Periods of Limitation and Construction Contracts

THIS BRIEFING OUTLINES THE INTERACTING FACTORS BETWEEN CONTRACTS, KEY LEGISLATION AND INSURANCE FOR ANYONE CONSIDERING HOW BEST TO APPROACH THEIR LIMITATIONS OF LIABILITY.

Contracts typically contain limitation periods agreed by the parties involved. These limitation periods reflect the commercial interests of the contracted parties and can side step the limitation periods available under law. How contractual limitations relate to and interact with insurance and limitation periods under law are important factors. This is especially the case if the parties are to rely on insurance and understand what, if any, liability sits on their balance sheets outside of contract.

- Contractually you can sidestep limitation periods under legislation, but only with regard to the contents contained within the contract; anything that is not captured in the contract is open to the limitation periods available under law. Examples include warranties and guarantees, variations of scope, novated risk, and risks not referred to in the contract [such as pollution and regulatory fines & penalties].
- Limitation periods accepted under contract may exceed the duration that insurance cover is normally purchased for (standard insurance programmes will be designed with the default limitation periods in mind, taking into account the commercial trade-off between price and duration).
- Having a robust internal process to quantify risk that sits on your balance sheet can be an invaluable business tool and helps to address issues such as whether the contract fee / price is worth the exposure? Or whether the duration of the exposure is acceptable given the potential for risks to compound over time?

Contracts and standard terms & conditions largely factor in these points. However, parties should regularly revisit their standard contract terms and conditions to ensure they still operate as intended and reflect changes in law.

Limitation laws prevent certain legal claims being brought against a person or company after a defined period of time. They provide a defence against old claims and give certainty in relation to legal liability for past events.

The key legislative limitation periods requiring legal actions to be brought against the defendant within restricted timeframes are as follows:

- For claims in tort or contract arising from acts or omissions that occurred prior to 31 December 2010 (governed by the **Limitation Act 1950**): Within six years, with longstops of 12 years from the date on which the cause of action accrued, and 15 years from the date of the act or omission.
  - In the case of contract claims six years starts from the date of the breach of the contract.
  - In the case of claims in negligence six years starts from the date of the damage (and, in some cases, when the damage is reasonably discoverable).
- For money claims arising from acts or omissions that occurred after 31 December 2010 (governed by the **Limitation Act 2010**): Within six years, with a further three years added for 'late knowledge', with a longstop of 15 years .
  - Money claims cover most claims in contract, tort and for breach of trust.
- Within a 10 year longstop under the **Building Act 2004** in respect of "building work associated with the design, construction, alteration, demolition, or removal of any building; or the performance of a function ... relating to the construction, alteration, demolition, or removal of the building."
- Within 10 years from the issue of the code compliance certificate under the **Weathertight Homes Resolution Services Act 2006** (Osborne vs. Auckland Council [2014] NZSC 67).

The Limitation Act also contains provisions for ancillary claims [claims joining additional and substituted parties, set-offs and counterclaims] and claims for contribution [where there are other joint parties]:

- Under the 2010 Act the Court has discretion to allow relief for an ancillary claim when allowing relief for an original claim. However, the claimant must apply for relief before a decision has been made that the ancillary claim is being made out of time.
- The Limitation period for claims for contribution from another joint party is two years from the date the liability of the party seeking contribution is quantified by an agreement, award, or judgment.

Practically, regardless of what is contractually agreed, which limitation period applies at law is ultimately fact specific as not all claims would necessarily be captured under these Act(s) – for example the Fair Trading Act has a three year limitation period.

In all cases, a business should be clear on the scale and duration of the potential liability outside of contract sitting on their balance sheet.

SPOTLIGHT

1. WHAT DOES THE LATE KNOWLEDGE DATE MEAN?

Under section 14, a claimant's late knowledge date is the date on which the claimant gained knowledge or ought reasonably to have gained knowledge of the following facts:

- The fact that the act or omission on which the claim is based had occurred.
- The fact that the act or omission on which the claim is based was attributable (wholly or in part) to or involved the defendant.
- If the defendant's liability or alleged liability is dependent on the claimant suffering loss, the fact that the claimant has suffered damage or loss.
- If the defendant's liability or alleged liability is dependent on the claimant not having consented to the act or omission on which the claim is based, the fact that the claimant did not consent to that act or omission.
- If the defendant's liability or alleged liability is dependent on the act or omission on which the claim is based having been induced by fraud or, as the case may be, by a mistaken belief, the fact that the act or omission on which the claim is based is one that was included by fraud, or by a mistaken belief.

A claimant does not have late knowledge of a claim unless the claimant proves that, at the close of the start date of the claim's primary period, the claimant neither knew, nor ought reasonably to have known, all of the facts listed in section 14.

