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Accidentally, incidentally or indirectly sidestepping the 10-year limitation period for building actions

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Introduction

Victoria and New South Wales both have a 10-year limitation period for building actions. However, the 10-year limitation period has differing scopes of operation in each state.

In Victoria, under s 134 of the Building Act 1993 (Building Act Vic), the limitation period runs for a period of 10 years from the date of issue of an occupancy permit or certificate of final inspection, and is intended to cover all causes of action that are "building actions".[1] It is intended to replace the 6-year limitation period for tort and contract which runs from when the cause of action accrues. In contract, the cause of action accrues when the contract is breached; in tort, particularly pure economic loss, the cause of action accrues when the damage becomes manifest. The 10-year "replace-ment" limitation period in the Building Act Vic addresses the mischief where, because of the different operation of the 6-year limitation periods in contract and tort, a builder or building professional might face indetermi-nate liability for negligence and an owner might dis-cover the damage after the cause of action in contract expires.[2]

In New South Wales, the 10-year limitation period in s 6.20 of the Environmental Planning and Assessment Act 1979 (EPAA NSW) is not a "replacement" of the 6-year limitation period in contract and tort. Instead, it is a "long stop" for actions in negligence, said to address the mischief of indeterminate liability for builders and building professionals in negligence.[3]

Despite their differing operations, a shared purpose between the Victorian and New South Wales provisions is the prevention of actions being taken against builders and building professionals once a 10-year period has expired after works have concluded, so as to avoid indeterminate liability.

Generally speaking, the purpose of a temporal limit on claims is to protect a defendant. In particular, in *Brisbane South Regional Health Authority v Taylor*,[4] McHugh J set out four rationales for limitation periods, as follows:[5]

- As time goes by, relevant evidence is likely to be lost.
- It is oppressive, even "cruel", to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed.
- People should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them.
- Insurers, public institutions and businesses, particularly limited liability companies, have a significant interest in knowing that they have no liabilities beyond a definite period.

A building action

A key term in the Building Act Vic conditioning the application of the limitation period is that the action is a "building action", defined as an action (including a counterclaim) for damages for loss or damage *arising out of or concerning* defective building work.[6]

The EPAA NSW conditions the application of the 10-year limitation period on there being "civil action for loss or damage *arising out of or in connection with* defective building work".

The connecting words italicised above (the connecting words) are similar but not identical.

Damage caused accidentally, incidentally or indirectly by defective work

There is now a line of authority, including appellate, in both New South Wales and Victoria, that where loss and damage is caused accidentally, incidentally or indirectly by defective work, then the 10-year limitation period does not apply. The rationale for this is that those persons who have suffered loss and damage caused accidentally, incidentally or indirectly by defective work (such as occupiers of defective premises that did not contract for the works) are not intended to be captured by this legislation, and therefore the connecting words must be read narrowly so as to avoid the application to those persons.

The most recent decision is of Hammerschlag J in *Sydney Capitol Hotels Pty Ltd v Bandelle Pty Ltd*[7] (*Sydney Capitol*) who followed (reluctantly) the New South Wales Court of Appeal in *Dinov v Allianz Australia Insurance Ltd*[8] (*Dinov*) which applied a Victorian Supreme Court decision of Bongiorno J in *Re Leighton's Joinder Applications*[9] (*Re Leighton*). This line of authority is controversial because of its origin in a decision unrelated to limitation periods, it advances a purposive construction over the plain grammatical meaning of the words of the statute, and because Hammerschlag J considered it wrong but applied it anyway. The cases are presented in chronological order so as to give context to the decision of *Sydney Capitol*.

Re Leighton (2003)

This matter was an action for pure economic loss against Leighton Contractors Pty Ltd. Leighton constructed an overpass over a railway. A beam collapsed onto the railway track from the overpass, which blocked trains from using the track for 8 days. Various companies that used the railway tracks alleged Leighton's negligence caused them loss of profit.

Leighton applied to join various other defendants to the claims made against it, pursuant to the (then) apportionment regime located in Div 2 of Pt 9 of the Building Act Vic.[10] Division 2 of Pt 9 also contained (and still contains) the 10-year limitation period, which was not in issue in that matter. The apportionment regime applied to a "building action", being the same term that conditions the application of the 10-year limitation period.

