CITATION: Skuy v. Greennough Harbour Corporation, 2012 ONSC 6998
COURT FILE NO.: 11-CV-439804
COURT FILE NO.: 11-CV-439808
DATE: December 7, 2012

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
PERCY SKUY and ELSA RUTH SKUY Plaintiffs	*Eric M. Wolfman* for the Plaintiffs
– and –	
GREENOUGH HARBOUR CORPORATION and JOHN KEESO Defendants	*Mathew Furrow* for the Defendants
AND BETWEEN:	
MORREY SOLWAY and LENORE SOLWAY Plaintiffs	*Eric M. Wolfman* for the Plaintiffs
– and –	
GREENOUGH HARBOUR CORPORATION and JOHN KEESO Defendants	*Mathew Furrow* for the Defendants
	HEARD: November 29, 2012

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] The Plaintiffs Percy and Elsa Skuy in action 11-CV-439804 and the Plaintiffs Morrey and Lenore Solway in action 11-CV-439808, respectively, sue Greenough Harbour Corporation on unpaid promissory notes, and they sue John Keeso and

Greenough on guarantees. The Skuys and the Solways respectively move for summary judgment.

[2] In resisting the motion for summary judgment, Greenough and Mr. Keeso rely only on a limitation period defence under the *Limitations Act*, 2002, SO 2002, c.24 Sched. B. They submit that the claims on the promissory notes and on the guarantees are statute-barred.

[3] For the reasons that follow I grant the motion for summary judgment with respect to the guarantees against Greenough and Mr. Keeso. I dismiss the motion for summary judgment with respect to the promissory notes signed only by Greenough.

[4] In my opinion, the guarantees were free-standing primary obligations. Most importantly, they were demand obligations for which the limitation period never commenced to run. Given that the Defendants only defence fails, the Plaintiffs should have summary judgment on the guarantees.

[5] The limitation period, however, commenced to run against the promissory notes upon default of payment on maturity, and there were no partial payments or acknowledgements that acted to extend the running of the limitation period on the promissory notes. The motion for summary judgment on the notes should be dismissed.

B. FACTUAL BACKGROUND

[6] On January 6, 2004: (a) Percy Skuy lent $50,000 to Greenough, and it signed a promissory note maturing on July 6, 2004; and (b) Percy and Elsa Skuy lent $30,000 to Greenough, and it signed a promissory note maturing July 6, 2004. By extension agreements, the maturity dates were extended to July 31, 2005.

[7] Using the $30,000 note as the example, the terms of the promissory notes were as follows:

PROMISSORY NOTE

January 6th, 2004 $30,000

1. FOR VALUE RECEIVED, the undersigned GREENOUGH HARBOUR CORPORATION (herein the "Company") promises to pay to the order of PERCY AND ELSA SKUY (THE "Payee") at the City of Toronto, Ontario on July 6, 2004, the sum of THIRTY THOUSAND Dollars ($30,000) (the "Principal Sum") in lawful money of Canada with simple interest on the Principal Sum from the date hereof to the date of payment at the rate of TWENTY Percent (20%) per annum, and such interest shall be payable as well after as before maturity, default and/or judgment, with interest on overdue interest, at the same rate until this note is actually paid in full.

2. If this note is not repaid on the maturity date note above a penalty amount of SEVEN PERCENT (7%) will apply to the Principal Sum. Such penalty amount will be added to the Principal Sum and the interest rate stated in 1. Above will apply to the penalty as well as the Principal Amount until repayment in full for a period of three (3) months from the maturity date. If the note is not repaid by the Company within nine (9) months from the

date of issue of this Promissory Note the Payee will exercise his or her rights under the personal guarantee issued by John Keeso.

3. The Company and every endorser hereof (the "Obligors") hereby waive presentment, demand, protest, notice of dishonour, notice of protest, notice on non-payment and any other notice required by law to be given to any Obligor on this note in connection with the delivery, acceptance, performance, default or enforcement of this note.

4. This note is specific to the Payee (and as applicable the Payee's heirs, executors and legal personal representatives) and is not assignable or transferable before default without the prior written consent of the Company.

