# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ewachniuk Estate v. Ewachniuk,*
2011 BCCA 510

Date: 20111214
Docket: CA038982

Between:

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

Respondent
(Plaintiff)

And

**Alexander Theodore Ewachniuk**

Appellant
(Defendant)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Ryan
The Honourable Madam Justice Saunders

On appeal from: Supreme Court of British Columbia, 1 April 2011
(*Ewachniuk Estate v. Ewachniuk*, 2011 BCSC 395,
Vancouver Docket No. S095481)

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|---|---|
| Counsel for the Appellant: | T.R. Berger, Q.C., H.I. Schachter |
| Counsel for the Respondent: | G.E. Sourisseau, R. Robertson |
| Place and Date of Hearing: | Vancouver, British Columbia<br>3 October 2011 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>14 December 2011 |

**Written Reasons by:**
The Honourable Chief Justice Finch

**Concurring Reasons in the result by:**
The Honourable Madam Justice Ryan (p. 22, para. 91)

**Concurred in by:**
The Honourable Madam Justice Saunders

**Reasons for Judgment of the Honourable Chief Justice Finch:**

## I. Introduction

[1] The issue on this appeal is whether the learned trial judge erred in holding that the plaintiff's claim for payment of $750,000 alleged to be owing on a promissory note was not barred by s. 3(5) of the *Limitation Act*, R.S.B.C. 1996, c. 266.

[2] Section 3(5) provides that:

> Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after <u>the date on which the right to do so arose</u>. [Emphasis added.]

[3] It is common ground between the parties that the cause of action pleaded is not specifically provided for in the *Limitation Act* or any other statute.

[4] The promissory note on which suit was brought is dated at Vancouver, B.C., on 23 December 1980, and is in the following terms:

> For value received, I promise to pay to the order of Roman and Sophia Ewachniuk the sum of Seven Hundred and Fifty Thousand Dollars ($750,000.00), <u>payable one (1) year after demand</u>, without interest.
>
> [Emphasis added.]

[5] The note is signed by the defendant.

[6] The payees on the note were the defendant's parents. Roman Ewachniuk died on 30 December 1984. Sophia Ewachniuk died on 1 June 2006. No demand for payment was made during the lifetime of either.

[7] The plaintiff in this action was appointed administrator of the estate of Sophia Ewachniuk by order of the Supreme Court of British Columbia on 27 October 2008. On 29 November 2008, the administrator made written demand on the defendant for payment of the note. The defendant denied any obligation to pay the sum demanded by 30 November 2009, or at all.

[8] On 23 July 2009, the plaintiff commenced this action to recover the sum owing under the note. It is common ground that nothing turns on the fact that the action was commenced within one year from the date of the demand. The defendant agrees that the writ could have been reissued after 30 November 2009, and within the six-year limitation period provided for in s. 3(5) of the *Limitation Act*.

[9] The question of whether the action is barred by the *Limitation Act* turns on when the right to bring the action arose. The defendant contended below, as he has on appeal, that as a demand note it became payable and actionable one year after it was executed on 23 December 1980, that the six-year limitation period began to run on 23 December 1981, and that the limitation period expired on 23 December 1987, with the result that the action was commenced out of time.

[10] The plaintiff successfully contended in the court below that this was a "delayed-demand" promissory note, that the right to sue on it did not arise until one year after demand for its payment had been made, and that the six-year limitation period only commenced to run on 30 November 2009, one year after the plaintiff

made his demand on 29 November 2008. Accordingly, the plaintiff says the action was commenced within the limitation period.

[11] Although for reasons which differ somewhat from those of the trial judge, I am of the opinion that she reached the correct conclusion, and that the plaintiff's action is not statute barred.

## II. Reasons of the Trial Judge

[12] In the court below the defendant raised many defences, all of which the trial judge rejected. For the purposes of this appeal it is necessary only to consider her reasons for holding that the action was not barred by s. 3(5) of the *Limitation Act*.

[13] The judge held that the terms of the note made s. 23(b) of the *Bills of Exchange Act*, R.S.C. 1985, c. B-4, applicable. That section provides:

> 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.

[14] The judge quoted from and relied on the judgment of the Supreme Court of British Columbia in *Zeitler v. The Estate of Alfons Zeitler*, 2008 BCSC 775, B.C.J. No. 1126 [*Zeitler*], where the judge said, in part:

> [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 Ac*t, 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.

[15] The judge was of the view that this Court effectively affirmed this reasoning in *Zeitler v. Zeitler (Estate),* 2010 BCCA 216, [2010] B.C.J. No. 1498.

