2012 ONSC 376
Ontario Superior Court of Justice

Temple, Re

2012 CarswellOnt 2817, 2012 ONSC 376, [2012] O.J. No. 856,
109 O.R. (3d) 374, 214 A.C.W.S. (3d) 609, 75 C.B.R. (5th) 312

In Matter of the Bankruptcy of Kenneth Temple of the City of Toronto in the Province of Ontario

Newbould J.

Heard: December 21, 2011
Judgment: January 27, 2012
Docket: CV-11-9532-00CL

Counsel: Calvin Ho for Applicant, Robert Edgar Gore
Robert A. Klotz for Respondent, Kenneth Temple

Subject: Insolvency; Contracts; Civil Practice and Procedure; Corporate and Commercial; Public; Torts

Headnote

Bankruptcy and insolvency --- Bankruptcy and receiving orders — General principles

Bankruptcy order — Applicant unsecured creditor was chartered accountant for debtor and his corporations — Unsecured creditor lent money to debtor and his corporations, for which only small amount was repaid — Other persons loaned debtor money for which they had not been repaid — Outstanding loans were listed as obligations of corporations — More than two years passed after last payment was made without any action being taken to collect on debt — Unsecured creditor brought application for order assigning debtor into bankruptcy — Application granted — Debtor's defences were not accepted — Debtor's defence of novation of loan obligation from him to corporation — Novation was not established — Limitations Act, 2002 was not applicable to bankruptcy application — Fact that no suit was brought on debt owing within two years of date of bankruptcy application was no defence to bankruptcy application based on that debt, as debt continued to be owed — Even if debt had to be within two-year limitation period, it would not be statute-barred, as there had been acknowledgement of debt in writing signed by debtor — Unsecured creditor, as debtor's accountant, did not breach any duty of confidentiality by giving evidence of debts owed by debtor to others.

Contracts --- Novation — Proof of novation

Bankruptcy order — Applicant unsecured creditor was chartered accountant for debtor and his corporations — Unsecured creditor lent money to debtor and his corporations, for which only small amount was repaid — Other persons loaned debtor money for which they had not been repaid — Outstanding loans were listed as obligations of corporations — Unsecured creditor brought application for order assigning debtor into bankruptcy — Application granted — Debtor's defences were not accepted — Debtor's defence of novation of loan obligation from him to corporation — Novation was not established — There was no assignment of loans from debtor to corporation, but merely administrative transfer of loans onto books of corporation — There were tax or accounting reasons for wanting loans to be shown on books of corporation — Making corporation liable on loans would not of itself make loans repayable only by corporation — Unsecured creditor did not accept liability of corporation in full satisfaction and substitution of obligation of debtor.

Civil practice and procedure --- Limitation of actions — Actions in contract or debt — Miscellaneous

Bankruptcy order — Applicant unsecured creditor was chartered accountant for debtor and his corporations — Unsecured creditor lent money to debtor and his corporations, for which only small amount was repaid — Other persons loaned debtor money for which they had not been repaid — More than two years passed after last payment was made without any action being taken to collect on debt — Unsecured creditor brought application for order assigning debtor into bankruptcy — Application granted — Limitations Act, 2002 was not applicable to bankruptcy application because bankruptcy application

was not proceeding in respect of claim to remedy injury, loss or damage — Debt was not extinguished by expiry of statutory limitation period — Because debt continued to be owed, it could be basis on which application for bankruptcy order could be made — Fact that no suit was brought on debt owing within two years of date of bankruptcy application was no defence to bankruptcy application based on that debt, as debt continued to be owed.

Civil practice and procedure --- Limitation of actions — Actions in contract or debt — Statutory limitation periods — Suspension and interruption of statute — Acknowledgment of debt

Applicant unsecured creditor was chartered accountant for debtor and his corporations — Unsecured creditor lent money to debtor and his corporations, for which only small amount was repaid — Other persons loaned debtor money for which they had not been repaid — More than two years passed after last payment was made without any action being taken to collect on debt — Unsecured creditor brought application for order assigning debtor into bankruptcy — Application granted — Limitations Act, 2002 was not applicable to bankruptcy application — Fact that no suit was brought on debt owing within two years of date of bankruptcy application was no defence to bankruptcy application based on that debt, as debt continued to be owed — Even if debt had to be within two-year limitation period, it would not be statute-barred, as there had been acknowledgement of debt in writing signed by debtor — Debtor signed trial balance sheet less than two years prior to issuance of application for bankruptcy, which was signed statement acknowledging outstanding loan to unsecured creditor and others.

