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IN THE SUPREME COURT OF NEW ZEALAND SC 11/2023

I TE KŌTI MANA NUI O AOTEAROA [2023] NZSC Trans 16

BETWEEN BECA CARTER HOLLINGS & FERNER LIMITED

Appellant

AND WELLINGTON CITY COUNCIL

Respondent

Hearing:	18 October 2023
Court:	Glazebrook J O'Regan J Ellen France J Williams J Kós J
Counsel:	M G Ring KC, J A McKay and T F Cleary for the Appellant L J Taylor KC, B J Sanders and B A Mathers for the Respondent

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CIVIL APPEAL

MR RING KC:

May it please your Honours. I appear with Mr McKay and Mr Cleary for the appellant Beca.

GLAZEBROOK J:

Tēnā koutou.

MR TAYLOR KC:

May it please the Court, I appear with Mr Sanders and Ms Mathers for the respondent.

GLAZEBROOK J:

Tēnā koutou. Mr Ring?

MR RING KC:

Thank you your Honour.

GLAZEBROOK J:

Can we get some idea of timing. We didn't think this should actually take a whole day because it's a relatively straightforward argument of statutory interpretation, but obviously I don't want to cut down if you think it should take longer, but just to try and get some idea.

MR RING KC:

Well I was hoping that I would be able to finish by about 11.30.

GLAZEBROOK J:

Yes, that's what we would have thought. I mean certainly we might go into the afternoon but that's wonderful thank you Mr Ring.

MR RING KC:

Thank you your Honour. Your Honours, this is a building work case in which the contribution issue has arisen, and which is governed, we say at least, by the Building Act and the Law Reform Act 1936 section 17(1)(c). If I can take you through the roadmap that we filed last night. The screen, as you previously saw on the screen, is section 393 as it was at 2008 when the relevant events

occurred. It changed in, as your Honours know, in 2010, but not in any material sense, at least as far as this case is concerned.

The competing interpretations that are at issue in this case is from Beca's point of view the longstop applies to all civil proceedings relating to building work which includes contribution claims, and the competing interpretation from the Council is it only applies to some civil proceedings relating to building work, because it does not apply to contribution claims. Beca's main reasons for it's position are the orthodox approach to statutory interpretation, the ordinary meaning of the text, and in particular the words "civil proceedings relating to building work" and secondly the date of the act or omission on which the proceedings are based. Second, the other compelling, we say, contextual references to civil proceedings elsewhere in the Building Act but in the same section as section 393 and thirdly, Parliament's relevant purposes in 1991 when the longstop was first enacted, and we make three basic points here.

First, that the purpose was to create certainty and finality to exposure for all construction participants once the longstop had expired, which they understood, that is Parliament understood, was in line with the availability of insurance. Second, that this was driven by the prescribed cover required by building certifiers under the Act, which was against any insurable civil liability that might arise from issuing a code compliance certificate. Third, it was set at 10 years because the information then available was that the 10-year cover period was the maximum readily available and economically available and that wasn't just for building certifiers, but it was for all construction participants and ironically including councils.

We say that these concurrent purposes – I'm sorry, let me start it again. What we say, your Honours, is that the Court of Appeal's conclusion that contribution claims are excluded from the longstop would have defeated these purposes, and we say also that the Court of Appeal's judgment gave no weight to, or insufficient weight to these purposes, and in particular there is a passing one sentence mention of the building certifiers, and of insurance, in paragraphs 91 to 92 of the judgment, which are being shown now, and that was it. that was

the whole mention of what was the – what monopolised Parliament and the preceding Building Act specific, or Building Bill specific legislative steps that led up to section – that let up to the Building Act 1991.

So if I can turn to the introduction. I just want to make a few introductory comments in relation to the various relevant aspects of Beca's argument. The first is in terms of the nature of time limitation, as your Honours are of course aware, it's a fixed deadline after which the claimant, a claimant with an otherwise enforceable claim, whether then known or unknown, is prevented from enforcing it. there's no practical difference, we say, between having insufficient time to bring a known claim, that is finding out about it at five to five on the 364th day of the fifth year of a six-year limitation, and having no knowledge of the entitlement to claim when the limitation has expired. It's perceived by the party that misses out inevitably as unfair, but as your Honours said in the judgment of this Court in *Carter Holt Harvey v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78, it will always be unfair to somebody, and the fact that it is unfair doesn't meant that the interpretation leading to that outcome is wrong.

We would also make the point in this context, your Honours, that the limitation applies even if there is fraud, as the decision of the Court of Appeal in *Johnson v Watson* [2003] 1 NZLR 626 (CA) made clear and third, that interpretation – unfairness is very much a matter of perspective. It primarily, or it deprives the owner of recourse to the benefit of the defendants such as a council, but a defendant can be on both sides of this argument, as it evidenced by the Wellington City Council's position in the *Minister of Education v James Hardie* [2018] NZHC 2 case, the judgment of Justice Fitzgerald.

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In that case it argued for the very things that we're arguing for successfully, and so what we're saying – well, I mentioned this to both of the lower courts and got no enthusiasm whatsoever as a result of it, but in my submission, your Honour, it is a relevant point to be taken into account because it just shows how

unfairness can be in the eye of the beholder at one level, but it also shows us a certain cynical approach by the councils. Primarily the longstop in the 10-year period –

O'REGAN J:

But so what? I mean what are you expecting us to do to say, well, we think that we – we think their interpretation's right but we're going to find against them?

MR RING KC:

No, your Honour, so I am – what I'm saying is that it just shows that the unfairness argument cuts, can cut both ways for the same party.

O'REGAN J:

Clearly it cuts both ways, yes.

MR RING KC:

Yes, yes. That's as far as I want to take it, your Honours. The second point I want to –

KÓS J:

While we've disturbed you, can I ask just a practical question about timing for the bringing of proceedings?

MR RING KC:

Sure.

KÓS J:

If you were to turn up Mr Taylor's submissions and look at page 28, 26 there's a chronology, and he has put the chronology there in terms of the time for proceedings to be brought against Beca. I want to ask when time would've run out in this case if BNZ had sued Beca directly?

MR RING KC:

If BNZ had sued Beca directly it would have run out at 10 years from the code – well from the PS4s.

KÓS J:

Yes.

MR RING KC:

12 March 2008.

KÓS J:

Right. So the same brown band that Mr Taylor has used at the bottom would apply not just to a claim by the Council against Beca but also a claim by BNZ against Beca?

MR RING KC:

Yes, we say that.

KÓS J:

Thank you.

MR RING KC:

Thank you. The second point I wanted to make under nature of time limitation is that it is of course statutory and as a result it's based on policy considerations, it's what Parliament considers is fair to all of the parties, and Parliament is the only one in the position to balance the interests of the parties, the industry sector and the public as a whole, which is what it did, and that is evidenced by the parliamentary debates and we've referred there to *Dustin v Weathertight Homes Resolution Service* HC Auckland CIV-2006-404-276, 25 May 2006 paragraph 22 and the judgment of Justice Lang in *Body Corporate 169791 v Auckland City Council* HC Auckland CIV-2004-404-5225, 17 August 2010 which discussed those two issues, one of a number of cases that refer to those two issues.

The second issue that I wanted to address under the introduction is the nature of an ultimate longstop and I just wanted to make two points in relation to this. First, it coexists with general limitation periods but it provides an alternative and final deadline to bring a claim, and second that it's invariably based on time

running from the date of the impugned conduct which may or may not coincide with the accrual of the cause of action.

In relation to the legal position, as at 1991 and 2004, I just wanted to emphasise the point here that it is the legal position at 1991, and at the latest 2004, which is relevant, and Parliament's purpose as at 2004, which is relevant, it's not Parliament's purpose at 2010 except to the extent that that enables the Court to reliably infer what Parliament intended by the 1991 and/or the 2004 Act.

Finally under this heading, the nature of a contribution claim, I just wanted to make four points in relation to that. First, that it's obviously a statutory cause of action in the nature of damages. Second, that it ameliorates the defendant's common law position already. The defendant is advantaged by it from what the common law position would've been, Under the common law the plaintiff could have chosen any defendant and that defendant would have no recourse to others who are also responsible. Third, liability is based on the contributor's own negligent conduct, and finally it can be brought as a standalone civil proceeding as well as, obviously as a cross-claim or a third party claim in the primary proceeding.

Against that background I'd now like to turn to the text of section 393. First of all, in our submission it creates a parallel regime, parallel specific regime to the general Limitation Act 1950 regime under LA 1950 by section 393(1), the LA 1950 provisions were preserved, and then in 393(2) by beginning with the words "however" Parliament signals an intention to, having left that regime intact, to create a separate parallel regime for civil proceedings relating to building work.

Second, under that parallel regime heading, and in relation to the Court of Appeal's judgment at paragraph 122, with respect we accept that the Court of Appeal was correct in saying that the longstop did not alter section 14 of LA 1950, that's the section obviously relating to contribution claims, but in our respectful submission the Court of Appeal's judgment was wrong to say that this left section 14 as the only limitation period in any statute that applied to civil

proceedings by way of contribution relating to building work, and we say that, again looking at the text at this stage, and focussing now on the words "civil proceedings relating to building work".

ELLEN FRANCE J:

Sorry, do you just mean the width of definition of civil proceedings?

MR RING KC:

Yes.

KÓS J:

Well your point is that there's no limitation provision in section 14?

MR RING KC:

Correct. Correct, and section 14 is the, obviously the general limitation provision for contribution running in parallel, we say, with section 393. So the two points I wanted to make in relation to civil proceedings is that in what it plainly says section 393 states that no civil proceedings are allowed after the longstop deadline, and that's an unqualified statement, and various High Court judgments, conveniently collected in the judgment of *Minister of Education v James Hardie*, that's Justice Fitzgerald's judgment, refers to Justice Courtney's judgment in *Dustin*, Justice Lang's judgment in *BC 169791* and Justice Andrew's judgment in *Perpetual Trust Ltd v Mainzeal Property and Construction Ltd* [2012] NZHC 3404, and the words that they use, which we adopt, are it's as plainly worded as it is possible to be. It covers every form of civil proceeding regardless of its source or makeup, it covers all claims without distinction or form.

The second point that we wanted to make that relates to the first is that civil proceedings includes contribution claims without having to say so, as the Court of Appeal itself acknowledged at paragraph 138. The Council's position is based on Parliament not saying expressly what is necessarily implied, and again Justice Courtney in *Dustin* anticipated and dealt with that argument by

saying there was no need to go further and specify that it applies to claims for contribution as well.

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Dealing then with the other textual issue that was relied on by the Court of Appeal, that's the date of the act or omission on which the proceedings are based, the Court of Appeal said at paragraphs 122 and 138 that this phrase is, and it used the word "inapt", and also the words not appropriate for contribution claims, and it went on to say that this was explicitly recognised by the Law Commission's R6 report in 1988 *Limitation Defences in Civil Proceedings*.

Again I want to make probably four broad points in relation to this. The first is that it is both appropriate and apt to have a start date for a longstop for contribution claims that is based on the date of the impugned conduct, and parallel with a general limitation period that is triggered when the liability is quantified, and in the same context it was, to deal with that from a practical point of view, it was applied. In fact, without any apparent difficulty from 2006 to 2021 by multiple courts, litigants and claimants.

The next point in dealing with report R6 in particular, that report did not say what was attributed to it by the Court of Appeal, and it actually proposed this wording for a suggested longstop as compared with the wording for a general limitation period, and again you just make a couple of subpoints in relation to that R6 report.

The first is in R6 the Law Commission proposed that the phrase date of act or omission on which the proceedings re based, would be the triggering start date for a longstop for contribution claims, and what it said was that the phrase should replace the accrual start date for general limitation period for monetary claims including contribution, but would have a special definition for certain contribution claims. However, it then went on to say that that special definition would not apply to contribution claims to which its proposed section 14 would apply, and that was the section that referred to ancillary claims which mean that

the ordinary meaning of the phrase "applied to ancillary claims" and so that is, we say, obviously contrary to what the Court of Appeal had understood.

The next point is in fact what the Court of Appeal attributed to R6 was actually words used in the June 2007 report, NZLC MP16. However, not in the context that the Court of Appeal relied on, and again two subpoints to be made in relation to this. First, the statement that the phrase was not appropriate was in the context of applying it to the start date for the general limitation period for contribution claims, not to a longstop. Second, that the Law Commission in that same report specifically recommended that the phrase would apply to the start date for the longstop, which they referred as the ultimate period for contribution claims.

That, if we can turn to appendix 2 of that document, but if you just back up to the previous page so that we can see the headings, and yet you can see the last two headings "start date for", well the second to last column, "start date for ultimate period". If we scroll down to the next page to contribution claims, the act or omission date. The last point that I wanted to make under this date of act or omission heading in the text section is Parliament did not, in fact, act on the Law Commission's limitation recommendations anyway until 2010, which is obviously after the date that we're concerned to assess Parliament's intention, and at that stage they did exclude the phrases applying to all contribution claims including for the purpose of the longstop.

Next I wanted to look at the second leg of the orthodox statutory interpretation assessment and that's other contextual references, and I just want to make the overall point here. This was not – didn't even get mentioned in the Court of Appeal judgment, and as far as I can see it didn't get mentioned in the counsel submissions either. But, we see it as a highly significant point, a highly significant pointer, to Parliament's intention in enacting the longstop.

It starts, of course, with the presumption that Parliament intended that the same expression, same unqualified expression, civil proceedings, in the Building Act 1991 and Building Act 2004, and it appears in five different places

in the BA 2004 and at section 390 – well, sorry, before we get to that, in the heading to the subpart 2 and part 5 which deals with the – in which section 393 appears, that heading is "Civil proceedings and defences" and most of these provisions that I'm about to refer to you are in that same section subsection.

So, 390 deals with an immunity for the Chief Executive of MBIE or his employees or agents or against – or claims against members, employees or agents of the territorial or regional authority for acts done or omitted in good faith, and it had an equivalent provision in the BA 1991. Secondly, section 392(1), claims against the building consent authority for acts done in good faith, in reliance on specified documents, equivalent section in the BA 1991. Third, no civil proceedings against – in a building consent authority or member employee or agent for issuing a building consent with knowledge that the building or the land was subject to damage from natural hazard. Again, an equivalent section in the BA 1991. I note that section actually referred to civil liability in that context.

And the transitional provision in the BA 2004, no civil proceedings against "members, building referees or employees" of the BIA for acts done in good faith. We make a point that's referred to in D3, it's inherently unlikely that Parliament intended that if civil proceedings by way of contribution was brought against these specified persons they would have both no statutory immunity in the specified circumstances and they would have no longstop benefit.

