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Latent Damage Claims After Six Years

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The applicable limitation period varies significantly across jurisdictions.¹ In Malaysia,² the Limitation Act 1953 prescribes a starting position of six years for both contractual and tortious claims.³ Within the construction industry, the common complaint arises out of defects only becoming discoverable more than six years after expiry of the applicable limitation period. Claimants would have lost their right to bring an action even before being aware of having such a right. The injustice in the state of law was fairly self-evident. Both courts and parliaments often find themselves in a precarious position of needing to balance the public's interest in access to justice against commercial business need for certainty and finality.

United Kingdom

In the UK, the six-year limitation period is prescribed in the Limitation Act 1980 (UK).

The gross shortcoming of the six-year limitation period was exposed in *Pirelli*,⁴ where cracks in a chimney constructed in 1969 were discovered in 1977. The plaintiff brought a negligence claim against the engineer in 1978. The House of Lords ruled that the

1 These may be anything between one year and 20 years, depending on the nature of the claim. See, for example, Belgium.

2 The references to Malaysia are a reference only to Peninsular Malaysia. Sabah and Sarawak have different limitation regimes.

3 Limitation Act 1953, s 6

4 *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1 (HL). Note that the then applicable act was the Limitation Act 1950 (UK).

plaintiff's cause of action had accrued when the chimney first suffered the physical damage of the cracks, even though the damage could not have been discovered at that time. As expert evidence indicated that the crack first surfaced in 1970, the plaintiff's claim was therefore found to be time-barred.

In recognising the injustice and inadequacy of the then state of the law, Lord Fraser in *Pirelli* held that "such a result appears to be unreasonable and contrary to principle, but I think the law is now so firmly established that only Parliament can alter it". Indeed, the uncertainty in determining when a latent defect crystallises into physical damage led to a line of cases being decided simply on the burden of proof.⁵

While the Limitation Act 1980 (UK) carves out exceptions to the general six-year limitation period, short of actual fraud, shoddy or incompetent workmanship was simply insufficient to invoke the exceptions. There was a need to establish deliberateness in the covering up of such works.

In response, the Latent Damage Act 1986 (UK) was enacted by the UK Parliament.

Malaysia

The courts in Malaysia were presented with the similar injustice that had formed the basis of the Latent Damage Act 1986 (UK). The Court of Appeal had first in *Abdul Aziz*⁶ followed *Pirelli* in holding that a cause of action accrues, regardless of whether damage is discovered. Subsequently, however, a different panel of judges in the Court of Appeal in *Kamariyah*⁷ departed from *Abdul Aziz*, holding that time would only start running from the date damage is discovered or ought to have reasonably been discovered. The conflicting judgments from the Court of Appeal resulted in much uncertainty in the state of law in Malaysia.

Limitation (Amendment) Act 2018

The Limitation (Amendment) Act 2018, passed by the Malaysian Parliament in April 2018, introduced a new s 6A to the Limitation Act 1953 which came into effect on 1 September 2019. Using almost identical wording as the Limitation Act 1980 (UK), the effect of this new s 6A is as follows:

- The initial six years period remains unchanged. Parties may initiate a tortious claim not involving personal injuries anytime within this time period —

(a) C bought a house from D in 2000. In 2010, C discovered a crack which damaged the walls badly. A building report made by a consultant revealed that the cracks had occurred in 2002, two years after C moved into the house. C has three years from 2010 to file an action in court against D for damages.

(b) C bought a house from D in 2000. In 2006, C discovered a crack which damaged the walls badly. A building report made by a consultant revealed that the cracks had occurred in 2002, two years after C moved into the house. C has three years from 2006 to file an action in court against D for damages.

(c) C bought a house from D in 2000. In 2005, C discovered a crack which damaged the walls badly. A building report made by a consultant revealed that the cracks had occurred in 2002, two years after C moved into the house. C has three years from 2005 to file an action in court against D for damages.

* Illustrations accompanying s 6(A)(2) of the Limitation Act 1953.

⁵ Nicholas J Mullany, "Reform of the Law of Latent Damage" (1991) 54 MLR 349 at 350

⁶ *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784 (CA)

⁷ *AmBank (M) Bhd v Kamariyah bt Hamdan & Anor* [2013] 5 MLJ 448 (CA)

- For damages discovered after the initial six-year period, a tortious claim not involving personal injuries may be initiated anytime within three years from the date the damage is discovered, or ought to have been discovered. This is, however, subject to a 15-year long-stop limitation —

(a) C bought a house from D in 2000. In 2017, C discovered a crack which damaged the walls badly. A building report made by a consultant revealed that the cracks had occurred in 2001, one year after C moved into the house. C cannot commence an action because he has already exceeded the fifteen-year limitation period.

* Illustrations accompanying s 6(A)(3) of the Limitation Act 1953.

When does time start running?

