

# CONTRACTUAL TIME BAR DID NOT PREVENT THIRD PARTY CONTRIBUTION CLAIMS

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Legal Briefings

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The High Court has held in *Bloomberg LP v Sandberg (a firm) and others* (TCC 16<sup>th</sup> October 2015) that a contractor could be joined to proceedings as a third party (or Part 20 defendant) so that the defendants could pursue a contribution claim against him, even though the ultimate claimant's direct claims against the contractor were subject to a contractual time bar.

The decision suggests that a contractual time bar will normally be interpreted as a procedural, rather than a substantive, bar to proceedings. Accordingly, it will not prevent the beneficiary of the provision becoming liable "through the back door", if other defendants who are liable to the claimant for the same damage seek a contribution under the Civil Liability (Contribution) Act 1978.

The court left open (though with some doubt) the possibility that a contractual time bar might operate to extinguish the relevant rights, so that a contribution claim could not be brought, but commented that if this were possible it would require very clear words.

## BACKGROUND

The claimant was the tenant of a building. It suffered losses (including the costs of remedial works) when a cladding tile fell to the ground in 2013. Substantial remedial works were found to be necessary. Malling Pre-Cast Limited (the "Contractor") had been employed to undertake the original cladding works in 2000, and had given a warranty directly to Bloomberg in respect of its work (the "Malling Warranty").

The claimant commenced proceedings against the Contractor and two engineering companies, Sandberg and Buro Happold Ltd, that it alleged were also liable in respect of its losses.

The claimant's direct claim against the Contractor did not continue as it was time-barred by clause 6 of the Malling Warranty, which provided that:

"... no proceedings shall be commenced against the Contractor after the expiry of twelve years from the date of issue of the last written statement by the Client that practical completion of the Project has been achieved under the Contract [ie 29 August 2000]".

Sandberg then joined the Contractor, seeking contribution from it, as a Civil Procedure Rules Part 20 defendant. It claimed a contribution under section 1(1) of the Civil Liability (Contribution) Act 1978 ("the 1978 Act") on the basis that, if Sandberg was found to be liable to the claimant, the Contractor was liable to the claimant in respect of the same damage.

The Contractor applied to strike out the Part 20 proceedings, or alternatively obtain summary judgment, on the basis that the contribution claim was barred by clause 6 of the warranty.

## **DECISION**

The High Court (Mr Justice Fraser) refused the application, finding that the contribution claim was not barred by clause 6.

The court rejected the Contractor's argument that the reference to "no proceedings" in clause 6 meant no proceedings could be brought by *any* party, not simply by the claimant. The words were clear and unambiguous; in the context of a warranty between the claimant and Malling, they could only (absent more) mean proceedings by the claimant.

The court then considered the effect of section 1(3) of the 1978 Act, which provides that a contribution claim is possible even if the third party has ceased to be liable in respect of the damage in question:

**"unless** he ceased to be liable by virtue of the expiry of a period of limitation or prescription **which extinguished the right** on which the claim against him in respect of the damage was based".

So the key question was whether, as the Contractor contended, the effect of clause 6 was to extinguish the right on which the claim against the Contractor was based. If so, the Contractor could take advantage of the proviso to section 1(3) to escape liability under the 1978 Act.

The court held that clause 6 acted as a procedural bar to any claim that the claimant might have, rather than extinguishing the underlying substantive right. Accordingly the Contractor could not rely on the proviso to section 1(3), and could not show that Sandberg had no real prospect of succeeding in its Part 20 claim.

The judge also noted that, had the Contractor's argument proven correct, parties could effectively contract out of the statutory provisions under the 1978 Act which were put in place to protect third parties. He commented that if this were possible by way of a contractual time bar (and he was not convinced that it was) very clear words would be needed, ie in order to extinguish the relevant rights by the passage of time. The words in clause 6 did not go far enough.

The court accepted that cases such as this one were properly to be described as "cessation of liability" rather than "no liability"; in the latter case, contribution cannot be sought because no liability has ever arisen in favour of the claimant. This was found to be the case where the parties are composite insured as in the case of *Co-Operative v Taylor Young* (2002).

## **CONCLUSION**

Whilst the application was refused on the basis that there was a real prospect of Sandberg succeeding at trial and is not a final determination, the point is of general interest as the wording of the warranty in question is commonly found. The judgement indicates that the effect of this common wording is insufficient to forestall contribution claims arising under the 1978 Act.

## **KEY CONTACTS**

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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