If I can turn now to Parliament purpose in 1991 and 2004. The – at least two of the relevant paragraphs or the relevant section in the Court of Appeal's judgment is paragraphs 138 to 140 where the Court of Appeal, in our respectful submission, held that Parliament had a negative purpose in enacting section 393 and that is despite the inclusive, all-embracing nature of the expression "civil proceedings relating to building work", it did not intend that to include contribution claims relating to building work. We say that it gave no weight to, and in fact scarcely any mention, of the interrelated, repeatedly stated objectives in the specific context of the building work longstop, of bringing certainty and finality to exposure to all construction participants in line with the

available insurance. This was initially and primarily driven by the building certifier regime which had prescribed insurance requirements in relation to having insurance cover for any insurable civil liability that might arise and which Parliament had understood that the insurance –

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O'REGAN J:
When the –

MR RING KC:
Sorry.

O'REGAN J:
Sorry. When the 2004 Act was passed was there any discussion of Justice Hansen's decision, which I think was in the mid-1990s?

MR RING KC:
No there wasn't. No.

O'REGAN J:
Because on the face of it that – you would've thought in response to that, if it was considered to be an inappropriate regime, that Parliament would've been a bit more clear about excluding it?

MR RING KC:
Well our response to that, your Honour, is probably twofold but the overarching response to that is that, with respect, it's not a legitimate aid to ascertaining Parliament's relevant purpose that in 2004 it left the longstop essentially intact despite the *Cromwell Plumbing and Drainage Services Limited v De Geest* (1995) 9 PRNZ 218 judgment and we say there are two essential propositions or reasons for that. The first of all – first is the principle that an interpretation must be clearly established by a line of cases going back a considerable period and not just one isolated case.

WILLIAMS J:

Why?

MR RING KC:

Because that is the authorities from the Court of Appeal, I don't think this Court has addressed it but I'll find you the reference, your Honour, to the Court of Appeal judgments that have held that to be the case in New Zealand.

WILLIAMS J:

In which context?

MR RING KC:

In the context of one case being –

WILLIAMS J:

Does not a summer make?

MR RING KC:

Correct. Correct. One –

WILLIAMS J:

Well it does make a precedent –

GLAZEBROOK J:

Well it could do, surely.

ELLEN FRANCE J:

Well it may.

MR RING KC:

Well –

GLAZEBROOK J:

I mean you have a really important case which establishes something which is – I can't see why you say you need 10 cases that apply it.

WILLIAMS J:

Well you say the Court of Appeal said that, not you?

MR RING KC:

Well I'm just –

WILLIAMS J:

You're just the messenger.

MR RING KC:

I'm just relying on people that are much smarter than me, your Honour, and who have – let me get that found for you because I'm certainly aware that there's one High Court judgment called the *Police v Mossop*, a judgment of Justice Chilwell's, that I can remember but let me see if I can find you something even more authoritative or more than one case that says that, a line of cases perhaps that establishes that proposition. But the second point I want to make –

GLAZEBROOK J:

Is it something that's been picked up in the textbook?

MR RING KC:

That's a proposition that's been picked up in the textbook, yes.

GLAZEBROOK J:

Well you can perhaps give us that.

MR RING KC:

Okay.

GLAZEBROOK J:

Or have we got the reference?

O'REGAN J:

It might be in the *Carter* textbook, yes.

GLAZEBROOK J:

Okay.

O'REGAN J:

Anyway that's – your point is one page doesn't justify –

MR RING KC:

Yes, well that's the first point. That's the first point but the second point is on the same reasoning there's a stronger argument that in 2010 Parliament left intact the position established by *Dustin*, *Carter Holt Harvey v Minister of Education* [2015] NZCA 321, (2015) 14 TCLR 106, that's the judgment of Justice Randerson's, *Davidson v Banks*, judgment of Associate Judge Faire, and *Lee v North Shore Council*, a judgment of Associate Judge Bell, and *Body Corporate 169791*, which is the judgment I've already referred you to of Justice Lang, all of which support the proposition that we're making. So whichever principle you adopt, then the last word –

KÓS J:

I thought 2004 was the key date. So what was the authoritative position in 2004?

MR RING KC:

Well the position in 2004 was *Cromwell*, I accept that, but what I'm saying is that Parliament left that position intact in 2010 –

KÓS J:

I understand your point.

GLAZEBROOK J:

It might be the same point you were making in fact that one case doesn't justify saying that they were leaving it in place, especially as it wasn't necessarily the – well the later authority has shown that it wasn't necessarily a definitive view. Is that more or less what you're saying?

MR RING KC:

Well that's one way of putting it. Another way of putting is that if *Cromwell* established the position in 2004 then five cases established the position, the opposite position in 2010 as Parliament's intention.

O'REGAN J:

I mean my question was really just was it mentioned in the parliamentary proceeding. I wasn't –

MR RING KC:

I'm sorry, I've gone far, far further than you –

O'REGAN J:

Yes, no – I mean you – and your answer to that was "no"?

MR RING KC:

No.

O'REGAN J:

Yes, okay.

MR RING KC:

I'm sorry, your Honour, I was anticipating the contrary submission as well, so perhaps I've dealt with some of my reply already.

O'REGAN J:

Right, yes.

WILLIAMS J:

Well it may be that Parliament thought that the relationship between the longstop and the LA and so forth will be a matter for the courts to work through over time.

MR RING KC:

Well I'm happy –

WILLIAMS J:

In which case it will be not helped either way.

MR RING KC:

Well I'm happy with that because the Court did work it over time, between 2004 and 2021, 16/17 cases all consistently saying exactly the same thing and disagreeing with *Cromwell*.

WILLIAMS J:

Yes but I don't know what that tells you about the relevant statutory provision, that's the point. It may be just Parliament both in 2004 and in 2010 said: "This will be a matter for the courts. Our hands are off this.

MR RING KC:

Well I'd be hesitant before I agree with your Honour in case I find out that it's actually not helpful to me. If your Honour is saying something that's helpful to my case, I agree entirely.

GLAZEBROOK J:

Well you'd say I suppose they didn't need to because the wording they used was clear?

MR RING KC:

Yes.

GLAZEBROOK J:

And fitting with the purpose?

MR RING KC:

Yes.

GLAZEBROOK J:

And they may have overlooked it or they may have thought, well, the courts will fit in with that wording and purpose?

MR RING KC:

Yes, which in fact they did, yes. So dealing with parliamentary purpose, the starting point of that of course is what was the mischief that was being addressed, and that was the discoverability of the damage trigger for the accrual of the negligence cause of action in relation to defective buildings, and that exposed defendants to enforceable claims for an indefinite period, and as a matter of policy Parliament considered that statutory intervention was required to ameliorate this exposure, and I don't know that I have to go further than your Honour Justice Glazebrook's judgment in *Klinac v Lehmann* HC Whangarei AP15-01, 6 December 2001 for essentially that proposition and, of course, I've referred to paragraphs 21 and 23, but I think we'll come to it later from about paragraphs 13 or 14 to about 23 or 24 there was the whole legislative history that was set out there and that's a, in my submission, a useful comparison to the legislative history that the Court of Appeal did not set out in its judgment in relation to the equivalent parliamentary debates and parliamentary history.

The second point we make under the mischief heading is that *Hamlin* provides a practical contemporary advantage – contemporary example, and I won't take you to it but you'll have seen the table that we put in our submissions in relation to *Hamlin*, and I just note it at this point because it's related. Interestingly the, one of the early Law Commission reports actually did a similar exercise but used the *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA) case as the comparator with the – to the same basic conclusion.

KÓS J:

Well that's true, although if you took your table and the 10-year longstops you would end up with a much shorter date?

MR RING KC:

Yes.

KÓS J:

I calculated it to be 1990 rather than 1998.

MR RING KC:

Yes. My learned, Mr McKay, has found the passage I was looking at, looking for in *Burrows and Carter Statute Law in New Zealand* page 276. "Legislative endorsement of decisions. The case of *Ex parte Campbell* suggested that if an expression in an Act has received a judicial interpretation and that same expression is then re-enacted in later legislation, the legislature must be deemed to be endorsing the interpretation. The interpretation might need to have been 'clearly established by a line of cases going back over a considerable period' and one that the courts have uniformly laid down. Sometimes, no doubt, there is still room for this presumption in a particular instance but the increasing tendency has been to regard it as unreliable. 'One hesitates nowadays to attach much weight to the re-enactment… as implying an adoption by Parliament of (earlier) interpretations…".

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The footnotes for that include *Police v Mossop* [1981] 2 NZLR 479 (SC), *Re Arnold Trading Co Ltd* [1983] NZLR 445 (CA) and *Legal Services Agency v New Zealand Law Society* [2004] 3 NZLR 63 (HC), a High Court judgment by Justices Wild and MacKenzie.

So I'm at the page 2, E3, what was the 1991 solution? The answer to that, and again there's essentially the three points that I wanted to make here. First, the longstop was the 1991 solution, the first ever limitation longstop enacted in New Zealand, and it was in respect, of course, of all claims relating to building work and the purpose was that after the longstop had expired, responsibility for the defective construction would request entirely with the onus so that all construction participants could rest easy from the date of their last actionable conduct. That reference to "rest easy", of course, is your Honour Justice Glazebook's reference in *Klinac v Lehmann*. With respect, I think that actually captures the essential purpose that Parliament was trying to achieve.

There is a number of cases that have dealt with this. We have given you the references to *Klinac* and if we just go to *Klinac* for a moment, please, and we go back to about paragraph – so, I just wanted to refer your Honours to the

extracts from the Parliamentary debates. If you just backtrack to paragraph 14. John Carter, who was – and that was during the debate that was reporting back at the report of the internal affairs and local government committee. You can see in a number of different ways he expresses the finality of the longstop: "In other words, no action can be taken after 15 years against a builder, or a certifier, or anybody involved int eh construction of a building." Of course, at that stage, the longstop period was 15 years and subsequently reduced to 10. "After 15 years, the responsibility for the construction rests entirely with the building's owner."

Now, those words would not be consistent with a longstop that Parliament intended to exclude contribution claims, because obviously in that situation, after the proposed 15 years, the responsibility for the construction would not only be rested – wouldn't be resting entirely with the building owner but would be resting with the alleged contributor that the defendant had made a claim against.

KÓS J:

Well, no, not just the contributor. Clearly, the defendant 1 and defendant 2 together.

MR RING KC:

Well I, no, I –

KÓS J:

I mean, there's no contribution claim unless there's – the claim has been brought against D1.

MR RING KC:

Yes. But what I'm contemplating is that the claim is brought in time by the owner against D1 and then after 15 years the responsibility is resting with the contributor who's claimed against, in whatever shape or form, and that would be inconsistent with what Parliament is saying here.

O'REGAN J:

Well, I don't think it would, would it? Because if there's a contribution claim, by definition, the owner has sued within time.

MR RING KC:

Yes.

O'REGAN J:

So responsibility doesn't rest with the owner.

MR RING KC:

I'm sorry, we may be at cross-purposes. After 15 years, if the owner has sued in time, and the longstop does not apply to contribution claims, then after 15 years some responsibility, potentially all, 99% of the responsibility could rest with an engineer and architect, tradesman whatever. In that sense I'm saying that's inconsistent with the whole of that paragraph which says, in other words no action can be taken after 15 years against anybody.

ELLEN FRANCE J:

But that can't be quite, that can't be true in that broad sense if the contribution claim, for example, was brought within the 15 years. Right towards the end of it for example.

KÓS J:

Or if a primary claim against D1 was brought within the first 15 years, then the contributor is brought in shortly afterwards but outside the 15 years.

ELLEN FRANCE J:

Mmm.

KÓS J:

But nothing is going to happen if no claim has been brought within the 15 years.

MR RING KC:

That's correct, but no action can be taken. We say includes no contribution claim. No action, a contribution claim is action.

KÓS J:

Mmm. Your argument, I analogise your argument to a jigsaw puzzle. There are half a dozen pieces. A simple children's jigsaw puzzle. There are half a dozen pieces on the table. They're all in place. Each of them is a tortfeasor. But time runs out for the plaintiff against each of those people at different times. So we end up with just one piece left and it's probably the last person who materially contribution to the construction, so it's probably the builder. So a claim is brought against that person within time, but all the other pieces have disappeared from the board, and the effect of your argument is to say that the one remaining piece standing, probably the builder, cannot bring a claim for contribution against those person whose time has expired, as against the plaintiff. Now it seems to have a fundamental unfairness, given the claim for contribution to be affected, the claim has been brought against the last remaining piece in the jigsaw puzzle, within the 15 or 10-year time period.

MR RING KC:

It's not the fact that the plaintiff's claim is expired because we accept that at contribution claim, absent the longstop, can be brought, and section 17(1)(c) specifically says it can be brought on the basis that the plaintiff's claim against that tortfeasor is time barred. But what we're saying is that the longstop separately provides an absolute bar to bringing any contribution claim, or any claim whatsoever, after the 10 years expired from when the work was done.

KÓS J:

Yes, but that's because in your case, the piece in the jigsaw puzzle that represents Beca Carter has faded out from the picture before the last piece remaining, which was the Council.

MR RING KC:

Yes.

KÓS J:

So the claim was brought by P against D1, the Council, in time. The Council cannot then reach across and claim against Beca Carter because they faded out of the timing. They're time-barred earlier.

MR RING KC:

Yes, yes.

KÓS J:

That's the effect of your argument?

MR RING KC:

Yes, that is the effect of our argument.

KÓS J:

Even though the claim brought against the Council was brought within time?

MR RING KC:

Yes.

KÓS J:

Your piece of the jigsaw puzzle just faded out earlier?

MR RING KC:

Yes, yes, on that analogy that's correct. So we also rely on the rest of that paragraph, the second paragraph: "The committee… decided that it was in the best interests of the building industry, of local government, and of New Zealand to limit the period of liability." That would not be, obviously not be the case if there was an open-ended – well no longstop on contribution claims.

1050

If we can just scroll up paragraph 15. There's the reference to the government specifically taking into account the position of the local government and then Justice Glazebrook's conclusion in paragraph 16: "The provision was therefore

introduced as a 15-year longstop limitation on the liability of those involved in the process of construction and in particular local government. Concerns about liability of local government in negligence were clearly the driving force behind the provision." Well, that purpose would obviously be defeated if they could be successfully sued outside that period in contribution, for contribution claims.

Similar comments have been made in a number of the other judgments and we've referred you there to the *Ministry of Education v James Hardie* judgment.

KÓS J:

What is so fundamentally wrong about this? Because given that the claim has to have been brought against D1 within the 10-year time period, by the end of the 10 years the other participants in the building projects, he might be sued or might have been sued but haven't been sued know they're on risk. They know there's a possibility for contribution claim. You tend to rely on a rather vanishingly thin proposition that could be a contribution claim and I understand that, but that's an extremist argument.

MR RING KC:

Well –

KÓS J:

But otherwise everyone knows within time that there's a risk that they will be brought in. So, the effect of this is to require them to continue to have run on insurance past the longstop.

