



**MOTOR VEHICLE SALES AUTHORITY OF BRITISH COLUMBIA**  
*(Previously known as the Motor Dealer Council of B.C.)*

**IN THE MATTER OF THE *MOTOR DEALER ACT* R.S.B.C. 1996 C. 316 AND  
THE *BUSINESS PRACTICES AND CONSUMER PROTECTION ACT* S.B.C. 2004 c. 2**

**RE:**

**THE ESTATE OF GEORGE MANN SR.**

**COMPLAINANT**

**AND:**

**OCEAN PARK FORD.  
(Dealer # 8367)**

**MOTOR DEALER**

**DECISION OF THE REGISTRAR OF MOTOR DEALERS  
ON RECONSIDERATION**

Appearing for the Authority: Denis Savidan, Manager of Compliance and Investigations  
Holly Childs, Compliance Officer  
Bill Jost, Compliance Officer.

Appearing for the Complainant: George Mann Jr.

Appearing for Ocean Park Ford: Ron Ford, Dealer Principal  
Mike Pridie, General Sales Manager  
Roberta Orth, Business Manager  
Rick Lloyd, Business Manager

**Date and Place of Hearing: November 26, 2008, at Surrey, British Columbia**

**INTRODUCTION**

[1]. By way of letter dated August 5<sup>th</sup> 2008, Ocean Park Ford applied for a reconsideration of Registrar Ken Smith's Compliance Order dated the 14<sup>th</sup> day of July 2008 and the Notice of Penalty dated the 16<sup>th</sup> day of July 2008 (both herein the "Determinations") in accordance with

sections 181 and 182 of the *Business Practices and Consumer Protection Act* S.B.C. 2004 c. 2 (the “BPCPA”). Registrar Ken Smith’s reasons for issuing the Determinations were given on June 10, 2008.

[2]. Registrar Smith agreed that a reconsideration was appropriate in that new evidence was presented that was substantial and material to the issues in this matter. Pursuant to section 182(4) of the BPCPA, this matter has been delegated to me for reconsideration. In order to vary or cancel the Determinations, I must be satisfied that the requirements of section 182(2) of the BPCPA have been met.

[3]. As Mr. Mann Sr. passed away before Registrar Smith rendered his Determinations, he was not able to provide testimony before me. There are several written statements from him, for example, Exhibits 21 and 23. As Mr. Mann Sr. could not testify, and to properly put the new evidence into its proper context, I have reviewed the transcripts of the hearings, and the evidence that was before Registrar Smith. Various new exhibits were entered at the hearing before me and additional testimony was provided by Mr. Mann Jr. and Ocean Park Ford. Also, Ocean Park Ford and Mr. Mann Jr. provided written submissions on the application for reconsideration. While I may not comment on all the evidence before me, I have reviewed that evidence and given it its due weight.

### **THE BASIC FACTS**

[4]. On or about December 26, 2006, Mr. Mann Sr. purchased a 2006 Ford Fusion for \$23,000 excluding taxes, levies and the extended warranty. Mr. Mann Sr. provided a \$6,000 down payment, and owed a further \$21,142.95 which was financed: see Exhibit 3, purchase agreement. Mr. Mann Sr. was accompanied by his son during this transaction and took the 2006 Fusion for a test drive before agreeing to its purchase.

[5]. On or about December 30, 2006, Mr. Mann Sr. went back to Ocean Park Ford and asked to return the 2006 Fusion as he had difficulty with its blind spots. Ocean Park initially agreed to take the 2006 Fusion in on trade and provide a credit towards the purchase of a 2006 Ford Focus station wagon. The additional balance owing would be \$2,000 plus the appropriate taxes. Mr. Mann Sr. apparently agreed to this: see Exhibit 37, purchase agreement. Mr. Mann Jr. was not with his father for this transaction.

