COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Argo Mezzanine Financing No. 1 Ltd. v. Plaza 88 Development Ltd.,* 2025 BCCA 73

Date: 20250312
Docket: CA49569

Between:

Argo Mezzanine Financing No. 1 Ltd.

Appellant
(Plaintiff)

And

Plaza 88 Development Ltd., Michael Degelder, Patricia Degelder, Degelder Project Management Ltd., Degelder Construction Co. (2010) B.C. Ltd., Philip Louis, Julia Fu, KBK No. 101 Ventures Ltd., Charter Pacific Developments (Azure) Ltd. and PMD Developments Ltd.

Respondents
(Defendants)

Before: The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Abrioux
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated December 4, 2023 (*Argo Mezzanine Financing No. 1 Ltd. v. Plaza 88 Developments Ltd.*, 2023 BCSC 2134, Vancouver Docket S201596).

Counsel for the Appellant:	J.K. McEwan, K.C. A.I.M. Dhawan
Counsel for the Respondents:	D.P. Church, K.C. E. Dolinsky
Place and Date of Hearing:	Vancouver, British Columbia November 18, 2024
Place and Date of Judgment:	Vancouver, British Columbia March 12, 2025

Written Reasons by:
The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant and the respondent entered into a loan transaction relating to a real estate development. The appellant submits that the summary trial judge made extricable errors of law in concluding that, under the terms of the agreements between the parties, the appellant was not entitled to a share of the savings the respondent realised when it repaid the loan, which savings resulted from currency fluctuations. Held: the appeal is dismissed. The issues on appeal raise questions of mixed fact and law, not questions of law. Regardless of the standard of review to be applied, the judge's decision should be upheld, as it was substantively correct.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

[1] This appeal concerns the interpretation of certain terms in contractual instruments entered into between a borrower and lender. The loan and the instruments in question pertain to a construction project in New Westminster, British Columbia (the "Project"). The dispute between the parties centers around whether the lender, the appellant Argo Mezzanine Financing No. 1 Ltd. ("Argo"), is entitled to certain savings the borrower, the respondent Plaza 88 Development Ltd. ("Plaza"), realized due to currency fluctuations in the time between when the loan was advanced and repaid (the Currency Exchange Savings, or "CES"). The value of the CES is approximately $10,000,000 CAD and the amount at issue between the parties is approximately $1,000,000 CAD.

[2] Specifically, the dispute concerns whether Argo is entitled to a portion of the CES under the parties' Participation Agreement, which grants Argo a right to a 10% share of the Project's net distributable capital ("NDC"). Argo and Plaza disagree as to whether the CES forms part of the Project's NDC.

[3] This case involves four related instruments—the Participation Agreement, a Commitment Letter, and First and Second Amendments to the Commitment Letter. In the reasons that follow, I will refer to these agreements collectively as the "Agreements", where necessary.

[4] Argo brought a summary trial application in the Supreme Court, where it sought a declaratory judgment and damages for breach of contract, based on Plaza's treatment of the CES. The central question to be decided was whether the CES should have been included in the calculation of the NDC.

[5] In reasons for judgement indexed as 2023 BCSC 2134, the judge concluded that, under the terms of the relevant contractual instruments, the CES did not form part of the NDC. In this Court, Argo alleges the judge erred:

a) in misapprehending or conflating certain terms of the Participation Agreement with the terms of another instrument, the Commitment Letter; and

b) in interpreting the Participation Agreement and the Commitment Letter in a way that rendered the language of the Participation Agreement meaningless.

[6] For the reasons that follow, I would dismiss the appeal.

Background and Procedural History

[7] The facts are uncontroversial. In 2006, Argo and Plaza entered into a loan transaction (the "Loan") whereby Plaza borrowed $40 million from Argo to finance the construction of a mixed residential and commercial development in New Westminster, British Columbia (the "Project"). The Project was completed in 2019 and consists of three residential strata towers, a commercial development, and a rental tower.

[8] The Project is a joint venture between Charter Pacific Developments (Azure) Ltd. and PMD Developments Ltd., who jointly incorporated Plaza for the purposes of the Project. Argo was to provide financing for the Project.

[9] As I will describe, Plaza had the option to repay the Loan in either Korean Won or Canadian dollars. The Loan, which was advanced in two tranches, was repaid in December 2009, with Plaza exercising its option to repay in Won. The

funds Argo ultimately received were in Korean Won, in an amount equal to $40 million CAD given the exchange rate at the time the funds were advanced to Plaza.

[10] Between the date of the two loan advances and the repayment, the Canadian dollar appreciated significantly in relation to the Korean Won. This meant that Plaza saved $10,073,544 CAD, being the amount of the CES when it repaid the loan: at para. 23.

The Commitment Letter, Amendments, and Participation Agreement

[11] Four contractual instruments govern Argo and Plaza's legal relationship *vis-à-vis* the Loan, the Project, and the NDC. Argo's entitlement to a share of the NDC was particularized in the Participation Agreement, which the parties agreed to enter into in an earlier Commitment Letter. It is of assistance to review them in chronological order.