A reading of the newly introduced s 6A(4) of the Limitation Act 1953 indicates that time starts running as soon as a person has **both** the knowledge of the damage and the right to bring an action. The same section clarifies that having knowledge means being aware of, among others, the material facts associated with the damage and the identity of the potential defendant(s). The question of whether an action or inaction constitutes negligence is an irrelevant factor.⁸

The above clarification, however, falls short of detailing the full extent of knowledge required. Looking at the UK courts, it seems that the threshold to be met is being aware of the basis of the complaint along with knowledge that the defendant's acts or omissions were the cause of the damage.⁹ Closer to home, Singapore's Court of Appeal made it clear that time begins to run upon reasonable suspicion and **not** absolute certainty of the relevant facts.¹⁰

Seeking expert advice

The new s 6A(4)(iii) of the Limitation Act 1953 similarly attempts to address a specific category of defects which are only ascertainable with the help of appropriate expert advice. Subject to reasonableness, it now seems that the positive obligation to seek expert advice has been codified into statute.¹¹

Various criticisms arise out of this particular provision. Beginning with the usage of the term "reasonable", no attempts were made to provide guidelines as to the type of conduct that would be deemed reasonable. In some instances, defects may only be ascertainable upon multiple investigations. It is uncertain if there is therefore an obligation to engage subsequent experts to verify the findings of the first expert.

The new amendments similarly do not define the term "expert".¹² It is unclear whether informal advice and/or discussions with family members or friends who (or even self-proclaimed experts) would suffice to start the clock.¹³ Such uncertainties surely present a hotbed for arguments by lawyers.

Scope of s 6A

The Hansard indicates that Parliament had only concerned itself with latent damage within the construction industry when debating the Bill. The illustrations accompanying s 6A of the Limitation Act 1953 are similarly confined to defects within the construction industry.

However, the language of s 6A of the Limitation Act 1953 lends itself open to the extension of its application to negligence beyond the construction industry. On this note, other jurisdictions¹⁴ have recognised that the extension of limitation applies across a wide spectrum of industries including services by accounting firms¹⁵ and advice by solicitors.¹⁶ The simple position seems to be that the

8 Limitation Act 1953, s 6A(5)

9 *Haward and others v Fawcetts (a firm)* [2006] 3 All ER 497 (HL)

10 *Lian Kok Hong v Ow Wah Foong and Another* [2008] SGCA 30

11 Limitation Act 1953, s 6A(4)(iii)

12 *Supra* n 5, at 352

13 *Ibid*

14 The Limitation Act 1953, s 6A is *pari passu* with the Limitation Act 1980 (UK), s 14A and 14B

15 *Supra* n 9

16 *Blakemores LDP (in administration) v Scott & Ors* [2015] All ER (D) 63 (Oct)

amendments affect all forms of negligence not involving personal injury.

“No reason in principle why a plaintiff who has, for instance, suffered damage as a result of a negligently drawn lease should be in any worse a position than a plaintiff whose house has defective foundations.” — **English Law Reform Committee, 1984**¹⁷

Retrospective effect

The transitional provision of the Limitation (Amendment) Act 2018 stipulates that the new amendments are equally applicable to causes of action that have accrued prior to the coming into force of the new amendments.¹⁸ It seems that even actions that were previously time-barred prior to 1 September 2019, i.e. prior to the introduction of the new amendments, may have been given a new lease of life. This is a departure from the position in both the UK¹⁹ and Singapore,²⁰ where the extended limitation period is not applicable to actions already time-barred under the old regime and prior to introduction of the extended limitation period.

This immediately raises concerns in that businesses will unexpectedly find themselves exposed to the risk of litigation for matters and projects that were already time-barred and/or deemed closed under the old limitation regime and in respect of which insurance policies may have lapsed.

Practical tips

While there are numerous teething issues, the new amendments nonetheless signal a big step forward in addressing the problems with the Limitation Act 1953. It remains to be seen if the courts will follow in the footsteps of other jurisdictions in expanding the scope of the new amendments beyond defects within the construction industry.

Practical steps that could be taken to safeguard the uncertainties and re-allocation of risk following the new amendments are as follows:

Employers/construction professionals/service providers

- Properly understand client’s requirements and ensure strict compliance with any applicable legislation. All ambiguities are to be clarified.
- Professional indemnity insurance must have sufficient cover to negate risk of litigation. This must arguably be maintained beyond retirement of a professional and/or even after the sale of a business.

End-users/purchasers

- Do not automatically ignore small faults and cracks. These signs may be an indication of a bigger problem.
- If in doubt of services and/or any works received, immediately make reasonable enquiries, if necessary, to the appropriate experts. **LH-AG**

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17 Cmnd 9390 (1984), para 4.22.

18 Limitation (Amendment) Act 2018, s 5

19 Latent Damage Act 1986 (UK), s 4

20 Limitation Act (Singapore), s 24C