

CITATION: Guillemette v. Doucet, 2007 ONCA 743
DATE: 20071101
DOCKET: C45944

COURT OF APPEAL FOR ONTARIO

DOHERTY, GOUDGE and LANG JJ.A.

BETWEEN:

LAUREINE GUILLEMETTE

Applicant
(Respondent in Appeal)

and

PETER J. DOUCET

Respondent
(Appellant in Appeal)

James Morton, for the appellant

Sylvano Carlesso and Lisa Barazzutti, for the respondent

Heard: September 21, 2007

On appeal from the order of Justice David Nadeau of the Superior Court of Justice dated October 24, 2006 directing an assessment of the appellant's accounts.

DOHERTY J.A.:

I

Overview

[1] This appeal addresses the applicability of the two-year limitation period set out in s. 4 of the *Limitations Act*, R.S.O. 2002, c. 24, Sch. B to an application for an order directing the assessment of a solicitor's accounts brought pursuant to s. 4 of the *Solicitors Act*, R.S.O. 1990, c. S.15. The appellant, Peter J. Doucet ("Doucet"), a lawyer, argues that s. 4 of the *Limitations Act* applies and that the application brought by his former client, Laureine Guillemette ("Guillemette") was out of time.

[2] The application judge rejected this submission and directed that the accounts be assessed. I agree with his conclusion and would dismiss the appeal. In my view, the special circumstances exception in s. 4 of the *Solicitors Act* applies to Guillemette's application and permits the commencement of the application for a Reference to assess costs beyond the two year limitation period found in the *Limitations Act*. In addition, were it necessary to do so, I would hold that under the terms of the transitional provisions in s. 24(5) of the *Limitations Act*, the limitation period in the *Solicitors Act* applies since Guillemette's claim was discovered by her prior to January 1, 2004. The claim was not time barred under that statute.

II

The Facts

[3] Not unexpectedly, in a dispute over a lawyer's accounts, the lawyer and the client have very different versions of many of the relevant events. In directing an assessment, the application judge concluded that the material before him provided the requisite "special circumstances" warranting an assessment despite the passage of almost three years from the payment of the accounts.

[4] A finding of "special circumstances" turns on a fact driven exercise of judicial discretion. This court will defer to that discretion absent an error in principle or a clearly unreasonable result: *Plazavest Financial Corporation et. al. v. National Bank of Canada* (2000), 47 O.R. (3d) 641 at para. 33 (C.A.). I see no basis upon which to interfere with the application judge's exercise of his discretion.

[5] As I would not interfere with the finding of special circumstances, it is not necessary for me to review much of the conflicting evidence placed before the

application judge.¹ I observe, however, that some factual disputes between Doucet and Guillemette remain outstanding and will be resolved at the assessment. I need review only the facts relevant to the limitation period argument.

[6] Guillemette retained Doucet in mid-December 2002 to act for her in a matrimonial dispute. She signed a written retainer. Doucet acted for Guillemette until June 2003. Over the six months of his retainer, he delivered several accounts to Guillemette totalling about \$31,000. All of the accounts were paid in a timely fashion. The last account was paid before the end of June 2003.²

[7] Things did not go smoothly between Guillemette and Doucet. She regularly complained about the amount of his bills. She withheld payment on occasion and Doucet threatened to stop working on her behalf if she did not pay the accounts immediately. As he put it:

You are required to pay all of my accounts as rendered in accordance with our retainer agreement. If you stop paying my accounts, I will stop working for you. It is that simple.

[8] Guillemette's health was not good between December 2002 and June 2003. She had various physical problems and was abusing pain medication. She ended up in the hospital in September 2003. According to her, it was almost a year before she was physically able to look after her affairs and some considerable additional time before she could "gain control of [her] life".

[9] Guillemette indicated that after receiving and paying Doucet's last account in June 2003, she went to another lawyer she knew for assistance in assessing Doucet's accounts. She believed that the accounts were much too high. A secretary in that lawyer's office told Guillemette that she should hire a lawyer in Cochrane, where Doucet's office was located, to assist her in assessing his accounts. Guillemette did not take any further steps to initiate the assessment and in September 2003 she was hospitalized. She contended that she was physically and emotionally unable to initiate the application until 2006.