[16] She concluded that the promissory note was a delayed-demand promissory note, that the six-year limitation period began to run when the plaintiff made demand for payment on 28 November 2008 (as noted

below, this is an inconsequential error), and that the action was not statute-barred.

### III. The Parties' Positions

[17] The defendant maintains that the question to be decided in this case is what is the earliest date repayment of the promissory note could have been demanded. He relies on the statement of this Court in *Berry v. Page*, [1989] 38 B.C.L.R. (2d) 244 (C.A.) at 247 that:

> The characterization of the loan as either a contingent loan or a demand loan determines whether or not the action is statute barred under the Limitation Act. 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 Contracts 25th ed. (1983), vol. I, para. 1843, p. 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: *Barclay Const. Corp. v. Bank of Montreal,* 28 B.C.L.R. (2d) 376 at 381, [1988] 6 W.W.R. 707, 40 B.L.R. 150 (S.C.); *Heubach v. Sprague*, 41 Man. R. 292, [1933] 2 W.W.R. 99, [1933] 3 D.L.R. 647 (C.A.).

[18] The defendant says that the provision in the note for repayment "one (1) year after demand" is not a truly contingent event, because the demand lies within the power of the person claiming payment. Moreover, the contingent event must be certain to come to pass in due course, even if the timing of that future event is not certain.

[19] A demand, the defendant argues, is an uncertain event which may never happen. But in respect to bills of exchange and promissory notes, there is a common law rule that the demand is deemed to take place at the first date it could be made, thus rendering certain that which would otherwise be uncertain.

[20] In the defendant's submission, a so-called delayed-demand note retains its character as a demand note. He argues the law is settled that a cause of action in respect of a demand note accrues on the day the note could be enforced if the demand were to be made at the earliest possible time. The defendant maintains that, similarly, a cause of action in respect of a delayed-demand note occurs at the first time that it could be enforced, which is the date of execution, subject to delay according to the time specified.

[21] The defendant contends that the judge misconstrued this Court's ruling in *Berry* and that the authorities referred to in *Zeitler* do not support the conclusions reached by the judge in that case.

[22] Finally, the defendant submits that if the judge's analysis is correct, then there is effectively no limitation period governing so-called delayed-demand notes. He maintains that even the ultimate long-stop of 30 years under s. 8 of the *Limitation Act* would never apply, because the 30-year long-stop is triggered by the accrual of the cause of action. If the accrual of the cause of action requires the demand, then absent demand, limitations never begin to toll.

[23] The plaintiff submits that the issue in this case is correctly framed by asking when the right to sue on the note arose in fact, and not when it might have arisen on hypothetical assumptions, such as when demand could first have been made.

[24] The plaintiff argues the judge did not err in holding the claim on the note to have been made within

time. He agrees that an ordinary demand promissory note is actionable at the time it is made and that no prior demand is required before action is commenced. Such a note is a current obligation for which payment can be demanded at any time.

[25] The plaintiff asserts that limitation periods begin to run when a cause of action arises and because a creditor has a cause of action immediately upon the making of a demand note, the limitation period necessarily also begins to run from that date.

[26] However, the plaintiff maintains that a delayed-demand note is actionable only according to its terms. The debt exists, but the money is not due and payable on demand. The money only becomes due and payable when a cause of action, or the right to sue arises. That can only be after the demand has been made, and the specified period of time has elapsed.

[27] The plaintiff says that *Zeitler* was correctly decided, and that the judge did not err in relying on it.

[28] The plaintiff disputes the defendant's assertion that there is a common law rule concerning demand notes that deems or assumes demand to occur at the earliest possible time. In the plaintiff's submission, there is no such rule.

[29] Rather, the plaintiff argues that the common law rule, correctly stated, is that for demand notes or other simple debts, no formal demand is required before commencing action. Because a demand note is actionable when made, the limitation period runs from the date the loan was given and the note executed. The bringing of the action constitutes a demand for payment.

[30] The plaintiff also disputes the defendant's argument that the judge's conclusion results in there being no limitation for delayed-demand notes, and that even the 30 year long-stop limitation period under s. 8 of the *Limitation Act* would never apply. Even in the absence of an ultimate limitation, the plaintiff argues a stale claim might well be barred by the doctrine of laches.

[31] In ascertaining the parties' intentions, the plaintiff says it is important to have regard for the language actually used in the note. If the parties' intention had been to deem a demand at the time of making, with the cause of action to arise one year later, that could have been much more clearly expressed by making the note payable one year from the date of its making, or on a fixed date one year after its making.

[32] The plaintiff submits that the provisions of the *Bills of Exchange Act* are not relevant on this appeal. No issue of negotiability arises. The enforceability of this note as between the parties is not an issue. It is not said that the note is void or unenforceable for uncertainty.