[6]. Apparently on the same day, Mr. Mann Sr. decided he did not want the 2006 Focus station wagon and Ocean Park Ford apparently simply “tore up” that agreement as no transfer had occurred. Mr. Mann Sr. then executed a purchase agreement to purchase a 2007 Ford Focus. On one copy of the purchase agreement, with pricing noted in hand writing, Mr. Mann Sr. agreed to the purchase of the 2007 Focus for \$22,174.00 with a \$15,764.00 trade-in allowance for the 2006 Fusion he purchased four days prior: Exhibit 14 of the Exhibits. Mr. Mann Sr.’s total additional obligation would be \$6,500 after trade. The new purchase would also be financed. The handwritten agreement was typed up and re-executed with the purchase price of the 2007 Focus now recorded as \$28,174.00, an increase of \$6,000; but so too had the trade-in amount been increased by \$6,000 to \$21,674.00. The reason for this apparent discrepancy was to ensure Mr. Mann Sr. could still qualify to have this purchase financed and deal with a negative equity issue in his trade-in. Mr. Mann Jr. was also not with his father for this transaction.

### **REGISTRAR SMITH’S DETERMINATIONS**

[7]. The basic finding of fact and determination of Registrar Smith in this matter was that Ocean Park Ford committed an unconscionable act or practice contrary to section 9(1) of the BPCPA as Ocean Park Ford took advantage of Mr. George Mann Sr.’s trusting nature and his age (92 years) and his inability to understand a complex transaction. Registrar Smith ordered Ocean Park Ford to pay Mr. Mann’s estate \$6,500 as the amount he found went missing in this transaction. Registrar Smith also ordered Ocean Park Ford to pay an administrative penalty in the amount of \$2,000 and to reimburse the Motor Vehicle Sales Authority of B.C. (the “VSA”) for its investigation and hearing costs.

### **POSITION OF THE PARTIES**

#### **(a) Mr. Mann Jr.**

[8]. The basic position of Mr. Mann Jr., speaking for his father’s estate, is that if you add the \$6,000 down payment to the \$28,984.80 that was owed to Ford Canada Credit after his father passed away, that means Mr. Mann Sr. paid \$34,984.80 for the 2007 Focus. This, he says, is well above the asking price by other Ford dealers. Mr. Mann Jr. also inferred that the 2006 Fusion had been advertised with better rebates and incentives than those offered to Mr. Mann Sr. Mr. Mann Jr. says it is clear that Ocean Park Ford erred in this transaction in such a way that it deprived Mr.

Mann Sr. of the benefit of the \$6,000 down payment. Mr. Mann Jr.'s legal argument would be that the unjustifiable higher price for the 2007 Focus combined with the complexity of the transaction and his father's age and trusting nature combined to make this an unconscionable transaction. At the end of the hearing before me, Mr. Mann Jr. stressed he did not think Ocean Park Ford did anything intentionally, but that it had erred.

**(b) Ocean Park Ford**

[9]. Ocean Park Ford's contention is that Mr. Mann Sr. was told that Ocean Park Ford could not just unwind the deal on the 2006 Fusion because of issues regarding the rebates and the impact that had on its resale value relevant to new 2006 Fusions. Ocean Park Ford also discussed the problems of negative equity and how that affected the recording of the numbers on the 2007 Focus purchase agreement. Ocean Park Ford points to Exhibit 14 to show Mr. Mann Sr. was aware of this issue and he agreed that his total new obligation would be an additional \$6,500 on the 2007 Focus. Ocean Park Ford offered new evidence to show it did not profit some \$7,500 as contended by Mr. Mann Jr. and as found by Registrar Smith. Ocean Park Ford also provided new evidence to show what rebates were available at the time and that those were in fact credited to Mr. Mann Sr. on the 2006 Fusion. Finally, Ocean Park Ford showed that the \$6,000 down payment was credited to Mr. Mann on the first purchase which flowed through as part of that vehicle's residual trade-in value. In summary, Ocean Park Ford says it did not take advantage of Mr. Mann Sr., that he seemed aware and agreeable to the terms of the 2007 Focus purchase and the reasons why the first deal could not simply be unwound. Some of the new evidence led by Ocean Park Ford was accounting entries to show that it did not make the \$7,500 profit as indicated in Registrar Smith's Determinations.

**THE LAW**

[10]. Section 9(1) of the BPCPA prohibits a supplier of goods from committing an unconscionable act or practice during a consumer transaction. It is clear that Ocean Park Ford is a "supplier" and the sale of the two vehicles in question here were "consumer transactions" as those terms are defined by the BPCPA.

