IN THE DISPUTES TRIBUNAL **[2013] NZDT 129**

BETWEEN	**ACP**
	APPLICANT
AND	**ZXP Ltd**
	FIRST RESPONDENT
AND	**ZXO Ltd**
	SECOND RESPONDENT

Date of Order:	13 June 2013
Referee:	Referee Cadogan

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the case is struck out for lack of jurisdiction as the claim falls outside the limitation period imposed by the Building Act 2004.

Facts

[1] This matter involves problems caused by dampness in the ceiling of the home of ACP and NP, who have been represented today by ACP's father, DY.

[2] The house was designed in 2001, building started in September 2001, and was completed in June 2002 with Code Compliance issued in August 2002. ACP purchased the property in 2009.

[3] It is apparent that significant moisture build-up occurred in the ceiling cavity causing damage. Remedial work has cost in the vicinity of $35,000. ACP's claim that ZXP Ltd is partly responsible for not leaving a large enough gap in the ceiling to allow moisture to escape and that ZXO Ltd are partially liable for putting in a moisture extraction system that did not work properly.

[4] During today's hearing, the representative for ZXP Ltd, NG, raised an issue in relation to time limitations on the claim being made, based on s 393 of the Building Act 2004 (often referred to as "long-stop" provision).

[5] DY was given the opportunity to take legal advice on the limitation issue, but chose not to avail himself of the time to do so, instead leaving the decision in my hands.

Issues

[6] The issues to be considered are as follows:

(i) Do the provisions of the Limitation Act 1950 or the Limitation Act 2010 apply, and if so, how?

(ii) How do the provisions of s 393 of the Building Act apply?

(iii) What event triggers the beginning of the limitation period under s 393?

[7] The Limitation Act 2010 ("the 2010 Act") and the Limitation Act 1950 ("the 1950 Act") govern limitation rights in New Zealand by restricting the time in which a party may maintain an action in tort or breach of contract. Both Acts restrict this initial period to six years. The 2010 Act commenced on 1 January 2011 and applies to all disputes from that date. The 1950 Act applies to disputes which arose before the 2010 Act became operative – see s 59 of the 2010 Act. The applicability of each Act is determined by reference to when the right of action accrued. If the action accrued before 1 January 2011, the 1950 Act is the governing law; the 2010 Act applies to all actions which accrued after that date.

[8] The time upon which the right of action accrues differs dependant on the basis of the claim. If the claim is under contract law, time runs from the date on which the breach of contract occurs, even though damage may occur at a later point in time: see *Buxton and Others v McKenzie and Another* [1960] NZLR 732. If the claim is in tort, for instance negligence, damage is a necessary ingredient to founding a claim, therefore the cause of action commences from the date when all ingredients of the claim manifests itself – see *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234.

[9] In circumstances where there are possible concurrent claims in both contract and tort, the limitation period for either claim may obviously accrue at different times. Although the present claim has not been formulated along what branch of law it is based, it would seem to me that there is a possible claim under both contract and tort.

[10] In terms of a claim under contract, the allegation would be that the breach of contract occurred, for ZXP Ltd during the drafting of the plans and for ZXO Ltd during the installation. Both these events occurred in 2001/2002. Therefore, it follows that the 1950 Act applies. It states that no claim can be made six years after the cause of action has accrued. Therefore, I find that any claim in contract in this matter is statute barred.

[11] The time of the accrual of the cause of action in tort bears closer scrutiny. Tort is the law governing civil wrongs, i.e. one party harming another through actions that are not criminal. It would appear that any claim ACP may have under tort would lie in negligence.

Put very simply, negligence is where one party owes another a duty of care, breaches that duty, damage results from the breach of the duty and is not so remote as to avoid responsibility for the breaching party.

[12] As stated, in tort, the clock starts ticking in terms of limitation once all the elements of the claim manifest themselves; in other words, from when every fact exists which it would be necessary for the applicant to prove in order to gain judgement.

[13] In this case, damage was required before the ability to claim relief occurred. To put it another way, if ACP's claim is correct and the ceiling space and ventilation are inadequate, there would be no way of knowing that without there being damage resulting from the inadequacy.