## III. Analysis

[33] The central question in this dispute is when the six-year limitation set out in the *Limitation Act* begins to run in the case of a so-called delayed-demand promissory note. Does it start running at the earliest point when a demand could have been made, as the defendant contends? Or from the point when a demand was actually made, as the plaintiff argues?

[34] A singular feature of this case is that there is a trial judgment which, if correctly decided, would be dispositive of the entire issue. In *Zeitler*, the British Columbia Supreme Court likewise considered the moment at which the limitation period began for a delayed-demand note. Neither party in the present matter has made any attempt to distinguish *Zeitler* from the case at bar; rather, the defendant contends that it was wrongly decided.

[35] In arguing that the conclusion in *Zeitler* was flawed, the defendant employs two principal lines of argument. First, he takes issue with the authorities on which the Court in that case relied, arguing that some failed to support the Court's reasoning, while others were themselves without foundation. Second, he contends that the present-day law of limitations and of negotiable instruments, and the policy objectives underlying this law, militate against the disposition made in *Zeitler*. The plaintiff rejects both of these arguments.

[36] After considering both of these lines of reasoning, I have come to the conclusion that *Zeitler* was decided correctly and that the judgment of the trial judge in the case at bar is similarly sound. In the following reasons, I will address each argument in turn.

**1. Are the authorities relied upon in *Zeitler* sound?**

[37] The judge in *Zeitler* reached two legal conclusions that are at issue in the case at bar. First, the demand in a delayed-demand promissory note may properly be characterized as a contingent future event. Therefore, the end of the designated period following the demand marks the moment when the cause of action arises and the *Limitation Act* begins to run. I will call this the "Contingency Conclusion".

[38] Second, the judge held there is no merit to the argument that the "demand" in a delayed-demand note may never be made and is therefore uncertain and not at a "determinable future time". I will call this the "Certainty Conclusion".

[39] In support of the Contingency Conclusion, the judge in *Zeitler* cited *Berry v. Page*; Graeme Mew, *The Law of Limitations*, 2d ed (Toronto: LexisNexis Butterworths, 2004) at 175; Bradley Crawford, *Payment, Clearing and Settlement in Canada*, vol 2 (Aurora: Canada Law Book, 2002) at 1088; and *Chitty on Contracts*, vol 1, 29th ed (London: Sweet & Maxwell, 2004) at 1587-88.

[40] In support of the Certainty Conclusion, she cited *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.); *Elliot v. Beech* (1886), 3 Man. R. 213 (Man. C.A.); and *Sparham v. Carley* (1892), 8 Man. R. 246 (C.A.).

*A. The Contingency Conclusion*

<u>*i. Berry v. Page*</u>

[41] I reproduce the disputed passage in *Berry* at 247:

> Case law supports the proposition that if money is lent to be repaid at a particular time in the future, or upon the happening of a specified contingency, then the cause of action arises at the time specified or upon the happening of the contingency: *Ingrebretsen v. Christensen*, 37 Man. R. 93, [1927] 3 W.W.R. 135 (C.A.); *Re Gould; Ex parte Garvey,* [1940] O.R. 250, [1940] 3 D.L.R. 12 (C.A.). In these circumstances, the cause of action does not arise, and the statute of limitations does not run until the contingency is satisfied.

[42] The judge in *Zeitler* read the phrase "if money is lent to be repaid at a particular time in the future" as applying to delayed-demand notes, with the result that the Statute of Limitations would not begin running on such a note until after the demand had been made and the designated delay had run its course.

[43] The defendant points to the same sentence as evidence that the court was drawing a distinction between demand requirements and "truly contingent obligations that depend on the happening of a future event". He argues that a demand is not truly a contingent event, since it remains within the power of the person claiming payment, and is not certain to come to pass. The defendant also maintains that the judge in *Zeitler* had ignored the statement in *Berry* that demand notes are due at the first time the demand could have been made.

[44] With respect, it does not appear, on a close reading of the excerpt in question, that the Court in *Berry* intended to draw a distinction of the kind the defendant suggests. The final sentence of the paragraph uses the word "contingency" to apply to both the repayment of money at a particular time and to a "specified contingency". More likely, therefore, the paragraph was intended to apply to a general category of contingencies, which includes both payments to be made at a particular time (likely the most common type of contingency contemplated) and a residual category of "specified contingencies". This reading has the advantage of being consistent with the other authorities discussed below.

