Russell McVeagh

Breaking Ground

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Case Law Update - NZ

Beca Carter Hollings & Ferner Limited v Wellington City Council [2022] NZCA 624

A recent decision of the Court of Appeal has addressed the relevant limitation period for contribution claims.

Background

CentrePort Limited operated the port at Wellington. In October 2006, it contracted with the BNZ to construct a building on land it owned on Waterloo Quay. CentrePort then contracted with Beca Carter Hollings & Ferner Ltd (**Beca**) for engineering and design consultancy services, and with Fletcher Construction Company Ltd for design and construction services. When the building was completed, it was leased by BNZ pursuant to the terms of the contract.

During the Kaikoura earthquake of November 2016, the building suffered irreparable damage. BNZ was never able to return to the building, which was determined uneconomical to repair and demolished.

Court proceedings

In August 2019, BNZ filed proceedings against Wellington City Council. It said the Council was liable to it in negligence because of the circumstances in which the Council had issued building consents and code compliance certificates.

The Council denied liability and pleaded a number of limitation defences. It also filed third party proceedings against Beca for contribution, in the event it was found liable to BNZ.

Beca denied any liability. It also considered that it was protected by the 10 year "long stop" period included in the Building Act 2004. On the basis that provision applied, the Council was out of time to bring a contribution claim against Beca.

Beca then applied for strike out and summary judgment. The High Court dismissed those applications. Amongst other things, it held that the Building Act's long stop provision did not apply to contribution claims. Beca appealed to the Court of Appeal.

The limitation issue

The main issue for the Court on appeal was whether the High Court was correct to find that the Building Act's 10 year long stop did not apply.

The Building Act's long stop provision states:[1]

> *… no relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.*

Beca said that the Council's claim for contribution was a civil proceeding relating to building work based on Beca's allegedly negligent acts in 2007 and 2008. It said this meant that (1) the long stop provision applied; and (2) when the proceeding was commenced by the Council in 2019, its claim against Beca was out of time.

The Council argued the opposite. It said the Building Act long stop did not apply to claims for contribution. Instead, it considered that limitation for contribution claims was governed by s 34(4) of the Limitation Act 2010, which provides:

> *It is a defence to [a tortfeasor (**A**)'s] claim for contribution from [another tortfeasor (**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 [another person (**B**)] is quantified by an agreement, award, or judgment.*

The Council said that, because its own potential liability to BNZ had not yet been quantified by agreement, award or judgment, the two year limitation period had not yet begun, and the contribution claim could not be time barred.

Decision

The Court of Appeal held:

- The long stop provision of the Building Act was not intended to apply to contribution claims.
- The cause of action for a contribution claim accrues on the finding of liability; that is, the date upon which the person claiming contribution has been found liable to the original plaintiff.
- From this date, a two year limitation period will apply.
- The Council's claim for contribution from Beca was accordingly not time barred.

The court's reasons included:

- The relevant legislative history provided very strong support for the Council's reasoning. That is, the introduction of the long stop period in the Building Act did not alter the law regarding contribution claims as it had been set out in the earlier Limitation Acts.
- The phrasing of the Building Act, which refers to "the date of the act or omission on which the claim is based" is ill suited to contribution claims, which do not accrue at the time of the original wrongdoing.
- Section 34 of the Limitation Act 2010 was intended to provide a "bespoke approach" in relation to contribution claims, which the Building Act did not override.
- While there had been some prior High Court authority which supported Beca's position, the Court considered that line of cases to be incorrect.

Observations

Claims for contribution can be an effective tool for reducing liability where another party may also be at fault.

There is benefit in initiating claims for contribution early:

- Initiating contribution claims while the original claim remains on foot will give all parties a clearer sense of the potential complexity of the dispute. This may help to move matters towards settlement. It may also mean there is a greater pool of financial resources from which to draw in reaching a settlement.
- It can mean one trial instead of two, saving time and money.
- Where a claim for contribution is filed before judgment on the original claim is determined, the contribution claim – at least on the law as it now stands – will never be out of time.

However, as established by this case, claims for contribution need not be rushed.

It is, of course, possible that the decision will be appealed to the Supreme Court.

Footnotes

1. Building Act 2004, s 393(2).

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Case Law Update – England and Wales

LJR Interiors Limited v Cooper Construction Limited [2023] EWHC 3339 (TCC)

A recent judgment of the High Court of England and Wales provides a rare example of court intervention in an adjudication decision, and serves to highlight one of the differences between that jurisdiction's adjudication regime and our own.

Background

LJR Interiors Limited (**LJR**) entered into a contract with Cooper Construction Limited (**Cooper**) for the dry lining, plastering, and screed works at a development in Oxfordshire (**Contract**).

