

Limitation period holds good

Even where insurers have entered into negotiations on a claim, they are entitled to rely on a contractual limitation period, unless they have made a clear representation that they will not do so.

A recent grant of summary judgment in the Commercial Court once more affirms that, unless insurers have made an unequivocal, unambiguous and unconditional promise to the contrary, they can raise the defence that an action is out of time.

In *Fortis Bank SA v Trenwick Insurance Co Ltd*, Mrs Justice Gloster said that the insurers were not estopped from relying on the existence of a limitation clause in the insurance contract, even though the parties had negotiated on the subject of quantum after that limitation period had expired.

Case facts

Fortis Bank had entered into a contract to purchase book debts and future debts from Zye Technology Limited. Following an alleged fraud under this agreement, the bank claimed £1m under its insurance policy with the defendant insurers.

The loss had been discovered in or around February 2000 and the insured did not bring proceedings until July 2003.

The defendants argued that the claim was made too late because general condition 13(b) of the insurance policy provided for a contractual limitation period of two years from the date of the discovery of the loss.

Negotiations For two years following the discovery of the loss, the insurers and the insured were involved in discussions as to whether the loss was proved. Although no adequate proof of loss was provided, these negotiations included detailed discussions on the subject of quantum.

The bank argued that these discussions showed that the parties shared the assumption that Fortis had a valid claim which was not time-barred and that it was not necessary to start proceedings in order to keep this claim alive.

Proceedings

When the bank indicated, in June 2002, that it was planning proceedings under the policy, the insurers indicated that they would rely on the provisions of general condition 13(b) and that the insured was contract-barred from bringing a claim. When the insured eventually brought proceedings, in July 2003, the insurers made an application for summary judgment on the basis of the limitation clause. The bank argued that the insurers were estopped from relying on general condition 13(b) because they had continued to negotiate as to the proof of the loss after the limitation period had expired.

Summary judgment

The application was heard on 29 October 2004 and 12 January 2005. Kennedy represented the insurers. Mrs Justice Gloster rejected the bank's arguments. She

referred to Lord Justice Ward in *Seechurn v Ace* [2002] 2 *Lloyds Rep* 390, when he said that, in such circumstances, the claimant must show that there is 'a clear, unequivocal, unambiguous and unconditional promise by the insurers that they would not raise the defence that the action was statute [or otherwise, time-] barred.'

Mrs Justice Gloster went on to say that 'the mere fact that an insurer has attempted to negotiate with the insured about a claim, both before and after the expiry of the limitation period, cannot per se amount to a waiver or an estoppel.'

Chris Sharrock and Christopher Hughes

London

c.sharrock@kennedys-law.com

c.hughes@kennedys-law.com