**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *Howatt v. Behan*, 2023 NSSC 7

**Date:** 20230117
**Docket:** Yar No. 483048
**Registry:** Halifax

**Between:**

Charles Howatt and Kristen Fowler and Value Convenience Store Inc.
Plaintiffs

v.

Trevor Behan and Kelly Behan
Defendants

**Decision**

| | |
|---|---|
| **Judge:** | The Honourable Justice Denise Boudreau |
| **Heard:** | June 13, 14, 15, 16, September 21, 22, 2022, in Yarmouth, Nova Scotia |
| **Final Written Submissions:** | November 28, 2022 |
| **Counsel:** | Sarah Shiels, for the Plaintiffs<br>Andrew S. Nickerson, KC, for the Defendants |

**By the Court:**

[1] The parties to this action have commenced actions (and counter-actions) against each other as a result of the sale of a business from the defendants to the plaintiffs in March 2018.

## Facts

[2] In March 2018, the defendant Trevor Behan placed an ad on Kijiji for the sale of his business, "Value Convenience Stores Inc.". The ad read:

> Successful and well established convenience store with popular bakery/café attached. Very modern 10 door walk in cooler, slush machines, display fridges and freezers. Over $100,000 spent on refurbishments in the past 5 years. The store is 2500 square feet and located 2 minutes from Bayers Lake. The store has roadside presence with plenty of foot traffic. Revenues are over $1M per year and the bakery has a 5 star rating. This is a great opportunity for the right person to own a well established convenience store (over 20 years in the same location) in a wonderfully thriving and growing community. Priced to sell at $150K plus inventory. Owners are discreet. Please contact for more info.

[3] The ad was accompanied by a photo of the interior of a convenience store. The shelves appearing in the photo seem well stocked.

[4] Mr. Behan noted in his evidence that at the time he listed this business for sale, he also owned the strip mall where the convenience store was located. The convenience store had been owned/operated at that location as a "Needs" by Sobeys for many years. In September 2017, Sobeys indicated their intention to sell

the business. Mr. Behan then decided to buy the business as a "transitional plan"; he wanted the business to stay in his building, so he bought it from Sobeys with the intention of then selling it to a third party. Mr. Behan held the business for approximately six months before selling it; he noted that in those six months the business was profitable, with a good cash flow. He estimated about $3,000 per day of sales.

[5] The plaintiff Charles Howatt was a business owner in Western Nova Scotia. He owned and operated a bulk candy store. He and the plaintiff Kristen Fowler were friends, having met in approximately 2017. Ms. Fowler was a manager at another store in town and would frequent Mr. Howatt's store, and at times would provide him with retailing advice.

[6] Mr. Howatt saw the above-noted Kijiji ad and was interested. He approached Ms. Fowler and they discussed entering into this business venture together. He felt that they had complementary assets to bring to such a venture; he had experience owning a business and Ms. Fowler had a long experience as a manager of retail. Furthermore, at that time Mr. Howatt described his credit as "recovering" and so Ms. Fowler's good credit was needed to run a convenience store (which they knew would require constant crediting by suppliers). Having no business experience, Ms. Fowler relied upon Mr. Howatt's opinion that this purchase was a good idea. They

also agreed that Mr. Howatt's friend, Daniel Latham, who had experience working in a small convenience store, would be a good fit to manage the store on a day-to-day basis.

[7] The plaintiffs contacted Mr. Behan by telephone and told him of their interest in buying his business. While the evidence is unclear about the dates of these initial events, it appears that this initial contact was sometime in the second week of March 2018.

[8] According to the plaintiffs, Mr. Behan advised them that the business enjoyed excellent foot traffic and was busy. He told them the business had "built in" financing (in the form of a CBDC loan of $100, 000).

[9] The plaintiffs say that they recall Mr. Behan mentioning, during that initial telephone call, that included inventory would be worth roughly $30,000 (not including equipment). However, the plaintiffs acknowledged that their priority at that point was to get a deal for the business in place, so inventory was not their main focus. They felt details on inventory could be straightened out later and did not anticipate any difficulties. For his part, Mr. Behan denies that he committed to this amount of inventory, at any time.

[10] This first phone call between the parties was very positive. The plaintiffs were very pleased and felt this was an excellent opportunity.

[11] Ms. Fowler was not clear on the financial details of the deal, and left that all up to Mr. Howatt, who seemed confident. As to the CBDC loan, Mr. Howatt recalls Mr. Behan saying at some point very early on, “It should be easy (for you) to re-finance with them after the deal.”

[12] According to Ms. Fowler, this initial telephone conversation took place on March 17, and it ended with the plaintiffs expressing definite interest to Mr. Behan and asking for the weekend to consider it further. However, Ms. Fowler must be incorrect about her assessment of this date. The documentary evidence shows that by March 15, Mr. Howatt and Mr. Behan are already emailing each other and discussing the terms of a sale agreement.

[13] The parties agreed that the sale would be effected by way of a sale of the shares of the business. Mr. Howatt drafted a sale agreement by finding a document which he downloaded from an internet site and adding some clauses. Some additional clauses were sought by Mr. Behan and were then added. It was also noted that since Mr. Behan was the owner/landlord of the building where the

business was located, a lease would need to be signed by the parties at some point as well.

[14] In the emails, Mr. Behan noted that he was leaving the country on March 27 for 10 days and wished to have the matter concluded before then.

[15] A few days later, the plaintiffs drove to Bayers Lake to visit the business. They dropped into the store that evening upon their arrival. The plaintiffs described the store as looking well-stocked, like the picture in the Kijiji ad in terms of the inventory. They were pleased.

[16] The next morning, they returned to the store and met with Mr. Behan and some of the staff. The plaintiffs indicated that they were there quite a long time, touring the store, as well as the coolers, the back office, and the bakery. Following this visit, the parties all went to the Behan home, where all signed the document that had been negotiated/discussed by Mr. Howatt and Mr. Behan.

[17] The document was entitled “Purchase of Business Agreement” (hereinafter “the Agreement”). Ms. Fowler advised that she did not read this document prior to signing it; she simply trusted Mr. Howlett that all was good.

[18] The Agreement was put before the Court. It is dated March 19, 2018, and is clearly a "precedent" style document, with some additional clauses. These added clauses are quite conspicuous, as the language used is much less formalistic.

[19] The Agreement required a $20,000 deposit. The plaintiffs paid this deposit through an advance on Ms. Fowler's credit card. The Agreement further noted a purchase price of $82,000, plus the inclusion of the CBDC debt of $98,000, for a total all-inclusive price of $180, 000. According to Mr. Howatt, this total number was arrived at by Mr. Behan, comprising the $150,000 price (as advertised in Kijiji) and the $30,000 inventory.

