IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 11/2023

Between	**BECA CARTER HOLLINGS & FERNER LIMITED** Appellant
And	**WELLINGTON CITY COUNCIL** Respondent

Synopsis of Submissions for Respondent

Dated: 11 July 2023
Next Event Date: Hearing, 18 October 2023

We certify that, to the best of our knowledge, the Respondent's submissions are suitable for publication and do not contain any information that is suppressed.

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Introduction and Summary of Position

1. The issue in this appeal is whether the 10-year longstop limitation provision in s 393(2) (**BA Longstop**)[1] of the Building Act 2004 (**BA 2004**) applies so as to defeat the Wellington City Council's contribution claim against Beca. The Council's contribution claim is based upon its statutory right to claim contribution pursuant to s 17 of the Law Reform Act 1936 (**LRA**).

2. There is no evidence that Parliament intended to deprive defendants of their statutory right to contribution when introducing the BA Longstop in the Building Act 1991 (**BA 1991**) and re-enacting it in 2004. On the contrary, when the BA Longstop was re-enacted in 2004, the only High Court decision on point held that the BA Longstop did not apply to defeat contribution claims brought outside the 10-year BA Longstop period.[2]

3. The conclusion reached by John Hansen J in *Cromwell* stood unchallenged for over 10 years until the 2006 decision of Courtney J in *Dustin*.[3] In *Dustin,* the judge expressed the (obiter) view that the BA Longstop applied to contribution claims so as to defeat a contribution claim which was brought more than 10 years after the negligent act or omission of the contribution claim defendant.

4. There then followed a series of High Court decisions which, in essence, adopted the reasoning and conclusion expressed by Courtney J in *Dustin*. However, this Court in *Carter Holt Harvey v Minister of Education*[4] did not express a view as to the correctness of those High Court decisions. It noted that the issue had not been determined at appellate level. This proceeding is the first time that this issue has been considered by the appellate courts.

5. As found by both the Court of Appeal[5] and the High Court[6] in this proceeding, there was no legislative intention, when enacting the BA Longstops, to limit or derogate from the long established and bespoke rights of defendants to claim contribution from joint tortfeasors. The LRA and the BA Longstop have quite different purposes and address different mischiefs:

    a. The purpose of s 17 of the LRA was to enable defendants who had been found liable for damage to the plaintiff to recover a just proportion

[1] In these submissions references to the BA Longstop include both s 91(2) of the BA 1991 and s 393 of the BA 2004, unless the context indicates otherwise.
[2] *Cromwell Plumbing Drainage & Services Ltd v De Geest Brothers Construction Ltd* (1995) 9 PRNZ 218 (***Cromwell Plumbing***) **[Res BoA 5 / 40].**
[3] *Dustin v Weathertight Homes Resolution Service* HC Auckland CIV-2006-404-276, 25 May 2006 (***Dustin***) **[App BoA 12 / 174]**.
[4] *Carter Holt Harvey v Minister of Education* [2016] NZSC 95; [2017] 1 NZLR 78 at [127] (***Carter Holt Harvey v MOE***) **[App BoA 9 / 77]**.
[5] *Beca Carter Hollings & Ferner Limited v Wellington City Council* [2002] NZCA 642 (**CA Judgment**) **[05.0001]**.
[6] *BNZ Branch Properties Limited v Wellington City Council* [2021] NZHC 1058 (**HC Judgment**) **[101.0001].**

from those who shared the blame for the damage caused to the original plaintiff. Section 17 (as amended) and s 14 of the Limitation Act 1950 (**LA 1950**) made it clear that the statutory right to contribution could not be defeated by a statutory limitation period applicable to a claim between the original plaintiff and the contribution claim defendant. Contribution claims are only subject to the 2-year limitation period in s 34(4) of the Limitation Act 2010 (**LA 2010**) or, if applicable, the 6-year limitation period in the LA 1950.

b. The purpose of the BA Longstop was to impose a limitation period of 10-years on claims by building owners for damage, including latent damage, arising from defective buildings. The 10-year period was to commence at the time of the negligent act or omission which was alleged to have caused the damage. The BA Longstop was introduced to mitigate the prospect of temporally indefinite liability to building owners of persons whose neglect had caused the building damage.

6. The Council says, as the Court of Appeal found, that, properly interpreted, the purposes of those Acts can be achieved without one interfering or derogating from the other. There is no inconsistency between the purposes of the two Acts. The BA Longstop, when properly construed, does not, and was never intended to, limit or derogate from the well-established rights of contribution claimants.

7. If Beca's position were correct, any contribution claim by the Council arising out of Beca's PS4s for the substructure and superstructure needed to be issued before 12 March 2018. If not, the BA Longstop would apply to defeat the Council's contribution claim.

8. However, the last date upon which the BNZ could claim against the Council was 26 March 2019 (being 10-years from the date of issue of the CCC for the superstructure). In other words, if Beca's position is correct, the Council lost its right to bring a claim for contribution before the 10-year BA Longstop period applicable to the primary claim by the BNZ had expired.

9. This case demonstrates the very injustice that s 17 of the LRA was intended to defeat. If Beca is right in its submissions the Council will have lost its right to claim contribution simply because the BNZ, as lessee of the building, has chosen to sue only the Council within the 10-year BA Longstop period.

10. For the reasons discussed below, the Council submits that both the Court of Appeal and High Court were right to conclude that the BA Longstop does not apply so as to defeat the Council's contribution claim against Beca.

Material Facts

11. The material facts were summarised in the Courts below:[7]

    a. The Building was constructed on land owned by CentrePort.[8] Beca was engaged to provide the structural engineering design of the Building and to issue producer statements (PS1s).

    b. The Council issued a building consent for the substructure on 13 November 2006 (SR153556) and a separate building consent for the superstructure on 23 February 2007 (SR155010).[9]

    c. Beca was engaged to provide construction monitoring services and issue producer statements (PS4s). On 12 March 2008, Beca issued a combined PS4 for the substructure and superstructure.[10]

    d. The Council issued a code compliance certificate (**CCC**) for the superstructure on 27 March 2009 and the substructure on 12 March 2010.[11] The Council relied on Beca's PS4s when doing so.[12]

    e. Beca continued to provide design services and construction monitoring until practical completion of the Building in August 2011.[13]

    f. The Building was damaged in the Seddon earthquake on 21 July 2013. That damage was repaired. It was damaged again in the Kaikōura earthquake on 14 November 2016.[14] It has now been demolished.

Statutory Interpretation Principles

12. The core issue is one of statutory interpretation. The orthodox approach is well established. The meaning of the legislation must be ascertained from its text and in light of its purpose and context.[15] This is regardless of whether or not the legislation's purpose is expressly stated in the legislation.[16]

13. Even if the meaning of the text may appear plain in isolation, the meaning must always be cross checked against the purpose. In determining purpose, the Court must have regard to both the immediate and general legislative context.

[7] CA Judgment at [11] **[05.0005]**, HC Judgment at [18]-[26] **[101.0006]**.
[8] HC Judgment at [1] **[101.0002]**.
[9] CA Judgment at [11] **[05.0005]**.
[10] CA Judgment at [11] **[05.0005]**.
[11] CA Judgment at [11] **[05.0005]**.
[12] Affidavit of Christopher Scott dated 13 February 2020 at [14] **[201.0004]**.
[13] HC Judgment at [23] **[101.0008]**.
[14] CA Judgment at [11] **[05.0005]**.
[15] Legislation Act 2019, s 10(1) **[App BoA 4 / 15]**.
[16] Legislation Act 2019, s 10(2) **[App BoA 4 / 15]**.

