IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Puhalsky v. Barrows,*
2025 BCSC 1586

Date: 20250818
Docket: S253599
Registry: New Westminster

Between:

Dwayne Puhalsky

Plaintiff

And

Roy Barrows

Defendant

Before: The Honourable Mr. Justice Gibb-Carsley

Reasons for Judgment

Counsel for the Plaintiff:	R. Kusahara
The Defendant, appearing in person:	R. Barrows
Place and Dates of Trial:	New Westminster, B.C. June 23, 25 and 26, 2025
Place and Date of Judgment:	New Westminster, B.C. August 18, 2025

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I. Introduction

[1] In this trial, the plaintiff, Dwayne Puhalsky, seeks damages against the defendant, Roy Barrows, for losses he says flow from his purchase of an excavator from the defendant. The defendant operates a side business of importing used heavy equipment from China for resale in Canada. The plaintiff, responding to an advertisement posted on Facebook Marketplace, purchased what was purported to be a used 2021 Komatsu PC-56 excavator (the "Excavator") from the defendant for $49,900.

[2] The plaintiff did not inspect the Excavator before paying for it and taking possession of it from the defendant. When he retrieved the Excavator from the defendant, he had concerns that one of the tracks on the Excavator was faulty and it did not drive well. Despite his concern, he still took possession of the Excavator. However, in the days following his taking possession of it, the plaintiff became aware of what he asserts were serious deficiencies and defects in the Excavator. The defects were consistent with the Excavator being more heavily used and in worse condition than what he expected. Further, the plaintiff contends that the Excavator was a "Frankenstein" machine in that it was reassembled from various parts and given a fresh coat of paint to make it look like it was in better condition than it was in reality.

[3] The plaintiff seeks damages because he contends the defendant breached the contract by delivering a deficient product that had accrued far more hours of use than advertised. The plaintiff also asserts that the defendant misrepresented the condition of the Excavator to him and so should be liable for damages.

[4] The damages the plaintiff seeks include the return of the purchase price he paid to the defendant for the Excavator. The plaintiff also seeks to keep the Excavator, although his justification for this remedy was not well-articulated. The plaintiff also seeks to be reimbursed for the expenses he incurred in relation to borrowing funds from a lender to purchase the Excavator, including the interest expenses and administrative fees. In his Notice of Civil Claim, the plaintiff claims he

should be compensated for the business opportunities he says he lost because he could not commence the business he had hoped to commence for which he was going to use the Excavator, however, at trial, he did not advance that claim. Finally, the plaintiff asserts that it is appropriate to award him aggravated or punitive damages based on the conduct of the defendant.

[5] The defendant, who represented himself at trial, asserts that he sold the Excavator “as is” with no warranty. The defendant contends that the plaintiff could have, but did not, have the Excavator inspected before he took possession of it and did so at his own peril and accepted the risks associated with its purchase. Further, the defendant contends that because the Excavator has now been modified by the plaintiff, the defendant cannot be required to take it back and cancel the agreement. The defendant also objects to the claim that he misrepresented the condition of the Excavator as he says he simply passed on the information he received from the company in China from which he purchased the Excavator. Put simply, the defendant asserts that he is not liable for the plaintiff’s losses because the plaintiff agreed to the terms of the agreement and accepted the Excavator in the condition in which the plaintiff received it.

[6] On its face, this case appears straightforward and would require the Court to determine whether the defendant breached the terms of the agreement or misrepresented the condition of the Excavator.

[7] However, the conduct of the parties, especially that of the plaintiff, complicates my analysis. In the normal course, the plaintiff could and should have returned the Excavator and claimed a return of the price he paid for it from the defendant. While he at one point asked for a return of his money, he never made any effort to return the Excavator. Instead, he kept the Excavator despite his concerns about its state of fitness and attempted to repair the deficiencies himself. He then sued the defendant for damages.

[8] The matter is also made more complicated by the defendant’s conduct. The defendant advertised the Excavator as a machine with low hours implying it was in

good working order. There were no warnings that it was to be sold “as is” at the time the offer was made to the plaintiff. The only time there was mention that the Excavator was to be sold “as is” is in a document drafted by a third-party financing company for the plaintiff and defendant. It is unclear as to whether the plaintiff and defendant contemplated whether the Excavator was to be sold “as is” at the time the offer to sell was made and accepted by the plaintiff. The defendant raises the issue of the application of the doctrine of *caveat emptor* – let the buyer beware. Accordingly, I must also consider whether, in the circumstances of this case, the doctrine applies.

[9] This case is further complicated because the defendant was self-represented in trial, and the plaintiff decided not to put any expert evidence before the Court as to whether the Excavator was used more than the 495 machine hours that the defendant said it was used. However, I note that despite the lacuna of expert evidence as to the hours the Excavator was operated, I had the benefit of fact evidence from the plaintiff, defendant, and a heavy machine mechanic, Jake Carano, regarding the condition of the Excavator that allows me to make factual findings regarding its wear and what repairs are required to make it a machine that would operate in a similar fashion to a machine with “low hours”.

[10] Given the foregoing, I find that there are four issues I must decide. First, did the defendant breach the agreement by providing the plaintiff with a machine that was not operating to a standard as would a machine with “low hours”? Second, did the defendant misrepresent the state of the Excavator? Third, does *caveat emptor* apply to protect the defendant from being liable for any deficiencies in the Excavator? Fourth, if liable, what are the appropriate damages necessary to compensate the plaintiff?

[11] In these reasons for judgment, I will set out some brief facts for context. I will then provide my legal analysis. Finally, I will provide my assessment of the appropriate damages, if any, to which the plaintiff is entitled.

II. Facts

[12] Most of the events related to the plaintiff's purchase of the Excavator are not in dispute. For example, the chronology of events, the payment of the purchase price, and delivery of the Excavator are not contentious matters. Indeed, much of the testimony of the witnesses regarding the interactions between the parties is corroborated by text messages or by written documentation.

A. The Parties

[13] Both the plaintiff and the defendant testified at trial.

[14] Due to a previous car accident, the plaintiff is currently unable to work full time. He has experience working in the movie industry with heavy equipment and decided to start a part-time company doing excavation work. He purchased a trailer and a small dump truck. The plaintiff also arranged for an individual to be hired as an operator for an excavator because he is unable to operate machinery for long periods due to his previous injuries.

[15] The defendant is now retired, but has 34 years of experience working with gantry cranes used to load product onto ships. The defendant now operates a business of importing heavy machinery equipment from China and reselling the equipment in Canada. The defendant testified that he is not an expert in heavy equipment, but has some knowledge in the operation of heavy construction equipment such as the Excavator. From his testimony, I accept that he has some knowledge of the mechanics of the machines including the general mechanics of tracks such as the time used on the Excavator. The defendant also testified that he changed the battery, the oil, and the oil filter, and tightened the fan belt in the Excavator. He also testified that when the track appeared loose on the Excavator, he attempted to pump up the cylinder with grease. I accept that these steps he took with the Excavator and his experience in importing heavy equipment in the past show he has at least some knowledge of the mechanics of heavy equipment.

