

CANADA / JUDGMENT

Mah Estate v. Lawrence

2023 BCSC 411

COURT

Supreme Court of British Columbia

DECIDED

22 March 2023

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2023 BCSC 411 Mah Estate v. Lawrence

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mah Estate v. Lawrence,

2023 BCSC 411

Date: 20230322

Docket: S225674

Registry: New Westminster

Between

Lynn Ma in her capacity as Executor of the Estate of Bailey Mah

Plaintiff

And

Braxton Lee Lawrence

Defendant

Before: The Honourable Mr. Justice Gibb-Carsley

Reasons for Judgment

Counsel for the Plaintiff:

K. Tiwana

Representative for the Defendant:

T. Lawrence

Place and Date Hearing:

Port Coquitlam, B.C.

February 10, 2023

Place and Date of Judgment:

New Westminster, B.C.

March 22, 2023

Table of Contents

I. INTRODUCTION.. 3

II. FACTS.. 4

The Sales Contract and Promissory Note. 10

The Defendant Expresses Concern.. 11

The Plaintiff's Offers to Rescind the Contract 14

III. ISSUES.. 14

IV. PARTIES' POSITION.. 15

A. Plaintiff's Position.. 15

B. Defendant's Position. 16

V. LEGAL ANALYSIS AND DETERMINATION.. 16

A. Is this Matter Suitable for Summary Trial?. 16

B. Are the Sales Contract and Promissory Note Binding?. 20

i. Legal Framework. 20

ii. Analysis. 22

Caveat Emptor 25

C. Is the Defendant in Breach of the Sales Contract and Promissory Note?. 30

D. Was there a Free-Standing Gift of \$20,000 and if so what is its relevance?. 30

i. Promissory Estoppel 31

VI. COSTS.. 33

VII. DISPOSITION.. 36

VIII. CONCLUSION.. 37

I. INTRODUCTION

- [1] At its core, this summary trial concerns a disagreement between two parties regarding the sale price of a used car. However, the context in which the transaction occurred is clouded by familial relationships and attempts to honour the sentimental wishes of a deceased family member to restore a classic automobile.
- [2] The plaintiff, Lynn Ma, is the executor of her brother's estate. Her brother, Bailey Mah, owned a 1969 Ford Mustang, Cobra, Mach 1 (the "Mustang") that he spent many hours repairing as a passion project. Mr. Mah also spent thousands of dollars paying professionals to repair the Mustang. The defendant, Braxton Lawrence, was the boyfriend of Mr. Mah's daughter, and he and Mr. Mah had a close relationship. One of the bonds the two men shared was an interest in the Mustang.
- [3] Months after Mr. Mah died, after extensive correspondence between the parties, the defendant purchased the Mustang from Mr. Mah's estate, entering into a sales contract (the "Sales Contract") and a promissory note (the "Promissory Note") setting out how he would pay for the car with minimum monthly payments (collectively, the "Agreements"). The lead up to the sale was pleasant, with both parties pleased that Mr. Mah's prized possession was being sold to someone who cared about the Mustang and its restoration. However, soon after the sale, the defendant came to believe that the Mustang's fair market value was lower than what he paid. He kept the Mustang, but stopped making payments.
- [4] The plaintiff brings this summary trial to recover the remaining amount owing on the Promissory Note. She says the Agreements set the price for the Mustang, the parties agreed to the price, but the defendant has breached the Agreements by not paying. The plaintiff also seeks full indemnity for her legal costs as the Promissory Note provided that the defendant would be responsible for all reasonable legal fees incurred by the plaintiff in collecting the amount owed on the note.
- [5] The defendant says the parties had always understood that the Agreements did not set the final price of the Mustang and that the final price would be determined after an appraisal was completed. The defendant also asserts that he is entitled to apply a discount to the final appraised value of the Mustang based on a statement made by the plaintiff to the defendant during the course of negotiations that Mr. Mah had said he wanted to gift the defendant a sum of money.
- [6] For the reasons that follow, I conclude that I am able to, on the whole of the evidence adduced, grant judgment and it would not be unjust to do so as a summary trial. In respect of the merits of the application, I conclude that the defendant is in breach of the Agreements and that the plaintiff is entitled to full indemnity for her legal costs, but those costs must be reasonable, fair and proportionate in the circumstances of this case.

II. FACTS

- [7] In setting out the evidence, I have decided to quote extensively from texts and emails exchanged between the parties. In my view, the correspondence assists in setting out the underlying context, tone and expectations of the parties in making arrangements regarding the sale of the Mustang.
- [8] The plaintiff and her sister, Sau Kim Ma (referred to as Kim in correspondence), are named as executors in the last will and testament, dated February 12, 2016, of their brother, Bailey Mah (the "Will"). Mr. Mah died on August 24, 2018, in Maple Ridge, British Columbia.
- [9] The defendant is currently 31 years old. He has attended various post secondary institutions and taken courses that ranged from human kinetics, psychology, and financial accounting and he has received professional program diplomas in trade and freight forwarding logistics. He and Mr. Mah were friends and knew each other because the defendant was dating Mr. Mah's daughter. For a time the defendant lived in a portion of Mr. Mah's house with Mr. Mah's daughter. I accept that the defendant and Mr. Mah had a relatively close relationship, and that the defendant would assist Mr. Mah with yard work and that occasionally they had meals together. I accept the evidence of the defendant that he and Mr. Mah often discussed the restoration of the Mustang during their visits.
- [10] Four days after Mr. Mah's death, the defendant texted the plaintiff to express his condolences and admiration for Mr. Mah. The defendant also indicated that he was interested in purchasing the Mustang. The text exchange between the parties was initiated by the defendant and commenced on August 28, 2018, with the plaintiff responding on August 31, 2018:

August 28, 2018:

Hey Lynn, This is Braxton. I'm so sorry for your loss. Bailey was an awesome mentor that I had the privilege of learning much from. It took us the whole summer but we finally completed the back 40. I'm very happy hearing that it will not be the last project I do for Bailey. We'd mainly talk about the back 40 or his car; among other topics. I know he'd be happy it being with me to complete the restorations the way he wanted them done. Whenever is convenient, let me know what you come up with regarding a payment plan and transfer. I can't reiterate how much Bailey meant to me. He really was like a Dad to me. I'm very thankful for the insight he gave me on life and how to be successful. I know it's just a glimpse of how much knowledge he had to offer but they are lessons forever learned. His voice will always be in my head as motivation. I miss him a lot.

August 31, 2018:

Hi Braxton, thank you for your kind words. I know Bailey enjoyed having you around the house and sharing a meal when you came over to help with the yard. You were a great help to him because the back 40 and the bees kept him busy and inspired. Kim and I have not made any decisions on anything major yet as we consult with our lawyer going through the process. There

is a lot to consider and still more work to do in gathering information. A very slow process, however we need time. We will take everything and everyone into consideration when making the decision. We know that Bailey thought a lot of you. Meanwhile if you need anything or someone to talk to, I am here. Thanks again.

[11] There were more text messages exchanged between the parties that indicated that the plaintiff was carefully considering what to do with the Mustang. On September 27, 2018, the defendant submitted two "Action Plans" showing why he was suitable to purchase the Mustang. The defendant stated in the introduction to the email the purpose of the proposal:

The purpose of this proposal is to give you reassurance that Bailey's car will be tended to and cared for as he did. Finances, as well as my plan of action will be explained. By the end of this summary, my goal is to give you the confidence you need in determining that this is the right choice.

[12] In the email, the defendant also expressed his passion for restoring the Mustang:

This will be my hobby/passion and will enable me to have one last project to complete for Bailey in honor of his name. I feel like if it went to someone else, it will lose the Bailey connection.

[13] In the defendant's second plan he proposed that he move in to the house that Mr. Mah had resided in before Mr. Mah died to take care of the day-to-day chores. The defendant indicated that the rent would be "TBD", which I accept is "to be determined". The second plan also indicated that he would provide house maintenance, yard maintenance, and a monthly payment towards the purchase of the Mustang of \$1,200.