[11]. Section 9(2) of the BPCPA reverses the onus of proof such that Ocean Park Ford must show that their conduct was not unconscionable. In *Blackman v. Fedex Trade Networks Transport & Brokerage (Canada) Inc.* 2009 BCSC 201 (B.C. Supreme Court) at paragraph 101,

Madam Justice Garson noted this reverse onus provision requires Ocean Park Ford to provide evidence of the positive assertions it raises in its defense. The burden of proof for unconscionability remains the civil burden - on a balance of probabilities: *F.H v. McDougall* 2008 SCC 53 (Supreme Court of Canada).

[12]. Section 8 of the BPCPA states that I must look at the whole of the transaction and consider the factors set out in sub-section 8(3) of that Act. There is no statutory definition of an unconscionable act or practice. In *Kilroy v. O.K. Payday Loans* 2007 BCCA 231 (B.C. Court of Appeal) the Court stated this provision was an attempt to codify the common law rules on unconscionability applied in contract law. In *Blackman, supra*, Justice Garson noted the following from the common law had been applied to the BPCPA and its predecessor legislation:

[87] In *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 at 713, 54 W.W.R. 257, Davey J.A. explained that an unconscionable transaction is one in which there is an inequality in the positions of the parties, and substantial unfairness in the transaction:

...a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious [sic] use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable.

[13]. In *Bain v. Empire Life Insurance Co.* 2004 BCSC 1577 (B.C. Supreme Court) Mr. Justice Tysoe also cited *Morrison, supra*, and further noted at paragraph 72:

That single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded. (p. 177)

This test was recently cited by the B.C. Court of Appeal in *Ma v. MIV Therapeutics Inc.*, 2004 BCCA 483.

[14]. If an unconscionable act has been found to have occurred, section 10(1) of the BPCPA states that the transaction is not binding on the consumer, at the election of the consumer. Regarding this, Mr. Justice Tysoe in *Bain, supra*, cited approvingly the following caution:

[88] In *Miller v. Lavoie* (1966), 60 D.L.R. (2d) 495 (B.C.S.C.), Wilson C.J.S.C. made the following observation about predecessor legislation dealing with unconscionable transactions:

This Court exists for many purposes and one of these purposes is the protection of unsophisticated and defenceless persons against the exactions of conscienceless persons who seek to take advantage of them. The legislation provides one method of exercising that benevolent authority. But the Courts are not empowered to relieve a man of the burden of a contract he has made under no pressure and with his eyes open, merely because his contract is an act of folly. (p. 501)

## ANALYSIS

[15]. I turn to a consideration of the factors set out in Sub-section 8(3) of the BPCPA. I would note that Mr. Mann Jr. has conceded in the evidence that the first sale – 2006 Fusion - went well and that there is no allegation of wrong-doing regarding this transaction. For Mr. Mann Jr., what went wrong was the subsequent consumer transaction for the 2007 Focus, and how the \$6,000 down payment, and the trade-in amount, given for the 2006 Fusion were credited in the 2007 Focus transaction.

***(a) that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;***

[16]. There is no evidence that Ocean Park Ford subjected pressure on Mr. Mann Sr. to enter the purchase of the 2007 Focus. Mr. Mann Sr. sought out Ocean Park Ford for all these consumer transactions and chose the days in which to attend at the dealership. In his letter of May 5, 2007, Mr. Mann Sr. states he felt trapped and signed the deal because it was a Sunday and there were no managers around: Exhibit 23. This statement speaks of pressure internal to Mr. Mann Sr. and is not the type of external pressure from Ocean Park Ford contemplated by this sub-section. In *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 43 B.L.R. 29 at 35 (B.C. Supreme Court) McLachlin C.J.B.C (now Chief Justice of Canada); cited approvingly the following from *Solle v. Butcher* [1950] 1 K.B. 671:

The correct interpretation of that case [referring to the decision in *Bell v. Lever Brothers Ltd.*, [1932] A.C. 161], to my mind, is that, once a contract has been made, that is to say, once the parties whatever their innermost states of mind, had to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless and until it is set aside for failure of

some condition on which the existence of the contract depends, or for fraud, or on some equitable ground.[underlining is mine]

See also *Frolick v. Frolick* 2007 BCSC 84 (B.C. Supreme Court)

***(b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;***

[17]. The operative words in this sub-section are that Ocean Park Ford (the supplier) must have taken advantage of Mr. Mann Sr. (the consumer) due to one of the enumerated reasons or a reason related to the transaction.

