Court of Appeal
Supreme Court

New South Wales

Case Name:	Bandelle Pty Ltd v Sydney Capitol Hotels Pty Ltd
Medium Neutral Citation:	[2020] NSWCA 303
Hearing Date(s):	30 July 2020
Decision Date:	25 November 2020
Before:	Leeming JA at [1]; White JA at [46]; Emmett AJA at [86]
Decision:	1. Grant leave to appeal. 2. Direct Bandelle to file a notice of appeal in accordance with the draft notice of appeal dated 19 March 2020, and otherwise dispense with the requirement of service. 3. Appeal allowed. 4. Set aside the orders made by the primary judge including the answer to the question, on 18 December 2019, and in lieu thereof, answer that question "Yes, s 6.20 afforded a defence to Capitol's claim", and dismiss the proceedings with costs. 5. Capitol to pay Bandelle's costs of the appeal.
Catchwords:	BUILDING AND CONSTRUCTION – limitation period – limitation period for actions arising out of defective building work more than ten years after completion of work – limitation period originally contained in s 109ZK of Environmental Planning and Assessment Act 1979 – section renumbered as s 6.20 – as originally enacted, s 109ZK applied only prospectively – defendant's building work done before enactment of s 109ZK – whether limitation period applied to building work done before section enacted – whether s 6.20 replaced s 109ZK – whether limitation period applied to loss of the kind alleged by the plaintiff.

	STATUTORY CONSTRUCTION – amending legislation – limitation section renumbered and reworded – transitional and savings regulations – regulations deferred commencement and qualified scope of limitation period – effect of repeal of regulation – further regulations including amended regulations preserving repealed sections and qualifying renumbered section – whether effect of legislation and amendment was a period of time during which limitation period did not apply – whether legislation displaced operation of Interpretation Act 1987 – observations on undesirability of regulations affecting operation of statute.
Legislation Cited:	Choice of Law (Limitation Periods) Act 1993 (NSW) Environmental Planning and Assessment Act 1979 (NSW), Part 6, s 6.20, former Part 4A, s 109C, Part 4C, ss109ZI, 109ZK, Part 8, s 146A Environmental Planning and Assessment Amendment Act 1997 (NSW), item 55 of Schedule 1 Environmental Planning and Assessment Amendment Act 2017 (NSW), Schedules 6, 10 Environmental Planning and Assessment Amendment Regulation 2018 (NSW), cl 18 Environmental Planning and Assessment Regulation 2000 (NSW), Part 9, Div 7A Environmental Planning and Assessment (Savings and Transitional) Regulation 1998 (NSW), cll 2, 34 Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 (NSW) Interpretation Act 1987 (NSW), ss 30, 34, 35 Limitation Act 1969 (NSW), s 14 Statute Law (Miscellaneous Provisions) Act 2010 (NSW), item 5 of Schedule 1.26 Statute Law (Miscellaneous Provisions) Act (No 2) 2011 (NSW), cl 1 of Schedule 5 Subordinate Legislation Act 1989 (NSW) Uniform Civil Procedure Rules 2005 (NSW), r 28.2
Cases Cited:	Abdulla v Birmingham City Council [2012] UKSC 47; [2013] 1 All ER 649 Australian Competition and Consumer Commission v Maritime Union of Australia (2001) 114 FCR 472; [2001]

FCA 1549
Australian Rail Track Corporation Ltd v Leightons Contractors Pty Ltd [2003] VSC 189
Bayside City Council v Telstra Corporation Ltd (2004) 216 CLR 595; [2004] HCA 19
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25
Bryan v Maloney (1995) 182 CLR 609; [1995] HCA 17
Burswood Management Ltd v Attorney-General (Cth) (1990) 23 FCR 144; [1990] FCA 203
Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280; [1993] FCA 456
Dinov v Allianz Australia Insurance Ltd (2017) 96 NSWLR 98; [2017] NSWCA 270
John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503; [2000] HCA 36
Kelly v The Queen (2004) 218 CLR 216; [2004] HCA 12
Maxwell v Murphy (1957) 96 CLR 261; [1957] HCA 7
Moubarak by his tutor Coorey v Holt (2019) 100 NSWLR 218; [2019] NSWCA 102
O'Grady v Northern Queensland Co Ltd (1990) 169 CLR 356; [1990] HCA 16
Ombudsman v Laughton (2005) 64 NSWLR 114; [2005] NSWCA 339
Owners Corporation Strata Plan 76841 v Ceerose Pty Ltd [2017] NSWCA 140
Pretty v Solly (1859) 26 Beav 606; 53 ER 1032
Republic of Costa Rica v Erlanger (No 3) (1876) 3 Ch D 62
Sheldon v McBeath (1993) Aust Torts Rep 81-209
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418; [1950] HCA 35
Sydney Capitol Hotels Pty Ltd v Bandelle Pty Ltd [2019] NSWSC 1825
Taylor v The Owners – Strata Plan No. 11564 (2014) 253 CLR 531; [2014] HCA 9
The Queen v Khazaal (2012) 246 CLR 601; [2012] HCA 26
Williams v Central Bank of Nigeria [2014] AC 1189; [2014] UKSC 10
Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515; [2004] HCA 16
Workers' Compensation Board (Qld) v Technical

	Products Pty Ltd (1988) 165 CLR 642; [1988] HCA 49 Yrttiaho v The Public Curator of Queensland (1971) 125 CLR 228; [1971] HCA 29
Category:	Principal judgment
Parties:	Bandelle Pty Ltd (Appellant) Sydney Capitol Hotels Pty Ltd (Respondent)
Representation:	Counsel: T Lynch SC with D Hand (Appellant) D S Weinberger with A R Jordan (Respondent) Solicitors: Farrar Lawyers (Appellant) Gells Lawyers (Respondent)
File Number(s):	2019/399301
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Equity – Technology and Construction List
Citation:	[2019] NSWSC 1825
Date of Decision:	18 December 2019
Before:	Hammerschlag J
File Number(s):	2019/263542

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the decision]

Capitol commenced proceedings in the Technology and Construction List alleging that in 1997 a builder had negligently undertaken construction work in a shaft passing through a building occupied by it, and that in 2017, that breach caused loss and damage when the building's fire sprinklers were activated following the spread of fire and smoke through that shaft. In 2014, Bandelle had succeeded to the liabilities of the builder pursuant to a scheme of arrangement.

By its Technology and Commercial List response, Bandelle alleged that the claim was barred by s 6.20 of the *Environmental Planning and Assessment Act 1979* (NSW). There was a separate determination of that issue.

Section 6.20 provided:

> "(1) A civil action for loss or damage arising out of or in connection with defective building work or defective subdivision work cannot be brought more than 10 years after the date of completion of the work."

Section 6.20 replaced former s 109ZK, in Part 4C of the Act. Section 109ZK provided:

> "(1) Despite any Act or law to the contrary, a building action may not be brought in relation to any building work:
>
> (a) more than 10 years after the date on which the relevant final occupation certificate is issued, or ..."

Clause 34 of the Environmental Planning and Assessment (Savings and Transitional) Regulation 1998 (NSW) provided that:

> "Part 4C of the amended EP&A Act 1979 does not apply to or in respect of any development carried out under the authority of:
>
> (a) a development consent granted under the unamended EP&A Act 1979 ..."

Clause 34 was repealed in 2012.

A series of provisions postponed the commencement of some of the provisions of the *Environmental Planning and Assessment Amendment Act 2017* (NSW), which governed when s 6.20 came into force.

The primary judge held that the claim was not barred by s 6.20. Bandelle appealed.

Held, allowing the appeal:

By all members of the Court:

(1) In order to construe s 6.20 it is necessary to consider its predecessor s 109ZK: [9], [11]; [75]; [110], [114].

(2) Section 6.20 and former s 109ZK apply to all claims for economic loss caused by defective building work: at [38]; [71]-[74]; [123]-[127].

Australian Rail Track Corporation Ltd v Leightons Contractors Pty Ltd [2003] VSC 189 distinguished.

(3) The purpose of s 6.20 and former s 109ZK is to provide a long-stop limitation period, independently of when damage first manifested: [8]; [116]-[117], [123].

(4) Section 6.20 replaced s 109ZK. There was no gap when neither provision applied: [39]-[41], [65]-[68], [109]-[110].

By Leeming JA, allowing the appeal:

(5) Section 109ZK as originally enacted was confined to defective building work pursuant to development consents granted after July 1998, but extended to all defective building work in 2012, after the repeal of cl 34: [12]-[19], [24]-[37].

(6) No differently from s 109ZK in 2012 after the repeal of cl 34, s 6.20 is not confined to building work done pursuant to development consents granted after 1998: [41].

By White JA, allowing the appeal:

(7) While the repeal of cl 34 did not revive the limitation period in s 109ZK, the scope of s 6.20 is not limited in the same way as the former s 109ZK: [48], [78]-[82].

(8) Section 6.20 is not confined to defective building work pursuant to development consents granted after July 1998, but extends to all defective building work: [75]-[77].

By Emmett AJA, dissenting:

(9) Both s 109ZK and s 6.20 were confined to building work pursuant to development consents granted after July 1998, and thus did not apply to the work on which Capitol's complaint was based: [101]-[103], [110], [128].

JUDGMENT

1 **LEEMING JA:** I agree with White JA that Capitol's claim is barred by s 6.20, that the appeal should be allowed, the separate question answered accordingly, and the proceedings dismissed. I agree with most of the reasons

of White JA and Emmett AJA, and I should say at the outset that their reasoning has greatly assisted my own analysis of the issues in this appeal.

2 What follows presupposes familiarity with the factual and procedural background addressed in Emmett AJA's reasons.

Sections 109ZK and 6.20, their text and purpose

3 Former s 109ZK and current s 6.20 of the *Environmental Planning and Assessment Act 1979* (NSW) are very similar. The former relevantly provided:

> "**109ZK Limitation on time when building action or subdivision action may be brought**
>
> (1) Despite any Act or law to the contrary, a building action may not be brought in relation to any building work:
>
> (a) more than 10 years after the date on which the relevant final occupation certificate is issued, or ..."

