IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ewachniuk Estate v. Ewachniuk,*
2011 BCSC 395

Date: 20110401
Docket: S095481
Registry: Vancouver

Between:

**Norman Ian Cameron in his capacity as
Administrator of the Estate of Sophia Ewachniuk, Deceased**

Plaintiff

And

Alexander Theodore Ewachniuk

Defendant

Before: The Honourable Madam Justice Russell

Reasons for Judgment

Counsel for the Plaintiff:	G.E. Sourisseau
Counsel for the Defendant:	J.D. Vilvang, Q.C. M. Hamilton
Place and Date of Trial/Hearing:	Vancouver, B.C. November 22-25, 2010
Place and Date of Judgment:	Vancouver, B.C. April 1, 2011

Introduction:

[1] On December 23, 1980, the defendant, Alexander Theodore Ewachniuk (“Ted”), and his parents, Roman Ewachniuk and Sophia Ewachniuk (“Mrs. Ewachniuk”), entered into a purchase and sale agreement (the “Agreement”) concerning shares held by the defendant’s parents in the family company, Regent Holdings Ltd. (“Regent Holdings”).

[2] The purchase of his parents’ shares in Regent Holdings increased the defendant’s holdings from 13,000 shares to 28,000 shares as compared to the 8,500 shares held by each of his sisters, Neeva Gayle Hix and Mary Ann Runnalls.

[3] Payment for the Regent Holdings shares was secured by a promissory note dated the same day in

favour of Roman Ewachniuk and Mrs. Ewachniuk in the amount of $750,000 (the “Promissory Note”) and signed by the defendant.

[4] The Promissory Note does not contain a date for repayment but indicates that it is payable one year after demand, without interest.

[5] On October 12, 2000, Mrs. Ewachniuk executed a statutory declaration (the “Statutory Declaration”), the effect of which is in dispute but which the defendant alleges was a renunciation of his obligation under the Promissory Note.

[6] On the same day, Mrs. Ewachniuk executed a power of attorney in favour of the defendant and a will (the “2000 Will”). The parties agree that the 2000 Will divided Mrs. Ewachniuk’s assets equally among her three children, Ted, Mary Ann and Neeva Gayle, however a copy of the 2000 Will has not been located.

[7] On January 11, 2004, Mrs. Ewachniuk executed another will drawn by the defendant (the “2004 Will”) which required the defendant’s sisters to transfer their Regent Holdings shares to the defendant in order for them to share equally in the residue of their mother’s estate. If they declined to effect the transfer, each sister would receive only $5,000 from the estate and the remainder would pass to the defendant.

[8] Mr. Justice Hinkson found the 2004 Will was procured by undue influence and was void: *see Hix v. Ewachniuk,* 2008 BCSC 811, aff’d 2010 BCCA 317.

[9] Mrs. Ewachniuk died on June 1, 2006.

[10] Following the decision of this Court in the aforesaid *Hix*, letters of administration were granted to Norman Ian Cameron (the “Administrator”) on October 27, 2008. On November 28, 2008, the Administrator issued a letter of demand to the defendant for $750,000 as payment of the amount of the Promissory Note.

[11] In response, the defendant produced the Statutory Declaration executed by Mrs. Ewachniuk and asserted that he was not indebted pursuant to the Promissory Note. The defendant has not made any payment on the Promissory Note.

Issues

[12] The issues are as follows:

1) Did the Promissory Note represent a debt owed by the defendant to his mother?

2) What is the nature of the Promissory Note for the purpose of the *Limitation Act,* R.S.B.C. 1996, c. 266?

3) Are the estate’s rights under the Promissory Note spent?

If the answer to issue three is no, the following additional issues must be addressed:

4) Did Mrs. Ewachniuk renounce the debt owing to her under the Promissory Note?

5) Was there accord and satisfaction such that the defendant's obligation under the Promissory Note was met?

1. Did the Promissory Note represent a debt owed by the defendant to his mother?

[13] The defendant says that his parents never intended that he pay for the shares they transferred to him and that the Agreement and resulting Promissory Note were tax planning tools designed to ensure that the defendant had control of Regent Holdings and could put that company's assets to use for the benefit of his parents.

[14] It is trite law that, in the absence of ambiguity, the intention of the parties is ascertained from the plain and ordinary meaning of the contract's words. The British Columbia Court of Appeal said the following in *Nutreco Canada Inc. v. Agrimarine Industries Inc.,* 2002 BCCA 661 at para. 10:

> [10] If the language of a contract is capable of only one meaning, read objectively in the context of the contract as a whole and its surrounding circumstances, the Court is required to give effect to that meaning: *Gilchrist v. Western Star Trucks Inc.* (2000), 73 B.C.L.R. (3d) 102 (B.C.C.A.), paras. 17 & 18. This bedrock proposition is the first principle of the interpretation of contracts. The Court will not resort to subsidiary rules of construction or interpretation unless the words used by the parties are reasonably capable of more than one meaning.

