VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP650/2018

DOMESTIC BUILDING LIST

CATCHWORDS

Building Act 1993, s134, whether claim statute barred after 10 year limitation where 'building work' done without 'building permit' and no occupancy certificate issued. Statutory construction of s134, whether time starts to run and, if so, from what date. Found, s134 has no operation.

Limitation of Actions Act 1958, operation in default of s134 of the *Building Act* found.

Principles of statutory construction, text and context/purposive construction/extrinsic material/second reading speech considered: *Alcan (NT) Alumina Pty Ltd v Comm of Territory Revenue* [2009] HCA 41, *Comm of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55, *Project Blue Sky Inc v ABC* (1998) 194 CLR 355, *SM v The Queen* [2013] VSCA 342, *Baini v R* [2012] HCA 59, *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23, considered and applied.

Meaning of legislative intention: *Certain Lloyd's Underwriters v Cross* [2012] HCA 56.

Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd considered.

Reading in of words to give expanded meaning to section: *Taylor v The Owners – Strata Plan No11564* applied.

Tribunal to adopt the appropriate statutory construction even if not submitted for by counsel *Accident Towing & Advisory Committee v Combined Motor Industries Pty Ltd* [1987] VR 529 followed.

APPLICANT	Gayle Frances Gledhill
RESPONDENT	Scotia Property Maintenance Pty Ltd
WHERE HELD	Melbourne
BEFORE	Member MJF Sweeney
HEARING TYPE	Hearing
DATE OF HEARING	7 February 2019
DATE OF SUBMISSIONS	Applicant: 6 &14 February 2019 Respondent: 7 & 22 February 2019
DATE OF DECISION	2 April 2019
DATE OF ORDER	2 April 2019
CITATION	Gledhill v Scotia Property Maintenance Pty Ltd (Building and Property) [2019] VCAT 422

ORDER

1. I find and declare, section 134 of the *Building Act 1993* has no application in respect of the limitation period within which the Applicant's owner's claim may be brought.

2. I find and declare, the limitation period within which the Applicant owner's claim may be brought is governed by s 5 of the *Limitation of Actions Act 1958*.
3. The matter is listed before me for a directions hearing to consider the future conduct of the proceeding at 9.30 AM on 16 May 2019 with 1 hour allocated.
4. Costs reserved.
5. Liberty to apply.

MJF Sweeney
MEMBER

APPEARANCES:

For the Applicant	Mr N. Cozens, of Counsel
For the Respondent	Mr D. Colman, of Counsel

REASONS

BACKGROUND

1 By order of the Tribunal made on 1 February 2019, the hearing of the proceeding on 7 February 2019 is limited to a determination of the respondent's defence that the applicant's claim is statute barred.

2 The determination is confined in accordance with the order of 1 February 2019 with orders to be made in respect of the question, including any necessary consequential orders.

3 The hearing took place on 7 February and oral and written submissions were made. At the conclusion of the hearing, orders were made for the applicant to file and serve any further submission and the respondent to file and serve any reply. The applicant filed its further submission dated 14 February 2019. The respondent filed its reply submission dated 21 February 2019.

4 The applicant is the owner of a residential apartment in Park Street, South Yarra (**Owner**). The apartment is located on the first floor, the second story, of a two story apartment or town house building. The respondent is a builder (**Builder**) who performed repairs to the owner's outside balcony on or about June 2007 and rendered a final invoice on or about 24 July 2007. The Builder was not involved in the construction of the residential building which was completed some years earlier.

5 The Owner brought her claim before the Tribunal by application dated 15 May 2018. In amended points of claim dated 20 December 2018 (**APOC**) the Owner alleges that the Builder, in breach of the warranties under s8 of the *Domestic Building Contracts Act 1995* (**DBC Act**) or alternatively, by a failure to take reasonable care and skill, caused the Owner to suffer loss and damage.

6 In its amended points of defence dated 14 January 2019 (**APOD**) the Builder denies or does not admit many of the elements pleaded by the Owner. Relevantly, given the confined issue to be determined, at paragraph 16 of the APOD the Builder pleads pursuant to s 134 of the *Building Act 1993* ("**Building Act"**)[1] that the Owner's application of 15 May 2018 has been made beyond the 10 year prescribed limitation period and as a consequence her claims are statute barred.

7 No occupancy permit or certificate of final inspection was issued and no permit for building work was obtained in respect of the balcony works.

8 The parties agree the works undertaken by the Builder were completed on or about June 2007 and a final invoice rendered on or about 24 July 2007.

[1] Paragraph 16 of the APOD in fact pleads s134 of the *Domestic Building Contracts Act 1995*. The parties by their submissions both recognise that the intended pleading is to s134 of the *Building Act 1993*. The Tribunal proceeds on this basis.

They agree that the works constituted 'building work' as that term is defined in s 129 and s 3 of the Building Act[2]. They also agree that no permit was obtained by the Builder in undertaking the building works and that no occupancy permit or certificate of final inspection was issued.[3]

9 At the hearing on 7 February 2019, having regard to the confined determination to be made on the operation of the limitation period under s 134 of the Building Act, there was discussion on whether it would be necessary for me to determine whether a building permit was in fact required for the building work. The Owner submitted that even if the Builder was to contend that no permit was required the question was immaterial.[4] The parties agreed, for the purposes of the confined hearing, that it was not necessary for me to determine whether a permit was required[5] as the issue in question is the meaning to be given to s 134 where no building permit has been obtained.

10 The Builder submits, in the absence of the issue of an occupancy permit or certificate of final inspection, that s 134 of the Building Act, as a matter of statutory interpretation construed purposively, should be read such that the 10 year limitation period starts to run from 'the date of completion of the building work'.[6] In support of this interpretation and having regard to the purpose of the section, the Builder submits that it is proper to have regard to extrinsic materials, particularly the Minister's second reading speech. Thus, from 'the date of completion of the building work' on or about 24 July 2007, 10 years expires on 24 July 2017, making the Owner's claim approximately 10 months out of time.

11 The Owner rejects the submission and says that there is no proper basis to interpret s 134 in such a manner. The Owner submits s 134 should be read without recourse to extrinsic material as the meaning of section is clear from a plain reading having regard to the words of the statute itself. The Owner submits that s 134 applies and that, on a plain reading of the text, time has not started to run such that the Owner's claim is not statute barred.