4 Former s 109ZI defined a "building action" to mean "an action (including a counter-claim) for loss or damage arising out of or concerning defective building work".

5 The latter provides:

> "**6.20 Limitation on time when action for defective building or subdivision work may be brought** (cf previous s 109ZK)
>
> (1) A civil action for loss or damage arising out of or in connection with defective building work or defective subdivision work cannot be brought more than 10 years after the date of completion of the work."

6 Both provisions are subject to a proviso to the effect that they did not apply to or affect any right to recover damages for death or personal injury arising out of or concerning defective building work (former s 109ZL and s 6.21).

7 Section 6.20 does not employ a defined term "building action". The absence of that defined term explains the different title and much of the different language. If the definition of "building action" is read into s 109ZK, in accordance with the process described in *Kelly v The Queen* (2004) 218 CLR 216; [2004] HCA 12, then the similarities between ss 109ZK and 6.20 are even more apparent.

8 The provisions have a clear purpose. As was said in *Dinov v Allianz Australia Insurance Ltd* (2017) 96 NSWLR 98; [2017] NSWCA 270 at [9], they are directed to the "open-ended outcome arising from the application of existing

limitation periods with respect to claims for latent defects, which only give rise to actionable damage upon first becoming manifest", citing *Bryan v Maloney* (1995) 182 CLR 609 at 617; [1995] HCA 17. Their effect, which is confined to claims for damages for property or economic loss, is to impose a maximum limitation period of 10 years, irrespective of when the existence of defects first becomes manifest. The sections operate cumulatively with the 6 year limitation period calculated from the accrual of a cause of action (including the manifestation of damage) imposed by s 14(1)(b) of the *Limitation Act 1969* (NSW) and any other applicable limitation period. The 10 year period imposed by s 109ZK was aptly referred to as a "long-stop period" in *Owners Corporation Strata Plan 76841 v Ceerose Pty Ltd* [2017] NSWCA 140 at [22].

9 The only issue before the primary judge was whether s 6.20 barred Capitol's claim. In this Court, debate extended more broadly to whether s 6.20, or its predecessor s 109ZK, or nothing at all, applied. Although this introduces complexity, it remains a pure question of law, unaffected by any evidence. There are at least three reasons for this Court to resolve the matter without regard to the more circumscribed stance adopted by the parties at first instance. There is the effect of this judgment in other cases. There is the fact that even if Bandelle is right and the primary judge erred, this Court would only make a different order if satisfied that it were appropriate to do so. More generally and most importantly, a fuller analysis is necessary in order to construe s 6.20 in its context. To adopt with slight modification Lord Sumption's words in *Williams v Central Bank of Nigeria* [2014] AC 1189; [2014] UKSC 10 at [5], where a similar course was taken, "[n]ot only is it a pure question of law, but a proper understanding of [the section] requires an examination of both questions". This accords with a familiar passage in *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; [1950] HCA 35. On the view I take, the fact that after 2012 s 109ZK applied to the building work undertaken by Bandelle makes it easy to conclude, in light of the similarities between the two sections, that s 6.20 also applied when it replaced s 109ZK.

10 The litigation has proceeded on the basis that the allegedly defective work was undertaken pursuant to a development consent granted before 1 July 1998. That is significant for reasons not apparent on the face of the statute.

11 The better view is that s 109ZK, when first enacted, had exclusively prospective force. Why that is so is important for the resolution of this appeal. It is far from being free from complexity.

The effect of cl 34 of the 1998 regulation

12 Section 109ZK was enacted by the *Environmental Planning and Assessment Amendment Act 1997* (NSW), with effect from 1 July 1998. Part 6 of Schedule 6 of the Act was amended at the same time so as to extend the broad power to make regulations of a savings and transitional nature under cl 1 of that Schedule to regulations consequent on the enactment of that statute (see item 55 of Schedule 1 of the *Environmental Planning and Assessment Amendment Act 1997* (NSW)). The Environmental Planning and Assessment (Savings and Transitional) Regulation 1998 (NSW) commenced on the same day: cl 2. Clause 34 was an exercise of the newly expanded regulation-making power. It provided:

> "**34 Operation of Part 4C**
>
> Part 4C of the amended EP&A Act 1979 does not apply to or in respect of any development carried out under the authority of:
>
> (a) a development consent granted under the unamended EP&A Act 1979 ..."

13 It is a little unusual for the delegated legislation to curtail the application of a section in a statute which commences "Despite any Act or law to the contrary". However I think that when cl 34 is read with s 109ZK it has the effect stated in cl 34, confirming that s 109ZK does not apply to development carried out pursuant to a development consent granted before 1 July 1998.

14 The task is to reconcile the general words with which s 109ZK commences with the specific narrowing of application effected by cl 34. They are to be read together if that is possible, since they were made simultaneously, despite one being in a regulation and the other being in a statute.

15 The appropriate way of reading both provisions together is as follows. The opening words of s 109ZK are very general, while cl 34 is very specific. In *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595; [2004] HCA 19 at [24], the High Court applied the following rule stated by Sir John Romilly MR in *Pretty v Solly* (1859) 26 Beav 606 at 610; 53 ER 1032 at 1034:

> "The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative …"

16 The application of that rule is often straightforward. It is more contestable in the present case, because the "particular enactment" is contained in a regulation, while the "general enactment" is contained in a statute and commences "Despite any Act or law to the contrary". However, the fact that the particular enactment is in a regulation is not to the point, when the statute conferred a broad regulation-making power for savings and transitional provisions (in short, a Henry VIII clause, confined to a limited subject matter). The force of the opening words is more problematic. I respectfully favour the explanation given by Spigelman CJ for the operation of the rule of construction restated in *Bayside City Council*, who referred to:

> "an underlying principle that a legislature, which has created a detailed regime for regulating a particular matter, intends that regime to operate in accordance with its complete terms. Where any conflict arises with the general words of another provision, the very generality of the words of which indicates that the legislature is not able to identify or even anticipate every circumstance in which it may apply, the legislature is taken not to have intended to impinge upon its own comprehensive regime of a specific character": *Ombudsman v Laughton* (2005) 64 NSWLR 114; [2005] NSWCA 339 at [19].

17 That explanation is somewhat strained when applied to the generality of s 109ZK, reinforced as it is by the words "Despite any Act or law to the contrary". Those words tends to suggest that the Legislature has in fact identified and anticipated the circumstances in which the provision is to apply (namely, that it is to apply universally).

18 However, the emphatic opening words of s 109ZK have real work to do. They ensure that the "long-stop" limitation period applies even if the ordinary 6 year limitation period, and any other existing or future limitation period, has not expired. If s 109ZK is to achieve its purpose as an ultimate limitation period, not based on the accrual of a cause of action, but upon 10 years elapsing from the time the building work was done, then it has to defeat the entitlements at general law and under any current *or future* statute which might provide to the contrary. Conversely, cl 34 is very narrow: it applies to a single section, s 109ZK. And if it does not operate according to its terms, it is wholly otiose.

19 With some hesitation, I conclude that cl 34 applies notwithstanding the opening words of s 109ZK. (If I am wrong about that, my ultimate conclusion is unaltered; it means merely that s 109ZK operated generally not merely after 2012, but from 1998, and the conclusion that s 6.20 is a defence to Capitol's claim is all the stronger.)

20 There may be other difficulties in the construction of the opening words of s 109ZK. Lest there be any doubt about it, I am not expressing a view as to how s 109ZK might apply in cases of concealed fraud; I am merely explaining the reconciliation between s 109ZK and cl 34.

21 Read as delimiting the application of s 109ZK, cl 34 also avoided debate about whether the new "long-stop" limitation period operated with retrospective effect. That too would not be free from complexity. The complexity arises from the traditional characterisation of limitation provisions as procedural. It is to be borne in mind that the *Choice of Law (Limitation Periods) Act 1993* (NSW), anticipating *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; [2000] HCA 36, only alters the traditional characterisation of limitation laws for the purposes of choice of law. But as Dixon CJ said in *Maxwell v Murphy* (1957) 96 CLR 261 at 267; [1957] HCA 7, "[c]hanges made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed." Even so, it was always appreciated that the retrospective operation of a procedural law might as a matter of substance give rise to hardship or injustice. That would depend on whether the amendment had in substance the effect of barring a plaintiff's right or removing what had hitherto been a defendant's compete defence. This was explained by Gibbs J, with whom Windeyer and Walsh JJ agreed, in *Yrttiaho v The Public Curator of Queensland* (1971) 125 CLR 228 at 242; [1971] HCA 29:

> "The authorities support the view that an amendment to a Statute of Limitations may be regarded as being only of a procedural nature and, therefore, unless a contrary intention appears, retrospective in operation, if, being an amendment enlarging time, it took effect before the right sought to be enforced had become finally barred by lapse of time, and if, being an

amendment reducing time, it left time after its commencement within which an action might be brought. In these circumstances the substantive rights of the parties are not affected by the alteration of the limitation period."

22 This reflected the distinction made by Mellish LJ in *Republic of Costa Rica v Erlanger (No 3)* (1876) 3 Ch D 62 at 69: "No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done". As Dixon CJ observed in *Maxwell v Murphy* at 267, the distinction is clear enough in principle, but difficulties have always attended to its application. I shall return to this below.

23 For such time as cl 34 confined the operation of s 109ZK to defective building work done pursuant to development consents granted after July 1998, there could be no hardship or injustice. Builders (and their insurers), developers and purchasers would all be aware of the long-stop limitation period which would apply a decade after the building work was performed.

Clause 34 survives staged repeal until 2012

24 The next difficulty in the combined operation of s 109ZK read with cl 34 is the default operation of the staged repeal regime effected by the *Subordinate Legislation Act 1989* (NSW). That statute provides that most statutory rules are automatically repealed on 1 September following the fifth anniversary of the date on which they were first published: s 10(2). However, so far as I can see, that regime did not apply. There are two aspects to this.