[15] The Agreement is two and one-half pages in length. The relevant portion reads:

> AND WHEREAS the Vendors have offered to sell all of their said common shares in the capital stock of the company, being 15,000 common shares, to the Purchaser for the sum of $750,000.00 and the Purchaser has agreed to purchase the said shares for the sum of $750,000.00.
>
> AND WHEREAS the parties hereto have estimated the said sale price to be the true value of the shares, based upon the valuation of approximately $50.00 per share.
>
> ...
>
> 2. The parties hereto hereby agree that the value of the said purchased shares is to be the fair market value thereof as at the said 23rd day of December, 1980, and declare that the purchase price referred to in paragraph 1 represents their best estimate of the fair market value as at that date. If at any time within seven (7) years from the date of execution of this Agreement and in the event the Department of National Revenue or any other competent taxing authority at any time hereafter proposes to issue or issues any assessment that imposes or would impose any liability for any tax on either the Vendors, Purchaser, or on any other person on the basis that the fair market value of the shares sold in this Agreement at the date of sale is greater than the purchase price referred to herein, then in that event the value of the said shares shall be adjusted accordingly to equal a value that is proposed by the Department of National Revenue or such other competent taxing authority as the basis of any such investment, to the extent that Manning, Jamison, Pearson & Co., or their successors, are of the opinion that the value basis proposed or used by the Department of National Revenue or such other competent taxing authority in the making of any assessment would be upheld by the Court or alternatively is, in fact, established by a Court of competent jurisdiction.
>
> The amount of any adjustment to the said purchase price shall be paid by issuing a promissory note payable one year after demand, without interest.

[16] The Promissory Note is simply expressed. It states as follows:

> Vancouver, BC, December 21, 1980
>
> For value received, I promise to pay to the order of Roman and Sophia Ewachniuk the sum of Seven Hundred and Fifty Thousand Dollars ($750,000), payable one (1) year after demand, without interest.

[17] I find the wording of both the Agreement and Promissory Note unambiguous and capable of only one meaning. The Agreement is a promise to purchase shares for their fair market price as of December 23, 1980. No promissory note was made to amend the purchase price, and therefore the amount owing for the shares remained $750,000.

[18] The Promissory Note was a promise to pay $750,000 one year after a demand for that sum. The demand was issued by the Administrator on November 28, 2008 and the amount was therefore due on November 28, 2009.

[19] While I find that, on its face, each document is capable of only one meaning, the defendant points to evidence of the surrounding circumstances which he says indicates that the Agreement and Promissory Note should be given a different interpretation.

[20] He says the following is evidence that he was never meant to pay for the shares:

a) the Agreement does not fix a price for the shares;

b) no interest was charged on the amount owing under the Promissory Note;

c) Mrs. Ewachniuk never mentioned the debt to her daughters;

d) Mrs. Ewachniuk never asked the defendant to pay the amount owing under the Promissory Note; and

e) the defendant never set aside money to pay the amount owing under the Promissory Note.

[21] There is some evidence to support the defendant's assertion that the Agreement and Promissory Note were tax or estate planning tools. I find it more probable than not that the transfer was motivated, at least in part, to limit the tax consequences of the share transfer.

[22] In my view, however, this finding does not assist the defendant to demonstrate that he was not expected to pay for the shares. It is not inconsistent to both want to limit the tax consequences of a transaction and to want to be paid for the shares which form the subject matter of the transaction.

[23] There is no evidence contemporaneous with the share transfer. However, in a 1986 affidavit Mrs. Ewachniuk refers to selling the shares to the defendant and her desire that all three of her children benefit from the sale upon her death. Allowing the sisters to share in the proceeds of the sale of shares was consistent with Mrs. Ewachniuk's oft voiced complaints about the way in which she had not received equal recognition with the male members of the family for her work for Regent Holdings.

[24] According to Mary Ann, this was a common theme of her mother's conversations with her about business dealings in the family.

[25] There is no evidence that the defendant's sisters will benefit from the share sale upon Mrs. Ewachniuk's death if the Promissory Note is not paid.

[26] In addition, in 2000 Mrs. Ewachniuk testified during the defendant's divorce proceedings. In those proceedings the defendant was required to set out his net worth for the Court; he included the $750,000 debt to his mother. Defendant's counsel asked Mrs. Ewachniuk what she recalled about the transaction. Her answer is informative. She said that the transaction was entered into to protect her daughters. It appears that each sister was married to a man who wanted her to get her shares out of Regent Holdings, by which I understand Mrs. Ewachniuk to have meant that the husbands wanted their wives to sell their shares. Mrs. Ewachniuk said that the parents' shares were put in the defendant's name "not to use for himself but to protect [his sisters]".