[12] Argo and Plaza entered into the Commitment Letter on September 1, 2006: at para. 25. The relevant provisions, as identified by the judge, are:

> **5. SECURITY**
>
> The Loan shall be secured by the following documents (collectively the "Security") completed and, where necessary, registered in a form and manner satisfactory to the Lender's solicitors:
>
> …
>
> 5.12 A Participation Rights Agreement detailing the Lender's right to participate in the Net Distributable Cash from the Project, as more particularly set out in paragraphs 13 and 13A hereof; and
>
> …
>
> **10. PLACEMENT FEE**
>
> A non-refundable placement fee in the amount of $400,000.00 shall be paid by the Borrower to the Lender. This fee will be deducted from the proceeds of the First Advance.
>
> …
>
> **12. CURRENCY**
>
> Notwithstanding that the Principal Amount of the Loan shall be advanced in Canadian Dollars, the Borrower shall repay the Principal Amount of the Loan to the Lender in Won, the legal tender of the Republic of Korea in a cumulative amount calculated at the exchange rate published by the Korea

> Central Bank as the rate at which a party can purchase Canadian dollars in the amounts of the First Advance and Second Advance as at the respective dates of the First Advance and Second Advance. Any benefit or loss resulting from fluctuations in the currency exchange rate between the dates of the First Advance and the Second Advance and the date of repayment thereof shall be to the credit of, or borne by, the Borrower.
>
> **13. PARTICIPATION RIGHTS**
>
> 13.1 In addition to all other payments due to the Lender in connection with the Loan, the Lender shall be entitled to receive 10% of the Net Distributable Cash from the Project (the "Lender's Share"), as and when disbursed. For the purposes of this paragraph, "Net Distributable Cash from the Project" means the gross revenues from the Project less, without duplication, the total of all actual costs incurred for the Project identified as a cost category in the Project Budget delivered by the Borrower to the Lender pursuant to section 15.3 hereof, all construction and land acquisition costs, the Placement Fee described in paragraph 10, the Administration Fee described in paragraph 11, and the development fees described in paragraph 14.10, all other non-construction costs of the Project including the cost of any audit which may be requested by the Lender pursuant to paragraph 13.2 hereof, the amount repaid on all loans for the Project and interest thereon (including without limitation, all construction loans, this Loan, third party investor financing and loans advanced by PMD Developments Ltd. ("PMD") and Charter Pacific Developments (Azure) Ltd. ("Charter") which have been advanced in respect of the Project) and payment to Charter and PMD of the land value equity of $38,365,500.00 (collectively the "Deducted Costs") …
>
> [Emphasis added.]

[13] To recap, under the Commitment Letter, the Loan was to be advanced in Canadian dollars. However, it was to be repaid in Korean Won. The amount to be repaid was to be calculated based on the exchange rate published by the Korea Central Bank as of the respective dates of the two loan disbursements. The parties agreed that the risk or benefit of any exchange rate fluctuations between the disbursements and the date of repayment would lie with Plaza. The parties also agreed that they would execute a Participation Agreement whereby Argo would receive 10% of the Project's NDC, which they stipulated meant "… the gross revenues from the Project less …" certain costs, which costs included "… the

amount repaid on all loans…including…this Loan …" (referring to the $40 million CAD advanced by Argo).

[14] Approximately six weeks after entering into the Commitment Letter, the parties amended it (the "First Amendment"): at para. 27. The First Amendment altered ss. 12–13 of the Commitment Letter:

> 6. Paragraph 12 of the Commitment Letter will be amended by adding the following sentence:
>
> *a. "The respective principal amounts (each, the "Principal Amount") of the First Advance and the Second Advance, that the Borrower shall repay to the Lender hereunder, shall be the amount of the Canadian Dollar equivalent to the Won Principal Amount (as defined below), calculated by reference to the buying rate in Canadian Dollars of the Won Principal Amount as quoted by National for its best commercial clients at the opening of business [two (2)] Business Days prior to the date of any repayment which buying rate shall be confirmed by National to the Borrower in writing. The Borrower shall be advised by letter from the bank which effects the conversion of the amount ("Won Principal Amount") in Won (the legal tender of the Republic of Korea) paid by the Lender for purchases of Canadian Dollars on each remittance of the First Advance and Second Advance within [three (3)] Business Days after the remittance of each advance."*
>
> 7. Paragraph 13.1 of the Commitment Letter is amended by deleting the figure "$38,365,500.00" in the fifth line from the bottom of the paragraph and replacing it with the figure "$22,064,250.00".
>
> [Underlined emphasis added.]

[15] The First Amendment made two significant alterations to the Commitment Letter, and thus to the parties' contractual relationship:

> a) The Loan would now be repaid in Canadian dollars, in the Canadian dollar equivalent of the Won Principal Amount; and
>
> b) The amount repayable would now be calculated based on the exchange rate two days prior to repayment, rather than, as per the original terms of the Commitment Letter, as of the date of the loan disbursements.