MR RING KC:

Yes, which Parliament recognised wasn't available.

KÓS J:

Well if they can obtain insurance up to the longstop, why can't they obtain run-off insurance past the longstop.

MR RING KC:

Well because there are numerous examples of Parliament's understanding that no insurance past the longstop would be available.

KÓS J:

Is that – what's the evidence on that?

MR RING KC:

Well, I'm going to come to it. But there is a number of references to it. It's the whole theme of the legislative leadup to the enactment of the longstop.

KÓS J:

I simply can't understand why there wouldn't be a market for run-off for a period after if there's a market for insurance in the first place.

MR RING KC:

Just give me a second. Well, if I can just park that because I definitely will be coming to it.

KÓS J:

All right.

MR RING KC:

So the two elements that I wanted to highlight here were the certainty and finality to the exposure which is – after a readily identifiable date, after the impugnable work had been done as a matter of policy, and fixing the length of the longstop to match the availability and to minimise the cost of liability insurance which is initially driven by the statutory requirement for building certifiers to have adequate insurance that matched their period of liability, and then that was extended to territorial authorities because they had the same exposure, and then later extended to all construction participants, that is builders, architects and engineers. Then, finally set at 10 years and we look at – if you look at the paragraph starting: "All building certifiers will have to have sufficient insurance…to meet their potential liabilities. The Bill provides a

15-year longstop… Following representations", decided to reduce that to 10 years. It's vitally important the change the change be made. Information from the UK where the law allows for 15 years of insurance is unobtainable for 15-year cover. "The reality is that without a realistic longstop on liability, insurance cover will not be available, and without insurance cover being available there will not be any building certifiers."

So, that's what Parliament said at the time of the enactment, and now if I can turn to some of the leadup documents that we say is relevant to this. The first is the 1987 report, PP3, the Limitation Act. This was a document that wasn't before the Court of Appeal. The essence of this document is that it proposed a 15-year absolute longstop, including for contribution claims from the date of the defendant's conduct. And if you – the introduction – sorry, if we go back to the – paragraph 100. The authors of the report illustrated the present position in relation to the general limitation period between plaintiffs and defendants with a building work example. Then at 135 they recommend that a separate ultimate longstop starting from the date of the defendant's wrongful conduct. Then at 140 they said that that should apply in all cases except where there's been deliberate concealment or – in other words, in all cases except where there was fraud.

Then if we turn now to 150 – sorry, just there's a discussion there of latent damage and the, including the *Johnson* case that I was referring to before, there at 150 is a table, number of years between construction of building and signs of damage to highlight the discoverability problem. Then if you turn to 156, subparagraph (1), they refer to the New Zealand, present New Zealand law position with diagram A1, that's just the general position. Then in A2 they identify the contribution problem that we say was addressed by Parliament, and as you can see there's – they were talking there about a contribution claim being brought some 27 years after the impugned work had been carried out. Then if you just scroll down – just, sorry, just before you've referred to the –

GLAZEBROOK J:

Sorry, can you just – I think I might've missed that paragraph number.

O'REGAN J:

156.

MR RING KC:

156, subparagraph (1).

GLAZEBROOK J:

Oh, it was 156. That's right.

MR RING KC:

And diagrams A1 and A2. And in subparagraph (2) they talk about the English position and you can see that for diagram B they treated the 15-year longstop as absolute, and if you scroll down, the Albertan proposal, again they treated the Albertan proposal longstop as absolute, and then you come in subparagraph (4) to the Law Commission's proposal in subparagraph (4), and you can see that there is a longstop there that they also regard as being absolute.

Scroll down from there to paragraph 164, and there they refer specifically to contribution proceedings and say that there's no special provision for a general limitation period given that what was being proposed there was, at that stage, was a standard three-year period.

So the overall effect of that document is a proposal that the longstop will be ultimate and absolute, including contribution claims. The next document is 1988 R6. If you turn to, please, to paragraphs 280 –

KÓS J:

Just going back to that last point, is the effect of that then that if the plaintiff brings its claim against the – under the Law Commission's PP3 proposal. If the Law Commission, sorry, if the plaintiff brings its claim on the last limitation day against D1, effectively D1 will be timed out in bringing a contribution claim as it's as absolute as that, there's no further extension past the longstop.

1100

MR RING KC:

If it's on the last day of the longstop, yes.

KÓS J:

Yes.

MR RING KC:

Which is inherent in any longstop. I mean, that would be the case for the plaintiff as well.

KÓS J:

Yes. So, therefore, D1's position is wholly dependent on whether the plaintiff has sued just D1 or decides to add D2 and D3 to that proceeding within time.

MR RING KC:

Yes, which is effectively revert to the common law position.

KÓS J:

Well I'm not sure about that because contributions send a separate course of action.

MR RING KC:

Yes, but under the common law the plaintiff could choose his defendant and if he sued D1, D1 had no recourse against anybody else. So, section 17(1)(c) comes in to ameliorate that. The longstop comes in and limits that solely in relation to building work and effectively restores the common law position for building work after the longstop.

GLAZEBROOK J:

Why would you – I mean it might in practice but that can't have been in the intent, surely, to restore a common law position.

MR RING KC:

Well, I –

GLAZEBROOK J:

Because it's only restoring a common law position in certain circumstances I'm not sure that's –

MR RING KC:

I'm not saying that anybody sat down and did that, I'm just saying that looking at it now that's the overall effect. And what I'm –

GLAZEBROOK J:

Well it didn't really because you still have contribution claims, you just don't have them with the – you say they're out of time.

MR RING KC:

Oh, yes. They're – I'm –

GLAZEBROOK J:

So it's not really restoring a common law position where you didn't have contribution claim.

MR RING KC:

Well maybe that was a bad choice of words. I'm just talking about effectively restoring the common law position in that very narrow set of circumstances.

GLAZEBROOK J:

Yes.

MR RING KC:

The point I was making was if it was suggested, you know – well, no. I won't –

GLAZEBROOK J:

I think you've probably taken that as far as you can.

MR RING KC:

I won't go any further than that. So, sorry, I was dealing with R6, and the overall takeaway from R6 in our submission is that it proposed the 15 year absolute

longstop that included contribution claims from the date of the defendant's conduct and this was before building certifiers were contemplated. I was taking you to 280, from paragraphs 280 through to 285, talking about the extension of the longstop periods and the longstop in different jurisdictions and go through to 286, through 286 to 291 talks specifically about the insurance position in relation to longstop provisions and that is also dealt with – so that's 286 to 291, and the essential point being the difficult of obtaining insurance after and fixing the longstop at the period when insurance would be available, and also 302 talks about the Scarman Committee, and again, talks about the availability of insurance or the unavailability of insurance.

So, against that background the proposal was, and you can see this starting at 169 and 171, paragraphs 169, 171, that date of conduct should replace the accrual start date for the general limitation period for monetary plains including contribution, but there would be a special definition for certain contribution claims, and that special definition wouldn't apply to contribution claims which were ancillary claims. So that's the point that I made previously in relation to the date of the act or omission.

Then there's the 1990 report, Building Industry Commission report to the Minister of Internal Affairs, (*Reform of Building Controls*), and the best reference to this is the judgement of the Court of Appeal in *Attorney-General vs Body Corporate 200200* [2007] 1 NZLR 95 which was the BIA claim.

Turn to paragraph 7, you'll see in the first sentence that the Court recognised that the 1991 Act largely implemented that. In paragraph 8 onwards they go to talk about aspects of that report and in particular in relation to building certifiers because one of the arguments in this case was whether the BIA had acted negligently in approving approved building certifiers as a building certifier when its insurance was – turned out to be non-existent. Well, when I say non-existent, turned out to be avoided for non-disclosure and also was only limited to $2 million in any event. So, this whole paragraph 8 is all about the insurance problems and the insurance issues and so that – the discussion there relates to the need for adequate insurance for building certifiers for the duration

of their liability with the conclusion that counsel should be treated the same because they're in the equivalent position.

If you turn to paragraph 74, this is the section of the BA 1991 that was ultimately enacted, and subparagraph 3(b) is the insurance requirement that an application for a building certifier had to include: "Evidence that a scheme of insurance approved by the Authority will apply in respect of any insurable civil liability of the applicant that might arise out of the issue by the applicant of a code compliance certificate."

Turn to paragraph 83, a related provision further in the Act said that from the BIA's perspective it could only grant an approval of the certifier if it is satisfied that that certifier has a "scheme of insurance approved by the Authority that will apply in respect of any insurable civil liability". I didn't emphasise that the first time round but I just wanted to make that clear. It's any insurable civil liability of the applicant that might arise.

So, what you can see is two things happening simultaneously here, and that is an identification of the, in practise, maximum length of insurance that's going to be available to building certifiers and then a statutory provision that is going to fit within that believed availability so that building certifiers can have adequate insurance. But the key to it in order to get the insurance is there had to be a longstop that absolutely brought to an end the building certifier's civil liability, any civil liability by the building certifier after that date must have been brought to an end.

If you turn to paragraph 85 you can see that it fell down because: "The BIA issued a performance specification for insurance cover" that was on the basis of an up to 10-yearlimitation, so 10 years of cover. But that cover didn't turn out to be available. The BIA then had to modify its requirements, but none of this is consistent with their being any contemplation that a building certifier would be liable in contribution way after the limitation period had expired where he would have no insurance, he or she would have no insurance.

1110

Next, and I'm at E4, two report letters from the Department of Internal Affairs to the Minister of Internal Affairs containing the Department's recommendations on the Building Bill before the 31 October 1991 parliamentary session on the BIA 1991. The first point to note about this is that the Court of Appeal obtained these letters after the hearing, and they're referred to in footnote 48. But the letters, in our submission, do not support the Court of Appeal's conclusion that in 1991 Parliament intended to exclude contribution claims from the longstop, and instead we say they show that attention was specifically drawn to contribution claims as liability issues in the building industry context and the Law Commission's support was for the longstop, including contribution claims that was based on the date of the impugned conduct. So in other words, consistency between what was said in Parliament, subsequently said in Parliament, and those previous reports that we've taken you to, both the general reports and industry specific reports.

So, features of the 30 August 1991 report, you can see at paragraph 1, the purpose of the Building Act was to: "Clarify the civil liability of the Building Industry Authority, building certifiers and territorial authorities for actions relating to building consents. Resolution of the liability issues is crucial to the success or the new building control regime." It's inconceivable, in my submission, that they would make that statement expecting, or to put it another way, objectively inconceivable that contribution claims would be treated as completely outside of these limitations controls and this regime, giving rise to effectively – well, I won't call it unlimited liability, because I don't need to. Let me just call it liability in excess of the longstop limitation period.

So, if we just turn first to paragraph 4, because this is the only reference in the letter to contribution. It talks about four separate liability issues that arise in this context and you can see that contribution and joint and several liability is referred to in subparagraph (iii). The other two, whether duty is owed and how it arises, the limitation period, how long should the duty exist and whether for some good reason it's apparently restricted, should be restricted, that's the immunity issue.

If you go back to paragraph 2, the proposals that are intended to address those, place a 10-year time limit on "which territorial authorities and building certifiers may be liable for their own negligent actions in issuing a building consent" within the 10-yearperiod, make it clear that liability is in tort and not contract, and provide some specified immunities.

If you turn to paragraph 6 and 7, refers there to the Law Commission report about limitation: "A central feature was the introduction, in cases in which the liability did not become apparent for a period, of a 'longstop' on the length of this liability… being a fixed period… after which no action could be brought."

And again, in my submission, that is a reference to the Law Commission having contemplated an absolute 10-year longstop that included contribution, and that would certainly be consistent, and would only be consistent with introducing in – certainty into the law with corresponding benefits in terms of availability and cost of insurance, for the reasons I've already said.

Paragraph 7 refers to the evidence before the select committee about the availability or unavailability of insurance for building certifiers beyond the longstop, again reinforcing that it couldn't have been intended that they would be exposed beyond the longstop for contribution claims where no insurance – they knew no insurance was – or understood no insurance was available.

Paragraph 9: "All this points to the need for a longstop… which would limit the liability of building certifiers to a definite period." All liability again we would say, not liability subject to an unspecified exception. At that stage the Commission was proposing 15 years, the BIA was proposing 10.

Paragraph 11, our view, shared by the Commission, "that some limited reform via the Building Bill is better than no reform at all… limited reforms… could help strengthen the momentum that already exists for an overall reform of the law of liability…".

Further down, reinforcing that, at paragraph 12, that the Law Commission supported these proposes, so they must've regarded them as consistent with what they previously said.

Next report, 10 October 1991, no specific of contribution in here but there was an amended recommendation to a 15-year ultimate longstop, again based on the date of the conduct and in language, in our submission, that inferred no exceptions. In particular paragraph 1(a), (b), (c) and with the longstop applying to all civil proceedings and paragraph – and I just note (d), while I'm on that page, that again consistent, as far as they were concerned, with what the Law Commission had proposed in R6.

Going through to paragraph (d) – paragraph 10, sorry. The drafting instructions clearly state when the longstop commences, need to provide that the longstop would run for 15 years from the date of the issue and consent and 15 years from the date of the building certificate or code compliance certificate for building certifiers in (b), similarly in (c), and "in the case of other parties their longstop would have to run from 15 years from the date of their negligent acts".

Again, paragraph 11 confirming that this is consistent with – or that – consistent with the Law Commission's views. They support the proposals.

So those were the materials that led up to 1991 and they all point in the same direction, in our submission, and indeed that's the view that has been taken in the vast majority of cases that have addressed the legislative history. Probably the earliest was your Honour Justice Glazebrook's judgment in *Klinac* but there's been numerous other decisions to essentially traverse the same issues and drew the connection between the availability of the insurance and the 10-year longstop and the absoluteness of liability that had to attach as a result.

1120

Turning to the 2004 re-enactment, that's E6, we say that the statements that were made in that context were inconsistent with any suggestion that the longstop excluded contribution claims and would continue to or would exclude contribution claims.

So first of all the commentary to the Building Bill, as reported from the Government Administration Committee, if you scroll down to limitation defences, the essential features of this at page 641, it was intended that the 2004 Act would implement the same 1991 policy of providing certainty, finality to exposure after 10 years from the last actionable conduct by limiting civil proceedings against any person, and those are the words in the first three lines of that paragraph.

Then turning to the next page, confirmation in that paragraph there that building work would be treated as different enough in nature to require different statutory limitations. So again they're emphasising the specific and special regime thrown up by building work issues.

Then finally on the 2004 re-enactment, and again for what it's worth, it's one comment by one member in the course of the debate, and so I give it to you in that context. If you just go to the top of the page please. There'll also need to be run-offs so that if a building consent authority goes out of business, cover will run for the balance of the 10 years from the last building, without further premium payments. So again that would be entirely inconsistent with a view that there would be a post-10-year exposure for contribution claims.

GLAZEBROOK J:

Can I just – exactly where is that?

