IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 11/2023
[2024] NZSC 117

BETWEEN	BECA CARTER HOLLINGS & FERNER LIMITED Appellant
AND	WELLINGTON CITY COUNCIL Respondent

Hearing: 18 October 2023

Court: Glazebrook, O'Regan, Ellen France, Williams and Kós JJ

Counsel: M G Ring KC, J A McKay and T F Cleary for Appellant
L J Taylor KC, B J Sanders and B A Mathers for Respondent

Judgment: 18 September 2024

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The claim by Wellington City Council against Beca Carter Hollings & Ferner Ltd is not time-barred.

C The appellant must pay the respondent costs of $25,000 plus usual disbursements. We allow for second counsel.

REASONS

	Para No
Ellen France, Williams and Kós JJ	[1]
Glazebrook and O'Regan JJ	[89]

ELLEN FRANCE, WILLIAMS AND KÓS JJ
(Given by Ellen France J)

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Introduction

[1] This appeal concerns the meaning of s 393(2) of the Building Act 2004. That provision is described as a "longstop" limitation, the effect of which is to bar the commencement of legal proceedings which are covered by that longstop after a specified period. Under s 393(2), a 10-year longstop is imposed for "civil proceedings relating to building work". The 10-year period runs from "the date of the act or omission on which the proceedings are based".[1]

[2] The issue here is whether a claim made by the respondent, Wellington City Council (the Council), for contribution from the appellant, Beca Carter Hollings & Ferner Ltd (Beca), is caught by the longstop provision. If it is, then the Council's claim against Beca is out of time.

[3] The interpretation issue arises in this way. The Council is being sued in negligence regarding certain actions in relation to a building constructed on land owned by CentrePort Ltd (CentrePort) at Waterloo Quay, Wellington (the building). The relevant actions are the granting of a building consent, inspection of building work and issuing of a code compliance certificate. The plaintiffs in the action against the

1 Building Act 2004, s 393(2).

Council are the Bank of New Zealand and its subsidiary operating company BNZ Branch Properties Ltd (together, BNZ). BNZ entered into an agreement with CentrePort for construction of the building. The building was designed to meet BNZ's requirements, for example, those as to size and layout, and was constructed over the period between 2006–2010. BNZ leased the premises from CentrePort from around February 2011.

[4] As a result of the Kaikōura earthquake in November 2016, the building was irreparably damaged. BNZ has not been able to return to the building, which was treated as uneconomic to repair and has since been deconstructed.

[5] BNZ filed its proceedings against the Council on 2 August 2019. Its claim focuses on negligence in the design of the building's substructure and superstructure. Damages of around $101 million are sought for various losses, including those resulting from business interruption and from property damage caused by the impact of the earthquake on the building. The Council denies liability in negligence and pleads various limitation defences.

[6] On 26 September 2019 the Council filed a statement of claim against Beca and one other third party.[2] It is pleaded that Beca had responsibility for the provision of engineering design and construction of the building. Beca accepts it was engaged by CentrePort to, amongst other matters, undertake design work and monitor construction.

[7] Against this background, the Council claims contribution under s 17(1)(c) of the Law Reform Act 1936 and in equity from Beca as a joint tortfeasor with the Council if, contrary to the Council's denial, it is found liable to BNZ. The Council also claims in tort for negligence, relating broadly to the preparation of design documents, and for negligent misstatement, again, broadly, based on the misrepresentation of design documents knowing the Council would rely on them when issuing building consents and code compliance certificates.

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[2] The other third party is Professor John Mander, who the Council says had been engaged to peer review design details of the building.

[8] Beca denies liability. It says, amongst other things, that there has been no breach of its duty of care to BNZ, and so it is not a joint tortfeasor with the Council. Relevantly, Beca also pleaded the protection of the 10-year longstop in s 393(2) of the Building Act 2004.[3] In this regard, Beca says that the claim by the Council is a "civil proceeding relating to building work", based on Beca's allegedly negligent acts in issuing a producer statement for the substructure of the building on 19 February 2007; along with the combined producer statement issued on 12 March 2008 relating to the building work for both the substructure and superstructure. The Council says it relied on these producer statements in granting the initial consents for the superstructure, and in issuing code compliance certificates in respect of the consents for both the substructure and superstructure. Accordingly, when the third-party proceeding was commenced by the Council on 26 September 2019, Beca's case is that the Council's proceeding was out of time because of the 10-year longstop. Beca applied for strike-out and for summary judgment in relation to the Council's claim based on this limitation defence.

[9] Both the High Court[4] and the Court of Appeal[5] found in favour of the Council and so dismissed Beca's claims for strike-out and summary judgment. In doing so they accepted the Council's contention that s 393(2) of the Building Act 2004 does not apply to its claim for contribution. The Courts accepted the Council's submission that the applicable provision is s 34 of the Limitation Act 2010.[6] Section 34, relevantly, provides that there is a two-year limitation period attaching to contribution claims, but that this period does not begin until the Council's liability in tort to BNZ has been quantified. If s 34 of the Limitation Act 2010, or its predecessor in the Limitation Act 1950 (together, the limitation legislation) applies, then the Council's claim is in time.[7]

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3 Because there are various relevant versions of the Limitation and Building Acts, we retain a reference to the year of those Acts when discussing them.

4 *BNZ Branch Properties Ltd v Wellington City Council* [2021] NZHC 1058 (Clark J) [HC judgment].

5 *Beca Carter Hollings & Ferner Ltd v Wellington City Council* [2022] NZCA 624 (Miller, Clifford and Katz JJ) [CA judgment].

6 At [47]; and HC judgment, above n 4, at [69]. The appellant does not accept this position.

7 The Court of Appeal noted that the Limitation Act 1950 continues to apply to BNZ's claims against the Council in negligence, as the Limitation Act 2010 applies to "acts or omissions" from 1 January 2011. Under the Limitation Act 1950, the applicable limitation period was six years, not two, but the start date of that period, the date of accrual of the primary claim, was the same. See Limitation Act 2010, s 59; Limitation Act 1950, ss 4 and 14; and CA judgment, above n 5, at [36]. See also the contrasting position of Glazebrook and O'Regan JJ below at [96], n 92.

[10] We are accordingly asked to decide whether the Court of Appeal was correct to conclude that the contribution claim was not caught by the longstop provision under s 393(2) of the Building Act 2004, but, rather, governed by the applicable provisions in the limitation legislation.[8]

[11] The factual material above is sufficient to put the legal issues in context, but at this point it is helpful to discuss the relevant statutory provisions and to set out the approach in the Courts below before moving on to our analysis of the case.

The statutory framework

[12] What follows is a general overview of the statutory framework. It will be necessary to return later to discuss some of the provisions and the relevant legislative history in greater detail.

Contribution under the Law Reform Act 1936

[13] The right to claim contribution between tortfeasors is established by s 17(1)(c) of the Law Reform Act. Section 17 forms Part 5 of the Act headed "Liability of tortfeasors". Section 17 deals with "[p]roceedings against, and contribution between, joint and several tortfeasors". Section 17(1)(c) provides as follows:

> (1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—
>
> …
>
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued in time have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

8 Beca's argument that the facts were sufficiently clear to grant summary judgment in its favour in relation to the Council's negligence claims was also unsuccessful in the Courts below. That aspect of the claim is not pursued in this appeal and we say no more about it. See HC judgment, above n 4, at [87]; and CA judgment, above n 5, at [176].

Contribution under the Limitation Act 2010

[14] The Limitation Act 2010 succeeded the Limitation Act 1950, and provides for a two-year limitation period for contribution claims between joint tortfeasors. The two-year period runs from the date on which the first tortfeasor's (A's) liability to another person is quantified. The section reads as follows:

> **34 Claim for contribution from another tortfeasor or joint obligor**
>
> (1) This section applies to a claim under section 17 of the Law Reform Act 1936—
>
> (a) by a tortfeasor (**A**) liable in tort to another person (**B**) in respect of damage; and
>
> (b) for contribution from another tortfeasor (**C**) who is, or would if sued in time by B have been, liable in tort to B (whether jointly with A or otherwise) in respect of that damage.
>
> …
>
> (4) It is a defence to A's claim for contribution from C if C proves that the date on which the claim is filed is at least 2 years after the date on which A's liability to B is quantified by an agreement, award, or judgment.

The Building Act 2004

[15] The Building Act 2004 replaced the Building Act 1991.

[16] The longstop limitation in s 393 is found in Part 5 of the Building Act 2004, which deals with "[m]iscellaneous provisions",[9] and forms part of Subpart 2 entitled: "Civil proceedings and defences". Sections 390 and 392 are also found in Subpart 2. These are indemnity provisions relating to the specified activities of, respectively, the chief executive of the Ministry responsible for the administration of the Act and associated persons;[10] and building consent authorities and associated persons.[11] The

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9 See also s 5(2)(e) of the Building Act 2004, which describes Part 5 as dealing with "miscellaneous matters".

10 Section 390. "[C]hief executive" and "Ministry" are defined in s 7(1). Currently, this is the Chief Executive of the Ministry of Business, Innovation and Employment | Hīkina Whakatutuki.

11 Section 392. See also s 420(1) which continues the indemnity for actions in good faith for members, building referees, or employees of the former Building Industry Authority under the Building Act 1991 in relation to "civil proceedings".

indemnities in both ss 390 and 392 relate to "civil proceedings". For example, s 390(2) states as follows:

> (2) No civil proceedings may be brought against a person to whom this section applies for any act done or omitted to be done by that person in good faith under this Act.