[20] Some further notable clauses from the Agreement include, at page 6 clause 12 (u):

> "98,000 loan will be held by the seller threw (sic) CBDC"

[21] At page 7 clause 18(h):

> "the company (value convenience and Bakery) will pay the repayment amount of per month $1352.20 per month (sic) until 98,000 loan has been refinanced threw (sic) the CDBC. This will be completed in no less than 1 year from the share sale date or longer on the discretion of the seller."

[22] Mr. Howatt noted that he had tried to contact CBDC before the purchase, but they would not speak to him as a third party. He further noted that he discussed the CBDC loan with Mr. Behan (at an unknown time prior to the purchase), who said

he had discussed it with CBDC and "all was good". He understood this to mean that the loan could be refinanced without difficulty.

[23] The Agreement at page 5 clause 12(s) further noted:

> "seller agrees to have the stocked to the agreed upon level and have the final invoice for TRA paid through the business account"

[24] And still later at page 11 clause 36:

> 36. It is understood and agreed between the Parties that the Purchaser is not assuming and will not be liable for any of the liabilities, debt or obligations of the Seller arising out of the ownership or operation of the Corporation prior to and including the Closing date.

[25] The Agreement further noted that the balance remaining of $62,000 ($180,000 minus the $20,000 deposit and minus the $98,000 CBDC loan) would be owed by way of a Promissory Note, to be executed on the date of closing. The Agreement also confirmed (as I have already noted) that a lease would also need to be signed between the parties.

[26] Each of the parties signed the Agreement and each also signed waivers of legal advice. The Agreement provided a closing date of March 20. However, the closing ended up taking place on March 25 and 26.

[27] After the Agreement was signed, but before the closing, Mr. Howatt applied for a loan through a company called Thinking Capital (TC) on March 21. The

application put forward by Mr. Howatt to TC shows a “requested amount” of $69,500, but Mr. Howatt indicated in his evidence that the amount “ended up” being $45,000 (he did not explain why).

[28] Mr. Howatt indicated that he sought this loan because he wanted extra financing in place before the closing, as he knew that a convenience store business would require start up money and ready cashflow.

[29] The March 21 application made to TC was signed by both plaintiffs as “Borrowers”. However, the official “borrower” in the document was named as “Value Convenience”. Further, the application noted that the plaintiffs had (then) owned the business for six to 12 months.

[30] Of course, on March 21 the plaintiffs did not yet own the business at all. In his evidence, Mr. Howatt’s explanation for this was that “they” (i.e., TC) had filled out the paperwork and that “they” must have made that mistake.

[31] Before going any further, I note that I entirely reject that explanation. Although it may be true that a TC employee made the markings on the page, the only source for the information contained therein was Mr. Howatt. I can only conclude that Mr. Howatt told them this information. It was untrue.

[32] In this context, I specifically say “Mr. Howatt” because it is also clear that Ms. Fowler had precious little to do with this TC loan application. Although the document appears to have been signed by both plaintiffs, it was shown to Ms. Fowler during her testimony and she was very unsure of it. At one point in her testimony, she even said it was unfamiliar to her. Clearly, Ms. Fowler has never read this document.

[33] As with most of the details surrounding this purchase, Ms. Fowler relied entirely upon Mr. Howatt and, it appears, signed what he presented to her, even when it was unclear to her what the document was for.

[34] The defendants and plaintiffs met again on March 25 and 26 for the closing/transfer of the business. As I previously noted, the Agreement had provided for a promissory note of $62,000 to be executed by the plaintiffs in favour of the defendants. However, by the date of closing the plaintiffs were able to give the defendants an extra $15,000 (from the TC loan mentioned above). This brought their total down payment up to $35,000.

[35] A Promissory Note was therefore signed on March 25 by the plaintiffs to the benefit of the defendants, in the remaining amount of $47,000, payable by May 28, 2018.

[36] On March 26, the parties met at the store. Both plaintiffs indicated in their evidence that they had concerns that the stock appeared “low” on that day; however, they acknowledge that they did not mention this to the defendants. The plaintiffs did not provide any details about what exactly they thought was “low”. I do note the plaintiffs’ evidence that, at some point during that day, they made a trip to Wholesale Club to purchase some items to fill in the inventory. Ms. Fowler advised that they purchased bulk candy and bakery items.

[37] It is apparent that, throughout this period of time, both plaintiffs were excited about the purchase of this business and were less concerned with the details than they should have been. Ms. Fowler, for her part, agrees the closing day was a “whirlwind” and that she should have been more careful. She agrees that she did not effect due diligence.

[38] After this meeting, the plaintiffs then went with Mr. Behan to CIBC, at which time the parties effected the transfer of the Value Convenience bank account to the plaintiffs.

[39] The plaintiffs testified that after the account was transferred over, for the first time Mr. Behan told them he had concerns about them taking over the CBDC

loan. This caused the plaintiffs some concern, as they had understood that there would be no problem with this transfer.

[40] The plaintiffs returned to Yarmouth that same day, as they had planned. Mr. Latham was left behind to manage the store. On their way home that day, both plaintiffs testified that they contacted CBDC because of the concerns they had now developed as a result of Mr. Behan's comments. They said that they spoke to representative Alayne Jackson, and they advised her of the sale of the shares of the Value Convenience business to them.

[41] According to the plaintiffs, Ms. Jackson then informed them that there was a problem. She told them that Mr. Behan could not sell the business, as CDBC had a lien on it. The plaintiffs mentioned to her that it was a share sale. Ms Jackson said she would call Mr. Behan to discuss.

[42] The plaintiffs testified that they were now becoming very concerned that there might be problem with the sale. They noted in their evidence that the ongoing CBDC loan had been a selling feature of business, and that they needed this CBDC loan to be able to purchase/operate the business. The plaintiffs indicated that they were suddenly realizing that if this financing was not a possibility, such would mean huge problems for their new enterprise.

[43] The Court has been provided with Ms. Jackson's emails and notes as to this entire transaction. These were entered into evidence by consent of the parties and admitted for their truth. Interestingly, Ms. Jackson has no record of this telephone call on March 26.

[44] The evidence shows that, as time wore on, this CBDC loan became an increasing point of conflict between the parties. Mr. Howatt sent numerous emails to Mr. Behan putting forward his belief that CBDC did not approve/support the sale of the business, while for his part Mr. Behan would respond with increasing frustration that the debt was not being transferred as required by the Agreement.

[45] The evidence shows that the plaintiffs did eventually seek re-financing of this loan with CBDC. However, according to the documentation, their request was not for the $98,000 as noted in the Agreement, but instead for $145,000. This was made up of the $98,000 original CBDC loan plus the $47,000 they owed the defendants on the Promissory Note. Mr. Howatt concedes that he never discussed seeking an increased amount from CBDC with the defendants.

[46] Mr. Howatt indicated in his evidence that it was CBDC who wanted the plaintiffs to re-finance the entire $145,000 with CDBC, as "they" did not want the

business to have any other outstanding loans. This is also not contained in Ms. Jackson's notes.

[47] The plaintiffs request for financing of $145,000 was not granted by CBDC.