The social, commercial, or other objectives of the enactment may be relevant.[17]

14. There is a presumption that Parliament intends for all words in statutes to have meaning and all provisions to be able to work together.[18] The precision of modern drafting means that repeals are usually effected expressly. Courts are reluctant to find that one provision impliedly repeals another.[19]

15. It is inevitable that apparent conflicts and inconsistencies will arise. If it is reasonably possible to construe the provisions **so as to give effect to both**, that is to be done.[20] It is only if one provision is so inconsistent with, or repugnant to, the other that the two are incapable of standing together that it is necessary to determine which is to prevail.

16. Where there is an inconsistency between two provisions that cannot be reconciled, there are principles for determining which provision prevails. One is *generalia specialibus non derogant*. If there are general words in a later Act capable of reasonable application without extending them to subjects specifically dealt with by earlier legislation, the earlier and special legislation must not be indirectly repealed, or derogated from, merely by force of general words without any indication of a particular intention to do so.[21] The principle is based in common sense and, as a "*rule of thumb*", yields to context.[22]

Purpose and Context – Legislative History

17. The Court of Appeal determined there was no inconsistency between the provisions of s 17 of the LRA, Limitation Acts, and BA Longstop. The legislative provisions are capable of being construed in a way that does not defeat, or derogate, from the legislative purpose of the provisions of those Acts.

18. The Court reached this view following a detailed review of the legislative history of the relevant provisions, including the extensive work by the Law Commission, to ascertain the legislative purpose of the provisions. It correctly concluded that the BA Longstop does not apply to a claim by a defendant for contribution from a tortfeasor who, if sued in time, would have been liable to the person who suffered the same damage for which the defendant was liable.

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[17] *Commerce Commission v Fonterra Co-Operative Group Limited* [2007] NZSC 36; [2007] 3 NZLR 767 at [22] **[App BoA 11 / 158]** at **[167].**
[18] *Harris v General Manager of Railways* [1950] NZLR 737 at 749 per Callan J.
[19] *Laws of New Zealand* Statutes (reissue 3) (online ed) at [69], citing *Government of United States of America v Jennings* [1983] 1 AC 624 at 643 - 644; [1982] 3 All ER 104 at 116 **[Res BoA 13 / 177]** at **[179]**.
[20] *Stewart v Grey County Council* [1978] 2 NZLR 577 (CA) at 583 per Richardson J.
[21] *Seward v The Owners of the Vera Cruz (The Vera Cruz) (No. 2)* (1884) 10 App Cas 59 (HL) at 68 cited in R. Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 622. **[Res BoA 14 / 183]**.
[22] *R v Pora* [2001] 2 NZLR 37 per Elias CJ at [42].

Section 17(1)(c) Law Reform Act 1936 – Purpose

19. Section 17(1)(c) of the LRA introduced the right of contribution between joint tortfeasors. It was a remedial provision designed to abolish two problematic common law rules that: [23] (1) if two parties commit a joint tort, judgment against one joint tortfeasor was a bar to any subsequent action against another joint tortfeasor in respect of the same damage;[24] and (2) there was no right of contribution between joint tortfeasors.[25]

20. These rules were manifestly unfair in circumstances where the plaintiff sued only one or a selection of the potential defendants. Parliament's intention, as set out in the readings of the Bill, was to remedy that injustice by allowing the burden of liability to be shared between tortfeasors.[26]

21. Two principles of natural justice stand behind s 17.[27] In a claim brought against two or more defendants, a plaintiff should not be able to over-recover by collecting more than the aggregate damages. Equally, a plaintiff should not be able to choose to collect the entire award from one judgment debtor, leaving that party bereft of any ability to collect a fair contribution from the other parties who share liability to the plaintiff who suffered damage.

22. Parliament's intention when it passed s 17 was to ensure all those who had caused a loss could be held responsible for that loss. The purpose of this remedial provision was expansionist.

23. The effectiveness of this provision was challenged by the decision of the English High Court in *Merlihan v A.C. Pope Limited.*[28] *Merlihan* considered s 6 of the UK Married Law Reform (Married Women and Tortfeasors) Act 1935, which s 17 mirrored. The Court found that the liability of the third party arose at the time the negligence occurred (when the plaintiff had suffered damage), rather than when the defendant seeking contribution became liable to the plaintiff. The Court held the contribution claim was time-barred. The Court found the words "*or if sued had been liable*" could not be read as "*who if sued in time would have been liable.*"[29]

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[23] R. McElroy and T Greeson *The Law Reform Act 1936* (1st ed, Butterworth & Co, Auckland, 1937) at 76. **[Res BoA 15 / 188]**.
[24] *Brinsmead v Harrison* (1872) L.R. 7 C.P. 547.
[25] *Merryweather v Nixan* (1799) 8 Term Rep. 186.
[26] (3 September 1936) 246 NZPD 870 **[Res BoA 17 / 231]** and (17 September 1936) 247 NZPD 238 **[Res BoA 18 / 234]**.
[27] *Body Corporate 330324 "City Gardens Apartments" v Auckland City Council* [2015] NZHC 995 at [32]-[33] **[Res BoA 4 / 23]** at **[34]**.
[28] *Merlihan v A.C. Pope Limited* [1946] KB 166 (***Merlihan***) **[Res BoA 9 / 123]**.
[29] *Merlihan* at 170 **[Res BoA 9 / 123]** at **[127]**.

24. New Zealand's response to *Merlihan* came in the LA 1950.[30]

a. It introduced s 14 which provided for a specific and bespoke date for the accrual of the contribution cause of action.[31]

> *For the purposes of any claim for a sum of money by way of contribution or indemnity, however the right to contribution or indemnity arises, the cause of action in respect of the claim shall be deemed to have accrued at the first point of time when everything has happened which would have to be proved to enable judgment to be obtained for a sum of money in respect of the claim.*

b. It amended s 17 to add the words "*if sued in time*" so that it read:[32]

> *…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…*

25. The changes were made to remedy the obvious injustice of a defendant's 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. The addition of the words "*if sued in time*" was plainly intended to ensure that limitation defences applying to the primary claim (by a plaintiff who has suffered damage) do not apply so as to defeat the right of a defendant who is liable to the original plaintiff to claim contribution from others who have contributed to the same damage.

26. Some years after the above amendments were introduced by the New Zealand legislature, the English Court of Appeal rejected *Merlihan* in *Littlewood v George Wimpey & Co Limited.*[33] It determined that the defendant's cause of action in a contribution claim arose when their liability to the plaintiff had been ascertained[34] – the opposite of what had been decided in *Merlihan*.

