
CANADA / JUDGMENT

Hustad v. 594971 B.C. Ltd.

2008 BCSC 1441

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 1441 Hustad v. 594971 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hustad v. 594971 B.C. Ltd.,

2008 BCSC 1441

Date: 20081029

Docket: S083153

Registry: Vancouver

Between:

Allan Glenn Hustad

Plaintiff

And

594971 B.C. Ltd. carrying on business as Chevron Canada Ltd.,

Chevron Self Serve, Woodgrove Chevron and

Ivanhoe Cambridge carrying on business as Woodgrove Centre

Defendants

Before: The Honourable Mr. Justice Davies

Reasons for Judgment

Agent for Counsel for the Plaintiff:

J.D. James

Counsel for the Chevron Defendants:

A. Howden-Duke

K. Gourlay

Counsel for the Cambridge Defendant:

K. McLaren

Date and Place of Trial/Hearing:

August 20, 2008

Vancouver, B.C.

I. INTRODUCTION

- [1] In a statement of claim filed on October 20, 2006, the plaintiff, Allen Glenn Hustad, alleges that, on October 1, 2004, he stopped his vehicle to purchase gas at a gas station in Nanaimo which was operated by defendant 594971 B.C. Ltd., carrying on business as Chevron Canada Ltd., Chevron Self Serve, and Woodgrove Chevron (the "Chevron defendant") on land leased from the defendant, Ivanhoe Cambridge, carrying on business as Woodgrove Centre (the "Cambridge defendant").
- [2] Mr Hustad alleges that as he got out of his vehicle, his foot went through a large hole in metal grating causing him to fall and to injure his foot and ankle. He alleges that his injuries were caused by the negligence of the defendants and has pleaded and relied upon the provisions of the Occupier's Liability Act, R.S.B.C. 1996, c. 337.
- [3] The Chevron defendant has applied under Rule 18A of the Rules of Court to dismiss the plaintiff's claim as barred by the two year limitation provision for the bringing of personal injury claims under s. 3 of the Limitation Act, R.S.B.C. 1996, c. 266. A similar application by the Cambridge defendant was adjourned due to lack of notice.

II. ISSUES

- [4] In ordinary circumstances, the plaintiff's right to bring a claim for the damages arising from his alleged injury would have expired on October 1, 2006, so that his statement of claim filed on October 20, 2006 would have been filed outside the applicable limitation period.
- [5] The plaintiff submits, however, that by application of s. 5 of the Limitation Act, Zurich Canada ("Zurich"), the insurer for the Chevron defendant, confirmed the plaintiff's cause of action by a letter dated January 16, 2006 that postponed the expiry of the plaintiff's limitation period until January 16, 2008.

- [6] In response, the Chevron defendant submits that Zurich's January 16, 2006 letter cannot be construed as a confirmation of the plaintiff's cause of action due to both the context in which it was written and the response of Mr. Hustad's counsel to it. They also submit that since the letter was not signed, the provisions of s. 5(5) of the Limitation Act render it incapable of confirming the plaintiff's cause of action.
- [7] Those submissions require the determination of the following issues:
- (1) What test is to be applied under s. 5(2)(a) of the Limitation Act to determine whether a person has confirmed a cause of action;
 - (2) Did Zurich's letter of January 16, 2006 to plaintiff's counsel confirm the plaintiff's cause of action; and, if so;
 - (3) Does the absence of a signature on Zurich's letter of January 16, 2006 bar consideration of it as a confirmation of the plaintiff's cause of action?

III. BACKGROUND

- [8] Zurich was, at all relevant times, the insurer for the Chevron defendant and Nancy Campbell of Zurich was the claims specialist responsible for Mr. Hustad's claim.
- [9] After being notified of the plaintiff's claim, Ms. Campbell initiated the exchange of correspondence with Mr. Hustad's lawyer, Brian Sutton, which is now at issue on this application.
- [10] Specifically, in her letter of January 16, 2006 to Mr. Sutton, Ms. Campbell stated:

As you are aware we are the Liability Insurers representing Chevron Gas Bar. I called you on January 6, 2006 in order to discuss resolution of your client's claim.

