IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jones v. Boone,*
2024 BCSC 664

Date: 20240424
Docket: S57551
Registry: Vernon

Between:

Sharon Gail Jones

Plaintiff

And

Vincin Boone and Simone Boone also known as Simone Berg

Defendants

Before: The Honourable Justice Wilson

Reasons for Judgment

Counsel for the Plaintiff:	D.W. Draht
Counsel for the Defendant, Simone Berg:	R.R.N. Grant E. Russell
Place and Date of Trial/Hearing:	Vernon, B.C. April 4-5, 2024
Place and Date of Judgment:	Vernon, B.C. April 24, 2024

[1] The plaintiff used a line of credit that was secured by her home to buy a modular home in 2018 for the defendants, who are her son and daughter-in-law. The defendants separated a few years later. The main issue in this case is whether the modular home was a gift or a loan.

[2] The plaintiff applies by way of summary trial for judgment against the defendants in the approximate amount of $200,000.

Background

[3] The plaintiff Sharon Jones is the mother of the defendant Vincin Boone. The defendant Simone Berg is the former spouse of Mr. Boone. There is one other important person in the factual matrix, Mr. Charles Jones. Mr. Charles Jones was the plaintiff's husband but he is now deceased (“Charles”).

[4] The plaintiff’s relationship with Charles commenced in approximately 2011 and, over time, the defendants and plaintiff and Charles became closer. The plaintiff and Charles lived in Armstrong and, in early 2017, the defendants relocated to Armstrong. Initially, they lived with the plaintiff and Charles in their home, but subsequently it was decided that the defendants would secure their own residence.

[5] In April 2017, the defendants moved into a 2017 Wildcat trailer (“Wildcat”) that was purchased with the involvement of Charles. Shortly thereafter, the Wildcat was replaced with another trailer, a 2017 Cougar Fifth Wheel (“Cougar”). These purchases will be addressed below.

[6] In early 2018, Charles became ill, and he died in March 2018. The plaintiff inherited the entirety of his estate. The defendants moved out of the Cougar trailer and back into the home with the plaintiff, and shortly thereafter, the Cougar was returned to the vendor.

[7] In July 2018, a Modulux modular home was purchased for the defendants (the “Modulux”). This is the significant transaction for the purposes of this litigation. The plaintiff arranged for a line of credit in the amount of $200,000 that was secured

against the home that was now solely hers as a result of Charles' death. The Modulux was purchased using the plaintiff's line of credit and the bill of sale shows the defendants as the owners. Ms. Berg argues that the plaintiff purchased the Modulux as a gift for the defendants.

[8] The plaintiff says that she did not intend to gift, but rather the parties had entered into a loan arrangement. In the alternative, if there is no enforceable contract between the parties, the plaintiff says that the Modulux is held by the defendants by way of a resulting trust and, in the further alternative, the defendants were unjustly enriched and she is entitled to a remedy.

[9] The defendants separated in approximately August 2021. At that time, the plaintiff presented a draft form of promissory note to the defendants for signature. Mr. Boone signed the promissory note but Ms. Berg did not.

[10] At present, Ms. Berg continues to reside in the Modulux. When the plaintiff sold her home on May 4, 2021, the line of credit was paid off. At the time of the sale, the amount owed on the line of credit was approximately $195,000.

[11] While the majority of the balance outstanding on the line of credit can be traced to the Modulux, the evidence is less clear on some of the charges. First, the plaintiff acknowledges that there were three charges that were hers alone and did not relate to the defendants. Second, there were a series of what the plaintiff refers to as unauthorized charges. Finally, there are some other amounts for which the evidence is somewhat unclear, including a bank draft to Rona.

Procedural history

[12] The notice of civil claim was filed on March 16, 2022, claiming breach of contract. A response to civil claim was filed by the defendants on April 5, 2022. The response is handwritten and says, “There is no loan agreement/was gift from father."

[13] In June 2022, the plaintiff brought her first application for summary trial, but it was adjourned in order for more materials to be filed. The matter was reset for July

29, 2022, and the plaintiff proceeded on that date. The defendants did not appear, but during the course of the Chambers judge delivering her reasons for judgment, Ms. Berg attempted to join the hearing by way of videoconference. The judge concluded her decision but recommended that Ms. Berg obtain some advice. Ms. Berg successfully appealed and the matter was remitted back to this Court for rehearing (2023 BCCA 215).