[45] As for the argument that the Court in *Zeitler* ignored statements in *Berry* about when demand notes become due, this is, with respect, a mischaracterization. The judge in *Zeitler* did not "ignore" the general rule about the application of limitation periods to demand notes; rather, she found that delayed-demand notes fit within an exception to the general rule.

[46] In my respectful opinion, the application of *Berry* to the facts of *Zeitler* was sound. It is true that *Berry* was a case dealing with loans, and there are important differences between debts generated by simple agreements, such as loan agreements, and debts memorialized by promissory notes. However, I do not consider that these differences, which relate to the additional technical requirements of promissory notes, and to their negotiability, are relevant in a case such as this, which is concerned solely with limitation periods. Notably, both promissory notes and simple debt obligations are dealt with under the same catch-all section of the *Limitation Act*: s. 3(5). Moreover, the British Columbia Supreme Court has previously relied on *Berry* for the guidance it provides on limitation periods for promissory notes [see *FWC Holdings Ltd. v. Virtue Films Inc.*, 2009 BCSC 1563, [2009] B.C.J. No. 2431].

### ii. The Text Authorities: Mew's *The Law of Limitations;* Crawford's *Payment, Clearing, and Settlement in Canada;* and *Chitty on Contracts*

[47] All three authorities say essentially the same thing, and all rely on a core of the same authorities. Below is the disputed passage from *Mew* at 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.

[48] As for the reference in *Zeitler* to *Crawford*, only a page number is supplied – not a specific passage. The one most likely applicable is the following (at 1088):

> In the case of an instrument payable at a certain period after sight, demand, or presentment, the time begins to run in favour of the acceptor or maker from the day following the expiration of the specified period after presentment ... Since instruments payable at sight in Canada, are not demand bills, the same rule would be applicable to them.

[49] In *Chitty on Contracts*, the author lays out the general rule that demand notes are due on execution, but mentions an exception in cases where payment is not due until a fixed period following demand (at 1587-88). Since *Chitty* is the least specific of the three sources and says nothing on this topic that is not covered in *Mew* and *Crawford*, both parties focused attention on the other two sources, and I will as well.

[50] The judge in *Zeitler* viewed these textbook sources as confirmations of her reading of *Berry*. The defendant does not dispute this interpretation; rather, he argues that the passages themselves are without foundation. The defendant's argument leads back more than two centuries into the history of demand notes, along a lengthy chain of authorities.

[51] The following is a brief summary of the defendant's reasoning with respect to the legal foundations of *Mew*, *Crawford*, and *Chitty*. *Mew* and *Crawford* each base their respective statements on *obiter dictum* from the 1892 case of *Sparham v. Carley* (the quotation from *Mew* is, in fact, a nearly word-for-word transcription of the *Sparham obiter*).

[52] That section of *Sparham*, for its part, is taken *verbatim* from Sir John Barnard Byles, *A Treatise of the Law of Bills of Exchange, Promissory Notes, Bank-Notes and Cheques*,15th ed (London: Sweet & Maxwell, 1891) [commonly referred to as "*Byles on Bills of Exchange*"]. *Byles* itself attributes the principle (wrongly, in the defendant's view) to an 1826 case called *Thorpe v. Booth* (1826) Ry. & M. 388. *Chitty* likewise cites *Thorpe* as its authority for the statement cited in *Zeitler*.

[53] *Thorpe*, the defendant maintains, does not actually articulate the principle that *Byles* purported to take from it. The judge in *Thorpe* expressed uncertainty about the holding he was making, leaving open the possibility that the losing party could correct the decision by entering a nonsuit (though the party in question did not succeed in doing so). In coming to his decision, the judge in *Thorpe* relied on a case from 1810, *Holmes v. Kerrison* (1810), 2 Taunt. 323.

[54] *Holmes*, the defendant goes on to argue, is not a suitable foundation for *Thorpe*, since the former case dealt solely with the question of when to mark the beginning of the limitation period for a sight bill. The defendant contends that a sight bill is a fundamentally different creature from a demand note or a delayed-

demand note, and therefore the judge in *Thorpe* was wrong to the extent that he considered himself bound by *Holmes*.

[55] Leaving aside the arguments about the alleged errors made by judges and authors along the chain of authorities, the plaintiff does not dispute the defendant's sketch of *Zeitler*'s pedigree. Nor do I. There do not appear to be any relevant sources that the defendant does not account for. It is not too much to say, therefore, that the validity of the passages at issue in *Mew*, *Crawford*, and *Chitty* depend on the correctness and applicability of *Holmes* and *Thorpe*, two cases decided about two centuries ago.

