Claim No: SCCH-467775

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
AND IN THE MATTER OF A TAXATION

Cite as: Kenzie MacKinnon Law Inc. v. Mont, 2017 NSSM 71

BETWEEN:

KENZIE MacKINNON LAW INC.

Applicant (Solicitor)

- and -

WILLIAM MONT

Respondent (Client)

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on December 5, 2017

Decision rendered on December 6, 2017

APPEARANCES

For the Applicant (Solicitor)	Kenzie MacKinnon
For the Respondent (Client)	Matthew Moir Counsel

BY THE COURT:

[1] The applicant, Kenzie MacKinnon, is an experienced lawyer who practices primarily in the area of family law. As the material filed in support of this taxation of costs confirms, Mr. MacKinnon began representing the client, Mr. Mont, in or about March 2009, and continued to represent him for approximately 16 months thereafter. The last time docket entry is dated July 27, 2010. The last of a series of accounts rendered to the client by Mr. MacKinnon is dated June 21, 2011. By that time, the legal bill had accumulated to $42,140.55.

[2] This notice of taxation was commenced on August 31, 2017.

[3] This filing date of August 31, 2017 was no accident. As most Nova Scotia lawyers were aware, September 1, 2017 represented an important date for purposes of limitation periods. In legislation passed in 2014, the previous Limitation of Actions Act was repealed and replaced with a new Act. The overall intent of the legislation was (partly) to reduce limitation periods from what was often as much as six years, to two years. Because of the effect that this would have on existing rights, the legislation created certain transitional provisions. At the risk of oversimplification, between September 1, 2015 and September 1, 2017, the old limitation periods would continue to apply, although certain other procedures in the old Limitation of Actions Act would be repealed. In other words, during that two-year time frame, an action could survive for as much as the six-year period, but the provisions in section 3 of the old Act, which provided for an application to extend the limitation period by as much as four years, would no longer apply.

[4] To put those provisions in the context of this taxation, what that meant was that a contractual claim, such as the claim against the client for legal services, would be subject to the standard six year limitation until September 1, 2017, after which only a two-year limitation period would apply.

[5] As noted, this claim was commenced just under the wire on August 31, 2017, so that Mr. MacKinnon would not have to contend with a two-year limitation period. However, he is still stuck with a six year limitation period.

[6] A legal bill is payable when rendered, unless some other term is stipulated. As such, the debt to Mr. MacKinnon, if there is one, crystallized on June 21, 2011. Assuming no intervening act that would extend that limitation period, any claim to collect that account would have become statute barred on June 21, 2017.

[7] Mr. MacKinnon contends that there was an intervening event that the court should accept as having changed the date upon which the cause of action can be said to have arisen. Specifically, he produced an email which appears to be from Mr. Mont dated June 26, 2012, which contains what can charitably be characterized as an acknowledgement that there was a legal bill for which he was liable. Mr. MacKinnon says that this amounts to a "acknowledgement" within the meaning of section 20 of the new act. That section reads:

> **Acknowledgments**
>
> 20 (1) Where, before the expiry of the relevant limitation period established by this Act, a person acknowledges liability in respect of a claim for
>
> (a) payment of a liquidated sum;
> (b) the recovery of personal property;

(c) the enforcement of a charge on personal property; or
(d) relief from enforcement of a charge on personal property,

the limitation period begins again at the time of the acknowledgment.

(2) An acknowledgment of liability in respect of a claim for interest is an acknowledgment of liability in respect of a claim for the principal and for interest falling due after the acknowledgment is made.

(3) An acknowledgment of liability in respect of a claim to realize on or redeem collateral under a security agreement or to recover money in respect of the collateral is deemed to be an acknowledgment by any other person who later comes into possession of the collateral.

(4) A debtor's performance of an obligation in respect of a security agreement is an acknowledgment by the debtor of liability in respect of a claim by the creditor for realization on the collateral under agreement.

(5) A creditor's acceptance of a debtor's payment or performance of an obligation in respect of a security agreement is an acknowledgment by the creditor of liability in respect of a claim by the debtor for redemption of the collateral under the agreement.

(6) An acknowledgment by a trustee is an acknowledgment by any other person who is or who later becomes a trustee of the same trust.

(7) An acknowledgment of liability in respect of a claim to recover or enforce an equitable interest in personal property by a person in possession of it is an acknowledgment by any other person who later comes into possession of it.

(8) Subject to subsections (9) and (10), this Section applies to an acknowledgment of liability in respect of a claim for payment of a liquidated sum even if the person making the acknowledgment refuses or does not promise to pay the sum or the balance of the sum owing.

(9) This Section does not apply unless the acknowledgment is made to

(a) the claimant;
(b) the claimant's agent; or
(c) an official receiver of or trustee for the claimant, acting under the Bankruptcy and Insolvency Act (Canada), before the expiry of the limitation period applicable to the claim.

> (10) Subsections (1), (2), (3), (6) and (7) do not apply unless the acknowledgment is in writing and signed by the person making it or the person's agent.
>
> (11) In the case of a claim for payment of a liquidated sum, part payment of the sum by the defendant or the defendant's agent has the same effect as an acknowledgment referred to in subsection (10).