12 The Owner submits that the admissions by the Builder that the work is 'building work' as defined, that no permit was obtained and that no occupancy permit or certificate of final inspection was issued, are fatal to the Builder's contention that time has expired. It is fatal because, under a plain reading of the words of s 134 of the Building Act, the 10 year

[2] Applicant's submission dated 6 February 2019, paragraphs 15 and 16; Applicant's further submission dated 14 February 2019, paragraph 3; Respondent's submission dated 7 February 2019, paragraph 2.
[3] Applicant's submission dated 6 February 2019, paragraphs 8 and 9; Applicant's further submission dated 14 February 2019, paragraph 3; Respondent's submission dated 7 February 2019, paragraph 2
[4] Applicant's submission dated 6 February, paragraph 21.
[5] Agreement of the parties is confirmed in respondent's further submission dated 14 February 2019, paragraph 3(b).
[6] Respondent's further submission dated 21 February 2019, paragraph 6.

limitation period does not start to run because no occupancy permit or certificate of final inspection was issued.[7]

13 The Owner submits that, as a consequence of the operation of s 134 of the Building Act contended for by the Owner and the operation of s 33 of the *Limitation of Actions Act 1958* (**Limitation of Actions Act**), the 6 year limitation under s 5 of the Limitation of Actions Act is not applicable, that it has no role to play.[8] The Builder agrees with the Owner's specific submission that the Limitation of Actions Act has no default application.[9]

14 With both Owner's and Builder's respective contentions for the proper constructions of s 134 of the Building Act coupled with their common contention that s5 of the Limitation of Actions Act has no application, if I determine that s 134 of the Building Act does not operate in the circumstances of this case, I will need to consider whether the Limitation of Actions Act applies by default.

15 The Owner submits, in the alternative, if she fails in her argument that time has not started to run under s 134 of the Building Act, her claim is within the 10 year limitation period based on the time she brought an application before Domestic Building Dispute Resolution Victoria (**DBDRV**). The Owner applied to DBDRV on 6 July 2017. The Owner contends that s 134 of the Building Act states that time runs from the commencement of a 'building action'. This term is defined in s 129 of the Building Act in a way that the Owner says does not require the actual commencement of a proceeding. Thus, her application to DBDRV was made prior to the expiration of the 10 year limitation period on 24 July 2018.

16 The Builder submits that a referral to DBDRV does not constitute a 'building action' and refers for support to a number of authorities. It also says that no conciliation took place, with DBDRV finding that any building action was statute barred after 24 July 2017.

17 The issues for determination are:

a) Where a permit is not issued for building work and no occupancy permit or certificate of final inspection is issued, whether the 10 year limitation period under s 134 of the Building Act does not start to run, or whether it started to run from the date of completion of the building work; and

b) Where s 134 of the Building Act is determined as not having application in respect of building work where a permit is not issued and no occupancy permit or certificate of final inspection is issued, whether in respect of such building work, the Limitation of Actions Act applies by default.

[7] Applicant's further submission dated 14 February 2019, paragraphs 3 and 4; Applicant's submission dated 6 February 2019, paragraph 20(a) and (b).
[8] Applicant's submission dated 6 February 2019, paragraph 20; Applicant's further submission dated 14 February 2019, paragraph 5.
[9] Respondent's further submission dated 21 February 2019, paragraph 3(g).

18 A secondary issue for determination is whether the referral to DBDRV by the Owner constitutes a 'building action' as defined under s 129 of the Building Act to the effect that, under s 134, the claim of the Owner is within the 10 year limitation period.

PRINCIPLES OF STATUTORY CONSTRUCTION

19 The parties both contend that s 134 of the Building Act limitation period applies but have made opposing submissions on how the section is to be properly construed. The Owner says the meaning of s 134 is to be construed according to a plain reading of the text. The Builder says the meaning s134 is to be construed according to context and purpose. The nature of the opposing submissions raises important issues of statutory construction. Indeed, the opposing constructions argued for by the parties represent a case of the 'constant wrestle with text and context' where the application of the principles of statutory interpretation is always 'a matter of emphasis and nuance'.[10] It is therefore necessary to review the authorities in some detail.

20 The principles were recently and succinctly summarised in the Victorian Court of Appeal by reference to High Court authority. In *Joseph v Worthington & Anor*,[11] the Court of Appeal referred to the following statements.

> [19] In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*,[12] Hayne, Heydon, Crennon and Kiefel JJ emphasised the centrality of the words of the relevant statutory provision:
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> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.
>
> [20] In *Commissioner of Taxation v Consolidated Media Holdings Ltd*,[13] French CJ, Hayne, Crennan, Bell and Gageler JJ said:
>
> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text.' So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history

[10] *The intolerable wrestle: developments in statutory interpretation*, The Hon James Spigelman (2010) 84 ALJ 822 at 826, referred to with approval *S M v The Queen* [2013] VSCA 342 per Weinberg JA; referred to *Certain Lloyds Underwriters v Cross* [2012] HCA 56.
[11] [2018] VSCA 102 (23 April 2018) per Tate, Osborn and Niall JJA, adopting the principles as summarised by Derham AsJ in *Joseph v Worthington* [2017] VSC 501.
[12] [2009] HCA 41; (2009) 239 CLR 27 at 46-47.
[13] [2012] HCA 55; (2012) 250 CLR 503, 519.

and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.

[21] In *Project Blue Sky Inc v Australian Broadcasting Authority*,[14] McHugh, Gummow, Kirby and Hayne JJ emphasised the importance of reading a statute as a whole:

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v Agalianos*,[15] Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed.

21 In *Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd*,[16] the Victorian Court of Appeal considered whether s 134 of the Building Act imposed an absolute cap on the limitation period in place of the limitation period under the Limitation of Actions Act. The Court referred to the High Court's observations in *CIC Insurance Ltd v Bankstown Football Club Ltd*,[17] where the Court considered the use and scope of context when construing a statute:

> Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.

[14] (1998) 194 CLR 355, 381.
[15] [1955] HCA 27; (1955) 92 CLR 390.
[16] [2014] VSCA 165 per Redlich, Whelan and Santamaria JJA.
[17] (1997) 187 CLR 384, 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

22 In *Brirek*, the Court of Appeal also considered the legislative operation of s 35 of the *Interpretation of Legislation Act 1984 (Vic).*[18] In doing so, it referred to the High Court's decision in *Catlow v Accident Compensation Commission*[19]:

> This provision is extremely broad. Unlike s15AB of the Acts Interpretation Act 1901 (Cth), s.35 does not restrict the purposes for which it is permissible to consider the extrinsic materials referred to in that section. Whether or not extrinsic material is considered in interpreting a statutory provision, it is clear that the meaning attributed to the statute must be consistent with the statutory text. If the meaning which would otherwise be attributed to the statutory text is plain, extrinsic material cannot alter it. It is only when the meaning of the text is doubtful (to use a neutral term rather than those to be found in s.15AB(1) of the Acts Interpretation Act), that consideration of extrinsic material might be of assistance. It follows that it would be erroneous to look to the extrinsic material before exhausting the application of the ordinary rules of statutory construction. If, when that is done, the meaning of the statutory text is not doubtful, there is no occasion to look to the extrinsic material. In our opinion, that is the present case.