[14] The defendant also provided the plaintiff with a letter dated October 3, 2018, from Mike Rosetti, the owner of Lexington Motors, a licensed auto dealership in Burnaby, British Columbia. In the letter, Mr. Rosetti set out that he has known the defendant for over twenty years and endorses him as a suitable person to restore the Mustang because the defendant, "has been engaged in restoration projects and has a devoted interest in the complete restoration of this car." Mr. Rosetti wrote that his resources, which I take to mean his company, can provide "restoration, storage, auto shows and vintage auto consultations."

[15] At this point, the parties had not discussed a sale price for the Mustang. On October 11, 2018, the defendant sent a further email to inquire if the plaintiff had made any decisions regarding the Mustang, but the plaintiff advised him no decisions had been made yet.

[16] On October 12, 2018, the defendant presented a second letter to the plaintiff that provided his personal and work history and information about his plans for the restoration of the Mustang. In that letter, the defendant responded to questions from the plaintiff inquiring about how much the defendant thought it would cost to restore the Mustang. In response to the question the defendant wrote:

You had stated that the shop it is at currently approximates \$10,000 of work needed to complete the restoration. This would be accurate if you had to go through their shop for parts and labour. I would need a list of all the parts and labour costs associated to the restoration order to determine how much I will be saving with using Mike as a resource. Having known Mike since I was a child (family vacations [etc.]) and being able to use his resources, is an extremely cost-saving asset. Restoring classics is his passion and he is very good at it. After towing the Mustang to his shop, I will get a full report on what needs to be done and the cost without any markups. I don't have to worry about paying for labour, as I'll be working at his lot on the weekends

[17] The defendant followed up on October 29, 2018, again to see if the plaintiff had made any decisions about the sale of the Mustang. In response, the plaintiff informed the defendant that no decisions had been made as there were other parties interested in the Mustang and that the plaintiff did not see a decision being made in the near future.

[18] Ten minutes after receiving that text, the defendant texted the plaintiff asking if she knew "what the deciding factor will be of [who is] allowed to buy it?" He then asked if there was anything he could do to better his chances to allow him to buy the Mustang. The plaintiff responded to the effect that there was no single factor, and that instead the executors had to do what they felt Mr. Mah would want done with the car. The defendant replied:

I agree completely. I'm being honest when I say I truly believe Bailey would [have] wanted me to have the opportunity to buy it, especially if he was able to see how everything's set up. I understand that's meaningless not having been part of the conversations. Just want you and Kim to know that Bailey and I had a special bond with the car. I just hope it goes to someone who knew Bailey. Thank you for the consideration.

[19] On January 21, 2019, the plaintiff sent an email to the defendant expressing that she was seeking \$55,000 for the Mustang, but that the plaintiff would sell the Mustang to the defendant for a reduced price of \$35,000, as Mr. Mah had verbally expressed an intention to gift the defendant \$20,000. This email is the first email from the plaintiff providing details regarding the selling price of the Mustang to the defendant, and provides important context for this case. As such, I have reproduced much of its content:

Kim and I appreciate you writing your summary on your plan for Bailey's Mustang. We all know how much that car meant to Bailey and his last wish was that he wanted to drive it again before he passed. Sadly, that was not to be the case. Bailey owned the Mustang for over 30 years and worked on it slowly over time, until he had it towed to BC when he moved into his house. Bailey loved that car. When Ashley and Stephanie were both very young, Bailey had originally hoped and intended that he would eventually pass it on to one of his daughters someday. Unfortunately, neither of his girls are the muscle car type. The car has significant sentimental value to us, and it is important to us that the new owner cherish it as much as Bailey did. Therefore, after careful consideration, and based on your relationship with Bailey, we have decided to sell Bailey's Mustang to you, if you are still interested. Based on recent offers and our research, and the mechanical work that was recently completed last year, we believe that \$55,000-\$60,000 is fair

market price for the car in its current condition. You were a good friend to Bailey, and he appreciated all the help you gave him around the house and yard. He also recognized the fact that you looked after Ashley during past years when he could not, due to their strained relationship. Because of that, Bailey wanted to gift \$20,000 to you, upon his death. Therefore we propose to sell the Mustang to you for the outstanding difference of \$35,000.

The Mustang is presently parked at Torks Auto & Diesel Repair shop located at #512, 20170 Stewart Cr. (approx. 5 minutes from Bailey's house). We are currently in the process of settling the outstanding invoice with the mechanic, Phil Agostino. Once it is settled, we need to have the vehicle removed as soon as possible, which you would be responsible for. If you are still interested in buying the car, please look into what is involved in transferring the vehicle to you, as the car was never registered in B.C.

[20] The email concludes by asking that the defendant, "give the proposal some thought, and please let us know what you decide asap."

[21] In respect of the information conveyed by the plaintiff to the defendant that Mr. Mah had wished to gift the defendant \$20,000, the Will does not provide that any gifts be made to the defendant nor does it mention the defendant.

[22] The plaintiff's affidavit evidence is that she valued the Mustang at between \$55,000 and \$60,000 based on two sources. First, in 2016, Mr. Mah had contemplated selling the Mustang. He had put an advertisement online and had received interest from a potential buyer to buy the Mustang for \$50,000. Mr. Mah ultimately decided not to sell the Mustang in 2016. Second, the plaintiff says that on August 28, 2018, she was informed by Mr. Agostino, of Torks Auto, where the Mustang was being restored, that the vehicle was worth \$55,000 in its current condition and that with a complete restoration could be worth \$100,000. Relying on the truth of Mr. Agostino's assessment of the Mustang's value would constitute hearsay. However, I accept that the plaintiff based her estimate of the selling price, in part, upon the information provided to her by Mr. Agostino. I also accept that the plaintiff was not a person who was knowledgeable in automobiles or had any expertise in valuing used cars.

[23] On January 23, 2019, the defendant responded to the plaintiff in an email:

Thank you for your decision to sell me Bailey's car. I cannot express what this means to me. You can rest assure[d] that I will be fully restoring the car to its full originality which is what Bailey would want. I am in full agreement of the will \$20,000 being deducted as an initial payment leaving a balance of \$35,000 which I will pay off the remaining balance with at least minimum payments of \$500 per month, increasing to at least minimum of \$600 monthly after three months.

[24] The email message also referenced the possibility of the defendant renting a portion of Mr. Mah's residence, as the defendant had previously raised in his second action plan presented to the plaintiff on September 27, 2018. To that end, in the same January 23, 2019, email, the defendant wrote:

I will be arranging a conversation with my landlord regarding early lease dismissal. Currently, it set to end in July. With three months notice; I will not face any fine penalties. Hopefully I can get them down to two months notice or even less which would result in a loss of my deposit.

[25] On January 23, 2019, the plaintiff responded to the defendant's email, providing the following proposal:

I spoke to Kim and here is another proposal:

We will accept the minimum monthly payment of \$500-\$600 along with your income tax refunds and work bonuses as well as the proceeds from the sale of your vehicles when it happens on the condition \$35,000 is paid in full by June 30, 2019.

Also, I propose that the rent for Bailey's house be \$1,300 per month between now and June 30, 2019. On July 1, 2019 the rent will be \$1,500 per month with a one year lease. This will give you a bit of relief if you want to make extra car payments.

Let us know if the proposal is workable. We look forward to hearing from you.