[48] I have reviewed the documentary evidence put before me as to the CBDC loan. First, in text messages between Mr. Howatt and Mr. Behan, following the sale of the business (H is Mr. Howatt and B is Mr. Behan):

> 2018-04-05
>
> Starting at 3:26:32 PM
>
> (H) Also there is a problem with cdbc and the way you sold me the company for their loan I have an idea on how to fix it but it's hard to explain in text.
>
> (B) There should be no problem. With the cbdc..last we spoke you were going to refinance the loan thru them in the next 60 days. They called me to say you had Been in contact on Tuesday but you
>
> (H) They also won't refinance doo to it being a share sale
>
> (H) Apparently it breaks the terms of your loan with them
>
> (B) They will refinance under different guarantors. I have email proof of that. What's the problem? All you do is to simply apply as I did. We discussed this before hand and you said you had no problem doing it. Have you begun the process as agreed?
>
> (H) It's not me pushing back it's her she said that you broke your loan contract with them doing a share sale
>
> (B) She called me And told me they are more than willing to look. At refinance with you for the 98K. But you were looking for more equity out so you can pay me what you owe with regards to the promissory note. This was not the agreement as written. I suggest you begin the process to begin the refinance for 98K as agreed
>
> (H) I have forwarded her the texts you just sent me so she can confirm that I can do the refinance
>
> (B) The refinance is simply a new loan application. Anyone can make one. Why would you feel the need to forward my texts, without my permission?

(H) No it's not and you have broken your contract with them I am advising you I have a way to fix this however you don't seem to want to fix it.

(B) Its not my problem to fix. You need to refinance with them or someone else as or the agreement. Have you done that?

(B) Or will you do that?

(H) Man this is your problem you don't have time to mess around

(B) How is it my problem?

(H) I don't know what your thinking here but you're a guarantor and your building is linked to the loan and the state's you can't do what you did

(H) You can't sell the shares even tho you did they will come after you for the full 98 000.

(H) I am trying to help you but if you don't want the help I will leave it be.

(B) I can. Because in the contract you are supposed to refinance the loan…have you begun them process with cbdc?...I don't need help…but they'll Me what your proposal Is if you like

(H) Alayne has emails to you prior to you signing the agreement that you cannot refinance a share purchase. As the shares have transferred they are expecting payment in full immediately.

(H) The only way out is to split the shares and assets and do an asset sale, Which is what you should have done in the beginning.

(H) But like I said if you want to handle this on your own by all means

(B) Handel what?

(B) Did value make the loan payment as agreed?

(B) Have you applied to cbdc to refinance the loan as agreed?

(H) Loan payment went threw.

(H) Yup.

(B) Then there is no problem. They will refinance and pay out loan "a" With loan "b"

(H) Your not understanding you really need to talk to a lawyer if your confused

[49] In the documentation from Ms. Jackson, I note the following parts of her notes/emails, starting from March 16, 2018, when Mr. Behan contacted her about a possible sale to the plaintiff:

Hi Alayne,

I have received an offer for mine and kellys shares in Value Convenience. The potential purchaser has a track record in the industry and an excellent credit rating. Could he assume the loan on the equipment etc., if so what would the process be? He can also offer security, let me know.

[50] The response from Ms. Jackson March 16, 2018:

Good morning Trevor,

Wow, that was fast. Obviously someone else sees the value in what you've done there.

It could not be just an assumption, it would need to be considered as an entirely new loan..and we unfortunately can not finance a share purchase, only an asset purchase. (ACOA decided long ago that there's too much risk in share purchases). He can get around that by setting up a new company to purchase the assets. As well, since he doesn't own the building, we'd need a formal lease agreement and landlord waiver on assets. The term of the loan would need match the term of the lease.

Feel free to pass along my contact info if the potential buyer would like to discuss our lending programs. We moved this months board meeting to April 5th, so he'd be in good shape to be included on that agenda if he can move quickly on an application.

[51] From Mr. Behan again on March 16, 2018:

Hi Alayne,

Normally I would not sell so soon but this guy will bring great added value to the store and it will be an even bigger asset to the community. He is buying the shares separate from the assets. So the loan amount is for the assets. Does that help his cause?

[52] Response from Ms. Jackson on March 16, 2018:

I'm afraid not. I just called my ACOA project manager to see if there was any way around it, and there isn't. The only way we could look at it is as a new business start-up.

> Is he able to get financing elsewhere? What about you financing it through a vendor take-back? Or him doing some kind of lease-to-own arrangement? If you retained legal ownership of the business and assets until the loan was paid off and he operated it through a lease or purchase arrangement, that would leave our financing alone.

[53] Mr. Behan responds again on March 16, 2018:

> Hi alayne,
>
> The vendor take back sounds like the best option to me. I will also keep Some shares in the company. Thanks for your help!

[54] Ms. Jackson responds on March 16, 2018:

> Get some good legal counsel on the structure. You want to make sure that ownership doesn't transfer until paid in full and the buyer is required to provide you full disclosure on business performance. That way it doesn't change our loan at all, and if the buyer defaults, there's less legal issues.

[55] To this point, from these exchanges, some things are clear; Mr. Behan did advise CBDC in advance that he was selling. CBDC did not express any opposition to the sale of the business but did make it clear that a new application would have to be made by the purchaser in order to re-finance the loan.

[56] As I already indicated, there is no mention in Ms. Jackson's notes of any telephone conversation between herself and the plaintiffs on March 26. It is clear from the documentation that Ms. Jackson was very conscientious about keeping detailed notes of every interaction/conversation in relation to this file, as well as

copies of every email received and sent. This would be entirely as expected from an employee of such an organization. It does not appear that any such conversation happened.

[57] However, I do accept that at some point the plaintiffs were advised by Ms. Jackson that the CBDC loan could not simply be "transferred" to them.

[58] Ms. Jackson's next note is from March 29, an email received from Mr. Behan:

> Hi alayne,
>
> My shares in Value Convenience will be transferred to Stephen Howatt (copied) next week. You should contact him to obtain new loan documents and security.

[59] On March 29, 2018, Ms. Jackson responded:

> Hello Trevor
>
> Did your buyer find financing? Perhaps you could call me in Tuesday with the details.
>
> Happy Easter.

[60] On April 3, 2018, Mr. Behan responded:

> You too! I'm sure he will call you. Failing that you can call him at ******
> (NOTE: I have removed the telephone number)

[61] On April 3, 2018, Ms. Jackson made the following notes:

> Steve advises that he has paid cash for the share purchase and is looking for financing to come up with the purchase balance of $145,000. I advised that we could not finance a share purchase, and I had already told Trevor that. I said the only way we could even look at the proposal was an asset purchase to a new business. He said that he owns several businesses and a commercial property with lots of equity. I said we could look at it but would need his business plan and cash flow projections….basically start everything from scratch.
>
> He said he would get on it and get back to me.
>
> Called Trevor and let him know I had talked to Stephen and reminded him that we could not finance a share purchase. He said he was "unaware" that Stephen needed financing, and there was nothing in their agreement. I said he could not just "take over" our loan. He said then just tell him so and let him find financing somewhere else.