[16] Later that day, the parties amended the Commitment Letter a second time (the "Second Amendment"). The Second Amendment provided:

> Notwithstanding the terms and conditions set out in paragraph 12 of the Commitment Letter dated September 1, 2006 made between Argo Realty Advisors Inc. (the "Lender") and Plaza 88 Developments Ltd. (the "Borrower") and those other parties who or which are signatories thereto as covenantors (the "Covenantors") as amended by an amendment letter dated October 18, 2006 (the "Amendment"), between the Lender, the Borrower and 0375166 B.C. Ltd. as a further borrower (collectively that company with the Borrower are hereinafter called the "Extended Borrower"), the Covenantors and Argo Mezzanine Financing No. 1 Ltd. (the "New Lender"), as assignee of the Lender, the Lender and the New Lender covenant and agree for and in favour of the Extended Borrower and the Covenantors that the Extended Borrower shall have the option, to be exercised by the Extended Borrower in its sole and unfettered discretion by written notice to the New Lender (the "Payment Option Notice") to repay the Won Principal Amount in either Korean Won or the Canadian Dollar equivalent thereof as determined pursuant to the provisions of paragraph 12 of the Commitment Letter as amended by the Amendment which Payment Option Notice shall be given on the earlier of:
>
> …
>
> This letter of undertaking shall supersede the provisions of paragraph 12 of the Commitment Letter as amended by the Amendment as it relates to the currency in which the Won Principal Amount is to be repaid and any and all other documents, agreements and paper or electronic writings, registered or not, currently or hereafter signed by any of the Borrower, the Extended Borrower, the Covenantors, the Lender or the New Lender which repeat, reflect, arise from or contain terms relating to the terms of that paragraph 12 relating to the currency of repayment of the Won Principal Amount.
>
> …
>
> [Emphasis added.]

[17] As the judge observed, the Second Amendment thus gave Plaza the option, at its sole and unfettered discretion, to repay the Loan in either Canadian dollars or Korean Won. Without making any observations as to its purpose, the Second Amendment does appear to have resolved a conflict between the First Amendment and the original Commitment Letter, as the two instruments otherwise would have required Plaza to repay the loan in *both* Korean Won and Canadian dollars: at para. 58.

[18] The final agreement of relevance is the Participation Agreement itself. The parties had already set out the Participation Agreement's general terms in the Commitment Letter. In particular, the Commitment Letter provided that Argo was entitled to 10% of the NDC from the project, meaning "… the gross revenues from the Project less …" certain amounts, including the amount repaid on the Loan. The Participation Agreement further provided:

> **1. PARTICIPATION RIGHTS**
>
> **1.1** The Developer shall pay to Argo a sum equal to 10% of the Net Distributable Cash from the Project. For the purposes of this Agreement, "Net Distributable Cash from the Project" means the gross revenues generated from the Project, directly or indirectly, less, without duplication, the total of:
>
> (a) all actual Project costs incurred by the Developer identified as a cost category in the Project Budget;
>
> (b) all actual construction and Land acquisition costs;
>
> (c) the Placement Fee;
>
> (d) the Administration Fee;
>
> (e) the management fees, development fees and commissions described in paragraph 14.10 of the Commitment Letter;
>
> (f) all other reasonable non-construction costs of the Project, including:
>
> (i) the costs of any audit which may be requested by Argo pursuant to paragraph 1.4 hereof,
>
> (ii) the amount repaid on all loans for the Project and interest thereon (including without limitation, all construction loans, the Loan, third party investor financing and loans advanced by PMD and Charter in respect of the Project), and
>
> (iii) payment to Charter and PMD of the land value equity of $22,064,500.00.
>
> (collectively, the "Deduced Costs").
>
> …
>
> [Emphasis added.]

[19] The Participation Agreement added the modifier "directly or indirectly" to the description of the NDC. It also provided that "… the amount repaid on all loans for the Project …", including the Loan, would be deducted from the NDC.

[20] According to the Participation Agreement and Commitment Letter, the NDC—and so Argo's ultimate return—was inversely proportional to the amount of deductible costs. This meant that if the "amount repaid on…the Loan" was higher, Argo's ultimate return would be diminished, because the value of the NDC would be diminished, given that the amount of deductible costs would be increased. If the amount repaid on the Loan was lower, Argo would receive more. Similarly, under the terms of the Participation Agreement and Commitment Letter, the total value of Argo's share in the NDC would also fluctuate with the magnitude of the "… gross revenues generated from the Project, directly or indirectly …". If the CES is to be included in these revenues, then the value of Argo's share would be increased.

The trial reasons for judgment

[21] Justice Shergill found that the matter was suitable to proceed by way of summary trial and neither party challenges that finding in this Court.

[22] After summarizing the factual background and the contractual instruments, as well as setting out why the matter was suitable for summary determination (at paras. 1–33), the judge turned to the legal framework governing contractual interpretation. Her starting point was the Supreme Court of Canada's decision in *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53, as recently summarized in *Canaccord Genuity Corp. v. Reservoir Minerals Inc.,* 2019 BCCA 278 at para. 19 [*Canaccord*]. Under this approach, contractual interpretation is fundamentally concerned with determining the parties' objective intent, and relatedly, the scope of their understanding: at para. 34, citing *Canaccord* at para. 47. Contracts should be read as a whole, consistent with the surrounding circumstances reasonably known by the parties at the time of contract formation, and in a way that gives the parties' words their ordinary and grammatical meaning, insofar as this is consistent with the overall factual matrix: at para. 34, citing *Canaccord* at paras. 47–48. While the factual matrix is an essential interpretive aide, such considerations "… must never be allowed to overwhelm …" the words the parties actually use in their agreement; where a contract is in writing, interpretation should be grounded in the text, read as a whole: at para. 34, *Canaccord* at para. 19, *Sattva* at para. 57.

[23] At para. 35, the judge also summarized the following principles, also affirmed by this Court in *Canaccord,* which were set out in *RBC Dominion Securities Inc. v. Crew Gold Corporation,* 2016 ONSC 5529 at para. 52, aff'd 2017 ONCA 648:

> (1) When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said.
>
> (2) The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective.
>
> (3) In interpreting the contract, the court may have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties.
>
> (4) The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity.
>
> (5) If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity.
>
> (6) While the factual matrix can be used to clarify the intention of the parties, it cannot be used to contradict that intention or create an ambiguity where one did not previously exist.