B. The Advertisement of the Excavator

[16] On November 8, 2023, the defendant ordered the Excavator from a company in China called Kunhuan Construction Machinery Co. Ltd. (“Kunhuan”) for USD $17,500. He had not seen the Excavator before he purchased it. I accept that the defendant also incurred additional costs related to importing the Excavator into Canada including import fees.

[17] The defendant testified that his practice in selling the equipment he purchases from China is to advertise it for sale on Facebook Marketplace. The defendant testified that he copied and pasted the description of the Excavator that was provided to him by Kunhuan into the Facebook Marketplace advertisement. The specific wording of the advertisement is important to my findings and so I will reproduce it in its entirety:

> Description
>
> 2021 Komatsu pc 56 excavator
>
> Arriving Jan 7 at centennial dock, then it has to clear Canada customs!
> 11,000 pound / low hours / hyd thumb / quick release for buckets / 3 buckets / a/c and heat / spare filter kit / I also have a hyd jackhammer for it at an extra cost!
>
> Seller information
>
> Roy Barrows
>
> Joined Facebook in 2017

(The “Facebook Ad”).

[18] I pause to identify two important aspects of the Facebook Ad. First, there is no mention that the Excavator is being sold “as is”. Second, the Excavator is described as having “low hours”. I will return to the importance of this information later in these reasons.

C. The Agreement

[19] At some time before January 10, 2024, the plaintiff contacted the defendant to express his interest in the Excavator after seeing the Facebook Ad. Through a text

message on January 10, 2024, the plaintiff agreed to purchase the Excavator for $49,900.

[20] The plaintiff and defendant continued to text each other about the Excavator and other more social matters such as inquires about the defendant's work and retirement. One text exchange sometime on or about January 10, 2024, is as follows:

> Defendant: Wow I have lots of interest in this excavator.
>
> Plaintiff: Well it's sold. Let's go buy some more, I just got off the bank. They got lots of money to give me.
>
> Defendant: Np
>
> Plaintiff: This could be a good thing for the both of us if you want a partner
>
> …
>
> Defendant: I marked the excavator as pending! Friday I can't get a truck warehouse till 11 am, but it 176 and 1 ave in surrey so close.

[21] On January 11, 2024, the text messages continued:

> Plaintiff: Okay cool. Yeah I'm going to have to hook up and meet you tomorrow anyways and get your information for some money….
>
> …
>
> Defendant: Np, the machine is coming to my house, and not going anywhere.
>
> …
>
> Plaintiff: Is it okay if my finance guy calls you? His name is Roman
>
> Defendant: Yes

[22] The texts regarding the agreement continued on January 12, 2024, with the defendant asking the plaintiff for his contact information for the bill of sale. The plaintiff responds by giving his contact information and also texting the defendant "Don't put the full price down there if you don't mind."

[23] There are no texts between the parties at any point that indicate that the defendant is selling the Excavator "as is" or with no guarantees. I will deal with this issue and my findings of fact on this matter in my analysis below.

[24] Sometime between January 10, 2024, and January 20, 2024, the Excavator arrived at the defendant's home. The defendant testified that he changed the oil, installed a new oil filter, installed a new battery, and tightened the fan belt. Sometime after the Excavator arrived, the defendant sent a picture of it to the plaintiff. One of the pictures sent was of the hour meter of the Excavator which indicated it had been operated for 495 hours.

[25] The plaintiff obtained financing to purchase the Excavator from a financing company called LendCare Capital Inc. ("LendCare"). The loan agreement was put into evidence; it sets out that the plaintiff borrowed $66,076.74 with an annual interest rate of 9.90%. The term of the loan was five years and the loan was amortized over 10 years with biweekly payments of $400.36.

[26] A document dated January 14, 2024, titled "Intent of Sale" was put into evidence (the "Intent of Sale Document"). The Intent of Sale Document is purportedly signed by both the defendant and the plaintiff, but neither had a very clear recollection of signing the document. The Intent of Sale Document appears to be a form contract prepared by Canada Powersports Financing ("Canada Powersports"). Of note, the Intent of Sale Document provides the following information about the Excavator:

> Year: 2021
>
> Make: Komatsu
>
> Model: PC56
>
> Odometer Reading: 495 hours
>
> Date of Sale: 01/14/2024
>
> Amount: $49,900
>
> Conditions of Sale: Once payment is received in Full Includes: new hydraulic thumb, New bucket quick release assembly, 3 buckets, spare filter kit, sold as is, no warranty or guarantee implied

[27] I note that, based on the evidence adduced before me at trial, the Intent of Sale Document is the first time that there is any documentation indicating that the Excavator is being sold "as is". I will return to the relevance of this information later

in my reasons. However, as will be discussed below, the Excavator is still described in the Intent of Sale Document as having 495 Hours of operating hours.

[28] As I understand the evidence, it appears that Canada Powersports acted as an intermediary between the plaintiff and defendant and facilitated the payment for the Excavator to the defendant. It is agreed between the parties that on January 16, 2024, the defendant received $49,900 for the purchase of the Excavator from the plaintiff through Canada Powersports.

[29] The plaintiff did not have the Excavator inspected before agreeing to purchase it or paying for it.

D. The Plaintiff Takes Possession of the Excavator

[30] On January 20, 2024, the plaintiff went to the defendant's property with a truck and a trailer to take possession of the Excavator. The plaintiff testified that he had immediate concerns with the state of the Excavator when he was removing it from the property. The plaintiff testified that the left track was loose and that it was difficult to operate the Excavator, even to drive it on to the trailer for the purpose of transporting it to the plaintiff's property.

[31] In the days following January 20, 2024, after the plaintiff took possession of the Excavator, he expressed concern to the defendant through text messages that the Excavator was not operating as he expected. In response to the plaintiff's concerns regarding the loose track on the Excavator, the defendant responded in a text, "I will be over after work tomorrow I will pump those tracks up".

E. The Plaintiff Discovers Serious Problems with the Excavator

[32] The plaintiff testified that he knew there was an issue with the Excavator's left track when he removed the Excavator from the defendant's property and onto the trailer to take it to his property. However, more significant issues regarding the functioning and the state of the Excavator came to the attention of the plaintiff on January 26, 2024.

[33] On January 26, 2024, the plaintiff hired Jake Carano, a heavy machinery mechanic employed by True North Equipment Repair Ltd. (“True North Repair”), to assess and evaluate the Excavator at his property. The parties agreed that this could properly be described as a “tear down” where Mr. Carano provided an inspection of the track to discover what might be causing the problems.

