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Contracting Out: Court finds contract applies over Limitations Act

A recent decision of the Ontario Divisional Court upheld a contractually agreed-upon limitation period and enforced it against a third party, even in circumstances where it appeared to be at odds with the statutory provisions of the *Limitations Act, 2002*.

Section 18 of the *Limitations Act* provides that a claim for contribution and indemnity must be brought within two years from the day on which person wishing to assert a claim for contribution and indemnity is served with the claim.

In *Weinbaum v Weidberg*, the Divisional Court considered the intersection of section 18 of the *Act* and a contractual limitation provision that provided for a strict six year limitation period following substantial completion of the project at issue.

By way of background, in 1993, Jack and Anne Weinbaum entered into an agreement with Makow Associates Architect Inc. (“Makow”) to provide architectural services (the “Architectural Agreement”).

The Architectural Agreement provided for a six year limitation period after the substantial performance of work.

In 2008, 14 years after the work was completed, the Weinbaums discovered extensive water damage and mold growth. The Weinbaums brought an action against the construction manager, David Weidberg. They did not name Makow as a defendant to the action.

Weidberg then brought a third party claim against Makow in 2011. That was within the two year limitation period provided for under s. 18 of the *Act* for claims of contribution and indemnity.

Makow sought to knock out the claim, relying on the contractual limitation period provided for in the Architectural Agreement. Makow relied on the Supreme Court of Canada decision in *Giffels v Eastern Construction*, which held that a contractual limitation period may be enforced against a third party seeking contribution and indemnity. In that case, the Supreme Court held that a party who has contractually protected itself cannot be required to share in compensating the plaintiff for its losses, where a direct claim by the plaintiff itself is barred by operation

of a contractual limitation period.

At first instance, the motions judge dismissed Makow's motion. In so doing, the motions judge relied on the Ontario Court of Appeal's decision in *Waterloo Region District School Board v CRD Construction Ltd*, which held that the legislature intended to alter the law in enacting the *Limitations Act, 2002* to provide that the limitation period for a claim of contribution and indemnity is presumptively two years from the date when a person seeking contribution and indemnity is served with a claim.

The Divisional Court allowed Makow's appeal. The Court stated that absent clear direction from the Court of Appeal that section 18 of the *Limitations Act, 2002* applies to contractual limitation periods, parties were free to contract to limit their liability, and enforce even as against third parties.

The decision provides a clear exception to s. 18 of the Act, and serves as a reminder to all contracting parties of their ability to control liability. At least until the Court of Appeal weighs in.

With notes from Kate Costin