23 When appropriate to consider context, such as assistance that might be discerned from considering legislative intent, the Court of Appeal in *Brirek*, citing the High Court in *Saeed v Minister for Immigration and Citizenship*[20] stated:

> As Gummow J observed in *Wik Peoples v Queensland*, it is necessary to keep in mind that when it is said the legislative "intention" is to be ascertained, "what is involved is the 'intention *manifested*' by the legislation." Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning.

24 The submission of the Builder includes reliance on *CIC Insurance* as authority for considering context in the first instance and in its widest sense. The submission of the Owner includes reliance on *Catlow* as authority for considering the statutory text and attributing the plain meaning. To resolve the competing contentions of the parties it is necessary to examine the nuanced approach of the High Court (and the Victorian Supreme Court of Appeal) on the approach to statutory construction and consideration of text and context in the period following the decision of *CIC Insurance* and *Catlow*.

25 In *S M v The Queen*,[21] Weinberg JA observed that the High Court appears to have given greater primacy to the actual language used in the text than to

[18] *Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd* [2014] VSCA 165 at [110]
[19] [1989] HCA 43; (1989 CLR) 543 per Brennan and Gaudron JJ.
[20] [2010] HCA 23 at [31]; (2010) 241 CLR 252 per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.
[21] [2013] VSCA 342.

contextual matters.[22] The clearest example of this 'reversion to text' he said is found in the short passage in *Alcan NT Alumina Pty Ltd v Commissioner of Territory Revenue*, which passage I have referred to in paragraph 20 above.

26 Weinberg JA, continuing, then cited other recent High Court authorities. I refer in some detail to them below because His Honour's summary of the principles demonstrates the wrestle with text and context and that applying the principles of statutory interpretation is always a matter of emphasis and nuance.

27 In *S M v The Queen*, His Honour said:

> [51] In Baini v R[23] the High Court made essentially the same point. It reiterated what had earlier been said in *Fleming v The Queen*[24] to the effect that:
>
> '[t]he fundamental point is that close attention must be paid to the language' of the relevant provision because '[t]here is no substitute for giving attention to the precise terms' in which that provision is expressed. Paraphrases of the statutory language, whether found in parliamentary or other extrinsic materials or in cases decided under the Act or under different legislation, are apt to mislead if attention strays from the statutory text. These paraphrases do not, and cannot, stand in the place of the words used in the statute.
>
> [52] More recently still, in *Certain Lloyd's Underwriters v Cross*[25] French CJ and Hayne J said of what is generally described as the 'purposive approach':
>
> Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose of a statute resides in its text and structure. Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted. It is important in this respect, as in others, to recognise that to speak of legislative 'intention' is to use a metaphor. Use of that metaphor must not mislead. '[T]he duty of a court is to give the words of a statutory provision the meaning that the legislature *is taken to have intended* them to have'. [Emphasis added.] And as the plurality went on to say in *Project Blue Sky*:
>
> Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of

[22] [2013] VSCA 342 at [49].
[23] [2012] HCA 59.
[24] [1998] HCA 68.
[25] [2012] HCA 56

the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.

To similar effect, the majority in *Lacey*[26] said:

Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.

The search for legal meaning involves application of the processes of statutory construction. The identification of statutory purpose and legislative intention is the product of those processes, not the discovery of some subjective purpose or intention.

[53] Their Honours went on to say[27]:

A second and not unrelated danger that must be avoided in identifying a statute's purpose is the making of some a priori assumption about its purpose. The purpose of legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions. As Spigelman CJ, writing extra-curially, correctly said:

Real issues of judicial legitimacy can be raised by judges determining the purpose or purposes of Parliamentary legislation. It is all too easy for the identification of purpose to be driven by what the particular judge regards as the desirable result in a specific case. [Emphasis added.]

And as the plurality said in *Australian Education Union v Department of Education and Children's Services*[28]:

In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose.

WHERE A PERMIT IS NOT ISSUED FOR BUILDING WORK AND NO OCCUPANCY PERMIT OR CERTIFICATE OF FINAL INSPECTION IS ISSUED, DOES THE 10 YEAR LIMITATION PERIOD UNDER S 134 OF THE BUILDING ACT NOT START TO RUN, OR DOES IT START TO RUN FROM THE DATE OF COMPLETION OF THE BUILDING WORK?

28 The Building Act relevantly states:

3 Definitions

[26] *Lacey v Attorney-General (Qld)* [2011] HCA 10.
[27] [2012] 56 at paragraph 26.
[28] [2012] HCA 3.

(1) In this Act …

building work means work for or in connection with the construction, demolition or removal of a building;

129 Definitions

In this Division—

building action means an action (including a counter-claim) for damages for loss or damage arising out of or concerning defective building work;

building work includes the design, inspection and issuing of a permit in respect of building work.

134 Limitation on time when building action may be brought

Despite any thing to the contrary in the **Limitation of Actions Act 1958** or in any other Act or law, a building action cannot be brought more than 10 years after the date of issue of the occupancy permit in respect of the building work (whether or not the occupancy permit is subsequently cancelled or varied) or, if an occupancy permit is not issued, the date of issue under Part 4 of the certificate of final inspection of the building work.

THE BUILDER'S SUBMISSION

29 The Builder submits that the balcony repair work is 'building work' as defined by s 3 and s 129 of the Building Act. As referred to in paragraph 8 above, the Owner agrees with this and it is also agreed that no building permit was obtained by the Builder in respect of the balcony repair work. That there is agreement between parties that certain work constitutes 'building work' under the Building Act does not make it so. Earlier submissions of the parties relied on *McAskell v Cavendish*[29] and, on appeal, *McAskell v Timeline Pacific*[30]as authority for what constituted 'building work'. The facts in the *McAskell* case were materially different to the facts in the present case. However, for present purposes, I need not consider this matter and proceed on the basis that the parties have treated the matter as common ground.