[24] Having set out the governing legal framework, the judge considered whether the CES should be excluded from the calculation of the NDC, deciding that it should be. In her view, the Commitment Letter clearly assigned any risk or *benefit* of exchange rate fluctuations to Plaza, and the subsequent contractual instruments, including the Participation Agreement, did not abrogate this intent.

[25] She began her analysis by referring to clause 12 of the Commitment Letter, whereby Argo and Plaza agreed that Plaza would assume the risk of any loss or benefit from currency fluctuations: at para. 38. She then noted that while clause 13.1 expressly includes the Loan as one of the costs incurred for the Project (which could be deducted when calculating the NDC), the definition of NDC contained therein did not make any specific reference to including gains or losses due to currency fluctuations when calculating the Project's gross revenue: at paras. 38–40.

[26] The judge noted Argo's argument that "gross revenues", especially read in light of the Participation Agreement, is a broad term that ought to be read as including the Currency Exchange Savings: at para. 41. However, she observed that the Participation Agreement largely incorporated the language from the Commitment Letter, except for the insertion of the words "generated" and "directly or indirectly": at para. 42. Argo said that those words were intended to capture the Currency Exchange Savings, but the judge did not accede to this submission. She stated that where large sums are borrowed and different currencies implicated, "[i]t is a common commercial practice for contracting parties to turn their minds to … currency fluctuations …": at para. 45. Furthermore, as she observed, the parties *did* address the question of currency fluctuations, that is, "… they decided that Plaza would bear the risk or reap the rewards", and when they revisited the Commitment Letter in the First and Second Amendments, they left that provision in place: at para. 45. She concluded, stating:

> [46] The parties' decision to not mention currency exchange fluctuations in the calculation of the NDC can only be considered to be intentional. The close physical proximity between Clauses 12 and 13.1 removes any concern that the parties were not alert to the implications of not specifically mentioning currency fluctuations when addressing how the NDC would be calculated.
>
> [Emphasis added.]

[27] The judge further noted that the phrase "directly or indirectly" in relation to the concept of gross revenues was, in her words, tempered by the phrase "generated from the Project": at para. 49. She observed that "revenue" was not defined in any of the Agreements, but considered the *Encyclopedia Britannica's* definition of the word—"the income that a firm receives from the sale of a good or service to its customers"—to be of assistance: at para. 50, citing "revenue", *Encyclopedia Britannica, Inc.* online edition: 2023. She then noted that "Project" was defined in both the Commitment Letter and the Participation Agreement as consisting of the development and construction of up to four residential towers and retail space on specific land. "In my view", she wrote, "… it is the direct or indirect revenue 'generated from' this development and construction activity that is captured by the NDC definition": at para. 51. The Currency Exchange Savings fell outside the scope

of the Project, which concerned the development and construction of buildings on the lands: at para. 52.

[28] Finally, the judge considered the risk allocation set out in clause 12 of the Commitment Letter. She concluded that if the Currency Exchange Savings were included in the NDC, then the risk allocation that the parties agreed to would be "rendered meaningless": at para. 54. Argo's proposed reading, in her view, would have made the parties' agreement internally contradictory, with Plaza bearing *all* risk of loss or benefit from currency fluctuations, and simultaneously, with Argo being entitled to *share* in any such benefits. In the judge's view, to accede to Argo's argument would be to "… violate the principle that the court is to construe the contract as a whole in a 'manner that gives meaning to all its terms' …": at para. 55, citing *Canaccord* at para. 20.

[29] The judge observed that her interpretation was consistent with the other contractual documents setting out the parties' contractual relationship: at para. 56. In her view, the two subsequent Amendments to the Commitment Letter were limited in their scope: they did not supersede or eliminate the Commitment Letter's original distribution of risk: at paras. 57–64.

On Appeal

[30] There are essentially two issues in this appeal:

a) the standard of review to be applied to the judge's decision; and

b) whether the judge erred in determining that the CES did not form part of the NDC.

Positions of the Parties

[31] Argo submits that the judge erred in finding that the Participation Agreement did not require that the Currency Exchange Savings be included in the NDC. Specifically, it alleges that she erred by:

a) beginning her analysis with the terms of the Commitment Letter, rather than the Participation Agreement;

b) misapprehending or conflating the purpose of article 12 of the Commitment Letter and the purpose of article 1.1 of the Participation Agreement, resulting in the erroneous conclusion that accounting for the Currency Exchange Savings in the NDC would deprive Plaza of the benefit of currency fluctuations and render article 12 “meaningless”;

c) deciding that there was only one “logical way” to reconcile article 12 of the Commitment Letter with the terms of the Participation Agreement, which caused her to find that the parties specifically intended to exclude the Currency Exchange Savings from the calculation of the NDC;

d) relying on a dictionary definition to interpret “gross revenues” in article 1.1 of the Participation Agreement as excluding the Currency Exchange Savings and failing to interpret the words used by the parties in the context of their agreements; and

e) in doing so, interpreting the agreements in a way that implicitly rendered meaningless the language used by the parties in defining the Deducted Costs in article 1.1 of the Participation Agreement (i.e., as “costs of the Project” that were actually paid), thereby failing to give meaning to all the terms of the Participation Agreement.