27. The House of Lords in the subsequent appeal assumed that the decision of the Court of Appeal correctly stated the law.[35] The English Courts have more recently commented that contribution claims in England, which are subject to a

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[30] The explanatory note to the Limitation Bill 1950 referenced *Merlihan* as the reason for the changes (Limitation Bill (59-1) at Schedule 1, Part 1) **[Res BoA 19 / 254]** at **[256]**.
[31] Limitation Act 1950, s 14 **[App BoA 5 / 16]**.
[32] Law Reform Act 1936, s 17 (as amended) **[App BoA 3 / 11]**.
[33] *Littlewood v George Wimpey & Co Ltd* [1953] 2 QB 501 (CA) (***Littlewood***) **[Res BoA 8 / 97]**.
[34] *Littlewood* at 511 per Lord Justice Singleton and 519-20 per Lord Denning **[Res BoA 8 / 97]** at **[107], [115]**.
[35] *George Wimpey & Co Ltd v British Overseas Airways Corporation* [1955] AC 169 (HL) (***George Wimpey***) at 177 per Viscount Simonds, 182–183 per Lord Porter, and 193 per Lord Keith **[Res BoA 7 / 69]** at **[77], [82], [93]**.

2-year limitation period, are not subject to other limitation provisions, such as the 15-year longstop defence in s 14B of the UK Limitation Act 1980.[36]

Building Act Longstop – Purpose

28. The context in which the BA 1991 was introduced is important. From the 1970s, there was a significant period of development in case law regarding liability for building defects. This broadened the liability of parties, particularly local authorities, to building owners for latent building defects.[37]

29. The concept of reasonable discoverability by the building owner of a latent defect, as the date of commencement of the limitation period, was developing.[38] The focus in these cases was when the building owner could reasonably identify the defects and commence the proceedings as the plaintiff. There was a concern that this could lead to potentially unlimited exposure to stale claims by building owners who had suffered damage as a result of latent defects.

30. The 1988 Law Commission Report was commissioned, in part, to consider and address the concerns around latent building defects claims.[39] The Commission recommended a general limitation period of three years from a new standard commencement date – "*the date of the act or omission on which the claim is based*." This proposal was a significant departure from the 'accrual based' approach under the LA 1950, which had led to the issues with latent defect claims commenced by building owners and the judicial development of the reasonable discoverability test.

31. The proposed standard limitation period was subject to an extension where there was a lack of knowledge and a general longstop provision of 15-years. This was to address any uncertainty created by the late knowledge extension.[40]

32. However, the Commission recognised that the meaning of its proposed "*act or omission*" commencement date might not always be clear:[41]

> *In most cases the date of the "act or omission" will be clear. It refers to that conduct of the defendant of which the claimant complains. In relation to a contract, it will usually be the date of breach and thus correspond with the present rule as to the date of accrual. In other cases, the act or omission*

[36] *Financial Services Compensation Scheme Ltd v Larnell (Insurances) Ltd* [2005] All ER (D) 388 **[Res BoA 6 / 46]**. See also *Bellefield Computer Services v E Turner & Sons Limited* [2003] Lloyd's Rep PN 53 (CA) **[Res BoA 3 / 6]**.
[37] Law Commission, *Limitation Defences in Civil Proceedings* (NZLC R6 1988) (**1988 Report**) at [79] **[App BoA 18 / 366] at [389]**.
[38] *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA); *Askin v Knox* [1989] 1 NZLR 248 (CA).
[39] Law Commission *The Limitation Act 1950: A Discussion Paper* (NZLC PP3, 1987) at 2 **[Res BoA 20 / 286]** at **[292]**; Law Commission 1988 Report at [62] **[App BoA 18 / 366] at [385]**.
[40] Law Commission 1988 Report at [182] **[App BoA 18 / 366] at [412]**.
[41] Law Commission 1988 Report at [169] and [172] **[App BoA 18 / 366] at [410]**.

> *may be an earlier date than accrual - in negligence, for example, where a delay in the occurrence of damage would relate to our proposed extension provisions rather than the date of accrual….*
>
> *…*
>
> *As may be seen most clearly in the new draft state we recommend (set out in Chapter XV), we have provided for* ***special provisions*** *dealing with claims based on demands, conversion,* ***contribution****, indemnity and certain intellectual property claims.*

33. The Commission recommended that the proposed standard three-year limitation period would apply to contribution claims, but with a bespoke specification of the date of the "*act or omission*" which formed the basis of contribution claims.[42] The purpose of the proposed wording was to confirm that the "*act or omission*" on which a contribution claim was "based" (as provided in s 14 of the LA 1950) was the date upon which the defendant (contribution claimant) became liable to the original plaintiff who had suffered damage.

34. The Commission's draft Bill provided:[43]

> *When a claim for a sum of money by way of contribution or indemnity is made, the 'date of the act or omission' on which the claim is based, for the purposes of this Act,* ***is the date on which the sum of money in respect of which the claim is made is quantified*** *by a decision of a court or arbitrator or by agreement.*

35. The Building Bill 1990 as introduced to Parliament did not refer to limitation issues at all. The BA Longstop was only raised at the Select Committee stage. The Minister of Justice recommended that a 15-year longstop limitation period be introduced and apply to all parties who could be defendants in a claim for damages by a defective building owner.

36. The Law Commission assisted in producing the draft limitation defence for the Building Bill.[44] The wording of the longstop followed the language used in the 1988 Report – "*date of the act or omission*". That wording was adopted in the BA 1991, but the limitation period was reduced from 15 to 10 years.

37. Parliament's stated purpose in enacting the BA Longstop in the BA 1991 was expressed in comments to the House from John Carter MP, the Chairman of the Select Committee, who introduced the BA Longstop:[45]

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[42] Law Commission 1988 Report at p 99 **[App BoA 18 / 366]** at **[464]**.
[43] Law Commission 1988 Report at p 107 **[App BoA 18/366]** at **[472]**.
[44] Graeme Lee "Submission to the Internal Affairs and Local Government Select Committee on the Building Bill 1990" (30 August 1991) **[App BOA 19 / 557] at [561]**; Graeme Lee "Submission to the Internal Affairs and Local Government Select Committee on the Building Bill 1990" (10 October 1991) **[App BOA 20 / 562] at [566]**.
[45] (31 October 1991) 520 NZPD at 5296 **[App BoA 22 / 575] at [576]**.

> *At present* ***an owner of a building is able to lay a claim*** *against local government – and does – even if the building is 100 years old and built on a landslip or some other fault. Local government can be held liable for that. The committee, once again unanimously, decided that it was in the best interests of the building industry, of local government, and of New Zealand to limit the period of liability.*

38. These comments appear to reflect the 27 August 1991 report to the Minister which makes it clear that the proposed change was aimed at limiting the period for claims by plaintiff building owners who had suffered damage from latent defects.[46]

39. The Select Committee report on the Building Bill 2003 (prior to the BA 2004):[47]

> *Without this limitation, the provisions of the Limitation Act 1950 and the common law would apply to enable proceedings to be taken only up to 6 years after the matter that gave rise to the proceedings accrued, that is, occurred, or the damage was or could reasonably have been discoverable. In the case of latent defects, which are common in relation to buildings with a longer life expectancy, this could provide for a considerably longer time than 10 years in which to instigate.*

40. The Parliamentary papers for the BA 1991 (and BA 2004) do not contain any mention of s 17 or contribution claims. Parliament did not express any intention that the BA Longstop was to impact parties' right to bring contribution claims. On the contrary all of those papers clearly indicate that the BA Longstop was aimed at limiting claims by building owners who had suffered latent damage.

41. There is further evidence of this context and purpose in the period between the enactment of the BA Longstop in the BA 1991 and the re-enactment in s 393(2) of the BA 2004 – the BA Longstop that Beca argues is applicable to the Council's contribution claim.

