Thomas G. Heintzman, O.C., Q.C., L.L.D.(Hon.), FCIArb

Heintzman ADR

Arbitration Place

Toronto, Ontario

www.arbitrationplace.com

416-848-0203

tgh@heintzmanadr.com

www.constructionlawcanada.com

www.heintzmanadr.com

Thomas Heintzman specializes in alternative dispute resolution. He acts as an arbitrator and mediator in commercial, financial, construction and franchise disputes.

Prior to 2013, Mr. Heintzman practiced with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, insurance, broadcasting and telecommunications, construction and environmental law. He has acted in trials, appeals and arbitrations in Ontario, Newfoundland, Manitoba, British Columbia, Nova Scotia and New Brunswick and has made numerous appearances before the Supreme Court of Canada. He was an elected bencher of the Law Society of Canada for 8 years and is an elected Fellow of the American College of Trial Lawyers and of the International Academy of Trial Lawyers.

Thomas Heintzman is the author of ***Heintzman & Goldsmith on Canadian Building Contracts,*** 5th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

This article contains Mr. Heintzman's personal views and does not constitute legal advice. For legal advice, legal counsel should be consulted.

Contract Limitation Clause Precludes Contractor's Claim Over Against Designer

The limitation periods which apply to construction claims are difficult to sort out at the best of times. They are even more complicated when the limitation period applies to a claim over for contribution or indemnity.

That situation arises when the owner sues the contractor and the contractor then seeks contribution or indemnity from another party involved in the construction project, say a

subcontractor or designer. In this situation there are a number of building and consulting contracts in place and there can be a variety of contractual and statutory provisions that contain limitation provisions. The question may be: which provisions trump which?

In **Weinbaum *v. Weidberg***, the Ontario Divisional Court recently held that the contractual limitation period in the contract between the owner and the consultant prevailed when the contractor sought contribution and indemnity from the designer. The contractual limitation period effectively trumped the statutory limitation period for making claims for contribution and indemnity. Since the contractual limitation period had expired, the statutory period was not applicable.

Background

Mr. and Mrs. Weinbaum entered into a contract with Makow Architects for the design and construction of their home. The contract contained a six-year limitation of liability running from substantial completion of the work, which occurred in late 1994.

In January 2010, the Weinbaums commenced an action for damages against Mr. Weidberg, the construction manager of the project. The Weinbaums alleged that they first discovered evidence of extensive water damage and mold growth in August of 2008. The Weinbaums did not sue the architects.

Then, Mr. Weidberg commenced a third party claim against Makow Architects and its principal, Stan Makow (the architects). The third party claim sought indemnity from the architects on the basis that their conduct caused or contributed to any damages suffered by the Weinbaums. Mr. Weidberg alleged that the architects failed to carry out their duties to the Weinbaums and did not assert an independent or contractual claim against the architects.

Statutory Regime

Section 18 of the **Ontario *Limitations Act, 2002*** states as follows:

> "**18.** (1) For the purposes of subsection 5 (2) and section 15, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place. (underlining added)

As can be seen in the first underlined portion, Section 18(1) states that the subsection is "for the purpose of subsection 5(2) and 15." So one has to understand those latter provisions, as well as section 4.

Under section 4, unless the Act provides otherwise, a proceeding "shall not be commenced after the second anniversary of the day on which the claim is discovered." So Section 4

establishes the general two-year limitation period that starts on the discovery of the claim, not on the day of the wrongful act.

Section 5(1) then establishes a number of criteria for determining the date when the claim is discovered. Summarizing the subsection, that date is the date when the plaintiff first knew, or ought to have known, that damage has occurred which arose from an act or omission of the defendant for which a civil action was an appropriate remedy.

Section 5(2) then says that a person with a claim "shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved." So the plaintiff has the burden of showing that it first knew or ought to have known of the claim on a later date than when the act or omission took place.

Section 15 then sets an ultimate limitation period. That ultimate limitation period is the "15th anniversary of the day on which the act or omission on which the claim is based took place. " Thus, even though the normal limitation period is based on the date of discovery, the ultimate limitation period is based on the date of wrongful conduct. That ultimate limitation period over-rides the normal limitation period so that, once the 15 years expires, the claim expires even if not discovered.

Motion Judge's Decision

The Motion Judge held that section 18 of the Act was intended to alter the previous law of limitations applicable to claims for contribution and indemnity, and that all those claims now have a general two year limitation period running from there date when the person seeking contribution and indemnity is served with the Plaintiff's claim. Accordingly, the Motion judge held that the third party claim was commenced within that limitation period.

Divisional Court's Decision

The Divisional Court held that section 18 does not change the previous law with respect to contractual limitation periods. Under that law (as most notably held by the Supreme Court of Canada in ***Giffels Associates Ltd. v. Eastern Construction Co***., [1978] 2 S.C.R. 1346), a claim over for contribution and indemnity cannot be made by a defendant against a third party if that third party is not liable to the plaintiff due to the expiry of a limitation period in the contract between the third party and the plaintiff.

