

ONTARIO DIVISIONAL COURT AFFIRMS USE OF CONTRACTUAL LIMITATION PERIOD IN GUARDING AGAINST THIRD PARTY CLAIMS

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In a recent decision, the Ontario Divisional Court affirmed the ability of a party to protect against third party contribution and indemnity claims by way of a contractual limitation period.

Weinbaum v. Weidberg (2017 ONSC 1040) resulted after the plaintiff (Weinbaum, in her capacity as an estate trustee) discovered extensive water damage in a residential home. Weinbaum started an action against the home's builder and other (referred to here as the "Weidberg respondents") alleging various construction deficiencies. The Weidberg respondents subsequently brought a third party action for contribution and indemnity under the *Negligence Act* (the "Act") against the home's architect, Makow Architects.

At issue in this particular decision was whether or not a limitation clause in the Makow Architects' contract with the plaintiff home owner could also bar the defendant builder from bringing its third party action. The question arose because the work was completed in 1994 but the water damage was not discovered until 2008. However, the Architectural Agreement between the third party Makow Architects and the plaintiff barred any action requiring payment of damages by the Makow Architects outside of a 6-year limitation window (which had, quite obviously, expired). As a result, after the Weidberg respondents started the third party claim, relying on that contractual limitation period.

In response to the initial summary judgment motion, the Weidberg respondents argued that section 18 of the Ontario *Limitations Act* (the "**Limitations Act**") supersedes any contractual limitation period. Section 18(1) of the *Limitations Act* states:

“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.”

In essence, the Weidberg respondents argued that since their claim was for contribution and indemnity, the

limitation period for their third party claim was 2 years (the standard period under the Act) from the date on which they were served with the plaintiffs' action. The Weidberg respondents, therefore, argued that the 6-year limitation period in the Architectural Agreement (operating from 1994 onward) did not apply to them and did not bar their third party action against the Makow Architects.

In the original summary judgment motion, the Makow Architects relied on the Supreme Court of Canada decision in *Giffels Associates* ([1978] 2 SCR 1346), wherein the court held that where a contractor protects itself from liability through a contractual term, another contractor cannot assert a right which goes behind that agreement to force the protected contractor (which has an agreement with the plaintiff) to share in compensating the plaintiff for proven losses.

Despite the rule in *Giffels Associates*, the motion judge found in favour of the Weidberg respondents and held that section 18 of the *Limitations Act* set an overriding limitation period for contribution and indemnity claims of 2 years from the date on which the main claim is served.

In the Makow Architects' appeal, the Divisional Court therefore focused on the question of whether a contract can set a limitation period for contribution and indemnity regardless of section 18 of the Limitations Act. The Divisional Court overturned the original motion decision and awarded the Makow Architects summary judgment, stating:

"I am of the view that principles of *Giffels* continue to be the applicable law in Ontario and that it remains available to contracting parties to limit the scope of liability in a contract. Consequently, the right of a party to claim contribution and indemnity against another party is lost where the plaintiff's rights to advance a claim have been extinguished by contract."

As a result, the defendant's third party claim against the Makow Architects was dismissed due to it having been started outside of the limitation period in the Makow Architects' contract with the plaintiff.

The Divisional Court's decision in *Weinbaum v. Weidberg* strongly affirms the benefits of contractual limitation periods, which can protect against not just long-delayed claims by the other contracting party, but against claims for contribution and indemnity where the latter contracting party has sued an individual or entity that is not party to the contract.

by Kyle Lambert

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

The logo for mcmillan, featuring the word "mcmillan" in a lowercase, sans-serif font. The "m" and "c" are in a dark red color, while the "m", "i", "l", "l", "a", and "n" are in a light blue color. The logo is positioned in the upper left corner of a banner image that shows a low-angle view of a modern glass skyscraper against a clear sky.

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