[34] Mr. Carano testified at the trial on behalf of the plaintiff. Mr. Carano testified about his inspection of the Excavator and the repairs he believed would be required to bring the Excavator into working operation. He also provided, based on his experience as a heavy machine mechanic, his view as to how many hours the Excavator had actually been used based on the corrosion and deterioration of parts. The essence of Mr. Carano’s evidence was that the Excavator was not functioning properly and showed wear and tear well beyond what would be expected of an excavator that was only used for about 500 hours. Mr. Carano also provided evidence of what would be required to repair the Excavator and the estimate of that cost, as indicated in the estimate for repairs provided by True North Repair on August 22, 2024.

[35] I note that Mr. Carano was not tendered by the plaintiff as an expert and no expert reports were prepared or filed. At trial, I indicated my concerns regarding Mr. Carano’s evidence as, in my view, his testimony contained both fact and opinion evidence. For example, he provided fact evidence regarding what repairs were quoted as necessary by his company on the Excavator to bring it into working order and what those repairs would cost. The estimate of the full repairs to be completed by True North Repari on the Excavator was provided to me at trial. The estimate for the repairs was $20,368.89, which includes, among other things, repairs to both tracks and the labour required to repair the undercarriage.

[36] Mr. Carano also testified that, in his opinion, the serial number plate on the Excavator had been altered. I will not consider this evidence in my decision on the basis that Mr. Carano was not qualified as an expert to provide opinion evidence.

[37] Similarly, Mr. Carano testified that, in his opinion, the Excavator showed use of 4000-5000 hours. I will not accept the precise number of hours provided by Mr. Carano as the operating hours of the Excavator because, again, Mr. Carano was not qualified to give that opinion evidence. However, I accept his evidence generally that the Excavator was used in excess of the "low hours" stated by the defendant in the Facebook Ad and the 495 hours set out in the text messages sent from the defendant to the plaintiff. I come to this conclusion based on his general evidence of what repairs were required and the fact that the defendant acknowledged that he "agreed" with Mr. Carano that the Excavator had been used more than 495 hours. This admission by the defendant provides confirmatory evidence that the Excavator was more heavily used than it was represented to the plaintiff in the Facebook Ad, the Intent to Sell document, and the text messages. Therefore, I find as fact that the Excavator was used more heavily than the 495 hours that were represented as its operating hours.

F. The Ongoing Discussions Between the Plaintiff and Defendant

[38] After the tear down on January 26, 2024, the plaintiff expressed his concern about the quality of the Excavator to the defendant. In one text message, sent on January 26, 2024, which I reproduce verbatim, the plaintiff wrote:

> Bottom line and want my money back. No ifs ends or butts. The more we look at the machine the more it was rebuilt in the tags were changed. Sorry but that's on your part. Maybe that's why they changed machines at the last minute? Anyways, I can't deal with this B*******. It's very stressful for me right now because of my back, injury and etc. I trusted you.

[39] The defendant expressed to the plaintiff that he gave the plaintiff all the information that he received from the company in China and that the plaintiff had bought it "as is". The defendant then offered to pay for the one side track repair and two rollers on the other side. The defendant then offered to try and get another brand of excavator, a Caterpillar machine, as a replacement. However, the defendant testified that he learned he was unable to import Caterpillar machines into Canada. When he was unable to import a Caterpillar machine, the defendant then offered to try to import another Komatsu PC 56.

[40] Despite these offers, the defendant did not provide the plaintiff with another machine or with replacement parts.

[41] The defendant testified that when the various replacement options fell through, he planned to provide the plaintiff with a cheque for $12,000 to assist the plaintiff in repairing the Excavator. However, he was served with the Notice of Civil Claim and so decided he would not provide any payment to the plaintiff.

[42] Put simply, from the text messages and his testimony, the defendant appeared as if he wanted to help alleviate the plaintiff's grievances regarding the Excavator, but never followed through with any of the offers to help other than visiting the plaintiff on January 24, 2024, to attempt to pump up the cylinder in the left track with his grease gun.

[43] I note that the defendant testified that he tried to take these steps to help the plaintiff, not because he felt he was obligated to do so but out of the "goodness of his heart". He testified that he believed the plaintiff had purchased the Excavator "as is" and so the plaintiff was responsible for the deficiencies.

III. The Parties' Positions

[44] The plaintiff frames the issues at trial on two bases. First, he alleges breach of contract on account of the defendant's failure to deliver an excavator with "low hours" as promised. Second, he alleges the defendant made a fraudulent or negligent misrepresentation to the plaintiff by stating that the Excavator had low hours and was functioning, when it was not. The plaintiff seeks a recovery of the losses he says flow from the breach or misrepresentation that include the return of his purchase payment, the cost of repairs he has already incurred, and the expenses he incurred to borrow the funds to pay for the Excavator. The plaintiff also seeks aggravated and punitive damages. As referenced above, in the Notice of Civil Claim, the plaintiff also seeks damages for lost business opportunities, but this was not argued at trial and I understand the plaintiff no longer advances his claim for lost business opportunities. Strangely, as mentioned above, the plaintiff does not appear to intend to return the Excavator to the defendant.

[45] The defendant argues that he sold the Excavator “as is” and with no warranties. He does not believe he misrepresented the state of the Excavator because he simply passed on the information that he received from the seller in China to the plaintiff. The defendant argues the plaintiff could and should have inspected the Excavator before purchasing it, but did not.

[46] The defendant also asserts that now that the plaintiff has made repairs and alterations to the Excavator, it is no longer in the state in which it was sold to the plaintiff and this meant that the defendant could not take the Excavator back when the plaintiff expressed his regrets about purchasing it. In short, the defendant asserts when the plaintiff purchased the Excavator he accepted the state it was in. Further, the defendant contends he should not be responsible for any of the financing costs incurred by the plaintiff, especially so because the plaintiff appears to have borrowed more than the cost of the Excavator from LendCare.

IV. Discussion

[47] I will first consider whether the defendant breached the terms of the agreement. I will then consider if the defendant misrepresented the quality of the Excavator to the plaintiff. If I find that the defendant breached the contract or misrepresented the condition of the Excavator upon sale, I will then turn to an assessment of what damages, if any, are warranted.

A. Did the Defendant Breach the Agreement?

[48] In order to determine if there was a breach of contract, I must first determine when the contract or agreement was formed between the parties and to what terms the parties agreed.