Bongiorno J held that the matter was not a building action for two reasons. First, his Honour held (also controversially[11]) that the overpass was not a building within the meaning of that term. Second, his Honour held that the purpose of the apportionment regime, gleaned from the Second Reading speech, was to protect building practitioners from the consequences of joint and several liability where other building practitioners who might be jointly and severally liable with them were unable to meet their obligations or were not appropriately insured, and nowhere is there a reference to claims where the plaintiffs have no interest in the building work and no interest in the building itself.[12] His Honour held therefore that the apportionment regime can have no application where the victim of a building practitioner's negligence, nuisance, trespass or other tort is an outside party whose loss and damage is caused by defective building work in only an accidental, incidental or indirect sense.[13]

Although his Honour did not determine the application of this principle to the 10-year limitation period, he commented that the 10-year limitation period suggests that building actions might indeed be confined to those concerned with defects in buildings as those defects affect building owners.[14]

Dinov (2017)

This decision concerned an action by an insurer pursuant to an indemnity given by the directors. The indemnity was given by the directors to support a home warranty insurance policy given by the insurer to a corporate builder. After the policy was issued by the insurer, the builder performed the works and the works were defective. The owners corporation of the building made a claim under the policy in respect of the repair cost of the defects. When the claim was made by the owners corporation and settled by the insurer, the builder was deregistered, so the insurer sued the directors for the amount paid to the owners corporation.

The directors claimed that the action by the insurer was a "building action" within the meaning of s 109ZK(1) of the EPAA NSW,[15] and as it was brought outside of the 10-year limitation period, it was statute barred. The definition of "building action" under the EPAA NSW and the Building Act Vic is identical. That Part (Pt 4C) also contained a similar apportionment regime to that originally contained in the Building Act Vic.

McDougall J held that the action brought by the insurer against the directors was based on the directors' failure to pay on demand the amount that the insurer had expended pursuant to the policy, and it may be characterised as an action for damages for breach of the promise to indemnify.[16] His Honour held that the purpose of Pt 4C, including both the apportionment regime and time bar, was to protect those engaged in the performance of building work, and in that context, the term "arising out of or concerning" must not be construed so widely as to cover an action for an indemnity under an insurance policy.[17]

McDougall J agreed with the approach of Bongiorno J in *Re Leighton*, noting that the connecting words "arising out of or concerning" must be construed so as to give effect to the evident purpose of the legislation, that purpose being to impose an absolute time bar for the protection of those who otherwise would have some legal liability in damages for defective building work.[18]

Sydney Capitol (2019)

This decision concerned a fire on the ground floor of a building, which activated a fire sprinkler system on level 5, causing material damage and consequential loss to an occupant on level 5. The fire was said to have been caused by defective work performed by the defendant on a duct system which serviced shops on the ground and passed through level 5. The defendant and plaintiff were never in a contractual relationship.

The plaintiff alleged that the defendant owed it a duty of care to avoid the risk of harm. The defendant defended the proceeding by relying on the 10-year limitation period in the EPAA NSW, which had expired. The plaintiff argued that s 6.20 of the EPAA NSW ought to be construed narrowly so as only to protect a party who does defective building work from a claim by a person with whom that party contracted to do the work, consistently with *Re Leighton* and *Dinov*.

Hammerschlag J held that on the plain and grammatical meaning of the section, the damage suffered by the plaintiff arises out of or is in connection with the defective building work. However, his Honour applied *Re Leighton* and *Dinov* to give the connecting words a restricted meaning, and in the course of doing so, his Honour held that the approach was wrong, but not so clearly wrong that he should not follow it.[19] His Honour also noted the force of an argument that a builder should not be liable for defective building work 10 years after it was done, irrespective of who suffers damage by it.[20]

Discussion

Dinov seems to be a reasonably uncontroversial application of the connecting words in the legislation, since the defective building work is a distant matter to an action for damages for breach of the promise to indemnify. It simply is not proximate to the action. *Re Leighton* and *Dinov* are different. Each is a decision where defective building work is seemingly a direct cause of the loss and damage, but where (in the author's view) the inferred purpose of the drafters of the legislation has deemed the loss and damage to be indirect, incidental or accidental.