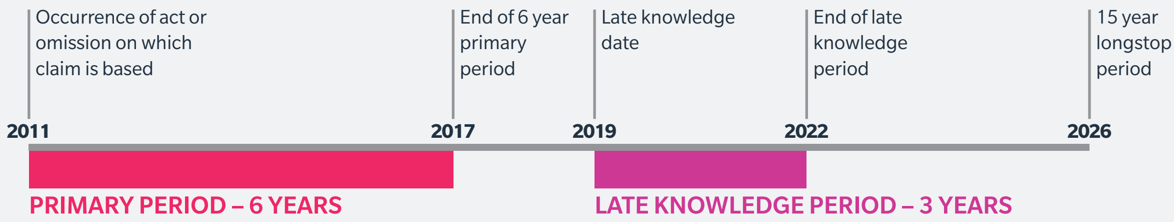
Exceptions to the general rules in sections 11 to 14 apply in cases of abuse, sexual abuse, minority, incapacitation, acknowledgement or part payment and fraud. Specific limitation definitions apply in relation to a range of claims prescribed in Part Three of the Act.

SPOTLIGHT

THE LONGSTOP PERIOD

If a claimant has "late knowledge" of a claim, instead of the primary period applying, a claimant must file the claim within three years of the "late knowledge date" (the late knowledge period) but subject to the requirement that no claim may be brought 15 years after the date of the act or omission on which the claim is based ("the longstop period") section 11(2) and (3).

The interrelationship between the primary period, the late knowledge period and the longstop can be graphically represented as follows:



2. HOW DO THE LIMITATION ACT 2010 AND THE BUILDING ACT 2004 INTERACT?

Under section 393 of the Building Act 2004 the reference to the Limitation Act has been updated to the 2010 Act but under sub-clause (2) the Building Act 2004 capped timeframe of 10 years overrides the 15 year timeframe of the Limitation Act 2010.

393 Limitation defences

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

HOW DOES INSURANCE WORK ALONGSIDE THE LIMITATION ACT 2010, THE BUILDING ACT 2004 AND THE WEATHERTIGHT HOMES RESOLUTION SERVICES ACT 2006?

Insurance is a contract in its own right that as a standard excludes contractual liability – except for where the insurer would have been liable under the terms and condition of the policy in the absence of the contract. Insurance policies respond to a defined 'Claim' or 'Loss' that is notified against a valid policy as soon as the policyholder becomes aware of a circumstance that may give rise to a claim. A valid policy:

1. Is in force at the time the claim is made and for the service to have been provided post the retroactive date [*for claims made policies*] or
2. Was/is in force during the works period [*for occurrence based policies*].

Thereafter several other factors influence whether or not a 'Claim' or 'Loss' is accepted by an insurer. Examples would be:

- The negligent act or omission does not fit the business description [*professional indemnity*].
- The cause of loss is excluded, such as asbestos [*general liability*].
- The relevant statute is excluded [*statutory liability*].
- Clean-up of the site, other than the works themselves, following a pollution event [*contract works*].

Even if a 'Claim' or 'Loss' is accepted under a policy, the significance of these Acts under consideration is that they can be used by insurers as a defence against a claim, which could put the policy holder in breach of contract.

CONCLUSION AND RECOMMENDATIONS

It is recommended that records be kept for at least 15 years, to align with the longstop provisions of the Limitation Act.

Parties entering a contract should consider the duration that they will retain liability for as well as the nature of these liabilities and structure insurance protection to align as closely as possible with the exposure.

For construction contracts parties should be aware they may need to maintain claims made policies for significant lengths of time after the completion of obligations under the contract. Given that the exposure remains for up to 15 years after the completion of works (10 years where the Building Act applies), for large and/or complex projects, complete protection could theoretically mean that claims made policies (such as professional indemnity) would need to be maintained for up to 20-23 years (made up of six months to one year's investigation/design prior to construction, three to five years construction, two year's defects period and 10-15 years run-off period).

As claims made policies need to be in force at the time that the claim is notified, it is important to consider how long a policy needs to be maintained to ensure that all potential claims will have manifested by the end of the policy period. A typical professional indemnity claim will take between one year and five to six years from initial discovery and notification to resolution of the claim.

The normal duration of six years after the completion of the works aligns with the main limitation period set out in the Limitation Act. However, the potential for proceedings to be commenced exists for up to 15 years (10 years if the Building Act applies) and parties need to evaluate the potential need to maintain claims made policies for longer periods – taking into account the probability of a cause manifesting more than six years after the completion of the works and the availability and cost of maintaining insurance for the extended period.

FOR FURTHER INFORMATION

For more information on this topic or advice on your risk and insurance programme please call us on 0800 627 744.