[17] Section 393(1) of the Building Act 2004 provides that the Limitation Act 2010 applies to the relevant "civil proceedings".[12] The subsection reads as follows:[13]

> **393 Limitation defences**
>
> (1) The Limitation Act 2010 applies to civil proceedings against any person if those proceedings arise from—
>
> (a) building work associated with the design, construction, alteration, demolition, or removal of any building … or
>
> (b) the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building …

[18] Importantly, for present purposes, s 393(2) makes provision for the longstop in these terms:

> (2) However, no relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.

[19] As will be apparent, key aspects of the text of subs (2) for present purposes are the reference to "civil proceedings" and the provision for time to run "from the date of the act or omission on which the proceedings are based". As to the latter phrase, subs (3) makes it clear that for the purposes of s 393(2), the date of the act or omission is:

> (a) in the case of civil proceedings that are brought against a territorial authority, a building consent authority, a regional authority, or the chief executive in relation to the issue of a building consent or a code compliance certificate under Part 2 or a determination under Part 3,

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[12] As this Court said in *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [96], this reference was superfluous because the Limitation Act 2010 would apply in any event, and because the reference was "incomplete". For example, it made no reference to other applicable limitation periods like that in s 43A of the Fair Trading Act 1986.

[13] See also the definition in s 7(1) of the Building Act 2004 of "building work".

> the date of issue of the consent, certificate, or determination, as the case may be; and
>
> (b) in the case of civil proceedings that are brought against a person in relation to the issue of an energy work certificate, the date of the issue of the certificate.

The High Court decision

[20] The High Court placed considerable weight on the legislative history. In particular, Clark J saw it as relevant that s 393 of the Building Act 2004 was itself amended by the Limitation Act 2010. This indicated that the legislature, while mindful of the Building Act approach, enacted s 34 of the Limitation Act 2010, which provides the two-year longstop provision for contribution claims.

[21] Clark J also emphasised the terms of the Limitation Act 2010, on the basis that the Act effectively enshrined the right to contribution by:[14]

> …
>
> (i) exempting a claim for contribution from the definition of money claims;
>
> (ii) enacting a two-year period within which claims for contribution are to be brought;
>
> (iii) specifying a date for accrual of a cause of action for a contribution claim that is different from the date on which time starts running for money claims.

[22] The High Court accordingly saw the combination of s 17(1)(c) of the Law Reform Act and the operative provisions of the Limitation Act 2010 as creating a "code" for the bringing of claims for contribution.[15] The Judge then drew a distinction between claims covered by the Building Act 2004 longstop provision, and those governed by s 34 of the Limitation Act 2010, in this way:[16]

> The right to contribution is untouched by s 393 and the longstop in s 393(2) (and was untouched by s 91 and the longstop in s 91(2) [of the Building Act 1991]). The "civil proceedings" to which s 393 of the Building Act applies are original claims. Civil proceedings, that is original claims, are governed by the Limitation Act 2010 and attract the defences in that Act, except that a longstop period of 10 years applies to such proceedings instead of the 15-year

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14 HC judgment, above n 4, at [68(f)].
15 At [69].
16 At [69] (footnote omitted).

> longstop under the 2010 Act. The Building Act's 10-year longstop does not override the specific two-year longstop in relation to contribution claims to which s 34 of the Limitation Act 2010 apply.

[23] In this context, the High Court drew on the distinction made in s 4 of the Limitation Act 2010 between an "original claim" and "an ancillary claim".[17] As apparent from the excerpt above, the Court saw the phrase "civil proceedings" in s 393(2) of the Building Act 2004 as applying to original but not ancillary claims. Claims for contribution, by contrast, were treated as ancillary claims.

[24] The Judge considered this interpretation, which effectively preserved s 34 of the Limitation Act 2010 in the face of the Building Act 2004 longstop, was consistent with the concerns motivating the enactment of s 393 of the Building Act 2004; that is, to avoid "temporally unlimited liability of those involved in the construction industry".[18] The Judge said that this interpretation had the benefit of meeting "the two sets of interests that are at the heart of s 393", namely "the interests of plaintiffs in accessing justice and the interests of defendants in not being disadvantaged by stale claims" — both of which continue to be balanced in the way the legislature intended.[19]

[25] Finally, the Judge considered that this construction was supported by the principle that the general does not detract from the specific (generalia specialibus non derogant). That principle was appropriately applied when, as is common ground, Parliament amended the Law Reform Act after *Merlihan v A C Pope Ltd* to consolidate the right of a defendant to seek contribution from a joint tortfeasor.[20] Hence, the Judge said:[21]

> It is unlikely that, without express words, Parliament intended "by a sweeping general provision to alter a rule passed to regulate a specific situation that was carefully considered and formulated at the time".

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17 For further discussion on this distinction, see below at [76].
18 HC judgment, above n 4, at [75] citing *Klinac v Lehmann* (2002) 4 NZ ConvC 193,547 (HC) at [16].
19 CA judgment, above n 5, at [76(a)].
20 *Merlihan v A C Pope Ltd* [1946] KB 166; and see Limitation Bill 1950 (59-1) (explanatory note) at iii.
21 HC judgment, above n 4, at [78] citing Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 476.

The Court of Appeal decision

[26] The reasoning of the Court of Appeal can be distilled into the following key propositions.

[27] First, the Court saw the key point in resolving the question of statutory interpretation as the "significance of the distinct legal and conceptual basis for a claim for contribution" in contrast to a claim for negligence for damages by a plaintiff from a tortfeasor.[22] Accordingly, and reflecting this distinction, contribution claims are treated differently for limitation purposes, and the Building Act 2004 longstop does not change the position for contribution claims in the building context.

[28] The Court of Appeal said that this interpretation resulted in an outcome which provided an appropriate balancing of the differing policy considerations. On the one hand, the Court noted that the right to claim contribution was introduced to remedy the injustice otherwise arising at common law where a plaintiff chose to sue only one of a number of wrongdoers, and that tortfeasor was left liable for the full loss suffered by the plaintiff. The Court also made the point that a claimant seeking contribution faced "a significant disadvantage that other plaintiffs do not", that is, the inability to begin an action "without having been sued by (or having settled with) the original plaintiff".[23] As a matter of fairness, these claimants needed to be given a reasonable chance to begin proceedings before the limitation period expires.

[29] On the other hand, the Court observed, the policy underlying limitation provisions "is to promote certainty and finality in litigation".[24] The balance struck between these competing interests was to make provision for finality between the original plaintiff and the chosen defendant(s) either by virtue of the ordinary limitation period or the longstop, while providing a two-year limitation period for defendants successfully sued by the original plaintiff.

[30] Second, the Court relied on the legislative history. Essentially, the Court saw the legislative developments affecting contribution claims in New Zealand since the

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22 CA judgment, above n 5, at [43].
23 At [150].
24 At [151].

enactment of s 17(1)(c) of the Law Reform Act as establishing a bespoke approach to contribution claims. The Court saw the legislative history as supporting the conclusion that the Building Act 2004 had not altered the bespoke approach, now reflected in s 34 of the Limitation Act 2010. The Court noted that Te Aka Matua o te Ture | Law Commission (the Law Commission) in various reports proceeded on the basis that there had been no change to the position now reflected in s 34, and the Law Commission's approach in turn was endorsed by the Limitation Act 2010.[25] Accordingly, although the Court of Appeal accepted that a contribution claim came within the wording of the Building Act 2004 longstop, that wording did not alter the bespoke approach to limitation in relation to contribution claims.

[31] Finally, the Court considered the principle that the general does not detract from the specific supported this view.

[32] Although agreeing with the High Court as to the result, the Court of Appeal did not adopt the distinction drawn by the High Court between original and ancillary claims. The Court said that the concept of ancillary claims related back to s 30 of the Limitation Act 1950. That section essentially provided that a defendant's claim for a set-off or counterclaim against the plaintiff could not be undercut by a limitation defence in circumstances where, because the plaintiff's claim was brought late in the piece, it could be argued that the limitation period arising in relation to a claim for set-off or counterclaim had run out prior to the defendant/counter-claimant having brought that claim.

[33] The Law Commission recommended some liberalisation of the position so that the s 30 approach would be extended to ancillary claims including, but not limited to, set-off and counterclaims.[26] The Court noted that the Limitation Act 2010 did not go quite as far as the Commission recommended. That is because under the Act, ancillary claims, including set-off and counterclaims, have the same limited defences as original claims. But, where an ancillary claim is "barred by an applicable statutory limitation period, s 50 of the Act provides for discretionary relief from the operation

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25 See Law Commission *Limitation Defences in Civil Proceedings* (NZLC R6, 1988) [NZLC R6, 1988]; and Law Commission *Apportionment of Civil Liability* (NZLC PP19, 1992) [NZLC PP19, 1992].

26 See NZLC R6, 1988, above n 25, at x and 191.

of the statute" if the original claim is not time-barred.[27] In other words, the Building Act 2004 longstop provision does not override the discretion in s 50 of the Limitation Act 2010 to allow an ancillary claim to be brought outside the limitation period.