SIGNED, SEALED AND DELIVERED this 6th day of January, 2004

"GREENOUGH HARBOUR CORPORATION"/ per J.H. Kelso

[8] On January 6, 2004, Mr. Keeso and Greenough executed Guarantees of the Skuy promissory notes. The terms of the Guarantees were as follows:

GUARANTEE dated as of January 6, 2004

WHERAS Percy and Elsa Skuy (the "Payee") has advanced the sum of $80,000 to GREENOUGH HARBOUR CORPORATION ("the Company"), which advances are evidenced by a promissory note, and may in future advance one or more additional sums to be evidence by promissory notes (with the existing note, the "Notes") made by the Company in favour of the Payee;

AND WHEREAS the undersigned JOHN KEESO ("Keeso") is a shareholder of the Company, and the undersigned GREENOUGH HARBOUR CORPORATION ("Greenough") is a Canadian controlled corporation;

AND WHEREAS Keeso and Greenough (the "Guarantors", and each a "Guarantor" have agreed to guarantee the Company's obligations to the Payee under the Notes;

NOW THEREFORE in consideration of the premises and the sum of Five Dollars ($5.00) now paid by the Payee to each Guarantor and other good and valuable consideration, the receipt and sufficiency of which each of the Guarantors hereby acknowledges, the Guarantors hereby jointly and severally covenant and agree as follows:

1. Guarantee. The Guarantors, as primary obligors and not merely as sureties, hereby irrevocably and unconditionally guarantee to the Payee the due and punctual payment by the Company of all its obligations under the Notes.

2. Obligation Absolute. This Guarantee is irrevocable, absolute, present and unconditional. The obligations of the Guarantors under this Guarantee shall not be affected, reduced, modified or impaired upon the happening from time to time of any of the following events, whether or not with notice to (except as to notice otherwise expressly required herein) or the consent of the Guarantors: the failure to give notice to the Guarantors of the occurrence of a default under the terms and conditions of the Notes; …. it being the intent of the Guarantors that their obligations hereunder shall not be discharged except by payment in full of all amounts owing by, and performance and compliance with all of the other obligations of, the Company pursuant to the Notes. ….

3. Waiver. The Guarantors hereby waive promptness, diligence, presentment, demand, notice of acceptance and other notice except as required herein, and further waive the right

> to require the Payee to: to proceed against the Company or any other person to enforce the terms and conditions of the Notes or to obtain any relief or remedy pursuant to the Notes; proceed or exhaust any security held from any person; and pursue any other remedy available to the Payee and notice of (i) acceptance and reliance on this Guarantee and (ii) default, or demand in case of default.
>
> 4. Assignment and Enurement ….
>
> 5. Law and Jurisdiction ….
>
> IN WITNESS WHEREOF each of the Guarantors has executed this Guarantee as of the date first shown above.
>
> SIGNED SEALED AND DELIVERED
>
> "(Witness) JOHN KEESO
>
> GREENOUGH HARBOUR CORPORATION

[9] Pausing here, it is worth noting that Greenough guaranteed payment of its own debt. This oddity creates the possibility that occurs in the case at bar that Greenough's liability on the notes is statute-barred but it is liable on its free-standing guarantee.

[10] Resuming the narrative, on February 18, 2004, Morrey and Lenore Solway lent $50,000 to Greenough, and it signed a promissory note maturing on August 18, 2004. The terms of the note were similar to the Skuy note set out above. By extension agreement, the maturity date was extended to January 31, 2005.

[11] On February 18, 2004, Mr. Keeso and Greenough executed a guarantee with respect to the Soloway loan. The guarantee is substantively identical to the Skuy guarantee set out above.

[12] On April 19, 2005, Mrs. Skuy lent $30,000 to Greenough, and it signed a promissory note. The same day Mr. Keeso and Greenough executed a guarantee similar to the guarantee set out above. By extension agreement, the maturity date was extended to September 30, 2005.

[13] On June 27, 2006, Percy and Elsa Skuy lent $30,000 to Greenough, and it signed a promissory note maturing on September 30, 2006. The same day, Mr. Keeso and Greenough executed a guarantee similar to the guarantee set out above.