30 The Builder concedes that s 134 of the Building Act 'on its face' does not apply to building work where no permit is required and no certificate of final inspection is issued.[31] The Builder nevertheless contends that such a conclusion would sit uncomfortably with the 'expressly stated intention of s 134'[32] to remove the ambiguity surrounding building work limitation

[29] [2008] VSC 563 per Hansen J.
[30] [2010] VSCA 79.
[31] Respondent's submission dated 7 February 2019, paragraph 3.
[32] Ibid.

periods by imposing an absolute cap of 10 years 'from the date of completion of the building work'.[33]

31 In other words, the Builder contends that reliance on the text of s 134 is insufficient and that it should be construed by having regard to the section's context, including the legislative purpose and the intention of Parliament.

32 In support of its contention that the expressly stated intention of s 134 is to impose a cap of 10 years 'from the date of completion of the building work', the Builder relies on the Minister for Planning's second reading speech to the Building Bill.[34] The Builder quotes from the second reading speech as follows:

> The Building Bill defines a clear starting date — the date of issue of an occupancy permit — and a clear conclusion date of 10 years from the date of issue. This will remove the existing ambiguity surrounding the time during which the building owner retains the right to issue legal proceedings. This will provide property owners with additional protection in terms of years beyond the very short number of years that now exists.

33 The Builder contends that the second reading speech, stating the intention to remove the ambiguity surrounding building work limitations by imposing an absolute cap of 10 years, is important context within which s 134 should be construed according to statutory construction principles stated in the 1997 High Court case, *CIC Insurance*, the pertinent part of which I have referred to in paragraph 21 above. On this authority, the Builder submits the modern approach to statutory interpretation insists that context be considered at the first instance, using 'context' in its widest sense to include the mischief one may discern the statute was intended to remedy.

34 Thus, the Builder submits s 134, properly construed using context in its widest sense, should be read so that the 10 year limitation period starts to run from the date of issue of the occupancy permit or, if no occupancy permit issued, the date of issue of the certificate of final inspection or (in the words proposed by the Builder), '*if no occupancy permit or certificate of final inspection is issued, the date of completion of the building work*'[35] (emphasis added). The consequence is that, so construed, the Owner's claim would be time barred and the Limitation of Actions Act would have no default operation or role to play.

THE OWNER'S SUBMISSION

35 From a different perspective based on a plain reading construction, the Owner submits that s 134 of the Building Act applies, but that the 10 year limitation period has never started to run. It has never started to run because

[33] Whether or not a permit is required for the building work need not be determined by me (refer to paragraph 8 above). The agreed question is whether the 10 year limitation period applies for building work not under a permit.

[34] Building Bill, second reading speech dated 11 November 1993.

[35] Respondent's further submission dated 21 February 2019, paragraph 6.

no building permit was ever obtained and, with no issue of an occupancy permit or certificate of final inspection, time cannot start to run. The consequence is that, so construed, the Owner's claim is within time because time has not started to run and the Limitation of Actions Act would have no default operation or role to play.

36 I understand the effect of the Owner's submission as being, where there is no building permit and where there is no occupancy permit or certificate of final inspection issued, s 134 still covers the field in respect of the limitation period for all 'building work'. The Owner contends that the focus must be on 'building work'[36] and with that focus there is no other applicable statutory limitation for the bringing of a building action for defective building work.[37] This is the more so because the Owner and the Builder submit that the Limitation of Actions Act has no role to play.

37 The Owner contends the meaning is plain from the text and that it is erroneous to look at extrinsic materials before exhausting the ordinary rules of statutory construction.[38] In particular, the Owner relies for this proposition on the 1989 High Court case of *Catlow*, the pertinent part of which I have referred to in paragraph 22 above, that it is erroneous to look at extrinsic material before exhausting the application of the ordinary rules of statutory construction.

38 The Owner develops this submission[39], relying on the statement of the Court of Appeal in *Brirek,*[40] that second reading speeches 'are not to precede the plain language of the statutory provision'[41]. The Owner then refers to *Saeed*, the pertinent part of which I have referred to in paragraph 23 above, which cites *Wik Peoples v Queensland,*[42]. *Saeed* held that statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning.

39 There are real questions of nuance which arise from the decisions of *CIC Insurance* and *Catlow*. Counsel for the parties have not sufficiently engaged with subsequent High Court decisions which seek to reconcile principles of statutory construction, particularly the wrestle between text and context, such as the need to consider statutory text in its context (*Commissioner of Taxation v Consolidated Media Holdings Ltd,*[43] referred to in paragraph 20 above). Engaging with these authorities is essential in the present case to discerning the proper construction to be given to s 134 of the *Building Act*.

[36] Applicant's submission dated 6 February 2019, paragraph 22.
[37] Owner contends that the *Limitation of Actions Act (Vic) 1958* is excluded by the introductory words of s134, and by s33 of that Act.
[38] Applicant's further submission dated 14 February 2019, paragraphs 9 and 10.
[39] Applicant's further submission dated 14 February 2019, paragraph 10.
[40] [2014] VSCA 165 at [111].
[41] The language of 'precede' is the Court of Appeal's paraphrasing of the High Court's decision in *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23.
[42] [2010] HCA 23; (2010) 241 CLR 252 per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.
[43] *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55.

This is of importance. The fact that counsel may not have supported a particular interpretation of legislation must not prevent a court, or the Tribunal in this case, from adopting the interpretation it considers to be correct.[44]

ASSESSMENT OF OWNER'S SUBMISSION

40 The Owner's submission is the meaning of s 134 of the Building Act is apparent from a plain reading of the text.

41 The text of s 134, omitting parts not relevant to present considerations, states: 'a building action cannot be brought more than 10 years after the date of issue of the occupancy permit in respect of the building work … or, if an occupancy permit is not issued, the date of issue … of the certificate of final inspection of the building work.'

42 A clearly defined period of limitation, that is, one with certainty, is reasonably defined by a specified starting time or a specified event and a specified ending time or other specified event. In respect of building work, s 134 specifies alternative starting times. The alternatives are *the date of issue of the occupancy permit in respect of the building work* or, if an occupancy permit is not issued, *the date of issue … of the certificate of final inspection of the building work* [emphasis added]. The consequent end time is not more than 10 years after either the issue of the occupancy permit in respect of the building work or the issue of the certificate of final inspection in respect of the building work.

43 There is no express reference in s 134 to another alternative starting time, such as, from the date of completion of the building work. (The Builder contends for 'the expressly stated intention of s 134'[45] but this is a reference to legislative intent said to be expressed in the second reading speech).

