CITATION: 1475182 Ontario Inc. o/a Edges Contracting v. Ghotbi, 2021 ONSC 3477
DIVISIONAL COURT FILE NO.: DC-19-27-00
SMALL CLAIMS COURT FILE NO. SC-18-116863
DATE: 20210513

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	
1475182 Ontario Inc. o/a Edges Contracting Plaintiff/Respondent	*Daniel Yudashkin* for the Plaintiff/Respondent
– and –	
Benjamin Ghotbi and 2310152 Ontario Inc. Defendants/Appellants	Timothy M. Duggan for the Defendants/Appellants
	HEARD: April 1, 2021 by Videoconference

REASONS FOR DECISION ON APPEAL

C. BOSWELL J.

[1] Civil claims in Ontario must generally be commenced within two years of the act or omission giving rise to the claim. After that they are statute-barred by the provisions of the *Limitations Act, 2002,* S.O. 2002 c. 24., Sched. B (the "*Act*").

[2] The "limitations clock" presumptively begins to tick on the date of the act or omission that gives rise to the claim. But that date can be extended in certain circumstances. One of those circumstances is where a debtor acknowledges a debt to a creditor in writing. Where that occurs, the clock begins to tick on the date of the acknowledgment.

[3] In this case, Edges Contracting ("Edges") sued Dr. Benjamin Ghotbi for money it says it is owed on a construction contract. The claim was commenced on May 30, 2018. Dr. Ghotbi argued at trial that the limitation period had expired because the last time he had made a payment to Edges on the contract was in March 2016. Edges submitted that Dr. Ghotbi had acknowledged

the debt in a text message sent June 2, 2016 and that the limitations period commenced on that date. If Edges was right, its claim was issued just days before the limitation period expired.

[4] The action was tried in the Small Claims Court. The trial judge agreed with Edges' position on the limitations issue. Dr. Ghotbi appeals, saying the trial judge erred in his application of the provisions of the *Act*. More specifically, he says the purported acknowledgment wasn't clear and unequivocal and that it demonstrated that there was a dispute about the amount outstanding. The trial judge failed, he says, to turn his mind to these factors. Moreover, the purported acknowledgment was not signed, which is a statutory requirement to an effective acknowledgment.

[5] For the reasons that follow, the appeal is dismissed.

OVERVIEW

[6] Benjamin Ghotbi is a dentist. In January 2015 he hired Edges to construct leasehold improvements at his new dental practice on Yonge Street in Thornhill.

[7] The existence and terms of the contract between the parties are not in dispute. The value of the contract, with taxes, was $245,210.00.

[8] Edges invoiced Dr. Ghotbi as work on the project progressed. In total, three invoices were rendered. The first, for $79,100.00 was rendered on April 28, 2015. It was paid in full on May 21, 2015. The second, also for $79,100.00, was rendered on August 31, 2015. It too was paid in full, on September 25, 2015. The third and final invoice was rendered on January 19, 2016. Partial payment in the amount of $62,489.00 was made on March 11, 2016, leaving a balance owing of $24,521.00.

[9] The parties communicated with one another by text messages following the March 11, 2016 payment. Those communications included the following exchange on June 2, 2016 between Dr. Ghotbi and Sonny Lupo, the principal of Edges:

> Mr. Lupo: Hello. We can be there in an hour to inspect what was already looked at and passed by the city. We will stop in only if you are in the office and have a cheque as discussed numerous times. This payment is months past due and we have completed plenty of extras without receiving a penny. Will you be there with our payment?
>
> Dr.Ghotbi: The balance will be paid once everything is completed as per your agreement. No payment will be made until everything is clear. I'm going to hire a third-party inspector and their fees will be deducted from your payments too.

[10] No further payments were made by Dr. Ghotbi on the contract.

[11] Edges commenced a claim in the Small Claims Court seeking $25,000.00 in damages plus costs.

[12] Dr. Ghotbi defended Edges' claim, asserting, amongst other things, that Edges' claim was out of time. He also commenced a Defendant's Claim against Edges seeking damages of $25,000.00 for negligence, breach of contract, breach of trust and misrepresentation.