[14] On October 4, 2007, Mrs. Skuy lent $15,000.00 to Greenough and it signed a promissory note maturing on May 31, 2008. Interest on this note was simple interest at 15% per annum. The same day, Mr. Keeso and Greenough executed a guarantee similar to the guarantee set out above.

[15] From time to time, interest was paid on some of the Skuy notes up until December 31, 2007, after which no interest payments were made nor has any principal been paid.

[16] On August 18, 2008, the Defendants paid $5,000.00 to the Solways representing the outstanding interest owed on the debt up to December 31, 2007. No further payments of interest or principal have been paid to the Solways.

[17] For the $15,000 loan made by Elsa Skuy, she received payment of interest in the amount of $1,670.54 covering the period between October 4, 2007 to June 30, 2008. Since that time no further payments of interest or repayment of principal have been made to the Skuys.

[18] On July 4, 2008, Mr. Keeso emailed Percy Skuy, and the message referred to the debt owing to the Skuys.

[19] On May 31, 2010, in a document titled "Greenough Harbour Status of Capital Financing" Greenough advised the Skuys of a potential financing deal in which it would pay out the notes once the deal was formalized. Greenough's name appears only in the title of the document, and the document is not signed by Mr. Keeso or by Greenough.

[20] On July 10, 2011, Mr. Keeso emailed the Skuys' son David and the message refers to the debt owing to the Skuys.

[21] At no time before the commencement of their actions, did the Solways or the Skuys make a demand for payment of the promissory notes or on the guarantees.

[22] On December 21, 2011, the Solways and the Skuys received a written proposal for a debt for equity swap whereby note holders could convert their principal, penalties and interest into preferred shares and equity in Greenough. In the proposal, Mr. Keeso states: "it has been my goal that all note holders have the potential to realize some rate of return on their investment in GHC".

[23] The written proposal came after the Plaintiffs had commenced their actions to enforce the promissory notes and the guarantees. Skuys commenced their action on November 18, 2011. The Soloways commenced their action the same day.

C. POSITION OF THE PARTIES

[24] The Defendants Greenough and Mr. Kelso have only one defence to the summary judgment motions. They submit that the Plaintiffs' claims are statute-barred under s. 4 of the *Limitations Act*, which provides that a "proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered." The Defendants submit that there are no partial payments or acknowledgements that extended the running of the limitation period so that the 2011 actions would be timely.

[25] In making their motions for summary judgment, the Plaintiffs, Skuys and Solways, respectively, submit that the limitation period had not begun to run when they issued their statements of claim. Alternatively, they submit that the defendants have acknowledged their debts and restarted the running of the limitation period making the Plaintiffs' actions timely.

[26] The Plaintiffs rely on *Bank of Nova Scotia v. Williamson*, [2009] O.J. No. 4507 (C.A.). In that case, the Court of Appeal held that for demand obligations, a demand is a condition precedent for the commencement of the limitation period. The Plaintiffs respectively submit that they have never made formal demand for payment on the notes or the guarantee and, therefore, the limitation period has never commenced to run. Alternatively, if the notes and the guaranties were non-demand obligations, the partial payments and various acknowledgements restarted the running of the limitation period.

D. DISCUSSION

[27] Pursuant to the full appreciation test of *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, this is an ideal case for a summary judgment, and the Defendants did not in argument suggest otherwise.

[28] For the purposes of deciding these motions for summary judgment, the relevant sections of the *Limitations Act, 2002* are sections 4, 5, and 13, which state:

> *Basic limitation period*
>
> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. 2002, c. 24, Sched. B, s. 4.
>
> *Discovery*
>
> 5. (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> *Presumption*
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

Demand obligations

(3) For the purposes of subclause (1) (a) (i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made.

Same

(4) Subsection (3) applies in respect of every demand obligation created on or after January 1, 2004.

Acknowledgments

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. ….

Liquidated sum

(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.

Restricted application

(9) This section does not apply unless the acknowledgment is made to the person with the claim, the person's agent or an official receiver or trustee acting under the Bankruptcy and Insolvency Act (Canada) before the expiry of the limitation period applicable to the claim.

Same

(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.

Same

(11) In the case of a claim for payment of a liquidated sum, part payment of the sum by the person against whom the claim is made or by the person's agent has the same effect as the acknowledgment referred to in subsection (10).

