IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Panopus PLC v. A.I.S. Resources Limited,* 2025 BCSC 1850

Date: 20250924
Docket: S234390
Registry: Vancouver

Between:

Panopus PLC

Plaintiff

And

A.I.S. Resources Limited

Defendant

And

Phillip Thomas

Defendant by way of Counterclaim

Before: The Honourable Justice Stephens

Reasons for Judgment (Summary Trial)

Counsel for the Plaintiff and Defendant by way of Counterclaim:	S. Sherrington J. Ensom
Counsel for the Defendant:	D. Gruber J. Roberts
Place and Dates of Hearing:	Vancouver, B.C. May 8–9, 2025
Written Submissions of the Plaintiff:	May 23, 2025
Written Submissions of the Defendant:	June 6, 2025
Written Submissions and Reply Written Submissions from the Plaintiff:	June 13, 2025
Place and Date of Judgment:	Vancouver, B.C. September 24, 2025

Table of Contents

Overview

[1] The defendant by counterclaim Philip Thomas was for several years a director and officer, including Chief Executive Officer ("CEO"), of the defendant A.I.S. Resources Ltd. ("AIS"). He provided services to AIS as officer through the plaintiff, Panopus PLC ("Panopus"). Mr. Thomas ceased being an officer of AIS on September 20, 2022, and ceased being a director of AIS on January 17, 2023.

[2] Panopus brings this application for a summary trial of their claims in this action — comprised of four discrete debt claims — against AIS to recover alleged unpaid amounts and interest, in the total amount of approximately $1 million. Panopus claims that AIS owes debts related to Panopus' (Mr. Thomas') consulting services to AIS, certain project management activities performed on AIS's behalf during Mr. Thomas' tenure, and for two loans advanced to AIS.

[3] At the same time, AIS is displeased with Mr. Thomas' conduct during his tenure as an officer at AIS, and into 2023, and has filed a counterclaim against him (but not Panopus) alleging breach of fiduciary duty to AIS and conflict of interest, seeking "indemnification from Mr. Thomas for all of the Debt allegedly owing to the Plaintiff in the Notice of Civil Claim" (counterclaim, Part 2, para 1(a)). AIS has not prosecuted that counterclaim which, as I understand it, has been effectively dormant since it was filed on August 14, 2023. There is no summary trial application before me brought by any party to grant, or dismiss, that counterclaim.

[4] Nevertheless, the counterclaim figures prominently in AIS's defence of this summary trial. AIS contends Panopus' claims are not suitable for summary trial determination because AIS's counterclaim is "inextricably interwoven" with Panopus' claims in the action: *Shannon v. Dhaliwal*, 2015 BCCA 402 at para. 7, citing *Kaspersky Lab, Inc. v. Bradshaw*, 2010 BCSC 68 at para. 13. In the alternative, AIS contends Panopus has not met its burden of proof on this summary trial to prove the claims against AIS, including interest components of the claim.

[5] Therefore, on this application, an issue arises whether the claims in the action are suitable for summary trial, or whether it is not suitable because AIS's counterclaim is inextricably interwoven with the plaintiff's claims: *Shannon* at para. 7.

[6] If the summary trial is suitable, the question arises whether the plaintiff has proven all or part of its claims and if judgment should be granted. On the merits of a summary trial, the plaintiff bears the onus of proof, and each party "must put their best foot forward": *Arbutus Investment Management Ltd. v. Russell*, 2022 BCSC 72 at para. 48, aff'd 2023 BCCA 9 [*Arbutus*]; *Faria Mechanical Ltd. v. Bosa Development Corporation*, 2024 BCSC 1946 at para. 24 [*Faria*]. Other than service of a list of documents by the plaintiff in the action, I understand there have been no discoveries conducted in this action, but this does not detract from the best foot forward principle, and the Court can grant judgment on a summary trial "relying upon the evidence it does have": *Arbutus* at para. 49, quoting *Canadian Western Bank Leasing Inc. v. SSC Ventures (No. 98) Ltd.*, 2016 BCSC 223 at para. 36.

[7] For the reasons that follow, I find that three of Panopus' claims — for consultancy fees for Mr. Thomas' role as AIS officer, and for two loans made to AIS — are not inextricably interwoven with AIS's counterclaim and are otherwise suitable for summary trial. I find I am able to fairly and justly make findings on these claims and grant judgment in favour of the plaintiff Panopus in respect of these claims.

[8] On the fourth claim for project management fees, I find this to be inextricably interwoven to AIS's counterclaim, since both concern Mr. Thomas' work (on AIS's behalf) on certain projects in Argentina (called "Pocitos"), and it is arguable that the AIS claim for equitable set off goes to the very root of the Panopus project management claim. I therefore find this fourth claim not suitable for summary trial and dismiss the application for judgment on that fourth claim.

[9] I summarize my views on some of the main legal issues on this application -- including those arising when suitability is contested because of an outstanding counterclaim -- and main findings, in this way:

(a) Where a court grants judgment on a summary trial for a plaintiff's claim, despite the existence of an unprosecuted outstanding counterclaim, the court to this extent permits litigating in slices notwithstanding the court's general disinclination to do so. Permitting the summary trial of a claim separately from a counterclaim is fair and just, where a plaintiff's claim is otherwise suitable for summary trial, since it provides an efficient adjudication of the plaintiff's claim and does not permit a defendant to effectively veto a summary trial of the plaintiff's claim through the defendant's own inaction by not prosecuting its counterclaim and not setting it down for adjudication;

(b) Where a plaintiff applies for judgment on summary trial on its claims, and there exists an outstanding counterclaim not also set down for summary trial, the court must consider the suitability factor as to whether the issues in the counterclaim are "inextricably interwoven" with the plaintiff's claim such that it would be unjust to decide two claims separately: *Shannon* at paras. 7, 10. Where the pleadings and the evidence on a summary trial demonstrate the counterclaim is inextricably interwoven, the plaintiff's claim is generally regarded as not suitable for summary trial and generally should not be decided separately: *Shannon* at paras. 9–10;

(c) One circumstance where a counterclaim may be inextricably interwoven with a plaintiff's claim is where the counterclaim advances a proper claim for equitable set off that goes to the "very root" of the plaintiff's claim, and it would be "manifestly unjust" to allow the plaintiff to enforce payment of the debt against the defendant without taking into consideration the counterclaim: *Cactus Restaurants Ltd. v. Morison*, 2010 BCCA 458 at para. 10 [*Cactus Restaurants*]; *Coolbreeze Ranch Ltd. v. Morgan Creek Tropicals Ltd.*, 2009 BCSC 151 at para. 38 [*Coolbreeze Ranch*];

(d) Where a defendant has not prosecuted and not set down for hearing its counterclaim for equitable set off at the same time as the plaintiff's summary trial, the court may consider if there is a proper equitable set off claim against

the plaintiff's asserted debt, without deciding the merits of the defendant's underlying claim advanced on the counterclaim for which equitable set off is sought. If a court finds that there is a "sufficient nexus between" the plaintiff's claim and a defendant's equitable set off counterclaim, it may order that they should be heard together: *Faria* at paras. 6, 34;

(e) In this case, three of Panopus' four claims are not inextricably interwoven with the AIS's counterclaim which includes (among other things) a claim for equitable set off. However, Panopus' fourth claim, for project management fees, concerns the Panopus work on AIS's behalf for Pocitos mining projects and are inextricably interwoven with the defendant's counterclaim for Mr. Thomas' breach of fiduciary duty in relation to (among others) those projects, and raises an arguable claim for equitable set off. It is of no moment that the Panopus' project management claim against AIS is brought by Panopus, whereas the counterclaim is brought by AIS against Mr. Thomas personally (not Panopus), since Mr. Thomas provided services through Panopus;

(f) Granting judgment on three of the plaintiff Panopus' four debt claims, and dismissing the fourth as not suitable, does result in litigating in slices but is nevertheless fair and just, since it permits efficient adjudication of Panopus' straightforward debt claims and does not permit the defendant AIS's unprosecuted counterclaim to delay adjudication of Panopus' otherwise suitable summary trial claims, consistent with the principles in *Hryniak v. Mauldin,* 2014 SCC 7.

[10] In summary, I grant judgment on this summary trial in favour of the plaintiff Panopus on three issues or claims in the notice of civil claim, and I dismiss the application for summary trial on the fourth issue or claim on the basis that it is not suitable for summary trial.

Issues

[11] These issues arise:

1. Are Panopus' claims suitable for summary trial?
    a. Does the AIS counterclaim, including its claim for equitable set off, render the Panopus claim unsuitable?
    b. Do other factors militate against suitability?
2. Is certain evidence inadmissible?
3. If suitable for summary trial, has Panopus proven its debt claims and should Panopus be granted the relief sought, in whole or in part?

Plaintiff's Claim and AIS's Counterclaim

The Plaintiff's Notice of Civil Claim

[12] Panopus pleads its claim against AIS arising out of four agreements alleged between the parties.