MR RING KC:

That's the first paragraph on – 642 is the –

GLAZEBROOK J:

When they're saying "last building", is that the last building work by the particular person or?

MR RING KC:

Well that's what I – that to me is the only reasonable interpretation from that. There can't – the last building –

GLAZEBROOK J:

Well it's a personal thing is what –

MR RING KC:

Yes, yes.

GLAZEBROOK J:

Yes.

MR RING KC:

Yes. The last building work by that person.

GLAZEBROOK J:

So you could've have somebody do building work in March and it would be a run-off period – March, you know, 2000 and the run-off period would be 10 years from the date of that building work which would be different, the building might've been finished in October?

MR RING KC:

Correct.

GLAZEBROOK J:

And that would be a different run-off period?

MR RING KC:

That's correct and that ties back into the date of the act or omission on which the claim was based.

GLAZEBROOK J:

Yes.

O'REGAN J:

But – and he's talking about building consent, he's really talking about certifiers there, isn't he? The last one they certified?

MR RING KC:

I don't think so because the certifiers had failed by that point, and were in the 2004 Act, which didn't have certifiers.

O'REGAN J:

But he talks about a building consent authority going out of business?

MR RING KC:

Oh, yes, yes.

O'REGAN J:

Yes.

GLAZEBROOK J:

Well that probably is from the last building because that's when the liability will run from, as you say.

MR RING KC:

Yes. Correct, thank you. So E7, consequences of the Court of Appeal judgment. We say that it would defeat Parliament's purposes in 1991 and 2004 of achieving certainty, finality and tying in with the availability of insurance. I want to make four points in relation to this. First, that this purpose has been recognised in multiple High Court judgments since 2004, and you've seen some of those and I've mentioned other examples.

Second, building industry participants are entitled to expect limitations of liability in the statute to be easily understandable and not subject to an unstated exception.

Third, that the interpretation of a Court of Appeal placed on it, gives rise to extended, I'll just use the word, extended exposure beyond the 10-year limitation period and that exposure both by active and retired building – builders, building industry professionals and their estates who could have reasonably expected to have ordered their affairs, including insurance, based on their position that it had been affirmed since 2006.

When I say "active" I'm thinking including people who have moved from one job to another and the insurance that they had at one previous job might not carry through to the current employment they have, but it's particularly significant, in my submission, for the retired builders who have basically lost the opportunity to protect themselves. At –

KÓS J:
Sorry, in what way?

MR RING KC:
Well –

KÓS J:
What would they have done?

MR RING KC:
Well, tried to obtain insurance. Tried to obtain run-off insurance.

KÓS J:
Well you told us that's not possible.

MR RING KC:

Well, I – yes. There would have been a certain amount of run-off insurance available but yes.

KÓS J:

Well that's what I would have thought.

MR RING KC:

But you're right. The opportunity to obtain insurance would have been lost. The opportunity to organise their affairs against the prospect of liability would have been lost. These are people who retired and after 10 years were entitled to and did think that they could rest easy.

KÓS J:

Yes, but this not a piece of legislation of piercing clarity. I mean, we know for a start that there was in 1995 of judgment of the High Court that said one thing and there was a series of judgments subsequently say a different thing. They haven't acted in response to the legislation. They've acted in what they see as a sequence of cases that have gone in one direction. But they're High Court cases, and there was an earlier one which went the other way. So, it's a pretty unsettled set of stands to build a house on.

MR RING KC:

Well, I mean it's not only that. Sorry, you go to section 393 and it's expressed in absolute terms, section 393(2).

KÓS J:

Well you say that's piercingly clear?

MR RING KC:

Well that's yet another expression that hasn't been used to date but I gratefully adopt it. Yes. It is piercingly clear, and to say that it is acknowledged that it is a wholly inclusive provision and to say that Parliament intended but did not express an important and having widespread ramifications exception to it does

leave people with the entitlement of, if they go to the section and read it, you would think that all civil proceedings have a 10-yearlimit.

The final point that we make is that despite the elapsed time there are still actual exposures and they are not just theoretical as this case shows. And I mean, this is a particularly large case. There's a 100 million dollars plus at stake here. And that's not even the owner of the building. So, we're not talking about necessarily small exposures either.

KÓS J:

Do we take it that some settlement's been reached through the council and –

MR RING KC:

No it's still going.

KÓS J:

That's still going?

MR RING KC:

Still going.

KÓS J:

And you're a third party to that proceeding?

MR RING KC:

Yes, but hopefully not for long.

GLAZEBROOK J:

Is that a convenient point for –

MR RING KC:

Yes. Could I just make – it would be, I just want to make one more comment.

GLAZEBROOK J:

Sure.

MR RING KC:

And that then finishes that section. Professor Mander is in exactly the same position as Beca in this. To give you the direct personal example of a single human being who is exposed, and I would just make the allied point, Professor Mander was the peer reviewer to Beca. So, under the Court of Appeal's interpretation – no, I'll leave it there. Professor Mander is the human being example which makes this not theoretical. Thank you, your Honour.

1130

GLAZEBROOK J:

We'll take the adjournment and obviously hear what you have to say on the other points, the remaining points after the adjournment.

MR RING KC:

Yes. I feel like it's a 15 minute possibly exercise to finish.

GLAZEBROOK J:

Certainly. Thank you.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.50 AM

GLAZEBROOK J:

Mr Ring, sorry.

MR RING KC:

Thank you your Honour. Section F, the Limitation Act 2010, just a couple of comments in relation to that. To the extent that Parliament's purpose in enacting the LA 2010 is relevant in ascertaining its purpose for longstop, we say this was to preserve and prioritise the Building Act's specific limitation regime. There are two points I wanted to make here. The first is that the Court of Appeal judgment treated this point inconsistently. Initially the Court, or

judgment recognised that the LA 2010 did not apply because we were dealing with 2008 conduct, and that's in paragraph 36, and then in our respectful submission, erred when relying on parliamentary purpose in enacting the 2010 section 34, and that's evident from paragraphs 53 and paragraph 125, and paragraph 148. The second point – finishing with the, instead of Parliament confirming that bespoke approach in the LA 2010.

The second point we wanted to make is that the parliamentary debate when introducing the 2010 Act, and at the same time making immaterial changes to the longstop is, in our submission, consistent with the irrelevance of section 34 to the interpretation of application of the longstop, and we're referring here to that paragraph by the Honourable Christopher Finlayson, Attorney-General, starting secondly: "Under the bill, the start date for the primary limitation for most claims will simply be the date when the act or omission on which the claim is based… That date will be readily identifiable. The bill also sets out special start dates for…" monetary claims. "Other special limitation periods are created by other legislation, such as… the Building Act. In the event of any conflict between the general rules in this bill and specific rules in other legislation, the specific rules will continue to prevail over the provisions of this bill."

Which of course was the same position in relation to the LA 1950 and is the inescapable effect of starting section 393(2) with the word "however".

Final section, the specific versus the general. In our submission the Court of Appeal wrongly held that as between contribution claims and civil proceedings relating to building work, the latter was general and the former was specific. Again this is paragraph 148. The Court held that if Parliament intended to exclude what it described as the bespoke approach to contribution claims including claims relating to building work from the ambit of the longstop, it would have said so in clear and unambiguous terms. Instead Parliament confirmed that the bespoke approach in the LA 2010 and the Court justified, or the judgment justified that conclusion by applying what they described as the essence of the principle of interpretation, generalia specialibus non derogant.

Again, we make three basic points to this. First of all the principle that's referred to was developed to resolve apparently conflicting purposes, but here there is no conflict as the text shows. The longstop created a parallel limitation regime based on conduct which has a particular start date. Both statutes apply. But if there is a conflict the longstop prevails because of section 33(1) of the 1950 Act and the same provision would have been the case under the LA 2010 anyway, neither of these points being mentioned by the Court of Appeal.

The second point we want to make is that there was no bespoke approach to limitation for contribution claims contrary to what the Court of Appeal said. First, that the LRA 1936, s 17(1)(c), only deals with limitation periods in one context, and that is between the plaintiff and the recipient of the contribution claim, and depends on whether – or doesn't – is not excluded because the plaintiff would have been – sorry, the contributor would have been liable to the plaintiff if sued in time.

The second point, the only other limitation periods of contribution claims at that stage were in LA 1950 and that was based on the accrual cause of action as the start date, and section 14.

The third point, that in relation to the BA 1991, and the BA 2004, and three subpoints here, and I'm sorry to be delving slightly into new maths, but contribution claims and civil proceedings relating to building work are each a subset of all civil proceedings, and devoid of any relevant context we accept that it may be arguable that neither contribution claims nor civil proceedings relating to building work is any more specific or bespoke than the other. That's devoid of context. But in the context of a building industry specific statute to introduce or maintain major reform to the building industry including to introduce private certifiers having mandatory insurance requirements, civil proceedings relating to building work must be more specific or bespoke than contribution claims generally.

Finally we just, again, refer to the Honourable Christopher Finlayson's comments in Parliament which are essentially to that effect.

Your Honours, unless I can help you with anything further, those are our submissions.

GLAZEBROOK J:

Is there anything specific you're relying on in the Finlayson material there?

MR RING KC:

That same paragraph.

GLAZEBROOK J:

Because it doesn't deal specifically with contribution?

MR RING KC:

No but –

GLAZEBROOK J:

So it's just the more general indication of it being an absolute longstop?

MR RING KC:

Correct.

GLAZEBROOK J:

Thank you.

MR RING KC:

And it's the specific general comparison that they do.

GLAZEBROOK J:

Yes. Thank you very much. Mr Taylor?

MR TAYLOR KC:

Thank you your Honours. Could I perhaps start by just taking you to some of the, or the general point that is made by my learned friend, that the various Commerce Commission reports did not treat, or recognise, contribution claims

as being claims which fell into a particular category and which raised different issues as to the application of both limitation periods and longstop periods, and in particular my learned friend took you to some general comments in the 1987 report that was made by the Law Commission, which was, as is clear, very much a discussion paper expressing tentative views by the Law Commission at that time, and that's at the bundle at page 701.

1200

KÓS J:

This is your bundle, Mr Taylor?

WILLIAMS J:

No, it's the appellant's.

MR TAYLOR KC:

No, it's at the appellant's bundle there, supplementary bundle I think. The 1987 report.

KÓS J:

We have – ours is tabulated rather than paginated so –

MR TAYLOR KC:

Yes, at page 701.

KÓS J:

Have you got tabs? Is it 17?

MR TAYLOR KC:

It's – I'm not sure of the tab number, your Honour.

ELLEN FRANCE J:

If you go to the index it's there in the index.

WILLIAMS J:

27?

MR TAYLOR KC:

27, yes.

WILLIAMS J:

It's the supplementary –

MR TAYLOR KC:

It's the supplementary bundle but the pagination number I have at the bottom is 701 and –

GLAZEBROOK J:

I don't actually have a supplementary bundle I don't think, but –

O'REGAN J:

Yes. I don't think we've got it.

WILLIAMS J:

We don't have it.

GLAZEBROOK J:

Yes, yes.

KÓS J:

It is there, it's the bottom.

ELLEN FRANCE J:

It's there.

KÓS J:

It's the same thing, the very bottom.

MR TAYLOR KC:

Yes, in red at the bottom?

O'REGAN J:

Yes, I can see the page numbers, it's just my bundle goes up to 23, not up to 27.

MR TAYLOR KC:

There's a supplementary bundle that was provided by the appellants with this report and a –

WILLIAMS J:

And my hyperlink isn't working either, it's actually showing up but it's not.

O'REGAN J:

Anyway, we've got it on the other screen so just –

ELLEN FRANCE J:

Yes, there it is but it – the hyperlink is not working.

MR TAYLOR KC:

The point that I really wanted to make –

GLAZEBROOK J:

Oh, okay, so –

ELLEN FRANCE J:

Yes.

GLAZEBROOK J:

Yes, okay, on the index? I understand.

MR TAYLOR KC:

The point that I –

GLAZEBROOK J:

No, my hyperlinks never work on these so – which is really helpful.

O'REGAN J:
You go ahead, Mr Taylor.

MR TAYLOR KC:
My learned friend took you to various aspects of that report that were discussion, essentially claims by a person who had suffered damage and the distinction between contract and tort and saying that the recommendation or tentative view of the Law Commission is that there should be – that it shouldn't make a difference in terms of setting the start of the time period for actions in contract and tort as to what the start date for the purposes of calculating both the standard limitation and the longstop limitation would be and therefore it was proposing that the negligent act or act of wrongdoing would be the date of the act or omission for calculating both of those periods.

But in my submission the Commission when it was making those comments was contemplating actions by in this case a building owner or in any other case a person who had suffered damage and the act or event that gave rise to that damage as being the starting point for the purposes of calculating the limitation period, whether it be the standard limitation period or the proposed longstop that they were discussing in that paper.

What my learned friend did not take you to was paragraph 164 of that report which is at page 755, and there you will see –

O'REGAN J:
I think he did take us to it.

MR TAYLOR KC:
Sorry?

O'REGAN J:
I think he did take us to it, 164.

MR TAYLOR KC:

Oh, well if – what in my submission – well I don't recall my learned friend taking us to it, but what it's talking about there is that it's recognising that contribution proceedings are a different type of proceeding, and that therefore the 1950 Act recognises that the date of accrual, the coming into existence of a right of contribution and section 14 of that Act at the time, recognises that the contribution right of action arises at the time liability against the contribution, or defendant to a claim by a plaintiff, is established. So what it is saying there is that: "Under the present 1950 Act it is possible for proceedings to become very stale where A sues B…".

It then states: "This resulted in an amendment to English legislation to provide that contribution claims must be brought within a special limitation period of two years. Given the Commission's present favouring of a standard three-year limitation period, there would seem to be little to be gained by any special provision relating to contribution proceedings, notwithstanding that there may be scope of cumulative proceedings."

In my submission what the Commission is talking about there is that in the English legislation where there was a longstop under the UK Latent Damage Act 1986, a particular provision was introduced imposing a two-year limitation period in respect of contribution claims, and I don't think there's any dispute that the Latent Damage Act doesn't, the longstop in that Act doesn't apply to a contribution claim, and that is saying, well, look, we're not proposing to change the period for the calculation of a limitation period, or the start date for that period in respect of contribution claims, as it is presently under the 1950 Act, but given that what we are proposing is a standard limitation period of three years, and in that case a longstop period of 15 years, we don't see any need to make any other special provision for limitation in respect of contribution claims.

KÓS J:

So is that saying that if P sued D1 at the end of a longstop period, that D! would then have three years to make a contribution claim against D2?

MR TAYLOR KC:

Three years from the date on which liability was established against D1.

KÓS J:

Ah, which would be afterwards.

MR TAYLOR KC:

Yes, yes.

KÓS J:

So there'd be an interregnum while the case against D1 proceeded?