[26] On January 24, 2019, the defendant emailed the plaintiff:

I accept your proposal in terms of the conditions and sale of the car. I also believe you have outlined a better position for me to rent/lease Bailey's residence. I will be talking with my landlord today and making arrangements to give notice. However, I do not anticipate a move-in date at the earliest in March. I want to leave my residence with acceptable notice that is agreeable to the landlord. This may work out given some work you stated needed to be done on the home

The Sales Contract and Promissory Note

[27] On January 30, 2019, the parties entered into the Sales Contract for the Mustang for the sum of \$35,000. The Sales Contract is signed by the plaintiff and the defendant and witnessed by third parties. The Sales Contract also provides that the car will be paid by "MONTHLY PAYMENTS" and the payment terms are "UNTIL THE VEHICLE IS PAID IN FULL ON OR BEFORE JUNE, 2019." As special conditions of the sale, the Sales Contract provides that the vehicle is "SOLD AS IT, WHERE IS" [sic]. I note that at the hearing, neither party brought to my attention an apparent typographical error in the special condition of the Sales Contract. I accept however that the parties operated under the presumption that the Sales Contract condition was understood to mean the Mustang was sold, "as is, where is", given with the typographical error, the condition would be non-sensical and so not open to another interpretation.

[28] Also on January 30, 2019, the defendant entered into the Promissory Note, agreeing to pay the plaintiff the sum of \$35,000, bearing no interest, on demand. The Promissory Note includes the following terms:

- a) the defendant will make minimum monthly payments to the plaintiff by way of e-transfers of \$500 commencing February 1, 2019;
- b) the defendant will assign his 2018 income tax refund to the plaintiff;
- c) the defendant will assign as 2018 or 2019 work bonuses to the plaintiff;
- d) the defendant will assign proceeds from the sale of the Mustang to the plaintiff; and
- e) the defendant will make full payment on or before June 30, 2019.

[29] The Promissory Note provides that the defendant will pay "all reasonable costs of collection and legal fees". The Promissory Note also provides that the defendant "waives presentment protest and notice of any kind in the enforcement of this Promissory Note."

[30] On January 30, 2019, the defendant took possession of the Mustang, by towing it from Torks Auto.

[31] The defendant made four payments of \$500 for a total of \$2,000 towards the balance owing on the Promissory Note. His last payment towards the Mustang was on April 13, 2019, in the amount of \$500.

The Defendant Expresses Concern

[32] On February 4, 2019, the defendant emailed the plaintiff regarding his concern about the state of the Mustang:

I was quite shocked at the change in the condition of the car from the last time I viewed it with Bailey as well as the discussions we'd have on the progress of the restoration. The car was drivable then and now it is not. I was informed by the shop that it had gone through significant damage which is why Bailey decided on a complete restoration. After viewing the car, they did not get far at all with the restoration and in actuality, left it in a worse state due to not putting it all back together. For the many discussions Bailey and I had during the summer after working in the back 40; pertaining to the progress of the restoration; I was advised he was looking to have it ready by the end of the past summer. This gave me the impression it would be in better condition than when I last previously saw it, especially the short summer. Time of three months - not feasible by for the amount of work that is needed. I immediately contacted Bailey's shop who stated they had their own appraisal done, with over \$100,000 work needing to be done for a complete restoration (they stated they mentioned this to you). With my Dad's restoration connection; it's estimated it will cost me \$50,000 for a complete restoration. The shop also indicated it would cost at least \$10,000 to place the parts back in the car and get it running. He also stated that the car is worth in this condition was \$25,000 CAD which he said he offered you. Lynn, I was basing my original price in your appraisal, and the condition last viewed with Bailey.

I really want to restore and keep the car but I have had a non-viewing appraisal completed and they sent me pictured comparable sales which I have added for your viewing. The appraisal given the condition is between \$30,000 and \$35,000. Given this new information, I'm hoping we can adjust to a price that's more a more fair market value given the [car's] current state

[33] On February 9, 2019, the plaintiff texted the defendant and informed him that if he no longer was interested in keeping the Mustang, that there were other interested purchasers. Although not stated explicitly in this text, I accept that the meaning of that text was that the plaintiff was offering to discuss a return of the Mustang to the plaintiff and to rescind the Agreements.

[34] Further, in response to the defendant's concerns about the state of the Mustang, the plaintiff obtained an appraisal of the Mustang from C/S Automotive Appraisal Services. C/S Automotive Appraisal Services valued the Mustang at \$35,000. The plaintiff sent the appraisal to the defendant.

[35] On June 3, 2019, the defendant emailed the plaintiff about whether the parties could adjust the loan amount:

With the true Market Value of the car being reflected in the appraisal @ \$35,000; can we adjust accordingly the loan amount to reflect the value of the car.

[36] This email led to an exchange between the parties regarding their understanding of the Mustang's sale price. The plaintiff wrote:

As per the bill of sale, the mustang is being sold to you for \$35,000, which is the appraised value.

[37] On June 4, 2019, the defendant responded by saying he was excited about this information. He stated that in his view this meant the sale price of the Mustang would be \$15,000, calculated as the \$35,000 appraised value less the \$20,000 gift the plaintiff had told him that Mr. Mah had mentioned. The plaintiff did not agree and responded later that day, stating that the full outstanding balance for the Mustang of \$33,000 (sale price of \$35,000 less \$2,000 in payments) was due on June 19, 2019. The plaintiff further stated that there was nothing in the Will that said the defendant would be receiving \$20,000.

[38] I note that, in my view, the defendant's emails in this exchange appear to be a rather clumsy attempt to trap the plaintiff into agreeing to a different price for the Mustang than the price agreed to by the parties in the Sales Contract and Promissory Note by replacing the amounts in those agreements with the appraised value of \$35,000 and then reducing it by a \$20,000 gift from Mr. Mah, that the defendant was asserting was a stand-alone gift.

[39] Upon receiving the plaintiff's position that the price of the Mustang agreed to by the parties was set out in the Agreements as \$35,000, the defendant responded on June 30, 2019, stating that he was receiving legal advice. The defendant also asked for the contact information for the plaintiff's lawyer for service.

- [40] On July 26, 2019, the defendant's father, Tony Lawrence, who is not a lawyer, began representing the defendant. Mr. Lawrence Sr. sent an email to the plaintiff and Kim that set out his view of the circumstances of the sale of the Mustang, as well as the potential agreement concerning the defendant renting a portion of Mr. Mah's house. The defendant's new position was that he sought damages from the plaintiff in the amount of \$340.22. He calculated his damages by taking the amount that the estate had valued the Mustang for probate--i.e., \$21,659.78--and subtracting the \$20,000 gift from Mr. Mah and the \$2,000 that the defendant had already paid towards the Mustang (i.e. $\$21,659.78 - \$20,000 - \$2,000 = -\$340.22$).
- [41] On or about September 30, 2019, the plaintiff's counsel sent a demand letter demanding payment of the outstanding balance of the Promissory Note, in the amount of \$33,000, plus legal fees in the amount of \$850 for a total amount payable of \$33,850.
- [42] The defendant has not paid any further amounts for the Mustang nor has he returned the Mustang to the plaintiff.

The Plaintiff's Offers to Rescind the Contract

- [43] During the course of the dispute, on three separate occasions, the plaintiff made overtures to the defendant that he could be released from the terms of the Sales Contract and the Promissory Note if he returned the Mustang. I accept that the plaintiff made at least three offers to release the defendant from his contractual obligations on the following dates. While the first two offers do not provide specific details of rescinding the Agreements, the email of June 4, 2019, explicitly offers the defendant the option to be released from the Agreements:
- a) February 9, 2019, the plaintiff texted the defendant informing him that if he was no longer interested in keeping the Mustang that the plaintiff had other parties interested in purchasing the Mustang;
 - b) May 27, 2019 - the plaintiff emailed the defendant, "Should you not wish to continue with the purchase and payment plan, we have other persons that are interested in buying the Mustang. Let us know what you want to do"; and
 - c) June 4, 2019 - the plaintiff emailed the defendant, "If you are not interested in paying \$35,000 for the car, we will refund the \$2,000 and have the car towed back. We have buyers that are willing to pay \$35,000 to \$40,000 for the car as is."
- [44] The defendant refused to accept the plaintiff's offers to release him from his obligations under the Agreements. The defendant has not returned the Mustang to the plaintiff. The defendant has made a total of \$2,000 in payments for the Mustang with the last payment of \$500 being on April 13, 2019.