Please advise if you have any medical documentation you can forward to the undersigned.

Thanking you in advance.

Yours very truly,

Nancy Campbell

Claims Specialist

[My emphasis]

- [11] That letter was written on letterhead identifying it as being from Zurich's Central Ontario Regional Claims Office, and while it concluded with the words "Yours very truly," with Ms. Campbell's name typed below, there is no evidence that Ms. Campbell signed the letter.
- [12] When she did not receive a reply to her January 16, 2006 letter Ms. Campbell wrote to Mr. Sutton again on May 17, 2006 saying:

May I please have a response to my voicemail of January 6, 2006, and my correspondence dated January 16, 2006.

Thanking you in advance.

Yours very truly,

Nancy Campbell

Claims Specialist

[13] Ms. Campbell's May 17, 2006 letter was written on the same Zurich letterhead but, unlike the earlier letter, was signed by her.

[14] On May 29, 2006 Mr. Sutton replied to Ms. Campbell's May 17, 2006 letter advising that Mr. Hustad was still having ongoing problems with his ankle and foot and was booked for an MRI on July 14, 2006. Mr. Sutton next stated:

In order to preserve our limitation date, we are in the process of drafting a Writ of Summons and Statement of Claim. In that regard, would you please advise whether or not you have instructions to accept the Writ of Summons

He concluded by writing:

Hopefully we will be in a position to talk once we have the results of Mr. Hustad's MRI.

[My emphasis]

[15] The evidence establishes that Mr. Sutton signed the writ of summons and statement of claim in this proceeding on September 1, 2006 but did not file either until October 20, 2006.

[16] There was no evidence adduced on this application as to the reason for the delay in filing and no evidence of any further written communications between Mr. Sutton and Zurich following his letter of May 29, 2006 until November 7, 2006, when Ms. Campbell sent Mr. Sutton an e-mail stating:

As you are aware I called you on October 12, 2006, at which time I left you a detailed voicemail.

I am interested to know if you are in a position to discuss your client's bodily injury that he had put forth.

Do you have any updated medical information you can provide me?

[My emphasis]

IV. ANALYSIS AND DISCUSSION

[17] There is no issue in this case that, but for the possible application of s. 5(1) of the Limitation Act postponing the running of the two year limitation period otherwise applicable to the plaintiff's personal injury claims, those claims would be statute barred so that the Chevron defendant would be entitled to a dismissal of the plaintiff's claims arising from the October 1, 2004 incident.

[18] To the extent that it is relevant to the issues to be decided, s. 5 of the Limitation Act provides:

5 (1) If, after time has begun to run with respect to a limitation period set by this Act, but before the expiration of the limitation period, a person against whom an action lies confirms the cause of action, the time during which the limitation period runs before the date of the confirmation does not count in the reckoning of the limitation period for the action by a person having the benefit of the confirmation against a person bound by the confirmation.

(2) For the purposes of this section,

(a) a person confirms a cause of action only if the person

(i) acknowledges a cause of action, right or title of another

(5) For the purposes of this section, an acknowledgment must be in writing and signed by the maker.

(6) For the purposes of this section, a person has the benefit of a confirmation only if the confirmation

(a) is made to the person or to a person through whom the person claims

Issue # 1: What test is to be applied under s. 5(2)(a) of the Limitation Act to determine whether a person has confirmed a cause of action?

[19] This issue arises in this case because there is now some question in British Columbia as to whether the test to be applied in determining whether a party has confirmed a cause of action is purely an objective one or whether it may now include some element of subjective intent.

[20] While I am satisfied that in the circumstances of this case the result would be the same whether an objective or subjective test is applied, it remains necessary to address this issue because of the evidence adduced and submissions made on this application.