(1) Staged repeal does not apply to the "Excluded instruments" specified or described in Schedule 4 (see the definition of "statutory rule" in s 3(1)), and until 9 July 2010, item 18 in Schedule 4 was "An instrument containing matters of a savings or transitional nature (provided the only other provisions contained in the instrument are provisions dealing with its citation and commencement)". Although perhaps not entirely free from argument, the better view is that the Environmental Planning and Assessment (Savings and Transitional) Regulation 1998 is, consistently with its name, an instrument which satisfied item 18.

(2) With effect from 9 July 2010, item 18 was narrowed, so as to apply only to instruments which were in force on 1 July 2010 (see item 5 of Schedule 1.26 to the *Statute Law (Miscellaneous Provisions) Act 2010* (NSW)). However, by reason of the operation of the *unamended* item 18 prior to its amendment on 9 July 2010, the Environmental Planning and Assessment (Savings and Transitional) Regulation 1998 continued to

be in force on 1 July 2010 and therefore continued to amount to an "Excluded instrument".

25 The Environmental Planning and Assessment (Savings and Transitional) Regulation 1998 was repealed by the explicit operation of statute. The *Statute Law (Miscellaneous Provisions) Act (No 2) 2011* (NSW) repealed it with effect from 6 January 2012.

The legal meaning of s 109ZK after the repeal of cl 34 in 2012?

26 As Dixon CJ said in *Maxwell v Murphy* at 266-267, "at common law the repeal of a statute or a statutory position means that the law must be applied as if the provision had never existed". But s 30 of the *Interpretation Act 1987* (NSW) alters the position at common law.

27 Section 30(1)(a) a provides that "[t]he amendment or repeal of an Act or statutory rule does not revive anything not in force or existing at the time at which the amendment or repeal takes effect". However, cl 34 was a rule which qualified the prima facie unlimited operation of s 109ZK. The question posed by cl 34 is not whether something which was not in force in 2012 was "revived". The question is simply whether the unqualified words of s 109ZK continue to bear the qualified meaning given to them by cl 34. Although I acknowledge that, like so many of the issues of statutory construction posed in this appeal, the question is one as to which minds might reasonably differ, I do not think that falls within the scope of s 30(1)(a).

28 Section 30(1)(c) provides further that the repeal of an Act or statutory rule does not "affect any right, privilege, obligation or liability acquired, accrued or incurred under the Act or statutory rule". It is difficult to apply that provision to the repeal of cl 34. Let it be assumed that defective building work was undertaken pursuant to a development consent granted before July 1998. If by 6 January 2012 no damage had been suffered, then the plaintiff had no accrued right; the plaintiff's cause of action was incomplete. But suppose damage had been suffered, but only recently, so that a cause of action had accrued less than 6 years before 6 January 2012. Under the restricted operation of s 109ZK effected by cl 34, the plaintiff had an accrued cause of action. Another (and perhaps better) way of putting this is that the plaintiff had a "privilege" or entitlement not to be met by a defence under s 109ZK, because

of the limited scope of that section. I accept that it is possible, although to my mind it is somewhat strained, to consider the accrued cause of action, or alternatively the privilege not to be met with a defence under s 109ZK, as something which was "acquired, accrued or incurred under" cl 34. But I doubt that that is the correct approach. The defence arises "under" s 109ZK; it is awkward to regard it as arising under cl 34. By that, I am really saying no more than that I think it is difficult to construe the words of s 30(1)(c) to a provision which merely alters the scope or application of another provision.

29 I need also to deal with s 30(2), which relevantly provides:

> "Without limiting the effect of subsection (1), the amendment or repeal of an Act or statutory rule does not affect—
>
> ...
>
> (b) any right, privilege, obligation or liability saved by the operation of the Act or statutory rule, or
>
> ...
>
> (d) the operation of any savings or transitional provision contained in the Act or statutory rule."

30 For reasons broadly similar to those already given, I doubt that s 30(2)(b) applies. It is difficult to see how cl 34 "saved" a right or privilege. Rather, it confined the scope of a generally worded limitation period.

31 Paragraph (d) of s 30(2) is different. Clause 34 is expressed to be a savings or transitional provision, and to my mind would naturally fall within this paragraph. However, even so I do not think it continued to apply. That is because s 30, no different from any other provision in the *Interpretation Act*, applies "except in so far as the contrary intention appears in this Act or in the Act or instrument concerned": s 5(2). I think s 109ZK manifests a contrary intention. (For that reason, I have not found it necessary to express a concluded view as to the operation of the various paragraphs in s 30(1) and (2) in the preceding paragraphs.)

32 Section 109ZK provides, expressly, that it prevails "despite any Act or law to the contrary". I do accept that s 109ZK is to be read together with cl 34, which was a specific provision enacted at the same time as s 109ZK, and serves a sensible legislative purpose, *while both provisions remained in force*. However,

I do not accept that when the Legislature has taken a separate, further step to repeal cl 34, it should nonetheless remain effective, as if it had not been repealed, despite the language of the opening words of s 109ZK. It is one thing for cl 34 to limit s 109ZK while both are in force. It is another thing for s 109ZK to be circumscribed by reason of a repealed regulation and the effect of a general savings provision in the *Interpretation Act*. Test the matter this way. Section 109ZK provides that it prevails over any other statute (including statutes not yet enacted). Why would it not defeat s 30 of the *Interpretation Act 1987* (NSW), when s 30 is *explicitly* subject to a contrary intention, and s 109ZK is *explicitly* stated to override all other statutes?

33 That is to say, cl 34 could only continue to deny to s 109ZK its ordinary unqualified force if the default provision in s 30 of the *Interpretation Act* displacing the ordinary operation of the common law caused that result to occur. But that is subject to a contrary intention, and the language that s 109ZK applies "despite any Act or law to the contrary" displaces what might otherwise be the preserving effect of s 30.

34 I return to the considerations of hardship and injustice mentioned above concerning the retrospective operation of statutes of limitation. The legislative purpose underlying the repeal of cl 34 is unclear. But it is not inconsistent with achieving a sensible policy purpose.

35 By 2012, the long-stop 10 year limitation period had been in force for more than a decade. It is likely that any defective building work undertaken pursuant to a development consent granted before July 1998 had been done more than a decade earlier. True it is that there might be cases where there was an only recently accrued cause of action, in respect of which the widened scope of s 109ZK might be said to operate unjustly. However, I bear in mind that the policy purpose served by s 109ZK was not one of amending an existing limitation period. It was one of providing certainty by reason of a materially different regime. The new regime was cumulative to existing limitation periods applicable to those affected by defective building work. Under the new regime, claims against such persons would be barred not within six years from the accrual of a cause of action, but also by a "long-stop" provision, of 10 years

after the building work was done, *irrespective of the accrual of a cause of action.* The implementation of that policy would inevitably carry with it the possibility of an outcome which left plaintiffs and cross-claimants worse off compared with the situation they would have been in had s 109ZK remained confined to a prospective operation. (To make this clear, even if, say, cl 34 had been repealed in 2012 but only with effect from one or five or even ten years in the future, there would still remain the possibility of defective building work from say 1995 resulting in damage in 2030 which would be statute-barred.) But the nature of much legislative activity is that it produces winners and losers; that is not the sort of hardship or injustice to which Mellish LJ and Dixon CJ referred.

36 In other words, the expansion of the operation of s 109ZK in 2012, more than a decade after it had been enacted with prospective force to extend to earlier building work, may be seen to reflect a policy judgment that it would no longer be potentially harsh or unjust to render all persons potentially affected by defective building work to be subject to a long-stop limitation period. On one view, this is an extrapolation of the distinction drawn by Gibbs J in *Yrttiaho* to a case such as the present where a new and cumulative limitation provision is being introduced. Only after more than a decade has elapsed is the new long-stop limitation provision made applicable to building work done before its enactment.

37 I conclude that s 109ZK meant what it said after 6 January 2012. It applied to all defective building work, irrespective of when it had been undertaken.

Sections 109ZK and 6.20 extend to Capitol's claim

38 As both White JA and Emmett AJA explain, neither s 109ZK nor s 6.20 bears the narrow meaning for which Capitol contended. Those provisions do not distinguish between physical damage and pure economic loss, nor are they confined to claims for latent defects, nor are they confined to claims by owners as opposed to tenants. Capitol's claim is a claim for loss or damage arising out of or in connection with defective building work, to which either s 109ZK or s 6.20 would be a defence if that section were in force. That was the view which the primary judge in fact favoured. I agree with White JA and Emmett AJA, for the reasons they give, that his Honour was correct to hold that view, but erred

in accepting Capitol's submission that *Australian Rail Track Corporation Ltd v Leightons Contractors Pty Ltd* [2003] VSC 189 required him, as a matter of comity, to reach the contrary conclusion.

Section 6.20 replaced s 109ZK

39 I now turn to the byzantine way in which s 109ZK came to be replaced by s 6.20. On any view, it is difficult to avoid the conclusion that there were errors in the legislative process.

40 I agree with White JA and Emmett AJA, albeit with some hesitation, that the literal meaning of the legislation and transitional provisions should be departed from, in order to avoid the conclusion that no long-stop limitation provision *at all* applied for a period of some 21 months. Such a vacuum would have been antithetical to the purpose underlying the long-stop period, and is not lightly to be discerned in legislation whose principal purpose was essentially cosmetic – replacing section numbers with a "decimal" numbering, and simplifying the wording. I agree with what White JA and Emmett AJA have said on that issue.

41 It follows in my view that any cause of action which Capitol might have immediately following the fire in January 2017 was barred insofar as it arose out of defective building work which had been undertaken in around 1997. Section 6.20 was in force. It extended to claims for economic loss from allegedly defective building work such as that brought by Capitol. No differently from s 109ZK after 6 January 2012, s 6.20 was not confined to building work done pursuant to development consent granted after 1 July 1998. The work of which Capitol complained had been undertaken more than 10 years before litigation commenced on 23 August 2019, and was therefore barred by s 6.20. That resolves this appeal.