[29] As will quickly become apparent, it is a gross understatement to say that the law about limitation periods and demand obligations is complicated.

[30] The *Limitations Act, 2002* was amended on November 27, 2008 to deal specially with the commencement of the limitation period for demand obligations. Demand obligations can include promissory notes, demand mortgages, and demand guarantees: *Bank of Nova Scotia v. Williamson, supra*.

[31] To determine what is a demand obligation, some guidance is provided by the *Bills of Exchange Act*, R.S.C. 1985, c. B-4, s.22 (1) which defines a bill payable on demand to be one: (a) that is expressed to be payable on demand or on presentation; or

(b) in which no time for payment is expressed. Using this guidance, a debt obligation expressly payable on demand is a demand obligation: *Toronto-Dominion Bank v. Formstructures Inc.*, 2012 ONSC 2256. A debt obligation that does not specify a date for repayment is a demand obligation: *Azman v. Viola* 2010 ONSC 6455 at para. 39. Where a debt obligation is payable on a fixed date, it is not a demand obligation, even if the obligation stipulates that the lender must give notice or make a demand for payment before enforcing the debt obligation: *Berry v. IPC Securities Corp.*, [2009] O.J. No. 1598 at para. 17 (S.C.J.); *National Trust Co. v. Saks*, [1994] O.J. No. 2488 (Gen. Div.), varied on other grounds, [1998] O.J. No. 2335 (C.A.). (This is an example of the confusing nature of the law because a non-demand obligation can have a demand component to it.)

[32] Under section 5(3) of the *Limitations Act*, for a demand obligation, the limitation period begins to run once a demand is made: *Shaw v. Anderson* (2010), 99 O.R. (3d) 775 at para. 18 (S.C.J.). Even if the creditor knows that the demand obligation is unlikely to be paid, the limitation period does not begin to run until the creditor makes a demand: *Bank of Nova Scotia v. Williamson, supra*. (The Plaintiffs in the cases at bar rely on these principles.)

[33] The amendment to the Act overruled the common law rule for demand promissory notes and for demand mortgages, which rule was that the limitation period began to run immediately upon the delivery of the demand promissory note: *Hare v. Hare* (2006), 83 O.R. (3d) 766 (C.A.), at para. 11; *Bank of Nova Scotia v. Williamson, supra* at para. 12 or upon the delivery of a demand mortgage: *Mortgage Insurance Company of Canada v. Grant*, 2009 ONCA 655 at para. 19; *Bank of Nova Scotia v. Williamson*, [2009] O.J. No. 4507 (C.A.) at para. 12; *Alter v. Csontos*, [2004] O.J. No. 1590 (S.C.J.) at para. 34.

[34] The common law rule, however, did not apply to demand guarantees or demand collateral mortgages, for which the limitation period did not begin to run until a demand for payment was made: *In re Brown's Estate*, [1893] 2 Ch. 300, at pp. 304-305; *Bank of Nova Scotia v. Williamson, supra* at para. 13. The rationale for the treatment of collateral obligations was that where the obligation is made on demand, the third party guarantor is given an opportunity to marshal the funds before the obligation is due: *Bank of Nova Scotia v. Williamson, supra* at para. 13.

[35] The effect of the amendment to the *Limitations Act* is that all demand obligations are treated the same way, and the limitation period for a demand obligation begins to run only from when a demand is made: *Peca v. Peca*, 2011 ONSC 770 (S.C.J.); *Toronto-Dominion Bank v. Formstructures Inc.*, 2012 ONSC 2256 (S.C.J.); *Quick Credit v. 1575463 Ontario Inc. (c.o.b. Yorktown Auto Collision)*, 2010 ONSC 7227 (S.C.J.), affd. 2012 ONCA 221 (Ont. C.A.).

