ONTARIO

SUPERIOR COURT OF JUSTICE

CENTRAL WEST REGION

Milton File #: 6177/07

Between:

Bank of Nova Scotia

Plaintiff

And

Todd Christie a.k.a. Todd A. Christie

Defendant

Appearances:

For the Plaintiff: Katherine I. Henshell

Todd A. Christie in person

Motion for summary judgment argued Thursday, July 25, 2008.

Ruling on Motion

Langdon J.

[1.] This motion for summary judgment raises issues as to the application of the transitional provisions of the *Limitations Act 2002,* which came into force January 1, 2004.

Facts

[2.] Defendant applied to the Bank's predecessor for a line of credit on April 28, 1995. The agreement called for a minimum monthly payment which was the greater of $50.00 or 3% of the debt outstanding on the date of the monthly statement.

[3.] Paragraph 13 of the agreement provided that,

> Regardless of any other provision of this agreement, you will pay to [the bank] immediately on demand all moneys borrowed now or in the future under this agreement, all accrued interest and all other present and future amounts owing by you ...

[4.] Paragraph 15 also provided,

> DEFAULT
>
> Without affecting [the bank's] rights under paragraphs 13 or 14 if:
>
> (a) any payment is not made when due under this agreement ...
>
> Then you will be in default and [the bank] will have no further obligation to permit you to borrow any amount under this agreement. Also without limiting [the bank's] rights under this agreement or by law, your total debt will become immediately due and payable without notice or demand.

[5.] The Bank accepted defendant's application and advanced funds to defendant. The interest rate was 11.5%. Defendant last made a payment to the Bank on April 14, 2003. [1] Under the terms of the agreement, defendant has been in default since June 6, 2003.

---

[1] Defendant tendered two further cheques, June 6, 2003 for $1,500.00 and July 8, 2003 for $1,700.00 but both cheques were dishonoured. The tender of even dishonoured cheques might constitute an acknowledgement of liability, but nothing turns on that fact in this case.

[6.] I doubt it will be material to the resolution of the issues in this motion, however, my review of the facts disclosed in the motion material persuades me that the Bank never treated defendant's obligation as a demand loan; rather the Bank asked defendant first to remedy his default and eventually invoked the acceleration clause in claiming payment in full.

[7.] The Bank appended Dunning notes to its statements of June 6, 2003, July 8, 2003 August 7, 2003 and September 8, 2003. None of these notes demanded more than the "required payment".

[8.] On May 28, 2004, the Bank's lawyers sent a demand letter to defendant claiming the entire balance of the note.

[9.] On June 2, 2004, defendant replied to the Bank and acknowledged the demand letter. In paragraph 2 of that letter he said,

> I, Todd Christie, ... confirm that I am liable ... for any outstanding balance ...

[10.] The Bank's lawyers sent a further demand letter for payment in full on June 8, 2004. On August 12, 2005, the Bank's lawyers wrote advising that they had instructions to sue.

[11.] In May 2006, a clerk with the Bank's lawyers called defendant to tell him the Bank was about to institute action. He claims that the clerk informed him that suit could be avoided if defendant submitted "even just a hundred dollars" as a show of good faith that he intended to pay the balance. Defendant argues that this attempt to coax money from him was an implied admission that the Bank knew that the applicable limitation had by then expired. Defendant argues

that the call was a transparent attempt to obtain a more recent acknowledgement of the debt from him so that the Bank could avoid the basic two-year limitation established by s. 4 of the *Limitations Act 2002.* Even if that were the clerk's motive, the application of the *Limitations Act* to the transaction is a question of law. It is not a fact that the Bank might or might not admit.