MR TAYLOR KC:

Correct, but what I'm saying is, in my submission the 1987 report cannot be read as the Law Commission contemplating or supposing that the longstop period would apply to a contribution claim other than on the basis that the contribution claim or the starting period for calculation of the period of limitation is the date upon which liability is established against defendant 1.

In my submission submission that recognition of the particular nature and different basis for a contribution claim is then reflected in the 1988 report, and your Honours will recall that in the 1988 report the Law Commission said, look, normally the date upon which, or the date upon which the Act or omission is based will be clear, and particularly so in a cause of action based on contract or tort, and determining what the wrongful act is from which the date or act of omission is calculated.

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The Commission in that report recognised that but said but there are special cases where what the relevant date of the act or omission is will be unclear, and they particularly recognise that that was the case in respect of contribution claims and that is why in the 1988 report, in the proposed legislation in that 1988 report, and if we could go to that, and I'll come back to this further but the

important point to note if we go to the draft legislation at paragraph – at clause 20.

KÓS J:

What page is this? Sorry, I just can't see it.

MR TAYLOR KC:

Sorry, if we go to the bottom. Can you scroll to the bottom? 0472.

KÓS J:

Thank you.

MR TAYLOR KC:

There you will see it states: "When a claim for a sum of money by way of contribution or indemnity is made, the 'date of the act or omission' on which the claim is based, for the purposes of this Act, is the date on which the sum of money in respect of which the claim is made is quantified by a decision of a court or arbitrator or by agreement."

So what it is doing is introducing that same start date which existed under section 14 of the 1950 Act and saying when you're looking under this Act at the date of the act or omission upon which a claim is based, if the claim is a contribution claim the date of the act or omission is the establishment of the liability against the defendant in the original claim by the plaintiff, and what I am submitting is that both in the 1987 report, the 1988 report and all the subsequent reports of the Law Commission, that critical recognition of the distinct nature of a contribution claim is recognised and repeated and there is no change in the Commission's view in that regard throughout the period, and in my submission the Court of Appeal was entirely correct when it said that the Law Commission and the legislature has recognised throughout that period the bespoke nature of a contribution claim.

GLAZEBROOK J:

But without including a bespoke exclusion as had been recommended in the 1988 report?

MR TAYLOR KC:

Correct, correct.

GLAZEBROOK J:

Well what do you say about that though?

MR TAYLOR KC:

Well what I say about that is that as is clear in the, this report itself, they're saying, look, the date of the act or of will normally be clear in a contract –

GLAZEBROOK J:

Well there's nothing particularly unclear about an act or omission in those circumstances, is there?

MR TAYLOR KC:

No but –

GLAZEBROOK J:

And the basis of the claim for contribution again is going to be clear in that if it was the date of the actions, then that will be clear for those people. So what's unclear about it? Unless you say there's something specific and different about a claim for contribution?

MR TAYLOR KC:

Yes. What –

GLAZEBROOK J:

Which I think is your argument?

MR TAYLOR KC:

Yes, absolutely, and – but not only is that my argument, that is what is recognised by the Law Commission because it says in its report there are special claims where the date of the act or omission will be different to the Act or – the act or omission of the plaintiff that gives rise to a cause of action in the primary claim. But it says it's unfair but it's not – sorry. It says it's unclear, and for the purposes of a proposed draft piece of legislation it seeks to, or recommends that that uncertainty be made clear in the draft legislation. But in my submission that doesn't detract from the thrust of the Commission's report, which is to recognise that although we are recommending that the standard limitation period, and the longstop period run from the date of the act or omission upon which the claim is based, in our view the date of the act or omission upon which a claim is based for a contribution claim is the establishment of liability and in my submission – against the defendant, who then seeks contribution from another defendant, who would also have been liable.

If we proceed on the basis that that was the thinking and the recognition of the Commission at the time it was involved in establishment of the 1991 Act, in my submission those prior reports indicate very clearly that when it used the words "date of the act or omission upon which the claim is based", for the purposes of calculating the application of the longstop period, it must have contemplated at that time that the relevant date of the act or omission upon which the claim was based for a contribution claim was the establishment of liability against the defendant in the primary claim.

GLAZEBROOK J:

That can only be based on section 14, can't it? It can't be based on the longstop provision itself?

MR TAYLOR KC:

Section 14 of the 1950 Act?

GLAZEBROOK J:

Well, yes, you're not suggesting that's read into section 393 are you?

MR TAYLOR KC:

I am in the sense that the use of those words, because what section 393 says is it runs 10 years from the date of the act or omission upon which the claim is based, and I am saying that it's clear from these 1987 and 1988 reports of the Law Commission that those words, at least in their view when applied to a contribution claim, were talking about the date upon which the defendants' liability was established.

O'REGAN J:

What's the act or omission?

MR TAYLOR KC:

The act or omission? Well the act, and this is the reason why the Commission were saying in the 1988 report it's not always clear what the relevant act or omission is, but –

O'REGAN J:

It was clear that it was an act or omission of the defendant being sued, wasn't it?

MR TAYLOR KC:

No, it wasn't, in my submission, and in my submission that's right, that's, it's, that's a part of the enquiry, but it doesn't have to be applying to the date of the act or omission of the defendant that's being sued.

WILLIAMS J:

Isn't the theory that this is a form of indemnity and therefore the act then referred to, although he construction is strange, is the finding of liability?

MR TAYLOR KC:

Correct, that's absolutely correct, and that's –

GLAZEBROOK J:

But how can that be an act or omission?

WILLIAMS J:

Well that's –

MR TAYLOR KC:

It's an act or omission –

GLAZEBROOK J:

It's an act of an establishment of liability of somebody else.

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MR TAYLOR KC:

Sorry? Well it is because it is for the purposes of reading that phraseology, and that is why in the draft legislation for the 1988 report it was decided to make it clear, but in my submission it doesn't detract from the fact that the date of the act or omission upon which a contribution claim is based, is the establishment of liability. It doesn't have to be the act or omission of a, of the defendant to the contribution claim, the question is what is the date of the act or omission upon which the contribution claim is based, and in that sense –

GLAZEBROOK J:

So the act, you'd have to say the act is the establishment of liability, even though it's –

KÓS J:

No, no, it's not that, it's the omission, because the omission is the obligation to fund the joint tortfeasor. So the omission there is the failure then to immediately pay your share upon establishment.

GLAZEBROOK J:

Well I have great difficulty with that.

KÓS J:

It's a simple unjust enrichment proposition.

MR TAYLOR KC:

Well of course that is what the section 17(1)(c) is aimed at, which is this essential unjust enrichment, but act or omission in that context is a general phraseology, and what you have to look to is to see, well, what is the act or omission upon which the claim is based, and whether one uses, relies on the word "act or" in which case it would be the establishment of liability or omission, it's the failure to contribute, in my submission is not the important thing. The important thing is to say, what is the relevant act or omission in this case, upon which the claim is based, and that is the establishment of liability against the person claiming contribution, because there's no right to contribution that even arises until that time, and that is precisely what the amendments for the 1950 Act, and the amendments to section 17(1)(c) of the Law Reform Act were aimed at.

KÓS J:

So is this an argument – I mean, the oddity of that is that you would have, under the 2004 Act, 10 years to bring your contribution claim, but that is then reduced down to two years by the 2010 Act?

MR TAYLOR KC:

Correct, correct, and that in the – if we go back to the 1987 report, and paragraph 164 that I just took you to, in all probability in respect of a claim, a contribution claim that is brought after the expiry of the longstop limitation period as between the plaintiff and the original defendant, the longstop is unlikely to have any operative effect because the standard limitation would come into operation beforehand, and in my submission that is reflected in the 2010 Act because instead of having a special definition for the act or omission for calculating the expiry of the standard limitation provision and the longstop provision, as was contemplated in the 1988 report, in the 2010 Act they took a contribution claim completely out of that scenario and said instead the time for calculating the expiry of a limitation period for a contribution claim will be

substituted with a special limitation period of two years, and that's under section 34 of the Limitation Act. So the principle that is being established in the 2010 Act is exactly the same as the principle that was being recognised in the 1988 Law Commission report but the method of implementing that was slightly or different in the 2010 Act and the effect of the 2010 Act is that neither the standard limitation provision or the longstop provision provided for in that Act applied to a contribution claim, instead a contribution claim must be brought within two years of the date upon which liability is established, and in adopting that methodology the legislature is giving effect to and recognising the special nature of contribution claims and the mischief against which section 17(1)(c) of the Law Reform Act was aimed.

WILLIAMS J:

Or it could've been restricting contribution claims within the longstop and the only problem with your beautiful thesis is there is no equivalent to clause 20(3) which makes that clear.

MR TAYLOR KC:

In the Building Act longstop, yes.

WILLIAMS J:

Yes, in the 19 – is it '88 or '87 draft provided by the Law Commission which specifically provided for these sorts of exceptional situations.

MR TAYLOR KC:

Yes, yes.

WILLIAMS J:

There's no equivalent to that –

MR TAYLOR KC:

Yes.

WILLIAMS J:

– and you're asking us to read clause 20(3) into these arrangements?

MR TAYLOR KC:

Yes but I've –

WILLIAMS J:

Because they work perfectly well, albeit unfairly perhaps it might be said.

MR TAYLOR KC:

Yes.

WILLIAMS J:

If you read the "add on two years" within the longstop?

MR TAYLOR KC:

Yes and I suppose my answer to that is, and you're right, and literally you're right, but my answer to that is although the Law Commission in its report recognised there was a – it was less clear what the relevant act or omission was for a contribution claim, it certainly was of the view that the act or omission upon which a contribution claim was based was the establishment of liability and that's why –

WILLIAMS J:

Was different to the underlying primary claim?

MR TAYLOR KC:

To the – yes, correct. And in my submission, and again I'll come to it in my written submissions, the fundamental difference between the parties in this case is that my learned friends make a virtue of the fact that there is no expressed reference to contribution claims in the lead-up to the 1991 Act or in any of the reports relating to that Act and therefore that means the intention must have been to exclude them, whereas I say if one looks at the legislative history and in particular the Law Commission reports which recognise the

special nature of contribution claims and in particular the mischief against which section 17(1)(c) and section 14 of the 1950 Act were implemented to prevent, it would be surprising indeed that there was any intention by the Commission or by Parliament to do away with 100 years of jurisprudence and statutory reform in respect of claims which fell within the Building Act. In my submission, as my learned friend says in his written submissions, that required – to do away with that would require an informed value judgment by Parliament and there is no indication whatsoever that Parliament ever made that value judgment, and that then brings us back –

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GLAZEBROOK J:

Can I just check, you said your friend's argument was the intention was to exclude them. I thought his argument was the intention was to include them in the longstop.

MR TAYLOR KC:

Yes, you're right, I'm sorry. I've used the wrong phraseology.

WINKELMANN CJ:

No, that's all right, I was just checking that we were on the same…

MR TAYLOR KC:

Yes, yes.

WINKELMANN CJ:

Thank you.

MR TAYLOR KC:

In other words my learned friend says the absence of any mention of contribution claims indicates an intention by Parliament to mean that they were gone in terms of any building work case, any case related to building work, and I'm saying, no, if that was the intention that would require a proper consideration by Parliament of the competing considerations and value judgments in order to

make that value judgment. So I say in the absence of any discussion of that kind, or any evidence of judgment, or Parliament forming a judgment on that issue, in my submission the words of the Act should not be construed so as to defeat that 100 years of statutory reform and jurisprudence. In other words by a sidewind, as I think Justice Clark and the Court of Appeal recognised.

In that regard in my submission the statement by the Minister, and by the Commission, and by others in that period leading up to the introduction of the longstop and building cases, is the must be read in the context, that what they were talking about was claims by building owners against persons responsible for latent defects in the building. That is the mischief that the longstop was addressed at, and when one reads the 1988 report which discusses the need for a longstop, it derives from, or includes comments by the Court of Appeal in *Askin v Knox* [1989] 1 NZLR 248 (CA), which indicated that a reasonable discoverability approach was to be adopted, but also recognised in the same case that that may require a longstop to provide certainty in the long-term, but that that was a matter for Parliament. But in my submission none of those statements, including those indications by the Court of Appeal, were indicating or stating that any longstop that might be introduced should exclude contribution claims, because at that –

GLAZEBROOK J:
Sorry, do you mean include?

O'REGAN J:
You mean include them in the longstop –

MR TAYLOR KC:
Yes, yes I do. Should include contribution claims.

GLAZEBROOK J:
Well I mean I hadn't fully appreciated that your argument was that they actually are included in the longstop, it's just the act or omission that's different.

MR TAYLOR KC:

Well in my submission they're not included in the longstop, in the Building Act longstop, and they were never intended to be included in the Building Act longstop.

GLAZEBROOK J:

But you, sorry, but you just – that's what I had understood your argument to be. When I put that to you, you said no they are because the act or omission referred to is, in fact, the defendant's liability being…

MR TAYLOR KC:

The establishment of the defendant's liability.

GLAZEBROOK J:

So your submission is they are, in fact, included in that longstop, it's just not based on their act or omission in the building but their act or omission, or somebody's act or omission.

MR TAYLOR KC:

Yes, which means, in effect, in practical terms, which means that the longstop would never have any operative role to play –

WILLIAMS J:

Because the limitation period is shorter than the longstop.

MR TAYLOR KC:

Correct, yes.

WILLIAMS J:

So you can have it both ways?

MR TAYLOR KC:

Yes, and I think the Court of Appeal actually recognises that in its decision. It says that in practical terms the longstop is just never going to have any effect.

GLAZEBROOK J:

Well of course that can happen with any longstop because it's a longstop. You could have a limitation that actually runs out before that period.

MR TAYLOR KC:

Yes, yes.

KÓS J:

Is the situation you're describing, does that parallel the position under the Latent Damage Act in the UK?

MR TAYLOR KC:

Yes, there's no specific authority that says a contribution claim is, falls within the longstop in the UK Latent Damage Act, but it is plain that the reason for that is that nobody thinks it would because the latent Damage Act is for claims based on negligence, in respect of claims based on negligence and imposes a longstop period in respect of those claims where there's late discovery, but it doesn't specifically deal with contribution claims, but our research suggests that it's never been suggested that the longstop in that act would apply to a contribution claim.

KÓS J:

And is there any suggestion that the New Zealand legislation was based on or drew upon the English legislation?

MR TAYLOR KC:

The UK Latent Damage Act is certainly discussed in the Law Commission reports, but it's really discussed in the context of looking at putting a longstop in light of the discoverability approach to the commencement of a claim in negligence.

KÓS J:

Right.

WILLIAMS J:

Can you help me out here. Let's assume the Council is D2 and being sued in contribution.

MR TAYLOR KC:

Yes.

WILLIAMS J:

If you read section 393(2) and (3) that actually defines the act or omission, you don't get to pick it. You don't get to apply your special definition there because it says, when you are suing a council this is the date of the act or omission.

