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ELIMINATING A "LEAKY BUILDING CASE" IN BRITISH COLUMBIA: SIX YEAR CONTRACTUAL LIMITATION PERIODS CAN WORK

FACTS & BACKGROUND

Insurers have had to contend with "leaky building" litigation since the late 1990's with the most recent litigation trends consisting of the emergence of a growing number of "leaky highrise tower" cases and "leaky school" cases. Given these successive "waves" of "mass litigation" liability insurers on the West Coast have rightly wondered whether the Courts would give effect to contractual limitation periods that have expired well before the building owner knows it has the basis for a lawsuit.

Contractual limitation periods are common throughout the construction industry. Historically, the standard CCDC contract used by general contractors when entering into a contract with the owner has included a limitation period of six years from substantial completion. Design professionals often use a similar form of contract that stipulates that liability for *"all claims…. shall absolutely cease after six years from the date of: (a) substantial performance of the Work."*. So, for many projects completed prior to 1991, liability insurers have wondered whether these six year contractual limitation periods could effectively be used to dismiss a "leaky building" lawsuit, or, whether common law discoverability principles would operate to postpone the inception of the limitation period thus allowing a building owner to have its case tried in spite of the contractual limitation period.

THE RULING

The recent decision of the B.C. Supreme Court in ***The Board of School Trustees of School District No. 71 (Campbell River) v. IBI Group Consultants Ltd. et al,*** decided February 28, 2007, should come as welcome relief to the insurance industry. The Court concluded, in the context of a "leaky school" completed in 1994, that the School Board's cause of action was extinguished six years following substantial completion of the project notwithstanding that the School Board did not know it had a problem until 10 years after substantial completion. The rationale in reaching this conclusion bodes well for construction site participants who had the business sense to insist upon a contract with a contractual limitation period tied to the date of substantial completion.

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The limitation statutes in the various Canadian provinces have undergone dramatic change over the past 35 years. In the 1960's it was not uncommon for provincial limitation legislation to make fine distinctions depending upon whether the claim was framed in tort or contract. To eliminate that distinction many of the Provincial Legislatures amended the relevant limitation statute to stipulate the time period in which to sue from the *"… accrual of the cause of action"* without regard to which cause of action was being relied upon. However, in the early 1980's the Supreme Court of Canada concluded that given the inherent unfairness in allowing a cause of action to expire in circumstances wherein the injured party was unaware it had a right to sue the Court introduced the "discoverability principle". In simple terms, the "discoverability principle" permitted a Court to treat a cause of action as not commencing until the injured party had "discovered" the material facts on which the cause of action was premised, or, was capable of discovering with the exercise of reasonable diligence. In that way the seeming "harshness" in having a cause of action lapse prior to any awareness of that cause of action was avoided.

However, as ***IBI Group*** makes clear, it is open to parties to a contract to set a particular limitation period that is "triggered" by a particular event which is not dependent upon the injured party's knowledge that it has a right to sue. In the environment of a contract one or both parties could, rather than leaving it to Judges to determine, stipulate that a cause of action expires upon the lapse of a defined time period following the occurrence of a stipulated event. If stated in words that were sufficiently precise and clear the parties' mutual intention would preclude any "Judge made" introduction of a "discoverability principle".

In giving precedence to the words used by the parties, the Court in ***IBI Group*** concluded that the choice of a limitation period clause that read *"…six years from substantial completion…"* was sufficiently precise that it entirely foreclosed any delay in the operation of the limitation period by reason of the fact that the injured party did not appreciate it had an accruing cause of action.

The School Board, faced with this legal result, sought to argue that the nature and seriousness of the construction defects inherent to the "leaky school" amounted to a fundamental breach that avoided the dismissal of the lawsuit simply by reason of the limitation period. The term "fundamental breach" is used to denote a contractual failing so serious in its consequences that the Court could say, in effect, *"neither party to this*

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contract thought the limitation period clause would apply if the failings were this serious in their consequences." The Court reviewed the recent judicial developments on fundamental breach and concluded that since both the construction site participant and the School Board were "sophisticated parties" that entered into a "sizeable commercial transaction" neither party was under the type of disability that augured for the application of the "fundamental breach" argument to relieve against the consequences of the six year limitation contractual limitation period.

IMPACT ON INSURERS

IBI Group is important for two reasons. Firstly, it seriously calls into question whether the Provincial Government can successfully sue construction site participants in respect of "leaky schools" if the parties entered into a contract that precludes legal action beyond six years from the date of substantial completion, and the project was substantially completed more than six years prior to the commencement of legal proceedings. Secondly, it underscores that the Courts in British Columbia are prepared to hold sophisticated parties to the terms of their contract even if it means an injured party loses its right to sue even before it knew it had such a right.

IBI Group comes as welcome news to liability insurers of general contractors and professional liability insurers of design professionals. Time will tell whether the B.C. Court of Appeal is prepared to adopt this "tough medicine" approach which is finding favour in the B.C. Supreme Court.

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