[27] This wording suggests that the transfer may have set up a trust arrangement for the benefit of the defendant's sisters and, perhaps, his parents. However as no trust is alleged, this statement is only of assistance inasmuch as it is evidence that in 2000, Mrs. Ewachniuk said that at the time of the transfer, she and her husband intended that their daughters would benefit from the transfer.

[28] After giving evidence that the defendant had given her the Promissory Note for $750,000, defendant's counsel and Mrs. Ewachniuk had the following exchange:

Counsel:	And when does Mr. – has Mr. Ewachniuk paid you that money yet?
Mrs. Ewachniuk:	No, he's not paid me any money because the – there isn't that much kind of money. There isn't that much coming in now and I don't need the money.
Counsel:	But Mrs. Ewachniuk, you intend for Mr. Ewachniuk to pay that money?
Mrs. Ewachniuk:	Oh, yes, that's my money and it's – providing – after my will reads for how it's to be divided.
Counsel:	So you expect Mr. Ewachniuk to pay you $750,000 at some point in time for those shares?
Mrs. Ewachniuk:	If and when, but if I change my will then maybe I won't.

[29] The evidence is that in the same year she gave this evidence, Mrs. Ewachniuk did change her will, executing the 2000 Will. Whatever the effect of that will and the Statutory Declaration executed at the same time, it is clear that at the time she gave this evidence, in 2000, Mrs. Ewachniuk considered the Promissory Note an outstanding debt.

[30] Its inclusion on his financial statement during his divorce proceedings suggests that the defendant also considered it a future obligation.

[31] I cannot accept what the defendant now says is evidence that he was not required to pay the debt.

[32] I do not accept that the Agreement does not fix an exact share price. The defendant does not argue

that the Agreement is void because one of the essential terms is missing; he would like to keep the shares but use the wording of the Agreement as evidence that no payment was expected.

[33] A price was determined and the Agreement provided a mechanism by which that price could be changed if it did not reflect the fair market value on December 23, 1980. As I have said, that price was not subsequently changed. The only inference I draw from this is that the parties determined that they had properly approximated the fair market price at the relevant time.

[34] The defendant contends that the Promissory Note was nothing more than a formality prepared to crystallize the share value for income tax purposes.

[35] However, the accountant who presided over the Agreement, and who likely gave the advice that the Promissory Note was necessary, could have been called as a witness in this proceeding to support the defendant's assertions.

[36] It is the defendant's burden to prove that the intention of the parties was not to make the Promissory Note enforceable against him. I draw an adverse inference against him for failing to call the accountant, Mr. Rick Watts, and find that Mr. Watts' evidence likely would have been contrary to the defendant's interest.

[37] The defendant also says that the fact he was not charged interest is consistent with him not being expected to pay the Promissory Note. The Ewachniuks' decision not to charge their son interest is consistent with a family arrangement. There is evidence that Mary Ann was not charged interest on the $54,000 loan given to her by her family and the Statutory Declaration indicates that Mrs. Ewachniuk loaned the defendant $90,000 interest-free to invest for his benefit. There is also evidence that both of those interest-free loans were to be repaid.

[38] It is perhaps unusual that Mrs. Ewachniuk did not mention the debt to her daughters. However, given the tension which appears to have existed between the defendant and his sisters with respect to Regent Holdings, it is perhaps less surprising. In any event, I cannot find that this is evidence that no payment was expected.

[39] During her life, Mrs. Ewachniuk did not ask that the Promissory Note be paid. She explains her reasons for this in her 2000 testimony during the defendant's divorce proceedings: she did not believe that kind of money was available, she did not need the funds and the funds were dealt with in her will. Her failure to demand payment is not evidence that she did not expect payment.

[40] Finally, I cannot accept that the defendant's failure to set aside money to fulfill the obligation is evidence that there was no obligation.

[41] Perhaps the most compelling indication that the debt was intended to be paid is that the document which is alleged to bring an end to the debt, the Statutory Declaration, was sworn in October 2000. The evidence is that Mrs. Ewachniuk was clear-minded until 2004 or 2005 and that she was involved in Regent Holdings in some capacity for most of her life and was a smart businesswoman. In 2000, Mrs. Ewachniuk

was 84 years old.

[42] It is not reasonable to conclude that a trained lawyer and a smart businesswoman waited 20 years to take steps to ensure that payment on the Promissory Note could not be enforced if they never intended the money to be repaid.

[43] Both would have known that on Mrs. Ewachniuk's death, the claim would pass to her estate. In 1986 the defendant was sued by his sisters regarding Regent Holdings. If the parties had "never" intended to give effect to the Promissory Note, I find it more probable than not that they would have taken steps to bring the defendant's obligation under it to an end long before 2000.

[44] Therefore based on the evidence of what motivated the transaction and consistent evidence from 1986 to 2000 that the amount was considered owing by the parties to the Agreement and Promissory Note, I find that at the time the Promissory Note was signed, it represented an actual debt owed by the defendant to his parents.

[45] I turn now to consider whether the debt has been extinguished by the operation of the *Limitation Act*.