[49] A contract of sale is formed when a person acquires the ownership of property in exchange for payment. In this case, the defendant delivered the Excavator to the plaintiff in return for payment from the plaintiff of $49,900. On the evidence before me, I am satisfied that there were exchanges of promises between the defendant and the plaintiff for the purchase of the Excavator through the text messages on January 10, 2024, when the plaintiff texted that the Excavator was

sold. At this point, the defendant indicated that the Excavator was not going anywhere and the parties then were only left to exchange details of the logistics of how payment would be made. I find that the agreement between the parties was valid; the parties had exchanged serious promises and understood their obligations under the agreement.

[50] At its core, the legally binding promise was for the defendant to provide to the plaintiff the Excavator that had “low hours” and which was shown in a photo sent from the defendant to the plaintiff as having accrued 495 hours. I accept as a fact that leading up to the plaintiff’s offer to purchase the Excavator, the defendant never indicated that the Excavator was being sold “as is”. Instead, I find that both in the text messages and the Facebook Ad, the Excavator offered for sale was presented as an excavator with low operating hours. Further, I find that this implies that it was in good working condition and functional. The defendant provided no information to ever suggest that the Excavator needed repairs, or that it may have been operated for more hours than what he represented to the plaintiff.

[51] In this regard, I reject the defendant’s evidence that he told the plaintiff that the sale of the Excavator was “as is”. The communication between the parties was largely if not entirely by text message. There were no text messages in which the defendant communicated that the Excavator was being sold “as is”. Further, the defendant’s evidence on when he told the plaintiff that the plaintiff should have the Excavator inspected or that it was sold “as is” was vague and general and the defendant was unable to recall or point to any specific times when he would have expressed these views to the plaintiff.

[52] I acknowledge that the Intent of Sale Document confuses this issue because it includes that the Excavator is sold “as is, no warranty or guarantee implied.” However, I conclude that the Intent of Sale Document is not the operative binding contract between the parties for a number of reasons. First, while it appears the plaintiff signed the Intent of Sale Document, it was never put to him in cross-examination by the defendant. The evidence regarding the plaintiff’s review or

consideration of the document is vague and leaves me unable to determine the circumstances under which it was presented to the plaintiff.

[53] A secondary concern is that the document was drafted by Powersport Finances which is not a party to the agreement. Neither the plaintiff nor the defendant had clear evidence as to the purpose of the document and it appears that it may have been created for the purpose of having the funds released from the finance company to the defendant for the purchase of the Excavator, thus not for the purpose of binding the plaintiff and defendant in their understanding of the purchase and sale of the Excavator.

[54] There was no evidence before me that the parties, even if they signed the Intent of Sale Document, contemplated its contents and it appears it was more a formal requirement for the funds to be released to the defendant. Indeed, the document is titled “Intent of Sale” not Contract of Purchase and Sale, which, in my view, provides some indication that I must be cautious in approaching it as the final and binding terms of the contractual agreement between the plaintiff and defendant for the Excavator.

[55] Accordingly, I conclude that when assessing whether the defendant breached the terms of the agreement he had with the plaintiff, I must consider whether the defendant failed to provide to the plaintiff an excavator that matched the description provided in the Facebook Ad.

[56] In the Facebook Ad, the defendant offered for sale a 2021 Komatsu excavator with “low hours”. I also accept that in follow-up text messages the defendant sent a picture to the plaintiff of the Excavator’s hour meter showing that the Komatsu had been operated for 495 hours. I accept that the corollary of having low hours is that the Excavator was in good working condition. Further, the defendant did not describe that the Excavator had any deficiencies, problems, or required maintenance in the Facebook Ad or in subsequent texts to the plaintiff before the plaintiff agreed to purchase the Excavator on January 10, 2024.

[57] As set out above, I accept the evidence of Mr. Carano as accepted by the defendant that the Excavator had been operated for more than 500 hours. Further, I accept that the Excavator had significant deficiencies that were not identified by the defendant when he offered the Excavator for sale. Simply put, the excavator the defendant offered for sale and which the plaintiff accepted to purchase was not the excavating machine the plaintiff received.

[58] As set out above, Mr. Carano testified that the wear and tear on the Excavator indicated it was a machine operated 4000-5000 hours, not 500 hours. As referenced above, the plaintiff did not provide any expert evidence as to how many hours that the Excavator, or an excavator in a similar state of disrepair as the Excavator, would have been used. Such a report would have been helpful to the Court. However, I understand that given the relatively small amounts in issue, it may not have been financially viable to commission an expert report in this matter. That said, I accept as a fact that the Excavator had more hours and more wear than a machine with only 495 hours and it was not in the state promised by the defendant and offered to the plaintiff.

[59] The legal test for fundamental breach of contract was considered by the Court of Appeal in *Ballantyne v. Grone* (1989), 22 R.F.L. (3d) 217, 1989 CanLII 2969 (B.C.C.A.) at para. 11, where Hinkson J.A. adopted the summary of the law stated in *Borg-Warner Acceptance Canada Ltd. v. Wyonzek* (1981), 122 D.L.R. (3d) 737, 1981 CanLII 2480 (Sask. K.B.) at 744–45:

> Whatever its limitations or the subtle shades of its essence the doctrine with all its imperfections is embedded in Canadian law and at least for the purposes at hand may be sufficiently if not exhaustively nor perfectly stated thus: a fundamental breach is one going to the very root of the contract; where one party fails to perform the very purpose for which the contract is designed so as to deprive the other of the whole or substantially the whole of the benefit which the parties intended should be conferred and obtained, such breach goes to the very root of the contract, and the party not in default is absolved from performing his end of the contract.

[60] Given the foregoing, I find that the defendant breached a material term of the agreement which was to provide to the plaintiff an excavator that had low hours and

thus functional. I am satisfied that on balance, based on the evidence of the plaintiff, Mr. Carano, and the defendant, the Excavator was not functioning in a manner consistent with an excavator that has low hours, and that the defendant did not provide any description of the Excavator consistent with it requiring repairs or being deficient. I conclude that the defendant breached the terms of the agreement by not providing to the plaintiff what he promised.

B. Did the Defendant Misrepresent the Condition of the Excavator?

[61] As I just set out, I find that the Excavator was not as advertised by the defendant nor as described in the Facebook Ad because it was in need of repair and not functioning in a manner consistent with an excavator with “low” operating hours. In other words, the Excavator’s condition did not correspond to how it was described in the Facebook Ad. I conclude that the defendant misrepresented the condition of the Excavator to the plaintiff. I will now consider whether the misrepresentation was willful or negligent.

[62] A representation is a statement of fact. A fraudulent representation is a false statement which, when made, the representor knew to be false: *Howse v. Quinnell Motors Ltd.*, [1952] 2 D.L.R. 425 at 429, 1949 CanLII 258 (B.C.C.A.); *Manning v. Dhalla*, 2018 BCSC 2148 at para. 33.