[10] This application for an assessment was commenced in March 2006, about thirty-three months after Guillemette received and paid Doucet's last account.

¹ In his factum, the appellant also argued that he was denied procedural fairness on the application. That claim was not urged in oral argument and is without merit.

² Guillemette also claims that she paid an additional \$10,000 to Doucet which, has not been accounted for by him in his accounts. Doucet denies that he received the additional \$10,000.

III

The Relevant Legislation

(a) The Solicitors Act

[11] A client may challenge his or her solicitor’s accounts by way of an assessment. The provisions of the *Solicitors Act* governing applications for assessments are notoriously unclear: see *Fiset v. Falconer*, [2005] O.J. No. 4023 at para. 24 (Sup. Ct.). Sections 4 and 11 of the *Solicitors Act* are in issue on this appeal. The present s. 11 came into force on January 1, 2004 as one of many amendments made to various statutes when the new *Limitations Act* came into force: *Limitations Act*, 2002 s. 46. The predecessor to s. 11 is also germane to this appeal. The relevant provisions are set out below:

Current Provisions	Predecessor Section
<p>4.(1) No such reference shall be directed upon an application made by the party chargeable with such bill after a verdict or judgment has been obtained, <u>or after twelve months from the time such bill was delivered, sent or left as aforesaid, except under special circumstances</u> to be proved to the satisfaction of the court or judge to whom the application for the reference is made. [Emphasis added.]</p> <p>11. The payment of a bill does not preclude the court from referring it for assessment if the special circumstances of the case, in the opinion of the court, appear to require the assessment.</p>	<p>4. Same as the present provision.</p> <p>11. The payment of a bill does not preclude the court from referring it for assessment, <u>if the application is made within twelve months after payment</u>, and if the special circumstances of the case, in the opinion of the court, appear to require the assessment. [Emphasis added.]</p>

[12] Prior to the amendment to s. 11, the case law revealed some confusion as to the interaction of ss. 4 and 11 on applications pertaining to accounts that had been paid more than twelve months before the application for an assessment was made. In *Fellowes, McNeil v. Kansa Canadian Management Services Inc.* (1997), 34 O.R. (3d) 301 at 302 (C.A.), this court held:

The *Solicitors Act*, R.S.O. 1990, c. S.15 makes no provision for the assessment of accounts paid more than 12 months before the application is made.

[13] In *Enterprise Rent-a-Car Co. v. Shapiro, Andrews, Finlayson* (1998), 38 O.R. (3d) 257 at 260 (C.A.), this court held that s. 4 of the *Solicitors Act*, which permits assessments beyond twelve months after delivery if “special circumstances” are shown, applies to both paid and unpaid accounts: See also *Fiset v. Falconer, supra*, at paras. 35-37 which adopts the position taken in *Fellowes, supra*.

[14] The amendment to s. 11 deletes the requirement that the application for the assessment of a paid account be made “within 12 months after payment”. Section 11 no longer imposes any time limit on the bringing of the application for an assessment of the paid accounts. The present s. 11, however, maintains the requirement that in all cases where the client seeks to assess paid accounts, the client must demonstrate “special circumstances”. The “special circumstances” requirement reflects the commonsense inference that payment of an account implies an acceptance of the reasonableness of the account: *Enterprise Rent-a-Car Co. v. Shapiro, Andrews, Finlayson, supra* at 265, *Re Randell and Robins and Robins* (1979), 22 O.R. (2d) 642 at 643 (H.C.).

[15] Section 4 of the *Solicitors Act* was not amended by the *Limitations Act*. The twelve month time period that runs from the delivery of the accounts applies to all accounts whether paid or unpaid, as does the “special circumstances” exception to that twelve month time limit. Consequently, an application to assess paid accounts brought more than twelve months after delivery of those accounts is subject to the “special circumstances” requirements in both ss. 4 and 11.