Our approach

[34] We see the issue on appeal as coming down to whether Beca is correct that the ordinary words of s 393(2) of the Building Act 2004, and of the other related provisions in that Act, mean s 393 is to be construed as imposing a comprehensive, industry-specific approach designed to address aspects of the leaky home phenomenon. Beca says both text and statutory purpose support that approach. The alternative view, advanced by the Council and in support of the Court of Appeal's approach, is that the Building Act provisions do not — and were not intended to — undercut the long-established and bespoke right of defendants to claim contribution from joint tortfeasors. If the Building Act was intended to override those rights, the Council says, specific language to that effect was required.

[35] As can be seen this case involves a contest between two strongly worded, subject-specific, statutory exceptions to the applicable scheme; each developed in response to a particular need. When these exceptions overlap — that is, when a contribution claim relates to a building — the question presented by this overlap is whether one statutory exception always overrides the other and, if so, which? Alternatively, can their respective texts and purposes be reconciled? In assessing the case for each of the parties, we start with the text and then address consistency with the statutory purpose.[28]

Text

[36] This Court in *Carter Holt Harvey Ltd v Minister of Education* accepted what it termed "[t]he most natural interpretation of the words 'civil proceedings relating to building work' in s 393(2)"; namely, "that those words are a shorthand reference for

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27 CA judgment, above n 5, at [160].

28 Legislation Act 2019, s 10(1); and see *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

civil proceedings of the kind described in s 393(1)”.[29] But the Court expressly reserved the position on whether a contribution claim would be time-barred by the Building Act longstop, the issue now squarely before us.[30]

[37] We accept that the language “civil proceedings relating to building work” is sufficiently broad to encompass contribution claims. It is not expressly limited, for example, to claims brought by a plaintiff. We also agree with Beca that the phrase “civil proceedings” has the same meaning in the other parts of the Building Act 2004, namely, ss 390–392 and 420. Applying the Court of Appeal’s approach would mean a consequential limit on what would otherwise be a full indemnity under ss 390–392 and 420 where the claim is for contribution.[31]

[38] Importantly, however, there is no express override in the Building Act 2004 of the right to seek contribution. We see that as significant for a number of reasons.

[39] First, the law as it applied prior to the enactment of the Building Act 2004 was that set out by the High Court in *Cromwell Plumbing Drainage & Services Ltd v De Geest Brothers Construction Ltd*.[32] The view adopted in *Cromwell* was that the predecessor to s 393(2) in s 91(2) of the Building Act 1991 did not prevail over the limitation provision relating to contribution claims in the Limitation Act 1950.[33]

[40] The key point made in that case was that the equivalent to s 393(2) in the Building Act 1991 did not stop effect being given to contribution as between a contributor (D2), whether sued or not, and the defendant (D1), who has been sued, so as to divide responsibility appropriately between the two. The High Court observed that if the intended effect was to impact on such a contribution claim, as Beca

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29 *Carter Holt Harvey*, above n 12, at [94] and see at [129]. “Civil proceedings” are not defined in the Building Act 2004. The term is defined in s 4(1) of the Limitation Act 2010, but only by distinguishing claims in the civil jurisdiction from criminal or disciplinary matters.

30 *Carter Holt Harvey*, above n 12, at [127] noting there had been no appellate authority on the issue.

31 We agree with the observation made by Glazebrook and O’Regan JJ that ss 391 and 420 are unlikely to have any material significance in contribution claims. However, as we explain, we differ on the significance that limiting the indemnity provided in ss 390 and 392 has on the interpretative question before us: see below at [98]–[103].

32 *Cromwell Plumbing Drainage & Services Ltd v De Geest Brothers Construction Ltd* (1995) 9 PRNZ 218 (HC).

33 At 221. That was the prevailing view after the enactment of the Building Act 2004 until questioned in 2006 by the High Court in *Dustin v Weathertight Homes Resolution Service* HC Auckland CIV-2006-404-276, 25 May 2006 at [44(a)].

contends, the "statute would need to specifically say so".[34] The Judge said that otherwise it "effectively" rendered "s 17(c) [of the Law Reform Act] meaningless in all cases relating to buildings".[35]

[41] In reaching that view, the Judge also observed that the statutory cause of action for contribution did not arise, on the law as it was, until judgment had been given. The High Court made the further point that the combination of s 17 of the Law Reform Act and the provision in the Limitation Act 1950 relating to contribution claims "provide a specific and self-contained code".[36] Finally, the Court said the cause of action is a statutory one and is different from, for example, the joinder of a further defendant.

[42] As the foregoing applied immediately prior to the enactment of the Building Act 2004, it can only be seen as significant that s 393(2) re-enacted s 91(2) without material change.

[43] Second, in our view, it would be odd at best to interpret "the act or omission on which the [contribution claim is] based" in s 393(2) as a reference to the contributor, D2's, original tortious building work; that is the very same conduct Parliament has directed must be assumed to have been in time when assessing the viability of the defendant, D1's, claim under s 17(1)(c) of the Law Reform Act.[37] Such a construction would dis-apply the key words of s 17(1)(c) in building work claims, namely, that a tortfeasor may recover contribution from another tortfeasor "who is, or would *if sued in time* have been, liable in respect of the same damage".[38] That construction should be adopted only if that is the necessary effect of the words of s 393. We do not consider it is when the two provisions are read together and in light of the longstop treatment of contribution claims at the time of the enactment of s 393.

[44] It is also relevant in this context that Beca's approach gives rise to issues of unfairness in relation to contribution claims. On Beca's analysis, a contribution claim could be out of time before the expiry of the limitation period applicable to the primary

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34 *Cromwell*, above n 32, at 222.
35 At 222.
36 At 221.
37 See above at [40]. For further discussion on the relevance of "if sued in time", see below from [56].
38 Emphasis added.

claim by BNZ. As this Court has recognised, there is a level of unfairness arising out of what is inevitably a somewhat arbitrary line drawing in this area.[39] But the potential outcomes in this case would go well beyond that.

[45] As the respondent submits, on the approach favoured by Beca, any contribution claim in respect of its producer statements for the building's substructure and superstructure had to be issued before 12 March 2018. But the 10-year period for the building owner to bring a claim against the Council did not expire until 27 March 2019. So, the Council could lose its right to claim contribution just because BNZ chose only to sue the Council within the 10-year longstop period. Such an outcome is both surprising and potentially unfair. As the respondent submits, this illustrates the very injustice the enactment of s 17 of the Law Reform Act was intended to remedy.

[46] Beca's approach may also invite gaming. We have in mind a situation where a plaintiff wants to sue two joint tortfeasors — T1 and T2 (the primary claims). The longstop period for the primary claim against T1 ends before that of T2. T1 may want to avoid being subject to a contribution claim from T2. Under Beca's approach, there is an incentive for T1 to settle with the plaintiff, if the plaintiff agrees not to sue T2 until T1's longstop period has expired — meaning that T2 could no longer sue T1 for contribution. So long as the settlement amount is less than T1's potential contribution liability to T2, there is an incentive for T1 to settle prematurely and at an unjust premium. This would also adversely affect T2, preventing them from claiming contribution.

[47] Finally, as is implicit in our reference above to the consequence in *Merlihan* that the 1950 amendment to the Law Reform Act was designed to avoid, we see the legislative history of contribution claims as supporting the view that the limitation period governing such claims remains that in s 34 of the Limitation Act 2010, or as applicable, s 14 of the Limitation Act 1950.

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[39] *Carter Holt Harvey*, above n 12, at [121].

[48] To explain our view of the legislative history, we note first that contribution claims have the following features:

(a) The claim is a statutory one.

(b) The claim accrues not when the original tort is committed, but only upon the enrichment of the second joint tortfeasor who is not sued, and when the first of the joint tortfeasors alone is found liable for a loss for which the second joint tortfeasor is also liable.

(c) Reflecting later case law in the United Kingdom, the legislature in New Zealand deliberately made changes correcting an earlier and much criticised decision.[40]

[49] We begin with the fact that the contribution claim is a statutory one, deriving from and based on the right under s 17 of the Law Reform Act to seek contribution. As *Todd on Torts* states, it is:[41]

> … a right sui generis: … a statutory right in the nature of an action for damages. It resembles a plaintiff's claim for money paid by him to the use of the defendant, who has been relieved, pro tanto, of his direct liability to the victim of the tort. … The statutory procedure exists so that the responsibilities of defendants can be determined inter se.

[50] Before the passage of s 17 of the Law Reform Act, at common law a plaintiff was free to choose which of those liable to the plaintiff in tort that it would sue. The chosen defendants could then be liable for the full amount of the plaintiff's loss without any right to seek contribution from others who were also liable, but not sued by the plaintiff. The respondent points to two aspects of the approach at common law that were problematic. First, where the parties had committed a joint tort, judgment against one of the joint tortfeasors barred subsequent action against another tortfeasor in relation to the same damage.[42] Second, there was no right of contribution between joint tortfeasors.[43] The enactment of s 17 remedied these problems.

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[40] See below at [54]–[55].
[41] Stephen Todd "Multiple Tortfeasors and Contribution" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) 1451 at 1463 (footnotes omitted).
[42] Citing *Brinsmead v Harrison* (1872) LR 7 CP 547 (Exch Ch).
[43] Citing *Merryweather v Nixan* (1799) 8 TR 186, 101 ER 1337 (KB).