[14] The plaintiff amended her notice of civil claim on September 13, 2023, to include allegations that were responsive to the pleading of a gift and also sought relief by way of alternative theories, namely resulting trust. Ms. Berg then subsequently amended her response to civil claim after retaining counsel. The amended response to civil claim denied a contract, and pleaded the gift with greater specificity.

[15] The plaintiff then refiled her summary trial application, including both the materials that were before the Court at the initial hearing, and subsequent materials.

[16] Mr. Boone has not actively participated in the proceeding. He did not appear at any of the summary trial hearings. He has not amended the handwritten response to civil claim.

[17] Prior to the first summary trial, Mr. Boone had sent an email to Ms. Jones' counsel, which was referred to by the Chambers judge at paragraph 9 as follows:

> [9] I further find, based on the evidence of Ms. Boden, that on or about June 29, 2022 in response to that email, she received an email from Vincin Boone stating the following:
>
> > Awesome I will not be attending any more of this bs and you tell that piece of shit mother of mine she can have her fucking house back and don’t ever contact me again.

[18] However, at this application, while Mr. Boone was not present, his evidence was before the Court by way of an affidavit sworn January 17, 2024. His affidavit is largely supportive of the plaintiff’s version of events. Ms. Berg objects to the admissibility of Mr. Boone's affidavit because she said it is not proper reply and its inclusion amounts to a splitting of the plaintiff's case.

[19] I find that it is appropriate to consider Mr. Boone's evidence in this matter. First, Mr. Boone is a defendant, and although I accept that the evidence was tendered on behalf of the plaintiff's application, it is not clear that his evidence was within the control of the plaintiff such that she could have provided it earlier. It is apparent from Mr. Boone's previous communication that he is not necessarily allied with the plaintiff in all respects.

[20] More importantly, it is in the interests of justice that his evidence be taken into account as it is readily apparent that Mr. Boone has important evidence that touches on matters at the heart of this dispute. Although the summary trial was scheduled to be heard on January 22, 2024, shortly after the affidavit was served, there has now been ample time to respond to and otherwise deal with Mr. Boone's evidence. Ms. Berg has specifically responded to Mr. Boone's affidavit by way of her third affidavit dated March 11, 2024.

[21] The most important aspect of Mr. Boone's affidavit is that he says that he made payments to the plaintiff on the loan. He says that although he made payments as regularly as he could, he was sometimes late and would sometimes miss payments because of the defendants' financial struggles.

[22] Ms. Berg also objects to another affidavit, the second affidavit of Gregory McLachlan filed January 17, 2024. The objection is the same as for Mr. Boone's, which is that it is not proper reply. The sole purpose of Mr. McLachlan's second affidavit is to exhibit certain text messages between Mr. McLachlan and Ms. Berg. Mr. McLachlan is the plaintiff's current partner.

[23] The appended text messages came to light when the defendant, Ms. Berg, provided an updated list of documents in December 2023. The text messages were originally exhibited to a legal assistant's affidavit, and Mr. McLachlan's Affidavit No. 2 simply provides direct evidence of Ms. Berg's text messages that she disclosed. There was no objection taken to the inclusion of the text messages to the legal assistant's affidavit and therefore it would serve no purpose to exclude Mr. McLachlan's affidavit.

[24] Ms. Berg says this matter is not suitable for determination by way of summary trial application. She says there are factual disputes that cannot be resolved summarily and that the Court ought to have the benefit of the *viva voce* evidence of the parties in order to be able to make the required factual findings.

[25] Ms. Berg also argues that the plaintiff's claim is subject to a limitation defence and also that the plaintiff is guilty of laches and that her claim ought not to be permitted to proceed.

Suitability of the matter for summary trial

[26] Rule 9-7 of the *Supreme Court Civil Rules* permits a party to apply for a final determination of a dispute summarily, and without the need for a full trial. While a summary trial is still a trial process, the evidence is generally tendered by way of affidavits, rather than with the witnesses testifying in person in the court room.