[13] Specifically, the notice of civil claim asserts four agreements: a Consulting Agreement (as allegedly amended and renewed), October 2020 Loan Agreement, December 2021 Loan Agreement, and Project Management Agreements.

[14] AIS's amended response to civil claim opposes the relief sought and pleads, among other things: "The Agreements do not exist or, in the alternative, do not constitute valid and binding agreements. There are no amounts due and owing to the Plaintiff under the Agreements or at all." The response to civil claim, at Part 3, para. 6, also pleads reliance on the doctrine of equitable set off:

> The Defendant relies on the law of equitable set-off. To the extent the Defendant is unable to recover any or all amounts owing from Recharge, the Defendant is entitled to set those amounts off against the Debt due to Mr. Thomas' breach of his fiduciary duty to the Defendant. The amounts owing from Recharge are closely connected to the Agreements and the series of events in issue and it would be manifestly unjust for the Debt to be enforced

> without taking into account any damages the Defendant suffers as a result of any amounts owing from Recharge that cannot be recovered.

The Defendant AIS's Counterclaim

[15] In the counterclaim, AIS pleads that:

> On or around June 10, 2021, the Defendant and Ekeko S.A. ("Ekeko") entered into an exploration and purchase option agreement (the "Option Agreement") with respect to certain lithium mining properties in Argentina known as Pocitos 1, 2, 7 and 9, and Yareta XIII (the "Properties") …
>
> …
>
> On or around June 22, 2021, the Defendant and Spey entered into an exploration and purchase option agreement (the "Spey Sub-Option Agreement") with respect to the properties known as Pocitos 1 and 2 for a term of 24 months.

[16] AIS submitted at the summary trial hearing that Mr. Thomas was in a "blatant" conflict of interest.

[17] AIS pleads that Mr. Thomas, among other things, breached his fiduciary duty to AIS:

> Mr. Thomas breached his fiduciary duty to the Defendant by not disclosing his conflicts of interest in the Plaintiff, Ekeko and Spey. Mr. Thomas personally benefited from the Defendant entering into agreements with these parties to the detriment of the Defendant. Mr. Thomas failed to act impartially or place the interests of the Defendant before his own.
>
> Accordingly, to the extent that any or all amounts of the Debt are owing to the Plaintiff, which is not admitted but expressly denied, then Mr. Thomas must indemnify the Defendant for all amounts owing to the Plaintiff due to the significant breach of his fiduciary duty to the Defendant.

[18] The counterclaim also pleads an equitable set-off, in terms mirroring that in the response to civil claim quoted above.

[19] Panopus' response to counterclaim pleads, among other things, that "there is no basis for indemnification" and that "the law of equitable set-off does not apply, as any amounts purportedly owing from Recharge to A.I.S. are unrelated from the amounts A.I.S. owes to Panopus": Part 3, paras. 6–7.

[20] Similarly, in an amended reply filed February 28, 2024, Panopus pleads, among other things, "there is no basis for indemnification. Panopus and Mr. Thomas acted honestly and in good faith and in the best interest of A.I.S. consistent with the law of the fiduciary duty". It also pleads that there is no basis for set-off:

> Contrary to paragraph 6 of the Legal Basis section of the Amended Response, there is no basis for set-off as Recharge and A.I.S. settled their dispute in September 2023. Furthermore, or in the alternative, the purported amounts owing from Recharge to A.I.S. are irrelevant to the Debt and should not be set-off as the lack a sufficient degree of interconnection.

Discussion

Issue 1: Are the Plaintiff's Claims Suitable for Summary Trial?

[21] Panopus submits this summary trial is suitable for determination; that the matter is not complex and is fundamentally a straightforward debt action for a liquidated sum of damages; that there are no meaningful credibility issues which prevent summary determination; and the matter is urgent based on the financial position of AIS which is acute and the company appears to be careening towards insolvency.

[22] Panopus contends that "A.I.S. has attempted to complicate the factual and legal matrix by bringing the Counterclaim against Panopus' principal, Phillip Thomas for alleged breach of fiduciary duty", and that the "Counterclaim is tactical and of no moment to Panopus' summary trial application." Panopus submits that AIS has done nothing to advance the counterclaim since it was filed on August 14, 2023.

[23] However, AIS submits that the Panopus claims are not suitable for summary trial because of the AIS counterclaim:

> …In its Counterclaim, AIS seeks indemnification of all amounts owing to Panopus from Phillip Thomas ("Thomas"), the alter ego of Panopus and former CEO, COO, President and director of AIS, due to his significant breach of fiduciary duty owed to AIS. The allegations in the Counterclaim are inextricably interwoven with the facts and issues on this summary trial application. They also raise credibility issues which make this matter inappropriate for determination via summary trial.

[24] AIS further contends that granting the relief sought by Panopus on this application would not be in the interests of justice since it would amount to litigation in slices.

[25] AIS contends it would be unjust to decide Panopus' claim without taking into account the damages AIS alleges it suffered and as set out in its pleadings:

> Thomas repeatedly breached his fiduciary duty to AIS by failing to act impartially and, both directly and indirectly, placing his interests ahead of those of AIS. Accordingly, to the extent that any or all amounts of the Debt are owing to Panopus, Thomas must indemnify AIS.
>
> AIS also relies on the law of equitable set-off. In the circumstances, AIS is entitled to set off the amounts owing to it by Spey, C29, and Recharge against the Debt. These amounts are closely connected to the agreements and the series of events in issue, and it would be manifestly unjust for the Debt to be enforced without taking into account the damages AIS has suffered as a result the amounts owing to it that cannot be recovered.

Summary Trial Suitability Principles

[26] I discussed the general principles as to the suitability of summary trials in *Hallat v. Couturier*, 2024 BCSC 901:

> [8] Determination of the suitability of an application for summary trial is a discretionary exercise that turns on the particular circumstances of an application; *Gill v. Gill*, 2022 BCCA 264, at para. 56, citing *Gichuru v. Pallai,* 2013 BCCA 60, at para. 34.
>
> [9] The law with respect to suitability has been canvassed in prior cases, including the leading case of *Inspiration Mgmt. Ltd v. McDermid St Lawrence Ltd.*, 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (BC CA.), a decision of the Court of Appeal. There the court at para. 40 of that case held that a chambers judge can decide a case summarily if the court is able to find the facts necessary for that purpose and finds it would be just to decide the issues in such a way.
>
> [10] The court retains the discretion in the determination of suitability. The exercise of discretion is guided by two lines of inquiry: (1) whether the court finds the facts necessary to decide the issues of fact or law; and (2) whether it is just in the circumstances to decide the issue summarily.
>
> [11] Proportionality is relevant to this determination; see *Brissette v. Cactus Club Cabaret Ltd.,* 2017 BCCA 200, at para. 26. […] That the amount at issue in an action is significant is not fatal to a summary trial application, see *Gichuru*, at paras. 30-31, but it is nevertheless a factor in my consideration weighing in favour of a trial process commensurate with the amount involved. And I cite too *Greenleaf Brewing Corp. v. Lonsdale Quay Market*, 2023 BCSC 2005.

[12] Conflict in the evidence *per se* is not necessarily always a reason to render a summary trial application unsuitable. As the Court of Appeal stated in *MacMillan v. Kaiser Equipment Ltd.,* 2004 BCCA 270, at para. 22:

> [22] …the mere fact that there is a conflict in the evidence does not in and of itself preclude a chambers judge from proceeding under Rule 18A. A summary trial almost invariably involves the resolution of credibility issues for it is only in the rarest of cases that there will be a complete agreement on the evidence. The crucial question is whether the court is able to achieve a just and fair result by proceeding summarily.

[13] However, a court should not decide an issue of fact or law solely on the basis of preferring one conflicting affidavit over another. There must be documentary evidence, evidence of independent witnesses, or undisputed evidence that undermines the affidavit of one of the parties on critical issues or some other basis for preferring one affidavit over another; see *Brissette*, at para. 27, citing *Cory v. Cory,* 2016 BCCA 409, at para. 10.

[14] In addition, as a prerequisite to deciding a case on a summary trial, the court must be able to find the facts necessary to decide the issues of fact or law and must be of the opinion it would not be unjust to decide the issues.

[15] When determining suitability, the court may also consider the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of proceedings, and any other matters which arise for consideration on this question, such as the cost of litigation and the time of the summary trial; whether credibility is a critical factor in the determination of the dispute; whether the summary trial may create unnecessary complexity in the resolution of the dispute; and whether the application would result in litigating in slices: *Inspiration Mgmt.,* at para. 49.

[16] The summary trial rule makes the judge a gatekeeper. It is a crucial role. Notwithstanding the wishes or submissions of counsel, judgment should not be given if the court is unable, on the evidence, to find the necessary facts or if it would be unjust to do so; see *Main Acquisitions Consultants v. Yuen,* 2022 BCCA 249, at para. 89.

[17] Documents which are simply attached to affidavits listed on a list of documents is not a good basis on which to decide a summary trial; see *Main Acquisitions*, at para. 97.