[32] Plaza submits that the judge made no reviewable error and that to the extent that Argo’s submissions are based on different arguments than those that were actually put to the judge on the summary trial application, they are not a proper basis for an appeal.

[33] I will deal with the parties’ submissions in greater detail below.

Issue #1: What is the appropriate standard of review?

[34] The parties disagree as to the standard of review that applies on this appeal. Argo submits that the proper standard of review is correctness, as the alleged errors raise extricable questions of law, while Plaza submits that the decision should be upheld absent a palpable and overriding error.

[35] According to Argo, the extricable question of law at issue relates to its argument that rather than grounding her analysis in the language of the Participation Agreement, the judge improperly relied on surrounding circumstances, including the Commitment Letter, to inform her conclusions. Argo says this is contrary to the proper interpretative framework identified in *Sattva* and *Resolute FP Canada Inc. v. Ontario (Attorney General),* 2019 SCC 60 [*Resolute*], and thus amounts to an error of law.

[36] The issue before the judge was one of contractual interpretation. In *Sattva*, the Supreme Court of Canada held that because contractual interpretation involves the inherently fact-specific exercise of ascertaining the parties' objective intent, such issues will generally raise questions of mixed fact and law, reviewable on a standard of palpable and overriding error: at para. 50; see also *Housen v. Nikolaisen,* 2002 SCC 33 at paras. 27, 36 [*Housen*].

[37] Writing for the majority in *Sattva,* Rothstein J. observed that "[t]he purpose of the distinction between questions of law and those of mixed fact and law …" supports the conclusion that issues of contractual interpretation are, generally speaking, questions of mixed fact and law. In his view, the distinction reflects the differing purposes of appellate courts and courts of first instance: appellate courts are responsible, among other things, for ensuring "… the consistency of the law, rather than … providing a new forum for parties to continue their private litigation": at para. 51. As such, "precedential value" (or the issues' degree of generality) is a central determinant of whether an issue of contractual interpretation raises a question of law or a question of mixed fact and law: at para. 51, citing

Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748, 1997 CanLII 385 at para. 37.

[38] For this reason, several post-*Sattva* decisions, including several from this Court and the Supreme Court of Canada, have held that the interpretation of standard form commercial contracts is a question of law: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.,* 2016 SCC 37 [*Ledcor*]; *Vallieres v. Vozniak,* 2014 ABCA 290; and *Precision Plating Ltd. v. Axa Pacific Insurance Company,* 2015 BCCA 277.

[39] While "… courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation", such questions may arise, including where a judge has applied an incorrect principle, failed to consider a required element of a legal test, or failed to consider a relevant factor: *Sattva* at paras. 53–54, *Ledcor* at para. 24, and *Richmont Mines Inc. v. Teck Resources Limited,* 2018 BCCA 452 at para. 69. This Court has found extricable questions of law surrounding contractual interpretation in several cases, including where the question was whether there is a free-standing contractual obligation of good faith, whether a fact-finder failed to consider the principles governing the implication of contractual terms, and whether subsequent conduct can generate contractual ambiguity when the finder of fact considered the wording of the agreement to be clear: respectively, *Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd.,* 2016 BCCA 393 at paras. 2–4; *JEL Investments Ltd. v. Boxer Capital Corporation*, 2011 BCCA 142 at para. 27; and *Wade v. Duck*, 2018 BCCA 176 at para. 32.

[40] An extricable question of law has been described as one about "… what the correct legal test is …": *Teal Cedar Products Ltd. v. British Columbia,* 2017 SCC 32 at para. 43 [*Teal Cedar*]. Conversely, mixed questions involve the *application* of a legal standard to a set of facts: *Teal Cedar* at para. 43. Since questions of mixed fact and law necessarily involve legal standards, courts should "… exercise caution in identifying extricable questions of law …", a principle that is also consistent with

the deference that appellate courts generally ought to apply regarding findings of fact: *Teal Cedar* at para. 45.

[41] Argo submits that the judge made extricable errors of law in failing to apply the principles of contractual interpretation, failing to interpret the words used by the parties in the context of the Participation Agreement and the surrounding circumstances, and in particular, in relying on a dictionary definition of "revenue" in interpreting the Participation Agreement. I would not accede to this argument. In my view, the issues on appeal do not raise extricable questions of law.

[42] Caution should be exercised when identifying extricable questions of law. The essence of Argo's challenges to the judge's conclusions appears to relate to how the judge applied the relevant principles to the facts. In my view, Argo has not identified a clearly material principle of contractual interpretation that the judge did not refer to in her reasons and has not identified any error in the judge's review of the applicable principles, which principles she considered in applying the law to the facts. As triers of fact, trial judges enjoy significant deference in their assessments of a contract's factual matrix and in their conclusions about how the factual matrix should be understood in light of the principles of contractual interpretation.

[43] As to the judge's use of a dictionary definition as an interpretive aide, as stated in Geoff R. Hall, *Canadian Contractual Interpretation Law* (Third Edition) (Lexis Nexus, 2016) at 112 [*Canadian Contractual Interpretation*]:

> When interpreting a contract, a court may use dictionaries to assist in determining the meaning of disputed words. A dictionary definition…will usually be adopted unless the overall context of the contract demonstrates that the parties have adopted their "own dictionary" to ascribe a contract specific meaning to a word or phrase.