Conclusion and orders

42 All members of the Court are agreed that the drafting which has led to this issue is unfortunately complicated. But a limitation period "represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated": *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR

541 at 553; [1996] HCA 25. It is neither a technicality nor necessarily unmeritorious, as was observed in *Abdulla v Birmingham City Council* [2012] UKSC 47; [2013] 1 All ER 649 at [41], but "reflects a fundamental and all but universal legal policy that the litigation of stale claims is potentially a significant injustice". The same point was made in this Court in *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218; [2019] NSWCA 102 at [72]. A corollary is that the operation of limitation provisions should be as straightforward as is reasonably possible. It is therefore regrettable that the position is as complicated as the judgments in this Court reveal. I agree in particular with the sentiments in the last two paragraphs of White JA's reasons.

43 There is a certain "convenience", from the perspective of the Executive Government, in a regime which permits the primary operation of a statute to be altered by regulation, and which – as this litigation well illustrates – also permits the regulations to be repeatedly amended. That convenience comes at a price. Where the commencement of legislation is qualified or delayed by reason of delegated legislation, there is the need for drafters to take especial care. They are not drafting mere delegated legislation. They are drafting instruments which, as a matter of substance, have primary force, in the sense that although the text will not itself pass three times through the parliamentary chambers and go through the process of assent, the regulation will control the meaning, extent or application of a statute which has gone through that process. Where the regulations which have primary legislative effect are themselves amended (most commonly, by regulation), even more care is called for. Where as here such amendments are preceded with "For the avoidance of doubt" but yet give rise to further questions of construction, there may come a time when for the sake of all it will be appropriate to acknowledge that error has, or may have, intruded, and enact clarifying primary legislation.

44 In my view the Legislature should intervene to make plain whether the long-stop limitation defence applies to building work done pursuant to development consents granted before 1 July 1998. It should do so irrespective of whether the conclusion I have reached is regarded as correct or erroneous. Plaintiffs, cross-claimants and defendants in such cases, and their lawyers and insurers, should not have to read this Court's judgment, still less should they have to

traverse the legislative labyrinth by which the outcome of this appeal has been reached, in order to answer a simple and recurring issue, which is bound to present itself into the future.

45 It is possible that there may be a basis for a special order as to costs, either in this Court or at first instance; if so, application may be made within the period specified by UCPR r 36.16. The orders which should be made are as follows:

(1) Grant leave to appeal.

(2) Direct Bandelle to file a notice of appeal in accordance with the draft notice of appeal dated 19 March 2020, and otherwise dispense with the requirement of service.

(3) Appeal allowed.

(4) Set aside the orders made by the primary judge including the answer to the question, on 18 December 2019, and in lieu thereof, answer that question "Yes, s 6.20 afforded a defence to Capitol's claim", and dismiss the proceedings with costs.

(5) Capitol to pay Bandelle's costs of the appeal.

46 **WHITE JA:** The issues arising in this appeal are explained in the reasons of Emmett AJA which I have had the advantage of reading in draft. These reasons assume a familiarity with those of Emmett AJA.

47 As Emmett AJA explains, the former Pt 4C of the *Environmental Planning and Assessment Act* 1979 (NSW) was introduced by the *Environmental Planning and Assessment Amendment Act 1997* (NSW). That Act commenced on 1 July 1998. Clause 34 of the Environmental Planning and Assessment (Savings and Transitional) Regulation 1998 ("the 1998 Regulation"), also commenced on 1 July 1998. Clause 34 provided in substance that Pt 4C of the amended *Environmental Planning and Assessment Act 1979* did not apply to or in respect of any development carried out under the authority of a development consent granted under the unamended Act. Because its full terms are relevant to the construction of s 6.20 of the principal Act considered below, I set out cl 34 in full:

> "**34 Operation of Part 4C**
>
> Part 4C of the amended EP&A Act 1979 does not apply to or in respect of any development carried out under the authority of:

> (a) a development consent granted under the unamended EP&A Act 1979 (including a development consent arising under clause 20 or 45), or
>
> (b) an approval for a prescribed activity granted under the unamended LG Act 1993."

48 Although the 1998 Regulation was repealed by cl 1 of Sch 5 to the *Statute Law (Miscellaneous Provisions) Act (No 2) 2011*, the repeal did not revive the operation of the limitation period in s 109ZK in its application to developments carried out pursuant to development consents granted before 1 July 1998. I agree with Emmett AJA that this is the effect of s 30(1) of the *Interpretation Act 1987*, confirmed by the heading to Sch 5 of the *Statute Law (Miscellaneous Provisions) Act (No 2)*, "Repeal of redundant acts, instruments and provisions".

49 The next question is when was s 109ZK repealed and when did s 6.20 commence?

50 The *Environmental Planning and Assessment Amendment Act 2017* (the "2017 amending Act") commenced on 1 March 2018.

51 Part 6.1 of Sch 6 to the 2017 amending Act, headed "Amendment of Environmental Planning and Assessment Act 1979 No. 203 – Building and Subdivision Certification", enacted new or re-enacted existing provisions by introducing a new Pt 6 to the principal Act.

52 Clause 10 of Pt 6.2 of Sch 6 to the 2017 amending Act provided:

> "**[10] Part 4C Liability and insurance**
>
> Omit the Part."

53 Schedule 10 provided for the making of regulations of a savings or transitional nature.

54 Section 109ZK was repealed when cl [10] in Pt 6.2 of the 2017 amending Act came into force. Part 6.2 was headed "Consequential and statutory revision amendments".

55 The Environmental Planning and Assessment Amendment Regulation 2018 ("the 2018 Amendment Regulation") also commenced on 1 March 2018. It amended the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017.

56 It is convenient to set out cl 18 of the 2018 Amendment Regulation. As originally made, it provided:

> "**18 Postponement of revised building and subdivision certification provisions**
>
> (1) In this clause, the **former building and subdivision provisions** means:
>
> (a) sections 81A (2)-(6) and 86 of the Act, as in force immediately before the substitution of those provisions by the amending Act, and
>
> (b) Part 4A of the Act, as in force immediately before the repeal of that Part by the amending Act, and the regulations made under that Part as so in force.
>
> (2) Until 1 September 2018, Part 6 of the Act (as inserted by the amending Act) does not apply and the former building and subdivision provisions continue to apply in respect of a matter (whether or not the matter was pending on the repeal of those provisions)."

57 Part 4C of the Act, as in force before its repeal, is not included in the definition of "former building and subdivision provisions". Section 6.20 is included in Div 6.6 of Part 6 of the Act as inserted by the 2017 amending Act.

58 On 16 March 2018 cl 18 was amended by including a new section (former s 121ZP) in the definition of "former building and subdivision provisions" in sub-cl (1) and by excluding Div 6.7 from the operation of sub-cl (2). That exclusion must have reflected an assumption by the draftsperson that sub-cl (2) otherwise applied to the whole of Pt 6. Division 6.7 deals with building information certificates.

59 Clause 18 was amended on 1 September 2018 by removing s 121ZP from the list of "former building and subdivision provisions" and amending the date in cl 18(2) to 1 September 2019.[1]

60 On 21 December 2018 a new sub-cl 18(3) was added as follows:

> "**18 Postponement of revised building and subdivision certificate provisions**
>
> ...
>
> (3) For the avoidance of doubt, the following provisions as in force immediately before 1 March 2018 continue to apply to and in respect of

[1] Section 121ZP had provided that a person could apply to a council for a certificate as to whether there were outstanding notices or orders in respect of land in a council area. Its inclusion for a time in the list of "former building and subdivision provisions" and subsequent omission does not seem to be significant.

a breach, occurring on or after that day, of a former building and subdivision provision:

(a) Division 4 of Part 6 of the Act,

(b) any other provision of the Act, or a regulation made under the Act, that provides for the prosecution of an offence in relation to the breach, including by way of issuing a penalty notice."

61 Division 4 of Part 6 of the Act as in force before 1 March 2018 related to prosecutions for offences. The amendment confirms that the focus of the regulation was on the continued operation of the defined "former building and subdivision provisions".

62 These proceedings were commenced on 23 August 2019. Clause 18 as then in force provided:

"**18 Postponement of revised building and subdivision certificate provisions**

(1) In this clause, the ***former building and subdivision provisions*** means:

(a) sections 81A (2)-(6) and 86 of the Act, as in force immediately before the substitution of those provisions by the amending Act, and

(b) Part 4A of the Act, as in force immediately before the repeal of that Part by the amending Act, and the regulations made under that Part as so in force.

(2) Until 1 September 2019, Part 6 of the Act (as inserted by the amending Act), other than Division 6.7, does not apply and the former building and subdivision provisions continue to apply in respect of a matter (whether or not the matter was pending on the repeal of those provisions).

(3) For the avoidance of doubt, the following provisions as in force immediately before 1 March 2018 continue to apply to and in respect of a breach, occurring on or after that day, of a former building and subdivision provision:

(a) Division 4 of Part 6 of the Act,

(b) any other provision of the Act, or a regulation made under the Act, that provides for the prosecution of an offence in relation to the breach, including by way of issuing a penalty notice."

63 On a literal construction of cl 18 no limitation provision under the Act was in force when proceedings were commenced. Section 109ZK was repealed on 1 March 2018 by cl [10] of Pt 6.2 of Sch 6 to the 2017 amending Act. Section 6.20 was part of the new Pt 6 introduced by Sch 6 to the 2017 amending Act,

but the commencement of that Part (except Division 6.7) had been deferred. (On 1 September 2019 it was further deferred to 1 December 2019).

64 Bandelle argued for a construction of cl 18(2) that would involve no deferral of the commencement of s 6.20. It submitted that cl 18(2) should be construed as if it read:

> "until 1 December 2019 Pt 6 of the Act does not apply to omit or amend the former building and subdivision provisions and the former building and subdivision provisions continue to apply ..."