Professions and occupations --- Accountants — Relationship with client

Duty of confidentiality — Applicant unsecured creditor was chartered accountant for debtor and his corporations — Unsecured creditor lent money to debtor and his corporations, for which only small amount was repaid — Other persons loaned debtor money for which they had not been repaid — Unsecured creditor brought application for order assigning debtor into bankruptcy — Application granted — Unsecured creditor, as debtor's accountant, did not breach any duty of confidentiality by giving evidence of debts owed by debtor to others — Unsecured creditor negotiated loan for other creditor and he received information for other debts from debtor as part of negotiations to provide security to creditors.

APPLICATION by unsecured creditor for order assigning debtor into bankruptcy.

***Newbould J.*:**

1 For some 20 years, the applicant was the chartered accountant for Kenneth Temple and his partner Brian Nykoliation and their various corporations involved in the land development business.

2 The applicant and his wife also lent money to them. In December 2005 Mr. Temple and Mr. Nykoliation signed a loan commitment for $425,000 in which the applicant and his wife were named as lenders. The commitment provided for interest at 10% per annum with a maturity date for the loan of May 31, 2006. The money was to be used to develop properties and was raised by the applicant and his wife by borrowing the funds from their bank secured by a mortgage on their house. $215,000 was advanced to Ken Temple Contracting Limited and $210,000 was advanced to Mark Baker & Company, the solicitor for the borrowers who acted for them in their development work. Only $75,000 in principal was repaid on the loan, the last payment being made on November 30, 2007. On February 3, 2011, the date of the issuance of this application, the outstanding principal of $350,000 and accrued interest totalled $476,723.91.

3 Mr. Paul Greenhalgh also lent money to Mr. Temple and Mr. Nykoliation. He advanced $250,000 in December 2005 and $500,000 in January 2006. Mr. Greenhalgh was also a client of Mr. Gore and it was Mr. Gore who arranged for the loan with Mr. Temple. The terms for repayment were the same as the loan made by Mr. and Mrs. Gore. Other than interest from January 2006 to November 2007, nothing has been paid on the loan by Mr. Greenhalgh.

4 Mr. Temple raises a number of defences.

Novation

5 Mr. Temple and his partner Mr. Nykoliation owned a number of properties through Beach Triangle Townhomes Limited, a company owned by them, including three properties on Broadview Avenue which were held by Mr. Temple and his wife personally in trust for Beach Triangle Townhomes Limited. It was that company that made payments on the loan to the applicant

and his wife. On November 9, 2007 Beach Triangle Townhomes Limited wrote to Mr. Gore and his wife "to confirm that as of November 9, 2007, Beach Triangle Townhomes owes the sum of $350,000 to Bob and Mary Gore". In 2009, the three properties were transferred to another company owned by Mr. Temple and Mr. Nykoliation named Temple Arthur Developments Inc. On the financial statements for Temple Arthur Developments Inc. for the year ended December 31, 2008, prepared by Mr. Gore and signed nearly one year later on December 9, 2009, the outstanding loan of Mr. Gore and his wife, as well as the outstanding loan of Paul Greenhalgh to Mr. Temple and Mr. Nykoliation, were listed as obligations of Temple Arthur Developments Inc. While the financial statements for Beach Triangle Townhomes Limited for the year 2007 are not in evidence, it is likely that these outstanding loans were also listed on those financial statements as being obligations of that company.

6 It is contended on behalf of Mr. Temple that there was a novation of the loan obligation from him and his partner Mr. Nykoliation to Temple Arthur Developments Inc. and, likely before that, to Beach Triangle Townhomes Limited.

7 Whether novation has occurred is a question of fact. In the absence of express agreement, the court should be loath to find novation unless the circumstances are really compelling. Thus, while the court may look at the surrounding circumstances, including the conduct of the parties, in order to determine whether a novation has occurred, the burden of establishing novation is not easily met. There is a three part test. First, the debtor must assume complete liability. Second, the creditor must accept the new debtor as principal debtor and not just as an agent or guarantor. Third, the creditor must accept the new contract in full satisfaction and substitution for the old contract. See *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410 (S.C.C.).