[18] Where there exists “uncertainties in the evidence”, see *Main Acquisitions*, at para. 100; and the determination of legal issues are largely fact dependent and require a close examination of the facts, these circumstances can militate against a summary trial determination since it may not be possible to find the facts necessary to decide those issues: *Main Acquisitions*, at paras. 100-101 and 106.

[…]

[19] A respondent to a summary trial application cannot veto it by inaction or otherwise. A defendant is required to put their best foot forward in defence of the plaintiff's claim; *Bajwa v. Habib*, 2018 BCSC 1822, at para. 95. That is, a respondent to a summary trial cannot fail to take pre-trial steps or provide

> their best foot forward, and claim that a trial is necessary to fairly adjudicate a proceeding and frustrate the benefits of the summary trial process; see *Hudema v. Moore*, 2021 BCSC 587, aff'd 2021 BCCA 482; and *Bajwa v. Habib* at para. 99, aff'd 2020 BCCA 230.
>
> [20] As Justice Horsman of this court, as she then was, stated: "Robustly applied, the summary trial procedure can be an important tool in achieving the objectives of proportionality and efficiency in our system of civil justice.": see *Hudema*, at para. 58.
>
> [21] A court should not refuse to grant judgment on a summary trial simply because a party contends that a full trial would "turn something up"; see *Hudema,* at para. 57.
>
> [22] A summary trial procedure cannot be open to frustration by one of the parties delaying pretrial procedures: see *Kok v. Adera Natural Stone Supply Co. Ltd.*, 2018 BCSC 1542, at para. 9.
>
> […]
>
> [25] But I return to the main premise of the role of the court on a summary trial application: judgment on summary trial should not be given if the court is unable, on the evidence, to find the necessary facts or if it would be unjust to do so: *Main Acquisitions*.
>
> [26] My role is to decide a case on summary trial if I can do so justly, and find the necessary facts.
>
> […]
>
> [28] I must also consider the principles of proportionality at the suitability stage: *Greenleaf* at para. 22.

[27] In some circumstances, it "may be fair and efficient to decide a discrete issue by way of summary trial even though it will not resolve the dispute in its entirety": *Peng v. Wang*, 2018 BCSC 1231 at para. 31.

[28] Where a counterclaim has been filed, this gives rise to additional summary trial suitability considerations. Strictly speaking, adjudicating claims in a notice of civil claim on a summary trial, without also at the same time litigating the claim in a counterclaim, can be regarded as an illustration of "litigating in slices", since not all claims in the proceeding are decided at the same time: *Faria* at paras. 55–56; *Revolution Resource Recovery Park Inc. v. Cheam First Nation*, 2023 BCSC 1527 at para. 79; *Beigi v. Sabaghchian*, 2025 BCSC 1338 at para. 69.

[29] Summary trial of a notice of civil claim is not suitable where the issues are "inextricably interwoven" with the counterclaim. In *Shannon*, the Court of Appeal said:

> [7] … The existence of a counterclaim is not a bar to summary trial, unless the issues are "inextricably interwoven". In *Kaspersky Lab, Inc. v. Bradshaw*, 2010 BCSC 68, the court said at para 13:
>
> > [13] Although the Rule allows judgment "on an issue or generally", the Court of Appeal has warned this court of the danger of "litigating in slices": *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.*, 2002 BCCA 138. However, it is also clear that the mere existence of a counterclaim is not a bar to a judgment under Rule 18A unless the issues are "inextricably interwoven": *Natco International Inc. v. Photo Violation Technologies Corp.*, 2009 BCSC 1504 at para. 10.

[30] The word "inextricable" means, "1. Impossible to disentangle or separate": Oxford University Press, *Concise Oxford English Dictionary*, 12th ed (2011) sub verbo "inextricable".

[31] In *Main Acquisitions Consultants Inc. v. Yuen*, 2022 BCCA 249, the Court of Appeal set aside a determination of specific performance made on summary trial, on the ground the application was not suitable for summary trial: para 106. One of the reasons for the Court of Appeal's conclusion was that the summary trial judge had determined whether damages was an adequate remedy, which was "inextricably interwoven" with other issues at trial (paras. 101-104):

> [101] … The determination of whether damages will provide an adequate or appropriate remedy is largely fact-dependent and requires a close examination of the facts: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.,* 2014 BCCA 388 at paras. 56-57…
>
> [102] The complexity of the damage assessment is highlighted by the fire that destroyed the wharf…
>
> [103] A further factor in determining whether damages would be an adequate remedy not considered by the chambers judge is whether the defendants are in a position to pay damages and, thus, whether the plaintiff is likely to recover them: *UBS Securities Canada, Inc. v. Sands Brothers Canada, Ltd.,* (2009) 95 O.R. (3d) 93 (C.A.) at para. 103. There is evidence in the appeal record that suggests that some, if not all, of the corporate defendants have few if any assets.
>
> [104] Whether damages would have been an adequate remedy was inextricably interwoven with the remaining issues that are still to be determined in this action and the other three actions which are still before the court. Given all of the above, the judge was not in a position to find the facts necessary to determine whether specific performance was a suitable remedy.
>
> [Emphasis added.]

[32] I am also mindful of the principles in *Hryniak*, including that "undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes": para. 24 [emphasis in original]. And that "the "principal goal [is]… a fair process that results in a just adjudication of disputes" and "the best forum for resolving a dispute is not always that with the most painstaking procedure": para. 28. The Court in *Hryniak* further stated that, "[w]hen a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective": para. 50.

AIS's Plea of Equitable Set-Off and Suitability Considerations

[33] Justice Pitfield discussed the defence of equitable set-off in *Coolbreeze Ranch*:

> [37] Equitable set-off is a defence. It finds its base in the principle that a claimant should not be granted judgment on a claim against another where that other asserts a claim in response that is so related to the original claim that the cross claim can be said to go to the root of the claim. In such a case, the cross claims are regarded as components of a single transaction, such that judgment should not be granted on one of the components without concurrent disposition of the other. The set-off is regarded as equitable rather than legal because the validity of the cross claim has not been confirmed or quantified, and in that sense, is an unliquidated claim.

[34] Equitable set off has been described as "a substantive right held by a debtor that constitutes a charge against a chose in action for his debt": *Cactus Restaurants* at para. 11. The law with respect to equitable set off is set out in *Cactus Restaurants* as follows:

> [10] … The elements of an equitable set-off are stated in *Holt v. Telford*, [1987] 2 S.C.R. 193 at 212 quoting from *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.*, [1985] 6 W.W.R. 14 at 22 (B.C.C.A.):
>
> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: *Rawson v. Samuel*, [1841] Cr. & Ph. 161, 41 E.R. 451 (L.C.).
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: . . . [*Br. Anzani (Felixstowe) Ltd. v. Int. Marine Mgmt (U.K.) Ltd.*, [1980] Q.B. 137, [1979] 3 W.L.R. 451, [1979] 2 All E.R. 1063].

> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim: . . . [*Fed. Commerce and Navigation Co. v. Molena Alpha Inc.*, [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066].
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract: *Bankes v. Jarvis*, [1903] 1 K.B. 549 (Div. Ct.); *Br. Anzani*.
> 5. Unliquidated claims are on the same footing as liquidated claims: [*Nfld. v. Nfld. Ry. Co.*, [1888] 13 App. C. 199 (P.C.)].
>
> [Emphasis added.]

[35] The factors set out in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.*, [1985] 6 W.W.R. 14 at 22, 1985 CanLII 144 (B.C.C.A.) are "considered in deciding whether the principle of equitable set-off should be applied to prevent immediate judgment on a liquidated claim": *Coolbreeze Ranch* at para. 38.

[36] The test for equitable set off has also been stated to involve "two questions; one on the issue of close connection and the other on the issue of manifest injustice": *Jamieson v. Loureiro*, 2010 BCCA 52 at para. 43, quoting *Place Concorde East Ltd. v. Shelter Corp. of Canada Ltd.*, 43 B.L.R. (3d) 54, 2003 CanLII 49373 (O.N.S.C.) at para. 261; see also *Baumeler v Ross*, 2024 BCSC 133 at para. 37.

[37] On a summary trial of a claim a plaintiff's action, where the defendant advances a separate claim for equitable set off, the court may consider the applicability of the doctrine of equitable set off to the defendant's cross claim when determining whether the cross claim must be determined at the same time as the plaintiff's claim: see, e.g., *Coolbreeze Ranch* at paras. 46–57 (plaintiff granted judgment, despite counterclaim seeking equitable set off); *Baumeler* at paras 28–34, 46 (plaintiff granted judgment, despite defendant's action seeking equitable set off); *Faria* at paras. 6, 34 (court finding sufficient nexus between plaintiff's holdback claim for work on a project, and defendant's counterclaim for set off for flooding events allegedly caused by plaintiff, and summary trial not suitable).