[16] The “special circumstances” that are relevant to a decision to allow an assessment of a paid account will overlap with the “special circumstances” that are relevant to the decision to permit an assessment more than twelve months after delivery of the account. The “special circumstances” will not, however, necessarily be identical. For example, the fact that an account was paid under a mistake may be relevant to the “special circumstances” required by s. 11 of the *Solicitors Act*, but not to the “special circumstances” required in s. 4. Similarly, a disabling illness suffered after payment of the account may constitute a “special circumstance” under s. 4 of the *Solicitors Act*, but have no relevance to the “special circumstance” inquiry under s. 11.

(b) The *Limitations Act*

[17] The *Limitations Act* came into force on January 1, 2004. It effected an overhaul of the law pertaining to limitation periods in Ontario: see *York Condominium Corp. No. 382 v. Jay-M Holdings Ltd.* (2007), 84 O.R. (3d) 414 (C.A.).

[18] One commentator has described the impact of the new *Act* in these terms:

The changes to the limitations law are dramatic and, although they are designed to rationalize and modernize a complex area of the law, legal practitioners will need to consider carefully the impact of the new limitations regime on their clients' affairs.³

[19] Section 2 of the *Limitations Act* provides that the *Act* “applies to claims pursued in court proceedings” and then lists several exceptions to that general rule of application. None of the exceptions are relevant to this proceeding. The word “claim” is defined broadly as “a claim to remedy an injury, loss or damage that occurred as a result of an act or omission”.

[20] I agree with the appellant’s submission that the application brought by Guillemette falls within the phrase “claims pursued in court proceedings” in s. 2 of the *Limitations Act*.

[21] Section 4 of the *Limitations Act* sets out what the heading describes as the “Basic Limitation Period”:

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.

[22] Section 19 of the *Limitations Act* speaks to the application of limitation periods found in other statutes to claims to which the *Limitations Act* applies:

19.(1) A limitation period set out in or under another Act that applies to a claim to which this Act applies is of no effect unless,

(a) the provision establishing it is listed in the Schedule to this Act; or

(b) the provision establishing it,

(i) is in existence on the day this Act comes into force, and

³ J. Lee “An Overview of the Ontario Limitations Act , 2002” (2004) 28 Advocates’ Q. 29 at 29.

(ii) incorporates by reference a provision listed in the Schedule to this Act.

- (2) Subsection (1) applies despite any other Act.
- (3) The fact that a provision is listed in the Schedule shall not be construed as a statement that the limitation period established by the provision would otherwise apply to a claim defined in this Act.
- (4) If there is a conflict between a limitation period established by a provision referred to in subsection (1) and one established by any other provision of this Act, the limitation period established by the provision referred to in subsection (1) prevails.
- (5) Sections 6, 7 and 11 apply, with necessary modifications, to a limitation period established by a provision referred to in subsection (1).

S.O. 2002, c. 24, Sched. B., s. 19, in force January 1, 2004 (O. Gaz. 2003 p. 789-790).

[23] Section 19 reflects the legislature's intention to jettison the numerous limitation provisions scattered throughout the statutes in favour of the generally applicable provisions found in the *Limitations Act*. With the exception of the statutes identified in s. 19(1), that section negates the operation of limitation periods found in other statutes if the claim in issue is one to which the *Limitations Act* applies. The *Solicitors Act* is not listed in the Schedule referred to in s. 19(1) of the *Limitations Act*, and does not incorporate by reference any of the statutes listed in that Schedule. Consequently, and subject to the transitional provisions in s. 24 of the *Limitations Act*, any limitation periods in the *Solicitors Act* do not apply to a claim to which the *Limitations Act* applies.

[24] Section 20 of the *Limitations Act* addresses provisions under other statutes which modify limitation periods set out in those statutes, as for example, by providing for the extension of a limitation period. It reads:

20. This Act does not affect the extension, suspension or other variation of a limitation period or other time limit by or under another Act.