[8] Mr. Moir argues that the email in question does not qualify under subsection 10, because it is not "an acknowledgement in writing signed by the person making it or the person's agent."

[9] I see two questions. The first question is whether the email in question is truly an acknowledgement of a debt. The second question is whether, notwithstanding its apparent genuineness, an email deriving from someone's email account can be said to have been signed.

[10] On the first question, I will quote certain parts of the email:

> "Could you send me an itemized statement ... seems high as we really didn't accomplish much but regardless you can't work for nothing."

[11] The email goes on to lament the author’s poor financial situation.

[12] I find it hard to accept that this email truly acknowledges the debt. My understanding of the reason for why an acknowledgement would reset the limitation period, is that an unequivocal acknowledgement of a debt is virtually the same thing as a promissory note, and it accordingly stands as a renewed debt as of the date that it is signed.

[13] The requirement in the Act for the acknowledgement to be in writing, must be given proper effect. I do not see it as being anachronistic or accidental. In an analogous piece of legislation such as the *Statute of Frauds*, which dates back centuries, the requirement for certain documents to be in writing has been relaxed to an extent, such as where a contract can be said to have been partly performed. The purpose of such an exception was discussed in *Haan v Haan*, 2015 ABCA 395 (CanLII):

> (a) The Statute of Frauds recites that it was enacted for the ". . . prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury . . .". The mischief arising from claimants asserting oral agreements was to be avoided by requiring that certain contracts be evidenced by "some memorandum or note thereof . . . in writing and signed by the party to be charged therewith . . .". Contracts respecting land "created by livery and seisen[1] only or by parole" would not be enforced absent such a writing.
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> (b) It quickly became apparent to the common law judges that the Statute might itself become an instrument of fraud (or at least injustice) if it was strictly enforced with respect to contracts that were wholly or partly performed: *Hill v Nova Scotia (Attorney General),* 1997 CanLII 401 (SCC), [1997] 1 SCR 69 at para. 10. The courts developed the concept of "part performance" as an exception. If a contract concerning land was partly performed, that could displace the need for a note or memorandum in writing signed by the party to be charged.
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> (c) It was one thing to create an exception that displaced the need for a memorandum in writing, but something else to completely nullify the Statute's operation. The thrust of the Statute was that contracts concerning land could not be proved by parol evidence alone. Thus, part performance might be an exception, but it could not, in effect, mean that the underlying contract could be proven by parol evidence. In developing the "part performance" exception, a balancing of the competing considerations was required. An important factor in the case law became that the part performance must be "unequivocally" related to the alleged contract.
>
> (d) In *McNeil v Corbett* (1907), 1907 CanLII 45 (SCC), 39 SCR 608 at pp. 611-2 Duff J stated the rule in the following way:

> With great respect, moreover, I must disagree with the view of the court below that the plaintiff has made out a case enabling him to take advantage of the doctrine known as the doctrine of part performance. A condition of the application of that doctrine is thus stated by Lord Selborne, in *Maddison v. Alderson*, 8 App. Cas. 467, at page 479:
>
> All the authorities shew that the acts relied upon must be unequivocally, and in their own nature, referable to some such agreement as that alleged;

[14] What I take from this is that the common law courts of centuries past, mindful of the need to ensure that the requirement of writing not be used as a tool for fraud, developed a narrow exception where “part performance” unequivocally pointed to the alleged agreement respecting land.

[15] However, the provisions of the new Limitation of Actions Act were passed by the Nova Scotia legislature in the year 2014, when it was already well known that much communication takes place by means other than signed documentation. Had the legislature intended that any other reliable acknowledgement would satisfy the terms of the statute, and effectively reset the limitation period, the legislature could have said so. They reverted to the old standby, a document signed by the liable party. Signatures still mean something in 2017.

[16] I have no doubt that Mr. Mont originated the subject email, as I fully trust Mr. MacKinnon's credibility, and I have zero doubt that this document is a forgery or that it could have originated from anyone other than Mr. Mont. However, this is not the question.

[17] The acknowledgement, such as it is, is somewhat equivocal. I do not believe that, on its face, it qualifies as an acknowledgement of the "debt." It is, at

best, an acknowledgement of some legal obligation that Mr. Mont probably hoped to negotiate downward. This does not, in my opinion, satisfy the requirement for an acknowledgement which, as I have already stated, should be the equivalent of a promissory note confirming an earlier debt.

[18] Moreover, I am not prepared to circumvent the specific requirements of the legislation which require any acknowledgement to be in writing and signed by the person giving it. Nothing short of a document signed by Mr. Mont acknowledging the specific debt in full, would satisfy the terms of the statute.

[19] Accordingly, it is inescapable that Mr. MacKinnon simply waited too long to commence his claim. I find that the claim was statute barred as of June 21, 2017, and the debt was extinguished thereafter. As such, the debt no longer existed, in law, on August 31, 2017 when Mr. MacKinnon commenced this notice of taxation.

[20] Accordingly, the preliminary objection by Mr. Moir is upheld, and the request to tax the account and make a payment order is accordingly denied.

[21] This decision having been dispositive of the entire matter, it is not necessary to consider other arguments raised by Mr. Moir on behalf of his client.

Eric K. Slone, Adjudicator