[21] Until very recently there was no doubt that in determining whether a person had confirmed a cause of action under s. 5(2)(a) of the Limitation Act the court was to apply an objective test.

- [22] In *Podovnikoff v. Montgomery* (1984), 58 B.C.L.R. 204, 14 D.L.R. (4th) 716 [Podovnikoff], our Court of Appeal held that, in order to prove that a claim has been confirmed by a defendant, the plaintiff must show that the alleged acknowledgment did not merely "acknowledge as a bare fact that someone has asserted a cause of action," but was actually an "acknowledgment in writing of a cause of action which admits some liability there under."
- [23] In determining whether any liability has been admitted, at ¶ 14, Aikins J.A. for the Court relied upon the decision of the House of Lords in *Davies v. Elsby Brothers Ltd.* (1961) 1 W.L.R. 170 (at page 176) for the proposition that:

It is a general principle of English law, not merely applicable to cases of misnomer, that the intention which the framer of the document has in mind when he brings it into existence is not material. In that we differ from many Continental systems. In English law as a general principle the question is not what the writer of the document intended or meant but what a reasonable man reading the document would understand it to mean; and that, I think, is the test which ought to be applied as a general rule in cases of misnomer -- which may embrace a number of other situations apart from misnomer on a writ, for example, mistake as to identity in the making of a contract. I think that the test must be: how would a reasonable person receiving the document take it?

[My emphasis]

- [24] The Court then held (at ¶16) that:

While the trial judge did not expressly adopt the principle expressed by Devlin, L.J. in *Davies*, I am not persuaded in the outcome that he was wrong. Quite to the contrary, I think he reached the correct conclusion. In my view, what was said by the trial judge (reproduced earlier in this judgment) supports the conclusion that a reasonable person receiving the letters and reading them would take it that the insurer was going to settle the respondent's personal injury claim. Thus, the second and third letters admit some liability and properly acknowledge the cause of action. I would only add that this conclusion is strongly supported by the consideration that there is nothing in the letters to indicate that the insurer had any reservations about settlement. Thus, there was nothing which might indicate to the recipient of the letters anything other than that the insurer would settle. If the adjustor had any doubts about settlement he would surely have said that liability was not admitted and that he would enter settlement discussions without prejudice. If the adjustor wanted only to void litigation and secure peace, one would expect to find some indications of this position in the letters.

[My emphasis]

- [25] That objective formulation of the test to be applied in construing the effect of correspondence from the party alleged to have confirmed the cause of action precluded any subjective consideration of what its writer intended or meant.

- [26] My review of the cases cited by both counsel on this application satisfies me that after Podovnikoff until 2006, the courts of this province consistently applied solely an objective analysis in determining issues raised under s. 5(2)(a) of the Limitation Act. See: *Williams v. Williams* (1995), 6 B.C.L.R. (3d) 317, 40 C.P.C. (3d) 17 (B.C.S.C.) appeal dismissed at 83 B.C.A.C. 224; 40 C.C.L.I. (2d) 300 [Williams]; *Canadian Pacific Railway Co. v. Enderby*, 2000 BCCA 319, 139 B.C.A.C. 135 [Enderby]; and *Florio v. Hay*, 2000 BCSC 1609, 27 C.C.L.I. (3d) 302 [Florio].
- [27] After 2006, however, following the decision of the Supreme Court of Canada in *Ryan v. Moore*, 2005 SCC 38, [2005] S.C.R. 53 [Ryan], two decisions of this Court of which I am aware (*Brons v. 622943 B.C. Ltd.*, 2006 BCSC 193 [Brons] and *George v. McMahon*, 2006 BCSC 1394 [George]) introduced the possibility of consideration of a subjective element in determining whether a party had confirmed a cause of action.
- [28] In *Brons*, Boyd J. referred to *Ryan* in the context of the submission that the Supreme Court of Canada had "broadened the test to include consideration of the intention of the party who created the document" and then stated (at ¶ 29) that:
- 29 Thus, while the parties' intentions are now considered to be relevant, it appears that in keeping with the objective test, the Court must still consider what a reasonable person would determine the intention and purpose to be from an examination of the document.
- [29] Having done so, however, Boyd J. went on to assess the evidence concerning the agreement of the parties that was said to constitute an acknowledgment of liability on an objective basis by examining the document and determined that it did not. Only in the alternative did she consider the same question on a subjective basis and reach the same conclusion.
- [30] In *George*, Myers J. considered *Brons* and, more specifically, the above-quoted passage. He determined, at ¶10, that there was no evidence of the intention of the maker or recipient (then deceased) of the correspondence in issue. He also found that he could only assume that any contemporaneous documentary evidence that might have been available would not be favourable to the maker or it would have been adduced. In the result, Myers J. applied a wholly objective test.
- [31] The question thus raised by *Brons* and *George* is whether the objective test enunciated in *Podovnikoff* was modified by *Ryan* and, if so, what the effect of any modification of the test might be upon the evidence now before me and the issues to be decided.
- [32] After considering *Ryan*, *Brons* and *George*, I have concluded that the Supreme Court of Canada has not modified the *Podovnikoff* objective test. Also, to the extent that either *Brons* or *George* may suggest the contrary, the ruling in each case was not based on any subjective test or analysis. In those circumstances, *stare decisis* does not require that I apply a subjective test in determining the issues in this case.
- [33] I reach that conclusion for the following reasons.