III. ISSUES

- [45] The primary issue in this case is whether the defendant breached the Sales Contract and Promissory Note. However, before resolving the issue, I must first determine if this matter is suitable for summary trial. Further, as the defendant's argument largely relies upon his belief that he is entitled to a \$20,000 gift from Mr. Mah, I will address the issue of the defendant's claimed entitlement.

IV. PARTIES' POSITION

A. Plaintiff's Position

- [46] The plaintiff argues that this is a simple case of breach of contract. She says the defendant agreed in the Sales Contract to purchase the Mustang for \$35,000 and to pay that amount pursuant to the Promissory Note. After making only \$2,000 in payments, the defendant stopped paying and did not return the Mustang. The plaintiff says that the Mustang was sold "as is, where is" and so the defendant was responsible for determining the value of the car before purchasing it if that was an important consideration for him. The plaintiff asserts that the defendant knew the location of the garage where the Mustang was being stored. He knew, or could have known, the Mustang's condition and value before he purchased it, but it appears he decided not to do so. The plaintiff also says that when she set the price of the Mustang for the sale, she believed that it reflected a fair value, based on the information she had at that time. However, by selling the Mustang "as is, where is" she was making no representations about its quality.
- [47] In respect of the \$20,000 reduction of the price of the Mustang offered by the plaintiff to the defendant, she says that it was not a stand-alone down payment for the Mustang. The plaintiff says that the defendant had no entitlement to a \$20,000 gift from Mr. Mah. She argues that the \$20,000 is irrelevant to the mechanism of setting the sale price other than being a gesture she and her sister made to recognize the defendant's friendship with Mr. Mah.
- [48] The plaintiff says the Sales Contract and the Promissory Note are clear and unambiguous in that the defendant agreed to pay \$35,000 for the Mustang. However, she asserts that the correspondence between the parties further corroborates the clear meaning of the Agreements. She says that the defendant is attempting to create a different narrative that is unsupported by evidence--namely, that he believed the sale price of the Mustang was contingent on an appraisal being performed and that there would be a renegotiation of the sale price and amounts owing under the Promissory Note based on the appraisal.
- [49] Finally, the plaintiff also points to the fact that on three occasions she indicated to the defendant that he could return the Mustang, but each time he refused. She argues that this demonstrates her reasonableness in the transaction and that she was not attempting to dupe the defendant into purchasing the Mustang for an unfair price.

B. Defendant's Position

- [50] The defendant argues that the Sales Contract and the Promissory Note did not set out the final amount he would pay for the Mustang, but was contingent on a final appraisal of the Mustang that would establish the ultimate price. The defendant also argues that from that appraised value, the \$20,000 gift Mr. Mah wished him to have would be deducted. He says that the \$20,000 gift was used to entice him to purchase the Mustang and then was withdrawn.
- [51] The defendant further asserts, although it appears it is not his primary position, that he and the plaintiff had an agreement that the defendant would rent a portion of Mr. Mah's house at a reduced rate. This reduced rate, when factored into payments for the Mustang, would have resulted in further savings to the defendant of \$4,000 to \$5,000. He says he was unable to realize these savings because the plaintiff refused to rent Mr. Mah's house to him and he has suffered losses as a result.

V. LEGAL ANALYSIS AND DETERMINATION

A. Is this Matter Suitable for Summary Trial?

- [52] The plaintiff seeks to have this matter heard by way of summary trial. She relies upon R. 9-7 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules], which allows a party to apply for judgment on affidavit evidence. Pursuant to R. 9-7(15), the court has discretion on such an application to grant judgment unless: (a) the court is unable, on the whole of the evidence adduced on the application, to find the facts necessary to decide the issues; or (b) the court is of the opinion that it would be unjust to decide the issues on the application.
- [53] The plaintiff asserts that this matter is appropriate for determination by summary trial because, in essence, it is a debt collection case and can be resolved by an interpretation of the documents--specifically, the interpretation of the Sales Contract and the Promissory Note. The plaintiff asserts that there is no need for viva voce evidence because the documents provide sufficient information to the court to determine the merits of the issues.
- [54] In his oral submissions, the defendant's representative, Mr. Lawrence Sr., stated that the defendant wants the matter resolved in an efficient and expeditious manner. He expressed some concern regarding the matter proceeding by summary trial. However, as I understood his position, the defendant's representative did not suggest that viva voce evidence was required to resolve the issues. Instead, he says generally that the defendant took a different view of the intentions of the parties about the contract--namely, that the defendant believed the price of the Mustang set out in the Sales Contract and the Promissory Note was always going to be adjusted when a final appraisal for the Mustang was completed.

- [55] I note that on September 9, 2022, the defendant filed a Notice of Application seeking, among other things, a date to set this matter down for summary trial. As such, I conclude that at least leading up to the hearing before me, the defendant was content that this matter proceed by way of summary trial. However, the intention of the parties does not end the inquiry of the suitability of a matter for summary trial.
- [56] To reiterate, a matter will be suitable for summary trial if the court is able to find the facts necessary to decide the issues before it and it is not otherwise unjust. The court must give full consideration to all of the evidence placed before it and must also consider whether the evidence is sufficient for adjudication. These principles are well established under the predecessor rule to R. 9-7, being R. 18A of the prior Supreme Court Rules, B.C. Reg. 221/90. Rule 9-7 and R. 18A before it have been used extensively in this province for decades: e.g., *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (C.A.). The principles articulated in these cases were endorsed by the Supreme Court in *Hryniak v. Mauldin*, 2014 SCC 7.
- [57] More recently, in *Main Acquisitions Consultants Inc. v. Yuen*, 2022 BCCA 249, our Court of Appeal held that the suitability for summary trial remains a threshold question to be determined by the court regardless of the parties' positions. The court plays an important gatekeeper role in determining whether a summary trial is suitable:
- [89] The Rule makes the judge a gatekeeper. It is a crucial role. Notwithstanding the wishes or indeed often the vociferous submissions of counsel, judgment should not be given if the court is unable, on the evidence, to find the necessary facts or if it would be unjust to do so.
- [58] To that end, our Court of Appeal in *Cepuran v. Carlton*, 2022 BCCA 76, held that a summary trial supported by affidavits may be sufficient for determination of disputes unless the judge is unable to find the necessary facts or is of the view that it would be unjust to do so. Justice Griffin held that the factors to consider include: the amount of money involved, the complexity of the matter, its urgency, any prejudice likely to arise from the delay, the costs of taking the matter forward to conventional trial in relation to the amount involved, the course of the proceedings, and whether the evidence is sufficient to resolve the dispute: paras. 149, citing *Inspiration* at 214.
- [59] I note that conflicting affidavits are not necessarily fatal to a summary trial application. A judge should not decide an issue of fact or law solely on the basis of conflicting affidavits even if she or he prefers one version to the other. However, it may be that other admissible evidence will make it possible to find the facts necessary for judgment to be given: *Inspiration* at 215-216, described in *Brissette v. Cactus Club Cabaret Ltd.*, 2017 BCCA 200 at para. 21.
- [60] In my view, while the parties' interpretation of the Agreements differ, there is sufficient documentary evidence that allows the court to objectively determine the matter on its merits without the need for the assessment of credibility through a conventional trial process. The essential evidence necessary to decide this matter is contained in the Sales

Contract and the Promissory Note. Further, while the parties have expressed different understandings of what they agreed to, I have been provided with the written communications between the parties made close in time to when the Agreements were executed. In my view, these communications provide further and sufficient objective evidence upon which to interpret the Agreements, and indeed, what the parties intended, when entering into those Agreements.

[61] While the suitability for summary trial must be determined on the specific facts of each case, this court has decided many debt action matters by way of summary trial. For instance, the following cases were adjudicated as summary trials and, similar to the case at bar, included debt collection under a promissory note:

- a) Strother v. Darc, 2015 BCSC 2507, aff'd 2016 BCCA 297;
- b) Beishuizen v. Dilon, 2021 BCSC 2682; and
- c) Ohman v. Sync Access + Security Technology Limited, 2018 BCSC 1078.