[56] In *Holmes*, the plaintiff had deposited money with the defendant, a banker, and took in exchange "promissory notes payable at a certain number of days after sight" (the judge appears to use the terms "bill" and "note" interchangeably throughout the judgment). When the plaintiff brought an action to recover on the bills, the defendant pleaded the Statute of Limitations. The Court found against him, holding that the limitation period could only begin to run once the bills had been presented for payment.

[57] *Thorpe* did not deal with a sight bill, but rather with a promissory note. Its facts are similar to those of *Zeitler* and to those in the case at bar. The defendant gave the plaintiff's wife a promissory note with the promise that he would pay her a sum of money "twenty-four months after demand". The note was presented for payment ten years after it was made, and the defendant pleaded the Statute of Limitations. The judge stated that he was "of the opinion, on the authority of *Holmes v. Kerrison*, that the Statute of Limitations will not in the present case be a bar to the plaintiff's right to recover on this promissory note."

[58] In my view, the judge in *Thorpe* did not err in relying on *Holmes.* The fact that the concepts of sight bills and demand notes are distinct does not mean that the legal regime governing the one is not relevant in deciding a case about the other. This is particularly true given the similarity between sight bills and delayed-demand notes. As Bradley Crawford observes in *The Law of Banking and Payment in Canada*, Vol 3 (Toronto: Canada Law Book, 2011) at §22.50.10(1), "according to the ordinary and natural meaning of the words, a bill payable at sight is the same thing as a bill payable on demand or on presentation." In the circumstances, it was reasonable for the judge in *Thorpe*, faced with a "point of some doubt and difficulty", to take guidance from the readily comparable, though not identical, case of *Holmes*.

[59] There remains the concern that the judge in *Thorpe* had doubts about the correctness of his ruling, an uncertainty evident not only from his reference to the "doubt and difficulty" of the question, but also from his decision to allow the defendant to move to enter a "nonsuit" – that is, for a judgment against a plaintiff who has failed to prove his case (*Black's Law Dictionary,* 5th ed, *sub verbo* "nonsuit"). In the end, the court refused the defendant's motion "for a rule to [show] cause why a nonsuit should not be entered."

[60] With respect to the contrary view, I do not believe that either the judge's caution or the defendant's failed effort to move for a nonsuit in *Thorpe* provides sufficient grounds for discounting the judgment. Where a court expresses some doubt on a conclusion, that may be good reason for subjecting the judgment to close scrutiny. The line of reasoning, however, may still be helpful. As for the matter of the failed nonsuit, the judge allowed the defendant in the case to bring a motion so that his decision "if wrong, may be corrected."

The motion was not granted, and accordingly the decision was not altered. I see no reason to infer from this piece of procedural history that the decision was somehow compromised.

[61] The final question to address concerning *Thorpe* is whether it provides a sufficient basis for the passage in *Byles* that was quoted in the *Sparham* decision (and later adopted by *Mew*, *Crawford*, and the trial judge in *Zeitler*). For ease of reading, I again reproduce the quotation below:

> 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.

[62] In *Thorpe*, a note dated in 1813 was made payable 24 months after demand. It was presented for payment in 1823, and the judge found on the authority of *Holmes* that the six-year statute of limitations did not bar recovery. Though the judge never explicitly articulated the general principle that *Byles* distilled from the case, it is implausible that he could have reached his decision without adopting it. Clearly, by relying on *Holmes*, the judge in *Thorpe* considered a promissory note “made payable at a certain period” to be “like a note payable after sight”, as discussed above. Moreover, he must have considered that the limitation period should be measured with reference to the date of the demand, rather than to the date of the note, or he would have found the claim to be statute-barred. It is not unusual that a judge should resolve a specific dispute without neatly summarizing the general rule informing his decision – particularly a judge writing almost two centuries ago. This should not deter later authors and judges from drawing out the principle in cases where, as here, it may be readily discerned.

[63] Since in my view the principle set down in *Byles* (and also *Chitty*) was well-grounded, it follows that the judge in *Sparham* did not err in relying on it. Proceeding up the chain of authorities, *Mew* and *Zeitler* are also sound. The trial judge in the case at bar, therefore, did not make the first error of law the defendant alleges.

iii. *Re Rutherford*

[64] One final note deserves mention before I consider the Certainty Conclusion. The defendant relies on the case of *Re Rutherford* (1880) 14 Ch. D. 687, which was not cited either in *Zeitler* or in the trial decision of the case at bar, but is referenced in *Chitty*. *Rutherford* concerned a delayed-demand promissory note that was stated to be due three months after demand. It was presented for payment 22 years after execution. At first instance, the trial judge held that “I am of opinion ... that this being a note payable three months after demand, time does not run under the *Statute of Limitations* until demand has actually been made” and ordered that the claim on the note be allowed. This order was reversed on appeal – not because the appellate court disagreed in principle about when the Statute of Limitations began to run, but rather because it found on the facts that there had actually been a demand shortly after the note was made. The decision in the case, therefore, serves to support the finding in *Zeitler* and the trial judgment in the case at bar.