[38] When it does so, the court may proceed on the basis that the cause of action giving rise to the claim for equitable set off raises an arguable case: *Coolbreeze Ranch* at para. 32.

[39] Where a court determines on a summary trial of a plaintiff's claim that the defendant's equitable set off claim is not inextricably interwoven with the plaintiff's claim, it may then find the plaintiffs' claim suitable for determination and give judgment on that claim without deciding the defendant's cross claim. It is fair and just to litigate in slices in this way in such circumstances, in the presence of an unprosecuted counterclaim, since a "defendant should not be permitted to delay the granting of judgment pending the trial of a cross-claim that may well not succeed": *The Owners, Strata Plan VIS 4686 v. Craig*, 2019 BCSC 2228 at para. 41, quoting *Clearly Canadian Beverage Corp. v. Remic Marketing & Distribution Inc.*, [1992] B.C.J. No. 1867, 1992 CanLII 613 (S.C.); and para. 42, quoting *Kok v. Adera Natural Stone Supply Co. Ltd*., 2018 BCSC 1542 at paras. 9–10.

[40] Granting judgment on a plaintiffs' claim in the presence of an unprosecuted counterclaim, where those claims are not inextricably interwoven, and the plaintiff's claim is otherwise suitable for summary trial, is also an illustration of the principle that a "respondent to a summary trial application cannot veto it by inaction or otherwise": *Hallat* at para. 19.

Findings – Suitability for Summary Trial

Consulting Agreement, and Two Loan Claims

[41] I find that three of the plaintiff's claims — the consultant fees claim, and the two loan claims — are not inextricably interwoven with the defendant's counterclaim. I also find that equitable set-off does not preclude adjudicating these claims on a summary trial since the defendant's claim for equitable set off does not go "to the very root" of these claims, and are not "so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim": *Cactus Restaurants* at para. 10. Adjudication of these claims is not precluded by *Shannon*. These claims broadly

relate to Mr Thomas's involvement with AIS, a topic while adjacent to the subject matter of, are not inextricably interwoven with the legal and factual issues in, the AIS counterclaim: *Shannon* at para. 7; while they broadly relate to the same subject matter, they are not "close[ly] connect[ed]", nor would it be "manifestly unjust" to decide them separately: *Jamieson* at para. 43

[42] Nor are these three claims otherwise unsuitable for summary trial.

[43] The exercise of discretion to decide a summary trial as suitable is guided by two lines of inquiry: (1) whether the court finds the facts necessary to decide the issues of fact or law; and (2) whether it is just in the circumstances to decide the issue summarily.

[44] I find credibility is not a critical factor on these three claims, and there are no conflicts in the evidence that cannot be resolved on the evidentiary record. I also find that a summary trial on these claims is a desirable and procedurally efficient manner of disposing of the Panopus claims, and the summary trial will not likely create unnecessary complexity in the resolution of the dispute.

[45] AIS submits that it is financially illiquid, and raises the spectre of the possibility, that if judgment is given against it on this summary trial, this may cause it to become bankrupt.

[46] To the extent this was raised by AIS, I reject the spectre of AIS's bankruptcy as a factor militating against the suitability of this summary trial application. In my view, the financial consequences to the defendant of an adverse judgment, including a spectre of potential insolvency, if a claim against it is meritorious, is not a reason for a court to decline to decide a summary trial which is otherwise suitable.

[47] Taking account of the relevant considerations, I find these three claims — the Consultancy Agreement claim, and the October 2020 Loan and December 2021 Loan claims — suitable for summary trial.

Project Management Agreements Claim

[48] However, unlike the consultancy claim and loan claims, I find the plaintiffs' claims for project management fees is inextricably interwoven with the counterclaim based on the pleadings and evidence before me. Panopus' claim for project management fees, when Mr. Thomas worked on AIS's behalf on certain mining projects in Argentina, is bound up factually in AIS's counterclaim alleging Mr. Thomas' misconduct in relation to those mining projects. In addition, there is an arguable basis for AIS's claim for equitable set off, since Mr. Thomas' conduct with respect to these Pocitos projects arguably goes to the very root of, and is closely related to, the plaintiff's project management fee claim. I find the project management fees claim to be unsuitable for summary trial.

[49] I reject for the purposes of this application Panopus' argument that AIS lacks clean hands, which should disentitle AIS from claiming equitable or other relief and making equitable set off unavailable. The clean hands doctrine "is narrowly applied... and does not entitle a court to canvass all aspects of the party's behaviour known to the court. Its use must be kept to the circle of behaviour related to the relief sought": *Wang v. Wang*, 2020 BCCA 15 at para. 46. The "person seeking equitable relief must be required to rely on the misconduct in order to vindicate his claim": *Wang* at para. 47, quoting *Mayer v. Mayer*, 2012 BCCA 77 at para. 86. I do not find for the purposes of this application that AIS has engaged in conduct relating to its relief sought that justifies invoking the clean hands doctrine against it.

Summary – Suitability Findings

[50] While deciding the summary trial in this fashion will result in adjudicating three of the claims in the notice of civil claim separately from the fourth claim and from the counterclaim, I find that doing so is fair and just in the circumstances. The three claims decided in these Reasons are relatively straightforward, and no significant matters of credibility arise. I find I am able to find the facts necessary to decide the issues of fact or law for those claims and am of the opinion it would not be unjust to decide those issues. Further, there is not a risk of inconsistent findings between the

claims decided on these summary trial, in relation to the distinct project management fee claim and counterclaim not decided, since they are not inextricably interwoven.

Issue #2: Evidentiary Objections

Exhibit L to Smith Affidavit #1

[51] Panopus objected on hearsay grounds to that part of the AIS board minutes dated November 23, 2022 which records discussion of the Board under item 3 including that,

> The Directors noted that Phil's November 19, 2022 email was the first time the Board was made aware of the September 16, 2022 Ekeko extension contract.
>
> Martyn stated that he does not remember any correspondence or conversations regarding paying an extension fee to Ekeko nor providing his authorization to affix his signature to an extension contract.

[52] AIS submits that this is a business record, and that it was attached to an affidavit from AIS that was not responded to by Panopus.

[53] The statement in the minutes, tendered for the truth of its contents, that this was the first time the AIS Board heard of the Ekeko extension contract, is inadmissible hearsay: *McEwan v Canadian Hockey League*, 2022 BCSC 1104 at para 33. Having regard to Panopus' evidentiary objection, the plaintiff did not establish that the business records exception applies to render this statement in this record admissible for the truth of its contents: *Oswald v Start Up SRL*, 2020 BCSC 205 at paras 16-22; *The Owners, Strata Plan VR29 v Kranz and others*, 2020 BCSC 2171 at para 35.

[54] Nevertheless, Ms. Smith deposes about this topic at para. 27, which I find is not hearsay, which includes that "Thomas affixed the signature of [Martyn] Element on behalf of AIS, without Element's authorization":

> …Thomas caused AIS to enter into a purported Option Extension Agreement with Ekeko in respect to AIS's option to purchase the Properties under the Option Agreement. The Option Extension Agreement purported to extend the option term to June 30, 2023 while committing AIS to pay an additional $75,000 to Ekeko. However, Sorentino had previously extended the Option Agreement on April 12, 2022 for no additional fee. Sorentino signed the

> Option Extension Agreement on behalf of Ekeko and Thomas affixed the signature of Element on behalf of AIS, without Element's authorization.

[55] Martyn Element (the Chairman of AIS) agrees with the accuracy of Ms. Smith's affidavit: Element Affidavit #1, para 3. But, Mr. Thomas contradicts this at para. 48 of his affidavit, and deposes that "I communicated with A.I.S.'s independent directors throughout the negotiations regarding the refreshed extension and was instructed by Mr. Element during a phone call to affix his signature to conclude the extension".

Para 22 of Smith Affidavit #1 – IAS and IFRS Accounting Standards

[56] Panopus also objected to the portion of para. 22 of Ms. Smith's affidavit that she purports to give opinion evidence regarding what International Accounting Standards ("IAS") and International Financial Reporting Standards ("IFRS") require to be put in financial statements, as inadmissible opinion evidence.

[57] Paragraph 22 states:

> AIS's financial statements were all prepared in accordance with the International Accounting Standards ("IAS") and International Financial Reporting Standards ("IFRS"). IAS and IFRS require that corporations be conservative as to how they report their liabilities in their financial statements. For this reason, the full amounts of the alleged Debt (exclusive of interest accruals on management fees or project management fees) were included in AIS's financial statements, and the correspondence I sent to Panopus in April, 2023. Neither AIS's financial statements nor my letter to Panopus from April, 2023 constitute an acknowledgment of the Debt by AIS. [emphasis added]

[58] AIS submitted that Ms. Smith was here speaking as to how she performed her work as CFO, which was not an expert opinion, but if anything a "participating expert", and she is more than qualified and capable of giving that evidence. I took AIS to be arguing that Ms. Smith could provide this evidence as a lay witness. No information from the IAS or IFRS was appended to the affidavit seeking to substantiate the truth of the underlined portion above about IAS or IFRS requirements.