[63] The defendant testified that, in his experience, when he purchased heavy equipment machinery from China, it was sometimes uncertain what would be delivered. As I understood the defendant’s testimony, in his experience, sometimes what he ordered from China was not what was actually delivered in that there were differences in either the quality of the machine delivered as compared to what was ordered or, indeed in some cases an entirely different machine was delivered from the machine that he ordered.

[64] However, despite his knowledge about the state of products that he imported from China, I find as a fact that the defendant did not communicate these concerns to the plaintiff. Further, the defendant performed some work on the Excavator before the plaintiff took possession of it. He changed the oil filter, oil, battery, and tightened

the fan belt. In my view, this would have given him some insight into the wear and tear on the Excavator and that it had not been used for low hours. In cross-examination, the defendant accepted that it was likely that the Excavator had been operated for more than 500 hours. However, he never communicated this information to the plaintiff. In my view, by representing that the Excavator had only been operated for about 500 hours but knowing that it had been operated for more amounts to a fraudulent misrepresentation. In this regard, I also note that the defendant sent a photograph by text to the plaintiff of the Excavator's machine hour gauge displaying a reading of 495 hours.

[65] If I am wrong that the defendant knowingly misrepresented the condition of the Excavator to the plaintiff, I am satisfied that his misrepresentations to the plaintiff regarding the Excavator were negligent.

[66] In order to succeed in negligent misrepresentation, the plaintiff must establish the criteria set out in *Kingu v. Walmar Ventures Ltd.* (1986), 10 B.C.L.R. (2d) 15 at 10, 1986 CanLII 142 (B.C.C.A.):

> (1) A false statement negligently made;
>
> (2) A duty of care on the person making the statement to the recipient. A duty of care does not arise unless:
>
> > (a) the person making the statement is possessed of special skill or knowledge on the matter in question, and
> >
> > (b) the circumstances establish that a reasonable person making that statement would know that the recipient is relying upon his skill or judgment;
>
> (3) Reasonable reliance on the statement by its recipient;
>
> (4) Loss suffered as a consequence of the reliance.

[67] For the same reasons set out above regarding my conclusions that the defendant knowingly misrepresented the condition of the Excavator to the plaintiff, I find that if he did not know for certain the condition of the Excavator, he was willfully blind or reckless that the way the machine was described by the Chinese vendors did not accord with reality.

[68] The defendant testified that all he did for the Facebook Ad was “cut and paste” the description provided to him by the Chinese vendor. He did no due diligence to confirm the accuracy of that information and passed along no concerns in the Facebook Ad or in the text messages with the plaintiff that there could be issues with the accuracy of how the Excavator was described.

[69] Further, I accept from the testimony and the tenor of the text messages that the plaintiff was relying on statements made by the defendant and that reliance was reasonable. The defendant expressed in the text messages his experience of importing heavy equipment from China. The texts indicate that the plaintiff was impressed by the defendant’s experience and even asked at one point if he might become involved in the importing business with the defendant. While his trust in the defendant may have been misplaced or naïve, I find that the defendant expressed that he had experience in importing heavy machinery from China such that it would be reasonable for the plaintiff to rely upon the defendant’s representations.

[70] Given the foregoing, I find that the defendant misrepresented the condition of the Excavator to the plaintiff and the misrepresentation was either fraudulent or negligent.

[71] As referenced above, the defendant’s primary defence to the plaintiff’s claim is that he is protected by the doctrine of *caveat emptor* and that by purchasing the Excavator, the plaintiff took on any of its deficiencies because it was purchased “as is.” I will now turn to a discussion of whether *caveat emptor* applies in this case.

C. Does the Doctrine of *Caveat Emptor* Apply?

[72] The doctrine of *caveat emptor,* meaning ‘let the buyer beware’, establishes that a seller may be protected from liability against selling goods to a purchaser if the purchaser complains about the goods after the sale. In essence, it shifts the burden to the purchaser to ensure that the goods are of a sufficient quality and meet the purchaser’s requirements. The doctrine of *caveat emptor* was described by our Court of Appeal in *Nixon v. MacIver*, 2016 BCCA 8, as follows:

> [31] The doctrine of *caveat emptor* was colourfully summarized by Professor Laskin (as he then was) in "Defects of Title and Quality: *Caveat Emptor* and the Vendor's Duty of Disclosure" in Law Society of Upper Canada, *Contracts for the sale of land* (Toronto: De Boo, 1960) at 403:
>
> > Absent fraud, mistake or misrepresentation, a purchaser takes existing property as he finds it, whether it be dilapidated, bug-infested or otherwise uninhabitable or deficient in expected amenities, unless he protects himself by contract terms.

[73] The *Sale of Goods Act*, R.S.B.C. 1996, c. 410 [*SGA*] has displaced the *caveat emptor* doctrine in respect of the sale of goods in British Columbia, except where exemptions to the statute or its provisions apply. While contracting parties may agree to the application of *caveat emptor*, all such agreements must not run afoul of the prohibitions on waivers set out in the *SGA*: see e.g. s. 20. Where it is applicable, the *SGA* protects the purchaser of goods by implying conditions in relation to fitness for purpose, merchantability, or correspondence with description. In *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20, the Supreme Court of Canada explained the likely purpose of such legislation as being to protect buyers of goods from the risks associated with *caveat emptor*:

> [35] All provinces and territories, except Quebec, have a sale of goods Act modelled on the United Kingdom's Imperial Sale of Goods Act, 1893 (U.K.), 56 & 57 Vict., c. 71, which was itself a codification of the historical common law of sale established by the English courts during the 19th century. [2] These Acts contain a variety of statutory provisions dealing with many aspects of a sale transaction, including price, delivery and the transfer of ownership. Of particular importance to this appeal are three implied obligations that certain sellers may owe to buyers in relation to the characteristics or properties of the goods sold: fitness for purpose, merchantability and correspondence with description […] The introduction of these legislated protections was likely intended to reverse the negative effects that arose when caveat emptor reigned and buyers were saddled with all of the risks associated with the state of the goods, except when expressly agreed by the contracting parties.
>
> [Emphasis added.]

[74] In *Prebushewski v. Dodge City Auto (1984) Ltd.*, 2005 SCC 28, the Court recognized statutes like the *SGA* as part of "an emerging legislative pattern in North America designed to equitably reconfigure the imbalance in bargaining power between consumers and those who manufacture and sell products": para. 33. Such

legislation was introduced to protect buyers from unsafe products, fraudulent or deceptive practices, and to "rectify consumer vulnerability resulting from such common law principles as *caveat emptor*": para. 33.