MR TAYLOR KC:

Yes, but it is defining the act or omission for the purposes of a claim by the plaintiff against the defendant, and that's clearly what it's doing, and it's recognising that in a sense there's no act or omission of building work by a council, but for the purposes of this Act we're going to define what the act or omission is. We're making it clear.

WILLIAMS J:

Mmm.

GLAZEBROOK J:

I think you might be better with your argument that they're not included actually, I can understand that one. I'm having more trouble with having them included, that an act or omission defined differently, as you might have gathered from the comments.

MR TAYLOR KC:

Well, yes, I mean the act or omission argument in my submission is if you look at section 392 you have to say, well, we will define or we will determine what the relevant – that the time, the 10-year period depends on the act or omission upon which the claim is based, and if the claim is not based on the act or omission of the defendant, which arises in the contribution claim, but is based

on the act or omission of the establishment of viability, then the longstop period simply does not apply so as to defeat the contribution claim.

ELLEN FRANCE J:

So is that your answer to Mr Ring's reliance on those other provisions, sections 390 and 391?

MR TAYLOR KC:

Of?

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ELLEN FRANCE J:

The Building Act.

MR TAYLOR KC:

Oh, yes.

ELLEN FRANCE J:

The other one's talking about civil proceedings.

MR TAYLOR KC:

Yes, yes. In my submission, yes, that is the answer in two respects. One I would say you have to construe what civil proceedings – what type of civil proceedings are being aimed at and there is no barrier to the meaning of those words being different in one part of the Act to another part of the Act, and in my submission those provisions of section 390, et cetera, it's absolutely plain that they are contemplating a blanket immunity in respect of claims or civil proceedings against those persons.

ELLEN FRANCE J:

So where do contribution claims fit in then?

MR TAYLOR KC:

Well in respect of the persons that are protected by those, they're never going to be – it's never going to be an issue because they can never be sued, they'd never be seeking to make a contribution claim.

ELLEN FRANCE J:

So you are saying "civil proceedings" doesn't mean the same throughout the Act even though that subpart (2) has one heading relevantly?

MR TAYLOR KC:

In – read in context, if I need to go that far. In my submission when you look at the whole basis, the use of the words "civil proceedings" in relation to building work, those are words of general application that clearly can apply or would apply to a claim by a plaintiff against the defendant and arguably are wide enough to include a claim by a contribution – a person against whom contribution is being established or a contribution claim. Arguably they are but in my submission in construing the meaning of those words in terms of the whole of the longstop provision it's perfectly permissible to say, look, those words were not intended to apply to contribution claims and the indications of that are essentially that the date of the act or omission in respect of a contribution claim is not the act or omission, the negligent act or omission of the contribution claim defendant, it is the establishment of liability.

WILLIAMS J:

It's a fairly oblique point with relatively slim authority? I mean you refer to *Littlewood v George Wimpey & Co Ltd* [1953] 2 QB 501 (CA) which says it but it says it obliquely.

MR TAYLOR KC:

Yes.

WILLIAMS J:

Lord Denning says it – he doesn't quite say it the way you're saying it, he just simply says: "Well that can't be right"?

MR TAYLOR KC:

Yes and I say that *Littlewood* and *Tuckwood v Rotherham Corporation* [1921] KB 526 (CA) and those cases support what I am saying because if you go back to the decision of –

GLAZEBROOK J:

But can I just check what it is you're saying again? Because as I say, I understand an argument that says section 393 just doesn't apply to contribution claims.

MR TAYLOR KC:

Yes, yes.

GLAZEBROOK J:

But I'm having more difficulty understanding that it does but the act or omission is different mainly because you're looking at civil proceedings relating to building work and an act or omission relating to building work and the date upon which liability's established just doesn't cut it for me.

MR TAYLOR KC:

Yes.

GLAZEBROOK J:

But I can understand you say: "Well it's looking at something relating to building work, it only applies to building work and not contribution."

MR TAYLOR KC:

And it – correct.

GLAZEBROOK J:

I'm not saying I accept the argument but I can understand it.

MR TAYLOR KC:

No and that is essentially my argument, but the section has to be read in full and – well one of the arguments which points to it not being intended to apply

to contribution claims is that the relevant date of the act or omission for a contribution claim is the establishment of liability.

WILLIAMS J:

So it doesn't fit within the ambit of section 393 in fact?

MR TAYLOR KC:

Correct. Correct.

WILLIAMS J:

Got the wrong act or omission?

MR TAYLOR KC:

Yes.

WILLIAMS J:

Described in section 393 to be apt to apply to contribution claims?

MR TAYLOR KC:

Yes and really when one looks at section 393 and one looks at the legislative history, it is clearly intended to cover claims by a person who has suffered loss against a defendant whose act or omission has given rise to the damage which was caused. That's what that Act – that's what that longstop provision was clearly aimed at and the wording of the section is perfectly apt to capture that so –

GLAZEBROOK J:

As I say, I understand that argument, I just didn't understand your answer to me when I asked you whether that was your argument, that was attempting to have a gloss on section 393 but –

MR TAYLOR KC:

Yes. My essential argument is that section 393 should be construed so as not to apply to contribution claims because if you construe it differently you're really saying that Parliament has overridden all those years of jurisprudence and a

different mischief entirely to what this legislation was aimed at and it's done it by a side wind.

WILLIAMS J:

It hangs on – right, it hangs on the relative clarity of the proposition that the liability and the setting of the clock ticking for the contributor is their liability and not their act?

MR TAYLOR KC:

Yes. Correct. Correct because as is plain on the facts of this case, the ability to bring a contribution claim, the right to bring it, hadn't even arisen. It would've had to – the Council, if it wished to bring a contribution claim, would've had to bring it before the claim even against the Council had been made and if my learned –

WILLIAMS J:

So if you're right about that –

MR TAYLOR KC:

Yes.

WILLIAMS J:

– and the cases aren't all your way, but if you're right about that –

MR TAYLOR KC:

Yes.

WILLIAMS J:

– then the provision in section 393 that says these are the acts or omissions that are covered here –

MR TAYLOR KC:

Yes.

WILLIAMS J:

– is your friend, not your foe?

MR TAYLOR KC:

I'm not sure I'm following, Sir.

WILLIAMS J:

It's that very provision which demonstrates –

MR TAYLOR KC:

Yes.

WILLIAMS J:

– contribution is not included, ironically. It's the very description in subsection (3) –

MR TAYLOR KC:

Yes.

WILLIAMS J:

– that allows a contributor to be excluded, strangely, because it says these are the acts or omissions.

MR TAYLOR KC:

Yes.

WILLIAMS J:

The issuing of a certificate or the issuing of a –

MR TAYLOR KC:

Oh, I see, I see what –

WILLIAMS J:

– PP whatever it's called.

MR TAYLOR KC:

Yes. In –

WILLIAMS J:

Those are the acts or omissions about which the longstop will apply, you say the authorities are – that those are not the acts or omissions relevant to making a contributor liable?

MR TAYLOR KC:

Correct but I wouldn't want to be understood to be saying that those provisions mean that if for instance Beca had been the primary defendant it would've stopped a contribution claim being made against the Council after the expiry of the limitation period. I wouldn't –

WILLIAMS J:

No. No, well that's clearly –

GLAZEBROOK J:

No, well your argument is they're just not – contribution is just not included in section 393.

MR TAYLOR KC:

Yes.

GLAZEBROOK J:

And that's shown by the fact that the – they're looking at building claims and a contribution claim is not a building claim and the history of a contribution claim. So I must admit when I asked you the question I was asking whether you're relying on those specific provisions. To a degree you are but you're also relying on the history?

MR TAYLOR KC:

Very much so and –

GLAZEBROOK J:

And a necessity to make it absolutely – rather than making it absolutely clear they're not included, a requirement to – would it be a requirement to make it absolutely clear that they are…

MR TAYLOR KC:

Owned.

GLAZEBROOK J:

Included.

MR TAYLOR KC:

That is –

GLAZEBROOK J:

So it's the –

MR TAYLOR KC:

That is absolutely my submission. That is absolutely my submission.

GLAZEBROOK J:

Yes, thank you.

1250

MR TAYLOR KC:

And really it comes back to this, you're having to construe the terms of section 393 and I'm saying in doing that, if you could find a way where the purposes of both Acts are achieved, then that is what you should do when you're construing the application of section 393 to contribution claims, and that's a well-established principle of statutory interpretation recognised by the Court of Appeal in *Stewart v Grey County Council* [1978] 2 NZLR 577 (CA) and I think by Justice Richardson, but it's one that has particular application in this case, and what I'm really saying is my learned friend seeks to rely on the Law Commission reports as if they were encouraging or supporting a view that the

Building Act longstop was intended to exclude – or it was intended to apply the contribution claims, and in my submission the Law Commission reports not only don't support that proposition, they are contrary to it, and I accept what my learned friend says, that looking to the 2010 Act to construe the effect of the 1991 and 2004 Acts has a certain element of a logicality about it, but where I think – where in my submission it does have some role and meaning is that the 2010 Act, in respect of contribution claims, provides the recognition of the special nature of those claims, and the mischief against which the rules relating to contribution were introduced.

It recognises them in the 2010 Act in the same way that they were recognised by the Commission back in 1987 and 1988, and all the 2010 Act does differently is to provide a different mechanism for dealing with that issue and protecting those contribution claims. But recognising that that means even with the application of the longstop, there could be contribution claims that are brought after the period of the longstop, and therefore we're going to put in a two-year limitation, but the basic principle has been the same throughout, and if you look at the 1988 proposed legislation, it was saying basically the longstop and the standard limitation will apply but they will apply for the purposes of a contribution claim from the date on which liability against the defendant is established.

KÓS J:

Is the mischief from the 2010 Act a product of your construction of the Building Act, that is to say that it doesn't cover contribution claims and therefore there's a potential for those to run very late to be, as the Commission put it, become very stale?

MR TAYLOR KC:

That is one – I certainly – in my submission, that is one way of looking at it that – as recognised by the Court of Appeal, depending on which Act applies to a contribution claim, there's either a six-year limitation period or a two-year limitation period and the –

KÓS J:

But there's also the interregnum which is the time taken to establish the liability of D1?

MR TAYLOR KC:

Correct and certainly the 2010 legislation by implementing that two-year rule, limitation is introducing a new and special limitation period, which applies exclusively to contribution claims, and in that sense it does remedy at least the – or recognises and attempts to remedy the consequential, continued consequential consecutive contribution claims, which theoretically could eventuate but at least if a contribution claim has a limited two-year limitation period from that date, the likelihood of that sort of repetitive consequential contribution claim is going on almost indefinitely is at least reduced, but for the reasons that I have indicated in the written submissions, that idea of these consecutive contribution claims going on ad infinitum is, in practice, not an issue. It's never been a problem, it's not one that's addressed in any detail in any of the Law Commission reports, and that is because there are strong incentives on a defendant to a proceeding to join in contribution defendants to that proceeding, even before the right to contribution has actually arisen, simply to spread the cost and the risk among the people that should be properly involved, and it would be unusual for contribution proceedings to be brought separately from the main proceeding, except in some limited circumstances. So this idea that you should read the provisions of section 393 to exclude the possibility of that ongoing consecutive contributory negligence claims, in my submission, has no substance as a reason for doing so. It's a problem that's existed for the 100 years or so that section 17(1)(c) has been in existence, and it's not one that has attracted any significant attention when considering longstop provisions.

O'REGAN J:

What do you say to Mr Ring's point about the concern at the time of the Building Act reforms that certifiers and other participants in the building industry needed to be able to be insured, and needed to have certainty as to what their liability would be, so they could insure against it.

MR TAYLOR KC:

Yes. My submission that goes to the length of period for the longstop, and that's all it's –

O'REGAN J:

Well no it doesn't because with contribution you've just acknowledged that if there's consecutive claims there isn't, you don't know the length. You've got no idea how long it could be.

MR TAYLOR KC:

Yes, but, I quite agree your Honour, but the point I'm making is that when the context of those debates about insurance was insurance by, in respect of latent defects by building owners against members of the building industry, that's the primary risk that the insurers are facing, and what it was saying, wrongly as it turned out, was building certifiers and others in the industry aren't going to be able to get insurance if the their exposure to liability is more than 10 years. That proved to be wrong, but the submission I'm making is when you look at what the whole purpose of longstop was, it was to put a longstop on claims by building owners in respect of latent defects who had the reasonable discoverability test being applied to the commencement of time.

WILLIAMS J:

But wouldn't Beca say, it is now being placed with a claim that at root is a claim by the building owner for latent defects?

MR TAYLOR KC:

Yes, yes it would.

O'REGAN J:

So isn't Beca exposed to a liability that the framers of the 1991 Act thought they were protecting it from?

MR TAYLOR KC:

No, in my submission not, because the longstop was aimed at providing certainty in respect of claims by building owners against persons involved in the industry. It simply wasn't addressing the issue of contribution claims which had been recognised by the legislature for 100 years as being quite different to claims by persons who had suffered damage.

GLAZEBROOK J:

But you accept that they would have exactly the same insurance difficulties assuming the 10-year issue was correct?

MR TAYLOR KC:

The difficulty that arose post the Act –

1300

GLAZEBROOK J:

You're not suggesting they would have insurance outside of the 10 years are you?

MR TAYLOR KC:

Absolutely they would, and this is one of the problems with –

GLAZEBROOK J:

So why do you – well that's not what Parliament thought.

MR TAYLOR KC:

It may not be what Parliament thought because Parliament at the time was considering the role, the insurability of building certifiers and was persuaded by members of the insurance industry that they would only be able to get cover for a 10-year period, and that, what the basis for that was is unclear because professional indemnity policies at that time and then are claims made policies, and unless there is a retroactive date which says it's only going to be a claims made within a certain period, the availability of that insurance is still there. There's no suggestion, no evidence –

O'REGAN J:

I think when the reform was initially proposed the idea was certifiers would have fixed insurance for 10 years, not claims made policies, and the fact they did have claims made policies meant the whole reform failed, effectively.

MR TAYLOR KC:

Correct, correct, but that's the point. That was the context in which this 10-year period, instead of a 15-year period, was established because the insurance industry was saying, well, they're only going to insure these building inspectors, certifiers for a period of 10 years from the date on which they made it. But that, whatever the genuineness of that belief was at the time, it didn't come to pass, nor did it deal with the fact that most professional indemnity policies at that time then and now, in fact I would say all indemnity policies at that time and now, are claims made policies, and there is a discussion of this in I think the report, the decision of the Court of Appeal, which is the supplementary document, I'm sorry I can't put my finger on it immediately.

KÓS J:

Is this, sorry the judgment on appeal here?

MR TAYLOR KC:

No.

GLAZEBROOK J:

Do you want to take us to it after lunch?