[18]. The mere fact that Mr. Mann Sr. was 92 years of age is insufficient to say he was unable and incapable of understanding the consumer transaction. He was able to recognize that he had difficulty driving due to blind spots and returned the 2006 Fusion to obtain a different vehicle. The evidence is, and I accept as fact as it is not contested, that he understood the issue about 0% financing, leading him to reject the 2006 Focus station wagon. I also find that Mr. Mann Sr. understood the need to gross-up the price of the 2007 Focus and the trade-in, in order to obtain financing.

[19]. There is no evidence of mental infirmity. Persons are presumed to be mentally competent until proven otherwise; the onus of proof being on the person claiming the incompetency: Section 3 of the *Adult Guardianship Act* R.S.B.C. 1996 c. 6 and see *Holland v. Marshall* 2008 BCSC 333 (B.C. Supreme Court); leave to appeal dismissed, 2008 BCCA 456 (B.C. Court of Appeal).

[20]. There is no evidence suggesting Ocean Park Ford took advantage of Mr. Mann Sr. for any of the enumerated reasons or a reason related to the transaction: *Bain, supra*.

***(c) that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;***

[21]. Setting aside the \$6,000 artificial gross-up on the 2007 Focus, and the corresponding trade-in, the selling price of the 2007 Focus was \$22,174 before taxes, levies, and documentation fees. No evidence was put forth that this price grossly exceeded the total price that it could be obtained from another Ford dealership within the same marketplace – being Metro Vancouver. There is no

evidence at all that Ocean Park Ford asked a price greater than the going market rate. In fact, Ocean Park Ford's new evidence showed that the 2007 Focus's selling price was close to the price Ocean Park Ford had to pay Ford of Canada for the vehicle, netting it a profit of \$1406 for that vehicle. I will discuss how the \$22,174 increased to over \$28,000 below.

***(d) that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;***

[22]. This factor must be considered keeping in mind the guidance of the above noted case law on unconscionability. It would be wrong to simply consider Mr. Mann Sr. was 92 years of age and assume that he may not be able to pay in full because he may pass away. One must look at the whole of the transaction and consider that Mr. Mann Sr. agreed to a four-year term on the purchase of the 2006 Fusion and did so again on the 2007 Focus. Mr. Mann Jr. says they were fine with the first 2006 Fusion transaction, including the four-year financing term. The financing on both agreements had the same end date. I find nothing turns on this factor.

***(e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;***

[23]. This is truly the grounds which give rise to the controversy amongst the parties. Mr. Mann Jr. states that Ocean Park Ford did not give the full \$6,000 down payment credit to his father on the purchase of the 2007 Focus and required him to pay an additional \$6,500 even with the trade-in. These terms, he would argue, were harsh and in error on the part of Ocean Park Ford. I will deal with each in turn.

***(i) the \$6,000 down payment***

[24]. There is no argument that Mr. Mann Sr. was credited the \$6,000 down payment on the first purchase. When that money was exchanged for the 2006 Fusion, it lost its value as cash and was traded for a consumer good which depreciates in value and such value is determined at the time it is sold or traded-in, based on market conditions at that time of the sale or trade-in.

[25]. To illustrate, a person purchases a home from a developer for \$100,000. He puts down \$10,000 and then finances the rest of the purchase. He almost immediately changes his mind and turns around and sells the house (or asks the developer to take it in on trade) wanting to use that value towards the purchase of another house from the same developer. Due to market forces, the



value of the house has immediately depreciated to \$80,000. When he sells or trades-in the house, he gets either \$80,000 cash or an equivalent credit from the developer, based on the current market value. He does not get \$80,000 plus the \$10,000 initial down payment. The down payment was traded for the house and now forms part of the residual value of the home. One must also add to this, that the \$90,000 that was financed must be paid-off, leaving that person \$10,000 short to pay off the mortgage – negative equity.