[27] Rule 9-7(15) permits the court to grant judgment in summary trial applications unless:

a) the issues raised by the summary trial application are not suitable for disposition under the Rule; or

b) the summary trial application will not assist in the efficient resolution of the proceedings.

[28] Whether a proceeding can be decided by summary trial will frequently depend on whether the court is in a position to make the factual determinations necessary in order to resolve the dispute. The fact that there is contradictory evidence does not necessarily mean that the court cannot make the necessary factual findings.

[29] Even if the chambers judge can find the necessary facts, the court must still consider whether or not it is in the interests of justice to decide the matter summarily. Factors considered at this stage were set out in the leading authority on summary trials in this province, *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.,* 36 BCLR (2d) 202, and include: the amount involved; the complexity of the matter;

the urgency of the prejudice likely to arise by reason of delay; the costs of taking the case forward in relation to the amount involved; the course of the proceedings; whether credibility is an issue; whether the application would result in litigating in slices; any other factor appropriate in the circumstances: *Cadwell v. Martin*, 2020 BCSC 2091 at para. 33.

[30] Circumstances where the evidence is directly conflicting such that the court will need to make findings of credibility are generally not suitable for summary trial. However, the mere fact of a conflict in the evidence does not automatically render the matter unsuitable. The court may consider the surrounding circumstances and events, including contemporaneous documents, communications between the parties and other factors in determining whether or not it is possible to resolve the evidentiary conflicts. In other circumstances, it may not be possible to resolve the evidentiary conflict but the conflict may not be material to the matters that need to be decided.

[31] In deciding whether a matter needs to be sent to a full trial with *viva voce* evidence, the judge may consider whether or not the evidence will or may be different. In this case, Ms. Berg argues that the Modulux was a gift, in keeping with the previous gifts made by Charles, being the Wildcat and Cougar trailers.

[32] Whether these constituted gifts or not will be discussed later. However, it is unlikely that the evidence at trial would be different. There were four people involved or potentially involved in the various transactions. The three people who are able to give evidence regarding the events are the plaintiff and both defendants, and each has done so. Because Charles is deceased, there is no ability to obtain his evidence.

[33] The overarching question in this case is whether or not the plaintiff intended a gift. The parties do not disagree as to the legal test. That is, the question of whether or not a gift was intended depends on the intentions of the donor at the time of the alleged gift.

[34] The Court identified factors that may be taken into consideration when determining whether funds have been advanced as a gift or a loan in *Hancock v. Fitzpatrick*, 2014 BCSC 333 at paragraph 75:

> i) whether there are contemporaneous documents evidencing a loan;
> ii) whether the manner for repayment is specified;
> iii) whether there is security held for the loan;
> iv) whether there are advances to one child and not others, or advances of unequal amounts to various children;
> v) whether there has been any demand for payment before the separation of the parties;
> vi) whether there has been any partial repayment; and
> vii) whether there was any expectation, or likelihood, of repayment."

[35] However, as the Court of Appeal identified in *Beaverstock v. Beaverstock* 2011 BCCA 413, these are not elements of a cause of action, nor is the list of factors an exhaustive one. They are simply considerations that may be weighed by the trial judge when determining the transferor's actual intent at the time of the transfer: *Beaverstock* at para. 11.

[36] Whether or not payments were made is a significant consideration in this case. If payments were made, this would tend to support the plaintiff's position that she never intended a gift. The plaintiff deposes that she received payments from the defendants totalling $21,465 between June 2018 and April 2021. Ms. Berg says that question cannot be resolved summarily, and urges me to reject the evidence of the plaintiff and of Mr. Boone that Mr. Boone made payments. She notes that Mr. Boone's evidence is not substantiated by any bank statements, and that his evidence if he were required to testify at trial may differ.

[37] The difficulty with this submission is that Ms. Berg has taken no steps to challenge Mr. Boone's evidence. She may be entitled to examine him for discovery, and there is little doubt that on the circumstances here that she would have been entitled to cross-examine him on his affidavit. She also could have sought production of his bank records. None of those things have happened. Parties are obligated to put their best foot forward at the summary trial, and this includes taking such steps

as may be required in order to marshal such evidence as may be required. It is no defence to a summary trial application to say that the matter should go to a full trial in case something comes up: *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275 at para. 34.