8 The evidence of Mr. Temple, which was not really challenged, was that the debt to Mr. Gore and his wife, along with other loans made by individuals to Mr. Temple and Mr. Nykoliation, were transferred "administratively" onto the books of Temple Arthur Developments Inc. on the instructions of Mr. Temple. He testified that there was no formality involved and there was no assignment of the loans from Mr. Temple and Mr. Nykoliation to the company. He also testified that there was no discussion that the loans would no longer be owed by Mr. Temple and Mr. Nykoliation although he said in cross-examination that he could not recall discussing with Mr. Temple that the debt remained his personal obligation. Neither Mr. Temple nor Mr. Nykoliation testified.

9 On June 9, 2008 Mr. Gore drafted up an agreement to be signed by Mr. Temple and Mr. Nykoliation personally that committed them to not further encumber the equity in the Broadview properties. The agreement was signed by Mr. Temple. It is significant that the agreement was not drawn to be signed by Beach Triangle Townhomes Limited, which at that stage was the beneficial owner of the properties.

10 I do not think that novation has been established. There were presumably accounting or tax reasons for wanting the loans to be shown on the books of the company, but making the company liable on the loans would not of itself make the loans repayable only by the company. The evidence does not establish that Mr. and Mrs. Gore accepted the liability of the company in full satisfaction and substitution of the obligation of Mr. Temple and Mr. Nykoliation to them. As stated in *National Trust Co. v. Mead*, *supra*, in the absence of express agreement, a court should be loath to find novation unless the circumstances are really compelling. In my view Mr. Temple has not met the onus of establishing novation.

Claim statute barred

11 The debt owing by Mr. Temple to the applicant was due on May 31, 2006 and the last payment of any kind was made in November 2007. The application for a bankruptcy order was issued on February 3, 2011, more than two years after the debt was due, and no action had been commenced to collect on the debt.

12 It is contended by Mr. Klotz on behalf of Mr. Temple that the debt owing to the applicant is statute barred and that it therefore cannot support an application for a bankruptcy order. There is no Canadian authority for the proposition advanced on behalf of Mr. Temple. Reliance is placed upon the following statement in Houlden, Morawetz and Sarra, *Bankruptcy & Insolvency Law of Canada*, 4th ed. revised, vol. 4. P. 2-39 (Carswell): "The debt must be recoverable by legal process. Accordingly, if a debt is statute barred, it is not a sufficient debt for an application: *Re Tynte*, *Ex parte Tynte* (1880), 15. Ch. D. 125". It is contended

that the debt of the applicant must not be statute barred both at the date the application for a bankruptcy order was commenced and at the date of the hearing of the application.

13 In *Re Tynte*, a bankruptcy petition was dismissed on several grounds. The petitioning creditor had obtained a judgment against the debtor 18 years prior to the petition. The debtor's only asset was a life interest in property which under a judgment obtained 14 years prior to the petition, was being held for the benefit of creditors in that action. The petitioning creditor had been entitled to participate in that other action if all prior charges had been paid, but had declined to do so. Bacon C.J. thought that the attempt to have a bankruptcy order made was "preposterous". He held that the debtor had no assets. He also held that the Real Property Limitations Act, 1874 was an answer. That statute provided that no action, suit or other proceeding should be brought to recover any sum of money secured by a judgment except within 12 years of the right to receive payment, and that as the petitioning creditor had not taken any action on his judgment for more than 12 years, he had no right to take any proceeding on his judgment. While he did not say so expressly, it appears that Bacon C.J. was of the view that the bankruptcy petition was a proceeding to recover a sum of money secured by a judgment within the meaning of the Real Property Limitations Act, 1874.

14 I would not follow *Re Tynte*. The legislation in England in 1874 was different from the current limitations legislation in Ontario. Under the *Limitations Act, 2002*, a proceeding shall not be commenced in respect of a "claim" more than two years after the claim was discovered. Section 1 defines a "claim" to mean "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission". I do not think it can reasonably be said that a bankruptcy application is a proceeding in respect of a claim to remedy an injury, loss or damage that occurred as a result of an act or omission. Thus the *Limitations Act, 2002* is not applicable to a bankruptcy application.

15 Thus, if the *Limitations Act, 2002* does not prevent a bankruptcy application, what reason would there be to prevent an application because it is based on a debt for which a law suit was not brought to enforce it within two years of the bankruptcy application?

16 The BIA requires that there must be a debt "owing" to the applicant who applies for a bankruptcy order. If the debt was owed more than two years before the bankruptcy application, and thus a proceeding to obtain a judgment on it was statute barred, could it be said that the debt was "owing"?

