

Client Alert

August 2019

Limitation period for latent defects/latent damages

For further information, please contact:



Janice Tay
Partner
+603 2298 7838
Janice.Tay@WongPartners.com



Chih-Wen Ooi
Associate
+603 2299 6428
ChihWen.Ooi@WongPartners.com

Introduction

On 4 April 2018, the Limitation (Amendment) Act 2018 ("Act") was passed by the Malaysian Parliament and was then granted Royal Assent by the Yang di-Pertuan Agong on 27 April 2018. Since then, it has been gazetted on 4 May 2018 and is scheduled to come into force on 1 September 2019. The Act is the local equivalent of the United Kingdom's Latent Damage Act 1986 wherein limitation of actions are extended in two circumstances:

1. cases of negligence not involving personal injury and where the damage was not discoverable prior to the expiry of the statutory limitation period (i.e. where the damage is latent); and
2. when a person is under a disability at the time the cause of action accrued.


This piece will focus on the former.

The Limitation Act 1953

Pursuant to section 6(1)(a) of the Limitation Act 1953 ("Limitation Act"), actions in contract and tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. The 6-year limitation period applies notwithstanding when the plaintiff discovers the damages.

In the Court of Appeal case of *AmBank (M) Bhd v Abdul Aziz Hassan & Ors* [2010] 3 MLJ 784 ("**Abdul Aziz**"), it was argued that the statutory limitation period for a tort based claim should only start to run when the damage was discovered. The Court of Appeal disagreed. It held that section 6(1)(a) if the Limitation Act is an absolute bar and the courts do not have the power to extend the limitation period; that prerogative is reserved for Parliament.

This approach has been criticised and is especially unjust in cases of latent defects, a common occurrence in the construction industry. Latent defects are defects that are not immediately detectable upon inspection and such defects are sometimes only discovered after the six-year limitation period has passed.



Harmindar Singh Dhaliwal J (as he then was) commented in *Sharikat Ying Mui Sdn Bhd v Hoh Kiang Po* [2015] MLJU 621 that:

“Despite the evident injustice that would arise in cases of latent damage, our law in the form of s. 29 of the Limitation Act 1953, only recognizes postponement of the limitation period in cases of fraud, concealment or mistake. There are of course other provisions but none of which concern situations where a plaintiff may not have known or with reasonable diligence had discovered that he has a cause of action. This deficiency is in my view a matter for Parliament and the time is perhaps overdue for a review of the limitation laws in keeping with the developments in other common law jurisdictions.”

A Saving Grace?

The Act potentially redresses the perceived unfairness of *Abdul Aziz* by the introduction of section 6A.


The 6-year limitation period remains the starting point and Section 6A only applies when to criteria are met:


- a) the action is brought after the expiration of the said six years;
- b) where the claim is for damages for negligence not involving personal injury; and
- c) such an action must be brought within three years from the "starting date" and is subject to a longstop of 15 years.

In this regard, the Act is similar to the corresponding legislation in the United Kingdom and Singapore.

Section 6A(4)(a) defines "starting date" as “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 ... and a right to bring such action.”

Therefore, the commencement of the limitation period depends on when a person first had **knowledge**. Section 6A(4)(b) provides that a person is deemed to have the requisite knowledge when he knows of:

- 
- (1) the material facts about the damage for which damages are claimed; and
 - (2) other facts relevant to the action, including: (i) that the damage is attributable in whole or in part to the alleged negligence; (ii) the identity of the defendant; and (iii) where it is alleged that the act or omission was by a third party, the identity of the third party and the additional facts supporting the action against the defendant.



Simply put, a party is deemed to have knowledge when he might be reasonably expected to have acquired from facts observable or ascertainable by him, or with the help of appropriate expert advice which is reasonable for him to seek.

The Applicability of Section 6A

A reading of section 6A of the Act seems to be wide enough to cover all instances of negligence. However, is that truly the case?

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, it appears that Parliament intends for section 6A to apply only to latent damage in construction cases.

Nonetheless, the English courts have not restricted the application of section 14A of the UK's Limitation Act 1980 (the equivalent of section 6A) to cases of latent defects in construction claims. In *Haward and others v Fawcetts (a firm)* [2006] 3 All ER 497, the House of Lords applied section 14A to a claim against an accounting firm for negligent investment advice but found that the plaintiff had discovered the damage before the statutory limitation period expired.


Likewise, in Blakemores LDP (in administration) v Scott and others [2015] EWCA Civ 999, the English Court of Appeal applied section 14A in a professional negligence claim against solicitors.

It remains unclear as to whether the Malaysian courts will apply section 6A to negligence cases that do not involve latent defects in construction cases.

Is 6A Necessary?



Prior to the introduction of the Act, the Court of Appeal in *AmBank (M) Bhd v Kamariyah bt Hamdan & Anor* [2013] 5 MLJ 448 ("**Kamariyah**") attempted to lessen the unfairness caused by the strict interpretation of section 6(1)(a) of the Limitation Act in Abdul Aziz by introducing the “discoverability rule”. His Lordship held that limitation should run from the date the damage was discovered, or ought to have been discovered. When invited to consider *Abdul Aziz*, the learned judge held, “... we must respectfully decline to defer to the ruling that time would run regardless of whether damage was or could be discovered.”



An example of a case involving latent defects considering the "discoverability rule" would be *The Ara Joint Management Body v Mammoth Land & Development Sdn Bhd* [2017] MLJU 631.

The case involved latent defects discovered in the buildings of The Ara Bangsar Development. The alleged defects were discovered sometime in 2014, 7 years after construction was completed in 2007. The plaintiff, the joint management body of the development, brought an action on behalf of the residents against the developer for latent defects in October 2016, some 9 years after the construction had been completed. The developer attempted to rely on *Abdul Aziz* to strike out the case on the grounds that the claim was time-barred. The plaintiff, on the contrary, argued that the "discoverability rule" should be adopted. Lee Swee Seng J, in dismissing the developer's striking-out application, held the preferred test would be a matter of fact i.e. when the damage was discovered. His Lordship then dismissed the striking out application and set the matter for trial.

Conclusion

When section 6A comes into force on 1 September 2019, there will be three tests to determine limitation for negligence not amounting to personal injury, namely: *Abdul Aziz* (limitation starts from the date of damage), *Kamariyah* (limitation starts from the date of discovery or when discovery ought to have happen), and section 6A (limitation starts from the date of discovery for the period of 3 years, after the expiry of 6 years and is subject to a longstop of 15 years).

Will section 6A override both *Abdul Aziz* and *Kamariyah* and apply to all claims for damages for negligence not involving personal injury, or will it only apply to construction cases involving latent damage and thereby subsist alongside section 6(1)(a) of the Act? That remains to be seen.