[12.] On October 17, 2007, plaintiff issued a statement of claim to recover the balance due on the line of credit. [2]

[13.] On December 3, 2007, defendant filed a statement of defence. It admits the line of credit agreement but puts plaintiff to strict proof of the balance outstanding. [3] The statement of claim pleads his June 2 "acknowledgement" and alleges that,

> 7. c. the act or omission on which the plaintiff's claim ... is based is deemed to have taken place on the day on which the acknowledgement was made, i.e., June 2, 2004; and
>
> d. the plaintiff is presumed to have discovered its claim ... on June 2, 2004.
>
> 8. ... defendant states that the plaintiff was not entitled to commence the ... action after June 2, 2006. The defendant pleads and relies on ss. 4, 5(1), 5(2) 13(1), 13(2), 13(9) and 13(10) of the *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B.

---

[2] Said to be $19,862.93 plus pre-judgment interest from August 7, 2003 at 11.5%, a sum that amounts to $31,209.02 as at July 24, 2008. Plaintiff claims post judgment interest at either 11.5% or the Courts of Justice Act rate.

[3] As to the balance outstanding, defendant has adduced no evidence that the sums claimed by the plaintiff are in error.

> 9. The plaintiff commenced the ... action on or about October 17, 2007. The defendant states that this Honourable Court should therefore dismiss the ... action, as it is statute barred by the limitation period referred to in paragraph 8 above.

[14.] No reply and joinder of issue was delivered. However, the plaintiff has moved for summary judgment alleging that there is no genuine issue for trial.

The plaintiff's argument

[15.] The account went into arrears and the plaintiff first became entitled to demand the full balance due on June 6, 2003. [4]

[16.] It follows that the plaintiff *discovered* the default in 2003. Plaintiff argues that this cause of action arose from that default. Because the cause of action arose before January 1, 2004, (the date on which the *Limitations Act 2002* came into force), the transition rules under the *Limitations Act 2002*, [5] provide that the former limitation applies.

[17.] The parties agree that, if plaintiff's argument prevails, the former limitation was 6 years and would not expire until June 6, 2009.

The defendant's argument

[18.] Under the new *Limitations Act, 2002*, the former limitation of 6 years was repealed, subject to transitional provisions. The new *Act*

---

[4] Plaintiff was always entitled to demand payment in full under ¶ 13 of the agreement.

[5] Ss. 24(5) Rule 2.

specifies that no proceeding shall be commenced in respect of a claim, after the second anniversary of the day on which the claim was *discovered*. Defendant argues that his acknowledgement of June 2, 2004, was an "acknowledgement" within the meaning of the new *Act*, s. 13(1).

> S. 13(1) If a person acknowledges liability in respect of a claim for payment of a liquidated sum, ... the act or omission on which the claim is based shall be deemed to have taken place on the day on which the acknowledgement was made.
>
> ...
>
> (9) This section does not apply unless the acknowledgement is made to the person with the claim, the person's agent ... before the expiry of the limitation period applicable to the claim.

[19.] No issue is taken that the defendant's acknowledgement was made to the Bank's agent. Thus, defendant argues, the two-year limitation under the new *Act* began to run afresh from June 2, 2004. No action could be commenced after June 2, 2006. Hence the present action is statute barred.

Discussion

[20.] Defendant relies on the decision of the Court of Appeal for Ontario in *Hare v. Hare*. [6]

[21.] The *Hare* decision dealt with a claim made on a *demand promissory note*. The decision confirmed the well established rule that a demand notes matures as soon as it is delivered. The majority

[6] (2006), 83 O.R. (2d) 766.

held (2:1) that that rule was not disturbed by the new *Act*. Thus, the limitation begins to run as soon as the money is advanced. However, the running of the limitation can be started afresh by an acknowledgement, such as a payment being made on account.

[22.] In *Hare*, the note was delivered February 10, 1997. The last payment made by the debtor was October 26, 1998. On November 10, 2004, the holder demanded payment without result. The holder sued February 17, 2005. The debtor moved for summary judgment to dismiss the claim. The debtor argued that the former, six-year limitation applied, and that the action was statute-barred six years after the last acknowledgement, i.e., on October 26, 2004.

[23.] The motions judge, holding that the new *Act* did not apply to the transaction, granted the motion and dismissed the claim.