MR TAYLOR KC:

I'll take you to it after lunch, yes.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.16 PM

GLAZEBROOK J:

Mr Taylor?

MR TAYLOR KC:

Thank you, your Honour. Before the adjournment I was just discussing this issue of the insurance availability and the discussion of that, and the discussion I was referring to was in the BIA case, which is in the appellant's supplementary bundle of documents, *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 and it's tab 26 at 700. Could we just bring that up. If we start please at paragraph 84. Yes, it's basically recording the provision – the position and you'll note there that it says: "The only insurance available was on a claims-made basis." And it explains that the Commission was over-sanguine in its report as to the ability of building certifiers to obtain insurance cover, and that issue is discussed again at paragraph 92 of that decision.

But the real point is that although the type of insurance envisaged for building certifiers at the time of the 1991 Act was – turned out not to be available, there is no evidence that claims-made insurance of the kind that normally applies in professional indemnity policies, and for which persons often obtain run-off cover even though they have ceased to practice in the industry, is somehow unavailable. There's just no evidence of that and it can't therefore be relied upon as a reason for construing section 393 in the general way which is being proposed.

O'REGAN J:

I think Mr Ring's also making the point that now people – whether they could've got cover or not, they haven't got cover, and they would sort of retrospectively now be exposed to having proceeded on the basis that the High Court decisions to the contrary to your argument are – were the law.

1420

MR TAYLOR KC:

That's a possibility but there's not actually any evidence of that. There's no evidence as to what the nature of the insurance arrangements are between people who have ceased operating in the industry more than 10 years ago, and really what I'm saying is when one looks at what the reason for the 10-year as opposed to 15-year longstop was, it was to address this issue of availability of

insurance for building certifiers, but in the end that basis for suggesting a 10-year period as opposed to the 15-year period recommended by the Commission was illusory. But that does not detract from the fact that there is no evidence that professional indemnity insurance, including run-off cover, is unavailable or would not be available.

GLAZEBROOK J:

Isn't that beside the point if we're looking at what Parliament's purpose was at the time of passing the legislation?

MR TAYLOR KC:

It's not beside the point but it reduces the importance of that factor in the decision-making relating to the longstop, and it's –

GLAZEBROOK J:

How does it…

MR TAYLOR KC:

Sorry?

GLAZEBROOK J:

Just because they're wrong, and have found out their wrong afterwards?

MR TAYLOR KC:

Well it's the explanation as being put forward by my learned friends that's saying this was intended to stop any liability for any industry participant for any type of claim including contribution claims. That that's, that this insurance issue was the basis for that, and what I'm saying is, well actually that's not right. When you look at it, it was talking about availability of insurance for building certifiers, and evidence that was given to the Committee that that would only be available for a 10-year period, and what I'm saying is that this insurance justification for reading the longstop as applying to all sorts of claims, including contribution claims, in my submission is not a principle basis upon which to approach the interpretation of the provision.

KÓS J:

I suppose building certifiers were unlikely, though, to be D1, were they? The first defendant. They might be joined as a second, third or fourth, and more likely to be contribution defendants, aren't they?

MR TAYLOR KC:

No, they could be a building certifier in the same way as a local council could be directly liable. There'd be a duty owed to the original –

GLAZEBROOK J:

Cap them at their level of insurance they were required to have, I doubt they'd be frontline.

MR TAYLOR KC:

Sorry?

GLAZEBROOK J:

Well they were only required when they had about a million insurance and I doubt that that's the deep pocket the plaintiffs would be looking for but – which was one of the flaws of the whole system of course.

MR TAYLOR KC:

Well in my submission the aim of the legislature in trying to impose a longstop that would enable provision of insurance to building certifiers was to address that deep pocket problem. They were saying we want them to have insurance, and indeed under the Act we're going to require them to have insurance in order to ensure that they've got the ability to pay. I would have thought that normally they would have been, if any plaintiff was contemplating suing persons who were responsible, they would be upfront, not necessarily there just as a contribution defendant, and that certainly was what Parliament was trying to achieve by enabling insurance.

KÓS J:

Well they were trying to achieve their being building certifiers at all, weren't they, because otherwise if they couldn't obtain insurance then you wouldn't have had certifiers and the industry would have had a major crisis.

MR TAYLOR KC:

Yes, yes, and, in fact, that's what happened because insurers – building certifiers couldn't get sufficient insurance, but not just them, what happened in the period after the 1991 Act was the introduction of exclusions in many professional indemnity policies in respect of watertightness issues.

KÓS J:

Mmm.

MR TAYLOR KC:

There's a whole lot of changes in the insurance environment during that period, and of course by the time of the 2004 Act building certifiers had been dispensed with I think. In any event, really my submission is when one looks at all of these pre-legislative materials, including the statements to the House, and the correspondence with the Minister, it's clear that the longstop was aimed at the reasonable discoverability issue, and the fact that there could be stale claims by building owners, which could have no temporal limit, and that the longstop was imposed to put a temporal limit on those claims in respect of latent damage, which would not otherwise be temporally limited, and if you accept that that was the purpose of the longstop, and in my submission that unquestionably was the purpose of the longstop, all of these statements by the Minister Carter et cetera in the House when read as talking about that issue, stale claims by plaintiffs who have suffered damage, and putting a temporal limit on those stale claims I light of the reasonable discoverability principles, if you read those statements in that context they're absolutely consistent with that being the purpose. What is important is that there is nothing in any of those statements which would suggest that when making those statements the Minister or the Commission had in mind to apply to longstop to contribution claims which were addressing an entirely different mischief.

GLAZEBROOK J:

Can I, we should probably have brought this up with Mr Ring, but he was in fact just answering issues in relation to those letters.

MR TAYLOR KC:

Yes.

GLAZEBROOK J:

It wouldn't be normal to look at letters to Ministers, would it, in the context of statutory interpretation?

MR TAYLOR KC:

It wouldn't be. What I would say is that really no real weight should be put on those letters, and this is the danger, of course, that when looking at reports of the Commission, or correspondence to the Ministers, all of those sorts of issues, the risk is, or the danger is reading those int the same way as you would read the actual legislation, and in my submission these legislative materials are there to give an indication as to what was being intended, and what the legislation or therefore what the purpose of the legislation was, and to that end I don't particularly object to those letters being, having regard to, but those letters themselves don't take you that far, and could I just refer you to my written submissions at paragraphs 37 and 38, and really in particular to the footnote at paragraph 38 of my submissions where I've referred to the submission to the Internal Affairs.

1430

Could we just bring that document up, it's appellant's bundle at 19, and that's one of the letters that was being referred to and if you just look at the footnote that I've got at footnote 48 of the written submission. What we see in that letter is a discussion of various issues that arise that have arisen and have been considered by the Commission and then at the end of that letter it says – the report concludes by saying that although the longstop, and they're talking here about the Building Act longstop, does "not address the wider issues of liability as they apply to building producers (or indeed any other party)", but it was

hoped the very limited reforms that are proposed in the paper "help strengthen the momentum that already exists for an overall reform of the law of liability along the lines" indicated by the Commission it its 1998 report.

In my submission what that indicates is that the Commission when it was saying: "Yes, we support this longstop provision," wasn't saying: "But we support it applying across the board to contribution claims and other claims which we recognise should be treated differently for the purposes of a longstop."

WILLIAMS J:

Except they mention "contribution" specifically in paragraph 4, don't they?

MR TAYLOR KC:

They do. They do, but in my submission they're saying these are the issues that we've been talking about, this limited longstop provision we don't think is going to cut across those issues, they'll be dealt with at a different time. But in my submission the thrust of these letters is not indicating an intention or a recommendation by the Commission that the longstop under the Building Act should apply to contribution claims when the whole thrust of the Commission's reports, including the 1988 reports, were that the longstop or at least the date of the act or omission for the longstop should be the date on which liability was established by – against the defendant.

So at that point I do want to take your Honours to the decision of the English Court of Appeal in *Tuckwood* which is the decision that's been considered and approved in the *Unsworth v Commissioner for Railways* (1958) 101 CLR 73 and *Nickels v Parks* (1948) 49 SR (NSW) 124 (CA) cases that are included in the respondent's bundle of authorities. But could we go to the respondent's bundle of authorities at page – at tab 11 and if we go to page 146 and that's what's come up, and the Court of Appeal were unanimous in that case in saying that a provision in a statute which barred any actions in respect of any alleged neglect or default in the execution of the Act were statute barred if not brought within six months and, in this case, the action, and that was a general limitation provision and in that case the question was whether the right to bring a

contribution claim or an indemnity claim under a different statutory provision was barred by that limitation, and you will see there that Lord Justice Banks at page 533 of the decision, if you go down about a third –

GLAZEBROOK J:

Can you just make sure you're talking into the microphone or else we're not going to be getting the – I suspect…

MR TAYLOR KC:

I'm sorry, yes.

GLAZEBROOK J:

That's fine. It's easy to do.

MR TAYLOR KC:

So the question that was posed was: "The question thus is," and you will see there his Honour concludes: "In my opinion, this action," that is the action for indemnity, "is not within those words— 'or in respect of any alleged neglect or default'," and his Honour goes on to state: "The question thus is, is this action claiming the right to the statutory indemnity an action in respect of any alleged neglect in the execution of any such duty?" So you've got a sort of similarity in the breadth of the wording to the wording that we have in this case, and his Honour states: "It is true that in order to succeed in the action the plaintiff must establish that the workman would have been entitled to recover damages against the corporation for the negligence of their service. That no doubt is an essential part of this cause of action; but I do not think that it is true to say that the action claiming the right to the statutory indemnity is an action in respect of any alleged negligent act," and obviously the wording is different but on my submission the purposive approach to the wording that's being addressed in this case is equally applicable to the approach of the Court in that case.

The Judge then goes on to say: "To accept any other interpretation will lead to this result, that in a very large number of cases, if not the majority of cases, a person who sought to take advantage of the indemnity clause would find that

he would be out of time," and so the Judge said that's another reason why we should be adopting a purposive approach to the interpretation of these words, and in my submission that approach is also indicated in the decision of the High Court in *Klinac* and also the decision of the Court of Appeal in *Gedye v South* [2010] NZCA 207, [2010] 3 NZLR 271, and in both of those instances part of the reasoning of the Court in both *Klinac* and in *Gedye* was that if it were otherwise the giving of the warranty or the misrepresentation in that case would be meaningless if the negligent act of the person who gave the representation in terms of the building work had taken place more than 10 years previously, and they really, the Courts in those – and that reasoning was also reflected in the decision of the Supreme Court when it refused leave to appeal in the *Gedye* case, and that's at [2010] NZSC 97. The Court, in refusing leave, at paragraph 4, said: "Furthermore, on the argument proposed for the applicant, if the warranty had been given on a sale more than 10 years after the building works were done, it would never be enforceable by proceedings. That cannot be the position."

1440

So, and the Court in that case agreed with the conclusion of the Court of Appeal in *Gedye* that the misrepresentation, although it involved proving that the building work was not compliant, so similar again to the *Tuckwood* situation, wasn't caught by section 393, and in my submission the situation the Court is faced with here is precisely the same in the context of contribution claims because, as the facts of this case show, if my learned friend is right, the right contribution, the right to claim contribution disappeared even before the claim by the BNZ against the WCC and that, in my submission, cannot be right for essentially the same reasons as persuaded the Courts in those cases.

Obviously the issues were slightly dissimilar, none of them – certainly *Gedye* wasn't talking about a contribution claim but in my submission you've got to look and say, really, is this what Parliament intended? That you have rights of contribution under section 17(1)(c) and that under that provision you can bring a claim if the person you're claim about – claiming against, if they had been sued in time would have been liable.

GLAZEBROOK J:

So are you saying therefore that a claim in – because a misrepresentation is a totally separate act, isn't it?

MR TAYLOR KC:

Yes, it is. It is.

GLAZEBROOK J:

So it's not – I mean you do say it's not totally on foot?

MR TAYLOR KC:

Oh, I do but what I am saying is that a contribution claim is a totally different type of claim. It is –

GLAZEBROOK J:

But not based on any different Act? It's based – because the misrepresentation is a totally different Act from the building?

MR TAYLOR KC:

Correct.

GLAZEBROOK J:

This is based on the building and a requirement to give contribution in respect of that?

MR TAYLOR KC:

Correct but the important point is the nature and basis of a contribution claim is wholly distinct from and different to a claim by a plaintiff/building owner for damage in respect of work done by somebody or building work done, and certainly in a contribution claim brought by a contribution defendant in a building case, in a general sense building case, is going to involve establishing that the work done was negligently done by the contribution claim defendant. The basis of the claim is not that. That is an incidental part of what has to be proved as part of the claim but it's not based on that, it's based –

GLAZEBROOK J:

You might say that but it's not very incidental, is it? I mean it's absolutely vital to the claim rather than a precondition for a – a precondition, for instance, for proving a misrepresentation?

MR TAYLOR KC:

It's no difference in terms of its importance than was the case in *Tuckwood* where the negligence of the person against whom indemnity was being claimed, and for whom there was a right to claim indemnity, was an essential part of the cause of action, and the same can be said of a contribution claim, but the basis or the nature of a contribution claim is to seek proportionate contribution from other persons that are liable for the same damage.

GLAZEBROOK J:

I can understand the *Tuckwood*, I just have more difficulty with *Gedye* I think. I can understand your argument based on *Tuckwood*, just more difficulty with *Gedye* given that you've got a – the claim is actually a specific act that's been done.

MR TAYLOR KC:

Yes, and in my submission if you look at *Gedye* in that sense, that explains their comments that it's the act of the defendant that you're looking at, but I am saying is that's absolutely fine in the context of the *Gedye* decision but it's not a bar to saying what is the true act or omission or basis of the claim for contribution that's before us, and the fact that part of that involves proving a negligent act by the defendant which relates to building work is not an answer to that question, adopting the approach of the Courts in *Tuckwood* and the purposive approach adopted in *Gedye*.

Just while I'm on *Tuckwood* could I also refer the Court to similar statements by the other Court of Appeal Judges in that case and the first is at page 149 of the Casebook in Lord Justice Scrutton's decision. He said there were three reasons why he thought the answer could not be that the indemnity claim was excluded and he makes the same point: "It is true that negligence is one of the

ingredients of the liability to indemnify, but there are several other ingredients of the liability," and goes on to state what those are.

Similarly, if we go to Lord Justice Atkin at page 152 of the Casebook, I'm sorry, at 153, where his Honour discusses the implications of the situation if what was being said was correct and his Lordship says: "To my mind this was never contemplated, and affords a very strong reason for refusing to put the construction upon the Act of 1893 contended for by the defendants. … Although proof of neglect or default in the corporation in respect of its tramway undertaking is necessary in order to claim the indemnity, the action is not brought in respect of that neglect or default." Again, I say the same sort of reasoning and the same approach applies here.