[59] I find that the underlined portion in para. 22 of Ms. Smith's affidavit, where she offers an opinion about what IAS and IFRS requires, is inadmissible opinion evidence, since Ms. Smith was not qualified to give opinion evidence on this topic: *McEwan v Canadian Hockey League*, at para. 57; *O'Brien v. Maxar Technologies Inc.*, 2022 ONSC 1572 at paras. 41-45. In my view this is evidence about accounting standards and practices which are beyond the scope of lay evidence and is inadmissible opinion evidence.

[60] I do not, however, consider to be inadmissible that part of para. 22 where Ms. Smith deposed she is of the subjective view that AIS did not constitute an acknowledgement of debt by AIS, although this does not seem centrally relevant to the issues in this application.

AIS's Assertion about the Quantum of its Counterclaim Damages

[61] The third objection raised by Panopus at the summary trial hearing was that AIS submitted that the counterclaim damages may outstrip the damages claimed in the main action, and Panopus gave notice that it submits this needs to be tethered specifically to evidence and proven to be an assertion relied on.

[62] I do not consider this an evidentiary objection as such, requiring an admissibility ruling, and will consider it in my overall assessment of the evidence and the submissions of the parties.

Comment on Para. 32 of Mr. Thomas's Affidavit

[63] Paragraph 32 of Mr. Thomas' affidavit contains legal argument. At para. 32 he deposes that "The Amended Response and Counterclaim raise false allegations regarding Panopus' involvement with A.I.S., <u>which are irrelevant to the disposition of this summary trial application but attempt to complicate the factual matrix to frustrate Panopus' efforts to obtain a judgment</u>" (emphasis added). I have disregarded the underlined portion, which I find to be legal argument, as inadmissible evidence: *Edenbrook Capital, LLC v. Absolute Software Corporation,* 2025 BCSC 1469 at paras. 167, 169.

Issue 3: Has Panopus Proven its Claims, and Should Panopus be Granted Relief Sought in Whole, or in Part?

[64] This is a summary trial. The plaintiff bears the onus of proof. On a summary trial each party must put their best foot forward: *Arbutus* at para. 48; see also *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241 at para. 64; *Gichuru v. Pallai,* 2013 BCCA 60 at para. 32. At a summary trial, evidence can be weighed: *The Bank of Nova Scotia v. Robertson*, 2001 BCCA 580 at para. 11. Conflicts in the evidence can be resolved: *Arbutus* at para. 49, citing *Zhao v. Ma*, 2013 BCSC 2174 at para. 6.

Plaintiff's Position on the Merits of the Claims

[65] Panopus argues that:

> A.I.S. owes Panopus the contractually agreed upon Debt arising from: (i) a consulting agreement entered into on or around January 15, 2017 (as amended and renewed, the "Consulting Agreement"); (ii) a loan agreement dated October 7, 2020 pursuant to which Panopus advanced $150,000 to A.I.S. (the "October 2020 Loan Agreement'); (iii) a loan agreement dated December 23, 2021, pursuant to which Panopus advanced $139,149 to A.I.S. (the "December 2021 Loan Agreement'); and (4) project management agreements entered into March 2021 and September 12, 2022, pursuant to which A.I.S. agreed to pay Panopus a portion (20%) of the fees AIS earned from a third party (Spey Resources Corp. ("Spey") and its subsidiaries) (the "Project Management Agreements", together with the Consulting Agreement, the October 2020 Loan Agreement, and the December 2021 Loan Agreement, the "Agreements").

[66] Panopus further argues that "[i]nterest has accrued and is accruing under each of the Agreements", and the amounts it claimed at this summary trial hearing (and its position on the interest rate) are set out in Schedule A.

[67] AIS disputes both liability and quantum of the alleged debt.

[68] AIS submits that Panopus has not proven the damages it claims.

Claim #1: Consulting Agreement Claim

[69] Mr. Thomas was appointed a director of AIS on October 31, 2016, the Chief Operating Officer ("COO") of AIS on January 15, 2017, and the President and CEO

of AIS on August 22, 2018. Mr. Thomas resigned as CEO, COO and President of AIS (and its subsidiaries) on September 20, 2022; and resigned as a director of AIS on January 17, 2023.

[70] Panopus submits that the "business relationship between the parties commenced in October 2016, when Panopus and A.I.S. entered into a consulting arrangement, pursuant to which Thomas performed certain project management services for A.I.S": written argument, para. 16.

[71] Mr. Thomas deposes at para. 10 of his affidavit that:

> Panopus and A.I.S. entered into a written consulting agreement formalizing the consulting arrangement which had been ongoing between the parties since October 2016 on or around January 15, 2017 (as amended and renewed, the "Consulting Agreement") … The initial monthly consulting fee payable by A.I.S. to Panopus for these services was $30,000. A copy of the Consulting agreement is attached as Exhibit "I".

He further deposes at para. 11:

> On January 23, 2019, the Consulting Agreement was renewed on amended terms, with the monthly consulting fee reduced to $10,000. A copy of the renewal of the Consulting Agreement is attached as Exhibit "J".

[72] Mr. Thomas deposes at para. 12 that, in "January 2021, the monthly consulting fee was increased to $15,000", and attaches an extract from AIS's general ledger.

[73] AIS's position on the principal claim is:

> The written Consulting Agreement between AIS and Panopus expired on January 15, 2019. No further notices of renewal were provided to Panopus. Panopus' letter of January 29, 2020 states that the Consulting Agreement expired on January 23, 2020.
>
> From January 16, 2019 to March, 2021, AIS paid for services rendered by Thomas on a month-to-month basis, with the services and the remuneration paid negotiated and agreed upon orally. Panopus' invoices during this period did not contain any express terms. In the absence of any agreement being proven to subsist, at most a personal claim of Thomas for *quantum meruit* for the services rendered would lie.
>
> Thomas breached his fiduciary duty in the course of providing his services as an officer and director of AIS, engaging the doctrine of equitable set-off.
>
> [Footnotes omitted.]

[74] AIS "admits that it entered into the Consulting Agreement with Panopus on January 15, 2017" for a 12-month term: application response, para. 6. But, as to Panopus' assertion that an extension agreement was entered into, AIS submits that "the purported agreement was only executed by Panopus, and not AIS": para. 7. AIS further submits that Mr. Thomas, on behalf of Panopus, wrote to AIS and "confirmed his view that the Consulting Agreement expired on January 23, 2020": para. 8.

[75] AIS acknowledges that it made payments to Panopus for services rendered through to March 2021 but submits these payments "were for services rendered on a month-to-month basis by Thomas in the capacity of CEO, COO and President of AIS (and its subsidiaries)" and agreed to orally: application response, para. 9.

[76] AIS position on the interest claim is:

> If an amount is owing to Panopus, no interest is payable thereon other than under the *Court Order Interest Act*. The "month-to-month" arrangement for services did not provide for interest. After the Consulting Agreement expired, the Panopus invoices during this period did not refer to interest being payable thereon.
>
> [Footnotes omitted.]

Findings – Consulting Agreement Claim

[77] I find that Panopus and AIS initially entered into an Agreement for the Provision of Services, Chief Operating Officer Role ("Consulting Agreement") dated January 17, 2017; a fully executed copy of this agreement is attached as Exhibit "I" to Mr. Thomas' Affidavit #1. The commencement date was January 15, 2017, and it lasted for 12 months; it was renewable for 12 months on a rolling 12 month basis with 30 days notice of renewal.

[78] Mr. Thomas deposes that this Consulting Agreement was "renewed on amended terms" (para. 11) and attaches a copy of the renewal at Exhibit "J" dated January 19, 2019, but this document is not fully executed since only Mr. Thomas signed it (on behalf of Panopus) with a date of January 23, 2019. Mr. Thomas does not expressly depose that the renewal document was ever sent to AIS. Further,

Mr. Thomas wrote to AIS on January 29, 2020 and stated to AIS that "the contract between Panopus Plc .. and AIS Resources Ltd… expired on January 23, 2020".

[79] Mr. Thomas subsequently wrote a letter to AIS dated September 20, 2022, resigning as COO, CEO and President of AIS (and CEO and director of certain subsidiaries). His letter does not mention a consulting agreement. He deposes that he "continued to provide consulting services on behalf of Panopus to A.I.S., consistent with [his] role as a chief executive officer, chief operating officer and president, until September 20, 2022": para. 13.

[80] Kiki Smith, Chief Financial Officer of AIS, filed an affidavit in response to the summary trial. She deposed that at all times, Mr. Thomas' services as an officer of AIS and its subsidiaries were provided through Panopus. She deposes that, "[o]n December 15, 2017, AIS provided a notice of renewal of the Consulting Agreement to Panopus for a further 12 months, commencing January 15, 2018" but that "[n]o further notices of renewal were provided to Panopus and the Consulting Agreement expired on January 15, 2019": para. 5.