42. The Law Commission issued its report "*Apportionment of Civil Liability*" in March 1992, after the BA 1991 had been enacted. It recommended the retention of the *in solidum* liability rule.[48] Under that rule, plaintiffs can choose

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[46] Graeme Lee "Submission to the Internal Affairs and Local Government Select Committee on the Building Bill 1990" (30 August 1991) **[App BOA 19 / 557]**. At paragraph 4 of the paper various different types of liability (including liability as a joint tortfeasor and contribution - see para 4 (iii)) were identified. The issues arising from discovery of latent defects by building owners were discussed at paragraphs 5, 6 and 7. The report concluded by saying that the proposed Longstop "*does not address the wider issues of liability as they apply to building producers (or indeed any other party) but it was hoped the very limited reforms that are proposed in this paper could help strengthen the momentum that already exists for an overall reform of the law of liability along the lines advocated by the Law Commission in its 1988 report.*"

[47] Building Bill 2003 (78-2) at p 51-52 **[App BoA 24 / 591]** at **[641]**.

[48] Law Commission, *Apportionment of Civil Liability* (NZLC PP19, 1992) (**1992 Report**) at [172] **[Res BoA 21 / 386]** at **[442]**.

to issue proceedings against one defendant and recover the entire loss from that defendant. That has the potential to leave the defendant 'carrying the can' for wrongdoers who the plaintiff has decided not to sue.

43. The Commission considered the position of contribution claimants in detail. It was agreed that the policy behind s 17 was correct and that a defendant's right to contribution should continue to be available notwithstanding the existence of a limitation defence as between the third party and the original plaintiff.[49]

44. The Commission's draft Act included this draft provision:[50]

> ***14 Limitation in contribution proceedings***
>
> *(1) A defence under the Limitation Act 1950, or similar defence under another enactment, in equity or under an agreement, that is available to a concurrent wrongdoer in respect of a claim for damages against that concurrent wrongdoer* ***is not a defence*** *in respect of a claim for contribution against the concurrent wrongdoer.*
>
> *…*
>
> *(3) This section does not affect the availability to a concurrent wrongdoer of any defence under the Limitation Act 1950, or a similar defence under another enactment, in equity or under an agreement in respect of a claim for contribution in its own right.*

45. The Commission explained:[51]

> *Subsection (1) ensures that a limitation defence of any kind (ie, a bar against bringing proceedings because of a time limitation) available to D2 against P* ***does not prevent D1 from claiming contribution against D2.*** *It* ***preserves and extends*** *to all kinds of civil claims the rule now applying to contribution claims between tortfeasors under s 17(1)(c) of the Law Reform Act 1936. …*
>
> *Subsection (3) relates to the limitation period applicable to the contribution claim itself (see s 14 Limitation Act 1950 and paras 253 and 254 of the paper) and indicates that the section does not affect it.*

46. This draft provision ensured that contribution claims would not be subject to the standard limitation provisions, but rather bespoke provisions that supported the purpose of s 17. The Commission supported this approach in later reports.[52]

47. As noted above, the High Court decision in *Cromwell Plumbing*[53] considered

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[49] Law Commission 1992 Report at [244]-[249] **[Res BoA 21 / 386]** at **[462]**.
[50] Law Commission 1992 Report at p 94 **[Res BoA 21 / 386]** at **[487]**.
[51] Law Commission 1992 Report at p 95 **[Res BoA 21 / 386]** at **[488]**.
[52] Law Commission *Apportionment of Civil Liability* (NZLC R47, 1998) **[Res BoA 22 / 510]**; Law Commission, *Liability of Multiple Defendants* (NZLC R132, 2014)**.**
[53] *Cromwell Plumbing* **[Res BoA 5 / 40]**.

the application of the BA Longstop to contribution claims after the BA Longstop was introduced in the BA 1991. In *Cromwell Plumbing*, John Hansen J found that a claim for contribution was a separate statutory cause of action which did not arise until the contribution claimant had been found liable or compromised the action. The Judge found that the LA 1950 laid down a specific limitation period in respect of contribution claims which was not overridden by the BA Longstop.

48. The decision in *Cromwell Plumbing* stated the legal position on the application of the BA Longstop to contribution claims when the BA Longstop was re-enacted in the BA 2004. The legal position as stated in *Cromwell* remained unchallenged for over 10 years until the (obiter) comments by Courtney J in *Dustin*[54] in 2006 – some two years after the BA 2004 came into force. No attempt was made in the BA 2004 to nullify or change the law as stated in *Cromwell Plumbing*.

49. The Commission's 2007 Report, *Limitation Defences in Civil Cases*, supported the approach adopted in its 1988 Report, including the general limitation period being connected to an 'act or omission'. However, like the 1998 Report, a bespoke, but slightly different, approach to contribution claims was proposed as the expression "*the date of the act or omission on which the claim is based' is not appropriate.*"[55] The Report recommended that the start date for the limitation period for contribution claims be the date on which the defendant's liability to the original plaintiff was established and that contribution claims be excluded from the proposed general longstop provision.[56]

50. When the LA 2010 was finally enacted, it introduced a bespoke 2-year limitation defence to contribution claims with the start date being "*the date on which A's liability to B is quantified by an agreement, award, or judgment".*[57] Contribution claims are also specifically excluded from the definition of a 'money claim', putting them outside the general 6-year limitation period, the 3-year late knowledge extension, and the general 15-year longstop.[58] In this way, the LA 2010 clarifies the "*date of the act or omission on which the claim is based*" for contribution claims.[59]

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[54] *Dustin* **[App BoA 12 / 174]**.
[55] Law Commission *Limitation Defences in Civil Cases: Update Report for the Law Commission* (NZLC MP16, 2007) at [64] **[App BoA 17 / 296] at [320]**.
[56] At [84] **[App BoA 17 / 296] at [326]**.
[57] Limitation Act 2010, s 34(4) **[Res BoA 1 / 4]**.
[58] Limitation Act 2010, s 12(3)(c) **[App BoA 6 / 19] at [21]**.
[59] Limitation Act 2010, s 5 defines this phrase for certain other claims **[Res BoA 1 / 3]**.

Council's Position on Purposes of Provisions

51. There can be no controversy that Parliament's intention (for almost 100 years) has been to create, maintain, and enhance the right of a defendant who is liable to an original plaintiff to bring a contribution claim against a joint tortfeasor. The words "*if sued in time*" were expressly included to ensure that this right would continue, even in the face of a limitation period which would bar any claim by the original plaintiff against the contribution claim defendant. This intention/purpose is not challenged by Beca.

52. The important question is whether the BA Longstop was introduced with the purpose and intention of defeating all claims, including contribution claims, against persons involved in building work.

53. The starting point must be that there is nothing in the legislative materials to show that Parliament considered, let alone intended, that the rights of contribution claimants in the building industry were to be stripped away by the BA Longstop. Parliament did not consider that contribution claims would be impacted at all. Parliament is presumed not to have intended to 'sweep aside' its clear purpose and intention behind s 17 and impliedly repeal its effect.[60] Beca's approach would do this.

54. As discussed above, the BA Longstop was introduced in the context of the issues arising out of the latent defect cases. The issues in those cases were that building owners were discovering defects many years after construction. They were then issuing claims against those involved in the construction.