[75] While the applicability of the *SGA* was not argued before me in any detail by the parties, I find it is engaged in the circumstances of this case to the effect of displacing *caveat emptor*. I find that both ss. 17(1) and 18(a) through (c) of the *SGA* apply:

> Sale by description
>
> 17 (1) In a contract for the sale or lease of goods by description, there is an implied condition that the goods must correspond with the description.
>
> …
>
> Implied conditions as to quality or fitness
>
> 18 Subject to this and any other Act, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale or lease, except as follows:
>
> a) if the buyer or lessee, expressly or by implication, makes known to the seller or lessor the particular purpose for which the goods are required, so as to show that the buyer or lessee relies on the seller's or lessor's skill or judgment, and the goods are of a description that it is in the course of the seller's or lessor's business to supply, whether the seller or lessor is the manufacturer or not, there is an implied condition that the goods are reasonably fit for that purpose; except that in the case of a contract for the sale or lease of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;
>
> b) if goods are bought by description from a seller or lessor who deals in goods of that description, whether the seller or lessor is the manufacturer or not, there is an implied condition that the goods are of merchantable quality; but if the buyer or lessee has examined the goods there is no implied condition as regards defects that the examination ought to have revealed;
>
> c) there is an implied condition that the goods will be durable for a reasonable period of time having regard to the use to which they would normally be put and to all the surrounding circumstances of the sale or lease;

[76] Regarding s. 17(1), the meaning of "sale by description" was explained in *Christopher Hill Ltd. v. Ashington Piggeries Ltd.*, [1972] A.C. 441 (H.L.) at 503, a meaning later endorsed by this Court in *Coast Hotels Ltd. v. Royal Doulton Canada Ltd.*, 2000 BCSC 857 at para. 32, and in *Joubarne v. Loodu et al.*, 2005 BCSC 1340 at para. 31:

> The "description" by which unascertained goods are sold is, in my view, confined to those words in the contract which were intended by the parties to identify the kind of goods which were to be supplied. It is open to the parties to use a description as broad or narrow as they choose.

[77] Earlier in this judgment, I made a finding that "low hours" and "495 hours" were part of the terms, or description, of the contract between the parties and that the Excavator sold to the plaintiff did not correspond with that description. It follows that the defendant breached the implied condition set forth in s. 17(1) of the *SGA*.

[78] I have also found that the plaintiff had made known to the defendant, expressly or by implication, the purpose for which he needed an excavator such that he relied on the defendant's judgment, and that the Excavator was of a description that is in the course of the defendant's business to supply. In these circumstances, s. 18 of the *SGA* implied conditions that the Excavator would be reasonably fit for the purpose for which it was sold to the plaintiff, of merchantable quality, and durable for a reasonable period of time having regard to the plaintiff's intended use of it.

[79] It follows that the defendant also breached the implied conditions set forth in s. 18. The Excavator was not reasonably fit or durable for a reasonable period of time. As noted above, the Excavator had significant deficiencies, that required remediation and repair as evidenced by Mr. Carano's testimony and the repair quote provided by True North Repair. I have concluded that these deficiencies would not be present in a machine that was described as having low hours of operation when there was no description or warning about potential defects or deficiencies.

[80] Pursuant to s. 69 of the *SGA*, the option of "contracting out" of ss. 17 and 18 was available to the parties in the instant case. The prohibition on waivers stipulated in s. 20 does not apply because the plaintiff intended to use the Excavator primarily

for business purposes: see *Foley et al v. Piva Contracting Ltd. et al*, 2005 BCSC 651 at para. 61.

[81] While I have already determined that the “as is” language used in the Intent of Sale Document did not form part of the express terms of the agreement between the parties, I have turned my mind to the possibility that I am wrong. If I was to accept that “as is” was a term of the agreement which waived the implied conditions stipulated in the *SGA*, the defendant would then be able to invoke the *caveat emptor* doctrine.

[82] However, as my analysis below will reveal, the application of *caveat emptor* still does not result in an outcome favourable to the defendant.

[83] In *Nixon,* our Court of Appeal held that the doctrine of *caveat emptor* does not apply when there is: (i) a breach of contract, (ii) active concealment (i.e., fraud), (iii) non-innocent misrepresentation, (iv) a warranty, or (v) a latent defect that cannot be discovered by reasonable inspection or reasonable inquiries: para. 47.

[84] In my opinion, the doctrine of *caveat emptor* does not apply in this case to protect the defendant for three reasons. First, I conclude on the facts that the defendant’s misrepresentation about the use and wear and tear on the Excavator should be considered non-innocent or negligent. The defendant testified that he knew from experience that heavy machinery purchased from China was not always in the same condition as it was described in the purchase documents. Further, the defendant tightened the fan belt, changed the oil and oil filter, and replaced the battery. I conclude that having performed that internal work on the Excavator, he would have at least some knowledge of the state of deficiencies of the Excavator and that it was not a machine that had only been used for low hours.

[85] As referenced above, the defendant never communicated that the Excavator had deficiencies or required repairs, or even that there were potential risks to buying heavy machinery from China. Indeed, based on the Facebook Ad and the texts between the parties, the defendant indicated that the Excavator would be in working

condition without defects. There was an imbalance of knowledge and experience between the defendant and plaintiff given the defendant's previous dealings with importing heavy equipment from China. In my view, given the knowledge the defendant had of how heavy machinery imported from China can have serious defects, his choice not to pass on that information to the plaintiff as a caution amounts to a non-innocent misrepresentation.

[86] Second, I find as a fact that the defendant at no time communicated to the plaintiff that the Excavator was being sold "as is". It was not mentioned in the Facebook Ad, nor was it contained in any of the text messages exchanged between the parties leading up to the purchase. I acknowledge that the Intent of Sale Document includes that the Excavator was sold "as is, no warranty or guarantee implied". However, as I described above, given the vagaries of the purpose of that document or how it came into existence, I do not find it sufficient to supplant the agreement between the defendant and plaintiff through the text messages on January 10, 2024, that the Excavator was sold as a functioning excavator with low hours.

[87] As set out above, I find that the defendant never communicated to the plaintiff that the plaintiff was purchasing the Excavator "as is" or that the plaintiff should have it inspected. The defendant testified that he "would always" tell a buyer to have an item inspected and so must have in these circumstances. I do not accept his testimony on this point. In the many text messages between the parties there is no mention that the Excavator is being sold "as is" or that the plaintiff should have it inspected before he purchases it, or that there could be deficiencies because it is coming from China.

[88] A third reason that *caveat emptor* does not apply in this case is that I find that the defendant waived reliance on the doctrine through his actions. The defendant testified that he was attempting to assist the plaintiff in fixing the deficiencies in the Excavator. He made a number of promises to attempt to fix the deficiencies. Indeed, he testified that he had planned to provide the plaintiff with a cheque for $12,000 to

assist him with the repairs, but he was served with the Notice of Civil Claim and so decided he would not provide that cheque.