On one view, the policy of not capturing within the 10-year limitation period a person who has suffered loss accidentally, incidentally or indirectly by defective work makes sense. That person did not contract with anyone involved in the works and therefore had no control over the works performed. As such, that person could not negotiate warranties and other protections that the drafters of the 10-year limitation period assumed would be the subject of the action within that time period. It is a similar analysis to the "vulnerability" consideration in cases considering whether there is a duty of care to avoid pure economic loss.[21]

Also, where a beam is lying on a rail blocking trains and causing loss, it seems to be a capricious result if a 10-year limitation period for claims relating to that loss (or, previously, the existence of an apportionment regime allowing the defendant to reduce its exposure to the plaintiff) depends on the circumstances causing the beam to lie there.[22]

On the other hand, the way the connecting words in the legislation have been construed makes it difficult to predict how the sections are to operate when the parties to an action were not in a direct contractual relationship. The terms "incidental", "accidental" and "indirect", which have been read into the statute to qualify when the 10-year limitation period might apply, are (with the greatest respect) vague and uncertain and do not readily identify when the limitation period might arise. It seems the main way to identify when a new set of facts fall within these terms is to look for a factual analogy with decided cases. In this regard, arguably this line of authority weighs the rights of those who suffer loss or damage incidentally, accidentally or indirectly over the rights of builders and building practitioners to have the protection of an absolute temporal limit.

A suggested instance of the application of this authority is to tenants of a building who suffer loss or damage resulting from defects in the building from its construction. A lease will ordinarily require a landlord to take responsibility for defects in the building.[23] It seems to be a capricious result of this principle if a landlord is unable to obtain compensation from a builder for claims a tenant makes against the landlord more than 10 years after the issue of the occupancy permit, and yet the tenant could make a claim directly against the builder or against the landlord after that time.

Similarly, if a fire to a building (building 1) causes damage to a neighbouring building (building 2), should the owner of the building 2 have greater rights against the builder of building 1 than the owner of building 1? Or does the fact of the greater vulnerability of the owner of building 2 justify the extension of the limitation period and therefore greater protection?

For lawyers, it is important to advise clients that the 10-year limitation period is not absolute. Insurers, builders and building professionals need to be wary of this sort of claim being made after the expiry of the 10-year limitation period, and to ensure their records are sufficiently detailed and retained so as to respond.

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Footnotes

1. *Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd* [2014] VSCA 165; BC201406219 at [135].

2. *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515; 205 ALR 522; [2004] HCA 16; BC200401482 at [103]; and above n 1, at [96].
3. *Dinov v Allianz Australia Insurance Ltd* (2017) 96 NSWLR 98; 227 LGERA 268; [2017] NSWCA 270; BC201708769 at [76].
4. *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541.
5. Above n 4, at 552–3.
6. Building Act 1993 (Vic), s 129.
7. *Sydney Capitol Hotels Pty Ltd v Bandelle Pty Ltd* [2019] NSWSC 1825; BC201911945.
8. Above n 3.
9. *Re Leighton's Joinder Applications* [2003] VSC 189; BC200303458.
10. Now in a broader form in Pt IVAA of the Wrongs Act 1958 (Vic).
11. See *Aquatec-Maxcon Pty Ltd v Barwon Region Water Authority (No 2)* [2006] VSC 117; BC200601653.
12. Above n 9, at [20].
13. Above n 9, at [21].
14. Above n 9, at [24].
15. Now s 6.20, with different wording.
16. Above n 3, at [70].
17. Above n 3, at [93].
18. Above n 3, at [107].
19. Above n 7, at [23].
20. Above n 7, at [22].
21. *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288* (2014) 254 CLR 185; 313 ALR 408; [2014] HCA 36; BC201408266.
22. Above n 9, at [23].
23. For instance, see Retail Leases Act 2003 (Vic), s 54(2)(e).