

LIMITATION OF LIABILITY FOR ENGINEERS



By Ir. Lai Sze Ching

The liability of engineers has been a thorny issue as there is always the fear of "life guaranteed" liability for all design work they do. This issue was finally resolved when the Limitation Act 1953 ("Limitation Act") was amended recently.

The Limitation (Amendment) Act 2018 ("Amended Act") was passed by Parliament on 4 April, 2018. The Act was subsequently granted Royal Assent by the Yang Di-Pertuan Agong on 27 April, 2018 and gazetted on 4 May, 2018. It will come into force on a date to be appointed by the Minister.

The objectives of the Amended Act are to:

1. Postpone the commencement of the limitation period when a person is under a disability at the time the cause of action is accrued;
2. Extend the limitation period in cases of negligence not involving personal injury and the damage was not discoverable prior to the expiry of the statutory limitation period;
3. Provide an overriding 15-year long-stop from the act of negligence giving rise to the damage.

Here, we will discuss the amended new Section 6A of the Amended Act which addresses the last 2 issues. It must be noted that Sarawak and Sabah have their own legislation on limitation, therefore this Amended Act is not applicable in these 2 States.

EXTENSION OF THE LIMITATION PERIODS IN THE LIMITATION ACT 1953

Section 6(1)(a) of the Limitation Act provides that any legal action must be brought within 6 years from when a cause of action accrued.

What is cause of action? In *Lim Kean v Choo Khoon (1970) 1 MLJ 158*, the Court said, "a cause of action normally accrues when there is a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed." In the law of contract, the cause of action normally will arise when the terms of a contract are breached, for example when the project fails to complete on time or the contractor refuses to comply with the instructions issued by the contract administrator.

For claims initiated under law of tort, the limitation period is 6 years when a plaintiff suffers damage due to

the tortious act such as negligence by the defendant. The 6-year limitation period applies regardless of when the plaintiff discovers such damage.

However strict interpretation of the said provision may cause injustice when the damage is discovered only after 6 years. In *Pirelli Cable Works v Oscar (1983) 1 All ER 65*, the chimney was constructed in 1969 but the faulty condition of the chimney could not have been discovered with reasonable diligence and was only, in fact, discovered in 1977. The court held that the cause of action accrues at the date when the cracks on the chimney occurred and not when the plaintiff could have diligently discovered it. In this case, the plaintiff's action was time-barred as the date when he discovered the crack was over the limitation period of 6 years.

To address the injustice caused by this, UK has enacted the Latent Damage Act 1986 which provides that where the cause of action could not be discovered when it arises, the plaintiff can sue within 3 years of the time when it could be discovered.

NEW SECTION 6A

The amendment of the Limitation Act introduces a new section 6A as follows:

"Limitation of actions to claim damages for negligence not involving personal injuries"

1. 6A. Notwithstanding subsection 6(1), this section shall apply to any action for damages for negligence not involving personal injuries, where the starting date for calculating the period of limitation period under subsection (2) falls after the date on which the cause of action accrued.
2. An action to which this section applies shall not be brought after the expiration of three years from the starting date if the period of three years expires from the starting date if the period of three years expires later than the period of limitation prescribed in subsection 6(1).
3. Notwithstanding subsection (2), no action shall be brought after the expiration of fifteen years from the date on which the cause of action accrued.
4. For the purposes of this section:
 - (a) "starting date" means the earliest date on which the

plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such action."

Therefore the new section 6A(1) enables a person to take action founded on negligence not involving personal injuries by allowing an extended limitation period of 3 years from the date of knowledge of the person having the cause of action.

This proposed new section 6A considers negligence cases involving latent damage in construction cases, where the damage was not discoverable through general inspection and that the person having the cause of action did not know or could not have been reasonably expected to know of the damage.

It must first be noted that the 6-year limitation period remains to be the starting point. Section 6A only applies to actions brought after the expiration of the said 6 years, and where the claim is for damages for negligence not involving personal injury only. The limitation period for breach of the contract remains to be 6 years from the date of cause of action arises.

In addition, such action must be brought within three years from the "starting date" and is subject to a longstop of 15 years. In this respect, the Act is similar to the corresponding legislation in the United Kingdom and Singapore.

APPLICATION OF SECTION 6A(1) AND 6A(2)

The new section 6A(1) and 6A(2) provide 3 illustrations to explain the operation of this section.

- a) C bought a house from D in 2000. In 2010, C discovered a crack which damaged the walls badly. A building report made by a consultant revealed that the cracks had occurred in 2002, two years after C moved into the house. C has three years from 2010 to file an action in court against D for damages.
- b) C bought a house from D in 2000. In 2006, C discovered a crack which damaged the walls badly. A building report made by a consultant revealed that the cracks had occurred in 2002, two years after C moved into the house. C has three years from 2006 to file an action in court against D for damages.
- c) C bought a house from D in 2000. In 2005, C discovered a crack which damaged the walls badly. A building report made by a consultant revealed that the cracks had occurred in 2002, two years after C moved into the house. C has three years from 2005 to file an action in court against D for damages.

LIMITED TO NEGLIGENT CASES

Read on its own, section 6A of the Limitation Act is wide enough to cover all instances of negligence involving injury. However there are some limitations to this new section 6A.

The explanatory statement in the Bill initially states that the provision is intended *"to enable a person to take action founded in negligence not involving personal injuries by allowing an extended limitation period of three years from the date of knowledge of the person having the cause of action."*

However, it then goes on to explain that the provision *"considers negligence cases involving latent damage in construction cases, where the damage was not discoverable through general inspection ..."*

From the above statement, it appears that Parliament intends for section 6A to apply only to latent damage in construction cases. There are two grounds to support this contention.

First, according to the Minister's statement in the Hansard of 4 April 2018, section 6A *"would permit a plaintiff to take action based on negligence involving latent damage in construction cases by extending the limitation period by three years..."*

Second, all three illustrations provided in section 6A(2) to describe the operation of certain sub-sections, are premised on construction cases.

Therefore it remains to be seen whether the Malaysian Courts will apply section 6A to negligence cases which do not involve latent defects in construction cases.

LIMITED TO 15 YEARS

Section 6A(3) provides as follows:

"Notwithstanding subsection (2), no action shall be brought after the expiration of 15 years from the date on which the cause of action accrued."

Therefore section 6A(3) prevents any person from instituting court proceedings more than 15 years after the cause of action accrued, even if it results in the extended limitation period being less than 3 years or even though the damage is discovered after 15 years.

APPLICATION OF SECTION 6A(3)

The new section 6A(3) provides an illustrations to explain the operation of this section.

C bought a house from D in 2000. In 2017, C discovered a crack which damaged the walls badly. A building report made by a consultant revealed that the cracks had occurred in 2001, 1 year after C moved into the house. C could not commence an action because he had already exceeded the 15-year limitation period.

Therefore, an engineer's liability under tort of negligence involving injury is now limited to a longstop of 15 years. He does not have to worry about a stale claim brought against him 15 years or more from the date he designed the project. With this amendment, Malaysia is now in line with the jurisprudence in Singapore and United Kingdom on this issue. ■

Author's Biodata

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"NOTE - the amendment of the Limitation act has been announced by the Minister that it shall take effect from 1st September 2019."