[89] I accept the defendant's evidence that he was trying to assist the plaintiff "out of the goodness of his heart" as he felt he had no legal obligation to do so. This is an admirable sentiment, and I will have more to say about this below, but I find that the defendant's actions demonstrate that he had waived his ability to rely upon the doctrine of *caveat emptor*. These actions include:

1. Visiting the plaintiff's property on January 24, 2023, with a grease gun to attempt to "pump up" the track to get the Excavator mobile;

2. Advising the plaintiff he was going to purchase another excavator to replace the Excavator; and

3. Offering to obtain additional buckets for the Excavator.

[90] Given the foregoing, I conclude that the doctrine of *caveat emptor* does not apply in the circumstances of this case.

D. The Impact of the Plaintiff's Post Sale Conduct

[91] In the normal course, the remedy for the defendant's breach of contract would be for the plaintiff to return the Excavator to the defendant and the defendant to return the purchase price to the plaintiff. However, this did not happen because the plaintiff kept the Excavator and undertook repairs on it. In my view, this somewhat complicates the issues before me.

[92] The plaintiff has engaged True North Repair to repair the Excavator. He has also made modifications to the Excavator in an attempt to get the Excavator in working order. In my view, two issues arise from the plaintiff's actions. First, the Excavator is not in the same condition as when the plaintiff obtained it from the defendant in January 2024. Second, the plaintiff has incurred expense to presumably improve the Excavator. As a result, to require a return of the Excavator to the defendant in exchange for the purchase price would enrich the defendant.

That said, it is the plaintiff who has brought about these circumstances by making the repairs to the Excavator instead of returning the Excavator to the defendant.

[93] I admit that I am puzzled by the plaintiff's actions and his claim. While he claims that the defendant misrepresented a material aspect of the agreement by delivering an Excavator that was not the Excavator contemplated in the agreement, he has not returned the Excavator to the defendant. Further, in addition to keeping the Excavator, he has made modifications to it. In my view, his actions require an analysis as to whether the plaintiff and the defendant by their actions have modified the terms of the agreement and, in essence, are bound by a new amended agreement.

[94] I conclude that after taking possession of the Excavator and then having it inspected and assessed by Mr. Carano, the plaintiff knew the condition of the Excavator. At that time, he had a decision to make. He could have returned the Excavator and requested the return of his payment. He did not. Instead, he had work performed on the Excavator but did so with the general agreement of the defendant who was actively communicating with the plaintiff regarding ways to assist the plaintiff in repairing the Excavator.

[95] The actions of the parties have blurred the lines between the initial contract and the ongoing relationship between the parties, and how to remedy the original breach of the contract by the defendant. In my view, given the unconventional manner in which the parties have behaved in this transaction, it will require some creativity on behalf of the Court to remedy what I perceive as an unfairness perpetrated by the defendant on the plaintiff through the defendant's breach of contract and misrepresentation. The remedy is best addressed through my assessment of damages to which I will now turn.

E. Assessment of Damages

i. Damages

[96] General damages are to place the plaintiff in the position they would have been in had the breach of contract not occurred: *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc. et al.*, 2004 BCSC 1464 at para. 12.

ii. The Return of the Purchase Price

[97] The plaintiff claims damages for the amount of the purchase price of $49,900. However, the plaintiff does not intend to return the Excavator to the defendant. As I stated above, I am puzzled by the plaintiff's position. Had the plaintiff paid the purchase price and never taken possession of the Excavator, or returned the Excavator without making any modifications to it, his argument might have some merit. However, he has retained the Excavator and yet seeks the return of his purchase price.

[98] There is no support for the plaintiff's position in law. The plaintiff has kept the Excavator and made modifications upon it. Simply put, it is not in the same condition as it was when he obtained it from the defendant. Again, I struggle to understand how the plaintiff believes it would not be an unjust windfall if he is able to retain the Excavator and have his purchase price returned to him from the defendant.

[99] I will not award the plaintiff the return of his purchase price, primarily because he decided to keep the Excavator and commission repair work. However, having found that the defendant did not provide the Excavator in the condition that was promised to the plaintiff in the agreement, I find that the most equitable manner to put the plaintiff back to the position he was in before the transaction occurred is to require the defendant to pay for the repairs to the Excavator in order to bring it to a working condition that generally corresponds with what would be expected of a machine that was advertised in the Facebook Ad.

iii. Damages for the Costs to Repair the Excavator

[100] The evidence before the Court was that the estimated repair costs for the Excavator by True North Repair was $20,368.89. I accept that the repairs proposed by True North Repair will bring the Excavator into a condition that would be in working order which was the state promised by the defendant to the plaintiff as a machine with “low hours”.

[101] The estimate tendered as evidence at trial was prepared by True North Repair on August 22, 2024. I accept that it was only an estimate and costs can exceed estimated costs. Further, I take judicial notice of the fact that there have been general inflationary pressures on costs of goods and services in Canada in the past months. My concern of limiting an award to the plaintiff to the estimated costs is that it might result in the plaintiff not being put in the position he should have been had the defendant delivered him a functioning excavator. Accordingly, I will increase the estimated damages to $24,442.69 to account for a 20% increase for contingency amounts. I acknowledge this is a “rough and ready” approach to provide a form of “rough justice”. However, in the circumstances of this case, I conclude it is equitable and just to ensure that the plaintiff is put back into the position he was in had the contract been completed and he was provided with an excavator of the quality he expected.

iv. Damages Claimed for the Cost of Borrowing

[102] The plaintiff claims that he borrowed $66,076.74 to pay for the Excavator and that his cost of borrowing those funds was $28,034.92. This amount represents the interest payments he is required to pay over the course of the five-year term of the loan he received. The plaintiff calculates that the cost of borrowing to date is roughly ($28,034.92 /60 months x 18 months =) $8,410.48 of interest.

[103] The plaintiff takes his argument for damages arising out of the cost of borrowing further. In his written submissions, it is set out as follows:

> [65] Therefore, damages may be awarded for anything reasonably arising from the breach of the contract. As it is apparent that the loan the Plaintiff

> received was for the sole purpose of obtaining the excavator from the Defendant, it is fair to state that the interest the Plaintiff must continue to pay is reasonably connected to the breach of contract. But for the contract with the Defendant, the Plaintiff would not have borrowed money from LendCare Capital Inc. and but for the excavator not being defective, the Plaintiff would have been able to profit from the use of the excavator and use said profits to pay back the loan. However, the excavator was misrepresented by the Defendant and was defective, as such, the appropriate remedy for the Plaintiff is to be awarded damages for breach of contract for $49,900 as well as the fees and interest accumulated over the lifetime of the loan, $43,163.56. The total cost for damages related to breach of contract is $93,063.56.