[38] The evidence I do have with regard to payments made is set out in the plaintiff's affidavit and also in Mr. Boone's affidavit as outlined above. Ms. Berg's evidence goes no further than saying that she was not aware of Mr. Boone making any payments.

[39] In all of the circumstances, I have concluded that I am in a position to determine this matter summarily. Although there are some conflicts in the evidence, I do not consider all of those conflicts to be material and those conflicts that are material can be resolved on the state of the evidence before the Court.

Discussion

[40] I will first address the question of whether the plaintiff intended a gift to the defendants.

[41] If no gift was intended, I will then address the question of whether there was a loan. Even if the plaintiff did not have the requisite donative intent, it would not necessarily follow that there was a contract. If there was no gift but no contract either, the plaintiff would left with equitable remedies, such as resulting trust, or perhaps a resulting constructive trust arising out of an unjust enrichment.

Was there a gift?

[42] Ms. Berg says that the Modulux was a gift to she and Mr. Boone from the plaintiff, which she says was consistent with two prior gifts of the Wildcat and Cougar trailers.

[43] Although the evidence of Ms. Jones and Ms. Berg differs with regard to the quality of the relationship during the time after the defendants moved in with the

plaintiff and Charles, there is no conflict as to the fact that all parties were of the view that the defendants needed to live in their own home.

[44] There is also no conflict in the evidence with regard to the fact that the Wildcat was purchased but then returned, and that the Cougar was also purchased and subsequently returned.

[45] The Wildcat was purchased in April 2017 from an RV dealer in Kelowna. The purchase price was $75,701.64 and the contract, presumably prepared by someone at the dealership, showed Charles as the purchaser on page 1 of the agreement but had the signatures of both defendants on the third of three pages in the agreement. The purchase contract included a financing clause that provided for payments of $247.30 biweekly, commencing August 5, 2017.

[46] The Cougar was purchased to replace the Wildcat in June 2017. The documentary evidence is sparse, and the only document is an ICBC transfer/tax form that shows Mr. Boone as the sole owner.

[47] The evidence is that when the Cougar was returned, no money was owed by or to any of the parties.

[48] These two transactions are important because Ms. Berg relies on these two transactions to illustrate a pattern of gift from Charles to the defendants. She says that the Modulux followed that same pattern, in that the home was purchased for the defendants as a gift without any expectation of repayment.

[49] Although Mr. Boone's evidence reveals a lack of recall of all of the details, he deposes that he made payments and that from his understanding, Charles was in the position of guarantor. He had no understanding that Charles was making a gift to he and Ms. Berg. Charles also provided overdraft protection so that if the defendants missed a payment, the missed payment would be covered.

[50] The difficulty with Ms. Berg's position that the Wildcat and the Cougar were gifts is that the gifts had no value because both trailers were fully financed. If

Charles had paid for the Wildcat but the Wildcat was owned by the defendants, then presumably Charles would have still held the debt, but the Wildcat would have belonged to the defendants. As such, Charles' debt would not have been retired when the Wildcat was returned because he did not own the trailer.

[51] Because the debt with regard to both of the trailers was retired in full when the asset was surrendered, it cannot be said that Charles made a gift of the Wildcat, worth $75,000, and some larger amount in the case of the Cougar. Rather, what Charles did was use his credit to allow the defendants to purchase first the Wildcat and subsequently the Cougar. The overdraft protection provided the defendants with some additional comfort. I am satisfied that the trailers were fully financed, as evidenced by the fact that no monies were paid to or from the parties when the trailers were returned which would suggest that the trailers were fully encumbered.

[52] In all of the circumstances, Charles did not buy the trailers outright and give them to the defendants. Rather, he provided assistance to the defendants by allowing them to access his credit in order to acquire the trailers. Had everything gone according to plan, the defendants would have paid for the trailers over time and the debt would have been satisfied.

[53] Ms. Berg's understanding of the transactions regarding the two trailers as gifts is what informs her characterization of the acquisition of the Modulux.