Could I just deal with what is probably a less important aspect of my learned friend's submissions, but my learned friend in his submissions was trying to suggest to you that the Law Commission in all of its reports was basically supporting this idea that a longstop would apply to a contribution action, and in the course of that my learned friend referred to the 1998 report which is at tab 18 and in particular section 20(4) of the draft legislation that was annexed to that report, and could we bring that up, and you'll see there that at subsection (3) we have this particular definition of the date of the act or omission which was to apply for the purposes of the Act, and in particular if that Act had been introduced would have applied for the purpose of determining when time began to run for both the standard limitations and the longstop limitations.

1450

Then subsection (4) says subsection (3) does not apply to claims to which section 14 applies, and if we go to section 14, section 14 deals with what are defined there as ancillary claims, and for the reasons expressed by the Court of Appeal in its decision, I accept what the Court of Appeal says, that a contribution claim is not an ancillary claim of the kind that is contemplated in the 2010 Act nor, in my submission, is it an ancillary claim which was contemplated by section 14 of the draft 1988 legislation.

So my learned friend's reference to section 20(4) is, in my submission, a red herring, and I don't want to take the Court through the detail of why that conclusion is reached, except to say that in the 1988 report at paragraphs 410 to 433 the Commission is discussing the principles that it was saying ought to apply in respect of various types of ancillary claims, including third-party claims, and I don't want to take you to it but there is an example given at 423 which talks about third-party claims of the kind that this part of the report was addressing, which in that case was a third-party claim in respect of a direct cause of action between the defendant and the third party, and at paragraph 428 of the report it answers a question in respect of that type of claim.

But what, in my submission, is plain is that in addressing that type of third-party claim, and the limitation periods that should apply in respect of an ancillary claim, being one that has been added to an existing claim, it was not referring to contribution claims and that is what section 20(4) was addressing. It was making it clear that subsection (3) didn't apply to the types of ancillary claim that the report was discussing, and when we come to the 2010 legislation the issue that was being discussed there is addressed in the 2010 legislation by the introduction of the discretion to deal with applicable limitation periods to various types of claim as defined as being ancillary claims.

So that's – the same issue was being discussed in 1988 and in 2010 but in 2010 the legislature adopted a slightly different approach to how to deal with limitation periods in order to ensure fairness. But the point I'm making is that it's absolutely plain that those provisions, section 14, and indeed under the 2010 Act, are not intended to apply to contribution claims which have specific provisions.

So I'm sorry, I apologise for the somewhat long-winded nature of that but I am confident that when reading those provisions in the report it becomes clear that they are not talking about those principles applying to contribution claims.

I'll just very, I think, in closing, go briefly to my written submissions, and in particular to paragraphs 91 to 94 of my written submissions, because in my submission these are the issues that dictate in my submission a purposive approach to section 393 and one which results in contribution claims not being included within the longstop provision.

So at paragraph 91, and I've really already made this submission, I think, in answer to a question from Justice O'Regan. The facts of this case highlight the fundamental flaw in Beca's argument. On Beca's case, any contribution claim in respect of its PS4s for the substructure and superstructure had to be issued by 12th of March 2018. But the 10-year period for the building owner to bring a claim against the Council did not expire until 27th of March 2019. Again, that just cannot be right. That cannot have been the intention of Parliament.

The impact of Beca's argument is that the clearly protected right of a defendant (the Council here) to bring a claim following a quantification of the original claim against it is stripped away before that right has even accrued. The English Courts, and the Courts below in this proceeding, have recognised that such injustice should not be permitted. In my submission, the Court would only adopt an interpretation that had that effect if it was persuaded that there was no other possible interpretation.

If I can then just go briefly to paragraphs 93 and 94 of my submission, and that is that the approach urged on you by the respondent and accepted by both the High Court and the Court of Appeal is that this approach ensures that the purpose behind the addition of the words "if sued in time" to section 17 is maintained. Those words contemplate that limitation provisions, such as the BA longstop, may apply to the original proceeding, but then expressly directs that those limitation provisions do not apply to exclude a contribution claim, and, of course, I've discussed in some detail, and the Court of Appeal has discussed, the very mischief which that provision was directed at. In my submission Beca's approach strips the words "if sued in time" of their full meaning and intended purpose and restores the injustice that those words were intended to overcome, and it does that in the absence of any evidence that the purpose of the

legislation or the intention of Parliament was to strip away those contribution rights in respect of claims relating to building work.

1500

O'REGAN J:

What do you say in response to Mr Ring's argument that the converse is that if you get consecutive contribution claims you can have liability extending out for, you know, 10, 20, 30, 40 years?

MR TAYLOR KC:

The short answer to that is that that's a problem that's existed since section 17(1)(c) and the 1950 Act were implemented. It's not a problem that in practice has given rise to those sorts of extreme results and in my submission there's nothing to indicate that Parliament, when introducing the Building Act longstop, was attempting to address that problem which, in my submission, is a theoretical one and not a problem in practice. Again, if one looks even at the insurance position, the position of insurers in respect of the primary liability that they are insuring against, which is usually a claim by a building owner against an insured, benefit from the ability to bring contribution claims because they can spread that risk among other defendants who have contributed to the damage which is covered under the primary policy, and there's no evidence that policies are being drafted in a way that would exclude contribution claims. Basically section 17 was addressing the injustice of being unable to claim against others because you had – they had not been sued in time by the original plaintiff.

Unless your Honours have any further questions, those are my submissions.

GLAZEBROOK J:

Thank you very much. Mr Ring?

MR RING KC:

Thank you, your Honours. I think I'm going to make probably four, deal with four things. I think it's four. First, my learned friend's proposition that the

Law Commission before 2010 consistently rejected the date of conduct as the start date for the longstop. I just want to make the general point of course that what the Law Commission recommended in the general limitation provisions, is quite a different thing to what was going on in an industry-specific statute under the BA 1991 and the BA 2004. But quite apart from that, I just wanted to remind your Honours about PP3 in 1980, which is referred to in our submissions at E4, and if that could be put up for a moment, and in particular if what could be put up is paragraph 156 at 27/749 which is the two diagrams, 1A and – sorry, A1 and A2.

There's no question if you look at A1 and A2 that the authors of this report, the Commission, were specifically considering not only claims by the owner against the people responsible directly but also contribution claims and identifying the problem of the 27-year potential liability in the example in diagram A2, and then if you go to A4, sorry, diagram D, the proposal is very clearly a proposal that brings a sudden and absolute end to liability with the longstop, and it would be totally inconsistent with that diagram for the authors of this proposal to have been anticipating contribution claims after the date of the longstop.

Just backing up, please, a few lines, to the UK decision – the position. My friend referred to the Latent Damage Act in the United Kingdom. Whatever is the actual position in the UK, the authors of this report very clearly understood or believed that the longstop in the UK was absolute and included contribution claims as well. Again, otherwise that diagram would be different given the other diagrams that have taken place there.

KÓS J:

Sorry, help me to understand why that's so.

MR RING KC:

Well, because the longstop – everything finishes at 15 years. Damage discoverable, longstop 15 years. Everything comes to an end. If you compare that to the previous diagram…

KÓS J:

It would be helpful if the diagrams included contribution. A2 is a bit better at that.

MR RING KC:

Well, that's the point, your Honour. They don't include contribution and if it was anticipated that or understood that the English Act allowed for contribution after the longstop, given the way diagram A2 is drafted, you would have expected that to be conveyed, but what is being conveyed here is that the longstop is absolute.

WILLIAMS J:

Well, it would have been useful if it had conveyed the contribution was also stopped at that point because they make a special point of it in A2 but don't mention contribution in any of the later ones, which is frustrating.

MR RING KC:

Well, your Honour, I would have called it a matter of necessary implication at the very least or reasonable implication from what they've said.

KÓS J:

That's the very problem though, isn't it? Here we are trying to construe these charming little diagrams as if they're statutory, and just not.

MR RING KC:

Well, with respect, your Honour, I'm not suggesting that they be given a statutory interpretation in themselves. I'm just trying to objectively address what to a reasonable reader this must convey in relation to contribution claims, and that is that they are recognised by the author in A2 but in all subsequent diagrams there's an absolute longstop. That can only reasonably suggest, as far as the author was concerned, any contribution claims were inside the longstop and not after it. That's the only submission that I'm making in that respect.

Also let me take you to the 2007 –

GLAZEBROOK J:

Can I just say what you say about clause 20?

MR RING KC:

Yes, let's address clause 20.

GLAZEBROOK J:

Of the draft legislation, that is.

MR RING KC:

Subsection (4) says that section 3 doesn't apply to claims to which section 14 applies. If you go to section 14 it allows for the longstop defence but only in relation to ancillary claims. So a contribution claim which is brought as a standalone proceeding is still going to be subject to the longstop in section 5. If you go back to section –

GLAZEBROOK J:

What about the first part of clause 20?

1510

MR RING KC:

Yes, but they're not mutually exclusive. The other proposition that we make in relation to this is the one I said before, that it's general.

GLAZEBROOK J:

So you're saying that they're cumulative?

MR RING KC:

Yes.

GLAZEBROOK J:

Okay, thank you.

MR RING KC:

And that this is a general statute, it's not an industry-specific statute.

GLAZEBROOK J:

Yes, understood.

MR RING KC:

The 2007 M16 report, which is referred to in C3(4), we go to appendix 2 at 362, 363. So again there's no question about it here. Proposed limitation periods. Start date for ultimate period for contribution claims, next page, act/omission date.

UNIDENTIFIED MALE SPEAKER: (15:11:18)

Yes, but with the exception at the end.

MR RING KC:

So, again we're saying that there's no necessary inconsistency there. The second issue that I wanted to address at this stage was the wording of section 393, and the proposition that the date of the act or omission in a contribution claim is intended to be the date when the liability was established, which was one of the alternative propositions we put up, and I want to make two points in relation to that. First of all, the proposition that the focus in a contribution claim is on the omission, and it's the omission to pay that is material, well of course at the time that we're talking about here, there is no liability to pay, because it hasn't been established. So there can't be any omission to pay that is relevant to that interpretation.

The second point is the one that focuses on the section 393(3)(a) and the point there is that if the plaintiff sues a defendant counsel, then the, direct, then the act or omission under subsection (3)(a) is the date of the issue of the certificate or the consent, but my learned friend's proposition is that if the, another defendant sues the Council for contribution, but it's a different date. It cannot be a different date. It would have to be the same date because of subsection

(3)(a). So there can't be contribution claims buried somewhere in the wording of section 393(2).

Third point I wanted to make, your Honours, is in relation to the insurance. In my respectful submission the insurance position is crucial to the proper interpretation of section 93 in this context, because it's the whole underlying basis of the new scheme that was being introduced by this industry-specific act, and I think there's four points which, in my submission, just logically follow.

The first is that the insurance availability to those responsible for defective building work was crucial the success of this industry-specific statute.

Second, based on the material that Parliament had before it, it did not believe that there was any insurance availability for a liability for not only certifiers but generally after the 10 years from when the defective work was done.

Third, contribution is just as much a form of liability in that context as any other form of liability.

Finally, in light of those three propositions in my submission it is inconceivable that Parliament would have intended to exclude contribution liability from the longstop.

Just while I'm on that topic, if I can take your Honours to 21/569 which is referred to in our synopsis at – I have it up anyway. This is in response to my learned friend's proposition that the Act was all about building certifiers and nobody else and the insurance was all about building certifiers and nobody else. I referred your Honours to the third paragraph down previously and I now want to go three paragraphs down from that. "The benefits of having a longstop will not apply just to building certifiers; the same benefits will also apply to territorial authorities, builders, architects and engineers…"

GLAZEBROOK J:

Who's…

MR RING KC:

This is Graeme Lee, the Minister of Internal Affairs, second reading. He makes the point that we emphasise, that insurance for ordinary building professionals was at issue here, and finishing with the proposition: "The effect of the changes that I have announced will be to make that cover available for periods of up to 10 years." Again, emphasising the absolute nature of that 10-year liability tied in with the understanding of the availability of insurance.

Then the final point is to pick up on my learned friend's emphasis on nearly 100 years, I think he'd described it, but perhaps slightly overly exaggerated, but nearly 100 years of contribution statutory liability, that was apparently at the forefront of Parliament's, or should be treated as being at the forefront of Parliament's consideration, and again in my submission two points at least to be made in relation to that. One, if that was right, where is it, because it's not mentioned at all, and, second, that completely in my submission underestimates or disregards the industry-specific context that we were dealing with here. Parliament wasn't trying to reform the law on contribution or preserve the law on contribution generally. Parliament was trying to solve a specific industry problem. We need certifiers; they need insurance; insurers need a limit of liability. What can we do to give them that limit of liability? We'll give them a 10-year longstop. It would be completely incompatible with that to say: "Oh, we'll only give it for some liabilities and we'll make all the others, the contribution liabilities, they can stay open ended."

Unless I can help your Honours with anything further, those are our submissions in reply.

GLAZEBROOK J:

Thank you very much, Mr Ring. Was there something…

MR TAYLOR KC:

May it please the Court, could I just address one aspect of what my learned friend said in reply and it's only by reference to the 2007 report and the schedule?

GLAZEBROOK J:

Certainly, and Mr Ring, if you need to reply again after that, that's fine.

MR TAYLOR KC:

Could we go to the 2007 report and my learned friend took you to –

GLAZEBROOK J:

And again perhaps if you can just move the microphone or…

1520

MR TAYLOR KC:

My learned friend took you to appendix 2 at page 366 was it, I'm sorry, 362, and he took you to it to say in respect of contribution claims the Commission at that point was suggesting that the act or omission date should apply in respect of contribution claims rather than the date – in respect of longstop provisions, rather than the date amount fixed by the judgment of the award or agreement which it was proposing would apply in respect of standard limitation periods. But what my learned friend ignores is the column at the end where it says: "15 years; plus extension when primary claim not fixed within 14 years from act/omission date."

So it provides an express carve out in respect of contribution claims, and that carve out is explained in the footnote to paragraph 84 of that report, and it's very important because it's completely contrary to the submission that my learned friend is putting, and if you look at the, if you read paragraph 84 it says: "An ultimate period must be modified in the case of contribution claims." That modification is what they are proposing in that schedule and appendix 2.

O'REGAN J:

You're talking about footnote 88 are you?

MR TAYLOR KC:

Footnote 88, yes, yes, and that footnote is expressly referred to at paragraph 188 of the Court of Appeal's decision, and it'[s consistent with the

conclusion reached by the Court of Appeal that throughout this period the Commission was recognising and providing for the particular special or bespoke nature of contribution claims. That's all I have to say your Honours.

GLAZEBROOK J:

Anything arising from that?

MR RING KC:

No your Honour, thank you.

GLAZEBROOK J:

Thank you. We will take time to consider our judgment and release the judgment in due course, and thank you very much counsel for your very helpful submissions.

COURT ADJOURNS: 3.23 PM