44 The Owner says s 134 is clear in stating that time starts to run only from the issue of an occupancy permit or certificate of final inspection and where there are none of these, it is perfectly clear that time has never started to run.[46] As discussed in paragraphs 36 and 37 above, the basis for this proposition appears to me to be that, once any work comes within the definition of 'building work', s 134 covers the field in respect of all building work.

45 I do not accept the Owner's submission that s 134 limitation period, construed on a plain reading of the text, operates in respect of building work which is not referrable to the issue of an occupancy permit or not referrable to the issue of a certificate of final inspection. I do not accept that s 134 can be construed as governing the 10 year limitation period for building work which is exempt under the Building Regulations (or for

[44] *Accident Towing & Advisory Committee v Combined Motor Industries Pty Ltd* [1987] VR 529 at 547 per McGarvie J.
[45] Respondent's submission dated 7 February 2019, paragraph 3.
[46] Applicant's further submission dated 14 February 2019, paragraph 14.

which there is otherwise no issue of a building permit), having the effect that the 10 year limitation period does not start to run.

46 The operation of s 134 is expressed as setting a time limitation period for bringing a building action arising out of building work by reference to two fixed and certain parameters, both which are dependent on the need for a building permit. Leaving aside the Builder's submissions at this stage, s 134 on a plain reading of the text does not provide a limitation period arising out of building work not referenced to the two fixed and certain parameters, or where no building permit has been obtained.

47 The building work complained of by the Owner in this case, is not a building action arising out of building work by reference to the date of an occupancy permit or certificate of final inspection. Rather, the Owner contends it is a building action arising out of building work, not governed by the alternative trigger events.

48 The issuing of a building permit has an important role under the scheme of the Building Act. The requirement to obtain a building permit in respect of building work, as defined in s 3 of the Building Act, is central to the operation of the Act. Section 16 creates an offence and prescribes penalties for failure to obtain a building permit in respect of building work.

49 The situations where a building permit is not required are limited. Section 16(1) requires that building work must not be carried out unless a building permit has been obtained.

50 Section 16(6) provides that the offence and penalties prescribed by s 16(2), for carrying out building work without a building permit, do not apply if the building work is exempted under the Building Act or regulations. For example, item 3 of schedule 8 of *Building Regulations 2006*, provides an exemption for building work for repair, renewal or maintenance of part of an existing building if the building work will not adversely affect structural soundness of the building.

51 In such situations a building permit for building work is not required. The prescription for exempted building work under the above regulations describes building work of a smaller nature and confined in scope.

52 Thus, under the Building Act, if no building permit in respect of building work has issued, the relevant party either has an exemption or has committed an offence in breach of the Building Act.

53 Pursuant to s 39 and s 21(2), all building work requires an occupancy permit unless the building surveyor considers the building work as minor or that it does not compromise suitability for occupation. For all building work not requiring an occupancy permit, including building works that the surveyor considers to be minor, pursuant to s 38 and s 33, a certificate of final inspection must be obtained. However, both are dependent on there being a building permit issued in the first instance. Simply put, an

occupancy permit or certificate of final inspection has no operation and cannot issue in the absence of a building permit.

54 The 10 year limitation period of s 134 is referrable to the date of issue of an occupancy permit (or certificate of final inspection) 'in respect of the building work'. On a construction based on a plain reading of the text, s 134 is silent concerning any operation in respect of building work not ultimately referrable to the existence of a building permit, including exempted building work.

55 Again, leaving aside the Builder's submission for a purposive construction at this point, the text of s 134 is expressed in language of limitation. It expresses a 10 year limitation period. It expresses the limitation period by reference to a 'building action' for 'building work' the subject of an 'occupancy permit' or similarly in respect of a 'certificate of final inspection', premised on the issue of a 'building permit'.

56 Section 134 is not expressed in enlarging or expansive terms, such that a plain reading makes clear s 134 has the effect of there being no limitation period for exempted building work or for building work for which there is no building permit. Section 134 is not expressed in enlarging terms to the effect that the 10 year limitation period simply does not start to run.

57 The construction contended for by the Owner would require implying into s 134 words to the effect that, for building work which is exempted from a building permit or not otherwise obtained, the 10 year limitation period does not start to run. An enlarged operation of such a nature is not warranted under a plain or grammatical reading of the text. The Owner has not sought to contend on other than a plain reading basis.

58 If the Owner had contended, in the alternative, that additional words should be implied or read into s 134 to the effect that, for building work which is exempted from a building permit or where there is otherwise no building permit, the 10 year limitation period does not start to run, I would be guided by the majority decision of the High Court in *Taylor v The Owners – Strata Plan No 11564*.[47]

> The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills "gaps disclosed in legislation" or makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature".

59 In my view an addition of words to the effect I have referred to above, would fall into the second category of seeking to fill gaps in s 134 and be too much at variance with the language in fact used. Had this been

[47] [2104] HCA 9 (2 April 2014) per French CJ, Crennan and Bell JJ at [38], citations omitted.

contended for by the Owner, which it was not, I would have found against such a construction.

60 Based on a plain reading of the text, there is no proper basis to construe that s 134 applies where no building permit has issued in respect of building work and no occupancy permit or certificate of final inspection has issued. The Owner's submission that time has not and does not start to run must fail. Where there is no building permit in respect of building work as defined under the Building Act, there can be no issue of an occupancy permit or certificate of final inspection to the effect that s 134 has no operation.

ASSESSMENT OF BUILDER'S SUBMISSION

61 The Builder submission is that under a proper construction that has regard to context and purpose, words may be implied or read into s 134 to the effect that the 10 year limitation period has expired because time runs from 'the date of completion of the building work'.[48]

62 I refer to the summary of the Builder's submission, particularly at paragraphs 32 to 34 above. The Builder submits, based on principles of statutory construction including as supported by *CIC Insurance*, that the modern approach to statutory construction insists that context be considered at the first instance, using context in its widest sense to include the mischief one may discern the statute was intended to remedy.

63 The Builder submits that, using this approach to statutory construction and having regard to the second reading speech, s 134 should be read as if the following words are added at the end of s 134: '*if no occupancy permit or certificate of final inspection is issued, the date of completion of the building work*'.

64 The Owner refutes any suggestion[49] by the Builder of there being ambiguity in the words of s 134 as support for construing s 134 by considering its context and a wider meaning. In my opinion, the Builder's reference to ambiguity[50] refers to the ambiguity commented upon by the Minister in the second reading speech, quoted in paragraph 32 above. The Minister comments on ambiguity arising from when time is regarded as starting to run under the Limitation of Actions Act provisions.

