

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Kim v. Argo Ventures Inc.*,
2025 BCCA 350

Date: 20251017
Docket: CA49904

Between:

Young Chul Kim

Appellant/
Respondent on Cross Appeal
(Plaintiff)

And

Argo Ventures Inc.

Respondent/
Appellant on Cross Appeal
(Defendant)

Before: The Honourable Chief Justice Marchand
The Honourable Mr. Justice Butler
The Honourable Justice Mayer

On appeal from: An order of the Supreme Court of British Columbia, dated
May 6, 2024 (*Kim v. Argo Ventures Inc.*, 2024 BCSC 763,
Vancouver Docket S205944).

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Cross Appeal:

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Cross Appeal:

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Place and Date of Hearing:

Vancouver, British Columbia
April 15, 2025

Place and Date of Judgment:

Vancouver, British Columbia
October 17, 2025

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Chief Justice Marchand
The Honourable Justice Mayer

Summary:

The appellant appeals a decision quantifying an incentive he was entitled to receive under a development financing agreement. He alleges the judge erred in interpreting the agreement which resulted in a miscalculation of the appellant's share of the incentive. On cross-appeal, the respondent claims the judge erred in law by severing a clause from the agreement that excluded some investors from receiving the incentive after finding the clause void for uncertainty. The respondent argues the uncertainty of the exclusionary clause rendered all incentive provisions of the agreement uncertain and made the agreement unenforceable.

Held: The appeal is dismissed and the cross-appeal allowed. The judge did not err in his interpretation of the agreement and quantification of the incentive, if it were owing. His conclusions are entitled to deference. On cross-appeal, the judge erred in severing the incentives exclusionary clause from the incentive provisions. The uncertain exclusionary clause was essential to determine the parties entitled to receive incentives and could not be severed from the incentive provisions of the agreement.

Reasons for Judgment of the Honourable Mr. Justice Butler:

[1] Jason Hong is the sole shareholder and director of Argo Ventures Inc. ("Argo"). Through Argo, Mr. Hong identified real estate investment opportunities in Canada and pooled capital from third-party investors. Argo typically managed the business for investors in exchange for a management fee. The appeal and cross-appeal concern an agreement made between Argo and one of its investors, the appellant, Mr. Young Kim, whereby Mr. Kim agreed to provide additional financing to a mixed-use real estate development referred to as the Olympic Village Project (the "RSJV Agreement").

[2] The Olympic Village Project was ultimately profitable. At trial, the parties agreed that Argo earned a notional profit of \$18,369,337. Mr. Kim claimed he was contractually entitled to receive compensation for his assistance in arranging financing for the Olympic Village Project, or that he should receive compensation because Argo was unjustly enriched. The trial judge rejected both of these claims but accepted another of his claims: Mr. Kim was entitled to receive \$34,542 as his share of an agreed incentive the trial judge referred to as the RSJV Liquidation Incentive.

[3] On appeal, Mr. Kim argues the trial judge made two distinct errors in interpreting the RSJV Agreement which resulted in a miscalculation of his share of

the RSJV Liquidation Incentive. On the cross-appeal, Argo argues the judge erred in severing a term described as the Incentives Exclusionary Clause from the agreement. Argo submits that because the judge found the term void for uncertainty, he should have concluded that the uncertainty of the incentive provisions rendered the RSJV Agreement unenforceable.

[4] For the following reasons, I would dismiss the appeal and allow the cross-appeal.

Background

[5] The Olympic Village Project was originally developed by a partnership known as Jameson-Argo Projects Limited Partnership (“JAPLP”), in which Mr. Hong’s companies held a 70% interest. By February 2007, this 70% interest was held by Argo Mezzanine Financing #3 Ltd. (“AMF3”).

[6] Mr. Hong was AMF3’s sole director. He was a 6% shareholder, with other investors, including Mr. Kim's wife, holding 94% of its shares. AMF3 provided a total of \$8.5 million in capital for the Olympic Village Project by way of an equity investment and a loan. Another entity managed by Mr. Hong, Argo Mezzanine Financing #5 Ltd (“AMF5”), loaned \$5.5 million to the Olympic Village Project.