55. The mischief that the BA Longstop was intended to address was the potentially open ended liability to owners of buildings with latent defects. The Law Commission's 1988 Report, and the BA Longstop, was responding to that issue. It was not at all related to the rights of defendants to bring contribution claims. That was not the mischief that was being addressed.

56. Parliament's expressed purpose of the BA Longstop was for it to address the ability of "*an owner of a building*" to lay a claim against those in the building industry "*even if the building is 100 years old.*"[61] If a claim had not been brought within the BA Longstop limitation period, then the "*responsibility for the construction rests entirely with the building's owner.*"[62] The BA Longstop was introduced to address and limit original claims from building owners who had

[60] HC Judgment at [78] citing Burrows and Carter *Statute Law in New Zealand*, (5th ed LexisNexis, Wellington, 2015) at 475 **[101.0029]**.
[61] (31 October 1991) 520 NZPD at 5296 **[App BoA 22 / 575]** at **[576]**.
[62] (31 October 1991) 520 NZPD 5296 **[App BoA 22 / 575]** at **[576]**.

suffered damage.

57. There was no expressed intention that contribution claims would be impacted. It must be presumed that Parliament did not intend to repeal, or derogate from, its longstanding and clear intention to ensure that joint tortfeasors can bring contribution claims, notwithstanding the expiry of a limitation period for the primary claim. Express words would be required, either in the LRA or the Building Acts, if the intention was to deprive building industry defendants of their right to contribution from joint tortfeasors.

58. The use of the words "*civil proceeding relating to building work*" is apt to describe claims by building owners for damages. Such general words are not, however, sufficient to show an intention by Parliament to deprive building industry defendants of their right to contribution in respect of contribution claims brought outside the 10-year BA Longstop period.

Consistency of Provisions

59. Beca's submissions on the approach to this statutory interpretation exercise miss the point. They do not reference the purpose of s 17 at all. Beca simply asserts what it says was Parliament's intention when introducing the BA Longstop in the Building Acts, which, they say, means that this Court should agree that contribution claims are captured by the BA Longstop.

60. That is not the correct approach to statutory interpretation. The Courts must look at the purposes of both statutes and determine whether it is possible to give effect to them both.[63] If possible, that is to be done. It is only if one provision is so inconsistent with, or repugnant to, the other that the Court needs to determine which one prevails. Beca does not engage in this approach. Rather, Beca turns a blind eye to s 17 and the amendments in the LA 1950.

61. The Court of Appeal did, however, follow the orthodox approach to statutory interpretation. It followed the correct purposive approach and found that the text of s 17, the LRA and the BA Longstop work together to give effect to the purpose of the provisions. It found that the BA Longstop was not intended to apply to contribution claims:

    a. The cause of action for contribution accrues on the finding of liability against the defendant / contribution claimant.

    b. The bespoke approach to limitation claims is reflected in s 34 of the LA

[63] *Stewart* at 583 per Richardson J.

2010, which was an exception to the general approach taken in the LA 2010 (and, previously, in section 14 of the LA 1950). The fundamental reasoning and objective of all of the Law Commission Reports, in respect of contribution claims, was to preserve the right of contribution claimants to bring such claims after expiry of the limitation periods applicable to the primary claim. That fundamental objective is recognised and achieved in the LA 2010.

62. Two important factors support the Court of Appeal's reasoning:

a. The nature and legal basis of a contribution claim.

b. The point at which the right to bring a contribution claim arises.

Nature and legal basis of a contribution claim

63. The Court of Appeal comprehensively explained the nature and legal basis of a contribution claim, which the Council expressly adopts.[64]

64. A contribution claim has a distinct and separate legal and conceptual basis from a claim in negligence by a plaintiff against a tortfeasor. *Todd on Torts* explains the nature of the right:[65]

> *This right to recover contribution is a right sui generis: it is 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.*

65. The Court of Appeal referred to the decision in *Brook's Wharf and Bull Wharf Limited v Goodman Bros,* where Lord Wight MR stated:[66]

> *The essence of the rule is that there is a liability for the same debt resting on the plaintiff and the defendant and the plaintiff has been legally compelled to pay, but the defendant gets the benefit of the payment, because his debt is discharged either entirely or pro tanto, whereas the defendant is primarily liable to pay as between himself and the plaintiff. The case is analogous to that of a payment by a surety which has the effect of discharging the principal's debt and which, therefore, gives a right of indemnity against the principal.*

66. The right to contribution arises from something new and separate from the primary claim. It is not a claim in tort. It arises from, and is based on, the statutory right under s 17 for a defendant to seek contribution from a tortfeasor.

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[64] CA Judgment at [43] – [46] **[05.0013]** and [60] – [64] **[05.0020]**.
[65] Stephen Todd (ed) "Multiple Tortfeasors and Contribution" in *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [24.3.01] (footnotes omitted) **[Res BoA 16 / 228]** at **[230]**.
[66] *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534 (CA) at 544.

67. The claim for contribution is not based on the fact of negligence of the defendant, nor that of the third party joint tortfeasor (although that is an aspect of the cause of action to be proved). It is claim based on the finding of liability of the defendant to the plaintiff which, when discharged, enriches the joint tortfeasor. The defendant is liable for the full amount of the plaintiff's damage. Where that includes damage contributed to by the fault of a joint tortfeasor, that tortfeasor is enriched at the expense of the defendant who is liable for the whole of the damage suffered by the original plaintiff.

68. The English Court of Appeal decision in *Tuckwood v Rotherham Corporation Limited*[67] illustrates this. Tuckwood sought an indemnity from the City of Rotherham in respect of compensation paid to one of the plaintiff's employees for injuries sustained in a collision with a city tramcar. Tuckwood's employee had sued it successfully.

69. Tuckwood's claim against the City sought an indemnity under the Workmen's Compensation Act 1906. The City claimed Tuckwood was time-barred under the Public Authorities Protection Act 1893. The Act provided that any claim "*in respect of any alleged neglect or default in the execution of any such Act, duty, or authority*" was time-barred unless brought within six months of the act or neglect. Tuckwood's claim was issued outside that period.

70. However, the Court concluded it was not time barred. As stated by Banks LJ:[68]

> *The question thus is, is this action claiming the right to the statutory indemnity an action in respect of any alleged neglect in the execution of any such duty? In my opinion it is not. It is true that in order to succeed in the action the plaintiff must establish that the workman would have been entitled to recover damages against the corporation for the negligence of their servant driving the tramcar. That no doubt is an essential part of his cause of action;* ***but I do not think that it is true to say that the right to the statutory indemnity is an action in respect of any alleged neglect in the execution of a duty within the language used in the section.***

71. The negligence of the joint tortfeasor is relevant but only to the extent that it proves that the defendant can bring the contribution claim against that particular joint tortfeasor. However, it is not the legal basis of the contribution claim. To use the language of the BA Longstop, the joint tortfeasor's negligence is not the "*act or omission on which the [claim for contribution] is based*".

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[67] *Tuckwood v Rotherham Corporation* [1921] KB 526 (CA) **[Res BoA 11 / 139]**. See also: *Unsworth v Commissioner for Railways* (1958) 101 CLR 73 **[Res BoA 12 / 154]**; *Nickels v Parks* (1948) 49 SR (NSW) 124 (CA) **[Res BoA 10 / 129]**.