[81] Ms. Smith deposes at para. 6 of her affidavit that:

> After the Consulting Agreement expired, Thomas's services as an officer of AIS and its subsidiaries were provided through Panopus on a month-to-month basis. The services provided by Thomas (through Panopus) and the remuneration paid to Panopus were agreed upon orally as between Thomas and the directors of AIS, including AIS's Chairman, Martyn Element…

[82] Ms. Smith deposes that AIS's board "passed resolutions as to the amounts that would be paid to Panopus for Thomas's services" (para. 7) and attaches as Exhibit "B" a resolution resolving that Mr. Thomas receive $15,000 per month for the period January 1 to December 31, 2021. She attaches as Exhibit "C" five examples of Panopus' invoices (the latest being dated March 31, 2021) to AIS. She acknowledges that AIS made payments to Panopus for services rendered through to March 2021.

[83] Mr. Element of AIS deposes that Ms. Smith's affidavit evidence is true and correct, to the best of his knowledge: para. 3.

[84] Mr. Thomas did not file any rebuttal affidavit disputing or contradicting AIS's evidence concerning the nature and terms of the consulting services agreement: R. 9-7(8)(b). He did not contradict AIS's evidence that a month-to-month oral agreement was entered into. He did not dispute Ms. Smith's evidence, at para. 6 of her affidavit, that at the material times:

> Thomas's services as an officer of AIS and its subsidiaries were provided through Panopus on a month-to-month basis … and the remuneration paid to Panopus were agreed upon orally…

[85] The evidence demonstrates the existence of a $15,000 per month, month to month agreement for remuneration after March 2021, and the absence of a fully executed written amendment to the consultancy agreement during this time period.

[86] I find, applying the best foot forward principle to Panopus, that Panopus has not proven on a balance of probabilities that the parties agreed to amend and renew the Consulting Agreement in the form of the written agreement it contends for at Exhibit "J" of the Thomas Affidavit. I find on a balance of probabilities that the Consulting Agreement expired on January 19, 2019. After that, I find that for the period March 2021 to September 2022, Panopus and AIS entered into an oral agreement to pay Panopus on a month-to-month basis for Mr. Thomas' continued services as officer of AIS with a fee of $15,000 per month.

[87] The AIS financial statements are consistent with AIS agreeing to pay Panopus $15,000 per month for Mr. Thomas' services as officer of AIS after expiry of the Consulting Agreement, as is the AIS corporate resolution at Exhibit "B" to Ms. Smith's Affidavit, which she deposes to, approving compensation of $15,000 per month to Panopus (Mr. Thomas) for the period January to December 2021 as "President, CEO and COO".

[88] Looked at objectively, I find by their conduct and oral agreement the parties agreed that AIS would pay to Panopus, on a month-to-month basis, $15,000 per

month for Mr. Thomas' continued services as officer from March 2021 to September 2022 after the term of the written Consulting Agreement expired: see, e.g., *Coffee Time Donuts Incorporated v. 2197938 Ontario Inc.*, 2022 ONCA 435 at para. 7 [*Coffee Time*], citing *Saint John Tug Boat Co. v. Irving Refining Ltd.*, [1964] S.C.R. 614 at 621–622, 1964 CanLII 88; *Sloan v. Davis*, 2024 BCSC 1780 at paras. 50, 60–65.

[89] The existence of a month-to-month agreement between Panopus and AIS for Mr. Thomas' services for $15,000 per month is consistent with the amounts shown on AIS's general ledger as payable to Panopus (e.g., Exhibit "K" to Mr. Thomas' affidavit) and invoiced to, and paid by AIS, up until March 2021. The total amount from April 2021 to September 20, 2022 (about 17.5 months) of $264,863.01 is set out in the audit confirmation letter from AIS to Panopus dated April 17, 2023, and reflected as an amount "owing" to "former director and CEO for consulting".

[90] The parties' conduct is consistent with Ms. Smith's affidavit evidence that Panopus and AIS orally agreed to month-to-month services for Mr. Thomas as officer, at $15,000 per month.

[91] Panopus has not proven on a balance of probabilities that there was any agreement reached between the parties on interest on his consulting fees after March 2021.

[92] Accordingly, I find there was no agreement on interest as part of the oral month-to-month consulting agreement from March 2021 to September 2022.

[93] In the result, Panopus is entitled to $15,000 per month from April 2021 to September 20, 2022, or approximately 17.5 months, in the total amount of $264,863.01.

[94] Panopus is entitled to pre-judgment interest on this amount under the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 [*Court Order Interest Act*].

[95] I have found this claim suitable for summary trial since it is not inextricably interwoven with AIS's counterclaim, there are not significant issues of credibility, and it is a straightforward claim. I find that the documentary evidence in the record assists to resolve any dispute on the affidavit evidence, and relying on AIS's evidence and the absence of a fully executed written extension of the consulting agreement, provides a basis to prefer Ms. Smith's affidavit over Mr. Thomas' affidavit on this discrete issue: *Hallat* at para. 13.

[96] I do not find that the AIS equitable set off claim in the counterclaim goes to the very root of the Panopus claim for consultant fees, and so the doctrine of equitable set off is not applicable to this claim. The counterclaim alleges misconduct by Mr. Thomas in his role handling AIS's affairs in respect of Pocitos projects in Argentina with various other companies; the counterclaim alleges Mr. Thomas breached his fiduciary duty to AIS in the course of providing project management services on AIS's behalf to Spey. While AIS's cross claim for breach of fiduciary duty may be said to broadly relate to Panopus' claim for consulting fees for his services to AIS as officer of AIS, I find it is not "closely" connected (within the meaning of the jurisprudence) to the counterclaim which alleges breaches of fiduciary duty when performing services on AIS's behalf on the Pocitos projects. I am not persuaded that it is inextricably interwoven to this claim.

[97] The jurisprudence permits a plaintiff's summary trial application to be adjudicated, despite the existence of an unprosecuted counterclaim for equitable set off, in appropriate circumstances where no claim for equitable set off lies: see, e.g., *Coolbreeze Ranch* at paras. 3, 25, 28, 57. I find this is an appropriate circumstance to do so.

[98] I do not find *Geocomp Data Management Inc. v. International PBX Ventures Ltd*, 2015 BCSC 302 [*Geocomp*], relied on by AIS, to be on point to the case at bar. There, Justice Pearlman found that "neither Geocomp nor Mr. Sookochoff had any express agreement with PBX for the provision of Mr. Sookochoff's services" (para. 84) and were left with claims to *quantum meruit*. The Court found that

"Mr. Sookochoff breached his fiduciary duties of loyalty and the avoidance of conflict of interest by failing to disclose to the board the expiry of his management agreement and by continuing to invoice for his services at the contract rate of $15,000 per month without board approval": para 82.

[99] Here, however, I have found there was a consultancy agreement between Panopus and AIS after March 2021 — an oral agreement — for month-to-month consultancy services for Mr. Thomas' work as officer of AIS, at $15,000 per month. Both AIS and Panopus' evidence is that Mr. Thomas' services as executive to AIS were provided through Panopus rather than Mr. Thomas personally. A claim by Mr. Thomas personally under the doctrine of *quantum meruit* does not arise. As to suitability, unlike in *Geocomp*, there is no evidence that Mr. Thomas did not disclose the expiry of his consulting agreement to AIS, and instead AIS knew of the status of his consultancy agreement and agreed to month-to-month services. Further, the counterclaim in *Geocomp* related to an allegation of non-disclosure respecting the very same management services which the plaintiff was claiming payment for, whereas here they do not. I find *Geocomp* to be distinguishable from the plaintiff's claim to consultancy fees.

Loan Agreement Claims

Claim #2: October 2020 Loan Claim

[100] Panopus submits, at para. 21 of its written argument, that "[o]n October 7, 2020, Panopus and A.I.S. entered into the October 2020 Loan Agreement, pursuant to which Panopus advanced $150,000 to A.I.S. The October 2020 Loan was documented by promissory note, and was approved by an independent director of A.I.S., Element". It submits that, "[n]o repayment of the October 2020 Loan Agreement was ever made": para. 22.

[101] Mr. Thomas deposes that "[o]n or around October 7, 2020, Panopus and A.I.S. entered into a loan agreement whereby Panopus advanced $150,000 to A.I.S. (the "October 2020 Loan Agreement"). A copy of the promissory note evidencing the $150,000 advanced by Panopus to A.I.S. under the October 2020 Loan Agreement,

is attached as Exhibit ‘M’”. That promissory note is fully executed by Panopus and AIS.

[102] The AIS financial statements for the year end December 21, 2021, are consistent with the existence of the October 2020 Loan Agreement; it states: “During the year ended December 21, 2020, the Company issued a promissory note in the principal amount of $150,000 to a director of the Company”.

[103] AIS’s position on the principal aspect of this claim is:

> AIS does not dispute the principal of the October 2020 Loan Agreement. However, it would be inequitable for Panopus to recover on this loan without AIS’s counterclaim being heard and decided at the same time.