[51] The Court of Appeal referred to the helpful summary of the background to the introduction of s 17 given by Fogarty J in *Body Corporate 330324 "City Gardens Apartments" v Auckland City Council*:[44]

> [29] The history of contribution can be reliably taken from the Australian text, *Equity Doctrines and Remedies*, by Meagher Gummow and Lehane. The opening sentences of [chapter 10] are as follows:
>
> > The application by the Court of Chancery of the doctrine of contribution is an example of its concurrent jurisdiction with the common law courts. Both equity and law came to share the view that, in the words of Kitto J in *Albion Insurance Co Ltd v GIO (NSW)* (1969) 121 CLR 342 at 350; [1970] ALR 441 at 446, "persons who are under *co-ordinate liabilities* to make good the one loss (eg sureties liable to make good a failure to pay the one debt) must share the burden pro rata" (emphasis supplied). There were a number of relationships cognisable both at law and in equity which involved co-ordinate liabilities in this sense. … Joint tortfeasors were long in a different position. For the common law turned its face against contribution between joint tortfeasors in *Merryweather v Nixan* (1799) 8 TR 186; 101 ER 1337, and equity followed the law, with the result that the right as it exists today rests upon statutes modelled after the ambiguously phrased Imperial [L]aw Reform (Married Women [and] Tortfeasors) Act 1935.
>
> [30] The New Zealand Law Reform Act 1936 followed the Imperial Law Reform.

[52] The ability to make a claim for contribution reflected, accordingly, a specific decision to change the position as it was at common law in order to remedy the injustice that might otherwise arise. For example, there was otherwise unfairness where a plaintiff chose to sue only one or a select group of potential defendants.

[53] It is also relevant that the point in time from which the limitation period runs for contribution claims has also been the subject of consideration by the legislature. As originally enacted, s 17(1)(c) of the Law Reform Act provided that where damage was suffered by a person as a result of a tort—

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44 *Body Corporate 330324 "City Gardens Apartments" v Auckland City Council* [2015] NZHC 995 at [29] (footnote omitted) citing RP Meagher, JD Heydon and MJ Leeming *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, LexisNexis Butterworths, Chatswood (NSW), 2002) at 387. The fifth edition of the text has since been published, but we continue to cite the fourth edition as it provides a useful history of contribution which is not replicated in the latest edition: JD Heydon, MJ Leeming and PG Turner *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed, LexisNexis Butterworths, Chatswood (NSW), 2015).

(c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

[54] Section 17(1)(c) was amended by the Limitation Act 1950, and s 14 of that Act addressed limitation issues relating to contribution claims. Section 14 essentially made it clear that claims for contribution accrued when the essential facts to establish the claim "happened". Schedule 2 of the Limitation Act 1950 also amended s 17(1)(c) of the Law Reform Act by adding the words "in time" after the word "sued". Section 14 of the Limitation Act 1950 reflected the position ultimately reached by English Courts in *Littlewood v George Wimpey & Co Ltd* (*Wimpey's* case).[45] As we have noted, the New Zealand legislature in this respect rejected the approach taken in the earlier English decision of *Merlihan* which had the potential to undercut the purpose of the English equivalent to s 17 of the Law Reform Act, namely, s 6 of the Law Reform (Married Women and Tortfeasors) Act 1935.[46] In discussing the clause which became s 14, the explanatory note to the Limitation Bill said that it was "included to meet difficulties revealed by the decision in the case of *Merlihan*".[47]

[55] To explain the different approaches, *Merlihan* was a case concerning the collision of two vehicles. The plaintiff (P) was the injured passenger in the first vehicle and sued the driver of the second vehicle (D1). P's claim was commenced on 17 May 1944. In March of the following year, just prior to the judgment finding him liable, D1 began a third-party claim against the driver of the first vehicle (D2) under the English equivalent to s 17(1)(c). D2 sought to rely on the 12-month limitation period contained in s 21 of the Limitation Act 1939 (UK). The Court found in favour of D2, holding that the cause of action for contribution brought by D1 against D2 arose on the date D2 became a tortfeasor, that is, the date of the accident. On this approach D1's third-party claim was out of time. As the Court of Appeal in the present case

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45 *Littlewood v George Wimpey & Co Ltd* [1953] 2 QB 501 (CA) [*Wimpey's* case] and assumed to be correct on appeal to the House of Lords: *George Wimpey & Co Ltd v British Overseas Airways Corporation* [1955] AC 169.

46 *Merlihan*, above n 20.

47 Limitation Bill 1950 (59-1) (explanatory note) at (iii); and see in relation to the associated amendment to s 17(1)(c) at iv.

said, *Merlihan* "was roundly criticised" and *Wimpey's* case subsequently adopted the position reflected in s 14 of the Limitation Act 1950.[48]

[56] The written submissions for the respondent must be right that adding the phrase "if sued in time" was intended to avoid the unfairness of a right to contribution being defeated by "the whim of the plaintiff in choosing not to (or omitting to) sue the other responsible tortfeasors in time". We can draw some support for our approach from the fact that the drafters of s 393 must have had some awareness of s 17 of the Law Reform Act yet chose not to capture it either expressly or by necessary implication. The phraseology "if sued in time" communicates that s 17 is not subject to limitation periods applicable to non-contribution proceedings. There is no textual reason to exclude the Building Act 2004 longstop from the effect of that phrase. And, as we discuss, there are relevant policy considerations, albeit they cut both ways.

[57] The Court of Appeal in the present case made the point that ultimately, s 34 of the Limitation Act 2010 maintained the approach taken in s 14 of the Limitation Act 1950 for contribution claims. Further, s 34(4) distinguished contribution claims from money claims between a plaintiff and a defendant. For the latter claims the limitation period runs from "the date of the act or omission on which the claim is based".[49] As the High Court said, s 34 introduced "a specific limitation period for contribution claims".[50]

[58] We interpolate here that, in terms of the legislative history, Beca is critical of the weight that the Court of Appeal placed on the Law Commission reports in relation to the issues raised by the appeal. Beca says, first, that some of the points made by the Court of Appeal are not correct and, second, that some of the material relied on does not relate to the relevant legislative provisions, but to later changes.

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48 CA judgment, above n 5, at [69]–[70].

49 Limitation Act 2010, s 11(1). Nor does the 15-year longstop in s 11(3)(b) for money claims apply to contribution: s 12(3)(c).

50 HC judgment, above n 4, at [66(a)].

[59] However, as Glazebrook and O'Regan JJ accept, the Law Commission reports reflect the Commission's view that a different, bespoke, approach should apply to the commencement of the limitation period for contribution claims.[51]

[60] It is appropriate to begin a discussion of the Law Commission's approach with its report *Limitation Defences in Civil Proceedings* (Report 6).[52] In Report 6, the Commission said the limitation period for contribution claims should not commence on the date of the act or omission on which the claim is made. Rather, the Law Commission recommended the commencement date should be defined to mean "the date on which the sum of money in respect of which the claim is made is quantified by a decision of a court".[53] That approach was maintained in subsequent Law Commission discussion on the topic.[54]

[61] In terms of Report 6, Beca says in its submissions that the Court of Appeal was wrong to say the Law Commission found the timing as to the commencement of limitation periods more generally "inapt" or "inappropriate" for contribution claims.[55] However, while that language was not used, plainly, the Commission in recommending a bespoke, different, approach did not find the general approach apt.[56]

[62] Beca also points to one of the recommendations in *Limitation Defences in Civil Cases: Update Report for the Law Commission* by Chris Corry as indicative of a reversal of the approach to timing that had been recommended in Report 6.[57] This is a reference to the Law Commission's recommendation that, in relation to the 15-year "ultimate period" or longstop under which a claim is finally barred, a "limited" exception for contribution should be made.[58] The commencement date for this ultimate period, generally and in respect of contribution claims, was to be determined on the act/omission approach.

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51 Below at [112].
52 NZLC R6, 1988, above n 25.
53 At 164 and see at 153.
54 NZLC PP19, 1992, above n 25, at [253]–[254]; Law Commission | Te Aka Matua o te Ture *Limitation of Civil Actions* (NZLC PP39, 2000) at [85]; and Law Commission | Te Aka Matua o te Ture *Tidying the Limitation Act* (NZLC R61, 2000) at [27].
55 See CA judgment, above n 5, at [122].
56 See NZLC R6, 1988, above n 25, at [168]–[171].
57 Law Commission *Limitation Defences in Civil Cases: Update Report for the Law Commission* (NZLC MP16, 2007).
58 At [84], n 88 and [117].

[63] We do not attach the significance Beca would have us adopt to the recommendation relating to the ultimate period. The ultimate period is of limited application, in that it is intended to address undesirable, but not common, cases where the general period did not limit a claim Parliament intended to be time-barred. Apart from this, limited, departure from the bespoke approach, the Law Commission maintained the position that contribution claims are to be treated uniquely. The special approach for the commencement of limitation periods as set out in Report 6 was however maintained for contribution claims more generally.

[64] It is true, as Glazebrook and O'Regan JJ observe, that the Law Commission does not explicitly address the impact of the Building Act.[59] That may be because the Commission did not see the Building Act as applying to contribution claims. That is the implication of the, admittedly brief, observation in the Commission's Preliminary Paper *Apportionment of Civil Liability*, in the context of discussion of the timing of commencement dates, that "[n]o general decision has been taken on the implementation of [Report 6] (although see the Building Act 1991[,] s 91)".[60] Certainly, it is odd that the Commission did not criticise the longstop start date in the Building Act regime given it is inconsistent with the approach preferred by the Commission. In any event, we see no error in the Court of Appeal's conclusion that the legislative history supports the view that the wording of the Building Act longstop provision did not alter the bespoke approach to limitation in respect of contribution claims.