[26]. The same holds true in this transaction; the \$6,000 down payment is intertwined with the residual value of the 2006 Fusion based on the market forces at the time it was sold or traded-in. That value was not sufficient to pay-off the lien, meaning there was negative equity in the 2006 Fusion. That negative equity had to be dealt with by incorporating it into the purchase financing of the 2007 Focus as will be discussed below. I do not find that Ocean Park Ford failed to apply the \$6,000 down payment towards the 2007 Focus purchase.

***(ii) paying \$6,500 more, even with the trade-in***

[27]. Part of the confusion in this matter is the proper characterization of the return of the 2006 Fusion. Mr. Mann Sr. did and Mr. Mann Jr. continues to speak of the loss of the \$6,000 down payment when Mr. Mann Sr. purchased the 2007 Focus. This indicates a belief that the 2006 Fusion was being returned for a refund. Ocean Park Ford maintains it never agreed to take back the 2006 Fusion and unwind the transaction. Ocean Park Ford's evidence is that doing so would mean the loss of the rebates, the ability to offer rebates to the next purchaser, and would mean losing money on the 2006 Fusion.

[28]. After reviewing the evidence, it is clear that at all times, Ocean Park Ford offered to take the 2006 Fusion only as a trade-in. This is clear when reviewing the documentary evidence such as the appraisal slip, and the two purchase agreements for the 2007 Focus. Mr. Mike Pridie explained how the 2006 Fusion was appraised and the market forces that were in play when the appraisal took place. Important to how the 2006 Fusion was appraised, is the effect rebates have on new and used cars.

[29]. First, if the 2006 Ford Fusion was returned, Ocean Park Ford would not be able to offer any of the rebates that were available for the new 2006 Fusions. Rebates were only available on new, never before registered, 2006 Fusions. Therefore, the ability to sell the 2006 Fusion with the \$2000 rebate and \$500 e-bonus was lost when it was sold to Mr. Mann Sr. If Ocean Park Ford

refunded the full price of the 2006 Fusion, it would also have refunded the price of the rebate it received from Ford Canada and which it gave to Mr. Mann Sr. on this deal.

[30]. Ocean Park Ford paid Ford Canada \$24,663 for the 2006 Fusion and sold it to Mr. Mann Sr. for \$23,000 (\$25,000 – \$2,000 rebate) and then the \$500 e-bonus was also subtracted so Ocean Park Ford really obtained \$22,500 from Mr. Mann Sr. – through financing: Exhibit 34. In order to profit on this sale, Ocean Park Ford relied on the rebate from Ford Canada. With internal costs for preparing the 2006 Fusion for delivery, Ocean Park Ford's documents show a profit of \$97.00 on the sale of the 2006 Fusion. I accept this evidence as it is not contested and the newly presented documents support this conclusion.

[31]. Second, Mr. Pridie noted that Ford of Canada was starting to offer a \$5,000 rebate on the new 2006 Ford Fusions being sold in the 2007 year, in order to move the old inventory. This means that a brand new 2006 Fusion which cost Ocean Park Ford \$24,663 to purchase could be reduced to as low as \$19,760, plus internal costs, to obtain the same \$97.00 profit as it did with Mr. Mann Sr. In order to make a used 2006 Ford Focus attractive enough to purchase over a new one, the price of the used vehicle would have to reflect a reasonable savings to a consumer. What is a reasonable savings depends on the supply and demand of the market place at the time of the sale. It would certainly have to be a price well below the \$22,500 as sold to Mr. Mann Sr.

[32]. By offering a \$5,000 rebate on new 2006 Fusions, Ford of Canada drove down the value of used 2006 Fusions regardless of mileage, quality or age. Mr. Pridie said that based on various factors, the 2006 Fusion was appraised at \$14,500: Exhibit 31. Ocean Park Ford credited Mr. Mann Sr. \$15,674 for the 2006 Fusion (setting aside the \$6,000 artificially inflated price to obtain financing). When it resold the 2006 Fusion, Ocean Park Ford made a profit of \$1,023: Exhibit 33. I accept this above evidence as it is supported by the new documentary evidence.