The Contract contained no provision for the referral of disputes to adjudication, meaning the default adjudication provisions of The Scheme for Construction Contracts (England and Wales) Regulations 1998 (**Scheme**) – the equivalent of New Zealand's provision for adjudication under the Construction Contracts Act 2002 (**CCA**) – applied.

The works were completed in October 2014. LJR had issued three payment claims to Cooper, including a final claim (**Application No. 3**) on 31 October 2014. Cooper disputed elements of Application No. 3 and did not respond to it.

On 31 July 2022, almost eight years after LJR had finished the works under the Contract, LJR submitted another payment claim (**Application No. 4**) to Cooper. Cooper did not pay (or dispute) Application No. 4, taking the view that the claim was essentially a duplication of Application No. 3.

Referral to adjudication

LJR gave notice to Cooper on 9 September 2022 that it intended to refer the disputed payment to adjudication. LJR took the position that a dispute had arisen "on or around August 2022" when Cooper failed to pay the sum said to be due under Application No. 4 by the final date for payment. It said this was a breach of contract.

In response, amongst other arguments, Cooper said that LJR's claim had been issued outside of the statutory limitation period of six years. It said the limitation period had started running when Cooper failed to pay Application No. 3 by 28 November 2014 (being that application's final date for payment), and that LJR's ability to bring a claim had therefore become time-barred from late 2020.

Adjudicator's decision

The adjudicator decided that Application No. 4 was a valid application for payment, and held that, by failing to make payment of the sum claimed under that application by 28 August 2022, Cooper was in breach of contract. Cooper was liable to pay the sum claimed.

The adjudicator noted that neither the Contract nor the Scheme contained any provisions limiting when a claim for payment may be made, and was not persuaded that the delay in submission of Application No. 4 had rendered it invalid. The adjudicator decided the limitation point on the basis that LJR's cause of action had accrued on 28 August 2022, meaning its claim was not time barred.

The adjudicator emphasised that Cooper had not responded to Application No. 4 with a "pay less" notice (the equivalent of a Payment Schedule under the CCA) disputing the sum.

Court decision

As is the usual procedure in England and Wales, LJR applied to court for enforcement of the adjudication decision by way of summary judgment against Cooper. Cooper resisted enforcement of the decision and separately sought a declaration that it was void and unenforceable on the basis that the sum awarded was barred by the statutory limitation period.

The court found that:

- The adjudicator was wrong in making a decision that essentially allowed the limitation period to "refresh" by permitting the referring party to make another application for payment of sums which had already been demanded. The works were properly completed on 19 October 2014, and a payment claim submitted almost eight years after this was void.
- The adjudicator's decision had paid no regard to the terms of the Contract as to when the right to payment of the balance sought by Application No. 4 accrued, and had assumed that the absence of a "pay less" notice meant that it was unnecessary to consider whether the application *itself* had been too late.
- LJR's right to payment of all sums identified in Application No. 4, which matched those made in Application No. 3, was one which accrued on 28 November 2014. The unpaid balance of those sums did not somehow become "due again" for limitation purposes simply by virtue of being demanded many years later.
- The claim under Application No. 4 was statute barred, and the decision requiring payment of the sum sought by it unenforceable.

Observations

While the adjudication of construction disputes in England and Wales follows a similar structure to that of New Zealand, the outcome of this case provides an interesting example of where the systems diverge.

In England and Wales, the court may decline to enforce an adjudicator's decision where the adjudicator has acted outside their jurisdiction (for example, the dispute does not relate to a construction contract), or where there has been a breach of natural justice. Neither of those grounds were relevant in this case. Instead, Cooper relied on a separate, very specific, ability to resist an adjudication enforcement application brought via summary judgment by claiming declaratory relief, which is available in relation to issues which "it would be unconscionable for the court to ignore".[2]

In New Zealand, a defendant's ability to oppose the entry of an adjudication award as a judgment is limited,[3] and the Court of Appeal has indicated it would be very difficult to persuade the court that it should intervene in an adjudicator's determination by way of judicial review.[4] Nor is there a separate pathway based on "unconscionability", as in England and Wales. A New Zealand party confronted with an adjudication decision incorrectly granting relief on a time barred claim would therefore be unable to challenge that decision in the way Cooper did. Instead, it would need to litigate the dispute afresh in a new forum (for example, by commencing arbitration or court proceedings). In the interim, the incorrect decision would still be enforced, meaning any sums the adjudicator had determined were owed would need to be paid. This is a consequence of New Zealand's stricter (but simpler) regime.

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Footnotes

2. A type of challenge recognised in *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC) at [17].
3. See Construction Contracts Act 2002, s 74(2).
4. *Rees v Firth* [2011] NZCA 668, [2012] 1 NZLR 408 at [27].

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