[24.] The holder of the note appealed. She argued that the limitation began to run, i.e., that the cause of action arose, when the debtor refused to respond to the demand for payment made November 10, 2004. Hence, under the new *Act*, the holder of the note had two years from that date, namely, until November 10, 2006 in which to commence proceedings. The Court rejected that interpretation and dismissed the appeal.

[25.] The Court held that because the proceedings had been commenced after January 1, 2004, regard must be had to the transitional provisions of the new *Act* in order to determine whether the former or new limitation applies.

[26.] The appeal was argued as if the applicable provision was s. 24(5).

> 24(5) If the former limitation did not expire before the effective date, [January 1, 2004], and if a limitation under this Act would apply were the claim based on an act or omission that took place on or after [January 1, 2004], the following rules apply.
> 1. if the claim was not discovered before [January 1, 2004], this Act applies as if the act or omission had taken place before the effective date.
> 2. If the claim was discovered before [January 1, 2004], the former limitation period applies.

[27.] The Court ruled that this approach was in error. Gillese J.A. for the majority said,

> [13] ... s. 24(2) must be considered before it can be known whether s. 24(5) is applicable.

[28.] S. 24(2) provides,

> This section applies to claims based on acts or omissions that took place before [January 1, 2004] and in respect of which no proceeding has been commenced before [January 1, 2004].

[29.] The Court noted that two conditions must attach to make s. 24 applicable to a claim. First, the claim must have arisen before January 1, 2004. The Court agreed that it was the delivery of the note as extended by the making of the interest payment, October 26, 1998, that was the act or omission on which the claim was based. Thus the claim arose before January 1, 2004. Because no action had been commenced on the note before January 1, 2004, the second

condition also applied. Hence s. 24 applied to establish which limitation applied.

[30.] Similarly in the case at bar, for the purposes of ss. 24(2), the act or omission on which the claim was based was the failure to pay the June 6, 2003 instalment.

[31.] Also, no action was taken to enforce the claim before January 1, 2004. Hence, s. 24 of the new *Act* applies to plaintiff's claim.

[32.] The Court in *Hare* next turned to the words of ss. 24(5).

> (5) If the former limitation period did not expire before the effective date and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, the following rules apply:
>
> 1. If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date.
>
> 2. If the claim was discovered before the effective date, the former limitation period applies. 2002, c. 24, Sched. B, s. 24 (5).

[33.] The Court concluded,

> [18] On a plain reading of s. 24(5), its rules apply if two conditions are met:
>
> 1. the former limitation period did not expire before January 1, 2004; and,
>
> 2. a limitation period under the new *Limitations Act* would apply if the claim were based on an act or omission that took place after January 1, 2004.
>
> [19] Thus, I must first consider whether the two conditions in s. 24(5) have been met.

Have the conditions in s. 24(5) of the new Limitations Act been met?

The First Condition

[20] The former limitation period, as provided by s. 45(1)(g) of the former *Limitations Act*, was six years. As the motion judge explained, given that a payment had been made in October 1998, that six-year limitation period expired in October 2004. As the former six-year limitation period had not expired before January 1, 2004, the first condition is met.

[34.] I apply similar reasoning to the case at bar. The default of the defendant that triggered clause 15 of the contract and thus accelerated defendant's duty to pay the full balance due straightaway was the non-payment of June 6, 2003. Thus the limitation then applicable expired June 6, 2009, i.e., after January 1, 2004. The Court continued,

The Second Condition

[21] The second condition requires a determination as to whether a limitation period under the new *Limitations Act* would apply if the appellant's claim were based on an act or omission that took place after January 1, 2004.

[22] The parties disagree as to what act or omission is the basis of the appellant's claim. The appellant contends that her claim is based on the respondent's refusal to repay the loan after demand for repayment had been made. The respondent maintains that the appellant's claim is based on the Note. In my view, regardless of which of those views is correct, a limitation period under the new *Limitations Act* would apply and the second condition has been met.

