on the interpretation of s134 of the Building Act 1993 which states as follows:

"Despite anything to the contrary in the Limitations 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 (whether or not the occupancy permit is subsequently cancelled or varied) or if an occupancy permit is not issued, the date of issue under Part 4 of the certificate of final inspection of the building work."

The Victorian Civil and Administrative Tribunal (VCAT) has long held the view that s134 created a separate 10 year limitation period in respect of building actions and replaced the limitation regime contained in the *Limitation of Actions Act* 1958 (the replacement view). A number of VCAT decisions including the decisions in *Trieu v Kok Khim Lim Pty Ltd* [2004] VCAT 2538, *Thurston v Campbell* [2007] VCAT 340 and *Hardiman v Gory* [2008] VCAT 267 confirms that the replacement view is the approach adopted by VCAT.

This position became somewhat uncertain when the decision of Justice Shelton in *Brirek Industries Pty Limited v McKenzie Group Consulting (Vic) Pty Limited* [2011] VCC 294 was handed down on 1 March 2011 in which the replacement view was rejected in favour of the "long stop view".

Amidst the controversy brought about by the decision of Justice Shelton in Brirek, VCAT continued to prefer the replacement view in the later decisions of *Jacobi & Ors v Motalli & Anor* [2012] VCAT 659, *Martinov v Extension builders Australia Pty Ltd* [2013] VCAT 409 and *White v Noble trading as WR and EM Noble* [2014] VCAT 413.

The facts

On 12 November 2001, Brirek Industries Pty Ltd (Brirek) entered into a contract of sale for the purchase of a land in Southbank. The contract was conditional upon the provision of an approved plan of subdivision and a town planning permit. In addition, the vendor also agreed to provide a building permit.

Brirek subsequently contracted with Bailey Heights to construct a unit to lock up stage. McKenzie Group Consulting (Vic) Pty Ltd (McKenzie) was appointed the building surveyor in respect of the building works on the property.

Building works ceased in March 2003 as a result of a dispute between Brirek and Bailey Heights. The building permit was amended in April 2004 noting Brirek as the new builder but works did not recommence until February 2007.

On 5 December 2008, Brirek commenced proceedings in the Victorian County Court against McKenzie in respect of a range of alleged breaches of a contract made in late 2002 and in tort.
Brirek contended amongst other things that McKenzie had breached its duty both in contract and in tort to deal properly with the building permit applications including by reason of:

- issuing building permits when the builder was not a registered commercial builder
- issuing later building permits as purported amendments without the power to do so under the Building Act
- failing to warn Brirek of the expiry of the planning permit
- issuing building permits and extensions thereto when there was no planning permit in place
- failing to ensure that the plans comply with all laws and regulations
- issuing a building permit without the consent of the builder named in the permit.

Late in the trial, on 2 September 2010, Brirek sought leave to amend its claim to include breaches in respect of a contract entered into in April 2004.

Proper interpretation of s134
An issue then arose as to whether Brirek was time barred from introducing the new cause of action, given that almost all of the alleged breaches took place before September 2004 (being six years prior to leave being granted to pursue the claims).

Justice Shelton accepted McKenzie's argument that the new cause of time was time barred by operation of s5 of the *Limitations of Actions Act* 1958 (LAA). Justice Shelton considered that s134 did not replace the 6 year limit prescribed by s5 of the LAA nor extend any period of limitation which has already expired under the LAA. Instead, that section imposed an absolute cap on the time within which building action may be brought in negligence in circumstances where the 6 year limit has not expired under the LAA.

The Court of Appeal overturned this decision, finding that the trial judge had placed an *'artificial restraint'* on the meaning of s134 of when in fact that section does not contain any express restrictions on applicability or scope whether in respect of claims in contract or in tort, patent or latent faults, physical loss and damage or pure economic loss.

The words *'[d]espite anything to the contrary in the Limitation of Actions Act 1958'* in s134 simply mean that the 10 year limit operates despite any different periods prescribed under the LAA, consistent with the replacement view adopted by VCAT. Section 33 of the LAA further reinforces this interpretation of s134 in providing that the period of limitation prescribed in the LAA shall not apply to any action for which a period of limitation is prescribed in any other enactment – in this case, s134 of the *Building Act*.

This judgment confirms that the position in Victoria now departs from the position in NSW, where the "long stop" approach has been expressly adopted by s109ZK(2) of the *Environmental Planning and Assessment Act* 1979 (NSW).

Other matters – s17 of the *Building Act* and duty of care

In asserting the 2002 contract, Brirek relied on s17 of the *Building Act* which provides that building permit applications may be made to a building surveyor *"by or on behalf of the owner of the building or the owner of the land"* as proposition that it had entered into a statutory contract with McKenzie in 2002, notwithstanding that in 2002, it was Bailey Heights that contracted with McKenzie.

The Court of Appeal rejected Brirek's contention that s17 of the Building Act could *"dispense with the requirements for the establishment of a legally enforceable agreement"* and hence create a statutory contract (or cause of action) between the land owner and the building surveyor in circumstances where the building surveyor is engaged by, for example, the builder of the project.

The Court of Appeal also rejected the contention that a building surveyor could owe a duty of care in negligence to prevent an owner from suffering pure economic loss. In doing so, the Court was careful to draw a distinction between loss and damage arising out of *"frustration or violation of the purposes of the Building Act so far as it regulates the conduct of building surveyors"* such as loss suffered by reason of defective construction of the premises (for which a duty of care may exist) and loss arising by reason of late completion (for which a duty of care does not exist).

What does the appeal decision in *Brirek* mean moving forward?

Following this decision, and in light of VCAT's longstanding approach to this issue, it appears that a 10 year limitation period for building actions is now the settled position in Victoria (subject to any further appeal).

The much welcomed clarity arising from the decision in *Brirek* may perhaps see a fall in the number of ill-prepared claims commenced after the decision of the trial judge largely to preserve rights to do so in the event the "long stop" view prevails on appeal.

Consideration should be given by parties to the terms of insurance policies and specifically, whether contractual arrangements should provide for professional indemnity insurances to be maintained for the full 10 years anticipated by s134.

Should you have any questions about this case, please contact a member of our **Construction & Infrastructure** team.