[33]. Based on the above evidence, I do not find that the terms of the agreement to purchase the 2007 Focus and the trade-in value offered by Ocean Park Ford for the 2006 Fusion can be characterized as harsh or adverse. I do not find Ocean Park Ford profited some \$7,500 on the sale, trade-in and resale of the 2006 Fusion as was initially believed.

***(f) a prescribed circumstance.***

[34]. There are currently no applicable prescribed circumstances.

**(g) Section 8(2) of the BPCPA – consideration of the whole consumer transaction**

[35]. Section 8(2) of the BPCPA states that I must also consider the whole consumer transaction and those circumstances that Ocean Park Ford knew or ought to have known. There is no legal wrong in selling a new vehicle to a 92-year-old person, and having it financed over four years. As stated both in the case law and from the factors set out in section 8(3) of the BPCPA, it is the taking advantage of that age which amounts to unconscionability. In reviewing all the circumstances, I have not noted any taking advantage of Mr. Mann Sr. for any reason due to his age or otherwise. The evidence suggests, and I accept, that Ocean Park Ford took steps to explain the transaction to Mr. Mann Sr. The mere fact that Mr. Mann Sr. was still confused is insufficient to say he was taken advantage of.

**(h) Mistake and Misunderstandings**

[36]. Under contract law, a written contract is a strong presumption of the intention of the parties to agree to its express terms. A party who wishes to have a contract “rectified” (judicially amended) or “rescinded” (judicially cancelled) has a high burden to show that the contract does not evidence the parties’ meeting of the minds: *Frolick v. Frolick* 2007 BCSC 84 (B.C. Supreme Court).

[37]. Where a person is confused about a material term or fact regarding the formation of the contract, that confusion alone is insufficient to have the contract set aside or amended. Justice Metzger in *Outwest Enterprises Limited v. Timms*, 2007 BCSC 560 (B.C. Supreme Court) stated:

[18] There is a difference between mistake and misunderstanding. The court must determine whether the agreement reflects a meeting of the minds. In *Frolick*, supra at para. 45, Smith J. writes:

The mere fact that one party may suffer from a misunderstanding as to a term of the agreement does not necessarily lead to the conclusion that a consensus was not achieved. The principle was stated in *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 (Q.B.) as follows:

If whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that the other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound.[underlining is mine]

[38]. In *May v. Dunster* 1996 CanLII 3453 (B.C. Supreme Court) Madam Justice Saunders succinctly stated it thusly:

[28] The law on commercial transactions has historically been firm. A party who entered a commercial transaction was bound by the terms of the contract, without regard for confusion of a party as to the import of its terms or appreciation of its consequences.

[39]. Where a mistake by one party or by both as to the essential terms of a contract or a mistaken presumption of essential facts has occurred, the courts may apply the remedies of rectification or rescission (because there was no meeting of the minds), and the facts will dictate the most appropriate remedy: *Frolick, supra*. As Registrar of Motor Dealers, my jurisdiction is confined to deceptive and unconscionable acts. If there has only been a “mistake” (confusion) regarding the essential terms or essential facts of a contract, I do not have jurisdiction to issue a remedy and the parties would need to seek the assistance of the courts. For a mistake (or confusion) to become an unconscionable act, there must be evidence that Ocean Park Ford knew of Mr. Mann Sr.’s mistake, took advantage of that mistake as well as proof of substantial unfairness in the transaction: *Bain, Frolick, May, and Timms, supra*.

[40]. Ocean Park Ford provided evidence that showed Mr. Mann Sr. was appraised of the \$6,500 additional cost for the 2007 Focus. Ocean Park Ford provided evidence that Mr. Mann Sr. was aware of the 0% financing option and rejected the deal on the 2006 Ford Focus station wagon because he could not get that 0% financing. Ocean Park Ford also provided evidence that Mr. Mann Sr. and Mr. Mann Jr. understood why the retail price and the trade-in price were grossed-up in order to deal with the negative equity issue in the 2006 Fusion trade-in. The circumstances and the evidence do not support a finding that Ocean Park Ford was aware of Mr. Mann Sr.’s confusion and took advantage of it, as was found in the *May* decision, giving rise to an unconscionable act.