[14] Therefore, I find that the cause of action in this case accrues from the date of the damage. The damage occurred after 1 January 2011, and so the 2010 Act applies. The 2010 Act clarified parties' rights in relation discoverability and "late knowledge" of claims, in circumstances where a party does not know, or reasonably ought to know, that they have a claim in tort or contract. The Act balanced claimants and defendants rights by establishing circumstances in which claims outside of the initial limitation period may be brought.

[15] Section 11(1) establishes a limitation period of six years as a defence against a money claim (be it in contract or tort). This is called the "primary period".

[16] Section 11(2) provides that a claim brought after the primary period may still be made if it can be shown that the claimant did not have knowledge of all the facts necessary to establish the claim. This is called the "late knowledge" date.

[17] Section 14(1)(a) to (e) defines this further, and includes cases such as the present case where damage is required as part of the claim (s 14(1)(c)). A claimant is permitted to bring a claim within three years of the discovery of the damage; this is called the "late knowledge period".

[18] Therefore, I find that this claim (in tort) is not barred by the provisions of the Limitation Act 2010 because the damage came to the knowledge of the Applicant within three years of the date of filing the claim.

[19] However, the 1950 and 2010 Limitation Acts are not comprehensive schemes and are complemented by limitation periods provided in other enactments, for instance, and relevant here is s 393(2) of the Building Act 2004, which purports to prevent any claims from being heard (regardless of whether or not a right of action has accrued) after a specified timeframe.

[20] The relevant parts of s 393 state:

> **393 Limitation defences**
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> (1) The Limitation Act 2010 applies to civil proceedings against any person if those proceedings arise from—
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> (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.
>
> (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.

[21] Section 393(2) provides that no claims are possible after ten years from which the act or omission of a claim could otherwise stem from. As discussed above, the 2010 and 1950 Acts attach the limitation period to the date in which the right or action (in tort or contract) accrues. As such, it is possible to have actions in tort for negligent building work that occurred over six years ago. However, s 393(2) restricts the period to which the action may attach to ten years. In circumstances where an action in tort accrues eleven years after the negligent work was completed, s 393(2) prevents claims for loss suffered due to that workmanship, even if the negligent work only becomes apparent after the ten year period.

[22] The operation of s 393 has been considered by the courts and is settled law. The decision of *Frith v Auckland City Council* [1996] DCR 549 outlines the operation of the long-

stop provision (then under s 91 of the Building Act 1991) and states that "[t]he Building Act makes no distinction between dormant causes of action and those which have crystallised by discoverability". The effect of this is that there is no ability to use a "late knowledge" type provision as found in the Limitation Act 2010 in building claims.

[23] Applying this to the present case, the latest date I could say that ZXP Ltd completed the plans is September 2001 (the date building started). Ten years from that date is September 2011. ACP filed in the Tribunal on 11 March 2013, outside the ten year limitation imposed by s 393. Similarly, the latest date I could say ZXO Ltd would have completed its work would be 23 August 2002, when Code Compliance was issued. Under the s 393 ten year limitation period, ACP has also filed these proceedings too late.

[24] So the obvious question here is this: If ACP is not stopped from pursuing this claim (in tort) by the Limitation Act 2010 but is stopped by the Building Act limitation period, does one section defeat the other? Or, from ACP's perspective, can the claim still come before the Tribunal because the Limitation Act 2010 allows it to, even though the Building Act does not?

[25] The answer is, unfortunately for ACP, no. Firstly, the "however" at the beginning of s 393(2) makes it clear that the 10 year provision in s 393 has priority over any provision in the Limitation Act 2010. Secondly, s 40(1)(a) of the Limitation Act 2010 states:

> **40 Other enactments may displace or affect defences**
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> (1) A defence under Part 2 or 3 does not apply to a claim if an enactment other than this Act
>
> (a) prescribes for the claim a limitation period or any other kind of limitation defence;...

[26] The "late knowledge" provisions of s 14 upon which ACP relies are found in Part 2 of the Act. The effect of s 40 is that the limitation period contained in the Building Act must apply (as this is a case involving civil proceedings in relation to building work) and, as that limitation period is ten years, and this claim has not been made within ten years of the actions

that may have led to liability on behalf of the Respondents, the claim is barred by that limitation period.

[27] For these reasons, I must strike out the claim on the basis that the Tribunal has no jurisdiction to hear the claim, it being brought outside the ten year limitation imposed by s 393 of the Building Act.