[65] The defendant, however, quotes a passage of *obiter dictum* from Sir George Jessel, the Master of the Rolls, who wrote one of the concurring opinions in the *Rutherford* appeal:

> …But I wish to guard myself from being supposed to say that if there had been no evidence of payment of interest [by which fact the court concluded a demand had been made] this demand ought not, after the lapse of twenty-two years, to be rejected as being a stale demand.

[66] The wording of this passage is not entirely clear. Essentially, it appears that Jessel, M.R. was saying that even if there had been no demand (which would start the clock on the Statute of Limitations), he would not rule out the possibility that the claim might be barred by the totally separate defence of stale demand.

[67] The defendant claims that this passage calls into question the decision in *Thorpe*. With respect, I disagree. On the contrary, in making this statement, Jessel, M.R. affirmed the principle applied by the trial judge in *Rutherford*; namely, that the Statute of Limitations does not begin to run until demand had been made. If the Statute of Limitations on a delayed-demand began to run at the earliest time that payment could be demanded, as the defendant alleges, then the existence of an actual demand would be irrelevant to the question of when the limitation period began to run. If that were the case, Jessel, M.R.'s statement would have made little sense. As the plaintiff notes, this excerpt from *Rutherford* also serves as a reminder that there are other defences, beyond the Statute of Limitations, to mitigate the risk of indeterminate liability.

*B. The Certainty Conclusion*

[68] After concluding that the demand in a delayed-demand promissory note may properly be characterized as a contingent future event, the judge in *Zeitler* rejected the argument that the "demand" may never be made, is therefore uncertain and that the note is not payable at a "determinable future time". This is, as already mentioned, one of the conclusions disputed by the defendant.

[69] The Certainty Conclusion is in effect an elaboration on an aspect of the Contingency Conclusion. The judge in *Zeitler* cited some five cases in support of it, all of which are contested by the defendant.

[70] With respect, the defendant's arguments against the applicability of the five cases are not convincing. I have already considered and rejected his argument against the applicability of *Sparham*. As to three of the remaining cases – *Alexander v. Thomas*, *Price v. Taylor and Fisher*, and *Elliot v. Beech* – the defendant's argument is essentially the same. He maintains that the reasons in each case have nothing to say about limitations or the time the promissory note became due. He therefore submits that none of them support the reasoning of the judge in *Zeitler* with regard to the Contingency Conclusion. However, these cases are not cited as support for the Contingency Conclusion, but rather for the Certainty Conclusion, which does not turn on limitation periods.

[71] Both *Alexander* and *Price* dealt with delayed-demand notes that were upheld as valid. However, it cannot be said for either case that the argument referred to by the judge in *Zeitler* "has been considered and rejected". *Elliot* is more directly on point, deciding that "all text writers on bills and notes, and numerous authorities, recognize the validity of notes payable "on demand" or "at sight" or at a certain time after demand or sight".

[72] Of the five cases cited in *Zeitler*, *Clayton v. Gosling* provides the best support for the Certainty

Conclusion. The plaintiff in *Clayton* held a promissory note from the defendant, entitling the plaintiff to a sum of money "for value received" twelve months after demand. In the course of his analysis about when the debt and the cause of action arose, Abbott C.J. stated for the majority that "this note was made payable at a time which we must suppose would arrive". Clearly, this statement goes to the heart of the question of whether or not the demand in a delayed-demand note can be considered a "determinable future time". However, the defendant does not engage with this holding, focusing instead on how *Clayton* relates to the Contingency Conclusion, about limitation periods.

[73] In short, therefore, there is authority to support the Certainty Conclusion as well as the Contingency Conclusion.

[74] I conclude that *Zeitler* does not, as the defendant contends, rest on wrongly decided or distinguishable authorities.

**2. Do *Zeitler* and the trial judgment in the instant case conflict with existing legal principles and policy objectives?**

[75] With regard to law and policy objectives, the defendant makes two basic arguments. First, he contends that delayed-demand notes must function essentially like ordinary demand notes with respect to limitation periods – a conclusion justified by the objective of certainty and grounded in established law (chiefly the common law and the *Bills of Exchange Act*). Second, he maintains that the principles of justice between the parties and certainty for all debtors necessitate a finite and predictable limitation period. Both of these considerations, he argues, militate for the commencement of the limitation period on a delayed-demand note at the earliest time that demand could be made.