[62] On April 10, 2018, Ms. Jackson received an email from Mr. Howatt:

> I am officially informing you the shares of value convenience have been transferred. I request that the value convenience be removed from any loan trevor began has outstanding. If the loan for 98K can be transferred I would like to proceed with that take over. If that is not possible as you have informed me and trevor. Then I would like value convenience name be removed.

[63] On April 10, 2018, Mr. Behan wrote to Ms. Jackson:

> Hi alayne,
>
> A condition of the share sale was that Stephen, and Kristen Fowler being new shareholders of value convenience and Value Convenience Stores, Inc. would refinance the loan through cbdc in a 60 day period from the share sale date. In the meantime they would fully honour the repayment terms of the loan. Have the new shareholders begun the process and paid the loan instalment?

[64] Ms. Jackson then noted:

> I didn't respond. Will let Denny reply formally.

[65] On April 10, 2018, Ms. Jackson wrote to Mr. Behan and Mr. Howatt:

> Good afternoon Trevor and Stephen,
>
> Thank you for the information. Please direct future correspondence regarding the sale of Value Convenience Stores inc. with our legal representative, Denny Pickup, of Burchells LLP. I have cc'ed Denny on this email and he may be reached at ***. (NOTE: I have removed the telephone number)

[66] On April 16, 2018, Ms. Jackson noted:

> Stephen called to ask about the status of the loan. I advised that until we see a copy of the purchase and sale agreement and terms, it would be hard to determine. I suggested he send me a copy and I have Denny review it, and then we could decide what our options are.
>
> He said he wants to take over the loan, and he could find the remaining financing to complete the purchase.

[67] On May 9, 2018, Ms. Jackson sent an email to Mr. Howatt:

> Good afternoon Stephen,
>
> As we discussed, your application was presented last evening, and the Board of Directors felt they did not have sufficient information to make a decision. The application may be brought forward again at our May 31st meeting, with additional information. Specifically they have asked for:
>
> - Financial statements for your other businesses
>
> - Current financial statement for new store activity since acquisition
>
> - A detailed list and proof of payment for all inherited Value Convenience Store debt, prior to acquisition
>
> - Proof of your $35K payment to Trevor
>
> - CRA balance confirmation (The "Comfort Letter") will cover this requirement
>
> I will need the additional information by May 18. If the comfort letter does not arrive in time, we will simply make it a condition of the loan and move ahead as far as we can.
>
> If you have any questions or require further information, please give me a call.

[68] Mr. Howatt was asked about this email during his testimony; specifically, did he provide the information requested in this email in order to perfect his CBDC

application. Mr. Howatt advised that he did supply "some" of the information requested but indicated that then "she pulled back".

[69] By way of explanation, Mr. Howatt suggested that Ms. Jackson told him not to bother continuing with his application, and that as long as the monthly payments continued to be made, there would be no problem. He also later testified that he was advised that the loan application would be rejected by CBDC in any event because of "pending litigation".

[70] Those assertions are entirely unsupported in the documentary evidence to/from CDBC. As I have already indicated, while those notes may not contain each and every detail of every interaction, the notes are detailed enough for me to infer that anything of significance would have been recorded.

[71] In fact, the documentary evidence is clear as to what really happened. On November 12, 2019, Ms. Jackson's notes indicate:

> Steve called to check in, He said he and Trevor are not going to court until October 2020. He wanted to know how to take over our loan. I informed that it's not as simple as "taking over" and is essentially a new application. **He had started one before and never completed it.** He claims to own 5 commercial properties and have a net worth of 2.6M. I told him the balance of the loan and he felt he could get a commercial mortgage against one of his properties and just pay us out. He said he'd work on it and let me know... [Emphasis is mine.]

[72] It is further notable that in April 2019 Mr. Behan wrote to Ms. Jackson to inquire about the "pending litigation" issue being raised by Mr. Howatt. Ms. Jackson responded on April 8, 2019:

> Good morning Trevor,
>
> I cannot comment on another client's application as you are aware, but I can say that, given the circumstances, litigation would not prohibit us from reviewing an application.

[73] It is clear to me from the evidence that Mr. Howatt simply did not perfect, and/or abandoned, his CBDC application for financing. I reject his explanations to the contrary. I do not know why he abandoned this application.

[74] I also reject Mr. Howatt's explanations for requesting $145,000 from CBDC, rather than the $98,000 that the Agreement required him to seek from CBDC. There is nothing in the documentation which supports his contention that CBDC wanted him to apply for the greater amount. Rather, the documentation supports the conclusion that this was Mr. Howatt's wish.

[75] As a consequence of all of this, and in violation of the Agreement, the $98,000 CBDC loan was, in fact, never refinanced by the plaintiffs. I do note that throughout 2018 and into 2019, the plaintiffs continued to pay the monthly CBDC loan; however, it remained in Mr. Behan's name. Eventually Mr. Behan had to himself pay out the CBDC loan in the amount (then) remaining, being $67,667.54.

[76] The CBDC loan issue was, unfortunately, not the only difficulty the plaintiffs experienced with their new venture. In fact, the evidence before the Court was to the effect that essentially from the moment the plaintiffs took over the store on March 26, 2018, they also experienced continual inventory and cash flow problems. However, the reasons for these problems were never explained.

[77] For example, when the plaintiffs bought the business, they needed to establish a current account with TRA (this was the wholesale company who was the major supplier for many/most of the items in the store, including tobacco). The previous account at the store (of the defendants) was closed/suspended when they sold the business.

[78] That issue appears to have snagged right from the start, and never fully resolved. Daniel Latham testified that when he put in an order to TRA on March 27 (the first day after the closing), he was told the account was "suspended"; he was surprised by this and was unaware of the reason for this.

[79] Mr. Latham testified that he told Mr. Howatt of this problem with TRA, and Howatt told him he would "straighten it out". But, for some reason, the TRA account issue continued to be a problem. Mr. Latham noted that he often had to go to an outside wholesaler himself, throughout that spring/summer of 2018, with

cash from the store, or the store account, in order to keep the shelves filled. To Mr. Latham's recollection, even after TRA had an active account with the plaintiffs, he would continually have to supplement the shelves with stock he would purchase from an outside wholesaler. He described how disruptive this practice was, and how it left the store bank account continually depleted. Mr. Latham could not/did not explain why this would occur.

[80] As another example, Mr. Howatt complained in his evidence that a number of bills owed by "Value Convenience" came in after closing, for debts arising before closing. This appears to have caused much frustration for Mr. Howatt, which he expressed to Mr. Behan (in texts and emails). Mr. Behan acknowledged that he was liable for debts incurred pre-closing and requested documentation from Mr. Howatt in order to determine what he owed. Unfortunately, by this point the communication between the two men had essentially broken down. Although Mr. Behan and Mr. Howatt continued to email/text each other, their exchanges became increasingly unpleasant, eventually consisting of nothing but accusations, argument, and terse requests to contact legal counsel.