[36] Where the parties to a guarantee incorporate a demand as a condition-precedent to the guarantor's liability, liability does not crystallize until a proper demand has been made and the limitation period commences upon the receipt of the demand: *Mortgage Insurance Co. of Canada v. Grant*, 2009 ONCA 655 paras. 23-25 (C.A.); *Pearson v.*

Nickle, [2003] O.J. No. 577 (S.C.J.); *Lin v. Lee* (1997), 44 B.C.L.R. (3d) 68 (C.A.); *Canadian Imperial Bank of Commerce v. Sayani* (1994), 100 B.C.L.R. (2d) 294 (S.C.) at para. 3; *Canadian Imperial Bank of Commerce v. Pittstone Developments*, (1985), 24 D.L.R. (4th) 224 (B.C.S.C); *The Dominion Bank v. Elliott*, [1933] O.W.N. 328 (H.C.J.) at pp. 328-329. Thus, the creditor is in the position of extending the limitation period by not making a demand, after which the limitation period will begin to run: *Bank of Nova Scotia v. Williamson*, *supra* at para. 19.

[37] Moreover, to add to the complexity (and to provide another example of the confusing nature of the law) some demand obligations can be enforced without an actual demand having been made. A creditor claiming under a guarantee is not required to make a demand before action unless the plain wording of the guarantee requires this to be done: *Canadian Imperial Bank of Commerce v. Pittstone Developments Ltd.*, [1985] B.C.J. No. 3013 at para. 11 (B.C.S.C.); *Bank of Montreal v. MacGregor* (1980), 21 B.C.L.R. 83 at pp. 90-91 (B.C.S.C.).

[38] The requirement or non-requirement of a demand is thus a source of confusion. The confusion arises, in part, because now for all demand obligations, the limitation period only commences with a demand, but for some obligations no actual demand is necessary or the statement of claim can serve as the demand. The law differentiates between demand obligations that may be enforced only with a prior demand and demand obligations where the statement of claim would be sufficient to constitute the demand. In this regard, the law differentiates between a "present debt" of the obligor and a "collateral debt" of the obligor: *KNP Headwear Inc. v. Levinson,* [2005] O.J. No. 5438 (Div. Ct.). The distinction was drawn by Chitty, J. in *Brown Estate v. Brown*, *supra* at pp. 304-5, where he stated:

> ... it is plain that a distinction has been taken and maintained in law, the result of which is, that where there is a present debt and a promise to pay on demand, the demand is not considered to be a condition precedent to the bringing of the action. But it is otherwise on a promise to pay a collateral sum on request, for then the request ought to be made before action brought.

[39] Thus, there are some demand obligations; namely, a promise to pay a present debt owing by the promisor, that do not require an actual demand: *Mortgage Insurance Co. of Canada v. Grant Estate* (2009), 99 O.R. (3d) 535 at para. 23 (C.A.); *Bank of Montreal v. Dodd*, [1981] N.J. No. 113 (Nfld. S.C.T.D.), or for which the statement of claim can serve as the demand: *Canada Trustco Mortgage Co. v. 1122293 Holdings Ltd.*, [1984] A.J. No. 126 (C.A.); *Royal Bank of Canada v. Dwigans* [1933] 1 W.W.R. 672 (Alta. C.A.); *Caisse Populaire Beauséjour Ltée v. Wry* 2012 NBQB 234; *Bank of Montreal v. Wilder* (1980), 19 B.C.L.R. 77 (B.C.S.C.).

[40] However, there are some demand obligations, including collateral obligations, that are not actionable unless the required demand has been made: *KNP Headwear Inc. v. Levinson*, [2005] O.J. No. 5438 (Div. Ct.); *Bank of Nova Scotia v. Battiste*, [1979] N.J. No. 138 (Nfld. S.C.); *Bradford Old Bank v. Sutcliffe*, [1918] 2 K.B. 833; *CSRS Ltd. v. Embley*, 2008 BCCA 533 at paras. 158-64 (B.C.C.A.); *Caribou Hotels (1980) Inc. v. 5857 Yukon Ltd.* (1990), 51 B.C.L.R. (2d) 141 (Y.T.C.A.); *Bank of Montreal v. Agnew* (1986), 72 N.B.R. (2d) 276 (N.B.Q.B.); *Canadian Imperial Bank of Commerce v.*