2. What is the nature of the Promissory Note for the purpose of the *Limitation Act*?

[46] The defendant says that s. 3(5) of the *Limitation Act* applies to the Promissory Note and that the debt was therefore extinguished on December 23, 1987.

[47] It is my view that the terms of the Promissory Note bring it within s. 23(b) of the *Bills of Exchange Act*, R.S.C. 1985, c. B-4 which states as follows:

> 23. A bill is payable at a determinable future time, within the meaning of this Act, that is expressed to be payable
>
> (a) at sight or at a fixed period after date or sight; or
>
> (b) on or at a fixed period after the occurrence of a specified event that is certain to happen, though the time of happening is uncertain.

[48] It is reasonable to assume that when the Promissory Note was drawn, the parties anticipated that demand would be made on the Promissory Note after the death of Roman Ewachniuk and Mrs. Ewachniuk and that the defendant would have a year to raise the funds to pay the amount owed to the estate so that the defendant's sisters would benefit equally from the 1980 sale of shares.

[49] This means that the Promissory Note was payable at a fixed period after demand, a specified event which was certain to happen, although the time of the demand would be uncertain.

[50] The nature of the note before me is as that described in paras. 89-94 of *Zeitler v. The Estate of Alfons Zeitler*, 2008 BCSC 775 by Arnold-Bailey J.

[51] Because the description of the note and the application of the *Limitation Act* to the note in that case are directly on point, I will quote the comments of Arnold-Bailey J.:

[89] In relation to a demand promissory note, it is settled law that time begins to run, in terms of the limitation period, from the date the note is given, as opposed to the date of a demand upon it [citations omitted]. More recent applications of that principle are to be found in *Ponti v. Marathon Motors,* (1979), 9 B.C.L.R. 46 (Co. Ct.); *Bilkey v. Whitmore Estate*, 2004 BCSC 167; and *Umphress v. Verishine,* 2006 BCSC 1791.

[90] However, an exception emerges for promissory notes containing the delayed-demand feature that may be properly characterized as a contingent future event. Wallace J.A. articulated this principle in the Court of Appeal in *Berry v. Page* (1989), 60 D.L.R. (4th) 289 at 290-291:

> It is well established that the cause of action accrues, and the Statute of Limitation runs, from the earliest time at which repayment can be required (Chitty on Contract – 25th Ed. (1983) – Vol. I - pgra. [*sic*] 1843, 1024). For a demand loan, the Statute of Limitations runs as of the date of the advancement of the funds, and not from the date of the demand. No demand is necessary in order for the cause of action to arise...
>
> Case law supports the proposition that <u>if money is lent to be repaid at a particular time in the future</u>, or upon the happening of a specified contingency, <u>then the cause of action arises at the time specified</u> or upon the happening of the contingency... [Emphasis Added]

[91] This approach is also consistent with G. Mew's comments in *The Law of Limitations,* 2nd ed. (Toronto: LexisNexis Butterworths, 2004) at p. 175; B. Crawford's comments in *Payment, Clearing and Settlement in Canada*, Vol. 2 (Aurora: Canada Law Book, 2002) at 1088; as well as a brief comment to this exception to the general rule in *Chitty on Contracts*, Vol. I, 29th ed. (London: Sweet & Maxwell, 2004) at 1587-88.

[92] I quote Mew at p. 175:

> If a promissory note is made payable at a certain period after demand it is like a note payable after sight, the demand and the lapse of the specified time after the demand are conditions precedent and the limitation period runs from the time the note falls due.

[93] Therefore, there is nothing new in the notion of adding a time period to the demand. The argument that the "demand" in such a note may never be made and is therefore uncertain and not at a "determinable future time" has been considered and rejected: *Clayton v. Gosling* (1826), 5 B. & Cress. 360, 108 E.R. 134 (K.B.); *Alexander v. Thomas* (1851), 16 Q.B. 333, 117 E.R. 906; *Price v. Taylor and Fisher* (1860), 5 H. & N. 540, 157 E.R. 1294 (Ex. Ct.); *Elliott v. Beech* (1886), 3 Man. R. 213 (Man. C.A.); *Sparham v. Carley* (1892), 8 Man R. 246 (C.A.). Furthermore, section 41 of the *Bills of Exchange Act,* R.S.C. 1985, c. B-4... adds three days of grace to the time of payment.

[94] Based on this approach, I find that the note in this case, being properly characterized as a "delayed-demand" promissory note, is not statute barred by virtue of the limitation period of six years contained in s. 3 of the *Limitation Act,* R.S.B.C. 1996, c. 266. This is so because of the particular terms of the note, which require a demand to be made and thirty days to pass before the note becomes due and owing. Nor is the note statute barred by virtue of s. 8(1)(c) of the *Limitation Act*, which provides for an "ultimate limitation period" of 30 years.