[81] As to this issue, quite frankly, it is entirely unclear to me why the issue of these adjustments became such a sore point for Mr. Howatt. Within the sale of an asset such as a business, adjustments for amounts such as pre-closing debts would

be standard practice and should have been entirely anticipated by the parties. In fact, they were anticipated in one sense; they were the subject of a specific clause in the Agreement (clause 36).

[82] Despite that, it appears that none of the parties turned their mind to these details, or to the practicalities of how such adjustments would be made. Perhaps none of them even noticed that this clause was included in their Agreement. It would have been part of the standard form downloaded from the internet.

[83] These "incurred pre-closing but received post-closing" bills unfortunately led to a great deal of frustration, bad feelings, and mistrust between Mr. Howatt and Mr. Behan. All of this was entirely unnecessary. The parties could have and should have anticipated normal adjustments and should have clearly set out a process for dealing with those.

[84] Having said all of that, the total of these bills, according to what I have before me, was approximately $13,000. Certainly, these few bills did not cause the failure of this business or cause it to be unprofitable.

[85] I am left with many questions about the plaintiffs' evidence. The plaintiffs (mainly Mr. Howatt) were adamant that this business was unsuccessful during their tenure, and attribute all their difficulties to the defendants (for various reasons).

The plaintiffs say, in fact, that the store never made any profit whatsoever. However, there was nothing put before me to explain why/how this business failed. I am left to speculate.

[86] The evidence shows that the business was reasonably successful before the plaintiffs' involvement in March 2018. I have been provided with a document showing sales of Value Convenience, while owned by the defendants, from January 1, 2018, to March 25, 2018, for a total of $214,000. Mr. Behan notes that during the six months he ran the business, it was successful. I see no reason to dispute that assertion.

[87] I have no comparable information from Value Convenience after March 26, 2018, while it was owned by the plaintiffs. However, I have heard nothing which would make me think that all things being equal, the business would not have continued sales at approximately the same rate.

[88] As I have already said, the store was clearly selling product during the time that the plaintiffs held the business. The plaintiffs (and Mr. Latham) talked of routinely having to attend at a local wholesaler to obtain product to stock the shelves. So obviously, customers were coming in and buying items.

[89] Mr. Howatt also testified that when the CBDC loan did not materialize, the plaintiffs were “forced” to find “alternate” financing. They did so through a loan from friend Anne Latham (the mother of Daniel Latham).

[90] The Court was provided with a loan agreement between Mrs. Latham and Value Convenience in the amount of $230,000, at 8 percent interest per annum. The document is dated April 30, 2017; however, that date was the subject of much discussion. Mr. Howatt believed the document should have read 2018; later he acknowledged that the document appeared to have been created from a 2019 website. Ms. Latham, for her part, believed it had been signed in 2019.

[91] Mr. Howatt testified that this loan was, in fact, a line of credit meant to keep the business from going under. He suggested that Mrs. Latham became aware of the difficult financial situation of the store (due to Daniel), and that she approached him with this offer of a loan with an attractive interest rate. Mr. Howatt notes that not all of the $230,000 has been advanced by Mrs. Latham, but he was unsure as to how much.

[92] Anne Latham testified. She indicated knowing Mr. Howatt since his adolescence when he was placed as a foster child with her. She described him as

"family". Her recollection in relation to the loan was, to some extent, different than Mr. Howatt's.

[93] She described becoming aware of the financial difficulties that the plaintiffs were having at Value Convenience by approximately June 2018. She became concerned for the plaintiffs and her son Daniel (who was working at the store). She hoped Daniel could remain at that business and wanted to support it.

[94] Mrs. Latham noted that, at that time, her husband had recently died and she had come into an inheritance. She therefore started "loaning" money to the Value Convenience business and/or to Mr. Howatt directly. I say "loaning" in quotation marks because although the parties called these payments "loans", quite frankly I have difficulty accepting them as such. The payments were made by Mrs. Latham on an entirely informal basis, in the form of simple repeated cash transfers, incorporated into the day-to-day running of the business. It does not appear that either Mr. Howatt or Mrs. Latham kept a record of these "loaned" amounts.

[95] While Mrs. Latham noted that, at times, her son Daniel would make the requests for money, this does not appear to have been the typical scenario. At one point in her testimony, when asked about these ongoing "loans", Mrs. Latham indicated, "Mr. Howatt would ask for money. I would send it."

[96] Mrs. Latham testified that in April 2019, Mr. Howatt asked her for a total of what was then owing to her. Mrs. Latham estimated she had, by then, given $230,000. She testified that, in fact, this estimation was at the lower end of what she probably had actually given. Mrs. Latham confirmed that she and Mr. Howatt then signed the written agreement for the $230,000. Interestingly, Mrs. Latham was unclear where the "8% interest" figure in the document came from.

[97] Even more interestingly, Mrs. Latham testified that, to her knowledge, this money did not all go to Value Convenience. In relation to what was loaned directly to Value Convenience, Mrs. Latham believed it to be in the range of $127,000 or $128,000. As to where the rest went, Mrs. Latham is entirely unclear. If Mrs. Latham is correct, that means over $100,000 of her money (and the subject of the written "loan" agreement between Value Convenience and Mrs. Latham) is unaccounted for.

[98] Mrs. Latham further confirmed that nothing had been paid back to her on this loan, as of the date of her testimony, neither on the principal nor the interest. Clearly that "loan" was not the reason for the failure of this business.

[99] One thing is very clear; in the end, this entire transaction was a disaster. The plaintiffs say that they never saw any profits from the business, and as I understand

it, the business was eventually lost. Mr. Behan was never paid the $47,000 he was directly owed by the plaintiffs (the promissory note amount). Also, as I previously indicated, Mr. Behan was later forced to pay out the remaining CBDC loan.

[100] In Ms. Fowler's case, although she agrees that she never received any profits from the business, she herself has never looked at any financial statements from Value Convenience. She continues to accept Mr. Howatt's word, that the store was not profitable. Ms. Fowler also confirmed that has she never gotten back her $20,000 deposit. I have seen nothing to either confirm or deny Mr. Howatt's claims that the business generated no profits. If that is true, I would ask why.

[101] Within the present lawsuit, the plaintiffs have brought a number of claims against the defendants: that Mr. Behan made a number of misrepresentations that were relied upon by the plaintiffs to their detriment; that the defendants breached the implied contractual duty of good faith/honest dealings in the performance of contractual obligations; and that the defendants committed tortious interference with the plaintiffs' business relations. The plaintiffs seek damages plus interest and costs.

[102] In response, the defendants have counter-claimed against the plaintiffs, seeking payment of the promissory note amount ($47,000), as well as repayment

for the remainder of the CDBC loan that Mr. Behan paid out. They also seek interest on these amounts and costs.

