COURT OF APPEAL FOR ONTARIO

CITATION: Crosslink Bridge Corp. v. Fogler, Rubinoff LLP, 2024 ONCA 230
DATE: 20240402
DOCKET: COA-23-CV-0845

Miller, Copeland and Gomery JJ.A.

BETWEEN

Crosslink Bridge Corp. and Andrew Penuvchev

Applicants (Appellants)

and

Fogler, Rubinoff LLP and Davis Moldaver LLP

Respondents (Respondents)

Jeffrey Radnoff, for the appellants

Hailey Abramsky, for the respondents

Heard: March 22, 2024

On appeal from the order of Justice Carole J. Brown of the Superior Court of Justice, dated June 27, 2023, with reasons reported at 2023 ONSC 3466.

REASONS FOR DECISION

[1] The appellants appeal the order of the motion judge setting aside an assessment order under the *Solicitors Act*, R.S.O. 1990, c. S.15 (the "*Act*"), dated October 3, 2018, as statute-barred and ordering them to pay the respondents' outstanding fees (relating to the last three unpaid accounts). The matter came before the motion judge as a result of the respondents challenging the jurisdiction

of the assessment officer at the outset of the scheduled assessment, on October 1, 2021, on the basis that reference for assessment of at least some of the accounts was statute-barred. That question turned, in part, on whether the accounts were final or interim. The assessment officer referred the issue of whether the accounts were final or interim to a judge for directions.

[2] For the reasons that follow, we allow the appeal in part and refer the last three accounts for assessment. The assessment order is statute-barred as it relates to the first 29 of the 32 invoices. However, the motion judge committed legal errors in her analysis of whether the last three invoices were subject to assessment.

No error in finding that all of the accounts were final accounts

[3] The appellants argue that the motion judge erred in finding that all of the accounts were final accounts. The appellants argue that only the last account, delivered on October 22, 2018 (after the assessment order was issued), is a final account and that the previous 31 accounts are interim. The appellants argue that the motion judge erred in law in failing to consider if the accounts were part of "a continuum". The appellants further argue that the motion judge made a palpable and overriding factual error in finding that all of the accounts were final accounts on the record before her.

[4] We are not persuaded that the motion judge erred in law in her analysis of whether the accounts were final or interim. We find no legal error in her summary of the legal principles to be applied in considering whether an account is final or interim. Although the language of "a continuum" is used in some of the cases to describe the relationship between multiple accounts that are found to be interim, it is not a distinct legal test.

[5] Nor are we persuaded that the motion judge committed a palpable and overriding error of fact. The case law is clear that the question of whether an account is final or interim is a question of fact: *Fellowes, McNeil v. Kansa Canadian Management Services Inc.* (1997), 34 O.R. (3d) 301 (C.A.), at p. 303; *Shapiro, Cohen, Andrews, Finlayson v. Enterprise Rent-a-Car Company.* (1998), 38 O.R. (3d) 257 (C.A.), at pp. 261-62. The finding of the trial judge that all of the accounts were final was open to her on the record and is owed deference.

No error in finding that the first 29 accounts are statute-barred

[6] In light of the finding that all of the accounts were final, there is no error in the motion judge's conclusion that the first 29 accounts at issue are statute-barred. This result follows from both s. 4 and s. 11 of the *Act*.

[7] The first 29 accounts were delivered between May 5, 2014 and May 29, 2017, inclusive. They were all paid by the appellants. The assessment order was issued October 3, 2018. Unless special circumstances are established by the

appellants, s. 4(1) of the *Act* bars a reference for assessment after 12 months from the delivery of the account. Unless special circumstances are established, s. 11 of the *Act* bars a reference for assessment where an account has been paid. The appellants did not seek to establish special circumstances either before the motion judge or in this court.

[8] The appellants argued that the first 29 accounts could be assessed because, in their submission, the assessment order was obtained pursuant to s. 3(a) of the *Act*, which has no limitation period. We reject this submission, except in relation to the last account, which we discuss further below.

[9] Section 3(a) of the *Act* allows a client to requisition the *delivery* and assessment of a solicitor's account, where the retainer is not disputed and there are no special circumstances. Read in conjunction with s. 3(b), which provides for requisition of an assessment "of a bill already delivered, within one month from its delivery", it is clear that s. 3(a) of the *Act* only applies in circumstances where a solicitor has not yet delivered an account at the time the assessment is requisitioned. Section 3(a) has no limitation period because a limitation period in relation to assessment of a solicitor's account cannot run before an account is delivered to the client.

[10] The assessment order issued by requisition in this case does not reference either s. 3(a) or 3(b) of the *Act*. The text on the preprinted portion of the order

includes language ordering the solicitors to “deliver to the applicant(s) a bill of fees, charges and disbursements” within 14 days of service of the order. That language appears consistent with s. 3(a) of the *Act*. But whatever the language of the order, the circumstances are clear that s. 3(a) of the *Act* cannot apply to the first 31 accounts because they had already been delivered to the appellants at the time the assessment order was requisitioned.