[65] In addition to *Cromwell*,[61] we note that there is also some support for treating contribution claims in the way we do in similar contexts in English and Australian jurisprudence.

[66] For example, in *Tuckwood v Rotherham Corporation*, the Court of Appeal of England and Wales found that a statutory claim for indemnity against the City of Rotherham did not come within the scope of the limitation provision in s 1 of the Public Authorities Protection Act 1893 (UK).[62] Section 1(1)(a) provided that any

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59 Below at [112].
60 NZLC PP19, 1992, above n 25, at [241].
61 See discussion above from [39].
62 *Tuckwood v Rotherham Corporation* [1921] 1 KB 526 (CA).

claim against a city "in respect of any alleged neglect or default in the execution of any such Act [of Parliament], duty, or authority" was time-barred unless begun within six months of the act, neglect or default in issue. If s 1(1)(a) applied, the plaintiff's claim was out of time.

[67] The three members of the Court gave slightly differing reasons for concluding s 1 did not apply. But they all treated the right to the statutory indemnity as different from an action in respect of alleged neglect in the execution of a duty as described in s 1. The reasoning of Atkin LJ illustrates the point:[63]

> … in this case the alleged neglect or default in not driving the tramcar with proper skill gave no cause of action to the plaintiff. He derives his right to make a claim against the defendants, not because of their act or default, but because the Act of 1906 has imposed a liability upon them to indemnify him if he has had to pay compensation to his injured workman by reason of that neglect or default. So that is doubly removed … from the act or default. First, the plaintiff has to rely upon the statutory right to indemnity, and, secondly, he does not acquire that statutory right to indemnity unless the workman has recovered compensation from him.

[68] *Tuckwood* was cited with approval by the majority of the High Court of Australia in *Unsworth v Commissioner for Railways*.[64] The Court in that case was considering s 121(1) of the Railways Acts 1914–1955 (Qld) which, materially, limited the quantum of damages in "any action brought against the Commissioner [for Railways] to recover damages or compensation in respect of personal injury".

[69] Fullager J addressed the appellant's contention that he was entitled to receive a greater sum by way of contribution as that claim was not "an action to recover damages or compensation in respect of personal injury within the meaning of s 121".[65] Fullager J accepted that submission. In doing so, Fullager J endorsed the approach of Atkin LJ in *Tuckwood*.[66] The contribution claim under the Australian equivalent to the Law Reform Act was not a proceeding coming within s 121. Fullager J also drew support for this view from the decision of the Full Court of New South Wales in *Nickels v Parks*.[67]

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[63] At 538; and Public Authorities Protection Act 1893 (UK) 56 & 57 Vict c 61, s 1.
[64] *Unsworth v Commissioner for Railways* (1958) 101 CLR 73.
[65] At 86.
[66] At 86.
[67] *Nickels v Parks* (1948) 49 SR (NSW) 124 (SC).

[70] Taylor J also applied the approach in *Tuckwood* and in *Nickels* stating as follows:[68]

> The next question is whether the appellant's claim against the commissioner was "an action to recover damages in respect of personal injury". Clearly it was not. The cause of action given by s 5(3) of *The Law Reform Act*, is of an entirely different character; it is, in effect a claim for a partial indemnity, and, although one of the ingredients which must be established is that the person against whom the claim is made is a person "who is, or would if sued have been, liable in respect of the same damage", it is in no sense an action to recover damages in respect of personal injury. This view is inherent in such cases as *Tuckwood v Rotherham Corporation*; … *George Wimpey and Co Ltd v British Overseas Airways Corporation* … and *Nickels v Parks* …

[71] Both *Tuckwood* and *Unsworth* were discussed in *Minister of Education v James Hardie New Zealand*.[69] This is one of the High Court cases relied on by Beca, which takes the opposite view from that in *Cromwell.* It has a helpful discussion of the approaches taken in *Cromwell* and the subsequent cases departing from *Cromwell*. In terms of *Tuckwood,* the High Court accepted that case supported the:[70]

> … argument that a contribution claim does not arise from or relate to building work, but rather is something new and separate to the primary claim, and arises from the claimant's statutory right to seek contribution …

[72] However, the High Court said *Tuckwood* was distinguishable on two bases.

[73] The first of these was on the ground that the approach in *Tuckwood* was affected by the fact a different interpretation would mean most, if not all, claims for indemnity would be time-barred. This was because of the "very short" time period and the time at which these claims might be brought.[71] Second, the High Court said the limitation period in *Tuckwood* applied generally and the Parliamentary intention was not to apply it to the particular indemnity claim at issue. By contrast, the Parliamentary intention here was to have a cut-off for defective building claims.

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[68] *Unsworth*, above n 64, at 91.
[69] *The Minister of Education v James Hardie New Zealand* [2018] NZHC 22.
[70] At [80].
[71] At [80].

[74] We accept that the practical effect of the contrary interpretation was relevant to the decision in *Tuckwood*. But that does not detract in our view from the line of reasoning which relies on the nature of the indemnity claim.

[75] Finally, we note that the High Court in *The Minister of Education v James Hardie New Zealand* distinguished *Unsworth* on the basis the case turned on the particular statutory wording. That is correct, but again it does not undermine the recognition given to the distinctive nature of the contribution claim which underpins the approach.

Ancillary claims

[76] We add that, like the Court of Appeal, we do not adopt the distinction made in the High Court between ancillary and original claims. "Ancillary" claims are defined in s 4 of the Limitation Act 2010 to mean claims relating to or connected with the act or omission on which the original claim is based. Section 4 includes in the definition of ancillary claims an exhaustive list of what comprises those claims. This list includes counterclaims, claims by way of set-off, and third-party claims. Contribution claims do not fit readily within the types of claims in that list.

[77] As we have noted, the Court of Appeal made the point that the longstop does not override the discretion in s 50 of the Limitation Act 2010 to permit ancillary claims to be brought outside of the limitation period. Although we do not agree with the distinction drawn by the High Court, it does not make a great deal of sense to single out a contribution claim which is analogous to ancillary claims and treat that differently so that a claim brought on the last day against one joint tortfeasor alone effectively isolates that party from bringing a contribution claim against another joint tortfeasor.

Summary

[78] Drawing the threads together, our view is that if it was intended that the longstop provision was to override the special regime for contribution claims, it was necessary for the legislation to make that clear, as the High Court found in *Cromwell*.

Any other approach would also have the effect of reprising *Merlihan*, the very problem the 1950 amendment to s 17 of the Law Reform Act was designed to fix.

[79] We accordingly reject Beca's argument that the Building Act 2004 provides a specific regime overriding the general scheme of the Limitation Act 2010.[72] Policy considerations also support this view, given the unfairness that may otherwise result. When the nature of the claim is considered in light of the legislative history, both of those aspects also support the approach adopted by the Court of Appeal. That requires us to consider whether this approach is inconsistent with the statutory purpose.

How does this approach fit with the statutory purpose?

[80] We agree with Beca that the longstop provision was intended to provide both certainty and finality. As Beca submits, the impetus for the longstop provision arose out of the leaky home phenomenon and, in particular, the development in the case law of the concept of reasonable discoverability as a response to issues about liability for latent building defects; hence the intention to create some certainty for potential defendants in this area.[73]

[81] The intention to establish certainty and finality was also linked to concerns about the insurance implications of the leaky home litigation, in particular for building certifiers. This aspect is discussed in this Court's judgment in *Carter Holt Harvey* in these terms:[74]

> [130] There is an extensive analysis of the statutory history of s 91 of the 1991 Act in the judgment of Glazebrook J in *Klinac v Lehmann*. In that account, Glazebrook J records that the limitation period was initially intended to be 15 years but was, by the time of the second reading of the Building Bill 1991, reduced to 10 years. The reason given for this in the speech of the then Minister of Internal Affairs, Hon Graeme Lee, indicated that this was "for reasons primarily related to insurance as insurance for a

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72 The same approach would apply where the Limitation Act 1950 was the governing limitation legislation. We add that there is some support for Beca's view in the debates on the introduction of the Limitation Bill 2009 (33-2). Hon Christopher Finlayson MP, the then Attorney-General, referred to the fact that there were other "special" limitation periods such as those in the Building Act 2004. He envisaged that if there was conflict between "the general rules in this [B]ill and specific rules in other legislation, the specific rules will continue to prevail": (4 August 2009) 656 NZPD 5380.

73 See, for example, Building Bill 2003 (78-2) (select committee report) at 51–52.

74 *Carter Holt Harvey*, above n 12 (footnotes omitted).

> 15 year period would not have been available". That indicates the focus of the provision was on building certifiers which, under the 1991 Act became entitled to provide certification of buildings previously exclusively entrusted to local authorities. …

[82] To the extent the desire for finality and certainty reflected these insurance-related concerns, consistency with that purpose provides support for Beca's approach. However, two points can be made about this. First, as this Court noted in *Carter Holt Harvey*, "[a]s it turned out 10 year insurance was not available either, so the rationale for reducing the longstop period did not turn out to be a valid one".[75] Second, the legislative history relating to the introduction of the longstop does not provide any definitive answer about the extent to which an impact on the contribution regime was intended.[76] Given that, where it is possible to give effect to the purposes of both the Building Act and contribution regimes, an interpretation that achieves that should be preferred.[77]

[83] We consider it is possible to give effect to the purposes of both regimes. The contribution regime is designed to remedy the injustice we have identified, where a defendant's ability to pursue contribution from a joint tortfeasor is at the whim of the plaintiff's choice of defendant. But the right to seek contribution is not an open-ended one. Rather, as the Court of Appeal said, the interests of finality and certainty are reflected in the provision of the two-year limitation period applicable to claims governed by the Limitation Act 2010 or the six-year period under the Limitation Act 1950.