[62] As a final note on whether the matter is suitable for a summary trial, I find that in light of the relatively small amount of money at issue in this matter, it appears both expedient and efficient to avoid a full trial. The plaintiff seeks \$33,000 in damages, plus court ordered interests and a full indemnity cost award on a contractual basis. While the amounts at issue are not insignificant, they are not large. So long as the court can achieve the ends of justice in adjudicating this matter, it is preferable to be resolved by summary trial because it will save the parties time and money: Boss Power Corp. v. British Columbia, 2010 BCSC 1648 at para. 49.

[63] In summary, the amount at issue is not large, the issues are not complex, and they involve an interpretation of written agreements whose authenticity the parties do not dispute and whose interpretation is assisted by contemporaneous written communications between the parties. I therefore find that this matter is appropriate to be determined by a summary trial.

B. Are the Sales Contract and Promissory Note Binding?

i. Legal Framework

[64] It is trite law that in order for a contract to exist, there must be a meeting of the minds of the contracting parties on the agreement's essential terms. The parties must mutually understand that to which they are agreeing. If there is a meeting of the minds on the subject of the contract, then, in order for there to be a binding agreement, the terms of the contract must be certain and the contract must provide for consideration to both parties.

[65] When interpreting a written contract, a court must objectively determine the intent of the parties and "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": Sattva Capital Corp v. Creston Moly Corp., 2014 SCC 53 at para. 47; Athwal v. Black Top Cabs Ltd., 2012 BCCA 107 at para. 42. Where the language

of a contract is not ambiguous, it is presumed to reflect the intention of the parties, and an "interpretation that renders one or more of the contract's provisions ineffective will be rejected": Athwal at para. 42.

- [66] Given that the "meaning of words is often derived from a number of contextual factors", evidence of the surrounding circumstances is admissible to assist in determining contractual intention as it would be understood by "an 'objective reasonable bystander' in the circumstances of the parties": Sattva at para. 48 and Athwal at para. 46. The goal of examining such evidence is to understand the "mutual and objective intentions of the parties as expressed in the words of the contract": Sattva at para. 57.
- [67] However, as held by the Supreme Court in Sattva, the surrounding circumstances must never be allowed to overwhelm the words of an agreement:
- [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (Hayes Forest Services, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc. (1997), 1997 CanLII 4085 (BC CA), 101 B.C.A.C. 62).
- [58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (King, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (Investors Compensation Scheme, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

See also Athwal at para. 46.

- [68] To reiterate, the Court in Sattva made clear that the court cannot use the surrounding circumstances to deviate from the text and create a new agreement: at para. 57.
- [69] Importantly, in this case, the defendant's position is that he viewed the sale price for the Mustang set out in the Agreements as temporary and contingent on a final appraisal for the Mustang being completed. To that end, evidence of a party's subjective intention in entering

into the contract, or of the party's "understanding of the meaning of the words used in the contract, is not admissible to vary, modify, add to or contradict the express words of the written contract": Athwal at para. 43. In other words, the court is usually concerned not with the parties' actual intentions but with their manifested intention": Athwal at para. 43. In this regard, "[t]he parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing": Sattva at para. 59.

ii. Analysis

- [70] As discussed above, the defendant bases his argument that the Sales Contract is not binding on two factors. First, he says that the Sales Contract was contingent on a different value for the Mustang being set when the Mustang would be appraised. Second, he believes that he would receive \$20,000 from Mr. Mah's estate as an independent gift, to be applied to the final fair market value of the Mustang.
- [71] The evidence does not support the defendant's argument. I do not accept that when he entered into the Sales Contract or Promissory Note he believed the \$35,000 sale price for the Mustang, to which he agreed, was only conditional upon the completion of an appraisal. Rather, I find that at the time that the Sales Contract was executed, the defendant was aware that he was purchasing the Mustang for \$35,000. He then agreed to repay that amount under the terms of the Promissory Note.
- [72] There is nothing in the Agreements suggesting that the price of \$35,000 was conditional on a future appraisal. In this respect, the defendant attempts to read in an implied term or admit evidence that is outside the words of the Agreements. The terms of the Agreements are clear. The defendant agreed to purchase the Mustang for \$35,000 by "monthly payments", "until the vehicle is paid in full on or before June 30, 2019." Those payment terms were clearly articulated in the Promissory Note. There is no ambiguity in either agreement regarding the terms to which the defendant was agreeing. There is certainly no mention in either agreement that the initial price was only temporary pending the completion of an appraisal.
- [73] In my view, this fiction is created by the defendant to avoid his obligation. As well, even if this was the subjective intention of the defendant--which is contradicted by the correspondence exchanged between the parties--the parol evidence rule would preclude admission of evidence from outside of the written contract that contradicts the terms of the contract. As held by the Supreme Court, the primary purpose of the parol evidence rule is to achieve finality and certainty in contractual obligations: Sattva at para. 59. In this case, the defendant attempts to inject the very uncertainty the parol evidence rule seeks to avoid.
- [74] In sum, I interpret the provisions of the Sales Contract and Promissory Note as unambiguously establishing that the defendant agreed to pay \$35,000 for the Mustang.

- [75] However, Sattva allows the court to examine some limited surrounding circumstances to deepen the court's understanding of the mutual and objective intentions of the parties expressed in the contract: at paras. 57-58. To that end, I find that the surrounding circumstances set out in the correspondence exchanged between the parties supports an objective interpretation of the language of the Agreements. For example, as set out above, in text messages sent shortly before the Agreements were signed, the defendant agreed that he would pay the amount of \$35,000 for the Mustang stating that "he cannot express what it means to [him]" to be selected as the purchaser and that he is "in full agreement of the Willed \$20,000 [being] deducted as an initial payment leaving a balance of \$35,000 which [he] will pay off".
- [76] Further, the defendant's emails support a finding that he subjectively believed he was bound by the Agreements to pay \$35,000 for the Mustang. His correspondence provides no indication that he understood, at the time the Agreements were signed, that there would be a future adjustment in the sale price on the basis of a contractually-required appraisal. For example, as set out above, on February 4, 2019, the defendant emailed the plaintiff and stated the he was "hoping we can adjust to a price that's a more fair market value."
- [77] If the defendant truly believed that the Agreements contemplated setting the price of the Mustang in the future, as he now contends, he would not need to "hope" that the parties could adjust the price. Instead, such re-adjustment would be part of the Agreement. I find that the surrounding circumstances of the correspondence between the parties thus corroborate the unambiguous terms of the Agreements.
- [78] It is also illuminating to examine the Factual Basis of the defendant's Application Response to compare his view of the facts as compared to the evidence. The defendant sets out part of his Factual Basis as follows:
6. The Plaintiff stated that the vehicle was in good working order and indicated that she assumed the worth of the vehicle to be approximately \$55,000.
 7. The Plaintiff agreed to conduct an appraisal of the vehicle to act as a final price.
 8. The Plaintiff stated and wrote that the deceased had verbally expressed an intention to gift the Defendant a \$20,000 gift to apply towards the appraised value of the car.
- [79] These facts asserted by the defendant are not supported by the evidence. The defendant was aware that the Mustang needed to be towed from Torks Auto when he purchased it, indicating that he was aware that it was not in "good working order". Further, there was no indication that the plaintiff would conduct an appraisal of the vehicle to act as a final price--either in the terms of the Agreements or in the correspondence between the parties. Finally, in respect to the gift that the plaintiff indicated Mr. Mah intended to provide to the defendant, there was never any mention that any gift would be applied to the "appraised" value of the Mustang. In my view, the manner in which the "factual basis" set out by the defendant diverges from the evidence demonstrates that his argument is untenable given

the evidence. In other words, to be successful, the defendant would need the facts to be as he wants them to be, not as they are.