[76] Although both of these arguments raise important considerations in the law, they do not persuade me to depart from two centuries of case law and doctrine supporting the contrary position with respect to delayed-demand notes.

[77] The defendant's first argument proceeds from his assumption that delayed-demand notes are fundamentally the same as ordinary demand notes, the only difference between them consisting of the mechanism of the delay itself. From this position, he contends that the rule governing the running of the statute of limitations on a demand note must also apply to a delayed-demand note. Because the demand in a demand note does not constitute a contingent event, he argues, the demand in a delayed-demand note is likewise not contingent. Moreover, he asserts, delayed-demand notes cannot function like sight bills, because they are not sight bills.

[78] This argument is not without a certain logical appeal. However, this argument from analogy cannot prevail over settled case law, from *Thorpe* to *Zeitler*, establishing the principles that delayed-demand notes *are* distinct from demand notes in important respects, and that delayed-demand notes *do*, in fact, share some characteristics with sight bills. Moreover, several of the defendant's premises are without foundation. His reference to a "common law rule that the demand [in a demand note] is deemed to take place the first

date that it could be made" cites no authority. Nor does his further assertion that "in the same way, a cause of action in respect of a "delayed demand" note must accrue at the first time that it could be enforced."

[79] The defendant's second argument relates to more theoretical issues: justice between the parties and commercial certainty. With regard to the parties in this case specifically, the defendant suggests that it is "worthy of note" that this Court had, in an earlier related proceeding (*Hix v. Ewachniuk Estate*, 2010 BCCA 317, [2010] B.C.J. No. 1240), found that Sophia Ewachniuk had forgiven her son's debt. However, the trial judge in the instant case found otherwise, and that decision has not been appealed from. Accordingly, we need not address this argument.

[80] Finally, the defendant argues that, if the trial judgment is correct, then "there is effectively no limitation period governing so called delayed-demand notes." He points out, correctly, that the "ultimate limitation" of 30 years, set out at s. 8(1)(c) of the *Limitation Act*, would not apply to delayed-demand notes on which no demand had been made, since the 30-year limitation period is measured from the accrual of the cause of action.

[81] However, the defendant does not address the important equitable defences based on inexcusable delay, which are specifically preserved at s. 2(c) of the *Limitation Act*, and mentioned with respect to delayed-demand notes as early as *Rutherford*. Moreover, as the plaintiff observes, there have always been certain types of actions that are not subject to a statutory limitation period, as set out at s. 3(4) of the *Limitation Act*. I am not persuaded that applying the same framework to delayed-demand notes would produce an unworkable contractual environment.

**3. Other Matters**

[82] There are three minor points that deserve mention.

[83] First, the defendant argues that the trial judge erred in holding that the note in this case was governed by s. 23 of the *Bills of Exchange Act*. He contends that the provision governing this note was s. 22.

[84] In my respectful view, neither section is relevant to the disposition of this appeal. Issues of certainty and validity under the *Bills of Exchange Act* arise in deciding whether the note in question is an enforceable negotiable instrument. The only issue raised in this appeal is the right of the original payee to enforce the note, according to its terms, against the original payor. That issue depends entirely on when the limitation period commenced to run.

[85] Second, the defendant argues on appeal that the learned trial judge erred at para. 55 of her reasons where, in reference to *Zeitler v. Zeitler (Estate),* 2010 BCCA 216, she said:

> [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.

[86] The defendant asserts that this Court in *Zeitler v. Zeitler (Estate)*, 2010 BCCA 216, did not affirm the trial judgment of the British Columbia Supreme Court in *Zeitler v. Zeitler (Estate)*, 2008 BCSC 775, the decision on which the trial judge in the present case relied.

[87] In fact, the judgment of this Court in *Zeitler v. Zeitler (Estate)*, 2010 BCCA 216, was actually an appeal from a different trial judgment in the Supreme Court of British Columbia: *Zeitler v. Zeitler Estate*, 2009 BCSC 500, [2009] B.C.J. No. 741. However, although the trial judge may have been under a misapprehension in this regard, it is of no consequence. In my view, as explained above, the trial judgment relied upon by the trial judge in the present case (*Zeitler v. Zeitler (Estate)*, 2008 BCSC 775) was decided on correct principles and is well grounded in the authorities.

[88] Third, at para. 58 of her reasons, the learned trial judge said:

> [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.

[89] The second sentence is in error, because the six-year limitation period did not begin to run until one year after demand, namely on 29 November 2009. However, nothing turns on this slip.

[90] For the reasons stated above, I would dismiss the appeal.