Pittstone Developments Ltd., [1985] B.C.J. No. 3013 (B.C.S.C.); *Bank of Montreal v*. *MacGregor* (1980), 21 B.C.L.R. 83 (B.C.S.C.); *Canadian Petrofina Ltd. v*. *Motormart Ltd*. (1969), 7 D.L.R. (3d) 330 (P.E.I. S.C., App. Div.); *Kruse (Trustee of) v*. *Oakwood Construction Services Ltd.*, [1982] M.J. No. 83 (Man. C.A.); *National Trust Co. v*. *Maxwell***,** [1989] O.J. No. 341(Ont. H.C.J.). For this type of demand obligation, an action brought before demand will be dismissed as premature, but the plaintiff's claim will not be statute-barred, and he or she can subsequently make a proper demand and commence a new action: *Alberta Opportunity Co. v*. *Schinnour* [1990] A.J. No. 1125 (C.A.) leave to the SCC refd, [1991] S.C.C.A. No. 67 (S.C.C.); *Royal Bank of Canada v*. *Ruben,* [1980] N.B.J. No. 85 at para. 8 (N.B.C.A.); *Caisse Populaire Beauséjour Ltée v*. *Wry* 2012 NBQB 234 at paras. 22-29; *Bank of Montreal v*. *Agnew* (1986), 72 N.B.R. (2d) 276 (N.B.Q.B.).

[41] Courts have commented about the arid technicality of dismissing a premature action in these circumstances, and some have refused to dismiss the action to enforce the demand obligation as premature: *Alberta Opportunity Co. v*. *Schinnour* [1990] A.J. No. 1125 (C.A.) leave to the SCC refd, [1991] S.C.C.A. No. 67 (S.C.C.). (It is to be noted that in the cases at bar, the Defendants do not suggest that the Plaintiffs' actions are premature; the defence is only that the claims are statute-barred.).

[42] It is a matter of contract interpretation and a matter of the legal nature of the obligation that determines whether an actual demand is necessary to enforce the obligation; i.e., whether a demand is a constituent element of the cause of action to enforce the debt obligation is essentially a matter of interpretation of the debt contract. In other words, a document that states it is payable "on demand" does not always require an actual demand to be made before the demand obligation can be enforced; it depends on the nature of the obligation and the construction of the document: *Bank of Nova Scotia v*. *Williamson*, supra at paras. 11-13; *Bank of Nova Scotia v*. *Williamson*, [2008] O.J. No. 4756 at para. 13 (S.C.J.), affd. s*upra*.

[43] Where the debt obligation is not a demand obligation, the law about the commencement of the running of the limitation period is comparatively much simpler. The commencement of the limitation period will depend upon the date when the lender is aware or ought to have been award that he or she may sue to enforce the loan because there has been a breach of the lending contract: *Shaw v*. *Anderson*, 2010 ONSC 1164 (Ont. S.C.J.); *Saved by Technology Rentals Inc. v*. *Thomas* (2004), 71 O.R. (3d) 721 (Ont. C.A.); *Lewington et al. v*. *Raycroft***,** [1935] O.R. 474 (C.A.).

[44] In the case at bar, there is no genuine issue for trial that before the Skuys and the Solways commenced their actions, they did not demand payment of the promissory notes or of the guarantees. Thus, if the promissory notes are demand obligations, the limitation period to sue for payment of the notes never commenced to run. Similarly, if the guarantees are demand obligations, the limitation period to sue for payment of the guarantees never commenced to run.

[45] Thus, the major issue for this motion for summary judgment is whether the promissory notes or the guarantees are demand obligations.

[46] In the case at bar, the promissory notes are notes in which a time for payment is expressed. It follows that the promissory notes are not demand obligations, and, thus the limitation period for all the notes began to run from their maturity dates subject to partial payments and acknowledgements extending the limitation period.

[47] The last partial payment on the Skuy notes was in December 2007. The last partial payment on the Solway note was in August 2008. Recalling that the Plaintiffs' actions were commenced in November 2011 and since my conclusion below is that the alleged acknowledgements are ineffective to restart the limitation period, it follows that the claims based on the promissory notes are statute-barred.