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75 At [130] (footnote omitted).

76 In a report from the Secretary for Internal Affairs to the Minister of Internal Affairs, which was referred to the Internal Affairs and Local Government Select Committee on the Building Bill 1990, reference is made to the width of the term "liability", and that in this context it raises four issues including what should happen where a loss results from more than one party breaching its duties — "joint and several liability and contribution". But the report does not go on to address how that aspect of liability in particular is affected: M D Darroch *Building Bill — Policy Paper on Liability Issues* (Department of Internal Affairs | Te Tari Taiwhenua, LG Report 91/174 103/742, 27 August 1991) at [4]. See also Letter from Graeme Lee (Minister of Internal Affairs) to John Carter (Chairman of the Internal Affairs and Local Government Select Committee) regarding referral of the 27 August 1991 Report to the Internal Affairs and Local Government Select Committee (30 August 1991). See also M D Darroch *Building Bill — Further Paper on Liability Issues in the Light of Proposals by the Minister of Justice* (Department of Internal Affairs | Te Tari Taiwhenua, LG Report 91/19 103/742, 8 October 1991) at [4].

77 See *Stewart v Grey County Council* [1978] 2 NZLR 577 (CA) at 583.

[84] As to the longstop regime, the ten-year longstop usually begins when the negligent act or omission is alleged to have caused the damage. As the respondent submits, the longstop accordingly mitigates the prospect of temporally indefinite liability on the part of building owners. We add that one of the stated purposes of the Building Act 2004 is to promote "the accountability" of specified groups who have "responsibilities for ensuring that building work complies with the building code".[78] The groups identified in this context are "owners, designers, builders, and building consent authorities".[79] The concerns for finality and certainty also have to be considered in light of the objective of ensuring accountability.

[85] When these matters are considered, we agree with the Court of Appeal that the purpose of the longstop provision is not undermined by the approach we have taken to construction of s 393 of the Building Act 2004. Overall, we conclude that, reading the provisions together, the words of s 393(2) do not require s 17(1)(c) of the Law Reform Act to be disapplied when the dispute relates to a building, and their respective purposes are consistent with that conclusion.

Result

[86] In accordance with the view of the majority, the appeal is dismissed.

[87] The claim by Wellington City Council against Beca Carter Hollings & Ferner Ltd is not time-barred.

[88] The appellant must pay the respondent costs of $25,000 plus usual disbursements. We allow for second counsel.

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78 Building Act 2004, s 3(b).
79 Section 3(b) and see s 4(2)(q).

GLAZEBROOK AND O'REGAN JJ
(Given by O'Regan J)

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The essential issue

[89] We agree with the majority that the issue in the present appeal comes down to whether:[80]

(a) as argued by the appellant (Beca), the ordinary words of s 393(2) of the Building Act 2004 (the 2004 Act) are to be described as imposing an industry-specific approach designed to address aspects of the problem of latent defects in buildings; or

(b) as argued by the respondent (the Council), the words of s 393(2), although arguably on their face wide enough to cover a contribution proceeding, were not intended to undercut the long-established and bespoke right of defendants to claim contribution from joint tortfeasors, and therefore must be read as not applying to such claims.

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80 See the reasons of the majority above at [34].

[90] We have come to a different view from that of the majority on how the issue should be resolved. In our view the option described above at [89(a)] is correct. We would therefore have allowed the appeal.

[91] We acknowledge that the issue is finely balanced, as is illustrated by the conflict of authorities in the High Court, the decisions of the lower Courts in the present case and the views of the majority in this Court. But, in our view, the text and purpose of s 393 of the 2004 Act and of s 91 of the Building Act 1991 (the 1991 Act) support the interpretation advocated before us by Beca.

[92] As we see it, there are policy arguments going both ways, depending on which of two policy objectives is given priority: the right of defendants to seek contribution or the need for finality in building-related claims. The difficulty for us and for other courts that have addressed this issue is that there appears to be nothing in the 1991 Act, the 2004 Act or the parliamentary record to indicate that Parliament was alerted to this policy choice, or that it expressly made a choice one way or the other. However, the fact that s 91 of the 1991 Act and s 393 of the 2004 Act were enacted as part of overall reforms of the legal regime applying to the building industry makes it more likely, in our view, that the intention was to give priority to the need for finality in building-related claims. As we will come to, we do not consider that it is possible to give effect to both policy objectives.[81]

Background

[93] We adopt the majority's outline of the background to the dispute in the present case,[82] their description of the statutory framework[83] and their summary of the decisions of the lower Courts.[84]

"Civil proceedings" relating to building work

[94] As the majority accepts, the phrase "civil proceedings relating to building work" that appears in s 393(2) of the 2004 Act is sufficiently broad to encompass

81 Contrasting the view of the majority: above at [83].
82 Above at [1]–[11].
83 Above at [12]–[19].
84 Above at [20]–[33].

contribution claims and is not limited to claims brought by a plaintiff.[85] The majority also accepts that the phrase "civil proceedings" has the same meaning in other sections of the 2004 Act in which it is used, namely ss 390–392 and 420.[86] As we will come to, we attribute more significance to these factors than the majority does.

Features of a contribution claim

[95] We accept the description of the significant features of a contribution claim identified by the majority.[87] As the majority notes, the ability to make a claim for contribution reflected a specific decision by the legislature to change the position as it was at common law in order to remedy the injustice that might otherwise arise.[88] We also accept that s 34 of the Limitation Act 2010 (the 2010 Act) and its predecessor, s 14 of the Limitation Act 1950 (the 1950 Act) are drafted to allow a tortfeasor to seek contribution from a joint tortfeasor even if the time for a direct action by the plaintiff against the joint tortfeasor has expired.[89] We agree that s 34 introduced a specific limitation period for contribution claims.[90] This came into effect in 2011 for acts or omissions that occurred from 1 January 2011.[91]

[96] While we agree that these features of contribution claims are significant, we do not see them as having a decisive bearing on the issue before us. It is true that there is now a bespoke regime for contribution claims with its own limitation period of two years, measured from the date on which the liability to the tortfeasor seeking contribution is "quantified by an agreement, award, or judgment".[92] But, so is there a specific limitation regime for late knowledge situations: three years from the date on which the claimant knew or ought reasonably to have known of certain specified facts.[93] This regime applies to tort claims commenced by plaintiffs in cases involving latent defects. It is common ground that the limitation regime for a claim by a plaintiff in a latent defect case is overridden by the longstop in s 393(2) of the 2004 Act,

85 Above at [37].
86 Above at [37].
87 Above at [48].
88 Above at [52].
89 See above at [56]. We will refer to the tortfeasor claiming contribution as "the primary tortfeasor".
90 Above at [57].
91 Limitation Act 2010 [2010 Act], ss 2, 59 and 61.
92 Section 34(4). However, the 2010 Act was not in force at the time of the events leading to the claim against the Council.
93 Sections 11(2)–(3)(a) and 14.

providing a complete defence to some claims that would otherwise succeed. We do not see it as particularly remarkable, therefore, that the limitation regime for contribution claims is also overridden by the longstop in s 393(2).

Meaning of statutory wording is clear

[97] As the wording of s 393(2) of the 2004 Act is broad enough to encompass all civil claims including contribution claims, the question is: why should we read into the wording an unstated phrase ("other than a claim by a tortfeasor for contribution")?[94]

Same words used in other provisions of the 2004 Act

[98] We see it as particularly significant that the phrase "civil proceedings" is also used in ss 390–392 and 420 of the 2004 Act. If the majority's interpretation of the meaning of the words "civil proceedings" is adopted, the same unstated phrase would need to be read into those provisions as well. That would mean that the apparently comprehensive indemnity provisions are far more limited than they appear.

[99] Section 391 is unlikely to have any material significance in contribution claims by joint tortfeasors and s 420 is a transitional provision that is now spent. But ss 390 and 392 are important protections for entities involved in the regulation of the building industry and parties associated with those entities.

[100] As noted by the majority, s 390 provides a statutory indemnity relating to specified activities of the chief executive of the Ministry responsible for the 2004 Act and associated persons, such as employees of that Ministry.[95] There is no reason to suppose that Parliament's intention in enacting s 390 was to provide those office-holders with immunity from proceedings commenced by plaintiffs, but not contribution proceedings commenced by a defendant. The potential exposure of s 390 parties to liability in contribution proceedings under the majority's interpretation raises

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94 The Council argued that "civil proceedings relating to building work" is apt to describe claims by building owners for damages. Adopting that interpretation also involves reading into s 393(2) an unstated phrase ("commenced by a building owner"). The plaintiffs in the claim against the Council in the present case, BNZ Branch Properties Ltd and the Bank of New Zealand, are not, in fact, the building owner.

95 Above at [16].

issues about the need for the parties mentioned in s 390 to insure against potentially significant civil liabilities or to be contractually indemnified by their employer.

[101] Section 392 is also a significant protection for consent authorities. It provides immunity from civil proceedings against an authority where the authority has acted (or omitted to act) in reliance on specified documents.[96] The protection intended to be provided by this section would be substantially undermined if the immunity it provides is limited to immunity from claims by plaintiffs, but not contribution claims by defendants.