[41]. At the core of Registrar Smith’s decision and Mr. Mann Jr.’s position, is that it appears Mr. Mann Sr. paid some \$7,500 more for the 2007 Focus. Based on the evidence before Registrar Smith, he found this to be unconscionable. In reviewing the new evidence presented by Ocean Park Ford, it is clear that their combined profit on the sale of the 2006 Fusion and 2007 Focus was about \$1,503: Exhibits 33, 34 and 35, and not some \$7,500 as previously thought. There are other considerations besides profit within the \$7,500, such as the depreciation of the 2006 Fusion

and its negative equity as explained above. On all the evidence, I cannot say an unconscionable act occurred.

### **SOME ADDITIONAL COMMENTS**

#### ***(a) \$22,174 becoming \$28,984***

[42]. I believe it important to address additional concerns raised by Mr. Mann Jr. In his written submissions, Mr. Mann Jr. says his father spent some \$34,984.80 on the 2007 Focus. He arrives at this number by combining the \$6,000 down payment on the 2006 Fusion with the \$28,984.80 his father owed on the 2007 Focus to Ford Canada Credit. As noted above, there was no \$6,000 down payment on the 2007 Focus. The \$6,000 down payment was converted to a depreciating good – the 2006 Fusion – and was part of its residual value at the time of being traded-in.

[43]. The price of \$28,984.80 must be broken down into its varying parts. Important for this discussion is that Mr. Mann Sr. had to pay \$21,142.80 to clear the lien for the 2006 Fusion. Within this total amount owing were taxes, levies and the extended warranty purchased for the 2006 Fusion. As there was no refund on the 2006 Fusion, there was no refund on the taxes paid or the extended warranty, which was transferred to the 2007 Focus. As already explained above, Mr. Mann Sr. obtained a \$15,674 trade-in credit for the 2006 Fusion. This means Mr. Mann Sr. had to roll into the 2007 Focus's financing, an additional \$5,468.80 to pay off the lien<sup>1</sup>. If Mr. Mann Sr. did not have to pay off any lien, then the amount that would have been owing to Ford Canada Credit for the 2007 Fusion would have been about \$23,516 (\$28,984.80 - \$5,468.80).

#### ***(b) Manufacturer's Suggested Retail Price***

[44]. At the hearing, Mr. Mann Jr. was also focused on the Manufacturer's Suggested Retail Price (MSRP) and wanted to compare the MSRP for a 2007 Focus with the \$28,984.80 figure and the \$34,984.80 he believed was paid. This would be an inaccurate comparison for several reasons. First a dealer does not have to sell at MSRP. Second, the MSRP is the suggested price for purchasing one vehicle, with taxes, levies or extended warranties being extra. Third, the MSRP does not contemplate a motor dealer having to include a lien pay-out on a trade-in vehicle within the new car's financing. It is for this reason that comparing MSRP with the final price is incorrect. The price for the 2007 Focus was clearly set out to Mr. Mann Sr. on Exhibit 14, which

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<sup>1</sup> (\$21,142.80 [amount owing on the 2006 Fusion] - \$15,674 [amount Mr. Mann Sr. received for the 2006 Fusion])

Mr. Mann Sr. signed. - \$22,174 before taxes. The cost of the lien pay-out and taxes inflated that price.

***(c) Mr. Mann Sr. purchasing a vehicle while alone***

[45]. Mr. Mann Jr. also emphasizes in his written submission that he was not present when his father purchased the 2007 Focus. In *Kinninmont v. Russell* 2006 BCPC 0622 (B.C. Provincial Court), Mr. Kinninmont complained that Ms. Russell, a notary public, was negligent in notarizing Mr. Kinninmont's elderly mother's power of attorney; donating it to Mr. Kinninmont's sister. Mr. Kinninmont claimed his mother was incapable of donating the power of attorney. Mr. Kinninmont also asserted that his right to be informed of his mother's affairs was breached. Judge Bagnall stated at paragraph 18:

[18] The Claimant's view of the granting of the Power of Attorney by his mother to his sister, notarized by the Defendant, is that thereby his "right" to be consulted about his mother's affairs was wrongfully taken from him. He referred to this "right" as a "key" in his final submissions. The law does not recognize any such "right" or "key."