[7] In 2008, the withdrawal of Argo’s joint venture partner, the Pappajohn family, prompted the restructuring of the Olympic Village Project. As a result of the ensuing financial difficulties, the AMF3 and AMF5 investors were in danger of losing their investments without an injection of additional funds or capital.

[8] In order to restructure the Olympic Village Project, Argo approached the AMF3 investors with a Memorandum of Understanding (MOU). Argo asked the investors to waive their rights as investors in AMF3 in exchange for interest-free promissory notes from Mr. Hong personally that were to mature in 50 years. All the AMF3 investors signed the MOU and transferred their shares in AMF3 to Mr. Hong who became the sole shareholder. The investors agreed that if the AMF3 assets were liquidated, the promissory notes would be destroyed, and the investors would be repaid their initial investment plus a potential “bonus” if the project generated additional funds (the “Liquidation Agreement”). In 2011 and 2012, AMF3 and AMF5 amalgamated with Argo.

[9] In September 2009, Mr. Hong approached investors who were invested in other projects owned or managed by Argo (the “mutual aid assets”) to raise capital for the Olympic Village Project. Raven Song Joint Venture (“RSJV”), which held a beneficial interest in a property in Vancouver, was one of the mutual aid assets approached to assist AMF3. Mr. Kim held a 10% interest in RSJV which he acquired in 2005. Mr. Hong provided all members of RSJV, including Mr. Kim, with a proposal offering incentives in exchange for financial assistance to AMF3. This “RSJV Financing Proposal” became the RSJV Agreement. It was one of three proposals each made for a different audience of investors to raise funds for the Olympic Village Project.

[10] In reasons indexed at *Kim v. Argo Ventures Inc.*, 2024 BCSC 763, the trial judge described the key terms of the proposal provided to RSJV investors:

[86] On September 8, 2009, Mr. Hong provided members of the RSJV, including Mr. Kim, with a proposal (the “RSJV Financing Proposal”). The RSJV Financing Proposal asked RSJV investors to agree that \$2.1 million of RSJV’s equity in the RSJV Property be provided to Argo Ventures for use as collateral by AMF3 in the Olympic Village Project in return for the following three incentives:

- a) additional interest on Argo Ventures’ loan at 1.1%, annual simple interest to be repaid in a lump sum;
- b) a reduction in Argo’s management fee rate upon the sale of RSJV’s assets from 25% to 20% (the “RSJV Management Fee Incentive”); and
- c) a bonus payable to RSJV’s members, to be paid from any “liquidation surplus” available following the liquidation of AMF3’s assets (the “RSJV Liquidation Incentive”).

[87] The RSJV Management Fee Incentive and the RSJV Liquidation Incentive were not offered to all RSJV members. Rather, the RSJV Financing Proposal contained the following (translated) language with respect to these two incentives (the “Incentives Exclusionary Clause”):

[I]nvestors of the mutual aid assets related to AMF#3 and AMF#5 are excluded from the beneficiary list for the incentives.

[11] The judge also set out the English translation of the RSJV Liquidation Incentive clause:

[139] The RSJV Liquidation Incentive provides for a bonus payable to RSJV’s members from any “liquidation surplus” following the liquidation of AMF3’s assets. The liquidation surplus is defined as the “amount left over after all loans, expenses and investment principal are repaid”. The calculation of the RSJV Liquidation Incentive is provided for in the RSJV Financing Proposal. The English translation of the entirety of the RSJV Liquidation Incentive Clause reads:

If there is an amount left after all loans, expenses and investment principal are repaid (“AMF#3-Liquidation Surplus”); this can be arbitrarily executed by ARGO) when AMF#3 assets are liquidated, out of up to 25.0% of the AMF#3’s liquidation surplus, payment is to be made to the investors in the same proportion as their stakes in [RSJV] assets, according to the absolute contribution ratio (\$2,100,000/\$15,000,000), of the [RSJV] assets. (The absolute contribution ratio was used when restructuring funds were mobilized)

[12] Mr. Kim accepted the proposal and entered into the RSJV Agreement but did not receive the RSJV Management Fee Incentive or the RSJV Liquidation Incentive from Argo. He commenced this action in 2018 once he learned the Olympic Village Project had earned a substantial profit. The appeal concerns only the quantification of the RSJV Liquidation Incentive.