[68] At 533 and see to a similar effect Scrutton LJ at 536 and Atkin LJ at 538-539 **[Res BoA 11 / 139]** at **[146], [149], [151]**.

72. This point was explored by Glazebrook J in *Klinac v Lehmann*,[69] which related to a representation made during the sale of a property and an alleged breach of a warranty in the sale contract. The representation was that all building works on the property had been completed to an acceptable standard and in accordance with the permits issued. Klinac argued that the claim was timed barred by the BA Longstop as the building works were completed more than 10-years before the proceedings were issued, even though the representation was made, and warranty given, within the 10-year limitation period.

73. Glazebrook J found that the relevant date for the purposes of the BA Longstop was the date on which the warranty was breached in the sale contract:[70]

> *The making of the representation and entry into the agreement containing the term it is alleged had been breached determines the relevance of other factors, including the preceding building work. The faulty building work is relevant solely because it goes to prove that a representation was a misrepresentation, or that a term of the contract that was breached. It is not the act upon which the proceeding is based (unlike in actions in negligence).*

74. Although it was necessary to prove the building work was non-compliant in order to prove that there had been a misrepresentation, the defective building work was not the "*act or omission*" on which the claim was based.

When the right to bring a contribution claim arises

75. The right to bring a contribution claim does not exist until the establishment of liability against the defendant, at which time, the third party joint tortfeasor is enriched. This was expressly considered and confirmed by the English Court of Appeal in *Littlewood v George Wimpey & Co Limited.*[71]

76. In this case, the plaintiff sued George Wimpey in time, but the British Overseas Airways Corporation out of time. George Wimpey brought a contribution claim against BAOC under the UK equivalent of the New Zealand LRA.

77. The Court of Appeal considered when the contribution cause of action arose.

78. Singleton LJ found that:[72]

> *The cause of action arises when the defendant is held liable, that is, when judgment is given against him…and in the ordinary case it avoids the possibility of any injustice to a defendant as against a third party.*

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[69] *Klinac v Lehmann* (2002) 4 NZ ConvC 193,547 (HC) (***Klinac***) **[App BoA 14 / 202]**.
[70] *Klinac* at [50] **[App BoA 14 / 202] at [210]**.
[71] *Littlewood* **[Res BoA 8 / 97]**.
[72] *Littlewood* at 511 **[Res BoA 8 / 97]** at **[107]**.

79. Denning LJ agreed and stated:[73]

> *This depends on when the cause of action for contribution arises. If it arises at the date of the accident (as Birkett J. held in Merlihan v. A. C. Pope Ld., Pagnello Third Party) then the remedy would be barred; but I do not think that that is correct. It seems to me clear that* ***a tortfeasor cannot recover contribution until his liability is ascertained. If he has not been sued and has paid nothing and admitted nothing, he can have no cause of action for contribution, for the simple reason that he may never be called on to pay at all.***

80. This statement of the law was assumed to be correct on appeal to the House of Lords and has not been overruled.[74]

81. *Littlewood* makes it clear that s 17 is a statutory right that the defendant does not acquire until and unless the plaintiff has proved liability against the defendant. That finding of liability is the fundamental pre-condition to the defendant acquiring the right to bring a contribution claim.[75]

'Act or Omission'

82. The wording "*act or omission*" is arguably inapt to describe what a contribution claim is based on. That is because a contribution claim is based on the liability of a defendant for damages caused to the plaintiff for which another joint tortfeasor is also liable rather than an "act or omission" in the usual sense in which those words are used.

83. The Law Commission's 1988 Report recognised this. The Commission stated that the "*act or omission*" would be clear in most cases (because it will clearly be referring to the conduct of the defendant of which plaintiff complains).[76]

84. However, the Commission quite clearly considered that the "*act or omission*" upon which a contribution claim is based is the date of quantification of the primary claim against the defendant. It recognised the potential ambiguity or inaptness of the words "*act or omission*" to describe this. It therefore recommended a specific definition of the date of the "*act or omission*" for

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[73] *Littlewood* at 519-520 **[Res BoA 8 / 97]** at **[115]**.
[74] *George Wimpey* (HL) at 177 per Viscount Simonds, 182-183 per Lord Porter, and 193 per Lord Keith **[Res BoA 7 / 69]** at **[77], [82], [93]**.
[75] That does not, however, prevent a defendant issuing a cross claim for contribution in the primary proceedings before the right to contribution has accrued. See the discussion by Fogarty J in *Body Corporate 330324 "City Gardens Apartments" v Auckland City Council* [2015] NZHC 995 **[Res BoA 4 / 23]**. See also High Court Rule 4.4 in relation to issue of a third party notice by a defendant in the primary proceeding **[Res BoA 2 / 5]**.
[76] Law Commission 1988 Report at [169] **[App BoA 18 / 366] at [410]**. See also *Gedye v South* [2010] NZCA 207; [2010] 3 NZLR 271 (***Gedye***) at [29]: *"the act or omission on which the proceedings are based" are not of such precision as to provide an immediate and obvious answer to the problem.*" **[App BoA 13 / 188] at [195]**.

contribution claims to make it clear that the "*act or omission*" was the quantification of the primary claim against the defendant. The draft Act provided:[77]

> *When a claim for a sum of money by way of contribution or indemnity is made, the 'date of the act or omission' on which the claim is based, for the purposes of this Act, is the date on which the sum of money in respect of which the claim is made is quantified by a decision of a court or arbitrator or by agreement.*

85. The approach adopted by the Commission to include a special and specific date for the "*act or omission*" reflects that contribution claims have a distinct and separate legal basis from a claim for negligence by an original plaintiff (who has suffered damage) against the defendant.

86. As is clear from the analysis in the Court of Appeal decision in this case, although there were different approaches to drafting, the fundamental premise throughout the various proposals in the reports from the Law Commission was that a contribution claim was based on the date of quantification of the primary claim against the defendant. In the LA 2010, s 34 also introduced a specific limitation period for contribution claims – a 2-year limitation period for contribution claims from the date on which the defendant's liability to the plaintiff is quantified. This is not subject to the 15-year longstop defence in the LA 2010.

87. The words "*act or omission on which the claim is based*" in the BA Longstop, are appropriate to describe a negligent act or omission which has caused damage to a plaintiff building owner (which the BA Longstop is clearly directed at). As recognised by the Law Commission in its 1988 Report, those words are not so apt to describe the basis for a contribution claim where the "*act or omission*" upon which it is based is the quantification of the defendant's liability.

88. That, however, does not mean that the words used in the BA Longstop should be interpreted as meaning that a contribution claim is "*based on*" the act or omission of the contribution defendant which caused the damage suffered by the original plaintiff building owner. There is nothing in the legislative history or the words used in the BA Longstop which supports such an interpretation.

89. In essence, as found by the Court of Appeal, the basis of a contribution claim is not the act or omission of the joint tortfeasor who also caused the damage for which the defendant/contribution claimant is liable. The basis for such a claim is the quantification of the defendant's liability to the original plaintiff who suffered the damage. Although the defendant must prove that the joint

[77] Law Commission 1988 Report at page 107 **[App BoA 18/366] at [472].**

tortfeasor negligently contributed to the plaintiff's loss that is not the act or omission upon which the contribution claim is based.

