

WHEN CONCEALING RELEVANT INFORMATION WILL EXTEND THE LIMITATION PERIOD

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The UK Technology and Construction Court has confirmed that in cases where material information relevant to bringing a claim has been concealed, time does not start to run until the concealment has been discovered and that the effect of concealment is to turn the limitation clock back to zero.

THE FACTS

RG Securities (No.2) Limited (the “Claimant”) purchased the freehold of St. Francis Tower, Ipswich Central, Franciscan Way, Ipswich IP11 1LS (the “Property”) in 2015. Before the purchase, the Property was substantially refurbished by the third defendant R. Maskell Limited (“Maskell”) between 2006 and 2009. As a part of these works, the Property was clad with a Trespa cladding system, which is said to be highly flammable and therefore unsuitable for use. In addition to the cladding issues, the Claimant raised a number of other concerns, including relating to the internal fire compartmentation and to the safety of the windows.

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The Claimant alleged that the completed refurbishment works did not comply with building regulations and did not have a Building Regulations Completion Certificate. As a result, the Claimant brought a claim that the works were not carried out in a workmanlike or professional manner or with proper materials, causing the Property to be unfit for habitation and in breach of section 1(1) of the Defective Premises Act 1972 (“DPA 1972”).

By way of defence, Maskell’s argued the claim was statute barred under the Limitation Act 1980 (“the 1980 Act”). Any claims based on breaches of contract, or breach of duty under the DPA 1972, that occurred prior to 16 December 2013 (being six years before the date the claim form was issued) were time-barred. Maskell therefore applied for summary judgment.

In response to the summary judgment application, the Claimant averred that Maskell concealed the lack of Buildings Regulation approval at the time of the sale in 2015 and as a result, time did not start running¹ until the Claimant discovered the concealment in 2018.

THE DECISION AND LEGAL PRINCIPLES

The Technology and Construction Court (Fraser J) dismissed Maskell's application for summary judgment, finding that the Claimant had an arguable case that Maskell had concealed the fact that Building Regulations approval had not been obtained. This meant that time did not start running for limitation purposes until the Claimant had discovered the concealment.

Under English law, the 1980 Act provides that:

- an action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued²; and
- where any fact relevant to the plaintiff's right of action has been deliberately concealed by the defendant, the period of limitation shall not begin to run until the plaintiff has discovered the concealment or could have discovered it with reasonable diligence³.

Fraser J held⁴ that time under section 32(1)(b) of the 1980 Act would only start to run from the date on which any deliberate concealment was discovered. It would be wrong to summarily dismiss the Claimant's case as the case on concealment had a realistic prospect of success. In adopting the same approach to summary judgment applications as Lewison J in *Wetherspoon v Van de Berg & Co*⁵, Fraser J said that *"the court can take into account that further relevant evidence on this issue may become available upon the more full investigations of the facts that will take place at the trial"* and the *"state of evidence on concealment is still not at its final stage."*

ANALYSIS

In this case the alleged concealment took place after the primary limitation period had expired and not merely after the cause of action had accrued. The case therefore provides important guidance on how the clock is effectively reset for limitation purposes where information material for bringing a claim has been concealed.

The case is also of interest in the context of the ongoing scandal of buildings constructed with combustible cladding systems that do not satisfy health and safety requirements. While the UK Government has made funding available to progress remedial works, funding is contingent on building owners committing to pursue responsible third parties. In many cases, the cladding systems now known to be combustible will have been installed years ago and full details of their safety may not have been known or made available until fairly recently.

A recent report from the UK Audit Office⁶ highlighted the failure of that fund to progress remedial works and identified that less than 1% of funds available to fix cladding on private apartments in England has been paid out. While COVID-19 and public health measures has clearly impacted on the repair rate, the report points to wider problems with the strategy to make buildings safe.

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The Government subsequently acknowledged that only in a minority of cases would it be financially justifiable for building owners to bring legal action to recover money and in a significant number of cases some claims could be time-barred. For those that are able to pursue claims, the decision in *RG Securities v Allianz* should be welcome. The case confirms that the limitation period within which cases must be brought is extended where relevant information has been concealed. The extension applies even where the primary limitation period had expired and not merely after the cause of action had accrued.

This article was authored by Partner Barry Hembling in collaboration with Associate Cole Tennant-Fry and Kaajal Shaha, a trainee solicitor in the London office.

[1] Limitation Act 1980, Section 32(1)(b)

[2] Limitation Act 1980, Section 9(1)

[3] Limitation Act 1980, Section 32(1)(b)

[4] Following the House of lords case of *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] AC 102.4

[5] [2007] EWHC 1044 (Ch).

[6] *Investigation Into Remediating Dangerous Cladding On High Rise Buildings* dated 19 June 2020

KEY CONTACTS



BARRY HEMBLING
PARTNER • LONDON

bhembling@wfw.com



COLE TENNANT-FRY
ASSOCIATE • LONDON

T: +44 20 3314 6464

ctennant-fry@wfw.com

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