[54] The plaintiff by her own evidence was not particularly involved in either the Wildcat or Cougar purchases and therefore acknowledges she is not in a position to provide much evidence with regard to what occurred. By the time the Modulux was purchased, Charles had died. As such, the transaction involved the plaintiff instead.

[55] I conclude that Ms. Berg's evidence that the acquisition of the Modulux was intended to be no different from either of the trailers to be correct. Unfortunately, because she misunderstood those transactions, this does not assist her position. I find that consistent with the purchases of the two trailers, there was no intention by the plaintiff to provide a gift to the defendants. Rather, she was willing to permit her

credit to be used in order to assist the defendants in purchasing a home, which turned out to be the Modulux.

[56] What differs in the acquisition of the Modulux by way of credit, other than it was the plaintiff's and not Charles's credit that was used, is that the credit was arranged through a third-party (i.e., the bank) as opposed to through the dealership which was the case for the two trailers. As such, because the line of credit was secured by a mortgage on the plaintiff's home, the loan itself was discharged upon sale. However, the fact that the plaintiff's debt to the bank has been discharged does not inform the analysis regarding whether Ms. Jones intended a gift or not.

[57] As for Ms. Berg, she deposes that the trailers were both given to the defendants as gifts, yet there is no explanation as to why there were no proceeds upon disposition.

[58] The plaintiff denies any donative intent, and Mr. Boone's evidence is consistent with that of the plaintiff. Ms. Berg argues it was a gift, but her position is founded on her mischaracterization of the purchases of the Wildcat and Cougar trailers.

[59] I turn now to the factors identified in *Hancock*, while recognizing their limited role as was pointed out in *Beaverstock*. It is of note that Mr. Boone is one of four children of the plaintiff's, but she has not made any gifts to any of the others in excess of $5,000, which would make a gift of this magnitude less likely. The plaintiff is not a wealthy person. I accept that parents are not obligated to treat all their children equally, but there is no evidence that explains why Mr. Boone would receive preferential treatment.

[60] I have found that payments were made, even though there was no written confirmation of the arrangement at the time the Modulux was purchased.

[61] Although the payments turned out to be sporadic, that was not the original intent, and the fact that no demand for payments was made by the plaintiff prior to the defendants' separation is not concerning given the infrequent nature of the

payments made. It is understandable that the plaintiff would be flexible while the defendants were together, but would want to confirm and formalize arrangements upon learning of their separation, as evidence by her request for the promissory note.

[62] Earlier in these reasons, I mentioned that Ms. Berg had taken no steps to challenge Mr. Boone's evidence. The same comment applies equally to the plaintiff's evidence, in that there has been no examination for discovery nor a request to cross-examine her on any of her affidavits.

[63] In all of the circumstances, the pattern that emerges from the previous transactions is that the asset and debt were tied together, and that there was no gift. The transaction for the Modulux was no different.

[64] In all of the circumstances, I find there was no gift by the plaintiff to the defendants.

Was there a loan?

[65] If the arrangement between the parties was a loan, the onus is on the plaintiff to prove the contract. The requirements for the formation of a binding contract are well established. There must be an intention of both parties to contract, the essential terms must be agreed to, and the terms must be sufficiently certain: *Oswald v. Start Up SRL*, 2020 BCSC 1730, aff'd 2021 BCCA 352.

[66] Determining whether there was an intention to contract requires a contextual analysis, taking all the circumstances into account. This may include both prior and subsequent conduct of the parties. The ultimate question to determine contractual intent is whether an objective reasonable bystander would conclude the parties intended to contract: *Oswald* at para. 122.

[67] At paragraph 2 of her first affidavit, the plaintiff deposes to the following with regard to the loan arrangement between the parties:

> 2. In around June 2018, I entered into an agreement (the "Loan Agreement") with the Defendants, Vincin Boone and Simone Boone also

> known as Simone Berg (the "Defendants"), which was partly oral, partly written and partly by conduct. I agreed with the Defendants that based on the Loan Agreement, I would loan the Defendants the sum of $200,000.00 (the "Principal Amount") and the Defendants would pay me back the amount loaned with interest calculated at the rate my bank charged me in order to draw the Principal Amount from a line of credit. The Principal Amount was to be used for the purchase of a modular home (the "Modular Home"). If the Defendants defaulted on their repayment obligations, I was to be entitled to reclaim the Modular Home and claim the Principal Amount that remained outstanding with interest. I agreed with the Defendants that their monthly payments to me were to be in the amount of $1,200 on the first of each month.