65 The Builder's later submission[51] makes it clear that it does not rely on ambiguity as the basis for submitting s 134 should be construed having regard to context and purpose. Instead, the Builder submits on the basis that the expressly stated intention of Parliament stands in contrast to the words of s 134[52] and that s134 cannot be properly construed without regard to

[48] Respondent's further submission dated 21 February 2019, paragraph 6.
[49] Owner's further submission dated 14 February 2019, paragraph 15.
[50] Respondent's submission dated 7 February 2019, paragraph 3.
[51] Respondent's further submission dated 21 February 2019, paragraph 1.
[52] Respondent's further submission dated 21 February 2019, paragraph 1.

context and purpose as demonstrated by the second reading speech of the Minister.

66 The Owner submits that the Builder impermissibly departs from the proper approach to statutory construction by importing words at the end of s134 to make the intended meaning clear. The Owner, in reliance on the authority of *Catlow*[53] referred to in paragraph 22 above, contends that it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of construction.[54]

67 The Owner also contends, using the language of the Court of Appeal in *Brirek* above, that second reading speeches are not to 'precede'[55] the plain language of the statutory provision and, citing *Saeed*, referred to in paragraph 23 above, that statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning.

68 The parties' opposing submissions on the proper approach to statutory construction, one essentially relying on *Catlow,* the other relying on *CIC Insurance,* leaves the question unanswered. There is a real tension evident from the language employed by the High Court in the 1987 case of *Catlow* and the later 1997 case of *CIC Insurance* in expressing the proper approach to be taken in statutory construction. It exemplifies the wrestle between text and context. It is not necessary for me to try and reconcile the differently nuanced approaches of those two authorities. It is not necessary for me to determine whether the Owner is correct is asserting that one cannot consider context before exhausting the application of the ordinary rules of statutory construction in apparent contrast to the Builder's assertion that, to determine the most appropriate interpretation, context must be considered based on what Parliament intended to achieve. It is not necessary because this most complex of areas has been well considered by the High Court in the years since.

69 I have referred to the relatively recent and comprehensive summaries of the High Court's decisions by the Court of Appeal in the 2018 case of *Worthington* and the 2011 case of *S M v The Queen* (respectively, from paragraphs 20 and from 25 above). I have also referred to the Court of Appeal's specific consideration of the operation of s134 in *Brirek*.

70 The construction of s134 by the court in *Brirek* was made from its consideration of the plain meaning of the text.[56] Nevertheless, the Court did not consider itself therefore unable to consider context and statutory purpose. In fact it did so, finding that the second reading speech contained

[53] [1989] HCA 43, (1989) 167 CLR 43 at 549-550, as cited in *Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd* [2014] VSCA 165 at [110].
[54] Applicant's further submission dated 14 February 2019, paragraph 10.
[55] *Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd* [2014] VSCA 165 at [111].
[56] Ibid at paragraphs 112 to 114.

statements which in the Court's view supported the construction it considered to be the correct one based on s134's plain words.[57]

71 In my opinion, there is nothing from the authority of *Catlow* or *Brirek*, understood against the approach now taken by the High Court, that supports a proposition that resort may only be made to context after first finding that a plain meaning cannot be achieved from the text. It is not a temporal process of first considering text and only if a plain meaning cannot be derived by that method subsequently giving consideration to the context. The use by the Court of Appeal in *Brirek* of the phrase 'second reading speeches are not to precede the plain language of the statutory provision'[58] is to be understood as not taking precedence over the meaning derived from a plain reading of the text. The Court makes as much clear in citing the High Court decision in *Saeed*, referred to in paragraph 23 above, and by it then giving consideration to the second reading speech to confirm its view of the plain meaning derived from the text.

72 The High Court makes the position clear. The passage in *Alcan (NT) Alumina*, referred to in paragraph 20 above, stands as authority that the meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, but context cannot be relied on to displace the clear meaning of the text. *Project Blue Sky*, referred to in paragraph 20 above, held that the primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.

73 In my opinion, the passage from decision of the High Court in *Commissioner of Taxation v Consolidated Media Holdings Ltd*, referred to in paragraph 20 above, puts the matter beyond question. Construction must start and end with consideration of the statutory text with the text to be considered in its context. The use of context and extrinsic material only has utility if it assists in fixing the meaning of the statutory text.

74 For these reasons, I accept the Builder's submission that it is appropriate to consider the meaning of s 134 in its context and which includes reference to the Minister's second reading speech to determine whether such a consideration has utility in fixing the meaning of the statutory text, in this case, where there is no express provision concerning the absence of a building permit.

75 Whether the meaning submitted for by the Builder by the implication of words to s 134 is a proper construction now needs to be considered.

76 The Builder submits that s 134 is properly construed by the addition of the words at the end: '*if no occupancy permit or certificate of final inspection is issued, the date of completion of the building work*'. Whether 'completion

[57] Ibid at paragraph 118.
[58] *Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd* [2014] VSCA 165 at paragraph 111.

of the building work' is an expression of sufficient clarity to make clear the precise event from when time starts to run may itself be open to some doubt.[59]

77 Before considering the Builder's submission for a purposive construction of s 134 that seeks to give effect to a purported legislative intention, the more general question to be addressed first is whether a purposive construction allows the reading of a provision as if it contained additional words with the effect of expanding the provision's field of operation.

78 This is submitted for by the Builder on the authority of the High Court in *Taylor v The Owners – Strata Plan No 11564.*[60] It was held:

> Consistently with this Court's rejection of the adoption of rigid rules in statutory construction, it should not be accepted that purposive construction may never allow of reading a provision as if it contained additional words (or omitted words) with the effect of expanding its field of operation. As the review of the authorities in *Leys* demonstrates, it is possible to point to decisions in which courts have adopted a purposive construction having that effect.

79 The Builder also submitted that whether to read in words to a statutory provision may be guided by satisfying three conditions set out by Lord Diplock in *Wentworth Securities Ltd v Jones.*[61] In summary, the conditions are: first, the identification of the precise purpose of the provision, second, that by inadvertence, the draftsman and Parliament overlooked an eventuality that must be dealt with if the provision is to achieve its purpose and, third, what Parliament would have included in the provision had the deficiency been detected before the enactment.