- [80] Finally, based on my review of the correspondence between the parties prior to the execution of the Agreements, I find that it was the defendant who was making greater attempts to entice the plaintiff to sell the Mustang than the converse. The text messages show that the defendant was appealing to the plaintiff's sentimentality about the defendant's relationship with Mr. Mah and their bond over the Mustang. While I do not have reason to doubt that his affection for Mr. Mah was genuine, in my view, the defendant used his relationship with Mr. Mah to persuade the plaintiff to sell him the Mustang. As set out above, the defendant sent messages to the plaintiff asking to be considered to purchase the Mustang to "honor Bailey's name." The defendant also insisted that he would tend and care for the Mustang "as Bailey did" and that he knew that Bailey would be happy with the defendant completing "the restorations the way he wanted them done."
- [81] I mention the defendant's "representations" for two reasons. First it demonstrates that this is not a situation of a predatory seller looking to dupe a buyer into purchasing a used car. The plaintiff had sentimental attachment to the car because of her deceased brother, and the defendant made use of that emotion in order to be selected as the buyer. Second, in my view, the statements made by the defendant that he would restore the Mustang as Mr. Mah wished are no more binding on the defendant as is the mention by the plaintiff to the defendant of Mr. Mah wanting the defendant to have a \$20,000 gift. That is, the statements made by the parties during the lead up to the execution of the Sales Contract and Promissory Note are not terms of the Agreements and are simply part of a negotiation process.

Caveat Emptor

- [82] In my view, the sale of the Mustang engages the principle of caveat emptor--i.e., "let the buyer beware". As such, I will briefly address this legal principle in the context of the sale of used vehicles. Our Court of Appeal in *Nixon v. MacIver*, 2016 BCCA 8, held that generally the doctrine of caveat emptor applies only to the sale of land and not goods:
- [32] The leading decision on the maxim is *Fraser-Reid v. Droumtsekas* (1979), [1980] 1 S.C.R. 720 at 723, in which Mr. Justice Dickson (as he then was) recognized the continuing application of the doctrine of caveat emptor to the sale of land:

Although the common law doctrine of caveat emptor has long since ceased to play any significant part in the sale of goods, it has lost little of its pristine force in the sale of land.

- [33] The doctrine continues to apply to real estate transactions in this province, subject to certain exceptions: fraud, non-innocent misrepresentation, an implied warranty of habitability for newly-constructed homes, and a duty to disclose latent defects.

- [83] One of the factors undergirding the Court's discussion in *Nixon* is that, generally, the doctrine of caveat emptor has been displaced in the context of the sale of goods by statute, namely the Sale of Goods Act, R.S.B.C. 1996, c. 410. Section 18 of the Sales of Goods Act provides that there is a statutorily-implied condition in a contract for the sale of goods that the goods will be durable for a reasonable period of time: s. 18(c). However, s. 20(2) of the Sale of Goods Act clarifies that parties may contract out of the implied conditions stipulated in s. 18, in the case of the sale of used goods (i.e., goods that on reasonable inspection appear used or goods that are represented by the seller as used). The interplay between ss. 18 and 20 of the Act and its effect was described by the Provincial Court in *Clayton v. North Shore Driving School*, 2017 BCPC 198:
- [78] In British Columbia the Sale of Goods Act contains provisions which imply certain conditions and warranties into contracts for the sale of goods. In particular, s. 18 of the Sale of Goods Act implies certain conditions regarding fitness for a specified purpose, merchantable quality, and durability for a reasonable period. The import and applicability of the provisions of the Sale of Goods Act will be discussed in more detail in my analysis. Section 20 of the Sale of Goods Act in essence prohibits parties to a contract regarding the retail sale of goods from excluding the application of the implied warranties under s. 18. However, s. 20 does not apply to the sale of used goods. In other words, the seller of used goods can exclude the implied conditions contained in s. 18 by way of a term in the contract of sale: see *Sugiyama v. Pilsen*, 2006 BCPC 265. If the seller intends to contract out of the implied conditions found in s. 18, the seller must do so in clear and unambiguous language: see, *Trethewey v. Girard*, 1983 CanLII 326 (BC SC), [1983] B.C.J. No. 1918; *Queen Charlotte Lodge Ltd. v. Hiway Refrigeration Ltd.*, [1998] B.C.J. No. 13; and *Sugiyama v. Pilsen*.
- [84] Accordingly, in the case of a private sale of used goods, the parties may contract out of the implied warranty of the fitness of the goods, as long as the language used in the contract is clear and unambiguous. As I will now discuss, I find that the phrase, "as is, where is" provides clear and unambiguous language that the seller is making no guarantee as to the durability of the used goods for sale.
- [85] In *Connors v. McMillan*, 2020 BCPC 230, the Provincial Court considered the doctrine of caveat emptor in the context of a private sale of a used 1984 Ford motorhome. The contract of sale was subject to a condition that the motorhome was sold "as is". At paragraphs 68 to 70, the court held that in private sales the term "as is" is meant to convey that the buyer is purchasing goods without any attached conditions respecting the quality, durability or fitness of those goods. In short, the court found that a situation in which the contract of purchase and sale states that the product is to be purchased "as is" is a situation of caveat emptor, or more colloquially "buyer beware":
- [68] I agree with those comments and conclude that, in private sales, the term "as is" with or without the term "where is", is meant to convey that the buyer is purchasing goods without any attached conditions respecting the quality, durability or fitness of those goods. The "as is" term is also meant to make it clear that the buyer is assuming the risk if any problems

appear after the sale. The plain meaning of those words could not be construed otherwise. The use of the term "as is" is so common that if a member of the public were asked what a sale with the condition "as is" means, I have no doubt the answer would be that the buyer is buying goods in the condition they are in at the time of sale.

- [69] This places an obligation on a buyer to perform an adequate or reasonable inspection of the goods. If a specific quality, or condition, of the goods is important to a buyer, and a buyer fails to conduct an inspection, they cannot later complain about problems that arise after the goods are delivered. For example, if a buyer purchases a used vehicle and does not have the expertise or experience to assess the condition of the vehicle, a reasonable buyer would have it inspected by someone who does. A buyer who fails to do so will be subject to the risk that they did not get what they thought they were getting and made a bad bargain.
- [70] This situation is one of caveat emptor - buyer beware.
- [86] However, buyer beware does not apply when there is: (i) a breach of contract, (ii) fraud, (iii) non-innocent misrepresentation, (iv) there is a warranty, or (v) a latent defect that cannot be discovered by reasonable inspection: Nixon at para. 47. It is for the defendant to show that buyer beware should not apply because one of these conditions exists.
- [87] In my view, none of the factors described by our Court of Appeal in Nixon exist in this case. I find that in setting the price for the Mustang, the plaintiff was acting in good faith. While she could have obtained an appraisal earlier, it was not required of her to do so. I note that on the evidence before me, the plaintiff does not appear motivated solely by profit. In my view, she was attempting to balance getting a fair price for the Mustang, as would be her obligation as an executor of Mr. Mah's estate, with finding a purchaser of the Mustang that might have the same love of the car as did her brother.
- [88] The facts do not support a finding that the plaintiff was attempting to sell a sub-standard good at an unfair price to take advantage of an unwitting purchaser. I find that there was no fraud or non-innocent representation on the part of the plaintiff when she set the sales price at \$35,000. I find as a fact that the plaintiff made good faith inquiries as to the value of the Mustang and believed it had a value of approximately \$55,000. It is clear from the text messages that it was important to the plaintiff to sell the Mustang to someone who was knowledgeable about cars and who would restore the car as her deceased brother would have wanted.
- [89] I also note that the plaintiff gave the defendant three separate opportunities to be released from the terms of the Promissory Note and the Sales Contract, which he did not take. In my view, this is not a case where a seller is taking steps to disadvantage a purchaser through any form of sharp behaviour or obfuscation. I find that there was no fraud or non-innocent misrepresentation by the plaintiff with regards to the condition of the Mustang.