[104] AIS submits, at para. 21 of its application response, that it “never acknowledged the Debt allegedly owing to Panopus”.

[105] AIS’s position on the interest portion of this claim is:

> AIS does not dispute the 8% per annum rate, but disputes the amount of interest accrued. The total interest as of March 31, 2025 is $47,638.
>
> [Footnote omitted.]

[106] The evidence filed by AIS on this summary trial does not dispute the existence of a valid and binding promissory note for the October 2020 Loan Agreement.

[107] I find that Panopus and AIS entered into the October 2020 Loan Agreement for $150,000 in the form of a promissory note at an 8% interest rate per annum, and this amount remains owing to Panopus.

Claim #3: December 2021 Loan Claim

[108] Panopus submits, at para. 24 of its written submissions, that, “[o]n December 23, 2021, Panopus and A.I.S. entered into the December 2021 Loan Agreement, pursuant to which Panopus advanced $139,149 to A.I.S. A partial paydown of $50,000 towards the December 2021 Loan was made on November 30, 2022.”

[109] AIS’s position on the principal aspect of this claim is:

> Panopus has failed to prove its claim on the balance of probabilities. Thomas has tendered an unsigned loan agreement and an unsigned promissory note. AIS agrees that the balance of the principal is accurate, but whether those funds were advanced by Panopus or Thomas (as recorded in AIS's financial statements, on which Panopus relies) has not been established by the plaintiff.
>
> It would be inequitable for Panopus (or Thomas) to recover on this loan without AIS's counterclaim being heard and decided at the same time.
>
> [Footnotes omitted.]

[110] AIS's position on the interest aspect of this claim is:

> There is no established written agreement on interest for the principal sum advanced. It is unproven whether the unsigned loan agreement or unsigned promissory note (which are inconsistent with each other on the issue of interest) bound the parties. In the absence of a proven written agreement, the lender would be entitled at most to interest under the Court Order Interest Act from the date of demand.
>
> [Footnotes omitted.]

[111] Mr. Thomas deposes that, "[o]n or around December 23, 2021, Panopus and A.I.S. entered into another loan agreement whereby Panopus advanced $139,149 to A.IS." He attaches a copy of a Loan Agreement dated December 23, 2021, with a promissory note at Schedule A, as Exhibit "N" of his affidavit. They are not fully executed, being signed by Panopus but not AIS.

[112] However, the AIS financial statements for the year end December 21, 2021, are consistent with the parties having entered into the December 2021 Loan Agreement; it states: "During the year ended December 21, 2021, the Company issued a promissory note in the principal amount of $139,149 to a director of the Company". Despite the reference to entering into a promissory note "to a director", in my view on the whole of the evidence I find the loan agreement was made with Panopus, Mr. Thomas' company.

[113] Mr. Thomas deposes that, "A.I.S. made a partial repayment to Panopus of $50,000 of the December 2021 Loan Agreement" but "[n]o further repayment was made": para. 21.

[114] When Mr. Thomas deposes that Panopus and AIS "entered into" the December 2021 Loan Agreement, I take him to be deposing that the parties objectively communicated about this and agreed with each other for a loan in this amount, and that this agreement is reflected in the December 2021 Loan Agreement.

[115] Neither AIS representative who has given evidence on this summary trial, Ms. Smith or Mr. Element, respond or contradict Mr. Thomas' evidence that the parties entered into the December 2021 Loan Agreement.

[116] Ms. Smith does depose that "AIS never acknowledged the Debt allegedly owing to Panopus" (para. 20), the defined term "Debt" being a reference to that word in the notice of civil claim and amended response to civil claim being the total amount Panopus alleges is owing for all claims, with interest.

[117] In my view, Ms. Smith's evidence that AIS did not acknowledge the "Debt" falls short of a denial that factually AIS had dealings with Panopus in which it agreed to enter into the loan agreements.

[118] Despite that the December 2021 Loan Agreement is not fully executed, AIS's evidence does not dispute Panopus' evidence that the parties entered into the December 2021 Loan Agreement, and that funds were advanced by Panopus.

Findings – Loan Agreement Claims

[119] I find that, looked at objectively, including the conduct of the parties and AIS's external conduct evidenced in its financial statements, that Panopus and AIS entered into a loan agreement for the December 2021 Loan Agreement: see, e.g., *Coffee Time* at para. 7; *Dhami v. Redekop*, 2020 BCSC 630 at paras. 71, 74.

[120] In my view, applying the best foot forward principle to AIS, Panopus has proven on a balance of probabilities that it advanced these monies to AIS and agreed with AIS to enter into the December 2021 Loan Agreement at Exhibit "N" to

the Thomas Affidavit #1. I find that AIS owes Panopus $89,149 in principal, with an interest rate of 10% per annum.

[121] While the December 2021 Loan Agreement specified a 14% per annum interest rate at s. 4.2, it also attached a Promissory Note with a 10% interest rate. I find on a balance of probabilities that the interest rate for this loan agreed to by the parties is as set out in the Promissory Note at 10% per annum. This is consistent with the parties' conduct in which AIS sent Panopus an audit confirmation letter setting out, among other things, the interest rate for this loan specifying a 10% interest rate—a letter which Mr. Thomas on behalf of Panopus signed on April 23, 2023. The AIS consolidated financial statements also refer to a 10% per annum interest rate. Looked at objectively, including the conduct of the parties and their external conduct, I find that the parties entered into a loan agreement for the December 2021 Loan Agreement that had a 10% per annum interest rate.

[122] In my view, the two loan claims are suitable for summary trial, despite AIS's counterclaim. The loan claims are not inextricably interwoven with the breach of fiduciary duty claims in the counterclaim. The Panopus claim for repayment of loans is a distinct matter from the AIS counterclaim for equitable set off: see, e.g., *Tesscourt Capital Ltd. v. FG Nutraceutical Inc*., 2011 BCSC 814 at para 29 [*Tesscourt*]. That is, the claim for equitable set off relates to an alleged breach of fiduciary duty by Mr. Thomas, in connection with his handling of the Pocitos projects, but does not go to the very root of the plaintiff's loan claims: *Tesscourt* at para. 26. In my view, the claims raised in the counterclaim lack the necessary nexus to give rise to equitable set off against Panopus' loan claims: *Baumeler* at para. 39

[123] At the same time, the evidence about the loans claims is straightforward and not complex, and there is no significant dispute on the facts, and credibility is not a critical factor on these claims*: Baumeler* at para. 51.

[124] On the other hand, not granting judgment on the loan claims would in effect allow AIS to "[seek] to delay judgment" on these proven debt claims "until the issues

related to the [counterclaim allegations] have been decided" (*Baumeler* at para. 52), which would not be fair and just.

[125] In my view, Panopus has proven its claim to repayment of the loans based on the existence of the two loan agreements that I have found.

[126] At para. 20 of its application response, AIS submitted: "AIS does not dispute the existence of the October 2020 Loan Agreement or the December 2021 Loan Agreement, or the amounts Panopus alleges are owing thereunder". The application response had adopted defined terms from the pleadings, and the terms "October 2020 Loan Agreement" and the "December 2021 Loan Agreement" were defined in the notice of civil claim with reference to principal amounts allegedly advanced under these loans. The notice of civil claim states in this respect: "[o]n or around October 7, 2020, Panopus and A.I.S. entered into a loan agreement whereby Panopus advanced $150,000 to A.I.S. (the "October 2020 Loan Agreement")" (part 1, para. 8); and "[o]n or around December 23, 2021, Panopus and A.I.S. entered into another loan agreement whereby Panopus advanced $139,149 to A.I.S. (the "December 2021 Loan Agreement")" (part 1, para. 10). In paragraph 2 of the amended response to civil claim AIS denies these paragraphs of the notice of civil claim, and also denies corresponding paragraphs of the notice of civil claim asserting amounts of interest allegedly owed.

[127] There were submissions made by Panopus and AIS, both at the summary trial hearing, and in supplemental written submissions, about whether AIS had made binding admissions about these two loans in para. 20 of the application response. Panopus argued that para. 20 of the application response constitutes an admission, and AIS "should be held to its position as plainly and definitively set out in the Application Response". It submitted that, "[a]s a matter of litigation fairness, A.I.S. should not be permitted to engage in litigation by ambush by abandoning the clear and specific position in its Application".

[128] Given my findings on the evidence at summary trial, I do not find it necessary in these Reasons to decide if AIS made an admission about the validity of the loans

between AIS and Panopus, or the principal amounts owing under them, at para. 20 of its application response.

[129] However, to the extent I have, in these Reasons, found the interest rate on the December 2021 Loan Agreement to be other than contended for by Panopus at the summary trial (10%, not %14), and that I will leave the calculation of the precise amount of interest owing on the loans outstanding, to be agreed to by the parties or if necessary determined by this court, I do not find that in para. 20 of the application response AIS made a clear and unambiguous concession or admission about the interest rate and the precise quantum of the dollar amount of the interest portion payable on the loans: *Deng v. Zhang*, 2022 BCCA 271 at para. 80, citing *Adams v. Fairmont Hotels & Resorts Inc.*, 2008 BCCA 444 at para. 11.