[48] My conclusion that the promissory notes are not demand obligations is not changed by *Wojnarowsk v. Bomar Alarms Ltd.*, 2010 ONSC 273, which was a case relied on by the Plaintiffs. In that case, promissory notes were signed in 1993 and 1995, and payments continued to be made on the notes beyond their due dates. Justice Quinn at paragraph 61 of his judgment, in which he concluded that the claims on the notes were not statute-barred, stated that the acceptance of the payments effectively transformed the notes into instruments payable on demand. I do not understand this statement to be a conclusion that non-demand notes can be transferred into demand notes. As becomes clear by paragraph. 62 of his judgment, Justice Quinn's operative decision was that the partial payments acted as acknowledgments to restart the running of the limitation period for each note.

[49] Turning to the guarantees, in the case at bar, the guarantees are not expressly payable on demand and they are an obligation for which no time for payment is expressed. Thus, they are demand obligations.

[50] In my opinion, they are free-standing demand obligations. Under the guarantees, Greenough and Mr. Keeso are "primary obligors and not merely sureties." The guarantee is "absolute, present and unconditional." Under the guarantees "the intent of the Guarantors [is] that their obligations hereunder shall not be discharged except by payment in full of all amounts owing by, and performance and compliance with all of the other obligations of, the Company pursuant to the Notes."

[51] That under the guarantee the Guarantors waive demand does not mean that the guarantees are not demand guarantees. It simply means that the guarantees are enforceable precisely in the manner in which the Skuys and the Solways have chosen to enforce the notes by an action without a demand as a pre-requisite to that action.

[52] The guarantees do not have a maturity date that would disqualify them as demand obligations. That the promissory notes indicate that: "If the note is not repaid by the Company within nine (9) [or six (6)] months from the date of issue of this Promissory Note the Payee will exercise his or her rights under the personal guarantee issued by John Keeso," does not disqualify the guarantees as demand obligations for several reasons. First, this provision is not part of the guarantee contract. Second, this provision says nothing about Greenough. Third, if this provision applied to the guarantee, I would interpret it to mean that the Skuys or Solways must wait at least nine or six months after the issuance of the promissory notes before they could take action to enforce the guarantees, which is what happened in the case at bar.

[53] In my opinion, the guarantees are demand obligations for which no demand was ever made and the limitation period never began to run with respect to the guarantees. It is also my opinion, that although demand obligations, the guarantees in the case at bar are of the type that do not require an actual demand to have been made or for which the statement of claim can provide the necessary demand.

[54] It follows that the Plaintiffs' motion for summary judgment based on the guarantees succeeds.

[55] Turning again to their claim on the promissory notes, I have already concluded above that the promissory notes are not demand obligations. Accordingly, the limitation period for the promissory notes began to run with the last partial payment, which for some promissory notes occurred in 2007 and for one note occurred in 2008. The question then is whether there were any acknowledgements that restarted the running of the limitation period.

[56] The answer to that question is no. An acknowledgment occurs when, before the expiry of the limitation period, a person or his or her agent acknowledges in writing, with a signature, 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: *Limitations Act*, 2002, ss. 13 (1), (9) (10). For the purposes of the Act, an acknowledgement of an indebtedness for a liquidated sum must, at a minimum, confirm and concede the amount that remains owing: *Middleton v. Aboutown Enterprises Inc.*, [2008] O.J. No. 3608 (S.C.J.) at para. 11.

[57] The alleged acknowledgements in the case at bar do not satisfy the requirements for an acknowledgment. It follows that the Plaintiffs' claims based on the promissory notes are statute-barred.

E. CONCLUSION

[58] For the above reasons, I grant the Plaintiffs' motions for summary judgment.

[59] The parties provided me with their respective bills of costs. Having reviewed the bills, I award the Skys $6.000, all inclusive. I award the Solways $4,500, all inclusive.

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Perell, J.

Released: December 7, 2012

CITATION: Skuy v. Greennough Harbour Corporation, 2012 ONSC 6998
COURT FILE NO.: 11-CV-439804
COURT FILE NO.: 11-CV-439808
DATE: December 7, 2012

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

PERCY SKUY and ELSA RUTH SKUY

Plaintiffs

- and -

GREENOUGH HARBOUR CORPORATION and JOHN KEESO

Defendants

AND BETWEEN:

MORREY SOLWAY and LENORE SOLWAY

Plaintiffs

-and-

GREENOUGH HARBOUR CORPORATION and JOHN KEESO

Defendants

REASONS FOR DECISION

Perell, J.

Released: December 7, 2012.