**Negligent Misrepresentation**

[103] Where representations are made in preparation for a contract, it is the responsibility of the representor to exercise reasonable care to ensure that the representations are accurate and not misleading (*Queen v. Cognos Inc.*, [1993] SCJ No 3).

[104] Five criteria have been identified in order to determine whether reliance on such representations could be considered reasonable and binding. In *Hercules Managements v. Ernst & Young*, [1997] SCJ No 51, the Court notes them at paragraph 43:

> (1) the defendant had a direct or indirect financial interest in the transaction;
>
> (2) the defendant was a professional or someone who possessed special skill, judgment, or knowledge;
>
> (3) the advice or information was provided in the course of the defendant's business;
>
> (4) the A or I was given deliberately (not on a social occasion);
>
> (5) the A or I was given in response to a specific inquiry or request.

[105] The plaintiffs allege that the defendants (in particular, Mr. Behan) made the following misrepresentations: 1) that the plaintiffs could take over the CBDC loan;

2) that Value Convenience shares was free of liens and encumbrances; 3) that the inventory at the time of sale was/would be $30,000; 4) that yearly sales at the business were $1M.

[106] The defendants respond that the plaintiffs were well aware of the CBDC loan, the only loan existing at the time. The loan formed part of the Agreement between the parties. The plaintiffs knew this loan was “attached” to the business and they undertook its re-financing and payment. Mr. Behan states that while he did not expect any problem with the transfer of this loan, he never “represented” to the plaintiffs that such a transfer was guaranteed.

[107] Further, Mr. Behan denies telling the plaintiffs that the inventory at the store was/would be $30,000; he states that he told plaintiffs only that the store would remain stocked, as it was when they saw it. Mr. Behan notes that the plaintiffs saw the inventory on the date of closing and made no comment, so he reasonably assumed they were content. Mr. Behan further stands by his estimate of yearly sales at this business of approximately $1M (as stated in the Kijiji ad). In the view of Mr. Behan, any shortfall in profits the plaintiffs experienced while they owned the business was due to their own mismanagement.

**CBDC debt**

[108] Clearly this debt was part of the original Agreement. All parties would have been well aware of the existence of it, and of the plan outlined in the Agreement.

[109] Clauses 12(u) and 18(h) of the Agreement are concise but clear: the "seller" (the defendants) agreed to hold the loan with CDBC for an additional year; during this time the plaintiffs would make the payments. By the end of that year, the loan would be refinanced by the plaintiffs "threw the CDBC" (sic).

[110] The plaintiffs suggest that Mr. Behan "misrepresented" to them that the loan could be "easily" refinanced by them with CDBC, and that they acted on that representation, to their detriment. Mr. Howatt claimed that if he had been aware that the transfer of the CBDC financing might be problematic, the "deal" (i.e., sale) would not have gone through. The plaintiffs allege that due to these misrepresentations, they were forced to find financing where they could at high rates of interest. They seek compensation for same.

[111] Once again, I have great difficulty understanding the plaintiffs' complaints. What were they unaware of or misled about? The Agreement clearly said they would owe a total of $180,000. They were to refinance $98,000 with CDBC; that was clearly their responsibility. They also owed another $47,000, which they knew

they had to find somewhere. They knew that running a convenience store would require a consistent active account with a wholesaler, who would require good credit.

[112] Perhaps Mr. Howatt believed that he could get the entire $145,000 from CBDC, but that was never said to him by either defendant. Nor, frankly, was that a reasonable assumption to make.

[113] It should have been obvious to all parties here that a financial institution loan does not simply get "transferred" to a third party. Any loan application to any financial institution requires an application which is specifically assessed, and may/may not be granted depending on a number of factors, including the credit rating of the applicant. It seems highly unlikely that either Mr. Behan or Mr. Howatt, both of whom profess to being experienced and seasoned businessmen, would have said, or believed, that the loan to CDBC could simply be "transferred".

[114] It is interesting to note that Mr. Howatt, at the time he purchased Value Convenience, was having credit difficulties; this was one of his reasons for including Ms. Fowler in this arrangement. Mr. Behan was not aware of this; in fact, in an email to Ms. Jackson he described Mr. Howatt having an "excellent credit rating". That was inaccurate, and I do not know why he believed this, but it

may have been the reason he believed that the loan refinancing would not be a problem.

[115] Mr. Howatt, for his part, knew about his own credit difficulties; he knew (or ought to have known) that no re-financing application would be guaranteed.

[116] In the final analysis, I accept that both men thought (or, in the case of Mr. Howatt, hoped) that a CBDC re-financing could be done by the plaintiffs. I also accept that both men said those thoughts aloud to each other. However, I do not accept that what was said to that effect by Mr. Behan was offered as a "representation". It does not meet a number of the requirements of the *Hercules Management* case (supra).

[117] Furthermore, and in any event, nothing turned on Mr. Behan's words. As things turned out, the CBDC loan was never re-financed because of the actions/non-actions of the plaintiffs, in violation of the Agreement. The "non-transfer" of the loan had nothing to do with anything said or done by Mr. Behan.

[118] Firstly, the plaintiffs did not apply to refinance the $98,000 loan as they had promised to do in the Agreement; they sought $145,000 from CBDC. Their intention to do this was not known by Mr. Behan at the time of closing. The plaintiffs made this request despite having been explicitly told that CDBC did not

finance share purchases. The plaintiffs would have known (or should have known) that this additional request would create difficulties.

[119] Furthermore, I accept the evidence found in the notes of Ms. Jackson that the application made by the plaintiffs to the CBDC was never perfected. The Board was looking at their application and had very clearly requested more information from the plaintiffs. Some (or all) of that additional material was not produced.

[120] There were no other "liens" on the company or its shares. This CBDC loan was the only loan that needed to be addressed by the plaintiffs.

[121] In the final analysis, there was no material misrepresentation as to the CBDC loan. The plaintiffs simply failed to live up to their contractual obligations.

[122] As for the other financing that the plaintiffs obtained through the course of owning this business, all of it was entirely the choice of the plaintiffs (in particular, Mr. Howatt) in how they conducted their business.

[123] The evidence from the plaintiffs in relation to their "alternate financing" has been less than convincing, to say the least. For example, I note with interest the plaintiffs' most recent amended pleadings where they reference the Thinking Capital loan:

> 28. After entering the Agreement, the Plaintiffs discovered that they could not refinance through CBDC. Moreover, the Plaintiff Corporation's cash flow and revenue stream were significantly lower than represented by the Defendants. In order to restock the store and address the unpaid debts, the Plaintiff Corporation was required to borrow funds from high interest creditors, including a Thinking Capital Loan of $69,500 with an initiation fee of $2.085 and an interest rate of 20.75% which was personally guaranteed by the Plaintiffs.