[25] Section 20 retains in force any “extension, suspension or other variation” of a limitation period found in another statute even if the limitation period in that statute is itself no longer applicable to the claim by virtue of s. 19(1) of the *Limitations Act*.

[26] The transition provisions in the *Limitations Act* are also relevant to this appeal. Section 24(2) reads:

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

[27] Guillemette’s claim was based on acts that occurred before January 1, 2004 and no proceeding had been commenced before that date. The transition provisions apply to this claim.

[28] Section 24(5) sets out the rules for determining whether a former limitation period, or the limitation period in the *Limitations Act* applies to a claim that is caught by s. 24:

24(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. [Emphasis added.]

IV

(a) The applicable time limit

[29] The issue raised on this appeal appears to be a matter of first impression. None of the case law to which the court was referred addresses the relationship of the statutes in

issue on this appeal, or the interpretation of the relevant provisions of the *Limitations Act*.⁴

[30] The *Limitations Act* seeks to simplify and standardize the law of limitation periods in Ontario in part by fixing two generally applicable limitation periods, the basic limitation period of two years (s. 4) and an ultimate limitation period of 15 years (s.15). The Act, however, recognizes that these generally applicable limitation periods cannot apply in all circumstances and to all claims. Under the *Limitations Act*, some claims have no limitation period (s.16), some claims remained subject to the limitation periods set out in other statutes (s. 19), and some remain subject to limitation provisions in other statutes during the transition period referred to in s. 24.

[31] Section 20 of the *Limitations Act* places a further qualification on the application of the limitations periods set out in the Act. Section 20 provides that nothing in the *Limitations Act* will affect a provision in another act which extends, suspends or otherwise varies the limitation period found in another Act. Section 20 recognizes that individual statutes may provide for situations or conditions in which the limitation provisions in those statutes should be extended or modified. Those provisions may well be particularly apt for the limitation period addressed in that specific statute. The *Limitations Act* does not seek to standardize the circumstances in which limitation periods can be extended, suspended or otherwise varied by statute.

[32] I think the “special circumstances” qualifier in s. 4 of the *Solicitors Act* falls within s. 20 of the *Limitations Act*. The twelve month time period in s. 4 has repeatedly been described as a limitation period: see e.g. *Enterprise Rent-a-Car Co. v. Shapiro, Andrews, Finlayson, supra*, at 260-261. Where “special circumstances” exist, the court will order an assessment beyond twelve months after delivery of the account, thereby effectively extending, suspending or otherwise varying the twelve month time limit set out in s. 4.

[33] Consequently, while by virtue of s. 19 of the *Limitations Act*, the two year limitation period in that Act trumps the twelve month limitation period in s. 4, s. 20 of the

⁴ The court was referred to a passage from Rosemary Bocska, ed., *Ontario Limitation Periods: A Handbook of Limitation Periods and Other Statutory Time Limits*, 2d ed. (Toronto: Butterworths, 2003) at 1428 where the author observes:

With the removal of the 12-month limitation period in s. 11 of the *Solicitors Act*, the governing limitation period for court assessment of solicitor’s bills is now found in s. 4 of the *Limitations Act*, 2002.

No authority is cited for this proposition and no reference is made to the 12 month limitation in s. 4 of the *Solicitors Act*. Nor does this observation appear to have been carried forward into the Rosemary Bocska, ed., *Ontario Limitations Manual*, 3d (Toronto: Butterworths, 2006).

Limitations Act preserves the “special circumstances” exception set out in s. 4 of the *Solicitors Act*.

[34] Applying my analysis to this case, Guillemette had to show special circumstances before an assessment could be ordered because she was seeking to assess an account that had been paid: *Solicitors Act*, s. 11. Guillemette also had to show special circumstances because she was seeking an assessment more than two years after the delivery of the accounts: *Limitations Act*, s. 4; *Solicitors Act*, s. 4.