The motion judge erred in her analysis of the last three accounts

[11] The motion judge applied the same analysis to all 32 accounts in considering whether assessment was statute-barred. This was a legal error. The timing and payment status of the last three accounts required a different analysis under the *Act* and the Superior Court’s inherent jurisdiction over the assessment of accounts. In oral submissions, the respondent maintained that the reference for assessment of the last three accounts was statute-barred, but did not press the point.

[12] The motion judge approached the issue of the limitation period for all the accounts on the basis that the appellants were required either: (i) to show that all the accounts were interim and not final, or (ii) to establish special circumstances. This was correct for the first 29 accounts, but not for the last three accounts. We address the second-last and third-last accounts separately from the last account, as they raise different considerations.

[13] The second-last and third-last accounts were dated November 27, 2017 and April 6, 2018. They were not paid by the appellants.[1] As we have outlined above, the trial judge did not err in finding that these accounts were final accounts. However, she erred in holding that the appellants were required to establish special circumstances to have these accounts referred for assessment. A different legal analysis applies to accounts where the assessment is sought between one and 12 months after the account is delivered *and* the account remains unpaid by the client.

[14] A client is not required to show special circumstances in order to obtain a referral for assessment of accounts that have been delivered more than one month but less than 12 months before an assessment is sought, and that remain unpaid. Rather, a judge of the Superior Court has discretion whether to exercise its inherent jurisdiction to order an assessment: *Fellowes*, at pp. 302-03; *Enterprise Rent-a-Car*, at pp. 260-61; *Re Reid and Goodman & Goodman* (1974) O.R. (2d) 447 (H.C.); *Bunt v. Assuras* (2003), 63 O.R. (3d) 622 (S.C), at paras. 13 and 32; *Fiset v. Falconer*, 2005 CanLII 33783 (Ont. S.C.), at para. 34. In considering whether to exercise the discretion, a judge need only be satisfied that it is just and equitable that a reference for an assessment be made: *Bunt*, at para. 13. In *Fellowes*, this court held that, for unpaid accounts where assessment is sought

[1] The third-last account was partially paid. As it was not fully paid, we treat it as unpaid.

between one and 12 months after the account is delivered: “In the usual circumstances, little is required for that jurisdiction to be exercised” (at p. 303).

[15] The Superior Court’s discretion with respect to ordering assessment of unpaid accounts where referral for assessment is sought between one and 12 months after the account is delivered derives from the court’s inherent jurisdiction as circumscribed by the *Act*. The statutory bar in s. 3(b) of the *Act* applies to disallow an automatic right of assessment by requisition where assessment is sought more than one month after the account was delivered. However, the requirement to establish special circumstances in ss. 4 and 11 of the *Act* do not apply because the accounts are less than 12 months old (s. 4) and unpaid (s.11).

[16] In this case, the motion judge erred in law in applying a requirement to establish special circumstances to the second-last and third-last accounts because they had been rendered less than 12 months before the assessment order and remained unpaid.

[17] We acknowledge that the appellants moved by requisition under s. 3 of the *Act* and did not seek an order for assessment from a judge until after the respondents raised the jurisdictional issue at the outset of the assessment hearing. However, the respondents waited three years to raise the jurisdictional issue. Had the respondents raised the jurisdictional issue in a timely way, the appellants would have been in a position to seek an order for assessment from a judge within 12

months after the second-last and third-last accounts were issued. In the circumstances, it is appropriate to refer the second-last and third-last accounts for assessment.

[18] With respect to the last account, the trial judge erred in law in finding it was statute-barred. No limitation period was triggered for the last account as it fell within s. 3(a) of the *Act*. At the time the assessment order was requisitioned, on October 3, 2018, the last account had not yet been delivered to the appellants. It was delivered on October 22, 2018. It was also not paid by the appellants. Requisition of delivery of the last account and referral for assessment fell squarely within s. 3(a) of the *Act*. As a result, reference for assessment of this bill was not statute-barred.

Disposition

[19] The appeal is allowed in part. We vary the order of the motion judge as follows. Paragraphs 1, 2 and 3 of the order are set aside. In their place, the court orders as follows:

> 1. THIS COURT ORDERS that the Assessment Order dated October 3, 2018 is set aside in relation to the Solicitors' accounts dated May 5, 2014 to May 29, 2017, inclusive, as statute-barred, pursuant to subsection 3(b) of the *Solicitors Act*.
>
> 2. THIS COURT ORDERS that the Solicitors' accounts dated November 27, 2017, April 6, 2018, and October 22, 2018 are referred for assessment.

[20] We were advised by counsel at the hearing that an order as to costs below has not yet been made. As agreed by the parties, the respondents shall pay costs of the appeal and the motions below in the amount of $25,000, inclusive of disbursements and taxes.

"B.W. Miller J.A."
"J. Copeland J.A."
"S. Gomery J.A."