[34] In *Ryan*, the Supreme Court of Canada was concerned with a number of complex limitation issues raised by the defendants' application to strike the plaintiff's claim. The court held that the plaintiff's claim was barred because the action was outside the limitation period set by Newfoundland and Labrador's *Survival of Actions Act*, R.S.N.L. 1990, c. S-32, and because neither the discoverability nor the confirmation of causes of action provisions of that province's *Limitations Act*, S.N.L. 1995, c. L-16.1 were applicable.

[35] After determining that the confirmation of a cause of action provisions of s. 16 of the Newfoundland and Labrador *Limitations Act* did not apply, the court did, however, in obiter dicta, go on to discuss what would be necessary to establish confirmation under provisions substantively identical to those in s. 5(2) of our *Limitation Act*. At ¶ 42-48, Bastarache J. for the Court then stated:

42 Even if this [the fact that the *Limitations Act* provisions did not apply] were not the case, the facts here do not support a finding of confirmation on the part of the appellants. I will address this issue briefly as a matter of principle.

43 In order to establish confirmation, one of two events must be proven: (1) that the party acknowledged the cause of action; or (2) that there was a payment made in respect of the cause of action (see *Mew*, at p. 115).

44 The term "acknowledges" as used in s. 16(1)(a) of the *Limitations Act* has been described by Lord Denning in *Good v. Parry*, [1963] 2 All E.R. 59 (C.A.), at p. 61, as requiring an "admission". While care must be shown when applying English case law, as the English *Limitation Act*, 1939, 2 & 3 Geo. 6, c. 21, does not provide for the acknowledgment of the "cause of action" but the acknowledgment of the "claim", it is still persuasive authority for the present interpretation.

45 Thus, a party can only be held to have acknowledged the claim if that party has in effect admitted his or her liability to pay that which the claimant seeks to recover (see *Surrendra Overseas Ltd. v. Government of Sri Lanka*, [1977] 2 All E.R. 481 (Q.B.)). As the British Columbia Court of Appeal concluded in *Podovnikoff v. Montgomery* (1984), 14 D.L.R. (4th) 716, at p. 721, a person can acknowledge as a bare fact that someone has asserted (by making a claim) a cause of action against him, without acknowledging any liability. Simple acknowledgment of the "existence" of a cause of action is insufficient to meet the requirements of s. 16(1)(a). Acknowledgment must involve acknowledgment of some liability.