[13] The cross-appeal concerns the severability of the Incentives Exclusionary Clause. At trial, Argo argued Mr. Kim was precluded by operation of that clause from receiving the RSJV Liquidation Incentive. Alternatively, it argued the clause was void for uncertainty and, therefore, the RSJV Agreement was unenforceable. The trial judge found that the Incentives Exclusionary Clause was uncertain but that it could be severed from the agreement. He awarded Mr. Kim the RSJV Liquidation Incentive as calculated.

Trial Reasons

[14] Argo raised several defences to Mr. Kim’s claim for the RSJV Liquidation Incentive including: the claim was statute barred; interest now claimed but never collected by AMF3 and AMF5 had to be accounted for; and Mr. Kim was excluded as a related investor under the Incentives Exclusionary Clause: at paras. 88–89.

[15] The judge found Mr. Kim’s claim was not statute barred, that interest was not to be accounted for in determining the RSJV Liquidation Incentive, and that the Incentives Exclusionary Clause was void for uncertainty: at paras. 106, 129, 152. These conclusions are not challenged on appeal.

[16] The errors alleged on appeal challenge two of the judge’s conclusions on the proper interpretation of the RSJV Agreement: 1) the amount of the liquidation surplus to which the RSJV Liquidation Incentive applied; and 2) the “absolute

contribution ratio” to be applied to Mr. Kim’s financial contribution for calculating his incentive.

Assessment of Liquidation Incentive Available for Dispersal

[17] Having concluded the RSJV Liquidation Incentive was payable, the judge had to decide how to treat the investment principle of \$8.5 million that AMF3 had contributed to the project. The RSJV Liquidation Incentive provided that the liquidation surplus was to be calculated after “all loans, expenses, and investment principal are repaid.” Mr. Kim argued that no amount was to be deducted for repayment of the investment principal because the investors had surrendered their investment to Mr. Hong in April 2009 in exchange for a promissory note. Argo argued that the liquidation surplus had to be reduced by the amount it “paid” for the investment principal (by way of the promissory notes) to the AMF3 investors when they surrendered their shares.

[18] The judge concluded the notional profit should be reduced by the \$8.5 million investment principal and found that the liquidation surplus for the purpose of calculating the RSJV Liquidation Incentive was \$9,869,337. The judge reasoned that the value of the investment principal remained and was still payable to the investors by Mr. Hong despite it being converted into a promissory note:

[155] I agree with the defendants that AMF3’s net profit (i.e. the liquidation surplus) is to be reduced by the investment principal. As the plaintiff points out, Mr. Hong was the only remaining shareholder of AMF3 at the time of the RSJV Reconciliation because he had acquired the shares of AMF3 pursuant to the MOUs beginning in April 2009. However, it does not follow that Mr. Hong’s acquisitions of AMF3’s shares erase the investment principal in AMF3. Having been converted into a promissory note issued in Mr. Hong’s name, the investment principal was no longer in the same form as it was originally. However, the value remained and was payable to the investors by Mr. Hong. Indeed, pursuant to the MOU and the promissory note, Mrs. Kim received the repayment of her investment capital of \$1.774 million on June 19, 2018.

[156] The RSJV Financing Proposal was made at a time after Mr. Hong had bought out the investors and acquired their shares, and yet, the proposal referenced the need to reduce the liquidation surplus by the “investment principal”. In my view, its reference was in respect of the \$8.5 million in capital that the parties agreed was provided by AMF3 to the Olympic Village Project, the risk for which Mr. Hong had assumed liability for at the time the RSJV Financing Proposal was made.