> [23] Section 4 of the new *Limitations Act* creates a basic limitation period of two years following the discovery of a claim. It reads as follows:
>
> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> [24] None of the exceptions in s. 2 of the new *Limitations Act* apply to a demand promissory note so *prima facie* the appellant's claim (whether based on default after demand for repayment or the Note) would be subject to the two-year limitation period provided for by s. 4. As discussed below, the appellant's claim may be subject to the fifteen-year ultimate limitation period in s. 15 of the new *Limitations Act*. *However, whether the applicable limitation period is two years or fifteen years is immaterial for the purposes of the second condition as all that is required is that a limitation period under the new Limitations Act would apply if the claim were based on an act or omission that took place after January 1, 2004.* (Emphasis added).
>
> [25] As both conditions in s. 24(5) are met, its rules apply. Determination of which of its two rules applies will dictate whether the governing limitation period is that provided by the former or the new *Limitations Act*.

[35.] To follow the reasoning of the Court, it follows in the case at bar that a limitation would apply if the claim were based on an act or omission that took place after January 1, 2004. No one has suggested that the new *Act* would not impose a limitation on a claim on a demand note or on a line of credit.

[36.] Following the reasoning of the Court of Appeal therefore,

> [25] As both conditions in s. 24(5) are met, its rules apply. Determination of which of its two rules applies will dictate whether the governing limitation period is that provided by the former or the new *Limitations Act*.

[37.] The first rule ss. 24(5) is,

> 1. if the claim was not discovered before the effective date [January 1, 2004], this Act applies as if the act or omission had taken place on the effective date.

[38.] In interpreting this Rule, the Court of Appeal applied s 5(2) of the new Act:

> 5.(1) A claim is discovered on the earlier of
> (a) the day on which the person with the claim first knew
> (i) that the injury, loss or damage had occurred
> ...
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[39.] The court held that the act on which the holder's claim was based was the delivery of the note, (in which it included the acknowledgement). Since there was no evidence to rebut the presumption that the holder knew of the claim on the day of delivery or the day of acknowledgement, the Court ruled that the claim *was* discovered before January 1, 2004. Hence Rule 1 under ss. 24(5) did not apply. Thus Rule 2 under ss. 24(5) did apply.

> 2. If the claim was discovered before the effective date, the former limitation applies.

[40.] Since the 6 year limitation applied, the holder's suit to enforce the note was commenced after it was barred. Summary judgment dismissing the holder's suit was upheld by the Court of Appeal.

[41.] It is at this point that defendant in the case at bar argues that the facts here differ from those in *Hare*.

[42.] Defendant points to his letter of acknowledgement of June 2, 2004, and to the words of ss. 13(1) of the new *Act*.

> If a person acknowledges liability in respect of a claim for payment of a liquidated sum, ... the act or omission on which the claim is based *shall be deemed* to have taken place on the day on which the acknowledgement was made. (Emphasis added).

[43.] Defendant argues that this statutory command requires the Court to find that the act on which the claim is based occurred June 4, 2004, the day on which defendant sent his letter acknowledging his liability.

[44.] If that is the case, then Rule 1.of ss. 24(5) applies. Thus the claim was not discovered before January 1, 2004, and "this Act applies as if the act or omission had taken place on the effective date". If this argument prevails then the Bank's action, not commenced until October 17, 2007, was barred as of June 4, 2006.

[45.] Equally, however, the new *Act* commands under s. 5(1), (see above), that the Bank's claim was discovered on the day on which the Bank first knew that the loss had occurred. The statute provides in ss. 5(2) that the person with a claim,

> shall be presumed to have known of the [discovery] on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[46.] Since that discovery happened on June 6, 2003, it happened before January 1, 2004, and thus, applying ss. 24(5) Rule 2, it can be argued the former limitation applies.

The Flaw in Defendant's Argument.

[47.] I return to the words of s. 13(1) of the New *Act*.

> If a person acknowledges liability in respect of a claim for payment of a liquidated sum, ... the act or omission on which the claim is based *shall be deemed* to have taken place on the day on which the acknowledgement was made. (Emphasis added).