17 The same issue arises when a bankruptcy order has been made when claims of creditors are to be considered. Section 121(1) of the BIA provides that all debts and liabilities "to which the bankrupt is subject" shall be deemed to be claims provable in proceedings under this Act. If a creditor has a debt that was owed more than two years before the bankruptcy, and no suit within the two years was brought to enforce the debt to judgment, can it be said that the debt is one to which the bankrupt "is subject"?

18 The issue is whether a debt has been extinguished by the lack of any action having been brought within two years as required by the *Limitations Act, 2002*. The statute does not purport to state that a debt or other obligation is extinguished, but only that a proceeding shall not be commenced in respect of it.

19 In Graeme Mew, *The Law of Limitations*, 2d ed. (Markham, Ont.: Butterworths, 2004) the common law view that a limitation period bars a remedy but does not extinguish legal rights such as a debt is stated as follows:

> The common law tradition considers statutes of limitation as procedural, as contrasted with the position in most civil law countries, where limitations are regarded as substantive.
>
> As a result, limitation provisions found in Canadian statutes have, for the most part, been interpreted as extinguishing remedies rather than substantive legal rights. Thus, one commonly finds that an action must be commenced "within" or "within and not after" the prescribed period. As a result, although a party is barred from enforcing its remedies once that time period has expired, its legal right will survive. The rationale for this approach is explained as follows:
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> > Extinguishing rights is not an objective of a limitations system. Rather, its objective is to force the timely litigation of disputes, if there is to be litigation. Nevertheless, if, pursuant to a limitations statute, a defendant gains immunity

> from liability to any remedy which the law provides for the enforcement of the right upon which the claim was based, the right, although not extinguished, will become sterile.
>
> Thus in the absence of a remedy to enforce a right, such right, in and of itself, is of little value. It is not surprising, therefore, that both case law and legal texts seldom distinguish between whether it is the right or the remedy that is lost upon the expiration of the limitation period.

20 Graeme Mew points out that the traditional common law approach is changing, and cites *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 (S.C.C.). That case dealt with the tort law that should apply in cases involving a plaintiff suing in one province for a tort committed in another. The Supreme Court changed the law to provide that the tort law of the place of the accident, the *lex loci delicti*, should apply rather than the law of the province in which the suit was brought, the *lex fori*. It also held that a limitation period in the *lex loci delicti* should apply, and in so doing held that at least for the purposes of conflicts of laws, it should be considered as substantive law rather than procedural. LaForest J. stated:

> The common law traditionally considered statutes of limitation as procedural, as contrasted with the position in most civil law countries where it has traditionally been regarded as substantive.
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> . . .
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> I must confess to finding this continental approach persuasive. The reasons that formed the basis of the old common law rule seem to me to be out of place in the modern context. The notion that foreign litigants should be denied advantages not available to forum litigants does not sit well with the proposition, which I have earlier accepted, that the law that defines the character and consequences of the tort is the *lex loci delicti*. The court takes jurisdiction not to administer local law, but for the convenience of litigants, with a view to responding to modern mobility and the needs of a world or national economic order.
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> . . .
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> I do not think it is necessary to await legislation to do away with the rule in conflict of laws cases. The principle justification for the rule, preferring the *lex fori* over the *lex loci delicti*, we saw, has been displaced by this case. So far as the technical distinction between right and remedy, Canadian courts have been chipping away at it for some time on the basis of relevant policy considerations. I think this Court should continue the trend. It seems to be particularly appropriate to do so in the conflict of laws field where, as I stated earlier, the purpose of substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of both parties.

21 It is understandable that the Supreme Court said what it did about limitation periods when it held that the rights of the parties should be governed by the *lex loci delicti*. That is because historically, procedural rules of the *lex fori* governed law suits, and unless the limitation period in the *lex loci delicti* could be considered a substantive right, it would not apply. The Supreme Court was concerned to ensure that all of the rights of the parties should be governed by the *lex loci delicti*.

22 Can it be said as a result of *Tolofson* that limitation laws are now to be taken as substantive rather than procedural? In Ontario, that is questionable, as section 23 of the *Limitations Act, 2002*, enacted some 8 years after *Tolofson*, provides "For the purpose of applying the rules regarding conflict of laws, the limitations law of Ontario or any other jurisdiction is substantive law." Why would the legislature have said that if the limitations law of Ontario was already substantive? Implicit in the language of section 23 is that for purposes other than applying conflict of law rules, the limitations law of Ontario is not substantive.