[46]. Ocean Park Ford was not required to hold-off on this transaction simply because Mr. Mann Jr. was not present for the purchase of the 2007 Focus, even though he was there for the first transaction. Again, Mr. Mann Sr. is presumed capable of entering into these transactions, the onus being on his estate to prove otherwise: *Holland v. Marshall*, supra.

***(d) Negative Equity***

[47]. I would note that the gross-up of the trade-in and the 2007 Focus in order to secure financing is not necessarily unconscionable or misleading as between the parties so long as they all understand why and agree to it. That was the case here. It may, however, be misleading to the lending institute depending on the facts of the case: see the judicial comment of Judge Ingram in *Crosstown Motors (1982) Ltd. v. Motuz* 2005 ABPC 82 (Alta. Prov. Court), applying Alberta's *Fair Trading Act*.

***(e) Right to Return Goods***

[48]. Finally, it should also be noted that absent a statutory provision or some wrong-doing on the part of a supplier (Ocean Park Ford) there is generally no right to return a purchased product for a full refund. Examples of when statute requires a supplier to take back a product and refund the full purchase price are: (i) distance sales contracts – where the legislated requirements have

been met: Sections 46 to 51 of the BPCPA; (ii) a good yet to be produced and when delivered and inspected, it does not conform to the contract: Section 38 of the *Sale of Goods Act* R.S.B.C. 1996 c. 410; or (iii) a motor vehicle lease where a consumer cancels the lease within the legislated cooling off period: Section 31 of the *Motor Dealer Act Regulation* B.C. Reg. 447/78. None of these situations, or like situations, apply in this case. Therefore, whether Ocean Park Ford took back the 2006 Fusion, and at what price, was within its discretion.

## CONCLUSION

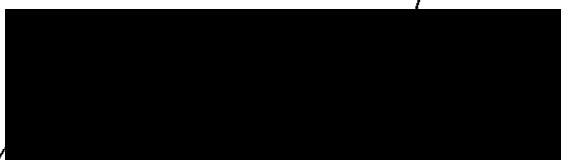
[49]. A consumer's misunderstanding or confusion about: a trade-in versus a return; comparing MSRP pricing with the actual after tax and additions (extended warranty) cost of a vehicle; the effect of rebates on the value of a used car; and negative equity issues in-and-of-themselves do not amount to an unconscionable act. They may only give rise to a "mistake" as that term is known in contract law. What must be shown is that Ocean Park Ford knew of Mr. Mann Sr.'s confusion and took advantage of that confusion resulting in a substantially unfair bargain in Ocean Park Ford's favour. Ocean Park Ford has provided new evidence in support of its positive assertions that it did not take advantage of Mr. Mann Sr. Ocean Park Ford provided new evidence to show it did not make a grossly high profit, which would make these consumer transactions substantially unfair, as originally found by Registrar Ken Smith.

[50]. In light of the new evidence, in conjunction with the previous evidence, my findings of fact here, and applying them to the law; Ocean Park Ford has met its burden and shown that an unconscionable act did not occur in these consumer transactions. In accordance with section 181(1)(a) of the BPCPA, I therefore find it necessary to cancel the Compliance Order dated the 14<sup>th</sup> day of July 2008 and the Notice of Penalty dated the 16<sup>th</sup> day of July 2008, issued by Registrar Ken Smith against Ocean Park Ford.

[51]. The complaint of Mr. Mann Sr.'s Estate is dismissed.

[52]. In accordance with section 182(6) of the BPCPA, this decision may not be reconsidered. This decision is reviewable upon application to the B.C. Supreme Court pursuant to the *Judicial Review Procedure Act* R.S.B.C. 1996 c. 241.

Dated: May 19, 2009

  
Ian Christman B.A., LL.B.