Several authorities have expressly approved of using dictionary definitions in contractual interpretation: *Buildevco Ltd. v. Monarch Construction Ltd.* (1990), 73 O.R. (2d) 627, 1990 CanLII 6823 (S.C.); *Paletta International Corp. v. Canada Life Mortgage Services Ltd.,* [2003] O.J. No. 1107, 2003 CanLII 5761 (C.A.),

leave to appeal ref'd [2003] S.C.C.A. No. 260. None of the contractual instruments in this case define "revenue".

[44] In addition, the preliminary question to be asked regarding the judge's reliance on a dictionary definition is whether the parties' conduct or overall agreement suggests that they adopted a non-standard, context specific meaning of "revenue"—a question of mixed fact and law. Only if this was the case would reliance on a dictionary definition have been inappropriate as a matter of law.

[45] In my view, the issues raised on appeal present questions of mixed fact and law, reviewable on a standard of palpable and overriding error. The issues are specific to these parties and do not present legal questions of general application; their precedential value is thus insufficient to engage one of the principled bases underlying the distinction between questions of law and questions of mixed fact and law, as outlined in *Sattva*. Furthermore, as I emphasized above, the errors alleged go to the judge's application of the appropriate legal standards: this is paradigmatically a question of mixed fact and law. There is, furthermore, no legal error *per se* in a judge using a dictionary definition as an interpretive aid.

[46] For these reasons, I conclude that the judge's decision is to be reviewed on a standard of palpable and overriding error.

[47] For an error on a question of mixed fact and law to warrant appellate intervention, it must be both palpable and overriding. The mere fact that a reviewing court might have reached a different conclusion based on the facts is not itself sufficient to establish a palpable and overriding error.

Issue #2: Did the judge err in concluding that the CES did not form part of the NDC?

1. Whether the judge erred in beginning her analysis with the Commitment Letter, rather than the Participation Agreement

[48] Argo submits that the proper starting point, as a matter of contractual interpretation, is the Participation Agreement; accordingly, the judge erred in

beginning her analysis with the terms of the Commitment Letter. It relies on the Supreme Court of Canada's decision in *Resolute,* in which the majority stated that "[c]ontractual interpretation begins with reading the words of the contract" (at para. 76) and that evidence going to an agreement's "… factual matrix … cannot 'overwhelm the words' of [a] contract …" or support an interpretation that deviates so significantly from the actual text as to generate a new agreement: at para. 78.

[49] Although the judge did not make an express finding on this point, it is apparent from the record and from her reasons as a whole that she considered the Commitment Letter, the First and Second Amendments, and the Participation Agreement to be related agreements. The parties agreed to enter into the Participation Agreement in the Commitment Letter, and the four Agreements as a whole, in my view, effect a single overall transaction between Argo and Plaza.

[50] As Geoff R. Hall writes (*Canadian Contractual Interpretation,* at 21):

> The principle that a contract is to be interpreted as a whole also requires consideration of related contracts entered into as part of a single overall transaction. This is a sensible extension of the principle because it helps to achieve interpretive accuracy and give effect to the intentions of the parties. The doctrine can result in sharply different interpretive conclusions than would be reached if individual contracts were considered in isolation.
>
> [Emphasis added.]

[51] Appellate courts in other provinces have recognized that where contractual instruments are related in the sense of effecting a single overall transaction, "… assistance in the interpretation of any particular agreement may be drawn from the related agreements": *3869130 Canada Inc. v. I.C.B Distribution Inc.,* 2008 ONCA 396 at para. 33, citing John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law Inc., 2005) at 715; see also *Salah v. Timothy's Coffees of the World Inc.,* 2010 ONCA 673 at para. 16. Just as the parts of a single agreement are to be interpreted harmoniously and in a way that gives each part meaning, so too should related agreements be interpreted, if possible, "… to make the parts work

harmoniously …" in order to best reflect the transacting parties' overall intentions: *Samson Cree Nation v. O'Reilly & Associés,* 2014 ABCA 268 at para. 82.

[52] The Supreme Court of Canada's decision in *Resolute* did not address related contracts. The propositions that: (1) contractual interpretation should begin with the contractual text; and (2) evidence going to an agreement's factual matrix should not overwhelm the interpretive exercise do not imply that where an agreement is part of a series of related agreements, it is incorrect to begin with one agreement over the others. Indeed, where related agreements are at issue, it seems sensible to set out the agreements in the order that the parties executed them. Since the alleged errors are ones of fact and law, I can see no palpable and overriding error in the judge's treatment of the Agreements as being related, and accordingly, I see no error in her decision to address the Agreements in chronological order.

[53] I would not accede to this ground of appeal.

2. Whether the judge erred by misapprehending or conflating the purposes of the Commitment Letter and the Participation Agreement

[54] For the reasons I have expressed, I consider the questions raised on appeal to be ones of mixed fact and law. Absent palpable and overriding error, the judge's findings are entitled to deference.

[55] Argo submits that the judge erred by misapprehending or conflating the purposes of the Commitment Letter and the Participation Agreement. It says that the Commitment Letter's allocation of risk was meant to account for unknown future risks, while the Participation Agreement contemplated a division of actual, known revenues. To put this in terms of a potential palpable and overriding error, Argo needs to establish that the judge's conclusion to the contrary cannot be reasonably supported by the evidence: *Hall v. Cooper Industries, Inc.,* 2005 BCCA 290 at para. 47, leave to appeal to SCC ref'd, 31055 (17 November 2005); and *Kuhnke v. Karner,* 2022 BCCA 399 at para. 40, citing *Housen* at para. 22. Argo advances this submission on the basis that the NDC was to be calculated based on the "actual costs" incurred for the Project, and so should factor in only the actual amount

ultimately repaid on the Loan; it says that the judge's interpretation is erroneous in the sense that it fails to give effect to this aspect of their agreement with Plaza.

