

IN THE SUPREME COURT OF NOVA SCOTIA  
**Citation:** Cluett v. Metro Computerized Bookkeeping Ltd.,  
2004 NSSC 196

**Date:** 2004/10/05  
**Docket:** S. H. No. 174414  
**Registry:** Halifax

**Between:**

Jeanette Cluett

Plaintiff

v.

Metro Computerized Bookkeeping Limited and Ian Hill

Defendants

**Judge:** The Honourable Justice K. Peter Richard

**Heard:** September 20, 21 and 22, 2004, in Halifax, Nova Scotia

**Counsel:** Kevin A. MacDonald, for the plaintiff  
Raymond S. Riddell, Q.C., for the defendants

**By the Court:**

**Introduction**

- [1] In this action the Plaintiff, Jeanette Cluett (Cluett) claims against Metro Computerized Bookkeeping Limited (Metro) and Ian Hill (Hill) damages for breach of contract in the amount of \$20,000 as well as general damages and exemplary damages. Hill and Metro counterclaim for the sum of \$56,000 for additional rent and unpaid business taxes for 1992.
- [2] At a pretrial conference it became clear that there are two preliminary issues involving an application by the plaintiff to add or substitute another plaintiff and to seek relief from the provisions of the Limitation of Actions Act. At that time I directed that I would deal with these matters at the opening of trial. After two days of hearings the matter was adjourned pending the determination of these preliminary issues.

**Background**

- [3] The plaintiff - Cluett she had a Grade IX education and had subsequently taken courses in accounting or bookkeeping. She had been employed in the securities section of Canada Trust following which she worked as an accounts receivable clerk at the Holiday Inn. Sometime later she became office manager for Maritime Graphic Arts and then was employed by the Royal Nova Scotia Yacht Squadron as an accountant for four years. It was in this position that she met the Defendant Hill who seemed impressed with her abilities. Hill told Cluett that if she ever wanted to make a move he might have something for her. In 1988 Cluett left the RNSYS and joined Hill Investments where she acted as office manager and did most of the accounting for several of the companies in which Hill had interests. In this capacity she did most of the accounting for the defendant Metro. After Metro acquired the Maritime Motel she did the accounts for that operation also. I find that at all material times Cluett was an experienced and competent records keeper and office manager.
- [4] In June of 1991 Cluett, through a numbered company, 2110250 Nova Scotia Limited, assumed the operation of the Maritime Motel by lease with an option to purchase. The lessor was Metro. During the time that she operated the Motel Cluett continued to do the "financials" for Hill Investments. . On September 30, 1993, after some 27 months, she gave up

the operation of the Motel and also resigned her other employment with Hill Investments. This action relates to this time frame.

- [5] Sometime in 1993 Cluett began treatment with her family doctor for stress and depression. According to the evidence she was prescribed a medium strength dosage of Atavin which is described as a medication used "to relieve nervousness and tension or improve sleep disturbances". Cluett indicated that in 1994 through 1996 she had several personal problems including the serious illnesses of her mother and her sister. These and other stresses prompted her doctor, in early 1996, to order her on sick leave for two to four months.
- [6] After her departure from the Motel and Hill Investments Cluett through her numbered company operated a video rental outlet for about six months in early 1994. She worked for another company for a period of time but this was terminated when she went on sick leave as previously indicated.. Although the evidence is not clear, it appears that Cluett returned to employment with Sobeys for about three months. Following that she ran a small gift shop at the Lord Nelson Hotel, again through her numbered company. It appears that this lasted about two years. At the present time Cluett, through the same numbered company operates a commercial and domestic cleaning company and has been so engaged for about five years.
- [7] The defendants - Hill is a businessman in the metro area with wide ranging interests in businesses such as automobile sales, automobile and property leasing as well as the operation of Metro Computerized Bookkeeping. All of his operations were conducted through limited companies and he did little or no business in his personal capacity. At times material to this action Hill spent considerable time (approximately four winter months) out of the country. Hill described 2001 as "not a good year". His son, a quadriplegic with whom he had a very close relationship, died in June of that year. Hill had, what he described as a "nervous breakdown" and went into extreme depression. Later that year he underwent surgery for prostate cancer. Sometime in November 2001 a storage building, owned by one of the Hill companies and containing many of the old corporate records, was destroyed by fire. For this reason Hill or his business associate Corkum were unable to review any of their documents relating to this matter.