[102] Counsel for the Council, Mr Taylor KC, submitted that the expression "civil proceedings" could have differing meanings in s 393(2) on the one hand (excluding contribution claims) and in ss 390 and 392 on the other (including contribution claims). There is nothing in the statutory context or the legislative history to support that submission. We reject it.

[103] We see these factors as supporting a construction of s 393(2) that accords with the plain meaning of the words in that provision.

Act or omission

[104] Mr Taylor also argued that the reference in s 393(2) of the 2004 Act to "act or omission on which the proceedings are based" could, in a contribution claim, be interpreted as a reference to the date of the quantification of the primary tortfeasor's liability to the plaintiff. If that were to occur, the 10-year period of the longstop would be measured from that date in a contribution claim. Alternatively, s 393(2) of the 2004 Act could be interpreted on the basis that there is no "act or omission" in a contribution claim, because the contribution claim is not based on an act or omission, but on the quantification of the primary tortfeasor's liability to the plaintiff. These arguments would answer the concerns identified above, at [97]–[103].

[105] We do not accept either of these propositions. We agree that s 34 of the 2010 Act eschews the "act or omission" formula for contribution claims, instead

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96 This is subject to the requirement of good faith: see Building Act 2004, s 392(1).

providing that the limitation period begins on the date that the primary tortfeasor's liability to the plaintiff is quantified. But there is no similar provision in s 393(2) of the 2004 Act differentiating contribution claims from other claims. The quantification of the primary tortfeasor's liability triggers the ability of the primary tortfeasor to claim against the alleged joint tortfeasor, but the act or omission on which the claim is based is the tortious act or omission of the alleged joint tortfeasor: without that, there is no basis for the claim. In our view, that means that both the propositions in [104], above, are untenable.

General does not derogate from specific

[106] Both the High Court and the Court of Appeal invoked the principle of statutory interpretation that the general does not derogate from the specific in support of their interpretation.[97] The majority appears to adopt similar reasoning, given the significance it attaches to the fact that there is no specific override of the right to seek contribution in the 2004 Act.[98] The principle is said to support the proposition that the general longstop provision in s 393(2) of the 2004 Act does not derogate from the specific limitation regime for contribution claims in s 34 of the 2010 Act. As we see it, the longstop provision is the specific provision (creating a bespoke regime for civil proceedings relating to building work) while the generic limitation regimes for both claims initiated by the plaintiff and contribution claims can be seen as the general. So, we think it is at least equally arguable that the principle that the general does not override the specific can be invoked to support the opposite conclusion to that reached by the lower Courts and the majority.

Statutory purpose

[107] We also consider that when the interpretation suggested by the plain meaning of the words is cross-checked against the purpose of s 393(2), the purpose supports the plain meaning interpretation.[99]

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97 *BNZ Branch Properties Ltd v Wellington City Council* [2021] NZHC 1058 (Clark J) at [77]–[78]; and *Beca Carter Hollings & Ferner Ltd v Wellington City Council* [2022] NZCA 624 (Miller, Clifford and Katz JJ) at [148]. See also above at [25] and [31].

98 Above at [38] and see at [78].

99 See *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

[108] As this Court noted in *Carter Holt Harvey Ltd v Minister of Education*, the statutory history indicates that the focus of s 91 of the 1991 Act was on building certifiers who, under that Act, became entitled to certify buildings (a task previously exclusively entrusted to local authorities).[100] A 1990 report of the Building Industry Commission to the Minister of Internal Affairs, which was largely implemented in the 1991 Act,[101] made it clear that a regime allowing for private certifiers should require those certifiers to carry adequate insurance cover, which needed to be at a price that was reasonable.[102] The report identified 10 years as the period for which professional indemnity insurance could be obtained, and recommended that 10-year insurance at defined levels be compulsory for certifiers.[103] The need for the certifiers to obtain insurance was a key reason that the originally intended 15-year longstop period was reduced to 10 years.[104]

[109] In *Carter Holt Harvey*, this Court noted that, ultimately, insurance for 10 years for certifiers was not available either, "so the rationale for reducing the longstop period did not turn out to be a valid one".[105] That does not detract from Parliament's focus on the need for building certifiers to obtain insurance that, in turn, would protect home-owners relying on their certification. Parliament thought this could be achieved only if certifiers were no longer at risk after the end of the 10-year longstop period. As Glazebrook J noted in *Klinac v Lehmann*, the legislative policy behind s 91 "was to provide certainty to those involved in building work so that they could rest easy after 10 years".[106] The legislative policy would not be achieved if the longstop was not as comprehensive as the plain wording of the provision.

[110] The legislative history also reveals that there were concerns at the time of the enactment of the 1991 Act about the temporally unlimited liability of local government entities in negligence. This was also seen as being a driving force behind the longstop

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100 *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [130].

101 See Building Bill 1990 (54-1) (explanatory note) at i.

102 Building Industry Commission *Reform of Building Controls* (vol 1, 1990) at [4.86]–[4.87] and [6.26]–[6.30].

103 At [4.88] and [6.30].

104 *Carter Holt Harvey*, above n 100, at [130] citing the analysis of the statutory history of s 91 in *Klinac v Lehmann* (2002) 4 NZ ConvC 193,547 at [13]–[26]. See also (20 November 1991) 520 NZPD 5490.

105 *Carter Holt Harvey*, above n 100, at [130].

106 *Klinac*, above n 104, at [54].

provided for in s 91.[107] That purpose will not be achieved by the interpretation adopted by the majority. It is perhaps ironic that it is a local government entity, the Council, that seeks this limited interpretation in this case, given the potential implications for it and other local government entities if the interpretation prevails.[108]

[111] As the majority acknowledges, there is some support for Beca's view in the debates on the introduction of the Bill which became the 2010 Act.[109] The then Attorney-General, Hon Christopher Finlayson MP, referred to the fact that there were other "special" limitation periods such as those in the 2004 Act. He envisaged that if there was conflict between "the general rules in this [Limitation] [B]ill and specific rules in other legislation, the specific rules will continue to prevail".[110]

Law Commission

[112] We do not derive much assistance from the Te Aka Matua o te Ture | Law Commission (Commission) reports discussed in the majority's judgment. We accept these reports collectively reflect the view that, generally, the limitation period for contribution claims should not commence on the date of the act or omission on which the claim is based and that the limitation regime for contribution claims should be a bespoke one.[111] But the Commission's reports do not address the approach to contribution claims in the 1991 Act or the 2004 Act. The 2007 report for the Commission prepared by Mr Chris Corry did address the position of contribution claims in respect of another proposed longstop (a universal longstop, as opposed to a bespoke one for building work claims) and recommended a limited exception for contribution claims.[112] But it is notable that this proposed exception still featured a

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[107] At [16].

[108] The appellant notes that Wellington City Council was, in fact, one of the successful parties in *The Minister of Education v James Hardie New Zealand* [2018] NZHC 22, in which Fitzgerald J adopted the approach now advocated by Beca Carter Hollings & Ferner Ltd.

[109] See above at [79], n 72.

[110] (4 August 2009) 656 NZPD 5380.

[111] See "A (Draft) Limitation Defences Act" in Law Commission *Limitation Defences in Civil Proceedings* (NZLC R6, 1988) 146 at cls 2(2)(d) and 20(3); Law Commission *Apportionment of Civil Liability* (NZLC PP19, 1992) at [254]; Law Commission *Apportionment of Civil Liability* (NZLC R47, 1998) at 32–33; Law Commission | Te Aka Matua o te Ture *Tidying the Limitation Act* (NZLC R61, 2000) at [27]; and Law Commission *Limitation Defences in Civil Cases: Update Report for Law Commission* (NZLC MP16, 2007) at [64], [81]–[84] and 68.

[112] Law Commission *Update Report*, above n 111, at [84], n 88 and [117].

start date of the date of the act or omission on which the claim was based[113] and, of course, this report post-dates the 2004 Act. More generally, there is nothing to indicate that the framers of the 2004 Act had any regard to the Commission's views as expressed in its various reports and discussion papers; rather, s 393(2) appears to have simply carried forward, in slightly different terms, s 91 of the 1991 Act, which predates the Commission's reports discussed by the majority, apart from its 1988 report.[114]

[113] In summary, these materials indicate that the Commission may not have agreed with the general wording used in s 393(2) and may have recommended that s 393(2) make separate provision for contribution claims.[115] But we do not think that assists us in interpreting the words actually used by Parliament in s 393(2).

Cromwell

[114] The majority speculates that Parliament may have made a decision to adopt essentially the same wording in s 393 of the 2004 Act as was used in s 91 of the 1991 Act because the law in 2004 was as described in *Cromwell Plumbing Drainage and Services Ltd v De Geest Brothers Construction Ltd* and Parliament intended to adopt the law as stated in that case.[116] There is nothing in the legislative history to support that speculation. If Parliament had considered *Cromwell* and decided it was desirable that contribution claims be excluded from the longstop provision, it seems to us more likely it would have enacted a specific provision to that effect to ensure there was no doubt about the exclusion. It did not do that. *Cromwell* was a High Court decision that was not binding on other High Court judges (and not followed by a number of High Court judges until the present case) and was susceptible to being overruled by an appellate court.[117] So it hardly provided a solid basis for continuing

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113 At 68.

114 Law Commission *Limitation Defences in Civil Proceedings*, above n 111. The Commission did assist Te Tari Taiwhenua | Department of Internal Affairs in the drafting of s 91 of the 1991 Act, but as noted above, that predated all but one of the Commission's reports on limitation: see (20 November 1991) 520 NZPD 5490.