[68] The plaintiff then goes on at paragraph 6 to describe payments made by the defendants:

> 6. The Defendants made payments pursuant to the Loan Agreement. Albeit such payments were in variable amounts and continued until on or about April 26, 2021 at which time they ceased making any further payments altogether. To date, the Defendants have made payments totaling $21,465.00. Attached and marked as Exhibit "C" to this my Affidavit is a copy of my bank records for the period from June 2018 to April 2021. Attached and marked Exhibit "D" to my Affidavit is a document prepared to show the total amount received from the Defendants pursuant to the Loan Agreement.

[69] Exhibit "C" shows various transactions into and out of the plaintiff's bank account. Exhibit "D" sets out what she says were payments made by or on behalf of the defendants.

[70] As for the defendants, Ms. Berg deposes that she did not make any payments to the plaintiff:

> 20. The home is in Vincin's and my names. I did not make any payments towards the Mobile Home and, as far as I am aware, Vincin also did not make any payments. The Mobile Home was a gift to myself and Vincin. This was in keeping with our close relationship and the previous gifts Charles had made to myself and Vincin in an effort to support us.

[71] At paragraph 22 she denies ever entering into a contract with the plaintiff, whether formally or informally, and denies she ever had any such discussions with Mr. Boone.

[72] Mr. Boone's evidence is consistent with that of the plaintiff. He deposes that he discussed with Ms. Berg that the money from the plaintiff was a loan (at

para. 12), and that he was making payments to the plaintiff, albeit those were irregular:

> 12. I know I discussed with Ms. Berg that the money from Ms. Jones for the Modulux was a loan but I cannot recall any specifics of when that was as it would have been many years ago. When we began discussing the Modulux with Ms. Jones, there were many discussions involving Ms. Berg, Ms. Jones and myself in which the fact that the money for it was being loaned was mentioned as well.
> 13. From the time Ms. Berg and I moved into the Modulux trailer, I paid Ms. Jones monthly amounts as repayments on the loan. I made these payments as regularly as I could but at times I was late or would miss payments. The reason for this was due to a lack of finances available.
> 14. Eventually I requested a reduction in the monthly amount because the payments to Ms. Jones for the Modulux combined with the monthly rent payments for our pad was not affordable.
> 15. The monthly payments to Ms. Jones for the Modulux were primarily from my bank account.
> 16. Throughout the course of my relationship with Ms. Berg we struggled financially. I wanted to pay Ms. Jones in full but could not if we did not have the money.

[73] Ms. Berg deposes that she never made a single e-transfer payment to Ms. Jones on account of the loan, or indeed otherwise. Her bank statements are exhibited to her affidavit. According to Ms. Berg, the first she heard that the plaintiff claimed there was a loan was when she was asked to sign the promissory note at the end of August 2021, around the time that her relationship with Mr. Boone was ending.

[74] Ms. Berg urges me to reject the evidence of the plaintiff and of Mr. Boone that Mr. Boone made payments. However, as I indicated earlier, Ms. Berg has taken no steps to challenge either Mr. Boone's or the plaintiff's evidence. The evidence of payments in both the plaintiff's and Mr. Boone's affidavits as outlined above is not contradicted, nor is it apparent that Ms. Berg would be in a position to do so.

[75] There is another aspect of the evidence with regard to Ms. Berg's knowledge regarding the defendants' obligation to the plaintiff, which is her text messages with Mr. McLachlan, the plaintiff's current partner, from March 2021. The text messages include the following:

Tue, Mar 2, 2021 4:00 PM

[Simone:] Sharon signed for a credit Greg, I have been paying that, not Vince!!! See you all in court because you all are business and not family!!! And that is why "your" entire family will always take advantage of the both of you!!! You only wished you had a daughter in law like me that hasn't stole from you!!!!