[124] This suggestion does not accord with the plaintiffs own evidence at trial. The Thinking Capital loan was applied for and taken out by Mr. Howatt before the closing, and he testified that he did so in order to have a ready source of cash to start. It was taken out long before any CBDC refinancing problems, or any supposed "revenue stream" problems. It had nothing whatsoever to do with the defendants.

[125] As for the supposed "line of credit" with Mrs. Latham, I am entirely unconvinced that such represents an actual debt owing by the corporate plaintiff. I have no doubt that Mr. Howatt has asked for, and has been given, significant amounts of money by Mrs. Latham over the years. I am unsure what amounts were meant for Value Convenience, or even given to Value Convenience. Whatever amounts went to Value Convenience, I am unsure what they were for. The amount of the "debt" owing is entirely unclear.

[126] Further, although the parties have called this a debt, I am entirely unconvinced. Mrs. Latham presented as a kind lady, helping a much-loved member

of her family who she believed was struggling, by giving him money. It is certainly possible that Mrs. Latham would accept repayment, if it were offered. However, nothing has been offered in repayment since 2019, and it seems clear that no part of this debt will ever be enforced. The "8% interest" term appears to be a fiction.

**Inventory**

[127] The plaintiffs claim that Mr. Behan undertook to have $30,000 of inventory in the store at the time of closing. Both plaintiffs claimed in their evidence to have heard Mr. Behan mention that specific amount of inventory during their earliest telephone conversation. They further claim that they did not receive such an amount of inventory on the date of closing.

[128] There is nothing specifically noted in the Agreement to that effect. The Agreement says, "seller agrees to have the stocked (sic) to the agreed upon level…" (at clause 12(c)). The document does not identify what this "agreed upon level" is.

[129] The plaintiffs note that Mr. Behan's Kijiji ad spoke of a sale price of "150K plus inventory". The sale price that was eventually agreed upon between the parties was $180,000. The plaintiffs submit that such is evidence that $30,000 was the agreed upon value of the inventory.

[130] Mr. Behan denies making this statement. He says he only undertook to stock the store as normally done, until closing. He also notes that the plaintiffs were able to see the inventory on the days they attended the store, including on the date of closing, and that no objection or question was raised by the plaintiffs at any time about the inventory in the store, including on the date of closing.

[131] On March 29, 2018, the following text messages occur between Mr. Howatt and Mr. Behan, where this dispute/confusion about inventory is raised:

> 2018-03-29
>
> Starting at 9:45:58 AM
>
> (H) Also there is no credit for lotto lotto tickets were counted in the inventory from the 30K
>
> (B) No they were not…the lotto account was mine it was credited to me..it cannot and was not counted as inventory. Really not getting a good feeling about this. Time will tell…
>
> (H) Then I want confirmation of 30 000 as inventory I know the bakery was not restocked I know the cigarettes were not restocked as you are holding me accountable for the reorder where is my 30K in inventory
>
> (B) Stephen…the bakery had $1300 of flour and stock delivered one week before closing. It was over stocked!!. You ordered cigarettes and there were cigarettes in the drawer and safe when you took over. The fridges were full as were the shelves (unlike now) have plenty of proof of this. That is all that was required in our agreement. You took over, saw the stock and said nothing. Now you trying to create problems. I don't like where this is going..it stinks of something crooked. Like I said time will tell…

[132] Very frankly, given the difficulties I have already noted with the credibility of Mr. Howatt's evidence, I am not inclined to accept his word as to what Mr.

Behan said during their first telephone call. Ms. Fowler, for her part, seemed to pay little attention to anything that occurred within this entire transaction, and I cannot accept her evidence about that either.

[133] Having said that, there is circumstantial evidence that there was at least an implied agreement that the store would contain $30,000 in inventory on the date of closing. The selling price was advertised in the Kijiji ad as “150K plus inventory”; Mr. Behan wanted $180,000 from the plaintiffs. I also note in the text exchange above, when Mr. Howatt says, “I want confirmation of 30 000 inventory.”, that number is not disputed by Mr. Behan in his response.

[134] However, even if the parties had agreed upon inventory of $30,000, that does not end the analysis. There are many questions remaining, and many parts of the plaintiffs’ claim which remain unestablished.

[135] Firstly, the parties appear to disagree as to what should be included in an assessment of “inventory”. This can be seen from the above text messages: does “inventory” include lotto tickets? Does it include bakery stock? There is no way to know now what was intended back then.

[136] More fundamentally, and to be perfectly frank, I am simply unable to conclude whether this “30K inventory” promise was, or was not, fulfilled by the defendants.

[137] I start with March 19, the first time the plaintiffs were in the store. They agree that on that date the store appeared to be “fully stocked”. I do not know the value of the inventory on that date.

[138] The plaintiffs then claim that on the date of closing (March 26), the stock is somehow now noticeably depleted. I find it difficult to accept their evidence to that effect. They acknowledge that they said nothing about it. But in any event, I do not know the value of the March 26 inventory either.

[139] In other words, even if I were to accept that there were less items on the shelves on March 26 as compared to March 19, I am entirely unaware of the value of the inventory on either day. I have no way of knowing what the stock in a store of this size is worth, so to say it is “fully stocked” or “half stocked” is meaningless to me, in terms of dollars. Therefore, I have no way of knowing if the inventory on either March 19 or March 26 was worth $30,000.

[140] In support of their claim, the plaintiffs have provided the Court with an inventory done by Daniel Latham (with the assistance of others). Mr. Latham

testified that he was asked to do this inventory very soon into his employment at Value Convenience, in fact, within days. He described this as an "ASAP" request from Mr. Howatt.

[141] It should be noted that Mr. Latham's prior experience in running a convenience store was as an employee at an Ultramar gas station/convenience store for approximately 12 years. Mr. Latham noted that as part of his job at the Ultramar, he did inventory; he described this as taking stock of what was on the shelves in the store, and then reporting that information to his manager. He noted that he did so in order to assist in determining what needed to be ordered or replenished.

[142] Other than his experiences at Ultramar, Mr. Latham has no other training in taking inventory. He also noted that the Ultramar store was notably smaller than Value Convenience.

[143] Mr. Latham started his inventory at Value Convenience on March 28. He described that the inventory was done by way of a hand count of each item on each shelf, by categorizing it by name, size, et cetera. He included all items found on the shelves and in the back stockroom, but he did not include any bakery items (he did not advise why he excluded those items).

[144] Mr. Latham did not do this task alone. He recruited others to count items as well, including his mother, his brother Michael, and his friend Alex. Each person was assigned certain shelves to count, and each wrote their counts by hand on sheets of paper. They did not check each other's work. The count took multiple days and the store remained open during this process (people were still in and out, buying items). Mr. Latham then took all the sheets of paper from everyone and included all of that information into an Excel spreadsheet on the computer.

[145] Mr. Latham also assigned a dollar value to each item. He understood that he was to use wholesale values in doing so (and not the retail selling price to a customer). However, Mr. Latham did not know the wholesale cost of the items. He therefore had to estimate these numbers.

