

# Limitation Periods for Building Defect Claims - The art of drawing a line in the sand

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## Introduction

1. Limitation periods should be foremost in the mind of a litigator.

This is especially so when dealing with defective building litigation.

2. This article is in three parts. It:
  - (a) Lists important limitation periods in the defective building litigation context;
  - (b) Discusses issues with the accrual of tortious claims;
  - (c) Concludes with a review of relevant provisions of the Limitation Act 2010.

## Limitation periods

### *Longstop limitation periods*

3. All civil claims relating to building work must be brought within 10 years of the act or omission on which the proceedings are based: Building Act 1991 s 91(2), Building Act 2004 s 393(2).
4. To be eligible for the Weathertight Homes Tribunal, the dwelling in issue must have been built (or alterations giving rise to the claim made to it) before 1 January 2012 and within the period of 10 years immediately before the day on which the claim is brought: Weathertight Homes Resolution Services Act 2006 s 14(a).
5. Non-compliance with s 14 prevents a claim being accepted as eligible, rather than creating an absolute defence like the Building Act. However, even if a claim is eligible the respondents may still have limitation defences available under the Building Act. This caters for the situation where a person's acts/omissions occur more than 10 years before the claim is lodged with the Tribunal, but the claim is made within 10 years of the dwelling being "built".<sup>1</sup> Identifying the precise nature and timing of specific building work is required.
6. Claims against builders or developers often involve allegations of negligent acts/omissions that cannot be dated with any particularity. In *Johnson v Watson* the Court of Appeal

<sup>1</sup> Built" is defined in *Auckland City Council v McIntyre & Ors* (unreported HC Auckland, Lang J, 24/11/09, CIV-2009-404-1761) as "the point at which the house has been physically constructed... which is ultimately a matter of judgment based on all the information that is available".

suggested in *obiter dicta* that such parties may be "under a continuing duty to remedy it right through until the date of completion, and there is a continuing "omission" until that date".<sup>2</sup> Subsequent judicial consideration of this argument has been lukewarm.<sup>3</sup>

***Other limitation periods***

7. Below is a summary of other limitation periods that must be read in conjunction with the "longstops" described above.

Cause of action	Period	Enactment / Caselaw
Breach of contract	6 years from breach of relevant term <sup>4</sup>	Limitation Act 1950 s 4(1)(a)
Negligence	6 years from defects/loss becoming "reasonably discoverable"	Limitation Act 1950 s 4(1)(a) & <i>Invercargill City Council v Hamlin</i>
Negligent misstatement	6 years from loss	Limitation Act 1950 s 4(1)(a)
Misleading and deceptive conduct in trade	3 years from when loss or damage or the likelihood of loss or damage discovered or ought reasonably to have been discovered.	Fair Trading Act 1986 s 43(5)
Statutory duty to exercise due skill and care when providing service	6 years from breach	Limitation Act 1950 s 4(1)(d)
Negligent issue of LIM	6 years from loss <sup>5</sup>	Limitation Act 1950 s 4(1)(a)

<sup>2</sup> [2003] 1 NZLR 626 at [27].

<sup>3</sup> Justice French found the concept unconvincing but tenable in *O'Callaghan v Drummond* (unreported, HC Christchurch, French J, 21/10/08, CIV-2007-409-1441) at [17].

<sup>4</sup> The standard vendor warranty is expressed as given at the date of settlement, so the date of breach will be the date of settlement. Note these are not claims relating to building work and so are not subject to the 10 year longstop - see *Gedye v South* [2010] NZSC 97.

<sup>5</sup> There is uncertainty over when the relevant loss occurs. See *Bayliss v Central Hawkes Bay District Council* (unreported, HC Napier, Andrews J, 22/2/10, CIV-2009-441-000593) where reasonable discoverability is considered in the context of a

**Accrual for tortious claims**

8. In New Zealand a cause of action in negligence for building defects accrues when:
- (a) Damage becomes manifest/apparent - *Mount Albert Borough v Johnson* [1979] 2 NZLR 234;
  - (b) Damage occurs to a degree that is more than minimal - *Bowen v Paramount Builders* [1977] 1 NZLR 394;
  - (b) The cause of the damage is obvious - *Pullar v R* [2007] NZCA 389;
  - (b) The market value of the property is affected - *Invercargill City Council v Hamlin* [1996] 1 NZLR 513.

The Privy Council concisely stated the test in *Invercargill City Council v Hamlin*:<sup>6</sup>

"The cause of action accrues when the cracks become so bad, or the defect so obvious, that any reasonable homeowner would call in an expert. Since the defects would then be obvious to a potential buyer, or his expert, that marks the moment when the value of the building is depreciated, and therefore the moment when the economic loss occurs".

10. At first glance this is an elementary test. However it assumes an equality in perception on the part of both an owner and potential buyer, and ignores the possibility for an owner to call in an expert and yet for the defects not to be obvious to a potential buyer.<sup>7</sup>
11. Recent caselaw has emphasized *understanding the cause* of the defects as an important touchstone when determining accrual. In *Body Corporate 169791 & Ors v Auckland City Council & Ors* (unreported, HC Auckland, CIV-2004-404-5225, 19/5/09, Cooper J) the Court observed that:

"[I]solated or even repeated incidences of leaks do not necessarily have an obvious cause... evidence which shows that there had in fact been no diminution in value until well after the date on which the alleged limitation period began must be relevant to the issue of whether the defects were obvious." (at [88] and [90])

<sup>6</sup> [1996] 1 NZLR 513 (PC) at 526 per Lord Lloyd.