Tue, Mar 2, 2021 6:16 PM

[Simone:] All I can see is that, I have been "paying" to keep us here and that Sharon is turning a blind eye as always!!! I have been dealing with court and not 1 time has Vince or Sharon attempted to deal with any of the crap they handed a cheque over to Modulux…. that "I" have been fighting in court and "I" have been paying for!!!

Vince and Sharon handed Modulux $165000 in cash and I have been fucked ever since then!!!

[Mr. McLachlan:] So where did you get the money to pay for the house

[Simone:] And paying financially, physically and mentally every since!!! I will prove this in court!!! Like I'm dong now with their fuck up!!! And I will prove I've been paying for it!!!

It's on a credit loan Greg, you know this and my emails and texts will prove Chuck and I had this agreement before he passed away, I'm sure he thought I would be taking care of him and surely NOT Sharon or his kids lol

. . .

[Simone:] And again, I have and always paid my debts and my way!!! I pay for that credit line more than the minimum payment!!! Vince has NEVER paid back my myself or my family 1 penny!!!

[76] Ms. Berg's answer to these text messages is set out at paragraph 8 of her third affidavit:

8. In specific response to paragraph 2 of the McLachlan Affidavit, any references to credit, credit loan, or credit lines in my text messages to Greg are with respect to debts I had incurred to third parties for paying routine household expenses (such as rent, insurance, and home repairs). As explained in my second affidavit in this action, made January 12, 2024 at paragraphs 25-28, I paid the vast majority of household expenses for Vincin and myself, which was frustrating to me and an ongoing issue in our relationship. In these text messages, I was not referring to the line of credit I now understand Sharon to have used for the purchase of the Mobile Home or any other debt to Sharon or Greg.

[77] The significance of these messages is that they predate Ms. Berg's separation from Mr. Boone. In terms of timing, they are approximately one month before the last payment, according to the plaintiff.

[78] Ms. Berg's counsel suggests there are other possible explanations for Ms. Berg's comments in the text messages. There was ongoing litigation with regard to the Modulux that Ms. Berg initiated Small Claims Court. It may be that "paying for it" means other than financially.

[79] I do not accept these explanations. The words "I pay for that credit line more than the minimum payment" does not lend itself to an alternative explanation unless there was another line of credit. Although it was suggested that perhaps "credit" referred to a credit card as opposed to a line of credit, there is no evidence that Ms. Berg made any payments on credit cards relating to the plaintiff either.

[80] Simply put, it is for Ms. Berg to explain what she was referring to when she texted Mr. McLachlan and her explanation in paragraph 8 of her third affidavit simply lacks sufficient detail so as to be plausible, when no other line of credit, at least as it relates to the plaintiff, is apparent. There is no evidence of the plaintiff having signed for any other credit for Ms. Berg's benefit. The only possible explanation for 'credit' or 'credit line' is the plaintiff's line of credit used to buy the Modulux in the context of the conversation.

[81] I accept that there is no evidence of direct payments from Ms. Berg to the plaintiff by way of Ms. Berg's bank statements, notwithstanding Ms. Berg's text messages to Mr. McLachlan in which she asserts that she was the one making them. There are a few possible explanations, but none assist Ms. Berg.

[82] Her claim that she was making the payments could be true, even if the payments were not made directly from her bank account. She may have considered herself to be paying the line of credit indirectly because she was subsidizing Mr. Boone, as evidenced by her claim that she paid many of Mr. Boone's bills. It may

also be that Ms. Berg was bragging to Mr. McLachlan by claiming to have made payments, even though she had not.

[83] Under any of those possible explanations, Ms. Berg was aware as of March 2021 that the plaintiff had accessed a line of credit to buy the Modulux and the defendants were liable to pay for it.

[84] I am satisfied that both of the defendants were aware that the plaintiff was not providing a gift; rather, the plaintiff accessed the equity in her home by way of a line of credit and the defendants were obliged to make the payments. This can only be a loan. The defendants ceased making payments in April 2021, at which point the plaintiff was entitled to bring her claim.

[85] The question then turns to what were the terms of the loan. The promissory note presented by the plaintiff upon the separation of the defendants clearly is not the agreement. It includes terms that I find were never discussed, including language that amounts to a security agreement. The wording of the promissory note suggests it was probably prepared by a lawyer. I find that the plaintiff's evidence at paragraph 2 of her affidavit, which is largely consistent with the promissory note, is also an overstatement of her understanding of the arrangement.