[104] In *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30 at para. 27, the Court set out that the general principle for assessing damages arising from breach of contract may encompass anything that reasonably arises from a breach of contract or can be reasonably assumed to have been contemplated by both parties.

[105] I do not accept that the plaintiff has made out his claim for the losses arising from his cost of borrowing. He put no evidence before me as to why he borrowed more funds from LendCare than were required for the purchase of the Excavator, or how those additional funds were impacted by the defendant's breach of contract and misrepresentations other than vague references to business opportunities he had hoped to get if the Excavator was functioning. Nor was there any evidence that the defendant was aware of the plaintiff's method of paying the purchase price for the Excavator such that it would be reasonably contemplated by him when he entered into the agreement to sell the Excavator to the plaintiff.

[106] I find that the costs of borrowing claim is too remote and not a foreseeable loss contemplated by the parties during the time of the transaction. I will not order that the defendant is liable to the plaintiff of the plaintiff's costs of borrowing.

v. Damages for the Repair Costs Already Incurred

[107] The plaintiff has already incurred expenses to repair the Excavator. Receipts put into evidence by the plaintiff provided that, to the date of trial, he has spent $120.61 for Ground Shafting provided by Metal Ventures Inc.; $614.46 for Bucket Pins provided by Orbit Machine Ltd.; and, $1,208.48 for labour provided by True

North Repair to address the loose right-side track and the leaking grease. The total cost of these expenses is $1,943.55 ($120.61 + $614.46 + 1,208.48).

[108] I accept that the invoice put into evidence from True North Repair dated May 10, 2024, is a legitimate expense related to the repair of the Excavator. I will allow the plaintiff's claim in respect of that amount. I do not come to the same conclusion for the other items as it appears to me that they relate to additional pins that the plaintiff had manufactured for the bucket for the Excavator. In my view, these are not repairs related to the deficiencies of the machine and such modifications of this nature would be the responsibility of the plaintiff, regardless of the quality of the Excavator.

[109] Accordingly, I will allow the plaintiff's claim for expenses he has already incurred for the repair of the Excavator in the amount of $1,208.48.

vi. Punitive and Aggravated Damages

[110] The plaintiff seeks punitive damages in the amount of $10,000.

[111] Punitive damages are warranted when there has been egregious conduct by a defendant that goes beyond negligent acts or omissions. The purpose of punitive damages is to punish a defendant for their behaviour that caused the loss to a plaintiff. Punitive damages may also serve as a deterrent to the conduct so as to attempt to prevent it from occurring in the future.

[112] An award of punitive damages is not automatic when fraudulent misrepresentation has occurred and is the exception, rather than the norm: *Battrum v. MacKenzie*, 2010 BCSC 1285 at paras. 37, 38. However, when the Court's sense of decency is offended by a defendant that engaged in behaviour that is oppressive, high-handed, and malicious, punitive damages may be awarded to act as a future deterrent against the defendant and anyone else who may wish to act in a similar manner: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 196, 1995 CanLII 59 (S.C.C.).

[113] As referenced above, in his testimony, the defendant acknowledged his understanding that there are risks purchasing used heavy machinery from China because often what you expect to get is not what is delivered. He stated that it was not uncommon to expect to purchase one item and another would appear. I am concerned that the defendant did not express any of these risks to the plaintiff, either in the Facebook Ad, in text messages, or verbally leading up to the plaintiff agreeing to purchase the Excavator.

[114] I find that the defendant withheld this information from the plaintiff and must be deterred from acting in such a manner in the future in his business dealings, so as not to mislead future potential buyers of heavy machinery from the defendant. Perhaps this will only require the plaintiff to be transparent in his advertising and dealings with customers that the equipment is being sold “as is”, or in recommending that the equipment be inspected by the purchaser before the sale completes.

[115] I am also troubled by the fact that the defendant was not transparent with the plaintiff that there could be deficiencies with the Excavator despite what was an apparent imbalance of knowledge and sophistication as between the defendant and the plaintiff.

[116] Given my findings and concerns, I conclude that punitive damages are warranted. I set the amount at $2,500. I have not awarded more significant punitive damages because I accept that while there was deception or at least omission of material information on the part of the defendant, the defendant genuinely wanted to assist the plaintiff after the plaintiff took possession of the Excavator. The defendant testified that he was trying to help the plaintiff “out of the goodness of his heart.” I accept that the defendant, believing that he had no legal obligation to assist the plaintiff, was genuinely trying to assist the plaintiff. This conclusion has mitigated my assessment of punitive damages.

V. Summary of Orders

[117] In summary, I order:

1. The defendant shall pay the plaintiff $24,442.69 for the estimated cost to repair the Excavator;

2. The defendant shall pay the plaintiff the costs of expenses already incurred to repair the Excavator in the amount of $1,208.48;

3. Punitive damages shall be assessed against the defendant in the amount of $2,500 and shall be paid to the plaintiff; and

4. The plaintiff is entitled to pre- and post-judgment interest from the date the purchase price of the Excavator was paid, being January 14, 2024.

[118] I also order that the defendant's signature is dispensed with on this order and that the order is to come back to my attention for review before being entered.

VI. Costs

[119] The general rule is that costs are awarded to the party that enjoys substantial success. In my view, the plaintiff has been substantially successful in the trial. Accordingly, I award the plaintiff his costs at Scale B.

[120] However, if there are any issues relating to how costs are to be awarded, including any offers of settlement made by either party of which I am unaware, the parties have leave to arrange a further appearance before me for that purpose.

VII. Conclusion

[121] The facts of this case are a reminder of the perils of purchasing goods without inspecting them. It was clear to me that the plaintiff was so eager to purchase the Excavator that he was imprudent and impatient in not conducting any inspection of the Excavator before he purchased or took possession of it. This is especially concerning given his testimony that when he first saw it, he observed there was an issue with the Excavator's left track. The plaintiff also complicated the issue by not returning the Excavator when he became aware of its various deficiencies upon consultation with Mr. Carano. The simplest course that likely would have avoided, expense, stress, and this legal proceeding would have been to return the Excavator

to the defendant and ask for a refund. He did not do so. I note that I find the plaintiff's claim, to keep the Excavator and have his purchase payment to the defendant returned, and his cost of borrowing refunded, ill-founded.

[122] Despite these criticisms of the plaintiff's conduct, I am satisfied that, at its core, the defendant misrepresented the quality of the Excavator to such a degree that he is liable to the plaintiff. Sellers should not be able to deceive or mislead in advertising without consequence. While buyers must exercise restraint and due diligence when purchasing items, I find in the circumstances of this case, the defendant failed to deliver the product in the quality expected by the plaintiff to such an extent that he is required to put the plaintiff in the position he would have been if the contract for a working and operational excavator was fulfilled.

[123] I thank the parties for their submissions.

"Gibb-Carsley J."