"The Honourable Chief Justice Finch"

**Reasons for Judgment of the Honourable Madam Justice Ryan:**

[91] I have had the privilege of reading in draft the reasons of the Chief Justice. I agree with his conclusion that this appeal should be dismissed. My approach differs in part from the Chief Justice. My comments relate to the 200-year-old line of jurisprudence analyzed by Arnold-Bailey J. in *Zeitler v. Zeitler (Estate)*, 2008 BCSC 775 ("*Zeitler*").

[92] The only issue on this appeal is whether the learned trial judge, Madam Justice Russell, erred in law in finding that the respondent executor's action to enforce a promissory note the appellant signed in favour of his parents was not barred by the expiry of the limitation period. In determining that the limitation period continued to run, Russell J. concluded on the principle of *stare decisis* (as expressed in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.)) that she was bound by the reasons of Madam Justice Arnold-Bailey in *Zeitler*.

[93] In *Zeitler*, Arnold-Bailey J. said this:

> [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 (*Barclay Construction Corp. v. Bank of Montreal* (1998), 28 B.C.L.R. (2d) 376 at 381 (S.C.), aff'd (1989), 41 B.C.L.R.(2d) 239 (C.A.); *Waldron v. Royal Bank of Canada* (1991), 53 B.C.L.R. (2d) 294 (C.A.). More recent applications of that principle are to be found in *Ponti v. Marathon Motors Ltd.* (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 290-91:

> 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 Contracts* - 25th Ed. (1983) - Vol. I – [paras.] 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 if money is lent to be repaid at a particular time in the future, or upon the happening of a specified contingency, then the cause of action arises at the time specified 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. 1, 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.); *Elliot 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 ("*BEA*") 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.

[94] In this Court, the appellant submits that *Zeitler* is wrongly decided. He says that the learned trial judge in *Zeitler* was misled by case law following passages found in respected and widely-cited texts, which in turn relied upon two English cases decided two centuries ago (*Thorpe v. Booth* (1826), Ry. & M. 388 ("*Thorpe*"), and *Holmes v. Kerrison* (1810), 2 Taunt. 323 ("*Holmes*")). The appellant says those cases were wrongly decided, wrongly summarized by commentators, or are otherwise inapplicable to the instant case.

[95] As the Chief Justice has put it at para. 55 of his reasons:

> ... There do not appear to be any relevant sources that the [appellant] does not account for. It is not too much to say, therefore, that the validity of the passages at issue in *Mew*, *Crawford*, and *Chitty* depend on the correctness and applicability of *Holmes* and *Thorpe* …

[96] In his reasons for judgment, the Chief Justice analyzes *Thorpe* and *Holmes* in some detail with an eye to demonstrating that these cases stand for the proposition cited in the texts upon which the parties rely.

[97] I agree with the Chief Justice that *Thorpe* and *Holmes* support the statements of Mews, Byles and Chitty in their texts, which, while non-binding, are nonetheless authoritative. Furthermore, I would not overrule those cases even if I had concluded that they were wrongly decided. In my view, the principle expressed in the maxim *communis error facit jus* applies here, as articulated by MacDonald C.J.A. in *Laursen v. McKinnon* (1913), 18 B.C.R. 10 (C.A.) ("*Laursen*") at 14:

> …To say that a Court ought not to perpetuate error is to give voice to a very pleasing and right-sounding abstraction. The Court ought not to perpetuate error, but this maxim is controlled by a very salutory rule that constructions which have long been accepted, though their correctness may be open to doubt, should not, save possibly by a higher Court, be disturbed <u>to the confusion of those who are accustomed to rely upon such constructions.</u> [Emphasis added.]

[98] Mr. Justice Martin applied *Laursen* in *Sale v. East Kootenay Power Co.* (1931), 43 B.C.R. 336 (C.A.) ("*Sale*") at 339-40. Mr. Justice McPhillips, concurring in the result, stated in *Sale* at 341-42:

> … [I]t is better to allow a decision which might be admitted to be contrary to law at the time when given, to stand, <u>since it has been woven into the law of the land, in some cases for centuries,</u> and it would be a great reversal of things, almost revolutionary, to set aside that law so well understood. [Emphasis added.]

[99] Regardless of whether the commentators noted above have rightly cited and distilled *Thorpe* and *Holmes*, they are cases of long-standing principle that have gained a place of authority in the jurisprudence. The facts of this case do not justify altering the course of 200 years of jurisprudence to the detriment of those who have relied upon it.

[100] I too would dismiss this appeal.

"The Honourable Madam Justice Ryan"

I AGREE:

"The Honourable Madam Justice Saunders"