23 But more importantly, it does not follow that even if it can be said that limitation periods in general should now be considered substantive rather than procedural, the obligation, in our case a debt, has been extinguished, at least in Ontario. There are provinces that have enacted provisions in their limitations legislation that expressly provide that upon the expiry of a limitation provision, rights are extinguished. For example, in the *British Columbia Limitations Act*, R.S.B.C. 1996, section 9 provides

> On the expiration of a limitation period set by this Act for a cause of action to recover any debt, damages or other money, or for an accounting in respect of any matter, the right and title of the person formerly having the cause of action and of a person claiming through the person in respect of that matter is, as against the person against whom the cause of action formerly lay and as against the person's successors, extinguished.

24 Ontario has enacted no such provision in the *Limitations Act, 2002*.

25 If the policy behind limitation periods is to prevent stale claims from being litigated, that policy would not be relevant to situations such as set-off. If there were debts owed between two persons, would set-off be disallowed because one of the debts was older than the applicable limitation period? There would be no policy reason behind such a result. If one of the debts was no longer owed, however, because of an intervening limitation period, disallowing a set-off would be the result.

26 Another example would be a *Cherry v. Boultbee* [(1939), 41 E.R. 171 (Eng. Ch. Div.)] situation, a rule which confers a right analogous to that of set-off. This rule applies to cases where a person obligated to contribute to a fund is entitled to make a claim against that fund. The rule allows the administrator of the fund to require that the person obligated must fulfill the duty to contribute before being allowed to participate in the fund. The theory is that the person obligated satisfies its own claim by receipt of an asset of the fund, i.e., its own indebtedness. See *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 14 O.R. (3d) 1 (Ont. C.A.) and *Paragon Development Corp. v. Sonka Properties Inc.* (2009), 96 O.R. (3d) 574 (Ont. S.C.J.), aff'd. (2011), 103 O.R. (3d) 481 (Ont. C.A.). There would be no policy reason to ignore the rule because a limitation period precluded a claim against the person obligated to contribute to the fund. Indeed, albeit pre *Tolofson*, the Supreme Court held in *Canada Trust Co. v. Lloyd*, [1968] S.C.R. 300 (S.C.C.) that the rule in *Cherry v. Boultbee*applied in spite of a limitation period having expired against the persons obliged to contribute. Hall J. stated:

> The three directors in question took the moneys and enjoyed the full benefits thereof since 1921. Their situation is analogous to that of a legatee who must bring into account even a statute barred debt before he can claim the legacy left to him in the testator's will.

27 *Tolofson* did not deal at all with this kind of a situation, or a situation like a bankruptcy application of the kind before me, and I do not read it as requiring a conclusion that a debt will be extinguished if a suit to enforce a creditor's right to payment is not commenced within an applicable limitation period.

28 In my view, in Ontario it cannot be said that a debt is extinguished if an action on the debt is not brought within two years of its being due. Rather, the debt continues to be owed. Thus such a debt can be the basis on which an application for a bankruptcy order can be made. Such a debt can also be the basis for a provable claim by a creditor in a bankruptcy. This would not, of course, preclude an order in a proper case under section 43(11) of the BIA staying a bankruptcy application if it were inequitable to permit the application for some kind of laches, perhaps of the kind involved in *Re Tynte*.

29 In summary, the *Limitations Act, 2002* is not applicable to a bankruptcy application. Moreover, the fact that no suit has been brought on a debt owing to the applicant within two years of the date of the bankruptcy application is no defence to a bankruptcy application based on that debt as the debt continues to be owed.

30 With regard to the contention that the debt must not be statute barred at the date of the hearing of the bankruptcy application, that in my view makes little sense, even assuming that the debt must not be statute barred at the date the application was commenced. The date of the hearing is not in the control of the applicant. Moreover, the date the decision was rendered on the application would appear to have more logic, but even that date is not in the control of the applicant. Had I held that the debt must not be statute barred at the date of the application, I would not have held that if it was not statute barred at that time, the application could not succeed if it became statute barred at some date thereafter.

Acknowledgment of debt

31 Even if the debt owed by Mr. Temple to Mr. Gore had to be one within the two-year prescription period contained in the *Limitations Act, 2002*, it would not be statute barred if there had been an acknowledgment of the debt in writing signed by the debtor or the debtor's agent, as per section 13(1) and (10) of the *Limitations Act, 2002*.

32 The evidence establishes that there was such an acknowledgment. The first was by Mr. Mark Baker, the solicitor for Mr. Temple. From some time in 2008, there was discussion between Mr. Gore on behalf of himself and Mr. Greenhalgh with Mr. Temple, Mr. Nykoliation and Mr. Baker regarding mortgage security against the Broadview Ave. properties that would be provided to secure the outstanding loans. In November, 2008 it was agreed that the security would be provided. By the fall of 2009, the mortgage security still had not been provided as there were apparently planning issues that had not yet been resolved.