## **The Cause of Action**

- [8] In May of 1991 Cluett and Hill commenced negotiations respecting the operation of the Maritime Motel in Bedford. On 13 May Hill wrote a memo to Cluett outlining the terms of a five year lease with option to purchase. The proposal called for a base rental of \$90,000 per year and additional rental of \$20,000 payable on 30 September of each year. It also called for a "security deposit" of \$20,000. As to the security deposit the proposal stated: "*A security deposit of \$20,000 would be held by Metro during the term of the lease to be returned to you upon satisfactory completion of the lease or to be applied to the purchase price of the property should you exercise your option to purchase referred to below.*" The security deposit is the subject matter of this action.
- [9] Cluett immediately instructed her lawyer, Kevin MacDonald to incorporate a numbered company through which she would operate the Motel. She entered into possession of the Motel on 1 June on her understanding that Metro would provide the lease purchase agreement later in the month. Cluett also retained MacDonald to act for her in the sale of her home since she needed cash for the payment of the security deposit. Also, there was a small home on the Motel property which she intended to move into in order to be close to her business.
- [10] The evidence is not clear as to the preparation of the lease after Cluett went into possession of the Motel property. A draft was prepared by Metro, or by Hill's business associate Eric Corkum, although there is some suggestion that another lawyer may have had a hand in the preparation of the lease. In any event, a draft copy of the lease was given to Cluett's lawyer who made several changes in the interests of his client. Sometime during the summer, or probably in September of 1991 Cluett was successful in selling her home. In early October Hill attended at the Motel and took delivery of the \$20,000 cheque drawn on Cluett's personal account and marked as "*Sec. Dep M.Motel*". In the records of Cluett's numbered company the security deposit is recorded as a "shareholders loan". Later financial statements of the numbered company show that this shareholders loan had been paid off.
- [11] The lease was a long time "in process" as evidenced by the fact that Cluett's lawyer wrote a letter to Metro indicating that if the lease was not executed within a reasonable time then she would require the return of the security deposit. It is unclear what happened as a result of this, but in a letter from Hill to Cluett of 24 September, 1992 Hill indicates that the lease was never executed.

- [12] During the time that Cluett was operating the Motel she was also employed by Hill Investments keeping the records for one or more of the Hill companies.
- [13] There is evidence to show that the Motel operation was not as lucrative as Cluett had originally hoped which may have been due, at least in part, to a downturn in the economy which had a detrimental effect on the tourism industry. On 23 September, 1992 Hill and Cluett met to review the situation. This resulted in the letter of 24 September which outlined the terms of a new arrangement which included a lower rental and other decreased expenses for Cluett. The letter also enumerated outstanding obligations under the lease which totaled \$56,000. This amount was comprised of "additional rental" for two years and unpaid realty taxes. This letter was apparently passed to Cluett's lawyer who responded by letter of 30 October 1992 which stated in part that Cluett: "*wishes to have no further dealings with yourself or Metro Computerized Bookkeeping in relation to the Maritime Motel.*" The letter further advises Metro that Cluett is entitled to a return of the \$20,000 security deposit... and reserves her right to maintain an action against Metro if the deposit is not returned to her.
- [14] In spite of that letter a new lease with a term of one year was drafted and given to Cluett's lawyer for review. Several changes were made and the revised document was reviewed by Cluett and Hill at the Motel in early October. It was then signed by the parties and Cluett delivered the signed copies to her lawyer who completed the jurat and registered the lease on 22 October, 1992. This lease contained a clause which purported to cancel all of the debts between the parties - "*By signing this lease the parties herein and Jeanette Cluett acknowledge that any agreements or leases entered into prior to the date of this lease on the property are replaced by this agreement and any monies owing between the parties are considered null and void.*" In her evidence Cluett said that she never read the leases that evening before signing it, even though she had initialled all of the changes before signing.
- [15] On 10 August, Cluett 1993 wrote a letter to Hill indicating that she would not be renewing the lease for the Motel and would terminate her employment with Hill Investments as of 30 October, 1993. Cluett said that in conversation with Hill around this time she asked for the return of the \$20,000 and he said "its all gone". She said that she then knew he would not repay the security deposit. I conclude from the evidence that the separation

on 30 October was amicable. Cluett asked if she could stay in the house for October if necessary, Hill agreed to this although it proved unnecessary since Cluett found alternate accommodation. On 28 July, 1994, at the request of Cluett, Hill wrote what only can be described as a glowing letter of recommendation for Cluett which ended with the comment "*I believe whomever employes (sic) Jeannette would acquire a valuable asset*". Cluett also said she continued a friendly relationship with Hill's disabled son.

- [16] Based on this evidence I find that this alleged cause of action arose on 1 October 1992 when Cluett, through her numbered company executed the lease (without purchase option) which purported to absolve the parties from any and all debt existing at the time. Hill was of the opinion that all outstanding matters between the parties had thus been resolved.
- [17] Cluett said that on New Years Eve of 2000 she resolved to do whatever was necessary to get the \$20,000 security deposit returned to her. Even after making that decision it was some seven and a half months, in mid-August that she met with Hill to make her demand. In August of 2001 Cluett met with Hill at Tim Horton's on Kempt Road and made a demand for the return of the security deposit. Hill said he dismissed this demand as frivolous. Hill said he was upset with this turn of events and he advised her to call Eric Corkum. This happened 8 years and 10 months after the cause of action arose without any other activity during the intervening time. The action was not commenced until 4 October, 2001, a full nine years after the cause of action arose on 1 October 1992.
- [18] There is no evidence that Cluett sought or received any legal advice during this time respecting the matter. It was open to Cluett to seek such advice respecting her legal rights as set out in MacDonald's letter of 30 October 1992 at any time but she apparently elected to do nothing.
- [19] This is a contractual matter which, under S. 2 (1) (e) of the Limitation of Actions Act, requires that the action must be commenced "within six years after the cause of any such action arose". However, S.3 of the Act purports to give the trial judge a wide discretion in disallowing a defence based upon the prescribed limitation period. The relevant portions of S.3 are:
- 3(1) In this Section,
    - (a) "action" means an action of a type mentioned in subsection (1) of Section 2;
    - (b) "notice" means a notice which is required before the commencement of an action;

(c) "time limitation" means a limitation for either commencing an action or giving a notice pursuant to

- (i) the provisions of Section 2,
- (ii) the provisions of any enactment other than this Act,
- (iii) the provisions of an agreement or contract.