80 Subject to discussion below, in the present case, it is unnecessary to consider the application of these conditions for, as noted by the High Court in *Taylor,*[62] irrespective of Lord Diplock's conditions:

> the task remains the construction of the words the legislature enacted. In this respect it may not be sufficient that "the modified construction is reasonably open having regard to the statutory scheme"[63] because any modified meaning must be consistent with the language in fact used by the legislature. Lord Diplock never suggested otherwise. Sometimes, as McHugh J observed in *Newcastle City Council v GIO General Ltd*,[64] the language of a provision will not admit of a remedial construction … His Honour's further observation, "[i]f the legislature uses language which covers only one state

[59] For example, the *Domestic Building Contracts Act 1995* (Vic) s45(c) and (d). In the absence of an occupancy permit or certificate of final inspection, 10 years after the date of practical completion; if neither of these are issued or required or the date of practical completion cannot be ascertained, 10 years after the domestic building contract was entered into.
[60] [2014] HCA 9; (1997) 191 CLR 85 at 116 citing *DPP v Leys* [2012] VSCA 304.
[61] [1980] AC 74 at 105-106.
[62] [2014] HCA 9 at paragraph 39.
[63] *DPP v Leys* [2012] VSCA 304.
[64] [1997] HCA 53; (1997) 191 CLR 85 at 113.

> of affairs, a court cannot legitimately construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances."

81 That is the proper approach here. There is no bar to the implication of words, but the words to be implied must be consistent with the statutory provision construed appropriately. My consideration below therefore focuses on whether the legislature can be taken to have intended a meaning that permits the implication of words as submitted by the Builder which enlarges the operation of s 134.

82 In this regard, the Builder submits that the second reading speech, referred to in paragraph 32 above, supports a meaning that is achieved by the reading in of the words referred to. The second reading speech states that the Bill defines a clear starting date and conclusion date and removes the existing ambiguity surrounding the time during which the building owner retains the right to issue legal proceedings.

83 The Builder contends that to read s 134 as having the effect of excluding from the limitation period building work in respect of which no building permit is obtained or required, runs counter to the 'stated objective' and would make no sense. It submits that the task is to adopt the most appropriate interpretation of the provision in accordance with what Parliament intended to achieve.[65]

84 There is some attractiveness to this submission even though the second reading speech does not expressly engage on the issue of what happens to the operation of the limitation period when no occupancy permit or certificate of final inspection is issued. The Builder urges the adoption of the most appropriate interpretation according to Parliament's intention, with a focus on the mischief intended to be remedied.

85 The 'most appropriate interpretation' submitted by the Builder's relies on the implication of the words into s 134 previously referred to as part of the purposive interpretation.[66]

86 In paragraph 27 above, I have referred to the several considerations of the High Court in *Certain Lloyds Underwriters v Cross*. In sub paragraphs 52 and 53, French CJ and Hayne J held that it is important to recognise that to speak of legislative 'intention' is to use a metaphor which should not mislead. The duty of a court (or the Tribunal in this case) is to give the words of the statutory provision the meaning that the legislature *is taken to have intended* them to have. The search for legislative intention is not the discovery of some subjective purpose or intention. It is not a search for what those who passed the legislation may have had in mind. The purpose of the legislation must be derived from what the legislation says, and not from what any assumption about the desired or desirable reach or operation of the relevant provisions.

[65] Respondent's further submissions dated 21 February 2019, paragraph 1.
[66] Ibid, paragraph 7.

87 The Builder submits that the second reading speech makes it clear the mischief intended to be remedied. The Builder contends it is only by the implication of the additional words, that time starts to run from 'completion of the building work', that the legislative intent for s 134 can be properly reflected.

88 The second reading speech does identify the mischief to be addressed as the confusion, under the 6 year limitation period under the Limitation of Actions Act running from when a cause of action accrues, such as from when damage occurs (for a tortious claim) or from when damage is discernible (for a contractual claim).[67] It also states that the Bill will introduce a clear trigger date for consideration of construction liability claims defined as the date of issue of an occupancy permit.

89 In introductory remarks to the pertinent section of the second reading speech (Liability and Insurance Reforms), the Minister states: 'The Bill introduces long overdue reforms to update liability and insurance arrangements in the building permit industry.'

90 The second reading speech also states: 'In introducing the reform the government is mindful of the possibility of a more widespread review of liability issues may be undertaken in future which may lead to further changes.'[68]

91 What the legislature may be taken to have intended may also be understood from the structure of the legislation. In this regard, I have referred to the important role of a building permit under the scheme of the Building Act discussed above from paragraphs 48 to 56.

92 I return to the question of statutory construction and whether a court is justified in reading a statutory provision as if it contained additional words (refer to paragraphs 58 and 78 to 81 above). In *Taylor's* case the High Court held, noting that whether to read in words is a matter of degree, that reading in words to a provision is not permissible where it is 'a construction that fills gaps disclosed in legislation or makes an insertion which is too big, or too much at variance with the language in fact used by the legislature.'[69]

93 The Builder's submission for the reading of the words to the end of s 134 is an attempt at a construction that seeks to fill a gap in the scope of operation of the 10 year limitation period for the case of building work for which there is no building permit. But this is not the task of a court or the Tribunal in the present case. The task is the construction of the words the legislature enacted. Moreover, regarding the matter of degree as to whether to read in words and the concept of what may be regarded as a 'gap', the second condition of Lord Diplock (referred to in paragraph 79 above) is that by inadvertence, the draftsman and Parliament overlooked an eventuality that

[67] *Building Bill*, second reading dated 30 November 1993 at page 134, Annexure 'A' to respondent's further submission dated 21 February 2019.
[68] Ibid.
[69] *Taylor v The Owners – Strata Plan No 11564* [2104] HCA 9 per French CJ, Crennan and Bell JJ, [38].

must be dealt with if the provision is to achieve its purpose. Section 134 of the Building Act has been in operation for many years. The absence of, or a 'gap' in, having a further provision for the limitation period to apply to building work for which there is no building permit, could not be described as an eventuality that must be dealt with if s 134 is to achieve its purpose. The operation of s 134 in respect of the 10 year limitation period under the Building Act, having as its purpose the replacement of the regime under the Limitation of Actions Act, is a purpose that has been well achieved.

94 For these reasons, the implication or reading in of the suggested words to s 134 of the Building Act is not permissible. The construction is impermissible based on a plain reading of the text of s 134. This reading is consistent within the context of the important role of a building permit under the scheme of the Building Act. It is consistent with, or not inconsistent with, giving the words of s 134 the meaning that the legislature must be taken to have intended them to have, having regard to second reading speech referring to the reform of the 'building permit industry', triggers linked to an occupancy permit which cannot issue without a building permit and acknowledgement of the possibility (at that time) of a more widespread review of liability issues in the future.