[56] I would not accede to this submission. While Argo's argument regarding differing commercial purposes was not made at the summary trial, it is not necessary to consider whether this constitutes a proper ground of appeal because I would not accede to it in any event. The judge carefully considered the text of the related instruments, took notice of common commercial practices, and referred to her responsibility to reconcile the instruments in a way that gave meaning to all of their terms: at para. 55, citing *Canaccord* at para. 20. These terms included *both* the Commitment Letter's risk allocation and the Participation Agreement's definition of NDC.

[57] Indeed, I agree with the judge that it is difficult to see how Argo's proposed interpretation would render the parties' agreement anything but internally irreconcilable. Argo's proposed interpretation is contradictory in that on the one hand it says, "… Plaza accepted the risk and reward of currency fluctuation …" but, on the other asserts that, "… the actual result would be factored into the NDC …" and therefore shared. Yet both statements cannot be true simultaneously: a benefit that must be shared is, by definition, not one that can be allocated exclusively to one party.

[58] As to Argo's submission that the parties intended that the NDC reflect the "actual costs" of the Project, I would observe the following. In defining NDC, clause 13.1 of the Commitment Letter (excerpted above) refers to several items. One of these is "… all actual costs incurred for the Project identified as a cost category in the Project Budget delivered by the Borrower to the Lender pursuant to section 15.3 hereof ….", which is identified before the Commitment Letter proceeds to identify the *next* items on the list, including "this Loan". From a grammatical perspective, "… all actual costs incurred for the Project …" does not modify every item identified as falling under the definition of NDC, only the first. In addition, turning to the definition of NDC given in the Participation Agreement, "actual…costs" attaches

only to *some* enumerated items but not others: for instance, the Participation Agreement's definition of NDC refers to "… all actual … costs…identified as a cost category in the Project Budget …" (clause 1.1(a)) and "… all actual construction and Land acquisition costs …" (clause 1.1(b)), but does not refer to actual costs in reference to the Loan (1.1(f)(ii)). The plain text of the Commitment Letter and the Participation Agreement does not support, but rather militates against, Argo's proposed interpretation.

[59] I would not accede to this ground of appeal.

3. Whether the judge erred in deciding there was only one "logical way" to reconcile the Commitment Letter and the Participation Agreement

[60] Argo submits that the judge erred in determining that there was only one "logical way" to reconcile the Commitment Letter's allocation of risk with the terms of the Participation Agreement, which error, it says, caused her to find that the parties intended to exclude the CES from the NDC. I disagree.

[61] The judge reached this conclusion having determined that if currency exchange fluctuations were read into the NDC, the Commitment Letter's risk allocation would be rendered meaningless. As I have observed, this conclusion is substantively correct: it cannot be the case that the parties' agreement exclusively allocated the risk or benefit of such fluctuations to Plaza while *also* stipulating that Argo would share in that risk or benefit.

[62] In addition, mindful that the appropriate standard of review is palpable and overriding error and not correctness, it is evident from the reasons, considered contextually and as a whole, that the judge's conclusion on this point was the product of a considered engagement with the record before her as well as the relevant principles of contractual interpretation she identified. The judge's characterization of her interpretation as representing the "only logical" conclusion may have been somewhat of an overstatement, in that questions of contractual interpretation are not synonymous with questions of logic. Nonetheless, I consider

the judge's interpretation as to what meaning could reasonably be imputed to the Participation Agreement to be entirely open to her on the record. While Argo disagrees with that interpretation, where the question is one of mixed fact and law, mere disagreement as to a matter of contractual interpretation does not result in a reviewable error: *Housen* at para. 23.

[63] I would not accede to this ground of appeal.

4. Whether the judge erred in relying on a dictionary definition of the word "revenue", thus failing to interpret the parties' words in the context of their agreement

[64] Above, I observed that it is acceptable for a judge to look to a dictionary definition to interpret the words used in a contract, provided the broader factual matrix does not establish that the parties adopted a different meaning for the purposes of their transaction. The question before this Court, therefore, is whether the judge made a palpable and overriding error in impliedly concluding that Argo and Plaza had not come to an alternate understanding of the concept of "revenue".

[65] In my view, she did not.

[66] Having noted that "revenue" was defined in neither the Commitment Letter nor the Participation Agreement, the judge turned to a dictionary definition—which was the only one either of the parties had put before her—in an effort to read the words of the agreement in their ordinary sense. In my view, given that "revenue" was not defined in the Agreements, it was clearly open to her to do so based on the governing principles of contractual interpretation—principles of which she was clearly aware, having summarized them previously in the judgment.

[67] The judge also noted that while "revenue" was not defined, "Project" was. She looked to the definition of "Project"—which concerned the development and construction of residential and commercial buildings—and found the dictionary definition of "revenue" consistent with what the parties had provided in their agreement. In its factum, Argo refers to several other definitions of "revenue" that it says are broader than the one relied upon by the judge. I note that Argo did not

place any of these definitions before the judge at the time of the summary trial; an appeal is not a "second chance" to make arguments more effective than those that counsel chose to make at trial.