90. It is submitted that the result is the same whether the court construes the words "*act or omission on which the claim is based*" as meaning the date of the quantification of the defendant's liability to the original plaintiff or determines there is no relevant "*act or omission*" because a contribution claim is not based on an "*act or omission*" within the meaning of those words in the BA Longstop. The BA Longstop does not apply to defeat the contribution claim in this case.

91. The facts of this case highlight the fundamental flaw in Beca's argument. On Beca's case, any contribution claim in respect of its PS4s for the substructure and superstructure had to be issued prior to 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.

92. The impact of Beca's argument is that the clearly protected right of a defendant (the Council here) to bring a claim following quantification of the original claim against it is stripped away before that right has even accrued. The English Courts, and the Courts below in this proceeding, have recognised that such injustice should not be permitted.[78]

Consistency of Provisions

93. The Acts can work together to give effect to the purposes and intention of the Acts. They are consistent. The provisions continue to address the separate and distinct mischiefs they were intended to address:

    a. The BA Longstop applies to limit plaintiff claims against defendants after 10 years from the defendant's "*act or omission.*" This protects defendants from stale claims and provides finality between the original plaintiff and the defendant(s) that the plaintiff chose to sue.

    b. The defendant(s) who are successfully sued by the plaintiff can then bring contribution claims against other potentially liable joint tortfeasors pursuant to s 17. This is subject to the 2-year limitation period in the LA 2010 (and, previously, the six-year period in the LA 1950). This supports the legislative purpose of enabling action to be taken against responsible parties and upholds the in solidum liability rule.

[78] *Littlewood* per Denning J at 515: "*if that is the law, I can only say that is most unsatisfactory. It means that the right of Wimpeys to contribution is defeated by something over which they had no control and with which they had nothing to do. It is defeated by the conduct of the injured man, first, in delaying to sue British Overseas Airways Corporation for more than a year…*" **[Res BoA 8 / 97]** at **[111]**.

94. This approach ensures that the purpose behind the addition of the words "*if sued in time*" to s 17 (by the LA 1950) is maintained. Those words contemplate that limitation provisions, such as the BA Longstop, may apply to the original proceeding, but then expressly directs that those limitation provisions do not apply to exclude a contribution claim. Beca's approach strips the words "*if sued in time*" of their full meaning and intended purpose and restores the injustice that those words were intended to overcome.

95. What Beca is attempting to do is bring the law back to the pre-LA 1950 position in respect of any claims relating to building work and say that the approach in *Merlihan* was correct, despite this being rejected by the English Court of Appeal and House of Lords and subject to Parliament's specific response in the LA 1950. Beca ignores the purpose of s 17 (and the amendments in the LA 1950) and is asking this Court to allow the very mischief the s 17 was designed to prevent. Parliament did not give any indication that this was its intention when introducing the BA Longstop in 1991.

96. The building industry is still protected by the 10-year longstop. A contribution claim cannot get off the ground unless the plaintiff building owner issues the proceedings within 10-years against the defendant(s). If that does not occur, then other joint tortfeasors will not be exposed to contribution claims.

97. Contrary to Beca's submissions,[79] the BA Longstop clearly is effective to limit the exposure of defendants in the building industry to claims by building owners who have suffered loss. That is all the protection the building industry could reasonably expect and all the protection that Parliament intended.

98. Likewise, Beca's submission of potential "indefinite legal liability through successive contribution claims"[80] (even assuming it is legally correct) is, as Beca states, "theoretical". It is not a real concern in practical terms.

99. Contribution claims in building claims are almost aways brought contemporaneously within the original proceeding (third or fourth party claims). It is very rare that contribution claims are made in separate proceedings, let alone multiple sequential contribution claims.

100. Even if there is a theoretical risk of such claims, it is a risk which has existed for nearly 100 years (since contribution claims were introduced). It was clearly not a risk which that the BA Longstop was introduced to remedy.

[79] Appellant's submissions at [89].
[80] Appellant's submissions at [7.1].

101. In any event, the strained examples hypothesised by Beca do not justify applying the BA Longstop to defeat the rights of contribution claimants in building cases. To the extent that it was a problem, if at all, it has been directly addressed by Parliament's introduction, after detailed consideration by the Law Commission, of a 2 year limitation period for contribution claims in the LA 2010.

Previous High Court Decisions

102. The Court of Appeal addressed the previous line of High Court decisions that adopted the opposite approach – that the BA Longstop does apply to contribution claims.

103. This line of authority, starting with *Dustin*,[81] heavily relied on the summary of the legislative enactment of the BA Longstop by Glazebrook J in *Klinac.* Glazebrook J made clear that the BA Longstop was enacted to deal with the issues arising out of the reasonable discoverability test.[82] Her Honour recognised the significance of the Law Commission's involvement in the enactment of the BA Longstop and the policy background in the 1988 Report.[83]

104. The subsequent High Court decisions adopted Glazebrook J's summary as demonstrating Parliament's intent and purpose when enacting the BA Longstop in 1991. However, as *Klinac* was not dealing with a contribution claim, the important legislative background to, and purpose of, s 17 was not considered, nor its interaction with the BA Longstop.

105. These decisions therefore proceeded on the flawed assumption that the use of the general words '*civil proceedings*' in the BA Longstop included contribution claims and that clear words were required if Parliament did not intend the BA Longstop to apply to contribution claims brought outside of the 10-year limitation period. This flipped the orthodox approach to statutory interpretation on its head. The Courts should have concluded that express words were needed to override Parliament's clear intention that defendants have a right to bring contribution claims, despite them being brought outside limitation periods which barred claims by the original plaintiff.

106. The Court of Appeal concluded that in these cases, the courts were not made aware of the full legislative history of s 17 and the BA Longstop and, as a result, took insufficient account of the longstanding and bespoke approach that Parliament has adopted to contribution claims.[84] That is plainly correct.

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[81] *Dustin* **[App BoA 12 / 174]**.
[82] *Klinac* from [13] **[App BoA 14 / 202] at [205]**.
[83] *Klinac* at [17] **[App BoA 14 / 202] at [206]**.
[84] CA Judgment at [146] **[05.0045]**.

High Court Approach

107. The High Court likewise adopted a purposive approach to the interpretation of s 17, the LA 1950, and the Building Acts. Clark J found that the provisions can work together to achieve their respective purposes. The Court's reasoning was:

a. The LA 2010 makes a distinction between "*original claims*" and "*ancillary claims*" and that a contribution claim is an ancillary claim.

b. The phrase "*civil proceedings*" in the BA Longstop can be narrowly interpreted to apply to original claims and not ancillary claims.

c. Section 17 and Limitation Acts created a 'code' for the bringing of contribution claims. The right to contribution was untouched by the BA Longstop.

108. The High Court's analysis of the BA Longstop differed from the Court of Appeal in that it focused on the words "*civil proceedings*" in the BA Longstop. The Court found that these words could be narrowly construed to refer to original (i.e. plaintiff) claims. Original claims relating to building work are governed by the relevant Limitation Act, except that the BA Longstop period of 10-years applies to such proceedings, rather than the general longstop period of 15 years.

109. Contribution claims (which are ancillary or derivative in nature) are instead governed by the specific regime created by s 17, together with the operative provisions of the LA 2010 (and previously the LA 1950). The specific limitation defence for contribution claims provided in the Limitation Act applies (6 years in the LA 1950; 2 years in the LA 2010). The right to bring a contribution claim is therefore untouched by the BA Longstop.