The Divisional Court acknowledged that section 18 does over-rule statutory limitation periods, including sections 4 and 5 of the ***Limitations Act, 2012*** itself and other statutory limitation periods (such as those governing the engineering and other professions). Nevertheless, the Divisional Court held that contractual limitation periods are not affected by section 18. In arriving at this conclusion, the Court referred to a number of decisions of the Ontario Court of Appeal which, in its view, indicated that section 18 did not apply to or over-rule contractual

limitation periods. It also expressed the view that the policy of the law is to leave parties to make their own commercial contracts absent a reason to the contrary relating to consumer protection or the like.

Accordingly, the Divisional Court dismissed the contractor's third party claim over against the architects.

Discussion

This decision is very important for the construction industry for three reasons.
First as already noted, building projects almost always involve a number of parties, and if something goes wrong then each party that is sued will almost invariably wish to claim over against one or more of the other parties involved in the project, asserting that those other parties are responsible, in whole or in part, for the loss or damage.

Second, building contracts often contain a limitation period that runs from a specific date or occurrence – usually substantial or final completion of the project. Thus, the CCDC contracts have a six-year limitation period running from substantial completion.

Third, damages arising from a construction project may be discovered many years after the project is completed. If the owner has a CCDC-type contract with its contractor, then the owner can't sue the contractor once that limitation period expires. But under the discovery-based regime in the **Ontario *Limitations Act, 2002*** – and in the limitation statutes of most Canadian provinces –the owner can bring an action against other parties involved in the building project until two years expires after the owner knew or ought to have known of the damage. That discovery may occur many years later. According to the decision in ***Weinbaum v. Weidberg*****,** those parties are precluded from claiming over against the contractor.

For this reason, any party involved in a building project should be aware of the terms, and in particular the limitation term, of the other contracts under which other parties are providing work or materials to the project. It may seem presumptuous for one party to a construction project to ask to see the terms of all other contracts, and very unlikely that this will occur in practice. But the Divisional Court's decision makes it advisable to do so.

Moreover, if a party is sued then that party must immediately assert any claims for contribution or indemnity. Any hesitation may result in the passage in the meantime of a limitation period in another contract applicable to the project. In ***Weinbaum v. Weidberg*****,** the limitation period in the prime contract had long since passed so there was nothing that the contractor could do.

The whole problem arising in ***Weinbaum v. Weidberg*** is due to two factors.

First, different limitation periods are expressed to run from different dates: date of discovery, date of a wrongful act, and a specific date (such as substantial completion). Obviously, when there are different limitation periods, then they will expire at different times.

Second, courts have refused to synchronize these dates. In ***Weinbaum v. Weidberg*****,** the Divisional Court could have synchronized the limitation periods by holding (as the Motion Judge did) that section 18 applied to all claims over for contribution and indemnity, including contractual claims.

The Divisional Court's policy reason for its decision is open to debate. It held that the parties should enjoy the freedom to contract as they wish, including with respect of limitation periods. That approach may be suitable when one is dealing with parties to the same contract. They may wish to agree to a contractual limitation period for claims between themselves. That approach, however, seems more problematic when dealing with claims for contribution or indemnity. In that situation, the parties have not contracted with each other. They have both entered into contracts with other people to provide services or materials to the project. Thus, in ***Weinbaum v. Weidberg***, the contractor and the architect each contracted with the owner, not with themselves. Is it fair that the terms in the contract between the owner and the architect should bar a claim over by the contractor against the architect, when the contractor is sued by the owner? Is that fair when the owner did not assert its claim against the contractor until limitation period for suing the architect had gone by? Maybe, but it doesn't seem to have much to do with freedom of contract.

Another reason why the result in ***Weinbaum v. Weidberg*** appears unfair is that, generally speaking, the plaintiff can recover its full loss from the defendant even if the loss was partly caused by another party. When a limitation period in a contract that the plaintiff has made with another party blocks a claim over by the defendant against that other party, perhaps the plaintiff should only be able to recover from the defendant the portion of the damage attributable to the defendant's conduct.

The construction industry might be advised to consider whether the present regime relating to claims over for contribution or indemnity is a fair one, and to seek amendments to the ***Limitations Act, 2002*** if that regime is considered to be unfair.

See *Heintzman and Goldsmith on Canadian Building Contracts*, 5th ed., chapter 9, part 3.

***Weinbaum v. Weidberg*, 2017 CarswellOnt 3205, 2017 ONSC 1040**

Building Contracts – Limitation Periods – claims for contribution and indemnity

Thomas G. Heintzman O.C., Q.C., LL.D (Hon.), FCIArb **April 16, 2017**
www.heintzmanadr.com
www.constructionlawcanada.com