[48.] Upon the facts before me, the evidence is clear that defendant *also* acknowledged liability on his obligation to the Bank when he last made a payment on account of that liability. The defendant's last payment to the Bank occurred April 14, 2003. That act was an acknowledgement just as much as defendant's letter of June 2, 2004.

[49.] Following this line of reasoning, s. 13(1) deems that the act or omission on which the claim is based took place on the day on which the acknowledgement was made, namely, April 14, 2003. Since that is before January 1, 2004, Rule 2. of ss. 24(5) applies, and the former limitation applies. The effect of this interpretation would be to extend the limitation to April 14, 2009. Thus the Bank's suit would not be statute-barred.

[50.] The policy of the new statute is to start the stopwatch of a limitation ticking once the person with the claim *discovers* the injury,

loss or damage. The policy of the recent cases decided under the former limitations statutes was also not to start the stopwatch of a limitation ticking until the person knew of the claim, i.e., until that person had discovered it.

[51.] What we are confronted with, in the case at bar, is a plaintiff who has twice "discovered" his claim against defendant. Which "discovery" is operative?

[52.] Discovery implies the acquisition of knowledge *for the first time*. Columbus discovered America in 1492. He may have returned to America in 1498, but he only "discovered" America once, in 1492.

[53.] Learning for the second time is not discovery.

[54.] If the Bank knew on April 14, 2003 that defendant had acknowledged his liability, it cannot sensibly be asserted that the Bank "discovered" that acknowledgement again on June 2, 2004. On June 2, 2004 the Bank was simply re-informed of what it already knew all too well.

[55.] I therefore conclude that the operative discovery, the one that started the stopwatch of the limitation ticking, was the discovery of June 6, 2003.

[56.] Defendant might then assert that his *first* acknowledgement occurred with his *first* payment, presumably made in May or June 1995. If that were the case, then ss. 24(3) of the new Act provides that

> If the former limitation had expired before [January 1, 2004] no proceeding shall be commenced in respect of the claim.

[57.] The Bank would be statute-barred.

[58.] I do not think that argument is tenable. In *Montreal Trust Co. of Canada v Vanness Estate* [7] the Court of Appeal for Ontario stated:

> ... 'a payment by a debtor to his creditor, from which a new promise to pay the debt may be inferred, has the effect of starting afresh the running of a period of limitation'. There were many such payments over the life of this mortgage, including many within the ten years before the action was commenced.

[59.] With each payment, a debtor re-acknowledges his liability. The acknowledgement that is operative, in computing the commencement of a limitation, is the acknowledgement that last occurs before the final default. A reasonable observer of the facts of this case would clearly see, in hindsight, that as of June 6, 2003, the Bank would not be disposed to make any further advances on the line of credit agreement after that date. From that date forward the Bank was focused on recovery of the debt. It had discovered its claim.

[60.] It is an oddity that under the former limitation, an action might not lie until after defendant had missed the instalment due a month following his last acknowledgement. However, under both the former and the new statutes, the discovery date would be the same, the day of the last acknowledgement before default.

[61.] Mr. Christie's letter of June 2, 2004, and his argument, were both cleverly contrived, but the operative word is *contrived.* His letter of June 2, 2004, couched as it was, in the language of an admission of liability, had drama. It tended to distract the reader and turn his

[7] [2005] O.J. 594 at ¶ 2. O.C.A.

attention away from the real acknowledgement. But that letter could not change history. The real acknowledgement was made April 14, 2003. Thus plaintiff discovered its claim on that day.

[62.] Hence I rule that Rule 2. of ss. 24(5) applies. The former limitation period applies. Plaintiff's action was commenced within six years of June 6, 2003. The motion for summary judgment is granted. Plaintiff shall have judgment against defendant for $31,209.02. Post judgment interest will be at the *Courts of Justice Act* rate.

[63.] I will accept written submissions as to costs, if delivered by the plaintiff by August 22, 2008, and by the defendant, by September 5, 2008.

Released at Milton Ontario, July 28, 2008.

"original signed by Langdon J."

Langdon J.