<sup>7</sup> In *Body Corporate 183523 v Tony Tay & Associates Ltd & Ors* (unreported, Priestly J, HC Auckland, 30/3/09, CIV-2004-404-4824) in rejecting a limitation defence Justice Priestly pointed out that although defects may be observable to a building surveyor, that does not mean they are observable to a lay person.

12. To add to the complexity in this area there is currently debate over whether a cause of action in tort for building defects can accrue more than once for a single property. Consider an apartment diagnosed with leaky building syndrome being sold at full price to a purchaser unaware of any defects. A cause of action would undoubtedly accrue to the owner at the time of the diagnosis. A cause of action may also accrue to the new owner upon (belatedly) discovering the defects.
13. In England, once defects appear it is the owner for the time-being that is able to sue. The cause of action accrues but once.<sup>8</sup>
14. In *Body Corporate 188529 & Ors v North Shore City Council & Ors* [2008] 3 NZLR 479 the Court held that a subsequent purchaser is not removed from the scope of the Council's duty, or barred from suing on it, merely because he or she acquires the unit after damage has manifested itself. This was confirmed on appeal, where Justice Baragwanath noted:<sup>9</sup>

"Purchasers generally must be able to claim against those responsible for the condition of the leaky building unless they have such knowledge, or means of knowledge, as entails acceptance of its condition... [T]here is no good reason to visit them with matters of which they are unaware."
15. This decision (including the limitation issue) is being appealed to the Supreme Court.<sup>10</sup>
16. It is submitted in New Zealand an owner should not be precluded from bringing a claim just because their predecessor in title discovered defects. The Building Act longstop, *volenti non fit injuria* and contributory negligence exist in a Court's armamentarium for weeding out undeserving claimants and alleviating any concerns of indeterminate liability.

#### **Limitation Act 2010.**

17. The 2010 Act comes into force on 1 January 2011, and only applies to claims based on acts or omissions after 31 December 2010.<sup>11</sup>
18. Part 2 of the Act creates the umbrella concept of a limitation defence to money claims - claims for "monetary relief at common law, in equity, or under an enactment".<sup>12</sup>
19. There are three limitation periods to consider for such claims:

<sup>8</sup> *Spartan-Souter v Town & Country Development (Essex) Ltd* [1976] QB 858 at 868.

<sup>9</sup> *Sunset Terraces* [2010] NZCA 64 at [82].

<sup>10</sup> Under SC 27/2010.

<sup>11</sup> Limitation Act 2010 s 10(a)(i).

<sup>12</sup> *Ibid* s 12(1).

- (a) A claim's "primary period" - 6 years after the date of the act or omission on which the claim is based;<sup>13</sup>
- (b) A claim's "late knowledge period" - 3 years after the claimant gained knowledge or ought reasonably to have gained knowledge of:
  - (i) The fact that the act or omission on which the claim is based had occurred; and
  - (ii) The fact that the act or omission on which the claim is based was attributable to or involved the defendant; and
  - (iii) If the defendant's liability is dependent on the claimant suffering damage or loss, the fact the claimant has suffered damage or loss.<sup>14</sup>

To engage a late knowledge period claimants will have to prove that at the close of the start date of the primary period they neither knew nor ought reasonably to have known all the factors listed above.

- (c) A claim's "longstop period" - 15 years after the date of the act or omission on which the claim is based.<sup>15</sup>

- 20. Parliament resisted the temptation to extend the Building Act longstop to 15 years.
- 21. Claims for contribution are dealt with separately and the statute expressly refers to claims under the Law Reform Act in respect of joint or concurrent tortfeasors, as well as claims by joint or concurrent wrongdoers. In both cases such claims must be brought within 2 years of the date on which the primary liability is quantified by agreement, award or judgment.<sup>16</sup>
- 22. The operation of the new Act is best tested with a hypothetical claim. Consider a claim by a homeowner against a builder for negligently constructing a deck.
- 23. The builder is served with proceedings that were filed 9 years after his last attendance on the site.
- 24. When filing a statement of defence, the builder relies on the primary period and alleges the claim was filed at least 6 years after his building work took place.

<sup>13</sup> Ibid s 11(1).

<sup>14</sup> Ibid ss 11(3)(a) & 14(1) - only factors relevant to building defect litigation are listed.

<sup>15</sup> Ibid s 11(3)(b).

<sup>16</sup> Ibid s 34.

25. The homeowner would then bear the onus of establishing a late knowledge period. He/she would need to file a response pleading that immediately after the building work in issue (being the close of the start date of the primary period) they neither knew nor ought reasonably to have known that:
- (a) The deck was constructed negligently;
  - (b) The negligent work could be attributed to the builder;
  - (c) They had suffered a loss.
26. It is easy to envisage fact specific litigation over the homeowner's knowledge (actual or imputed), with risks to both sides over the outcome of a limitation defence. Rather than improving the *Hamlin* test the new Act introduces further complexity, especially by requiring claimants to prove a negative to engage late knowledge periods.

#### **Conclusion**

27. Limitation periods are tools of certainty and longstop provisions undoubtedly achieve this end. However, the test for accrual of tortious claims will always require a fact specific analysis, and will consequently inject uncertainty into defective building litigation.
28. Salvation does not lie in the Limitation Act 2010. Unfortunately the new Act merely recasts the law in this area and still leaves plenty of room for limitation litigation.