[13] The action came on for trial before Deputy Judge Freedman on September 12, 2019. It was continued and completed on November 25, 2019. Judgment was granted in Edges' favour on that date for $24,521.00 plus $4,350.00 in costs. Dr. Ghotbi's Defendant's Claim was dismissed.

The Limitations Act, 2002

[14] One of the central issues at trial, and the only issue on appeal, is the trial judge's determination of the limitations issue.

[15] Three provisions of the *Limitations Act, 2002* are significant to the issue on appeal: ss. 4, 5 and 13.

[16] Section 4 provides for a basic two-year limitation period: a proceeding shall not be commenced after the second anniversary of the day on which the claim was discovered.

[17] Section 5 establishes the framework for assessing the date upon which a claim was discovered. It includes a rebuttable presumption that a claim was discovered on the date the act or omission giving rise to the claim took place.

[18] Section 13 provides, in effect, for the extension of the commencement date of a limitation period in relation to a claim for liquidated damages where an acknowledgment of the indebtedness is made. The outcome at trial turned on the application of this provision, so I will set out the relevant subsections of it in detail:

> 13 (1) If a person acknowledges liability in respect of a claim for payment of a liquidated sum, the recovery of personal property, the enforcement of a charge on personal property or relief from enforcement of a charge on personal property, the act or omission on which the claim is based shall be deemed to have taken place on the day on which the acknowledgment was made.
>
> (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 though the person making the acknowledgment refuses or does not promise to pay the sum or the balance of the sum still owing.
>
> (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.

The Decision of the Trial Judge

[19] Dr. Ghotbi took the position at trial that the applicable two-year limitation period commenced on March 11, 2016 when the last partial payment was made on account and when Dr. Ghotbi advised that he was withholding further payments. Edges took the position that the June 2, 2016 text exchange between the parties included an acknowledgment of the indebtedness by Dr. Ghotbi. In the result, the limitations clock began to tick on June 2, 2016 and the claim was commenced in time.

[20] The trial judge agreed with Edges' position. He found that the content of the text exchange on June 2, 2016 constituted an acknowledgement of the debt owing by Dr. Ghotbi to Edges. He based that finding on the plain wording of the texts, as well as the broader context of text exchanges between the parties. Although the texts were not signed, the trial judge concluded that there was no dispute as to their authenticity.

THE PARTIES' POSITIONS ON APPEAL

[21] Dr. Ghotbi submits that his appeal raises a question of law, or alternatively a question of mixed fact and law from which there is an extricable question of law, and as such, the standard of review is correctness.

[22] Dr. Ghotbi argues that the trial judge erred in his interpretation and application of s. 13 of the *Act.*

[23] He contends that an effective acknowledgment within the meaning of s. 13 of the *Act* requires:

(i) Clear and unequivocal language;

(ii) The absence of a dispute regarding the amount owing; and,

(iii) A signature.

[24] Dr. Ghotbi submits that his June 2, 2016 texts contain none of the required elements and, as such, it could not be a valid and effective acknowledgment of the debt. He says the trial judge committed legal error by (1) failing to turn his mind to the first two factors; and (2) by concluding that a finding of authenticity is a satisfactory proxy for the signature required by s. 13(10) of the *Act*. He asks that the judgment be set aside.

[25] Edges submits that the limitations issue raised on appeal by Dr. Ghotbi is a question of mixed fact and law. The standard of review is palpable and overriding error and the trial judge's decision is entitled to significant deference.

[26] Edges says there was a clear factual basis for the determination made by the trial judge that the debt was acknowledged on June 2, 2016. The fact that Dr. Ghotbi was refusing to pay the outstanding balance does not undermine the validity of the acknowledgment. There was no error, palpable or otherwise.

[27] The lack of a signature on the acknowledgment is not problematic, in Edges' submission. The jurisprudence is clear, it says, that the real issue in each case is authenticity. In this instance there is no dispute about the authenticity of the June 2, 2016 text exchange.