Claim #4: Project Management Agreements Claim

[130] Panopus submits that there are two project management agreements:

> The components of the Debt related to the Project Management Agreements are related to two projects. The first project management agreement concerned the Candella II Project and was entered into in March 2021 between AIS. and Tech One Lithium Resources Corp. (“Tech One”), a subsidiary of Spey. The second project management agreement concerned the Pocitos project and was entered into on September 12, 2022 between Spey and A.I.S.

[131] Panopus submits, at para. 27 of its written submissions, that, “[i]t was agreed by the parties that Panopus would receive 20% of the fees earned by A.I.S. under the Project Management Agreements”. Mr. Thomas deposes, at para. 26 of his affidavit, that, “[b]ased on the services provided by Panopus, Panopus and A.I.S. agreed that Panopus would receive 20% of the fees earned by A.I.S. from Spey under the Project Management Agreements”.

[132] Panopus submits that the “factual circumstances involving the Pocitos project forms part of the subject of A.I.S.’s Counterclaim”: para. 28. The Pocitos project is relevant to the project management agreements which forms the basis of Panopus’ project management fee claim.

[133] Ms. Smith of AIS deposes, at para. 14 of her affidavit, that:

> … AIS's main goal in providing the services to Spey and Recharge under the PMAs (as well as to C29) was to advance their respective projects sufficiently so that these entities would exercise their rights under option to purchase agreements in respect of the properties which had been negotiated with AIS, as vendor (with a resulting profit to AIS). Those option to purchase agreements are discussed under the heading "AIS's Counterclaim," below.

[134] AIS's position on the principal amount of the "Spey project management claims" is that:

> AIS agrees with Panopus' calculation of the amounts that would be owing to Panopus in respect of the project management services Thomas provided on AIS's behalf to Spey. However, Thomas breached his fiduciary duty to AIS in the course of providing these services, engaging the doctrine of equitable set-off.

[135] AIS does not disagree with Mr. Thomas' description of the exploration and purchase agreement between AIS and Tech One:

> Thomas's description of the exploration and purchase agreement between AIS and Tech One, at paragraph 24 of Thomas #1, is accurate. While this agreement was an option to purchase agreement for the Candela II property, and not a project management agreement, it did appoint AIS the "exclusive project manager" of this project (Preamble (D)).

[136] AIS's application response submits, as to the "Spey PMA":

> … AIS agreed that Panopus would be entitled to a portion of the fees earned by AIS thereunder. While AIS disputes that interest is payable, subject to its Counterclaim, it agrees with Thomas's calculation of the amounts owing to Panopus in respect of the project management services Thomas provided on AIS's behalf to Spey, being $94,071 CAD as of December 31, 2022.

Findings – Project Management Agreement Claims

[137] In my view, unlike the three other claims, I find that the pleadings and evidence demonstrate that Panopus' claim for project management fees is inextricably interwoven with AIS's counterclaim, which concerns Mr. Thomas' (Panopus') work on AIS's behalf on the Pocitos projects in Argentina: *Shannon* at para. 7. Further, there is an arguable case that AIS's claim for equitable set off goes the very root of the project management fees claim which relates to Panopus

performing project management services on AIS's behalf in regard to the Pocitos projects: *Baumeler* at paras. 36–38. This claim arises "in respect of the same matter" as the counterclaim allegations: *Coolbreeze Ranch* at para. 46.

[138] I was not satisfied by Panopus that there is a lack of a temporal connection between the allegations in the counterclaim, which relate in several ways to Mr. Thomas' dealings on behalf of AIS in relation to the Pocitos project, and the asserted Panopus project management fees.

[139] Therefore, this portion of the claim is not suitable for summary trial.

[140] The thrust of the counterclaim alleges that Mr. Thomas breached his fiduciary duty in relation to his work on the Pocitos' projects, and I find it is inextricably interwoven to the project management agreements fees claim. Further, the AIS equitable set off claim relates to amounts owing from Recharge Resources Ltd., which is factually tied to one of the Pocitos projects, and I find for the purposes of this application arguably goes to the very root of the project management fees claim by Panopus and is closely related to that claim. I find there is a "sufficient nexus between" the plaintiff's claim for project management fees and the defendant's equitable set off counterclaim, and the project management fees claim is not suitable for summary trial: *Faria.* In my view, determining the project management claim separately from the other plaintiff's claims decided in these Reasons does not result in the risk of inconsistent findings, since they deal with discrete subject matters and are not inextricably interwoven.

[141] I add that there is also a conflict in the evidence as to whether Mr. Thomas affixed Mr. Element's signature to an Ekeko extension agreement without Mr. Element's authorization: Mr. Thomas deposes he had authorization; however, Ms. Smith deposes he did not. This factual aspect of the counterclaim, which I have found is interwoven with the project management fees claim, cannot justly be decided on this summary trial. This is an additional factor, in any event, that militates against the suitability of the project management issue for summary trial. But I do not find the conflict in the evidence on this discrete factual point relating to the Ekeko

extension agreement precludes summary trial adjudication of the distinct consultant agreement fees claim and the two loan claims.

Conclusion on Plaintiff's Claims

[142] In short, I grant judgment in favour of the plaintiff Panopus on the consultant agreement fees claim and the two loan claims, but I find that the project management fees claim is not suitable for summary trial.

[143] While litigating in slices is generally to be avoided (*Mac's Convenience Stores Inc. v. Basyal*, 2025 BCCA 284 at para. 14), in my view this is a fair and just outcome of this application. Three of the claims are not inextricably interwoven with the counterclaim, which relates to project management services Mr. Thomas provided on AIS's behalf to Spey, and AIS has not persuaded me it can assert equitable set off arising from the underlying claims in its counterclaim (the merit of which I express no opinion in these Reasons) against these three debts. However, the fourth Panopus claim for project management fees (relating to project management services Mr. Thomas provided on AIS's behalf) is not suitable for summary trial due to the existence of the counterclaim which is inextricably interwoven and raises an arguable claim for equitable set off.

[144] In my view, it is a logical extension of the existing jurisprudence which permits a plaintiff's notice of civil claim to be adjudicated on summary trial separately from a defendant's counterclaim in appropriate circumstances (e.g. *Coolbreeze Ranch*) that where, as here, some but not all of the plaintiff's claims on summary trial are inextricably interwoven with the counterclaim, it may be fair and just to adjudicate and grant judgment on those issues and claims in the plaintiff's claim which are otherwise suitable for summary trial. To hold otherwise, would allow a defendant to avoid judgment against it on distinct and otherwise suitable claims by not prosecuting its counterclaim, which would not be a just result nor consistent with the principles of adjudicative efficiency in *Hryniak*.

[145] I find I am able to make necessary findings to fairly and justly decide three of Panopus' claims and am of the opinion it would not be unjust to do so. To decline to

decide and grant judgment on these three claims because of the existence of the defendant's outstanding counterclaim would in effect permit the defendant AIS to veto, through inaction, the fair, just and efficient summary adjudication on otherwise suitable claims and would be contrary to the purpose of the summary trial rule.

Conclusion and Order Made

[146] For these reasons, I make an order for judgment in favour of the plaintiff Panopus payable by the defendant AIS in these amounts:

(a) $264,863.01 for the Consultant Agreement claim, plus pre-judgment interest under the *Court Order Interest Act*;

(b) $150,000 for the October 2020 Loan claim, plus 8% interest per annum; and

(c) $89,149 for the December 2021 Loan claim, plus 10% interest per annum.

[147] I further order that the application for summary trial of the Project Management Agreements claim is dismissed as not suitable for summary trial pursuant to Rules 9-7(15).

[148] In para. 1(b) of the notice of application, Panopus alternatively sought summary judgment pursuant to R. 9-6. No meaningful submissions were made about this relief for summary judgment. I do not grant relief under R. 9-6, and para. 1(b) of the notice of application is dismissed.

[149] If the parties are unable to agree on the dollar amount of interest accrued on the principal amounts to be paid under my order, they may, within 45 days, seek an appearance before me to decide the amount of interest accrued.

[150] If the parties cannot agree on costs they may, within 30 days, submit a request to Supreme Court Scheduling for an appearance before me to make submissions on the matter of costs.

"Stephens J."

SCHEDULE A – PLAINTIFF'S CLAIMED AMOUNTS

	Principal	Interest Rate	Interest Accrued	Total
Consulting Agreement	$264,863.01	2% per month compounded monthly	$307,613.64	$572,476.65
October 2020 Loan	$150,000.00	8% per annum	$57,083.48	$207,083.48
December 2021 Loan	$89,149.00	14% per annum on Default	$48,744.63	$137,893.63
Project Management Agreements	US$69,456.00	None specified. Prejudgment interest rate under the *Court Order Interest Act* applies.	US$7,795.92	US$77,251.92