[35] I appreciate that my interpretation of the interaction of the *Limitations Act* and the *Solicitors Act* means that there is no absolute time bar against applications for the assessment of lawyers’ accounts. This result may seem inconsistent with the purpose underlying the *Limitations Act*. However, solicitors’ accounts have always been treated differently than other debts and even other professional accounts. A superior court has an inherent jurisdiction to review lawyers’ accounts entirely apart from any statutory authority. That inherent jurisdiction was not subject to a time limit. My interpretation of the two Acts preserves that *status quo*: see *Rooney et al. v. Jasinski*, [1952] O.R. 869 at 875 (C.A.); *Plazavest Financial Corp. v. National Bank of Canada et al.*, *supra* paras. 14-16.

[36] The passage of time, particularly a lengthy time period after a bill has been paid, will be a significant consideration in exercising the “special circumstances” discretion in both ss. 4 and 11 of the *Solicitors Act*. Time alone will not, however, preclude the examination of the suitability of a lawyer’s accounts where other circumstances compel a review of those accounts.

(b) The transitional provision

[37] Alternatively, if s. 20 of the *Limitations Act* does not preserve the “special circumstances” exemption found in s. 4 of the *Solicitors Act*, I would hold that the transitional provision in the *Limitations Act* forecloses the operation of the two year limitation period set out in s. 4 of the *Limitations Act*.

[38] Section 24 of the *Limitations Act* speaks to actions commenced after January 1, 2004 where the claim is based on an act or omission that took place before January 1, 2004. The transitional rules are found in s. 24(5). This case fits within s. 24(5) in that the limitation under the *Solicitors Act* had not expired as of January 1, 2004 and the limitation period in the *Limitations Act* would have applied had Guillemette’s claim been based on acts that took place after January 1, 2004.

[39] The question of whether the limitation provision in the *Limitations Act*, or the limitation provision in the *Solicitors Act* applies turns on when the claim was discovered. Rule 1 in s. 24(5) speaks to those cases where the claim is discovered after January 1,

2004. The *Limitations Act* provisions apply to those claims. Rule 2 speaks to claims discovered before January 1, 2004. The former legislation, in this case the *Solicitors Act*, applies to those claims.

[40] Guillemette contended that she had decided she had been overcharged by Doucet and wanted to assess his accounts by late June 2003. It is difficult to suggest that she had not discovered the claim by the end of June 2003 when she went to a lawyer seeking to commence an action against Doucet for recovery of some of those fees.

[41] On any measure of discoverability, Guillemette knew of her claim against Doucet by the end of June, well before January 1, 2004. Clearly, if the definition of discoverability provided in s. 5 of the *Limitations Act* guides the interpretation of discoverability for the purposes of s. 24(5), Guillemette had discovered her claim against Doucet when she went to another lawyer in June 2003. By that time, the loss of which she complained, the money paid to Doucet, had occurred (s. 5(1)(a)(i)). Also by that time, Guillemette had attributed her loss to Doucet's actions (s. 5(1)(a)(ii)(iii)). She had also decided that a legal proceeding was the appropriate means by which to remedy her loss (s. 5(1)(a)(iv)).

[42] Guillemette's claim was discovered before January 1, 2004. Under the terms of s. 24(5) any limitation period imposed on her action against Doucet had to be found in the *Solicitors Act* and not the *Limitations Act*. Section 4 of the *Solicitors Act* permitted the action assuming the judge found "special circumstances" at any time after the accounts were delivered.

V

Conclusion

[43] The claim advanced by Guillemette is not time barred. The application judge did not err in directing that the assessment of the accounts pursuant to s. 4 of the *Solicitors Act*. I would dismiss the appeal.

[44] The respondent is entitled to her costs. In oral argument, counsel agreed that \$4,500 (\$3,000 in legal fees plus \$1,500 for travel expenses) would be appropriate if the respondent was successful. I agree with counsel's submission and would so order.

RELEASED: "DD" "NOV 01 2007"

"Doherty J.A."
"I agree S.T. Goudge J.A."
"I agree S.E. Lang J.A."