[52] Counsel for the defendant argued before me that this finding from *Zeitler* is wrongly decided and I should find that the quote from Mew, (arguably a commentator on limitation periods not on Bills of Exchange) and the definition of a "delayed-demand promissory note" create an artificial distinction between a delayed-demand promissory note and a demand promissory note by suggesting that a demand note is instantaneously payable while a delayed-demand note is not. He argues that it would be silly to suggest a demand note is due on the spot since there inevitably is some passage of time between demand and payment. And of course, although in a delayed-demand promissory note, there is a period for payment

defined, it is still payable on demand. Therefore, there is only one kind of note, a demand note, payable on demand, which is dealt with in s. 3 of the *Limitation Act* and covered by a period of six years.

[53] The defendant's argument is interesting and has a certain logical appeal but *Zeitler* went to the British Columbia Court of Appeal and in a decision cited as *Zeitler v. Zeitler (Estate),* 2010 BCCA 216 that Court did not disturb the finding of the trial judge that I have quoted above.

[54] In fact, the Court of Appeal (per Low J.A.) mentions the promissory note and makes the following comments:

> [9] In October 1987, Ms. Zeitler transferred title to both properties to her husband. He assumed the mortgage on Lot 12 and the demand loan. For her equity, he gave her a demand promissory note in the amount of $92,000.86. The note is dated 1 October 1987. The interest rate is 10%, compounded annually.
>
> [10] At one point, Ms. Zeitler demanded payment of some of the interest that had accumulated under the note. Her claim against the estate for that portion of the interest is statute-barred, but the balance on the note remains due and owing. It is a substantial amount. There is no dispute that the amount owing on the note is an unsecured debt of Mr. Zeitler's estate. However, this debt is not relevant to the issue of contract interpretation raised in this appeal. [Emphasis added.]

[55] The issue on appeal was whether a term could be implied into the contract pursuant to which the promissory note was issued. The form of the promissory note was not directly at issue. However, I take from this comment that the Court of Appeal accepted that the form of promissory note used in that case did not make it vulnerable to the running of time set out in s. 3 of the *Limitation Act* until demand had been made and the money owed was due and payable.

[56] On the authority of *Re: Hansard Spruce Mills Ltd.,* [1954] 4 D.L.R. 590, 13 W.W.R. (N.S.) 285 (B.C.S.C.), I am bound by the decision of my sister judge.

[57] Therefore, I find that the Promissory Note is a delayed-demand promissory note.

3. Are the estate's rights under the Promissory Note spent?

[58] The Administrator made demand for payment on the Promissory Note on November 28, 2008. That is when the six year limitation period began to run.

[59] The action is not statute-barred.

4. Did Mrs. Ewachniuk renounce the debt owing to her under the Promissory Note?

[60] The obligations under the Agreement and Promissory Note could be terminated by an agreement between the parties which was intended to have that effect: see Gerald H.L. Fridman, *The Law of Contract* (Scarborough: Thomson Canada Limited, 1999) at 585-86 citing *Mason v. Scott*, [1935] S.C.R. 656, [1935] 2 D.L.R. 64.

[61] The defendant says that the first paragraph of the Statutory Declaration was a renunciation by

Mrs. Ewachniuk of the defendant's $750,000 debt. He says that there is evidence that the defendant developed Regent Holdings for the benefit of his parents, who derived jobs from the company and lived comfortably on income flowing from the company, that the defendant supported his mother and visited her daily. He says that the plain meaning of the Statutory Declaration and extrinsic evidence support his interpretation of the document.

What principles should be considered in interpreting the Statutory Declaration?

[62] In submissions, counsel for the defendant argued that the Statutory Declaration was the "primary source of knowledge of Mrs. Ewachniuk's intentions". He further said that "[t]he rules that apply to the interpretation of contracts are instructive in the interpretation of the Statutory Declaration".

[63] In his submission, those rules require that:

(a) the document be given its plain, literal and ordinary meaning;

(b) Mrs. Ewachniuk's intentions be determined by looking at the circumstances surrounding the signing pf the document; and

(c) effect be given to each clause unless one is repugnant to the document as a whole.

[64] I accept these submissions but have also considered principles used to interpret a testamentary document. At the time it was drafted only Mrs. Ewachniuk could have asserted a right to the funds owing on the Promissory Note, demanded the return of her $90,000 or profits gleaned from its use, or claimed ownership of the shares purchased by her son in her name. While she was alive and of sound mind, there was no need for her to set these matters out in writing. It is therefore likely that the Statutory Declaration was prepared in case a dispute arose surrounding these matters after her health had declined or following her death.

[65] I do not say that the Statutory Declaration is either a contract or a will. Though its dominant purpose is to explain the current state of certain affairs between Mrs. Ewachniuk and the defendant and therefore in certain respects it is a written expression of oral agreements between them, it cannot impose obligations on the defendant as he is not a party to it. It cannot be a will as it took effect before Mrs. Ewachniuk's death and did not dispose of her property. However, for the foregoing reasons, I will consider both contract and estate principles in interpreting the meaning of the Statutory Declaration.