[146] Mr. Latham described the process he used to do this. First, he rang up each item individually to determine its retail price. He then reduced each item by an estimated amount for markup; these estimates were based on his experiences at Ultramar. Mr. Latham again repeated that he was "in a rush" as Mr. Howatt had told him to do this ASAP.

[147] The tobacco products were marked up by Mr. Latham at 15 percent. He estimated a 60 percent markup for everything else. Mr. Latham noted that this

number was arrived at by he and Mr. Howatt, based on their experience. Mr. Latham acknowledged that he did not know if those numbers were the actual markups being used by Mr. Behan and/or his suppliers at Value Convenience.

[148] Mr. Latham further acknowledged that while at Ultramar, he would have known the actual wholesale cost of items. Here he did not. Mr. Latham also acknowledged that Ultramar used a different wholesale supplier than Value Convenience.

[149] By Mr. Latham's calculations, assuming the counts was accurately done, and assuming his markups were also accurate, he estimated the wholesale value of the stock at just under $20,000. Mr. Latham then also deducted another $3,600 on the instructions of Mr. Howatt; this represented the amount that Mr. Howatt estimated that the plaintiffs had contributed to the stock since they had taken over the business (this amount is unconfirmed in any documentation).

[150] By this inventory and these calculations, therefore, the promised $30,000 inventory was short by over $13,000.

[151] While I have no difficulty in accepting that Mr. Latham did his best to accomplish the project he was assigned by Mr. Howatt, this Court cannot rely upon the "inventory" he produced. It has multiple shortcomings.

[152] At a most basic level, there are obvious errors/omissions in the document. On a few occasions some items are noted, sometimes in multiple amounts, and no monetary amount is given to it/them.

[153] As I have already noted, nothing in the bakery appears to have been counted; I do not know why. Mr. Behan (as can be seen in his text) attributed significant value to those items.

[154] Furthermore, there are quite simply so many variables, and estimations, and complete guesses in this document (e.g., the $3,600 deducted by Mr. Howatt), that I am left questioning it in its entirety. Any of these variables might have significantly skewed the result. In particular, the count was done while the store was open, by multiple people, over multiple days; no one's work was double-checked. The wholesale cost was estimated based on Mr. Latham's experience at a smaller store, with a different supplier.

[155] The effect of all of these factors, compounded onto each other, causes me to be entirely unconvinced that this inventory provides me with reliable numbers. I cannot accept it.

[156] I do not say any of this to disparage Mr. Latham, and his efforts, in any way. He clearly did his best with the tools and time he had at his disposal. However, I cannot rely upon the values given here with any confidence whatsoever.

[157] In conclusion, therefore, it is certainly possible that there was a promise (explicit or implied) made by Mr. Behan that he would supply $30,000 in inventory on the date of closing. If there was, however, I cannot conclusively say whether that promise was delivered upon; it has not been shown to me that there was a shortfall.

**Misrepresentation re $1M sales**

[158] The defendants owned Value Convenience for approximately six months, from the fall of 2017 until March 2018. Prior to that, it was a "Needs" store and owned/managed by Sobeys. I have no information about sales during the "Needs" period of time, nor do I think such would be useful in any event.

[159] As I previously noted, the evidence includes a document showing sales of Value Convenience from January 1, 2018, to March 25, 2018 (74 days), for a total of $214,000. The defendants note that when one divides this number into the 74 days, this equals sales of $2,892 per day. When multiplied by 365 days, this equals

estimated sales of $1,055,580 per year. Therefore, the defendants take the view that the $1M figure estimated in the Kijiji ad was reasonable.

[160] The plaintiffs calculate this differently; they note that the document represents approximately one-quarter year. Four times $214,000 equals $856,000, which represents a shortfall of $144,000 from $1M.

[161] I accept that the calculation made by the defendants is more precise. Furthermore, the defendant notes that business at a convenience store will fluctuate during the year, and that January to March would normally be the less busy months. I have no reason to doubt that suggestion.

[162] In any event, in my view, this situation does not rise to the level of being a material misrepresentation. By any standard, the statement in the Kijiji ad (of $1M sales) was reasonably accurate, or at least very reasonably close, to the sales at the business prior to the involvement of the plaintiffs.

[163] More importantly, this statement was never a “guarantee” of any buyer achieving $1M of sales, nor could it be. Any business will be as successful as its owners make it.

[164] I find that no material misrepresentation has been made out by the plaintiffs.

[165] I also reject the other claims put forward by the plaintiffs.

[166] In my view, this case is very simple. The plaintiffs signed a contract to purchase a business. They agreed to refinance a $98,000 loan and pay another $47,000 to complete the purchase.

[167] It is apparent that this was an entirely impulsive decision on their part, entered into without any due diligence whatsoever. Perhaps the plaintiffs could not afford this much debt. Perhaps they were ill-equipped to run this business. Perhaps they should not have entered into this agreement. But they did.

[168] The business appears to have been unsuccessful for the plaintiffs, for reasons that are unclear. That is certainly unfortunate. I do not see that their lack of success can be attributed to the defendants.

[169] Having said that, there is no doubt that the defendants were also impulsive in this transaction. Mr. Behan, in particular, could certainly have been more diligent in ensuring the clean and efficient transfer of the business. The defendants have also paid for their impulsivity. All of this was done in a rush, to no one’s benefit.

[170] The plaintiffs’ claims are rejected in their entirety.

**Counter-claim**

[171] The defendants seek payment of the amounts that the plaintiffs agreed to pay in the Agreement. They have not done so. I see no reasonable excuse for that failing.

[172] I order that the plaintiffs pay to the defendants the sum of $47,000 (the amount of the Promissory Note) as well as the sum of $67,667.54 (the amount remaining on the CBDC loan that was paid by Mr. Behan) for a total of $**114, 667.54** payable by the plaintiffs to the defendants.

[173] The plaintiffs have argued that if anything is owing to the defendants, it should be attributed to the corporate plaintiff, Value Convenience. I see no way that such would be appropriate. The Agreement was signed by the plaintiffs in their own capacities. They are the ones who did not honour their commitments under this Agreement.

**Adjustments**

[174] In principle, both parties should be credited any amounts that were properly the responsibility of the other party, as this transaction unfolded.

[175] The plaintiffs say that the amount they should be credited is $13,675.10. The defendants do not dispute this amount but note that the amount they should be

credited (including an NSP deposit, an HST refund, and sales deposits immediately prior to closing) is comparable. They therefore suggest that the numbers cancel each other out and that no adjustment should be made. The plaintiffs have not directly responded to this suggestion. I leave it to counsel to discuss whether any adjustment is appropriate, and for what amount.

[176] I also leave it to counsel to discuss and attempt to resolve the issues of interest on the amount(s) owing, as well as costs. If counsel cannot resolve these issues they may refer them to me, along with counsels' briefs on any outstanding issues. Such should be done within 45 days of this decision.

Boudreau, J.