115 But it could be envisaged such a separate provision would have had a fixed end-date so those involved in building work could rest easy at the end of the relevant period.

116 Above at [39]–[42] referring to *Cromwell Plumbing Drainage & Services Ltd v De Geest Brothers Construction Ltd* (1995) 9 PRNZ 218 (HC) at 221–222.

117 For a list of such cases, see *Body Corporate 328392 v Auckland Council* [2021] NZHC 2412 at [34].

silence on the question of the impact of the longstop provision on contribution claims if Parliament's intention was to exclude the latter from the former.

Tuckwood

[115] We also accept that the decision of the England and Wales Court of Appeal in *Tuckwood v Rotherham Corporation* supports the majority's interpretation.[118] But we do not see it as decisive.

[116] In *Tuckwood*, a tram driver employed by Rotherham Corporation (RC) negligently caused an accident in which an employee of Mr Tuckwood was injured. Mr Tuckwood paid the employee compensation under the Workmen's Compensation Act 1906 (UK) (the 1906 Act). Under the 1906 Act, Mr Tuckwood was entitled to be indemnified by RC for the amount paid or payable to his employee.[119] Mr Tuckwood made a claim for such indemnification. RC argued the claim was time-barred under the limitation provision in s 1 of the Public Authorities Protection Act 1893 (UK).[120] Under that section, any claim "in respect of any alleged neglect or default in the execution of any [Act of Parliament], duty, or authority" was time-barred unless begun within six months of the act, neglect or default in issue. It was clear that if RC's interpretation was correct, that would mean the limitation period would have expired before the workman's compensation claim had been resolved in many, if not most of, such cases.

[117] The England and Wales Court of Appeal in *Tuckwood* found the claim for statutory indemnity against RC was not time-barred under s 1 as it was not a claim in respect of any neglect or default of RC. A distinction was drawn between a claim made because of some act or default by RC, and a claim that did not derive from any such act or default but was a liability imposed under the statutory indemnity.[121] This avoided the extreme result that would otherwise have ensued. The essence of the decision was that an indemnity claim was conceptually different from a claim based on neglect or default.

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118 *Tuckwood v Rotherham Corporation* [1921] 1 KB 526 (CA), discussed by the majority above at [66]–[67].
119 Workmen's Compensation Act 1906 (UK) 6 Edw VII c 58, s 6(2).
120 Public Authorities Protection Act 1893 (UK) 56 & 57 Vict c 61, s 1.
121 For example, see *Tuckwood*, above n 118, at 538 per Atkin LJ.

[118] While we acknowledge there is room for argument that this logic applies by analogy in the present situation, we do not accept that argument. In this case, the issue is whether a contribution claim is a civil proceeding relating to building work. It clearly is. It is true the contribution claim is a conceptually different civil proceeding from the plaintiff's claim against the primary tortfeasor. As the Council argued, the contribution claim is not a claim founded on the negligence of the defendant, nor that of the alleged joint tortfeasor, although the negligence of the alleged joint tortfeasor would need to be proved by the primary tortfeasor. That means it is not a negligence claim, but that does not mean it falls outside the concept of a civil proceeding relating to building work. It is a different kind of civil proceeding from a negligence claim, but it is still a civil proceeding, and it still relates to building work.

[119] The Council also argued that *Tuckwood* supported its argument (set out above, at [104]) that the "act or omission on which the claim is based" is, in a contribution context, not the negligent act or omission of the alleged joint tortfeasor. We do not agree. The claim against RC in *Tuckwood* was a claim for indemnification: it was not a claim for neglect or default in the execution of a statutory duty. It was only claims for neglect or default in the execution of a statutory duty that attracted the protection of the limitation provision in the Public Authorities Protection Act. The wording of s 393 of the 2004 Act does not require a particular type of claim; rather it applies to any civil proceedings, as long as the proceedings relate to building work. As stated above, it is clear that the Council's claim against Beca fits that description.

Unsworth

[120] We do not think the Australian decision in *Unsworth v Commissioner of Railways* assists the Council.[122] In that case, the wording of the statutory provision was an action brought "against the Commissioner to recover damages or compensation in respect of personal injury".[123] As the majority accepts, *Unsworth* is distinguishable because of the particular wording of the statutory provision in issue.[124]

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[122] *Unsworth v Commissioner for Railways* (1958) 101 CLR 73, discussed by the majority above, at [68]–[70].
[123] The Railways Acts 1914–1955 (Qld), s 121(1).
[124] Above at [75].

Ancillary claims

[121] Like the majority, we do not adopt the distinction made in the High Court between ancillary and original claims.[125] We agree with the majority's reasoning on that point.

Practical implications

[122] The practical effects of the interpretation adopted by the majority are significant. In effect, those associated with building work (such as architects, engineers, builders, sub-contractors and others) face liability in negligence for an undefined period beyond the 10-year longstop period if the way in which they are brought into the proceeding is through a contribution claim made by a defendant, rather than by a direct claim by a plaintiff. It is not clear whether insurance is available for potential liability beyond the 10-year longstop period, but, even if it is, the idea that those involved in the building industry need to continue to purchase insurance indefinitely runs counter to the legislative purpose of ensuring that, after the end of the longstop period, they can "rest easy".[126]

[123] Counsel for Beca, Mr Ring KC, said building industry participants relied on the plain wording of s 91 of the 1991 Act and s 393 of the 2004 Act and did not organise run-off cover or take asset protection measures after retirement, once the period of 10 years from their last project had elapsed. He said the risk to individual participants is not minimal: the size of claims relating to building defects can be large, as the present case illustrates.[127] Indeed, the Council's contribution claim is made not just against Beca, but also against an individual, Professor John Mander.

[124] In addition, as we noted earlier, the majority's interpretation also has significant effects for those relying on the immunity provisions in ss 390 and 392 of the 2004 Act.

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125 Above at [76].
126 *Klinac*, above n 104, at [54].
127 The claim against the Council is for over $101 million.

[125] The majority's interpretation would also require those involved in the industry to retain records relating to particular building works for an indefinite period, in case they become subject to a contribution claim outside the 10-year longstop period.

[126] Mr Ring KC pointed out that it is, at least theoretically, possible that contribution claims could occur serially, with each one adding another two years of potential exposure for building industry participants.[128] Thus, if tortfeasor 1 joins tortfeasor 2 at year 11, tortfeasor 2 may become liable in year 13 and then join tortfeasor 3 who may become liable in year 15 and join tortfeasor 4, and so on. We accept that this may be unlikely to occur in practice, but we do not think it is consistent with the statutory purpose to have this form of ongoing exposure to liability for those involved in the building industry and for local authorities.

[127] The majority concludes that it is possible to give effect to the purpose of s 393(2) of the 2004 Act (ensuring certainty and finality for building industry participants) and the purpose of s 17 of the Law Reform Act 1936 (ensuring that joint tortfeasors should share liability, rather than one being liable for the full amount of the plaintiff's loss).[129] We disagree. On the majority's interpretation, the certainty intended to be provided by s 393(2) is substantially undermined. It would be different if there was a bespoke longstop period for contribution claims; at least building industry participants would know how long they needed to maintain insurance and keep records. But taking contribution claims outside the scope of s 393(2) simply leaves uncertainty and potential liability for an undefined period.[130] We accept this undermines the purpose of s 17 of the Law Reform Act to some extent, but that arises only where the contribution claim is not made, or not able to be made, within the longstop period.

Potential unfairness

[128] We acknowledge that applying the longstop to contribution claims can lead to unfairness to the primary tortfeasor who is subject to the claim by the plaintiff that is

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128 In a case like the present, where the Limitation Act 1950 [1950 Act], rather than the 2010 Act, applies, the position would be worse because under the 1950 Act, the added period of exposure would be six years, not two.

129 See above at [83].

130 And exposes officials and consent authorities to liability: see above at [100]–[101].

made very close to the end of the 10-year longstop period.[131] In the present case, because Beca's work was undertaken before the certification by the Council, the longstop preventing a claim against Beca had already expired before the Council was sued for its alleged negligence in certifying the relevant building. We accept this is unfair, but unfairness in some cases was a price Parliament was prepared to pay to bring about certainty through the use of the longstop. Unfairness also arises where a building owner becomes aware of a latent defect after the 10-year longstop period has expired; in those cases, an otherwise straightforward claim can be effectively barred by the longstop. The majority appears to attribute to Parliament a position that unfairness to plaintiffs was an acceptable price to pay for the certainty provided by the longstop provision, but unfairness to defendants (primary tortfeasors) was not. We see nothing in the legislative history to support that.

[129] We conclude that there is no reason to interpret the words "civil proceedings relating to building work" other than in accordance with their plain meaning. If contribution claims were to be excepted, that needed to be stated. As the Council's contribution claim against Beca is such a civil proceeding relating to building work and was commenced outside the longstop period, we would have allowed Beca's appeal.

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131 Sometimes that may be because the plaintiff delays in commencing proceedings against the primary tortfeasor. But not always. It may just be that the latent defect became apparent right at the end of the period of 10 years after the act or omission of the primary tortfeasor. If the alleged joint tortfeasor's work was undertaken earlier than that of the primary tortfeasor, that may mean the longstop prevents the plaintiff pursuing a claim against the alleged joint tortfeasor; in that situation, the longstop would also prevent a contribution claim by the primary tortfeasor.