[68] That said, the alternative definitions do not assist Argo on this point. This is because Argo's principal submission—that the CES should be considered as "revenue"—misunderstands, in my view, an important distinction between the value *exchanged* in the bargain between Argo and Plaza and the value *generated through* the activities that the bargain made possible.

[69] The possibility of benefit from currency exchange fluctuations was allocated exclusively to Plaza, as was the possible risk associated with such possible fluctuations: this is part of the consideration that flowed to and from Plaza, respectively, as part of the parties' overall bargain. Argo's entitlement, as first set out in the Commitment Letter and further particularized in the Participation Agreement, was to a share of the gross revenues generated by the enterprise it funded (the Project). It would seem conceptually insupportable to say that Argo was entitled to partake of the *consideration that it had provided to Plaza* in exchange, we might reasonably presume, for Plaza's agreement to take on the risks associated with currency fluctuations. This is only made clearer by the definitions of "revenue" Argo has placed before this Court, which all, in general terms, contemplate monies either generated through normal business operations or received from an external source—as opposed to monies saved, not earned, pursuant to a pre-existing contractual allocation of risk to one party.

[70] In conclusion, I can see no reviewable error on the part of the judge. She was clearly well aware of her obligation to interpret the Participation Agreement in its context, including in the context of the related Commitment Letter and First and Second Amendments, in a manner that reconciled the ordinary meaning of an undefined word ("revenue") with the specific meaning the parties ascribed to another, related concept (the "Project"). Even if other reasonable interpretations existed (which the judge found was not the case), the fact that a judge prefers

one interpretation over another does not, without more, constitute a palpable and overriding error.

5. Whether the judge erred in rendering "meaningless" the language the parties used to describe certain "deducted costs"

[71] Argo submits that the Participation Agreement's enumerated categories of "deducted costs" demonstrate that the parties contemplated a broad range of activities as falling within the scope of the Project, and that if the "amount repaid" on the Loan was a Project cost then the savings arising from a reduced "amount repaid" should be considered indirect revenue. It says that the judge failed to account for this factor in determining that the parties had decided not to identify currency fluctuations in the calculation of the NDC. The consequence of all this, it says, is to render "meaningless" the parties' agreement to deduct the "amount repaid" on the Loan from the calculation of the NDC. In the context of the proper standard of review—palpable and overriding error—Argo's argument would be that the judge failed to apply an applicable principle, that is, the principle that a contract should be interpreted in a way that gives meaning to all its terms.

[72] I would not accede to this submission. While the judge did not specifically comment on the deducted costs and the meaning of "amount repaid", her other conclusions—in which I would find no reviewable error—answer Argo's argument on this point. Even if it is the case that the contractual provisions about "deducted costs" amounted to an indication by the parties that they contemplated a wide range of activities as falling under the parameters of the Project, the judge concluded—correctly, in my view—that the Commitment Letter allocated all risk or benefit of currency fluctuations to Plaza, and this allocation was not altered by the First or Second Amendments to the Commitment Letter, remaining effective in the Participation Agreement. In other words, if the parties *had* agreed that a wide range of activities should fall under the auspices of the Project (and I would draw no express conclusions on this point), this would not be inconsistent with their more specific decision to "carve out" an express allocation of risk or benefit with respect to currency fluctuations. The judge's conclusion that the risk or benefit of currency

fluctuations was allocated exclusively to Plaza would not render meaningless the language that the parties used to describe “deducted costs”.

[73] In my view, it cannot be said that the parties agreed, in the Participation Agreement, to effectively share profits or losses owing to currency fluctuations, thus altering the pre-existing allocation of risk set out in the Commitment Letter. This is because, as the judge found, the Commitment Letter already addressed the allocation of risk owing to currency fluctuations. The only way in which the Participation Agreement’s reference to the “amount repaid” on the Loan *could* indicate that the parties intended that the CES form part of the NDC would be through a post-contractual modification. It is well established that, as a general rule, post-contractual modifications require some form of consideration (*Stilk v. Myrick,* [1809] E.W.H.C. K.B. J58, (1809) 170 E.R. 1168) or, more imprecisely, a “practical benefit” to the promisor: as per *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.,* [1989] E.W.C.A. Civ. 5., [1991] 1 Q.B 1 and this Court’s decision in *Rosas v. Toca,* 2018 BCCA 191. Argo has made no submissions to this effect. We were also not directed to any evidence in the record that would support an argument that a modification of this sort was even agreed to, let alone supported by fresh consideration or any kind of “practical benefit” to Plaza.

Conclusions on Contractual Interpretation

[74] In interpreting the terms of the Participation Agreement between Argo and Plaza, the judge engaged carefully with the record before her and the relevant principles of contractual interpretation. Given the deferential standard of review applicable to questions of mixed fact and law, I see no reviewable error in her analysis.

[75] Furthermore, for the reasons I have expressed, the judge’s decision appears to be the substantively correct one. The Commitment Letter’s allocation of the risk and benefit of currency fluctuations exclusively to Plaza was clear, and appears to have been unaltered by the subsequent Amendments and the terms of the Participation Agreement. As related contracts, the Agreements should be interpreted

harmoniously, yet Argo's proposed interpretation would render them contradictory and would not give effect to the principle that a contract is to be interpreted in a way that reconciles and gives effect to all of its terms.

Disposition

[76] I would dismiss the appeal.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"