65 I accept that the focus of cl 18 was on the deferment of the commencement of the "former building and subdivision provisions" (as defined) and that the qualifying words that Bandelle proposes be read into cl 18(2) do not amount to an excessive re-writing of the provision. They would be appropriate to give effect to the apparent purpose of the regulation as deferring only the operation of those defined provisions and would avoid an apparent unintended consequence that a limitation provision that had been included in the Act since 1998 would be removed for 21 months.

66 Although no submissions were made on this issue, it would seem that if a literal construction were applied it would not only be s 6.20 which would be postponed after the repeal of its antecedent provision leaving an hiatus. Like s 109ZK, s 146A, which provides for the making of regulations regarding "Smoke alarms in buildings providing sleeping accommodation", was repealed by the 2017 amending Act (Sch 6, Pt 6.2, cl [14]). Section 6.34, which is the successor to s 146A, appears in Pt 6. A literal construction of cl 18 of the 2018 Amendment Regulation would result in an absence of regulation making power for 21 months. In light of the importance to public safety that such regulations provide (see Div 7A of Pt 9 of the Environmental Planning and Assessment Regulation 2000) it seems inconceivable that such a consequence would be intended.

67 It might be said against that construction that the express exception of Div 6.7 from the operation of cl 18(2) shows that the draftsperson realised that the effect of cl 18(2) before its amendment was to defer the commencement of the whole of Pt 6. But on Bandelle's proposed construction the exception of Div 6.7 from the deferral of the commencement of Pt 6 can be seen as consistent with

and cognate to the continued temporary operation of the defined former building and subdivision provisions.

68 Therefore I accept that s 6.20 was the applicable limitation provision when the proceedings were commenced.

69 Sections 6.19 and 6.20 relevantly provide:

> "**6.19 Definitions** (cf previous s 109ZI)
>
> In this Division:
>
> ***building work*** includes the design or inspection of building work and the issue of a complying development certificate or a certificate under this Part in respect of building work.
>
> ***civil action*** includes a counter-claim.
>
> ...
>
> **6.20 Limitation on time when action for defective building or subdivision work may be brought** (cf previous 109ZK)
>
> (1) A civil action for loss or damage arising out of or in connection with defective building work or defective subdivision work cannot be brought more than 10 years after the date of completion of the work.
>
> (2) Building work is taken to be completed on:
>
> (a) the date on which an occupation certificate is issued that authorises the occupation of the building or part of the building for which the work was carried out (or if an occupation certificate is not required, the date on which a compliance certificate is issued for the completed building work), or
>
> (b) if no such certificate has been issued – the date on which a required inspection of the completed building work was carried out by a certifier, or
>
> (c) if no such certificate has been issued and no such inspection carried out – the date on which the building or part of the building for which the work was carried out is first occupied or used.
>
> ...
>
> (4) This section has effect despite any other Act or law, but does not operate to extend any period of limitation under the *Limitation Act 1969* or the *Home Building Act 1989*."

70 Unless s 6.20 did not apply to building work done pursuant to pre-1 July 1998 development consents then it applied to the building work the subject of Capitol's claim. I gratefully adopt Emmett AJA's reasons for this conclusion.

71 The primary judge considered that on the plain and grammatical meaning of s 6.20 the section applied to Capitol's claim because the damage suffered by it

arose out of or was in connection with the defective building work, that work was done pursuant to a contract, and that work caused the fire which caused the damage suffered by Capitol (J [21]). I agree that on the plain and grammatical meaning of s 6.20 the damage Capitol has claimed that it suffered was suffered "in connection with" the allegedly defective building work and that the allegedly defective building work caused the damage claimed in that it failed to prevent smoke damage from the fire.

72 However, the primary judge thought that the decision of this court in *Dinov v Allianz Australia Insurance Limited* (2017) 96 NSWLR 98; [2017] NSWCA 270 at [92]-[93] and the approval given by McDougall J (with whom Beazley P and Meagher JA agreed) in that case to the approach taken by Bongiorno J in *Australian Rail Track Corporation Ltd v Leightons Contractors Pty Ltd* [2003] VSC 189 required his Honour to adopt a construction of s 6.20 which he would not otherwise have adopted.

73 I do not consider that this Court's decision in *Dinov v Allianz Australia Insurance Limited* required the primary judge to take a different view from what he considered to be the plain and grammatical meaning of the words in s 6.20. The language of all judgments has to be read in the light of the issues addressed. The reasoning of Bongiorno J in *Australian Rail Track Corporation Ltd v Leighton Contractors Pty Ltd* addressed a completely different situation where the plaintiff sued for damages for economic loss as the result of the collapse of an overpass that blocked railway tracks beneath the overpass. *Dinov v Allianz Australia Insurance Limited* concerned a claim by an insurer to enforce an indemnity under a policy of home building insurance against directors of the builder where the builder was found liable for damages for defective building work which the insurer was required to pay. The insurer's claim was on the indemnity.

74 Neither case addressed the issues arising in the present case. I agree with Emmett AJA for the reasons his Honour gives that the limitation period in s 6.20 applies to Capitol's claim on the assumption that s 6.20 applies to allegedly defective building work carried out pursuant to pre-1998 development consents.

75 The question then is whether the scope of s 6.20 is confined in the same way as the scope of s 109ZK was confined before its repeal.

76 The Explanatory Note to the Bill for the 2017 amending Act stated that Pt 6 was a "continuation" of the previous provisions. I agree with Emmett AJA that having regard to the Explanatory Note, it can be inferred that it was intended that s 6.20 would have the same operation and effect as had s 109ZK.

77 Nonetheless, I do not consider that the Explanatory Note justifies a construction of s 6.20 as not applying to a civil action for loss or damage arising out of or in connection with defective building work carried out pursuant to development consents granted before 1 July 1998. Those words are simply not contained in s 6.20.

78 The reason the repeal of cl 34 of the 1998 Regulation in 2011 did not revive a limitation period in respect of buildings constructed pursuant to pre-1998 development consents was by the operation of s 30(1) of the *Interpretation Act*. But that section does not apply to the construction of s 6.20. The only basis for saying that s 6.20 is limited in its scope in the same way as s 109ZK was limited is by the similarity of the provisions and the Explanatory Note. To give effect to that intention requires reading the terms of the repealed cl 34 of the 1998 Regulation into s 6.20 and construing the reference to Pt 4C as a reference to Div 6.6. That goes well beyond the permitted extent to which a purposive construction can justify the addition of words to the text of the provision. It would be to reconstruct the text of the Act (*Taylor v The Owners – Strata Plan No. 11564* (2014) 253 CLR 531; [2014] HCA 9 at [37]-[39]).

79 No-one reading s 6.20 should be expected to read the Explanatory Note unless ambiguity in s 6.20 is discerned. Even if on reading the Explanatory Note the reader were to refer to the now repealed s 109ZK, he or she would only see a similarity of language that would confirm, or appear to confirm, the Explanatory Note. It is asking too much of the reader then to carry out the labyrinthine detective work required of this court to discern that the scope of s 6.20 was confined by a regulation made in 1998, that was itself repealed in 2011, in relation to a now repealed provision.

80 In light of this, should my earlier conclusion as to the purposive construction of cl 18(2) of the 1998 Regulation be revisited? Clause 18 did not defer the commencement of Pt 6.2 of Sch 6 to the 2017 amending Act so as to defer until 1 December 2019 the repeal of Pt 4C. This is because Pt 6.2 of the 2017 amending Act was not Pt 6 of the Act as inserted by the amending Act. Nor was the former Pt 4C part of the "former building and subdivision provisions" as defined in cl 18(1).

81 The construction of cl 18(2) that involves the addition of the words "to omit or amend the former building and subdivision provisions" has the consequence that the limitation period in s 6.20 would apply to the present case even though the limitation period would not have applied if s 109ZK applied, and the apparent intention of Parliament was that s 6.20 would have only the same scope of operation as s 109ZK. However, the unintended consequence here is in the scope of s 6.20, not in the application of the regulation.

82 For these reasons I accept Bandelle's submission that the applicable limitation provision was s 6.20 and the scope of that provision is not limited in the same way as the former s 109ZK.

83 I would therefore grant leave to appeal and allow the appeal. Treating the preliminary question as being whether s 109ZK or s 6.20 afforded a defence to the claim made by Capitol in the List Proceedings, I would answer that question "Yes; s 6.20 afforded a defence to Capitol's claim". It was agreed before the primary judge that the consequence of this answer would be that Capitol's proceedings should be dismissed.

84 The difficulties in this appeal arise from the legislative technique applied in 1998 of effecting a substantial qualification to the operation of s 109ZK by regulation. If cl 34 of the 1998 Regulation had been incorporated in the Act, there would have been no risk of its being inadvertently repealed in 2011 on the erroneous assumption that the 1998 Regulation had become redundant. If the provision had been contained within the principal Act, then, consistently with the intention expressed in the Explanatory Note to the 2017 amending Act, it would have been incorporated in the amending Act. Tracing through the relevant provisions in this appeal has been a labyrinthine process. Even the

experienced lawyers engaged in the litigation did not come to grips with the intricacies of the legislation and regulations at the hearing before the primary judge, and in some respects, not even on appeal.

85 Leeming JA, Emmett AJA and I agree that the apparent intention of Parliament as reflected in the Explanatory Note to the 2017 amending Act was to re-enact s 109ZK. If this is correct, s 6.20 should be amended to make that intention clear, lest future litigants (unaware of this court's judgment) be misled by the terms of s 6.20. On the other hand, if the original intention as to the scope of s 109ZK reflected in cl 34 of the 1998 Regulation was at some point abandoned, then that should be made plain by legislative amendment. If the original intent were simply forgotten then the issue should be addressed and made clear.

86 **EMMETT AJA:**

Introduction

These proceedings are concerned with limitation of action provisions contained in the *Environmental Planning and Assessment Act 1979* (NSW) (**the Planning Act**). The question arises in the context of proceedings brought by Sydney Capitol Hotels Pty Ltd (**Capitol**) against Bandelle Pty Ltd (**Bandelle**) in the Technology and Construction List of the Equity Division (**the List Proceedings**). Bandelle contends that Capitol's claim for damages in the List Proceedings is barred by the operation of s 6.20 of the Planning Act. Alternatively, it contends that the List Proceedings are barred by the operation of the former s 109ZK of the Planning Act.