46 Consequently, the letters from the adjuster to Ryan's counsel (i.e. letters of November 18, 1998 and January 25, 1999) do not restart the clock as they do not constitute an admission of liability on the part of Cabot Insurance. These were obviously only requests for information and part of the normal investigation process. As submitted by the appellants, if mere investigation of claims were to constitute confirmation, then potential defendants, in order to protect limitation defence, would have no choice but to refuse to investigate until a statement of claim is issued. This would destroy the possibility of early settlements and lead to increased litigation and costs.

47 The same conclusion applies to the second way that confirmation can occur, through payment. Of importance is the fact that both payments mentioned by Ryan, payments for Ryan's medical chart and Dr. Landells' medical report, were not evidence of liability by Cabot Insurance; nor did they indemnify Ryan, at least in part, for damages caused by the accident. Thus, they cannot be payments in respect of the "cause of action". Ryan relies on the Newfoundland Court of Appeal decision in *Wheaton v. Palmer* (2001), 205 Nfld. & P.E.I.R. 304, for the proposition that a payment made to a physician, but sent to the plaintiff's solicitor will constitute confirmation. With respect, I am of the view that the Court of Appeal erred in this determination. I prefer the contrary position of the British Columbia Court of Appeal in *MacKay v. Lemley* (1997), 44 B.C.L.R. (3d) 382, at para. 21. Payment for a medical report with a cheque payable to a physician, but sent to the plaintiff's solicitor, does not constitute confirmation of the plaintiff's cause of action:

The mere fact that the payment, although made payable to the doctor, was directed through the lawyer's office for forwarding does not, in my view, bring the payment into the express wording of the section. The payment here, as in *Germyn*, was intended to pay to the doctor. The doctor was not a person through whom the appellant could claim. This was not a reimbursement to anyone for having paid for the medical report but a direct payment to the doctor by [the Insurance Corporation of British Columbia].

48 The purpose for which these types of payments and correspondence are made is critical. In this case, they were not intended as admissions of liability, but only to promote investigation and early resolution of certain aspects of the claim.

[My emphasis]

[36] In my opinion, Ryan did not modify the objective test because:

- (1) In *Ryan* the Supreme Court of Canada expressly referred to and approved the analysis of our Court of Appeal in *Podovnikoff* in finding that acknowledgment for the purposes of s. 16(1) (a) of the Newfoundland and Labrador Limitations Act [s. 5(2)(a)(i) of our Limitation Act] must involve acknowledgment of some liability.
- (2) Since *Podovnikoff* had applied a wholly objective analysis to the determination of whether the author of the alleged confirmation had acknowledged some liability for the plaintiff's claim, and since the Supreme Court of Canada did not disapprove of that approach in otherwise accepting the tests formulated in *Podovnikoff*, it is highly unlikely that the Court would, in obiter dicta, then proceed to modify the long established objective approach without specifically advertent to its intention to do so.
- (3) In *Ryan*, the Court's consideration of the "intention" of the parties was in respect of payments made to a plaintiff's physician for medical reports with a cheque payable to the physician but sent to the plaintiff's solicitor. The reference to "intention" in ¶ 48 of the Court's decision should be read in that limited context. It should not be construed as a rejection or modification of the established principles.