[66] Because the defendant relies on the Statutory Declaration as the expression of his mother's intentions, in my view it is appropriate to first determine who drafted the Statutory Declaration.

Who drafted the Statutory Declaration and brought it to Mrs. Ewachniuk for signature?

[67] There is a dispute both as to who drafted the document and how it arrived at Mrs. Ewachniuk's home where it was executed.

[68] The defendant says his mother composed the Statutory Declaration herself and then had someone

from his office type it. However, he agrees that he asked for the inclusion of paragraphs two and three, the paragraphs relating to the $90,000 loan to him and his use of his mother's name to buy and sell stocks, the proceeds of which were for his own account.

[69] As noted above, at the same time Mrs. Ewachniuk signed the Statutory Declaration, she signed a power of attorney in favour of the defendant and the 2000 Will.

[70] The defendant at first disputed he had drafted the 2000 Will. When presented with previous testimony in which he said he had drafted it, the defendant admitted he had lied when he testified in chief that it was his mother who had drafted the 2000 Will.

[71] I find that the defendant drafted the Statutory Declaration. I find it more probable than not that as a trained lawyer, the defendant did not leave it to his 84-year old mother to draft this important legal document. This is particularly so in light of his admission that he drafted the 2000 Will which his mother signed at the same time.

[72] I also find that it was the defendant and not George Kincaid who brought the documents to the meeting at Mrs. Ewachniuk's home for signature.

[73] The defendant had no other reason for being at the meeting at which the documents were signed. The defendant says that he was present at the signing of the documents, but that Mr. Kincaid brought the documents. Mr Kincaid said that he did not think he brought the documents.

[74] In light of the defendant's evidence that someone from his office typed the document and my finding that he drafted it, it is logical that the defendant prepared the documents and brought them to the meeting with his mother and asked George Kincaid to witness them.

Is the meaning of the Statutory Declaration clear on its face?

[75] I turn now to consider the document. The Statutory Declaration reads:

> STATUTORY DECLARATION
>
> I, Sophia Ewachniuk, of 4187 Cambie Street, in the City of Vancouver in the Province of British Columbia, DO SOLEMNLY DECLARE:
>
> 1. THAT my son, A. Ted Ewachniuk has supported myself and my late husband since 1961 and in the course of doing so, he has spent significant time developing the asset known as Regent Holdings Ltd. for the purpose of providing a cash flow for which we have lived in a most enjoyable manner. Accordingly, the shares from my late husband were transferred to A. Ted Ewachniuk and no funds are owing in accordance with that transfer. This transfer was in the form of an estate plan so that he would retain control of that Company. I acknowledge and attested to this operation of Regent Holdings by my son over the years. This confirms that there is [sic] no monies owing to anyone.
>
> 2. THAT during the sale of my mother's house at 526 West King Edward Street, Vancouver, B.C. I received from that estate the sum of $90,000 which I have loaned to my son, A. Ted Ewachniuk, to invest using my name but for his benefit. My son, A. Ted Ewachniuk, does not owe any interest, but does hold or owe the sum of $90,000 to my estate without any interest charges.

> 3. THAT I have authorized and permitted my son, A. Ted Ewachniuk, to purchase and acquire shares in my name and these shares are held in my name in trust for A. Ted Ewachniuk. I further authorize A. Ted Ewachniuk to affix my signature to any and all documents to accomplish this purpose before or after my demise.
>
> AND I make this solemn declaration, conscientiously believing it to be true and knowing that it is of the same force and affect [*sic*] as if made under oath.

[76] It was sworn before George Kincaid as Commissioner at Mrs. Ewachniuk's home.

[77] The main theme of the Statutory Declaration is to clarify the terms of certain financial dealings between the defendant and his mother.

[78] In paragraph two, Mrs. Ewachniuk says that she inherited $90,000 and that her son is to have the use of those funds for his benefit, without interest, however the principal is to be repaid. The effect of this paragraph is to ensure that neither Mrs. Ewachniuk nor her estate has a claim to any profits Mr. Ewachniuk earns from his use of the loan, and to ensure the principal is repaid to her or her estate.

[79] In paragraph three, Mrs. Ewachniuk permits her son to purchase shares in her name for his own benefit and to sign documents relating to those transactions. The effect of this paragraph is to ensure that neither Mrs. Ewachniuk nor her estate has a claim to certain shares, although they are held in her name. Presumably this relates to the investment accounts listed by the Administrator. They had a total value of $114,378.59 and were closed in June 2004.

[80] The meaning of paragraph one is, of course, the subject matter of these proceedings. The respondent says that it is a renunciation by Mrs. Ewachniuk of the $750,000 debt owing under the Promissory Note in respect of the 1980 purchase by the defendant of his parents' shares in Regent Holdings. The plaintiff says the debt remains payable to the estate.