87 In its Technology and Construction List statement of 23 August 2019 (**the List Statement**), Capitol made, relevantly, the following allegations:

- in around 1995, Fletcher Construction Australia Pty Ltd (**Fletcher**) was engaged by First Scope Development Pty Ltd (**First Scope**) as the project manager and builder of a refurbishment of the Capitol Square Building situated in George Street, Sydney;
- the refurbishment involved the carrying out by Fletcher of building works to construct three separate lots in the Capitol Square Building, being the Capitol Square Hotel, the Capitol Square Shopping Centre and the Capitol Square Carpark (**the Works**);
- the Works included the construction of a shaft (**the Shaft**) that housed the exhaust duct system that serviced the shops and restaurants of the Capitol

Square Shopping Centre on the ground floor of the Capitol Square Building and passed through the Capitol Square Hotel;

- Fletcher completed the Works in around 1997;
- Capitol has occupied the Capitol Square Hotel since around 1997;
- at the time when Fletcher carried out the Works, it was reasonably foreseeable to Fletcher that occupants of the Capitol Square Building would rely upon Fletcher having carried out the Works with reasonable care and skill, in accordance with the certified building plans and drawings and in accordance with the Building Code of Australia and that, were Fletcher to fail to do so, occupants of the Capitol Square Building would suffer harm in the form of property damage and economic loss;
- accordingly, in carrying out the Works, Fletcher owed a duty to Capitol to take reasonable care in carrying out the Works to avoid the risk of harm in the form of property damage and economic loss;
- in breach of that duty, Fletcher failed to exercise reasonable care and skill in carrying out the Works, in that Fletcher failed to construct the Shaft in accordance with the certified building plans and drawings and in accordance with the relevant specification of the Building Code of Australia, in that the Shaft was not constructed so as to extend beyond the roof sheeting of the Capitol Square Building and thereby failed to ensure that the Shaft was properly fire rated in accordance with the Building Code of Australia;
- as a result of Fletcher's breach of duty, Capitol suffered loss and damage, in that, on 2 January 2017, fire and smoke from the kitchen exhaust on the ground floor of the Capitol Square Building spread to the Capitol Square Hotel through a pathway caused by a space between the Shaft and the roof sheeting and caused the activation of the sprinkler system in the Capitol Square Hotel; and
- in about 2014, Bandelle assumed all liabilities of Fletcher, including those the subject of Capitol's claim, pursuant to a scheme of arrangement sanctioned by the Federal Court of Australia.

88 In its Technology and Construction List response (**the List Response**), Bandelle denied most of the allegations made in the List Statement. However, in paragraph 16 of the List Response, in further answer to the whole of Capitol's claim, Bandelle asserted that Capitol's claim against Fletcher was a civil action for loss and damage arising out of or in connection with defective building work within the meaning of s 6.20 of the Planning Act and that, under s 6.20, such an action must be brought within 10 years after completion of the building works. Bandelle asserted that, therefore, any civil action for loss or damage by Capitol against Fletcher for the Works became statute barred in or about 2007, being 10 years after completion of the Works.

89 By notice of motion filed on 7 November 2019, Capitol sought an order under r 28.2 of the Uniform Civil Procedure Rules 2005 (NSW) that the question of whether Capitol's claim is statute barred by the operation of s 6.20 be heard and determined in advance of all other questions in the proceedings. For reasons published on 18 December 2019, the following order was entered into the Court's electronic system:

> "Is the plaintiff's claim statute barred by the operation of 6.20 of the Environmental Assessment Act is "No". It follows that para 16 of the defendant's Technology and Construction List Response which pleads the operation of the section discloses no reasonable defence and must be struck out [sic]."

The order is not expressed felicitously. By reference to the published reasons, its intended effect appears to be that his Honour answered "no" to the question:

> "Is the plaintiff's claim statute barred by the operation of s 6.20 of the [Planning Act]?"[2]

and then ordered that, as a consequence, paragraph 16 of the List Response be struck out as disclosing no reasonable defence.

90 It is tolerably clear that the motion was, in effect, treated as a demurrer. Thus, the argument before the primary judge appears to have proceeded on the basis that all of the allegations made in the List Statement were admitted. In addition, for the purposes of the motion, the parties agreed on the following facts:

(1) in around 1997, the Works, being building works within the meaning of s 6.20 of the Planning Act, were performed at the Capitol Square Building;

(2) the Works were completed, within the meaning of s 6.20 of the Planning Act, in 1997;

(3) in about 2014, Bandelle assumed all liabilities of Fletcher pursuant to a court-sanctioned scheme of arrangement;

(4) on 2 January 2017, a fire occurred on the ground floor of the Capitol Square Building;

(5) Capitol did not contract with anyone to carry out the Works.

Those facts were agreed to for the purposes of the motion, notwithstanding that most of the allegations were denied.

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[2] See Sydney Capitol Hotels Pty Ltd v Bandelle Pty Ltd [2019] NSWSC 1825 at [25]–[26].

91 By summons seeking leave to appeal filed on 19 March 2020, Bandelle seeks leave to appeal from the orders made by the primary judge. A direction has been given that the appeal be heard concurrently with the application for leave to appeal, on the assumption that leave is granted. The questions that have been raised by the appeal are of considerable significance to the building industry generally and the grant of leave to appeal is not opposed by Capitol. In the circumstances, leave to appeal should be granted.

92 Capitol now contends that neither s 6.20 nor s 109ZK applies to the List Proceedings. However, Bandelle complains that, on the hearing of the motion, Capitol adopted the position that, if because of the transitional provisions to which reference is made below, s 6.20 did not apply to the List Proceedings, s 109ZK would apply and that his Honour proceeded accordingly. Accordingly, his Honour did not address the possibility that neither provision might apply to the List Proceedings. Bandelle contends that, because of the position adopted by Capitol in the hearing of the motion, Capitol should not now be permitted to advance the argument that neither of the provisions applies to the List Proceedings.

93 Counsel for Bandelle frankly acknowledged that the stance adopted by Capitol before the primary judge would have no effect on the facts and that the question as to the effect of the provisions, including the transitional provisions, is one of pure law. Nevertheless, Bandelle contends that, because of the significance of the contention now advanced by Capitol, it is possible that the Parliament may have intervened had that position been taken below and accepted by the primary judge. Of course, if that were a possibility, there is no reason why Parliament would not still intervene if this Court were to uphold Capitol's present contention.

94 Those issues highlight the difficulties of deciding questions such as these on a hypothetical basis without findings as to the relevant facts. However, in the circumstances, it is desirable, now that the question has been raised, for this Court to express an opinion as to whether or not either s 6.20 or s 109ZK applies to the Works so as to afford a defence in the List Proceedings.

The Sections in Question

95 Prior to its repeal, s 109ZK, which appeared under Pt 4C of the Planning Act, provided that a **building action** may not be brought in relation to any **building work** more than 10 years after the date on which the relevant final **occupation certificate** is issued. In Pt 4C, the term "building action" was defined by s 109ZI as an action (including a counter-claim) **for loss or damage arising out of or concerning defective building work**. Also for the purposes of Pt 4C, the term "building work" was defined as including the design, inspection and issuing of a **Part 4A certificate** or complying development certificate in respect of building work. The term "building work" was otherwise defined by s 4 of the Planning Act as "any physical activity involved in the erection of a building". The term "occupation certificate" was defined under Pt 4A, s 109C(1)(c) as a certificate that authorises the occupation and use of a **new building** or a change of building use for an existing building. Section 109C indicated that such a certificate was a "Part 4A certificate". The term "new building" included an altered portion of, or an extension to, an existing building.

96 Section 6.20, which appears in Pt 6 of the Planning Act, relevantly provides that a civil action **for loss or damage arising out of or in connection with defective building work** cannot be brought more than 10 years after the date of completion of the work. The term “building work” is defined in s 6.1 as meaning “any physical building activity involved in the erection of a building” and, under s 6.19 includes for the purpose of Div 6.6 “the design or inspection of building work and the issue of a complying development certificate or a certificate under [Pt 6 of the Planning Act] in respect of building work”.

97 If either s 6.20 or s 109ZK is applicable to the List Proceedings, the difference in language between the two provisions appears to be immaterial in the present circumstances. That is to say, if either of the provisions is applicable, the same question as to their effect in the context of the List Proceedings arises. However, before considering the effect of s 6.20 or s 109ZK on the List Proceedings, assuming one or other of the provisions applies, it is necessary to determine whether either of s 6.20 or s 109ZK is applicable. That requires consideration of the legislative history of the provisions and the transitional provisions applicable to the replacement of s 109ZK by s 6.20.

The Legislative History of the Sections

98 Section 109ZK was contained in Pt 4C of the Planning Act. Part 4C was inserted in the Planning Act by the *Environmental Planning and Assessment Amendment Act 1997* (**the 1997 Amendment Act**), which commenced on 1 July 1998 (**the appointed day**). The new rule was intended to be prospective and not retroactive. Thus, cl 34 of the Environmental Planning and Assessment (Savings and Transitional) Regulation 1998 (NSW) (**the 1998 Regulation**) relevantly provided that Pt 4C of the Planning Act, and thus s 109ZK, did not apply to or in respect of any development carried out under the authority of, relevantly, a development consent granted under the Planning Act as in force prior to the appointed day (**the unamended Planning Act**).

99 The effect of cl 34 of the 1998 Regulation was to exclude, from the operation of Pt 4C of the Planning Act, and thus s 109ZK, building work done under a development consent granted prior to the appointed day. Accordingly, in the absence of any other provision, the limitation period in s 109ZK did not apply to work carried out pursuant to a development consent granted under the unamended Planning Act. It seems to have been accepted that development consent for the Works was granted under the unamended Planning Act before the Works were carried out. Therefore, s 109ZK did not provide a limitation in respect of claims arising out of the Works, including the Shaft.