- [90] Further, there is no evidence that there was a latent defect in the Mustang that could not have been discovered by reasonable inspection. Indeed, it appears both the plaintiff and the defendant readily obtained valuations after the defendant purchased the car. There is no evidence that the defendant could not have had a valuation performed before he entered into the Agreements or that the deficiencies of which he complains could not have been discovered with a reasonable inspection.
- [91] In *Cardwell v. Perthen*, 2006 BCSC 333, aff'd 2007 BCCA 313, the court held that under the doctrine of buyer beware, there is a fairly high onus on the purchaser to inspect and discover patent defects, which are those that can be discovered by conducting a reasonable inspection. This may include an inspection by a qualified expert: at para. 122. The court continued to discuss the latent defects which are defects "which are not discoverable by observation and reasonable inquiry." A vendor who is aware of a latent defect and fails to disclose or conceals that defect may become liable for damages suffered by the purchaser as a result of the latent defect: at para. 127.
- [92] In his early text messages to the plaintiff explaining his interest in the Mustang and his restoration plans, the defendant acknowledged that the car needed to be towed from the mechanics shop if he took possession of it. As such, I disbelieve the defendant's comment in his February 4, 2019, email to the plaintiff that the Mustang "was drivable then and now it is not."
- [93] The defendant was aware that the Mustang was in the process of being restored by Mr. Mah. The defendant knew or should have known the general condition of the Mustang before agreeing to purchase it. The defendant had the opportunity to inspect the vehicle or have it professionally appraised before agreeing to purchase it. He knew where the Mustang was being repaired and lived in relatively close proximity to the location of Torks Auto. The defendant has an interest in restoring cars, which is evident from his emails to the plaintiff about the time he spent with Mr. Mah discussing the Mustang and its restoration. Further, given the letter provided by the defendant to the plaintiff from Mr. Rossetti it would appear that the defendant would have had access to Mr. Rossetti to assist in assessing the Mustang before he purchased it. Instead, it appears the defendant made no efforts to inspect the Mustang, even by making phone inquiries to assess the value or condition of the Mustang before he purchased it. In my view, the defendant failed to take those steps at his peril.
- [94] In summary, I find that the terms of the Sales Contract and Promissory Note are clear and unambiguous. The defendant agreed to purchase the Mustang for a price of \$35,000, with an "as is, where is" condition. He was to pay for the Mustang pursuant to the terms of the Promissory Note requiring that he make minimum monthly payments of \$500, with the full payment to be made on or before June 30, 2019.

C. Is the Defendant in Breach of the Sales Contract and Promissory Note?

- [95] Having found that the terms of the Sales Contract and Promissory Note are binding on the defendant, I turn to whether the defendant has breached the Agreements. The Sales Contract requires that the defendant pay \$35,000 for the Mustang in monthly payments and pay the full amount by June 30, 2019. The Promissory Note requires that the defendant pay the plaintiff \$35,000 for the Mustang with minimum payments of \$500 per month.
- [96] The defendant has only made \$2,000 in total payments, with his last payment being on April 13, 2019. While the Promissory Note included additional amounts that the defendant was to pay, such as amounts from his income tax return, any bonus he receives from his employment, and proceeds from the sale of his vehicle, I find that the terms of the Promissory Note are clear that he is to, at a minimum, make \$500 payments each month. He has failed to do so. Accordingly, I find that the defendant has breached the terms of both the Sales Contract and the Promissory Note, and was in breach as of May 1, 2019. I find that the defendant is liable for the outstanding amount of the Promissory Note as of that date.

D. Was there a Free-Standing Gift of \$20,000 and if so what is its relevance?

- [97] While I have determined that the defendant breached the terms of the Sales Contract and Promissory Note, I will address the aspect of the defendant's position that he asserts he was entitled to a \$20,000 gift from Mr. Mah independently from the sale of the Mustang.
- [98] In my view, the mention of the \$20,000 gift by the plaintiff is irrelevant to the terms of the Sales Contract or Promissory Note. As set out above, I find that the mention by the plaintiff of Mr. Mah's intention to gift \$20,000 to the defendant was a statement made by the plaintiff in the course of negotiating the transaction that led to the final price. While the defendant now asserts that he was entitled to a \$20,000 reduction on the price of the Mustang, I do not find that it is an element of the contract. Neither of the Agreements mentions the \$20,000 gift or a discount to the sales price by a specified amount. Instead, the Agreements set out a single price for the Mustang and an accompanying payment structure agreed to by the parties. To reiterate, the defendant attempts to read into the Agreements, without a textual foundation in the Agreements themselves, an entitlement to a free-standing credit of \$20,000 against the price of the Mustang.

i. Promissory Estoppel

- [99] While not pleaded or articulated as such, the defendant's argument regarding the \$20,000 gift from Mr. Mah's estate outside of the Will appears to engage the issue of promissory estoppel. Given the defendant has not pleaded promissory estoppel or sought a remedy on that basis, the plaintiff would be unfairly disadvantaged by not being able to fully respond to the issue. Recently, in *Park v. 1096303 B.C. Ltd.*, 2023 BCCA 78, our Court of Appeal held that a trial court must have regard for the issues set out in the pleadings. The Court held:
- [19] The risk to a plaintiff of failing to meet these requirements was explained by this Court in *Rain Coast Water Corp. v. British Columbia*, 2019 BCCA 201:

[157] Pleadings define the issues of fact and law for determination in an action and give opposing parties fair notice of the case to be met: *Lax Kw'alaams Indian Band v. Canada* (Attorney General), 2011 SCC 56 at para. 43; *Homalco Indian Band v. British Columbia*, 1998 CanLII 6658 (BC SC), [1998] B.C.J. No. 2703 at para. 5 (S.C.). If a party is unfairly disadvantaged by a failure to raise or properly particularise an issue in pleadings the court should not determine that issue. If it does, on appeal the result will be set aside: *Wu v. Sun*, 2010 BCCA 455 at paras. 19-20.

[Emphasis in original.]

[100] However, plaintiff's counsel anticipated that the defendant would argue that he was entitled to a \$20,000 gift from Mr. Mah. Accordingly, given the issue was raised tangentially and because the defendant is not represented by legal counsel, I have concluded that it is appropriate to briefly address the issue of promissory estoppel, as I see it relating to the defendant's argument.

[101] Promissory estoppel is an equitable defence. It requires the party relying on the doctrine to establish that: (1) the parties were in a legal relationship at the time of a promise or assurance; (2) the promise or assurance was intended to affect the parties' relationship and to be acted upon; and (3) the other party in fact relied on the promise or assurance. Implicitly, the reliance must also be to the promisee's detriment. See *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47 at para. 15, citing *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 at 57, 1991 CanLII 58.

[102] In my view, none of the elements of promissory estoppel are satisfied by the defendant in respect of his assertion that he was owed a \$20,000 gift from Mr. Mah. With respect to the first and second elements, the statement made by the plaintiff in her email regarding Mr. Mah's wish was not intended to affect a pre-existing legal relationship in respect of the Mustang. It was merely a basis for the plaintiff to offer the defendant a favourable price in the midst of their pre-contractual negotiations. There is no mention of a discount of \$20,000 to the price of the Mustang in the Sales Contract or Promissory Note. Instead, the Sales Contract indicates that the price of the car was \$35,000. Whatever manner upon which the plaintiff arrived at her selling price was her affair, just as it was the choice of the defendant to accept or refuse that price.

[103] The third element required to establish a defence of promissory estoppel is also not made out by the defendant. There is no evidence he altered his position based on his understanding of receiving a gift of \$20,000 from Mr. Mah. The Sales Contract, Promissory Note, and correspondence leading to signing the Agreements indicate that the defendant made his decision to purchase the Mustang based on a sale price of \$35,000. There is no evidence he changed his position once he believed he had a free-standing gift of \$20,000.

