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ACT QUICKLY IN NEGLIGENCE CLAIMS

***Eagle v Redlime Limited* [2011] EWHC 838 (QB) 4 April 2011**

Limitation is a perennial problem in construction claims as it may take many years before defects in a building become apparent.

The standard limitation periods are as follows:

In contract, a claimant has six years from the date of the breach of contract under a simple contract to bring a claim or 12 years from the date of the breach of contract under a deed.

In tort, a claimant has six years from the date that she has suffered damage.

However, section 14(a) of The Limitation Act 1980 throws a lifeline to claimants with tortious claims who are not aware that they have suffered damage at the time the damage actually occurs. Section 14(a) of The Limitation Act, in certain circumstances, will extend the limitation period in respect of claims for negligence. A claim can be brought under the Act three years from the earliest date upon which the claimant first had the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action. The knowledge required for bringing an action for damages in respect of the relevant damage is knowledge of the material facts about the damage and also of the fact that the damage was attributable in whole or in part of the act or omission which constitutes the negligence, the identity of the defendant and, if is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant. Material facts are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against the Defendant who did not dispute liability and is able to satisfy a judgment.

The limitation period for tortious claims, without the rescuing provisions of section 14(a) of The Limitation Act, are usually longer than for contractual claims, particularly for simple contracts, as damage tends to occur after a breach of contract.

It is for this reason that on commercial construction projects where parties are legally advised, contracts and appointments are usually entered into as deeds, thereby ensuring a contractual limitation period of twelve years. Where parties are not legally advised, or sometimes where they are, simple contracts are entered into which provide much shorter limitation periods.

Parties who are statute barred from pursuing contractual claims often have no choice but to bring a claim in negligence and there is a regular stream of cases in which claimants constantly seek to push the limits of tortious claims to provide them with a remedy where they

have missed out on a contractual claim. This involves attempting to push matters such as time limits and the extent of liability ever outwards.

Unfortunately, however, sometimes both limitation periods are missed and a Claimant does not have a claim, as occurred in *Eagle v Redlime*.

The facts

Mr Eagle employed Redlime Limited to construct a concrete base for dog kennels at his property and the work was carried out between January and March 2000. Mr Eagle then employed different contractors to build the rest of the kennels. The design of the base was drawn up by a Mr Bowyer, a surveyor, who was acting for Mr Eagle. Redlime Limited did not construct the base in accordance with Mr Bowyer's drawings but did something different and told Mr Eagle that this was the modern way of doing things.

In around early 2006, Mr Eagle noticed cracking in the render around the windows and down the walls in the dog kennels. Mr Eagle attributed these to normal settlement. In early 2006 he also noticed problems with the drainage system which was sinking and separating from the slab floor. He attributed these problems to defects in the placing of the drainage channel and carried out minor repairs to the channel and to the render.

Later, in 2006, further cracking appeared in the render and the problems with the drainage channel recurred. In September 2006 Mr Eagle contacted Redlime Limited and a site visit was arranged but Redlime Limited did not seem willing to grapple with the problem. Mr Eagle then wrote a letter in October 2006 to them complaining about the subsidence and asking them to reply, failing which he said he would obtain an expert report and carry out repairs and pursue them for the cost. Redlime Limited provided an unsatisfactory reply, and so, in November 2006, Mr Eagle instructed a structural engineer who concluded that the base had been constructed defectively and the engineer recommended underpinning it. In December 2006 Mr Eagle's solicitors sent a Pre-Action Protocol letter.

Crucially, proceedings were not issued against Redlime Limited until 29 October 2009. Mr Eagle's claim amounted to £400,000 on the grounds that the buildings were beyond economic repair and that it was necessary to demolish them and rebuild them.

Mr Eagle needed to establish that he did not have the requisite knowledge to bring the claim under section 14(a) of The Limitation Act until after 29 October 2006. Redlime Limited argued that he did have that knowledge before that date.

The decision

The Court considered the authorities for establishing the nature and degree of knowledge required by section 14 of The Limitation Act.

In *Haward v Fawcetts* [2006] 1 WLR 684, Lord Lichalls said that the requisite degree of knowledge was *"knowing with sufficient confidence to justify embarking on the preliminaries to the issue of any writ, taking advice and collecting evidence. Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice. In other words, the claimant must know enough for it to be reasonable to begin to investigate further."*

In *Ministry of Defence v AB and others* [2010] EWCA Civ 1317, the Court of Appeal said that the test was *"whether the Claimant has such a degree of belief that, objectively considered it was reasonable to expect him to commence investigating whether or not he had a viable case."*

In *Scargo v North Essex District Health Authority* [1997] PIQRP 235, Brooke LJ referred to *"a broad knowledge of the essence"* of the relevant act or omission. The judge concluded that Mr Eagle had the necessary knowledge of the material facts about the damage in respect of damages it claimed before October 2006, because by that stage he knew that there had been subsidence causing the drainage channels to sink and to separate from the concrete slab and that there had been cracking which had occurred twice to the windows and walls. It was the opinion of the Judge that these were *"facts about the damage as would lead a reasonable person who has suffered such damage to consider it sufficiently serious to justify him instituting proceedings for damages against a Defendant who did not dispute liability and was able to satisfy a judgment within the meaning of subsection (7)."* The Judge accepted that Mr Eagle did not have knowledge about the full extent of the damage but the Judge held that this was not necessary. Mr Eagle did know that the damage had been caused by something that Redlime Limited had done wrong, although he wrongly believed that the cause of the problem was defective placement of the drainage channel.

The Judge therefore concluded that Mr Eagle did have sufficient knowledge that the damage was attributable to an act or omission of Redlime Limited and that accordingly the limitation period had expired.

Conclusion

This case is a salutary reminder of the need to take prompt action when faced with a prospective claim and also to keep time limits that are ticking in mind at all times. This is particularly important in the context of construction claims where disputes often arise towards the end of limitation periods.

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