100 However, Bandelle relies on the provisions of cl 1 of Sch 5 to the *Statute Law (Miscellaneous Provisions) Act (No 2) 2011* (NSW) (**the 2011 Act**) as having the effect of applying the limitation to claims in respect of the Works. Clause 1 of Sch 5 to the 2011 Act, which was headed "Repeal of redundant acts, instruments and provisions", repealed the whole of the 1998 Regulation with effect from 6 January 2012.

Effect of the 2011 Act

101 The question is whether the effect of the repeal of cl 34 of the 1998 Regulation, by the 2011 Act, was that building work carried out under a development consent granted prior to the appointed day ceased to be excepted from the operation of Pt 4C of the Planning Act, and thus from the operation of s 109ZK. The savings and transitional scheme for the repeal of cl 34 of the 1998

Regulation, with effect from 6 January 2012, preserved the effect of anything done "under" cl 34.[3] Section 30(1) of the *Interpretation Act 1987* (NSW) (**the Interpretation Act**) relevantly provides that the amendment or repeal of an Act or statutory rule does not revive anything not in force or existing at the time at which the amendment or repeal takes effect, or affect the previous operation of the Act or statutory rule or anything duly suffered, done or commenced under the Act or statutory rule, or affect any right, privilege, obligation or liability acquired, accrued or incurred under the Act or statutory rule.

102 Under s 34(2)(a) and s 35(5) of the Interpretation Act, a heading can be considered:

- to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision, or
- to determine the meaning if the provision is ambiguous or obscure, or if the ordinary meaning would lead to a result that is manifestly absurd or unreasonable.

Schedule 5 of the 2011 Act shows no intention to enliven a wider operation of s 109ZK. Rather, the 1998 Regulation was simply considered redundant.

103 Clause 34 of the 1998 Regulation did not create any right. Rather, it excluded certain building work from the operation of the limitation created by s 109ZK. The repeal of cl 34 had no effect on claims arising out of building work carried out prior to the appointed day. The repeal of the 1998 Regulation did not *revive* the operation of the limitation period in s 109ZK to building work carried out prior to the appointed day. It follows that s 109ZK never applied to the building work consisting of the Works and the design and construction of the Shaft, as part of the Works.

Effect of the 2017 Regulation

104 The Planning Act was amended again by the *Environmental Planning and Assessment Amendment Act 2017* (NSW) (**the 2017 Amending Act**). Aside from renumbering the Planning Act, relevantly, the 2017 Amending Act:

- repealed Pt 4A of the Planning Act, dealing with "certification of development";

[3] 2011 Act, Sch 6, cl 2.

- repealed Pt 4C of the Planning Act, dealing with "liability and insurance", in which s 109ZK was contained;
- introduced a new Pt 6, dealing with "building and subdivision certification"; and
- authorised the making of regulations dealing with savings, transitional and other provisions.

The new Pt 6 contained Div 6.6 dealing with "liability for defective building … work", which included s 6.20.

105 Clause 18(2) of the *Environmental, Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* (NSW) (**the 2017 Regulation**), which was made under the Planning Act, relevantly provided that, until 1 September 2018, the new Pt 6 did not apply and **the former building and subdivision provisions** continued to apply in respect of a matter (whether or not the matter was pending on the repeal of those provisions). Under cl 18(1), the phrase "former building and subdivision provisions" was defined to mean:

> (a) sections 81A (2)–(6) and 86 of the [Planning Act], as in force immediately before the substitution of those provisions by the [2017 Amending Act], and
>
> (b) Part 4A of the [Planning Act], as in force immediately before the repeal of that Part by the [2017 Amending Act], and the regulations made under that Part as so in force.

Clause 18 of the 2017 Regulation was subsequently amended, on several occasions, to specify 1 December 2019 as the relevant date in cl 18(2). The effect of the 2017 Regulation will be addressed below.

106 The second question is whether, even if s 109ZK originally applied to the building work consisting of the Works and the design and construction of the Shaft, cl 18 of the 2017 Regulation had the effect that s 6.20 of the Planning Act does not apply to the List Proceedings. The 2017 Amending Act commenced on 1 March 2018. Capitol contends that, therefore, the List Proceedings, which were commenced in August 2019, were commenced at a time when neither s 109ZK nor s 6.20 was in effect.

107 Capitol contends that cl 18(2) of the 2017 Regulation had the effect, but only for the period from 1 March 2018 to 30 November 2019, of not "applying" any part of Pt 6 of the Planning Act, including s 6.20 and continuing the "application" of Pt 4A, and certain related provisions, other than Pt 4C,

including s 109ZK. The result would be a significant, but interim, amendment of the substantive law "for no apparent purpose". Further, it is unlikely that such a substantive change would be effected by means of a regulation having a savings and transitional nature consequent upon the enactment of Pt 6, as authorised by the Planning Act.

108 The explanatory note published in connection with the 2017 Amending Act indicates an intention, and an assumption, that, upon the repeal of Pt 4C, the 10 year limitation period prescribed in it would nevertheless immediately continue in force by the operation of the new s 6.20.[4] The construction of cl 18 of the 2017 Regulation contended for by Capitol would not effect a mere savings or transitional scheme. Rather, it would produce a hiatus of what was intended to be continuity in the transition from s 109ZK to s 6.20.

109 It would certainly be a curious and perverse result for the Parliament to have created a hiatus in relation to the operation of the limitation provision consisting of s 109ZK such that there was a hiatus between the repeal of s 109ZK and the commencement of its intended replacement, s 6.20, such that the proceedings commenced during that hiatus were not subject to any limitation provision.

110 Thus, s 6.20 is a successor provision to s 109ZK and there is no reason to think that the rewriting of the Planning Act by the 2017 Amending Act achieved a substantively different outcome. That is to say, s 109ZK was repealed on 1 March 2018 and building work to which s 109ZK formerly applied should, generally speaking, be building work to which s 6.20 was to apply and cl 18(2) should be understood as meaning that, until 1 December 2019, Pt 6 did not apply to omit or amend the former building and subdivision provisions and the former building and subdivision provisions continued to apply. Accordingly, if s 109ZK had applied to the Works, it would have continued to apply up to the point when s 6.20 replaced it and s 6.20 would have applied from that point.

Construction of the Limitation Provision

111 The third question is whether, assuming either s 109ZK or s 6.20 applies to the List Proceedings, the statutory bar applies to the claims made by Capitol in the List Proceedings. Capitol contends that, as a question of construction, neither

[4] See Explanatory Note, Environmental Planning and Assessment Amendment Bill 2017 (NSW) at 6.

s 109ZK nor s 6.20 was intended to cover claims of the type made in the List Proceedings.

112 In construing each of s 6.20 and s 109ZK, the starting point is the text of the section, having regard to its context. That context includes its legislative history and purpose and relevant extrinsic materials. More specifically, it includes such things as the state of the law existing when the provision was enacted and the mischief that one may discern, by legitimate means, was intended to be remedied by the provision. Legitimate means includes any explanatory note or memorandum in relation to the legislation in question and the speech on the second reading of the Bill for the Act that enacted the provision. Where statutory text is capable of a range of potential meanings, none of which is wholly ungrammatical or unnatural, the choice between alternative meanings may turn less on linguistic fit than on an evaluation of the relative coherence of the alternatives with identified statutory objects or policies.[5]

113 The explanatory memorandum published in connection with the 1997 Amendment Act stated that one of its objects was to provide for a maximum limitation period of 10 years for actions relating to building work.[6] The explanatory memorandum said that the imposition of a limitation period of 10 years for any person's liability for "damage arising from defective building work" was designed to address the law concerning "latent defects", for which the limitation period begins to run only when the defect becomes apparent.[7] The explanatory memorandum stated that the approach taken in the proposed s 109ZK was to limit the period within which proceedings could be commenced to the period of 10 years running from the date on which the relevant occupation certificate was issued. However, it also stated that the new rule would not extend any period of limitation under the *Limitation Act 1969* (NSW) (**the Limitation Act**), so that the limitation period applicable to relevant proceedings, pursuant to the Limitation Act, might be shorter than the 10 years proposed.

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[5] See Taylor v The Owners – Strata Plan No 11564 (2014) 253 CLR 531; [2014] HCA 9 at [66] (Gageler and Keane JJ).

[6] See Explanatory Note, Environmental Planning and Assessment Amendment Bill 1997 (NSW) at 2.

[7] Ibid at 11.

114 The explanatory memorandum for the Bill for the 2017 Amendment Act stated that its object was to amend the Planning Act to implement a range of reforms to improve the environmental planning and assessment system in New South Wales and to re-organise, revise and simplify the provisions of the Planning Act. It stated that the Amendment Act would revise and consolidate provisions relating to building and subdivision certification and would reorganise, revise and simplify the provisions of the Planning Act, including by rewriting in plainer and less complex terms provisions relating to planning, administration, building and subdivision certificates and criminal and civil enforcement. The explanatory memorandum stated that Sch 6.1 revised and consolidated, in a new Pt 6, provisions dealing with building and subdivision certification, including provisions relating to a continuation of the 10-year time limit on bringing legal proceedings in relation to defective building work or subdivision and that Sch 6.2 contained consequential and statutory revision amendments. Further, it indicated that the new Pt 6 would consolidate the existing Pt 4A and Pt 4C. Thus, it is clear enough that s 6.20 falls to be construed in its context as a re-enactment of s 109ZK and must be construed in the light of the purpose and object of the enactment of s 109ZK. The amendment of the Planning Act to substitute s 6.20 for s 109ZK was not intended to change the purpose and effect of s 109ZK.

115 There is no reason to differentiate, in terms of their meaning, between the phrases "arising out of or in connection with" and "arising out of or concerning" when used in the respective sections.[8] The issue that arises is whether a limitation should be read into the natural and ordinary meaning of those phrases. Each of the phrases deals with a connection between two separate matters. The degree of connection, and the nature and breadth of the relationship, between the matters intended to be connected, will depend upon the statutory context and purpose.[9]

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[8] See pars [95]–[96] above.