- (4) There is also no suggestion in Ryan that the Court considered any subjective evidence of intention in reaching its conclusions. More specifically, although in ¶ 48 Bastarache J. stated that the "purpose for which these types of payments and correspondence are made is critical," he did not then refer to any subjective evidence to conclude that those payments were not "intended as admissions of liability."
- (5) Since intention may be objectively or subjectively determined, I respectfully disagree with the proposition that Ryan altered the objective test enunciated in Podovnikoff.
- [37] I must also observe that to inject an element of subjective intent in a case such as this could lead to obvious potential difficulty in assessing the veracity of potentially self-serving ex post facto declarations of intent concerning the communications under scrutiny. In my view, such potential difficulties underscore and support the rationale for an objective analysis.
- [38] Having reached that conclusion I must, however, also observe that if I am wrong in that analysis and that some subjective element is now part of the inquiry into whether a cause of action has been confirmed under s. 5(2)(a) of the Limitation Act, I have concluded that if what is at issue is a unilateral communication (in this case Zurich's letter of January 16, 2006) the only subjective intent that could be relevant is that of the maker of that communication. In that regard, the Chevron defendant adduced no evidence regarding Ms. Campbell's subjective intent in writing and sending her January 16, 2008 letter. Accordingly, based upon the evidentiary record of this case, no issues concerning Ms. Campbell's subjective intent arise.
- [39] Further, unlike a situation involving the construction of an agreement between two parties (as in Brons), there will, in my view, never be any need to consider the subjective intent of the recipient of a unilateral communication. That is so because if a cause of action has been confirmed by the maker of a communication, the act of confirmation is complete. Accordingly, consideration of any reaction by the recipient to a unilateral communication should be limited to the context in which the communication was received and only to the extent that it may afford some evidence to inform the objective "reasonable man" analysis mandated by Podovnikoff, as applied in Enderby, as I will later discuss.

Issue #2: Did Zurich's letter of January 16, 2006 to plaintiff's counsel confirm the plaintiff's cause of action?

- [40] Counsel for the plaintiff submits that Zurich's letter of January 16, and its reference to discussing the "resolution" of Mr. Hustad's claim, was an acknowledgement of that claim, made in writing, signed by its maker, and made to a person (his solicitor) through whom Mr. Hustad claims. He thus submits that the new limitation date mandated by s. 5(1) of the Limitation Act falls on January 16, 2008, well after the plaintiff filed his statement of claim.

[41] In making that submission, the plaintiff relies on the reasoning and correspondence considered in *Podovnikoff and Williams*, in which the authors of the correspondence in issue in those cases invited the recipients to "contact the writer to discuss the settlement" of a claim (*Podovnikoff*) or enquired whether the recipient was "in a position to discuss the settlement of this claim" (*Williams*).

[42] In both cases, the trial and appellate courts each held that, in the circumstances, those letters had confirmed the plaintiffs' causes of action since, in the absence of liability being put in issue, a reasonable person would read the letters as providing acknowledgment of a cause of action and an admission of some degree of liability.

[43] The plaintiff also relies upon *Florio*, in which Hood J. considered a letter from the defendant's insurer to plaintiff's counsel in which the author stated that:

Further to our telephone conversation, enclosed is the police report for the 1st accident.

I would appreciate once you have obtained the wage loss information I have requested to forward it to my attention as soon as possible.

I look forward to an early resolution of this matters (sic).

[My emphasis]

[44] In *Florio*, Hood J. determined that, given that concerns about liability or reservations about settlement were not raised in the letter, "a reasonable man would read [it] as providing both an acknowledgment of a cause of action, and an admission of liability, as well as advice that the [defendant] wanted to settle the Plaintiff's claims on that basis."

[45] Counsel for the Chevron defendant submits that since there is no admission of any liability on the face of Zurich's letter of January 16, 2006, I must consider whether, given the context in which the communication was made, it can be construed as admitting any liability. He submits that the present case should be distinguished from *Podovnikoff*, *Williams* and *Florio* because of that context and because in this case it "cannot be said that liability is clearly not in issue." He also submits that the Court of Appeal's decision in *Enderby* is more applicable to the facts of this case.

[46] More specifically, counsel submits that:

(1) In *Podovnikoff*, the relevant context was that "if the writer were not interested in paying on [the] claim, in other words, in settling it, why would he be so anxious to have a communication from the claimant at all?" Thus the communication was made in the context of there being nothing to indicate to the recipient anything other than that the insurer would settle.