110. The Court found support for this approach in the Court of Appeal decision in *Gedye v South*,[85] in which the Court of Appeal confirmed the approach in *Klinac* and found that the BA Longstop applies to the "*act or omission*" of the defendant. This is consistent with the proposition that the phrase "*civil proceedings*" is to be read as applying to original (i.e plaintiff) claims.

111. While the Court's analysis focuses on the provisions of the LA 2010, rather than the 1950 Act, the same reasoning applies. In the LA 1950, contribution claims were subject to the same 6-year limitation period as other claims. However, contribution claims had a special start date – the date on which "*everything has happened which would have to be provided to enable judgment to be*

[85] *Gedye* **[App BoA 13 / 188]**.

obtained".[86]

112. The Court was correct to conclude that this bespoke regime for contribution claims means that, even prior to the enactment of the LA 2010, the BA Longstop can be read purposively to refer only to original (plaintiff) claims, and not contribution claims. This ensures that the Acts work together to achieve their respective purposes, as found by the High Court.[87]

Generalia Specialibus Non Derogant

113. The Court of Appeal found the interpretive principle of *generalia specialibus non derogant* provided support for its conclusion that the BA Longstop did not apply to the Council's contribution claim against Beca. This was not strictly necessary as the Court had already determined that the two provisions could work together, meaning there was no inconsistency to be resolved.

114. The Court of Appeal stated that:[88]

> *But we do consider the essence of that principle applies here – that is, if Parliament had intended to do away with that bespoke approach to claims for contribution, it would have said so in clear and unambiguous terms.*

115. Likewise, the High Court concluded:[89]

> *It was 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.*

116. In doing so, the Courts found that s 17 was the specific provision, which was not overridden by the general wording in the in the BA Longstop.

117. This approach is correct. Section 17 is a specific remedial provision, refined and supported by the LA 1950, and was enacted earlier in time to the Building Acts. This leads to the presumption that Parliament would not interfere with s 17 unless Parliament manifested its intention to do so very clearly.

118. As above, there is no intention expressed in the Building Acts (or the legislative materials) that shows that Parliament intended to sweep aside this specific provision, which was passed to regulate a specific situation and was carefully considered and formulated at the time.[90] Section 17 is the specific provision.

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[86] Limitation Act 1950, s 14 **[App BOA 5 / 16]**.
[87] HC Judgment at [76] **[101.0028]**.
[88] CA Judgment at [148] **[05.0046]**.
[89] HC Judgment at [78] citing Burrows and Carter *Statute Law in New Zealand*, (5th ed LexisNexis, Wellington, 2015) at 475 **[101.0029]**.
[90] HC Judgment at [78] **[101.0029]**.

119. If there is an unresolvable inconsistency between the BA Longstop and s 17 of the LRA (which is not accepted) it is submitted that s 17 must prevail. The words "if sued in time" in s 17 apply to any limitation period applicable to a claim by the original plaintiff against the contribution claim defendant.

120. Even though a claim could not have been brought by the original plaintiff against the contribution claim defendant (due to the 10-year BA Longstop) that does not bar a contribution claim against such a defendant who, if sued in time, would have been liable for the same damage. Resolving any inconsistency in this way gives effect to the purpose of s 17 and does not materially derogate from the purpose of the BA Longstop.

Insurance consequences

121. Beca is correct that the justification for the 10 year period of the BA Longstop was, in part, to address concerns about the availability of insurance for persons involved in the building industry as a result of (potentially) temporally indefinite exposure arising from latent defects which had not been discovered. During the passage of the Building Bill 1991, concerns were raised that insurance would not be available for building industry participants for the 15 year longstop period which had been originally proposed.[91]

122. However, as noted by this Court in *Carter Holt Harvey v Minister of Education*, that perceived insurance benefit did not eventuate, so the rationale for reducing the longstop period "*did not turn out to be a valid one*".[92]

123. Notwithstanding that, Beca has made a number of unsubstantiated assertions in its submissions as to the allegedly dire effects regarding insurance availability if the right to contribution is not subject to the BA Longstop. It is submitted that these speculative and unsubstantiated assertions cannot, even if they were proved to exist, be a proper basis for concluding that Parliament intended the BA Longstop to apply to contribution claims. There was no such intention.

124. If, as a result of the correct interpretation of the BA Longstop, insurers and insureds need to revisit their insurance arrangements, that is simply a consequence of those arrangements being based on an incorrect understanding of the effect of the BA Longstop on contribution claims. It is not a principled basis for perpetuating a wrong interpretation of the Building Act.

[91] (20 November 1991) 520 NZPD 5490 **[App BoA 21 / 567] at [569]**.
[92] *Carter Holt Harvey v MOE* at [130] **[App BoA 9 / 77]**.

Conclusion and Costs

125. The BA Longstop does not apply to contribution claims. This construction of s 17 and the BA Longstop confirms that both provisions can stand together while giving effect to their respective purposes, as found in the legislative history.

126. The BA Longstop applies to limit claims by original claimants against defendants after 10 years. Section 17 allows those defendants to bring contribution claims against other parties who are responsible for the plaintiff's losses, subject to the 6-year period in the LA 1950 or the 2-year limitation period introduced by the LA 2010.

127. This appeal should be dismissed with costs and disbursements awarded to the Council (including for second counsel).

Dated: 11 July 2023

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L J Taylor KC | B J Sanders | B A Mathers

Counsel for the Respondent

Schedule A: Chronology

Date	Event
04/10/2006	Beca issued PS1 for the design of the substructure.
13/11/2006	The Council issued Building Consent SR153556 (substructure).
19/11/2006	Beca issued PS1 for the design of the superstructure.
	10-year limitation period for primary claims against Beca in respect of superstructure design commences.
23/02/2007	The Council issued Building Consent SR155010 (superstructure).
12/03/2008	Beca issued PS4s for Building Consents 153556 (substructure) and SR155010 (superstructure).
	10-year limitation period for claims against Beca in respect of issuing PS4s for superstructure and substructure commences.
27/03/2009	The Council issued Code Compliance Certificate for SR155010 (superstructure) in reliance on Beca's PS4.
	10-year limitation period for primary claims against the Council for the superstructure commences.
2009 – 2011	Beca continues to provide services, including issuing PS1s and PS4s for other building consents for the Building.
08/2011	Practical completion of the Building.
21/07/2013	Seddon earthquake.
07/11/2013 – 27/03/2014	Beca provides services, including assessment and design of upgrade of seismic restraint of in-ceiling services and utilities post Seddon earthquake.
14/11/2016	Kaikoura earthquake.
12/03/2018	**10-year limitation period (as argued by Beca) expires for the Council to issue a contribution claim against Beca in respect of the issuing of the PS4s for the superstructure and substructure.**
27/03/2019	**10-year limitation period expires for BNZ to bring a claim against the Council for the issuing of the CCC for the superstructure.**
2/08/2019*	BNZ files claim against the Council alleging, inter alia, that the building consent and CCC for superstructure was negligently issued (*date extended by 6-month standstill agreement).
26/09/2019	The Council files third party claim against Beca claiming contribution.

List of Authorities referred to in Submissions

Legislation

1. Building Act 2004, s 393.
2. Building Act 1991, s 91.
3. Law Reform Act 1936, s 17.
4. Legislation Act 2019, s 10.
5. Limitation Act 1950, s 14.
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