[9] See The Queen v Khazaal (2012) 246 CLR 601; [2012] HCA 26 at [31] (French CJ), citing Workers' Compensation Board (Qld) v Technical Products Pty Ltd (1988) 165 CLR 642 at 653–654 (Deane, Dawson and Toohey JJ); [1988] HCA 49; O'Grady v Northern Queensland Co Ltd (1990) 169 CLR 356 at 376 (McHugh J); [1990] HCA 16; Burswood Management Ltd v Attorney-General (Cth) (1990) 23 FCR 144 at 146; [1990] FCA 203; Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280 at 288-289; [1993] FCA 456;

116 The obvious intention of any time bar is to protect those who would otherwise have some legal liability to a claimant. Clearly, the intention of s 109ZK was to impose an absolute time bar for the protection of those who otherwise would have some legal liability in damages for defective building work. That is to say, the mischief to which s 109ZK was directed was the open-ended possibility arising from the application of existing limitation periods with respect to claims for latent defects, which only give rise to actionable damage upon first becoming manifest.[10]

117 It is clear enough that the mischief to which s 109ZK was directed was the spectre, for an indeterminate period, of a potential liability to successors in title for builders and building professionals. That spectre was perceived to have arisen from observations made by the High Court of Australia in 1995.[11] The possibility of liability for an indeterminate period for such claims for latent defects had been the subject of much criticism. The public interest requires that there must be a clear time period beyond which a claim for damages cannot be made and a clear time from which the period of limitation begins to run.[12]

118 Capitol asserts, however, that s 109ZK, and therefore s 6.20, was not intended to cover claims of the type made in the List Proceedings. It asserts that the mischief would not be addressed and the objects of the sections would not be achieved if either of the sections in question were to apply to the List Proceedings. Rather, Capitol asserts, the mischief that the sections were designed to overcome was no more than the possibility that a subsequent purchaser of a house could sue the builder of the house in negligence when the defects in the house appeared many years after the house had been built. The loss arising from such latent defects is pure economic loss, consisting of the diminution in value of the house that arose when the previously latent defects became manifest,[13] and is distinct from, and not consequent upon,

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Australian Competition and Consumer Commission v Maritime Union of Australia (2001) 114 FCR 472 at 486-487 (Hill J); [2001] FCA 1549.

[10] See Bryan v Maloney (1995) 182 CLR 609 at 617 (Mason CJ, Dean and Gaudron JJ); [1995] HCA 17 ("Bryan v Maloney").

[11] See Bryan v Maloney.

[12] See Sheldon v McBeath (1993) Aust Torts Rep 81-209 (Mahoney JA).

[13] See Bryan v Maloney at 617 (Mason CJ, Dean and Gaudron JJ); Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515; [2004] HCA 16 at [19]–[20] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

physical injury to person or property. Ordinarily, a cause of action in tortious negligence arises when a plaintiff first suffers material damage or relevant loss, provided that the damage is more than negligible and the loss is measurable. Capitol contends that s 109ZK, and therefore s 6.20, was not intended to disturb that long standing position and that, if it were intended to do so, the legislature would have said so in clear words.

119 Capitol points out that the damage claimed by it is not limited to pure economic loss but includes physical property damage. In the case of physical damage, loss is sustained when it is inflicted and the cause of action accrues at that time, whereas, in claims for latent defects, damage is not sustained until the latent damage becomes patent or manifest, and the limitation period begins at that point. Capitol says that s 109ZK, and therefore s 6.20, was not intended to disturb the law concerning physical damage, whether to person or property, such as is the case in the List Proceedings. Rather, it says, the sections were designed to address only the law concerning latent defects in which the current limitation period begins to run only when the defects become patent or manifest.

120 Capitol contends that s 109ZK, and therefore s 6.20, was not intended to cover causes of action of the type made in the List Proceedings. The defects in the Shaft were patent from the date when it was constructed. A claim in respect of those defects would have been barred after the expiration of six years from the date of the completion of the Works, when the defect was apparent, by reason of the operation of the Limitation Act. Capitol distinguishes its claim in the List Proceedings from those that are the subject of the principles outlined above on the basis that it is not a claim for latent defects. Capitol has no proprietary interest in the Shaft, as owner or otherwise. The Shaft is for the exclusive use of the occupiers of the Capitol Square Shopping Centre on the ground floor of the Capitol Square Building. Capitol has no claim in respect of the defects in the Shaft either by reason of the diminution in its value or for its rectification.

121 The phrases “arising out of or concerning” and “arising out of or in connection with”, when considered at a level of generality, suggest no more than the existence of some real and discernible connection between the two subject

matters that are linked by the phrase. The width or imprecision of that connection requires its precise legal effect to be identified by reference to context, namely, the pre-existing state of the law, the perceived mischief and the legislative object in so far as it appears from the words of the provision.[14]

122 Capitol contends that the sections in question should be construed as being limited to the cost of rectification of latent defects by the owners of the property, or successors in title of the owners, to whom the person responsible for the defects was contractually bound. Capitol eschews the proposition that Bandelle is liable to it as the ultimate beneficiary of the Works. First Scope was not contracting with Fletcher for Capitol's benefit. The owners and occupiers of the Capitol Square Shopping Centre on the ground floor of the Capitol Square Building, which is serviced by the Shaft, have exclusive use of the Shaft. Capitol does not own or occupy any part of the Capitol Square Shopping Centre.

123 In their terms, each of s 109ZK and s 6.20 imposes a limitation period for actions brought to enforce a liability for property damage or economic loss arising out of or concerning defective building work, irrespective of when the existence of defects first becomes manifest. The reference to loss or damage is to harm or injury, as distinct from damages that are compensation claimed for harm or injury. An action will be "for" harm or injury if it claims a remedy in relation to it, or because of it. Harm or injury may be compensable when it is sustained to some interest of the claimant. Those interests might include personal property interests as owner, developer or subsequent owner. The expression "defective building work" describes building work that is defective and accordingly likely to require rectification. The existence of defects may also require that other work be undertaken. In each case, the undertaking of the rectification or other work may cause or result in other harm or damage, including damage by reason of delay or loss of income or diminution in value.[15]

124 The obvious intention of s 109ZK was to protect, through the mechanism of an ultimate time bar, those who are engaged, one way or another, in the

[14] See Dinov v Allianz Australia Insurance Limited (2017) 96 NSWLR 98; [2017] NSWCA 270 at [92]–[93] (McDougall J) ("Dinov v Allianz").
[15] See Dinov v Allianz at [11]–[12] (Meagher JA).

performance of building work. The protection related to liability in damages for the defective performance of such work. However, the achievement of that statutory purpose does not necessarily require the protection of people who were not engaged in the performance of building work at the suit of someone else who was also not engaged in building work. Someone could suffer loss by defective building work where the defective performance of building work was pursuant to a contract to which that person was a party, where the person is a purchaser of a property that has latent defects that were the result of defective building work performed for a previous proprietor or where the defective performance of building work caused physical injury to the person or the person's property.

125 The recurrent theme of the provisions of Pt 4C of which s 109ZK formed part is that they are concerned with participants in the building industry. Section 109ZK made it clear that those intended to be protected were participants in the building industry. Thus, a "building action" must be understood as extending to claims against persons of that character. While the phrases "arising out of or concerning" and "arising out of or in connection with" must be given sufficient legal effect to ensure that the purpose of the sections is met, the phrases should not be given a meaning so wide that the operation of the sections goes beyond that which, objectively, the legislature intended it to have.[16]

126 Where an action is brought against someone who did not perform defective building work by a claimant who does not claim damages for defective building work, the sections would have no application.[17] However, as indicated above,[18] the imposition of a limitation period of 10 years for any person's liability for "damage arising from defective building work" was designed to address the law concerning "latent defects", for which the limitation period begins to run only when the defect becomes apparent.[19] Further, there is no logical basis for an approach that assumes property damage cannot be caused by a latent defect in building work. The distinction between property damage and pure economic

[16] See Dinov v Allianz at [87]–[88] (McDougall J).
[17] See Dinov v Allianz at [108] (McDougall J).
[18] See par [116] above.
[19] See Dinov v Allianz at [10]–[11] (Meagher JA).

loss is certainly not apparent from the language of s 109ZK or s 6.20. There is nothing in the language of the sections to support the proposition that it makes any difference that damage is first suffered after the end of the limitation period. Clearly enough, if s 6.20 applied, neither First Scope, the original contracting party with Fletcher, nor any successor in title to First Scope, could bring the action after the expiration of the 10-year period following the completion of the Works. Thus, on Capitol's construction of the sections, the owner of that part of the Capitol Square Building occupied by Capitol, the successor in title of First Scope, would be bound by the limitation period but Capitol, who holds from that owner, would not. That would be a curious consequence.

127 The clear object of s 109ZK when enacted was to afford a limitation protection to those engaged in the building industry, irrespective of the nature of the claim, so long as the claim can be shown to be for loss "arising out of or in connection with" or "arising out of or concerning" defective building work. Clearly, the claim being made in the List Proceedings is one for loss arising out of or in connection with or concerning defective building work, namely, constructing or designing the Shaft defectively. There is no reason to construe the provision restrictively in the manner contended for by Capitol.

Conclusion

128 Having regard to the provisions of cl 34 of the 1997 Regulation, s 109ZK did not apply to Capitol's claim in the List Proceedings. However, if it did, the effect of cl 18 of the 2017 Regulation would be that s 6.20 would apply to the Works. In that case, it would follow that s 6.20 would have afforded a defence to the claim by Capitol. Nevertheless, in the circumstances, neither s 109ZK nor s 6.20 affords a defence to Capitol's claim.

129 The result is that leave to appeal should be granted. However, the appeal should be dismissed on the basis that the preliminary question should be understood as being whether s 109ZK or s 6.20 affords a defence to the claim made by Capitol in the List Proceedings and that the answer to that question is "no". There was no error on the part of the primary judge in making the order striking out paragraph 16 of the List Response as disclosing no reasonable

defence. Bandelle should pay Capitol's costs of the application for leave and of the appeal.

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