- (2) In Williams, in considering whether the defendant's insurer's question "are you now in a position to discuss settlement of this claim" constituted a confirmation of the cause of action, Cowan J. (upheld on appeal) found that liability for the claim was not in issue because, in his view, the only question was "the extent of the defendant's liability."
- (3) In Florio, the context of the communication under consideration was also that liability was not in issue. Further, the author of the impugned correspondence in Florio referred to "early" resolution of the matter(s) under consideration, as compared to Ms. Campbell's reference only to the "resolution" of the plaintiff's claim.
- (4) In Enderby the plaintiff's claims agent replied to an alleged confirmation of the cause of action by the defendant by stating that "it appears to me that you are still investigating the accident." At ¶ 10 in Enderby the Court of Appeal adopted the conclusion of this Court that "there is no basis for me to conclude that the plaintiff's claims agent is not a reasonable person or that any reasonable person would interpret the defendants' claims agent's request for information concerning the [accident] differently."

[47] The Chevron defendant argues that the statement in Mr. Sutton's letter of May 29, 2006 that he would be drafting a writ of summons and statement of claim in order to "preserve our limitation date" indicates that plaintiff's counsel did not consider that liability was not in issue and that his actions in preparing and signing a writ of summons and statement of claim before the expiry of the original limitation period also indicate that liability was in issue.

[48] I do not agree. There is nothing in Ms. Campbell's correspondence before, at the time of, or after the sending of that letter to indicate that the Chevron defendant had, in any way, put liability in issue. I also note the November 7, 2006 e-mail from Ms. Campbell to Mr. Sutton after the expiration of the original limitation period, in which she wrote:

I am interested to know if you are in a position to discuss your client's bodily injury he has put forth

Do you have any updated medical documentation you can provide me?

[49] While that communication does not specifically address either "settlement" or "resolution" of the plaintiff's claims, its delivery after the expiration of the limitation period tends to confirm that the Chevron defendant did not consider that liability was in issue.

[50] Concerning the Chevron defendant's submission that Mr. Sutton's letter of May 29, 2006 and his actions in preparing the writ of summons and statement of claim shortly thereafter indicates that he did not view Ms. Campbell's letter as a confirmation of the cause of action, I am satisfied that the last paragraph of his May 29, 2006 letter stating "[h]opefully we will be in a position to talk once we have the results of Mr. Hustad's MRI" can equally be construed as an acceptance of the Chevron defendant's acknowledgment of liability. Also, Mr. Sutton's statement in his letter of May 29, 2006 that a writ of summons and statement of claim would soon be filed "in order to preserve our limitation date," and his preparation of the writ of

summons and statement of claim, is not incompatible with his having concluded that the cause of action had been confirmed since confirmation would have started the limitation clock running anew. His response is therefore more equivocal than the plaintiff's agent's response in Enderby that "it appears to me that you are still investigating the accident."

- [51] After considering the totality of the evidence on this application I find that liability was not put in issue by Ms. Campbell when she sent the January 16, 2006 letter.
- [52] I have thus determined that the content and purpose of the January 16, 2006 letter, as well as the context of its delivery, are not substantively different from those considered in Podovnikoff, Williams and Florio.
- [53] In result, I am satisfied that Zurich's letter of January 16, 2006 must be objectively construed as a confirmation of the plaintiff's cause of action under s. 5(2)(a)(i) of the Limitation Act, so that the plaintiff's claims against the Chevron defendant are not time barred.

Issue #3: Does the absence of a signature on Zurich's letter of January 16, 2006 bar consideration of it as a confirmation of the plaintiff's cause of action?

- [54] The Chevron defendant submitted that even if Zurich's letter of January 16, 2006 is construed as confirming the plaintiff's cause of action, it is ineffective in doing so because it was not signed by its maker as required by s. 5(5) of the Limitation Act.
- [55] Although not referred to me by either counsel at the hearing of this matter, I subsequently became aware that there is at least one decision of this court (Shaw v. Van Louie, [1998] B.C.J. No. 2415 [Shaw]) and one decision of our Court of Appeal (Byle v. Byle, (1990), 65 D.L.R. (4th) 641, 46 B.L.R. 292 [Byle]) that have previously considered s. 5(5) of the Limitation Act. I accordingly requested further submissions in writing concerning those cases and have now received those submissions.
- [56] In Shaw, K. Smith J. (as he then was) considered s. 5(5) of the Limitation Act in relation to the respondent's application for a declaration that the petitioner's right to enforce payment of arrears of maintenance was barred by the Limitation Act. The petitioner argued that the claim was not barred because the respondent had confirmed her cause of action both by reason of a letter to her from the respondent, and a later letter from the respondent's former solicitor.
- [57] Smith J. determined that the letter from the respondent was a without prejudice communication and thus inadmissible as evidence of confirmation of the cause of action. He then went on to consider the letter from the respondent's former solicitor and stated (at ¶ 19) that:

The letter appears to have been written on the respondent's behalf, but it is unsigned and is therefore ineffective to constitute a confirmation by reason of subsection 5(5):

- (5) For the purposes of this section, an acknowledgement must be in writing and signed by the maker.

See also *Byle v. Byle* (1990), 65 D.L.R. (4th) 641 (B.C.C.A.) where, at p. 662, it was held that a solicitor's memorandum did not constitute an acknowledgement under the Limitation Act because it was unsigned.

- [58] In *Byle*, as Smith J. observed in *Shaw*, at issue was an unsigned memorandum from the solicitor for the maker of a promissory note (the limitation date for recovery in respect of which had expired) indicating the maker's willingness to enter into a settlement. At trial, this Court determined that the unsigned memorandum acknowledged the debt to postpone the running of the limitation period. On appeal, however, MacDonald J.A. disagreed, stating (at page 662):

There is no signature on the memorandum. In my opinion the subsection [s. 5(5) of the Limitation Act] has not been satisfied and the counterclaim should also be dismissed as statute-barred

- [59] I am satisfied that the decisions in *Shaw* and *Byle* do not preclude Zurich's letter of January 16, 2006 as being an effective confirmation of the plaintiff's claims under s. 5 of the Limitation Act.
- [60] I reach that conclusion because the facts in this case are significantly different from those in either *Shaw* or *Byle*. While the January 16, 2006 letter was not signed, I find that it should be read together with Ms. Campbell's letter of May 17, 2006, which was signed and specifically references the earlier letter. I find that those facts cure any lack of signature on the January 16, 2006 letter.
- [61] In support of that conclusion I refer to *E & B Mortgages Ltd. v. Skrivanos* (1980), 118 D.L.R. (3d) 139, 18 R.P.R. 215 (B.C.S.C.) and *Harvie v. Gibbons* (1980), 109 D.L.R. (3d) 559, 12 Alta. L.R. (2d) 72 (Alta. C.A.) which determined that necessary preconditions to the formation of a contract could be found in more than one document. I rely also on this Court's decision in *Meredith v. Vamar Estates Ltd.*, (1979) 102 D.L.R. (3d) 623, 7 B.L.R. 241, which considered the effect of separate documents when read together in finding the existence of an agency relationship under s. 5(9) of the Limitation Act sufficient to allow a determination of acknowledgment of debt to postpone the running of the applicable limitation period.

V. CONCLUSION

- [62] I find that on reading Ms. Campbell's letter of January 16, 2006, a reasonable person would conclude that the Chevron defendant had not raised any concerns that put liability in issue and wished to settle the plaintiff's claims. The letter therefore confirmed the plaintiff's cause of action under s. 5(2)(a) of the Limitation Act. The plaintiff's statement of claim filed on October 20, 2006 was accordingly filed within the extended limitation period.

[63] I also find that the lack of a signature on the January 16, 2006 letter was cured by the signature on Ms. Campbell's letter of May 17, 2006 that incorporated the January 16, 2006 letter by reference so that s. 5(5) of the Limitation Act does not nullify the Chevron defendant's confirmation of the plaintiff's cause of action.

[64] The Chevron defendant's application to dismiss the plaintiff's claim as barred by s. 3 of the Limitation Act is dismissed.

[65] The plaintiff shall have the costs of this application on Scale B.

"Davies J."

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