33 In mid-August 2009 Mr. Gore and Mr. Temple had a discussion to the end that the Broadview Ave. properties would be listed for sale and the equity used to pay the debt holders pro rata on their debt, with the mortgage security to be provided for the pro rata payments. Mr. Temple provided up to date information regarding these debt holders, being a Karen Budden as to $300,000, a Richard Deschenaux as to $100,000, Paul Greenhalgh as to $937,251, Mr. Gore as to $437,446, Mr. Baker's firm as to $200,000 and other sundry debts. On November 27, 2009 Mr. Baker e-mailed Mr. Gore regarding the mortgage that would be provided as security. He stated that the mortgage would be collateral to "a pari-passu agreement amongst the 4 creditors" and he asked for the full legal names of "the two creditors in your group" and the amounts owing to each. The reference to the 4 creditors rather than to his firm as a 5 th creditor was no doubt because he intended to obtain security for his outstanding fees, which he ultimately did in the amount of $250,000, without any pari-passu agreement relating to that mortgage. In my view, this e-mail was an acknowledgment in writing made on behalf of Mr. Temple of the debts owing to Mr. Gore and Mr. Greenhalgh, and that Mr. Baker's name on the e-mail was a sufficient signature within the requirements of the *Limitations Act, 2002*. It was less than two years prior to the issuance of the application for bankruptcy on February 3, 2011.

34 The second acknowledgment pertained to the financial statements for Temple Arthur Development Inc. for the year ended December 31, 2008 that were prepared in December 2009. A trial balance sheet was prepared at that time. Mr. Temple signed the trial balance sheet which listed the outstanding loan to Mr. Gore at $467,993.79. It also listed the outstanding loans to Mr. Greenhalgh at $866,113.97, to Ms. Budden at $300,000 and Mr. Deschenaux at $100,000. This was a signed statement by Mr. Temple less than two years prior to the issuance of the application for bankruptcy acknowledging the outstanding loan to Mr. Gore and to the others that were listed. The fact that it was an acknowledgment technically on behalf of Temple Arthur Development Inc. does not mean it was not an acknowledgment of the debt owed by Mr. Temple personally. Assuming Temple Arthur Development Inc. was liable for the debts, an acknowledgment of the debts signed by Mr. Temple was an acknowledgment that the debts were still owed, and he was personally liable for those debts.

35 It is contended that Mr. Gore was the accountant for Mr. Temple and his companies and that he has a duty of confidentiality that prevents him from using information received from Mr. Temple. Thus it is contended that in the circumstances, the evidence of the outstanding debts of Mr. Temple should not be admissible. Mr. Klotz did not provide any authority on the point as to whether there is a duty of confidentiality or whether that would prevent the evidence tendered in this case from being admissible.

36 It appears clear that an accountant owes a duty to his or her client not to disclose confidential information received from a client or former client. See *Drabinsky v. KPMG* (1998), 41 O.R. (3d) 565 (Ont. Gen. Div.), per Ground J.; aff'd (1990), 10 C.B.R. (4th) 130 (Ont. Div. Ct.). Mr. Gore in his evidence acknowledged such a duty not to share information from a client without the client's permission.

37 I do not think it can be said that Mr. Gore breached any duty of confidentiality in this case by giving evidence of debts owed by Mr. Temple to others. Mr. Gore negotiated the loan for Mr. Greenhalgh. The information for the other debts was given by Mr. Temple to Mr. Gore not in his capacity as an accountant for Mr. Temple, but as part of the negotiations by Mr. Temple to provide pro rata security to Mr. Gore and Mr. Greenhalgh over the Broadview Ave. properties. Moreover, Mr. Temple had to know that the information would be passed on to Mr. Greenhalgh, thus denying it any pretense of confidentiality. The information was also directly disclosed to Mr. Greenhalgh by Mr. Temple and Brian Nykoliation at a meeting to discuss the proposed mortgage security, and thus on that score was also not confidential.

38 Thus, even in the *Limitations Act, 2002* is required to be complied with regarding the debt of Mr. Gore, there were acknowledgments as required by section 13.

Conclusion

39 The bankruptcy application is granted. Harris & Partners Inc. is appointed trustee in the bankruptcy of Mr. Temple.

Application granted.