DISCUSSION

The Standard of Review

[28] The controlling authority with respect to appellate standards of review is *Housen v. Nikolaisen*, 2002 SCC 33. In *Housen*, the Supreme Court held that on a pure question of law, the standard of review is correctness. For findings of fact, the standard of review is palpable and overriding error. These standards are relatively easy to distinguish and apply.

[29] More difficult are questions of mixed fact and law, which involve the application of a legal standard to a set of facts. Generally, the standard of review is palpable and overriding error. But where there is an extricable question of law, such as a where the decision-maker applies an incorrect standard, fails to consider a required element of a legal test or makes a similar error in principle, then the error is properly characterized as an error of law and the applicable standard of review is correctness. See *Housen*, para. 36.

[30] The Court of Appeal recently addressed the standard of review applicable to limitations issues in *Fercan Developments Inc. v. Canada (Attorney General)*, 2021 ONCA 251 where they held, at para. 11:

> Whether a limitation period expired before an action was commenced is a question of mixed fact and law, and subject to review on appeal based on a "palpable and overriding error": *Longo v. MacLaren Art Centre Inc.*, 2014 ONCA 526, 323 O.A.C. 246, at para. 38; *Kassburg v. Sun Life Assurance Company of Canada*, 2014 ONCA 922, 124 O.R. (3d) 171, at para. 40. This is the case whether the determination is made at trial or in a motion for summary judgment: *Crombie Property Holdings Ltd. v. McColl-Frontenac Inc.*, 2017 ONCA 16, 406 D.L.R. (4th) 252, at para. 31, leave to appeal refused, [2017] S.C.C.A. No. 85. Findings of fact by the court below are subject to review on a palpable and overriding error standard. A "palpable and overriding error" is "an obvious error that is sufficiently significant to vitiate the challenged finding of fact": *Longo*, at para. 39. However, where there is an extricable error of principle, the standard of review is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] S.C.R. 235, at paras. 8, 36.

[31] With one exception, this was not a case involving the interpretation of a statutory provision, where the standard of review is correctness. That one exception is in the interpretation of s. 13(10) which imposes the requirement of a signature. I will come back to that issue momentarily.

[32] Apart from the issue involving s. 13(10), I am not satisfied that Dr. Ghotbi has demonstrated that the trial judge made any error in principle in his analysis, or any palpable and overriding error in his findings of fact or his application of the legal test to those findings.

[33] Dr. Ghotbi's assertion was that the trial judge failed to turn his mind to the requirements that the acknowledgment be clear and unequivocal and that there be no dispute as to the amount owing. I make two observations.

[34] First, I do not accept that an effective acknowledgment requires that there be no dispute as to the exact amount owing. Dr. Ghotbi's counsel cited two cases in support of this purported requirement: *Environmental Building Solutions v. 2420124 Ontario Limited*, 2018 ONSC 3112 and *T. Hamilton and Son Roofing Inc. v. Markham (City)*, 2018 ONSC 2665. In my view, these cases turn on their unique facts. I am not persuaded that they stand for the general proposition urged upon the court by Dr. Ghotbi. If they purport to do so, then I respectfully disagree.

[35] The Court of Appeal held, in *Middleton v. Aboutown Enterprises Inc*., 2009 ONCA 466, that the debtor does *not* have to demonstrate and confirm the amount of the debt that remains owing for the acknowledgment to be effective.

[36] In my view, it is sufficient that the debtor acknowledges that the debt claimed is owing, though he or she may dispute the precise amount or may refuse to pay. If it were otherwise, a written and signed statement by a debtor that he or she accepts that 95% of a claimed debt is owing, but disputes the other 5%, would be an ineffective acknowledgment under s. 13 of the *Act*. That cannot be the case.

[37] Second, while I agree with the submission that an effective acknowledgment must be clear and unequivocal (see *1702108 Ontario Inc. v. 3283313 Canada Inc*., 2016 ONCA 420 at para. 5), I am not satisfied that the trial judge failed to turn his mind to this requirement.

[38] This was a Small Claims Court trial. The Small Claims Court deals with a very large volume of cases. Those cases are, by design, disposed of as expeditiously as possible. Deputy judges typically give brief oral reasons for their findings and conclusions immediately following, or shortly after, the evidence and arguments have been completed. One cannot expect the level of detail in those reasons as one might expect following a lengthy trial in this court.