[86] I accept that the intention was that the defendants would make monthly payments in the amount of $1200 per month, although such payments were never actually made.

[87] This was an arrangement between family members. I find the most reasonable interpretation, which is not inconsistent with the plaintiff’s affidavit at paragraph 2, is that the defendants would make monthly payments and that the interest would be at the rate charged to the plaintiff by her bank under the line of credit. To the extent the payments exceeded the interest charges, the principal would be reduced.

[88] In the absence of an express term for repayment, the loan was repayable on demand but subject to an obligation on the part of the plaintiff to make what

constituted reasonable demand to depend on the circumstances. This is not a matter I need to determine, however, given that payments ceased in April 2021 and never resumed.

Amount owed

[89] The plaintiff argues that the sole purpose for the line of credit was to assist the defendants, and with the exception of three transactions that she made for her own benefit, the remainder of the line of credit was all for their benefit. She says that she paid $195,953 to retire the line of credit when she sold her house on May 4, 2021, and with the exception of those three transactions of the plaintiff's which totaled $3,450, the remainder is owed by the defendants to her.

[90] The amount sought includes a number of what the plaintiff describes as unauthorized withdrawals. She refers to 13 such transfers totalling $17,713.

[91] The amount paid for the Modulux is clear. There was an initial deposit paid of $25,000, and the remainder of the purchase price of $134,470.08 was paid upon transfer.

[92] Additionally, the evidence establishes that the plaintiff sent two bank drafts to the owner of the mobile home park, Mr. Moon, that total $7,649.96. The first $4,600 bank draft was used to pay the defendants' 'basic' pad rent for the period of August 1, 2018 to July 31, 2019, and the second draft for $3,049.96 is a combined payment for one year of what is referred to as the 'rent premium' and an option to purchase at a cost of $1,900, all under a tenancy agreement that was signed by both defendants. These amounts are also clearly on the defendants' account.

[93] As for other amounts, I find that the plaintiff has failed to meet her burden of proof in establishing that the defendants are liable. There was a bank draft made payable to Rona of $5,156.36 at approximately the same time as the Modulux was purchased. However, the Modulux was new, and the invoice suggests a number of additional features were included at the time of purchase. The plaintiff has not

established that the Rona bill pertains to the defendants and the Modulux, as opposed to her own home.

[94] As for the unauthorized withdrawals, while there is no reason to dispute that the plaintiff did not authorize them, the evidence does not establish that these funds went to the defendants. For example, there is no evidence as to who else would have had access to the account. The plaintiff assumes that it was the defendants. However, the only evidence on the issue is a text message from Ms. Berg to Mr. McLachlan that suggests it was Mr. Boone, but this evidence is not admissible to prove the truth of its contents.

[95] I find the plaintiff has proven that she is owed the sum of $159,470.08 for the Modulux, plus $7,649.96 that was paid to the defendants' landlord. The plaintiff is entitled to the interest she was charged by her lender on the line of credit.

[96] Although Ms. Berg argued limitation defence and laches, such defences could only arise if I were to find that no payments were made by the defendants to the plaintiff. In light of my finding that payments were in fact made until April 2021, it is not necessary to address these arguments because the action was commenced in 2022.

Disposition

[97] In all of the circumstances, the plaintiff is entitled to judgment against both of the defendants in the amount of $167,120.04 plus the interest that accrued on those amounts under the plaintiff's line of credit.

[98] Because the line of credit agreement provided for a floating rate, and because I have not allowed all of the amounts claimed, I am not able to determine the amount of the interest charged. If the parties cannot agree on the amount of interest, there will be a reference to the registrar, and the registrar will certify the result.

[99] To be clear, the plaintiff is entitled to the interest charged by her lender on the amounts proven up to and including May 4, 2021, and prejudgment interest thereafter.

[100] The plaintiff would ordinarily be entitled to her costs, but if the parties wish to speak to the matter, they may contact Supreme Court Scheduling in Kelowna to make those arrangements, within 21 days of the date of these reasons.

"Wilson J."