- [104] Recently, in *Kennedy v. Marcotte Estate*, 2022 BCSC 1486, Mr. Justice Brongers helpfully reviewed the law of promissory estoppel. In *Kennedy*, Mr. Kennedy argued that the will of the deceased should be varied to entitle him to a portion of the deceased's farm. Mr. Kennedy argued that at various times in his life, representations were made to him that led him to believe that he would be a beneficiary of the deceased's will and would inherit the farm. Mr. Kennedy was not named in the will as a beneficiary. Justice Brongers considered the various representations and found that it was not reasonable for Mr. Kennedy to rely upon those representations.
- [105] Citing the Supreme Court of Canada in *Cowper-Smith v. Morgan*, 2017 SCC 61, Bronger J. held that the representations were neither "unambiguous" nor "clear enough" to "reasonably have been understood as intended to be taken seriously": at para. 78. In *Kennedy*, as compared to the case at bar, there were six different representations made to Mr. Kennedy that he interpreted as indicating he would inherit the farm. These were not sufficient for the court to invoke promissory estoppel to vary the will. Further, I note that in *Kennedy*, there were representations made to Mr. Kennedy by the deceased before his death, and yet, those representations were still found to be too ambiguous to support a claim of promissory estoppel.
- [106] By contrast, in the case at bar there was only one mention in an email by the plaintiff to the defendant that the deceased had wanted to gift the defendant \$20,000. There is no context provided to this statement and it is not made directly by the deceased. It is ambiguous and it is not reasonable that it would be relied upon by the defendant to claim entitlement to a free-standing gift of \$20,000.
- [107] Again, I am aware that the issue of promissory estoppel was not raised before me and is obiter in that it is not necessary for me to determine that issue to reach my conclusion that the defendant breached the Agreements. However, given the focus the defendant placed on his belief that he was entitled to a free-standing \$20,000 gift from Mr. Mah based on what was expressed to him by the plaintiff, I have addressed his submissions regarding his reliance on the promise of the gift through the lens of promissory estoppel, as that is, in my view, the legal nature of this aspect of the defendant's argument.

VI. COSTS

- [108] The plaintiff argues that because the Promissory Note provides that the defendant will pay all reasonable costs of collection and legal fees, she is entitled to costs on a contractual basis and should be fully indemnified for her legal costs expended to resolve this matter. In support of this argument, the plaintiff referred me to *Sequoia Mergers & Acquisitions Corp. v. Camacc Systems Inc.*, 2022 BCSC 272 [*Sequoia*]. In *Sequoia*, the court held that if costs on an indemnity basis are contractually incurred, then:

- [4] The parties also agree that costs on an indemnity basis are not costs pursuant to the Supreme Court Civil Rules, B.C. Reg. 168/2009, such as party and party costs or special costs. Rather, costs on a full indemnity basis are contractually incurred. The parties further agree that the principles related to the assessment of full indemnity costs are most similar to an assessment of costs on a solicitor and own client basis, and that the factors considered in determining such costs are essentially the same as those considered in the taxation of legal fees pursuant to s. 71 of the Legal Profession Act, S.B.C. 1998, c. 9 [Legal Profession Act]: see *Hobbs v. Warner*, 2020 BCSC 1180 at paras. 37, 41; *Pallot v. Douglas*, 2018 BCCA 315; *Wanson (Bristol) Development Ltd. v. Sahba*, 2019 BCCA 459.
- [109] The defendant argues that the amount owing on the Promissory Note is within the \$35,000 jurisdiction of the Provincial Court of British Columbia, Small Claims Court, and as such no costs should be awarded. As support for his argument he relies upon R. 14-1(10) of the Rules:
- 14-1(10) A plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the Small Claims Act is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.
- [110] While the amount owing on the Promissory Note is only \$33,000, and thus less than the \$35,000 limit for a small claims action, the plaintiff argues that since her claim also includes the costs of collection and legal fees on a contractual basis, the amount of the claim as a whole exceeds the limit of the Small Claims Court.
- [111] The Promissory Note is clear that the defendant is responsible for the reasonable legal fees associated with the collection of the debt. As such, I conclude that the defendant must indemnify the plaintiff for her reasonable legal expenses incurred on a contractual basis. When a clear term of the contract relates to the recovery of collection and legal fees, a plaintiff is entitled to costs on a full indemnity basis: *Coastal Mountain Fuels Ltd v. Isacson*, 2022 BCSC 430 at para. 14.
- [112] As well, when the contractually based full indemnity costs award is added to the \$33,000 owing on the Promissory Note, the total amount owed by the defendant will exceed the limit of the Small Claims Court jurisdiction. I therefore find it was appropriate for the plaintiff to bring this action in Supreme Court, and that R. 14-1(10) has no application to this matter.
- [113] The legal fees may be significant, especially in proportion to the amount owing pursuant to the Promissory Note. However, in my view, the defendant has taken positions throughout his dealings with the plaintiff that have increased the plaintiff's legal expense. I note that it was the defendant who first indicated that he had retained legal counsel. Further, on three occasions the defendant refused offers by the plaintiff to resolve the dispute by returning the Mustang to the plaintiff. Finally, the defendant's actions have prolonged the matter and required the plaintiff to take additional legal steps to recover the amounts owed, including three court appearances initiated by the defendant in which the defendant was unsuccessful. In contrast, in my view, based on my interpretation of the tone and content of

the correspondence between the parties, the plaintiff's steps to recover the amount owing for the Mustang appear reasonable and taken to resolve the dispute amicably and efficiently.

[114] However, in respect of the quantum of costs in this matter, I emphasize that full indemnity costs awarded under a contractual basis must be fair, reasonable, and proportionate. An award on a full indemnity basis does not mean that the successful party is entitled to whatever costs were incurred, the amount must be fair and reasonable for what was involved in the particular proceeding: *United Soils Management Ltd. v. Mohammed*, 2019 ONCA 128 at para. 42. An award of full indemnity is not a complete recovery of legal fees and is still subject to review for reasonableness: *Wanson (Bristol) Development Ltd. v. Sahba*, 2019 BCCA 459 (Registrar) at para. 12. Put colloquially, courts caution that an award of full indemnity costs does not constitute a "blank cheque" for the successful party to recover disbursements and legal fees: *1353837 Ontario Inc. v. Pigozzo*, 2019 ONSC 4778 at para. 19. Further, I note that the language of the Promissory Note provides that the defendant is to pay all "reasonable" costs of collection and legal fees.

[115] Given the foregoing, the plaintiff's claim for legal fees must be reasonable in the circumstances of this case. If the parties are unable to agree as to the amount of costs, they may make arrangements through Supreme Court Scheduling to appear before me to resolve the issue.

VII. DISPOSITION

[116] I find the defendant breached the Sales Contract and the Promissory Note as of May 1, 2019. Accordingly, the court orders that:

- a) The plaintiff is awarded judgment in the amount of \$33,000, in respect of the sale of the Mustang pursuant to the amount remaining under the Promissory Note;
- b) Having found that the defendant was in breach of the Promissory Note on May 1, 2019, the plaintiff is entitled to pre-judgment interest on the amount of \$33,000 at the rate specified under the Court Order Interest Act, R.S.B.C. 1996, c. 79, from May 1, 2019, to the date of this judgment, and to post-judgment interest from the date of the judgment;
- c) The plaintiff is awarded full indemnity for legal costs at a reasonable amount in the circumstances of this case;
- d) If the parties are unable to agree to the amount of costs, they may make arrangements to appear before me for the purpose of resolving the amount of costs upon filing written submissions of no more than five pages at least five days before the appearance; and
- e) Plaintiff's counsel will draft this order and the defendant's signature is dispensed with on the order.

VIII. CONCLUSION

[117] As stated in my introduction to these reasons, I accept that the parties began their discussions relating to the sale of the Mustang with good intentions. I accept that both parties wanted to find a way to honour the memory of Mr. Mah through the sale of the Mustang. However, the defendant did not honour the contracts to which he agreed. It is unfortunate that the situation evolved as it did given that it is likely that in addition to the time and money expended on these legal proceedings, the parties have also incurred an emotional cost resulting from this conflict.

[118] I thank the parties' representatives for their submissions and presentation of this case.

"Gibb-Carsley J."

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