[81] It is curious that paragraphs two and three are clear and specific, but that paragraph one, which the defendant says extinguishes a $750,000 debt, is not.

[82] I find paragraph one ambiguous. There are two distinct topics addressed in paragraph one. The first is the reasons for which the defendant received the shares and the second is monies owing in respect of the shares.

[83] The Statutory Declaration says that the defendant had supported his parents since 1961 and spent significant time developing Regent Holdings so that that company could provide them with cash flow. It says that "accordingly", "the shares from my late husband" were transferred to the defendant. The transfer was "in the form of an estate plan" so that the defendant could "retain control of that Company".

[84] Referring to amounts owing, the Statutory Declaration says "no funds are owing in accordance with that transfer" and "[t]his confirms that there is [*sic*] no monies owing to anyone."

[85] I cannot find that this expresses Mrs. Ewachniuk's intention to extinguish the debt owing under the

Promissory Note.

[86] The shares sold to the defendant were owned by both Roman Ewachniuk and Mrs. Ewachniuk. The Promissory Note was a debt to both of them. It is therefore not clear that paragraph one refers to the shares covered by the Agreement as it refers only to Mrs. Ewachniuk's husband's shares.

[87] Further, as I have said above, it does not follow from the statement that the shares were transferred as part of an "estate plan" and to permit the defendant to "retain control" of Regent Holdings that the defendant was not required to compensate his sisters for their portion of the value of the shares. This statement is equally consistent with Mrs. Ewachniuk wanting to give her son control of Regent Holdings but give her daughters financial compensation for their share of the company's value.

[88] Finally, as I have said, the Promissory Note which secured payment for the shares was a delayed-demand promissory note. A reasonable interpretation of the phrases "no funds are owing in accordance with that transfer" and "[t]his confirms that there is [*sic*] no monies owing to anyone" is that demand has not yet been made for payment.

[89] As I have found that paragraph one is ambiguous, I must consider other evidence to ascertain its meaning.

What other evidence assists to ascertain the meaning of paragraph one?

[90] I will proceed to interpret paragraph one, considering the surrounding circumstances at the time the Statutory Declaration was signed, such as the terms of the 2000 Will, Mrs. Ewachniuk's character, the extent of her property, the number of her children and her relationship with each of them.

[91] As I have said, the main purpose of the Statutory Declaration is to clarify the terms of certain financial dealings between the defendant and his mother.

[92] The Statutory Declaration was executed at the same time as the 2000 Will, which the parties agree divided Mrs. Ewachniuk's estate equally among her three children, and only a few months after the defendant's divorce proceedings, when the Promissory Note was included by the defendant in the calculation of his net worth. At that time, when Mrs. Ewachniuk was questioned about the existence of the Promissory Note and the amount owing under it, she said the $750,000 was her money and that unless she changed the terms of her will, she expected the money to be distributed under it.

[93] The 2004 Will was invalidated and the defendant destroyed the 2000 Will. Mrs. Ewachniuk therefore died intestate.

[94] According to an April 2009 summary of her assets by the Administrator, her major assets were:

1) her home, which sold for $1,145,000. The defendant claims $38,077.96 for fixtures and repairs to the property;

2) a promissory note from the defendant for $90,000;

3) the Promissory Note at issue in these proceedings for $750,000;

4) a bank balance of $52,730.45 which had been drawn down to $0.50 as of February 25, 2008;

5) coins with an appraised value of $14,440.88 which the defendant says belong to him.

[95] The Promissory Note therefore represents almost 40% of Mrs. Ewachniuk's estate.

[96] Mrs. Ewachniuk was said to have been concerned about ensuring her daughters shared in the family company. This resulted from her being treated unfairly by her family because of her gender. In 1964 she convinced her son to divide the shares left to him by his grandfather between himself and his sisters and only months before signing the Statutory Declaration, in her testimony at the defendant's divorce proceedings, Mrs. Ewachniuk indicated that the transfer was made in 1980 to protect her daughters' interests against those of their husbands.

[97] Mrs. Ewachniuk clearly appreciated the defendant's work in developing Regent Holdings and she wanted him to retain control of the company. However, the amount owing under the Promissory Note does not put control of Regent Holdings at issue.

[98] Mrs. Ewachniuk saw the defendant regularly. He and his family assisted in taking care of her. Her daughters both lived out of town, though they visited her.

[99] She was aware of the 1986 legal action started by her daughters against their brother for his handling of Regent Holdings.

Is there a more plausible interpretation of paragraph one of the Statutory Declaration than that advanced by the defendant?

[100] The defendant's interpretation of the Statutory Declaration is only supportable if I can find that Mrs. Ewachniuk departed from the goal she had pursued since 1980, that is, to leave the company in the hands of her son for the benefit of all her children.

[101] I cannot find that removing 40% of the value of her estate, for the sole benefit of her son, is consistent with her stated intentions or character.