[39] Trial judges are presumed to know the law and apply it correctly. There is nothing in the trial judge's reasons that indicates that he was not aware of the applicable requirements of an effective acknowledgment under s. 13 of the *Act*. Indeed, I am of the view that it is implicit in the brief reasons given by the trial judge that he took the appropriate factors into account. Those factors had just been put to him in argument immediately before he rendered his decision.

[40] While the trial judge did not expressly use the phrase, "clear and unequivocal acknowledgment", that is not surprising, since neither counsel expressly used that phrase in argument. That said, it is evident that part of the debate in submissions was about whether the texts in issue constituted a clear acknowledgment that the debt in issue was owing to Edges. The trial judge said that in his view it was "fairly clear on the plain wording of the textual exchanges" that they constituted an acknowledgment of the debt within the meaning of s. 13 of the *Act*. Read in context, I do not interpret the trial judge's use of the adjective "fairly" to dilute in any way his conclusion that the acknowledgment was clear.

[41] I will turn, then, to the one extricable question of law which relates to the interpretation of s. 13(10) and the requirement of a signature.

The Signature Requirement

[42] An acknowledgment of indebtedness is not effective, for the purposes of s. 13 of the *Act,* unless it is in writing and signed by the debtor or the debtor's agent.

[43] There is no question that the purported acknowledgment here was in writing. The question is whether it was signed.

[44] The trial judge concluded that the requirements of s. 13(10) had been met. In my view, he was correct, although I would reach that conclusion in a slightly different manner than he did.

[45] The trial judge based his conclusion on the authenticity of the June 2, 2016 text messages, citing in support of that conclusion the case of *Lev v. Serebrennikov,* 2016 ONSC 2093. There, Patillo J., sitting as a single judge of the Divisional Court, considered whether an email, with the debtor's name on it, could satisfy the requirements of s. 13 of the *Act*. He found that it could, saying "the issue in every case will be one of fact concerning authenticity." (Para. 24).

[46] I agree that the signature requirement of s. 13(10) is grounded in concerns about authenticity. But the plain wording of the section cannot simply be ignored, in my view, even if the court is satisfied about authenticity by a means other than a signature.

[47] On the facts of the case at bar, Dr. Ghotbi's texts were obviously not "signed" in the traditional sense. But s. 13(10) does not prescribe any particular type of signature.

[48] The world is changing. Everyone knows that. We live in a digital world now, much more than was the case when the *Act* came into force in 2002. It is incumbent upon the court to consider not just traditional means of affixing one's signature to a document, but other, more modern means, including digital signatures.

[49] In this instance, there is no question about the authenticity of the text messages. There is no question that Dr. Ghotbi was the author of the June 2, 2016 texts in issue. From that perspective, the underlying purpose of s. 13(10) has been satisfied.

[50] I would also find that the express requirement of a signature is met in this case. Dr. Ghotbi used his cellular telephone to send and receive texts with Mr. Lupo. Dr. Ghotbi, like all other cellular telephone users, has a unique phone number linked with his phone. In fact, there will undoubtedly be other unique identifiers associated with Dr. Ghotbi's phone including, without limitation, an International Mobile Equipment Identifier (IMEI) number. These unique identifiers provide, in effect, a digital signature on every message sent by the user of that particular device. Again, there is no dispute that the user of the device was Dr. Ghotbi and that he sent the texts in issue. In my view, that digital signature is sufficient to meet the requirements of s. 13(10) of the *Act*.

CONCLUSION

[51] In the result, the appeal is dismissed.

[52] The parties each filed cost outlines. Edges' partial indemnity costs are sought at $7,800.00. Dr. Ghotbi's costs outline indicates that his counsel would have sought $6,800.00 in partial indemnity costs if successful.

[53] In my view, a fair, reasonable and proportionate costs award is $7,000.00, all-inclusive, and I fix costs in that amount, payable by Dr. Ghotbi to Edges within 30 days.

C. Boswell J.

Released: May 13, 2021