(2) Where an action is commenced without regard to a time limitation, and an order has not been made pursuant to subsection (3), the court in which it is brought, upon application, may disallow a defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which

- (a) the time limitation prejudices the plaintiff of any person whom he represents; and
- (b) any decision of the court under this Section would prejudice the defendant or any person whom he represents, or any other person.

...

3(4) In making a determination pursuant to subsection (2), the court shall have regard to all the circumstances of the case and in particular to

- (a) the length of and the reasons for the delay on the part of the plaintiff;
- (b) any information or notice given by the defendant to the plaintiff respecting the time limitation;
- (c) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought or notice had been given within the time limitations;
- (d) the conduct of the defendant after the cause of action arose, including the extent to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
- (e) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
- (f) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to

which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(g) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

...

(6) A court shall not exercise the jurisdiction conferred by this Section where the action is commenced or notice given more than four years after the time limitation therefor expired."

[20] I shall now deal with each of the circumstances of the case as outlined in S.(3)(3) of the Act.

(a) - The delay in this case is a full nine years after the cause of action arose. I am unable to discern, from the evidence of the plaintiff, any valid reason for such a lengthy delay. She did speak to stress related health problems which required medication and a four month period of leave. But her own evidence indicates that she was actively involved in business, either self-employed or as an employee during the balance of these 9 years.

(b) - I am satisfied that the defendants thought that all outstanding issues with Cluett had long since been settled so they had no possible reason to give any notice to Cluett respecting time limitations.

(c) - This action could have been commenced at any time after 30 October 1992. In my view, the elapse of 9 years raises a presumption that the evidence would be less cogent than it otherwise would have been. The evidence of Hill, taken as a whole, suggests a certain lack of cogency which can be attributed to the passage of time and the fact that for nine years the matter was completely "out of mind".

Further, in mid November 2001 the defendant's storage warehouse in Dartmouth was destroyed by fire and the defendant lost many old records including those relating to Metro and the Maritime Motel. The defendant was therefore prevented from determining what, if any, old records would have been germane to the defence of the plaintiff's action.



(d) - The defendants were not aware of the cause of action until the Cluett/Hill meeting in August of 2001 at Tim Horton's. Accordingly, there were no requests made by the plaintiff to which the defendants could respond.

(e) - It seems that this circumstance relates to a disability arising out of the cause of action. In this case there is no disability other than that alluded to in (a) above.

(f) - This also seems to relate more to a personal injury situation. In the context of this case, the plaintiff's lawyer had stated the nature of the claim to the defendants in his letter of 30 October 1992. It is presumed that this was done on the instructions of Cluett. Therefore, it is reasonable to conclude that the plaintiff acted neither promptly nor reasonably by "sitting on her rights" for some nine years. In *Butler v. Southam*, (2001), 197 N.S.R. (2d) 97 NSCA) Cromwell, J.A. said at para 142 "*Moreover, concern with the Plaintiff's diligence is consistent with s. 3 (2)'s focus on what is equitable. It will generally be less equitable for a limitation defence to defeat the claim of a diligent Plaintiff than of one who has sat back on his or her rights.*"(underscoring mine).

[21] In *Woods v. Hubley*, (1996), 146 N.S.R. (2d) 97, Chipman JA noted in paragraph 36:

*A review of all of the cases suggests to me that the amendments give a trial judge a very substantial discretion to virtually do away with limitation defences, subject only to the limit imposed by s. 3(6) of the Act.*

I do not read this as a direction to the trial judge to routinely grant all applications for relief from statutory time limitations. Indeed, such an interpretation is tantamount to adding four years to the prescribed limitation periods as a matter of course. In the *Random House Dictionary*, 2nd Ed, discretion is defined as "*The power or right to decide or act according to one's own judgement*". In my view, had I found in favour of the plaintiff and disallowed the defence under the Limitation of Actions Act I would have abdicated my statutory duty to exercise discretion.

[22] Accordingly, the plaintiff's application to disallow the defence under the Limitations of Actions Act is denied and the action fails on that ground.

[23] Since this disposes of the entire action I deem it unnecessary to rule upon the other preliminary matters which counsel addressed in their submissions.

[24] In the result, the plaintiff's action is dismissed. Costs will follow the cause. If necessary, I will accept submissions from counsel respecting quantum of costs.

[25] Judgement Accordingly

J.