[102] As I have said, Mrs. Ewachniuk recalled being treated unfairly in family business. She sought to avoid this by requesting that her son share his inherited shares with his sisters. She and her husband transferred their own shares to the defendant "not to use for himself but to protect [his sisters]". Those interests are not protected if the shares were a gift from the parents to the son.

[103] A more plausible interpretation of paragraph one is that, in the wake of his divorce proceedings, the defendant asked his mother to confirm that at that time, he did not owe her money on the Promissory Note. The wording used was vague and ambiguous. Perhaps the defendant sought to extinguish the debt when he drafted paragraph one, but I am not persuaded that that is what the words meant to Mrs. Ewachniuk.

[104] The defendant says I should consider that there was no evidence Mrs. Ewachniuk lacked capacity at the time the Statutory Declaration was signed.

[105] That does not assist the defendant. The defendant urged me to consider principles of contractual interpretation in ascertaining the meaning of the Statutory Declaration. One principle which arises is the doctrine of *contra proferentem*.

[106] The doctrine is succinctly explained in *Canadian Encyclopaedic Digest,* West. 4th ed., vol. 14 (Toronto: Carswell, 2009) (the "CED") at para. 582:

> Where a contractual provision is sufficiently ambiguous that it is reasonably capable of more than one construction, it will be construed against the party responsible for drafting and tendering the contract (rather than the person in whose favour the stipulation was made) and in favour of the opposite party ("contra proferentem"). Contra proferentem operates to protect one party to a contract from deviously ambiguous or confusing drafting on the part of the other party, particularly where there is an inequality of bargaining power between the parties...

[107] If this were a contract, then the ambiguity would be construed against the defendant as the party who drafted it.

[108] I cannot go quite so far. However, in *Niedt Estate v. Bell*, 1993 CarswellBC 2381 at para. 28, Kirkpatrick J., as she then was, accepted that the principle in *Miller v. Miller Estate* (1987), 14 B.C.L.R. (2d) 42, that "the court should require a high standard of proof from a person who claims he is owed money by a deceased person" applies to "a claim by a deceased person as represented by her estate for money owed to the estate". In *Miller*, at para. 37, the Court said that:

> the evidence of a claimant in these types of situations should be examined with "the most careful scrutiny and indeed at the outset with some suspicion".

[109] I have attempted to interpret paragraph one on its face. Finding it ambiguous, I have carefully scrutinized the surrounding circumstances and extrinsic evidence and approached the interpretation advanced by the defendant with some suspicion.

[110] I cannot agree that the debt owing under the Promissory Note was renounced by the wording of paragraph one of the Statutory Declaration. I consider the meaning of these sentences, both individually and when considered as part of the whole, ambiguous and consistent with a meaning other than the one advanced by the defendant. Indeed, given Mrs. Ewachniuk's long-expressed desire to have her daughters benefit from the share transfer, I find the defendant's interpretation improbable.

[111] It appears to me more plausible that Mrs. Ewachniuk wanted to ensure her son remained in control of Regent Holdings and to clarify that she had not made any demand under the Promissory Note.

[112] I cannot find that the Statutory Declaration expressed a clear intention by Mrs. Ewachniuk to renounce the debt owing under the Promissory Note. This does not meet the high standard, as required in *Neidt,* nor is it an absolute renunciation of rights for the purpose of s. 141 of the *Bills of Exchange Act*.

5. Was there an accord and satisfaction such that the defendant's obligation under the Promissory Note was met?

[113] Finally, the defendant argues that the debt was discharged by an accord and satisfaction. He says that paragraph one of the Statutory Declaration clearly expresses that Mrs. Ewachniuk accepted the consideration provided by the defendant to his mother and father throughout their lives in payment of the debt.

[114] The CED at para. 849 defines accord and satisfaction in this way:

> Accord and satisfaction is the purchase of release from an obligation, whether arising under contract or tort, by means of any valuable consideration, not being the actual performance of the obligation itself.... There can be no accord where nothing more is promised than compliance with an existing obligation, as there is no fresh consideration [citing *British Russian Gazette & Trade Outlook Ltd. v. Associated Newspapers Ltd.,* [1933] K.B. 616 (Eng. C.A.); *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, 1997 CarswellNfld 207 (S.C.C.); *Esquire Heating & Air Conditioning ltd. v. Hoffman*, 1984 CarswellAlta 132 (Alta. Master)].

[115] As I cannot find that the wording of the Statutory Declaration expresses a renunciation of the debt, it follows that I cannot find that it does so in satisfaction of a new accord made between the parties.

Conclusion

[116] The defendant has held a majority of the shares of Regent Holdings for 30 years. Demand has now been made for payment of those shares.

[117] The defendant owes his mother's estate $750,000 plus court-ordered interest accruing since November 28, 2009.

[118] Unless there are matters of which I am not aware, the defendant will pay the Administrator's costs.

"L.D. Russell J."

_____

The Honourable Madam Justice Loryl D. Russell