95 In these circumstances there is no proper basis to read in words enlarging the operation of s 134 to include a provision for where no building permit has issued in respect of building work and no occupancy permit or certificate of final inspection has issued. The Builder's submission that time starts to run from the date of completion of the building work must fail. Where there is no building permit in respect of building work as defined under the Building Act, there can be no issue of an occupancy permit or certificate of final inspection to the effect that s 134 has no operation.

WHERE S 134 OF THE BUILDING ACT IS DETERMINED AS NOT HAVING APPLICATION WHERE A PERMIT IS NOT ISSUED FOR BUILDING WORK AND NO OCCUPANCY PERMIT OR CERTIFICATE OF FINAL INSPECTION IS ISSUED, IN RESPECT OF SUCH BUILDING WORK, DOES THE LIMITATION OF ACTIONS ACT APPLY BY DEFAULT?

96 The primary matter for determination by me, under the Orders made 1 February 2019, is to determine whether the respondent's defence that the applicant's claim is statute barred has been made out.

97 As a consequence of the respective constructions for s 134 of the Building Act, both parties submit that the Limitation of Actions Act does not apply or have a role to play. The introductory words of s 134 are clear in excluding the operation of the Limitation of Actions Act where s 134 of the Building Act applies. The parties did not materially elaborate on the non application of the Limitation of Actions Act, notwithstanding that they had the opportunity of doing so, including in their respective supplementary submissions.

98 The respondent Builder's defence that the applicant Owner's claim is statute barred under s 134 of the Building Act I have determined was not made out with s 134 having no operation. In the circumstances, the operation of s 134 is a nullity in so far as governing the limitation period in respect of the applicant Owner's claim.

99 The Court of Appeal in *Brirek* considered the introductory words of s 134 of the Building Act as follows:

> The words '[d]espite any thing to the contrary in the Limitation of Actions Act 1958 or in any other Act or law' have work to do in s 134. The Limitation of Actions Act and other Acts provide for different periods of limitation. The period provided for in s 134 operates despite those different periods.
>
> The contention that s 33 of the Limitation of Actions Act prevents s 5 of that Act operating with respect to 'building actions' should also be accepted. Section 134 of the Building Act is 'a period of limitation ... prescribed by any other enactment' within the meaning of s 33.[70]

100 In *Brirek*, the building work under the relevant contract being considered by the court was the subject of a building permit for which an occupancy permit had issued. The court had found that s 134 applies to a building action in respect of building work. It stated that what s134 does 'is to limit the period within which 'building actions' may be brought generally.'[71] That is, 10 years from the undisputed (in that case) date of issue of the occupancy permit. Section 5 of the Limitation of Actions Act was excluded.

101 The present case is different. It is not disputed that no occupancy permit or certificate of final inspection issued. It is not disputed that the work was building work for which a building permit was not obtained.

102 Section 33 of the Limitation of Actions Act provides that the 'periods of limitation prescribed by the Act shall not apply to any action or arbitration for which a period of limitation is prescribed by any other enactment …'

103 With s 134 of the Building Act determined as having no operation and, pursuant to s 33 of the Limitation of Actions Act, there being no other period of limitation prescribed by any other enactment in respect of the subject building work, the Limitations of Actions Act is not excluded from operation and therefore applies.

104 The Builder's defence was not put, in the alternative, that the Owner's claim is statute barred under the Limitation of Actions Act. Whether the Owner's claim is or is not statute barred under the limitation period as defined in s 5 of the Limitation of Actions Act has not been put by the Builder as a defence and thus not argued by the parties. It is not therefore a matter upon which I make any determination.

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[70] *Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd* [2014] VSCA 165 at paragraphs 115 and 116.
[71] Ibid at paragraph 114.

SECONDARY ISSUE

105 The secondary issue for determination is whether the referral to Domestic Building Dispute Resolution Victoria by the Owner constitutes a 'building action' as defined under s 129 of the Building Act to the effect that, under s 134, the claim of the Owner is within the 10 year limitation period.

106 For the reasons given above that s 134 of the Building Act has no operation in the present case, it is unnecessary for me to consider this issue further.

CONCLUSION

107 The construction I have determined in respect of s 134 of the Building Act is made on a plain reading of the text. It is possible that poor drafting of s 134 may be some explanation for the absence of addressing its application in circumstances where no building permit is issued. But that is conjecture and legislative purpose is not to be determined from any assumption about the desirable reach or operation of the section. If it be a construction that is inconvenient then, as stated in *Australian Education Union v Department of Education and Children's Services* (referred to above at paragraph 27), it is not for a court (or this Tribunal) to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose.

108 Construed properly in accordance with the principles of statutory construction, s 134 is not open to remediation. It is perhaps one of the circumstances alluded to by McHugh J in *Newcastle City Council v GIO General Ltd* (referred to above at paragraph 80), where sometimes the language of a provision will not admit of a remedial construction. Again, as McHugh J observed, where the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances.

109 In respect of the Owner's submission, on a plain reading of the text, there is no proper basis to construe that s 134 applies where no building permit has issued in respect of building work and no occupancy permit or certificate of final inspection has issued. The Owner's submission that time has not and does not start to run must fail. Where there is no building permit in respect of building work as defined under the Building Act, there can be no issue of an occupancy permit or certificate of final inspection to the effect that s134 has no operation.

110 In respect of the Builder's submission, there is no proper basis to read in words enlarging the operation of s 134 to include a provision for where no building permit has issued in respect of building work and no occupancy permit or certificate of final inspection has issued. The Builder's submission that time starts to run from the date of completion of the building work must fail. Where there is no building permit in respect of building work as defined under the Building Act, there can be no issue of an

occupancy permit or certificate of final inspection to the effect that s 134 has no operation.

111 In respect of the Limitation of Actions Act, with s 134 of the Building Act determined as having no application and, pursuant to s 33 of the Limitation of Actions Act, there being no other period of limitation prescribed by any other enactment in respect of the subject building work, s 5 of the Limitation of Actions Act applies.

112 Whether the Owner's claim is or is not statute barred under the limitation period as defined by s 5 of the Limitation of Actions Act is not a matter for determination by me.

113 The proceeding will be listed for a directions hearing to consider the future conduct of the proceeding.

MJF Sweeney
MEMBER