[19] The RSJV Agreement states that up to 25% of the liquidation surplus will be available to investors “in the same proportion as their stakes in [RSJV] assets according to the absolute contribution ratio (\$2,100,000/\$15,000,000)”. Mr. Kim argued the “absolute contribution ratio” should be \$2,100,000/\$2,100,000 because the only funds Mr. Hong was able to raise from the mutual aid assets was the \$2.1 million raised from the RSJV investors. The judge rejected that argument, stating:

[161] The absolute contribution ratio was based on Mr. Hong’s desire to raise \$15 million which he hoped would come from the RSJV project and other mutual aid assets. The only funds Mr. Hong was able to raise from the mutual aid assets was the \$2.1 million from the RSJV project. However, I agree with the defendants that the absolute contribution ratio was not dependent upon the actual amount raised. Nowhere in the RSJV Financing Proposal is there a provision that provides for the absolute contribution ratio of \$2,100,000/\$15,000,000 to change based on the amount actually raised from the mutual aid assets. The words of the provision are plain and refer to an “absolute” ratio. Mr. Kim accepted this proposal and must have expected that he would be paid an incentive based on his proportionate share of his investment in RSJV, reduced by that absolute ratio.

[162] In essence, Mr. Kim’s position at trial asks this Court to read the words “absolute contribution ratio (\$2,100,000/\$15,000,000)” as “variable contribution ratio (\$2,100,000/amount actually raised from mutual aid assets)”. To read the agreement as such would clearly be inconsistent with the plain words of the RSJV Incentive, and I decline to do so.

[20] Applying these findings, the judge concluded Mr. Kim was entitled to an incentive of \$34,543 calculated as follows:

[163] 25% of the \$9,869,337 liquidation surplus is \$2,467,334. Mr. Kim’s proportionate investment in the RSJV project was 10%. The absolute contribution ratio provided for in the RSJV Liquidation Incentive is 14%. Consequently, the value of Mr. Kim’s entitlement to the RSJV Liquidation Incentive is 1.4% of 25% of the liquidation surplus. Mr. Kim is therefore entitled to \$34,543, reflecting Argo Ventures’ failure to pay the RSJV Liquidation Incentive to him pursuant to the agreement reached as set out in the RSJV Financing Proposal.

The Incentives Exclusionary Clause

[21] The judge also considered whether the Incentives Exclusionary Clause applied to Mr. Kim, thus making him ineligible for the incentive. The judge concluded the clause was “entirely unclear” because it was not possible to determine what was meant by the term “related” in the phrase, “investors of the mutual aid assets related to AMF#3 and AMF#5”: at para. 121. He also found he

was unable to resolve the uncertainty by reference to the context and surrounding circumstances: at paras. 118–128. The judge determined the Incentives Exclusionary Clause was void for uncertainty: at para. 129.

[22] The judge then considered whether the Incentives Exclusionary Clause could be severed from the RSJV Agreement. The judge observed that if the clause was vital to the parties' relationship it could not be severed. The clause could only be severed if it was minor, divisible or subsidiary: at para. 130.

[23] The judge concluded the Incentives Exclusionary Clause was subsidiary and could be severed. He reasoned that the vital aspect of the agreement was the right to use the equity from the RSJV property to assist the struggling Olympic Village Project in exchange for an incentive. Further, the investors would not have agreed to the use of the property without compensation in the form of the incentive offered: at para. 131. The judge also noted that the exclusion clause was not present in all three proposals Argo made to different investor groups, which supported his view that the clause was not fundamental to the RSJV Agreement or intended to govern the vital aspects of the agreement. In addition, the judge observed that the result sought by Argo would be unfair to the investors as Argo would have received the benefit of the use of the RSJV property at no cost. He considered it would be unfair to allow Mr. Hong to benefit from the deficiencies in his drafting of the Incentives Exclusionary Clause.

[24] Finally, the judge found it noteworthy that the agreement had been partially performed to a significant degree. The steps taken to perform the agreement included the registration of a mortgage against the RSJV property which allowed Argo to use funds for the Olympic Village Project. He acknowledged that partial performance cannot remedy a defective agreement but found that the parties' performance of the vital terms and their reliance on the RSJV Agreement was indicative of the divisibility of the Incentives Exclusionary Clause: at para. 135. He concluded:

[137] The parties reached an agreement on the essential terms of using RSJV equity in exchange for certain incentives. The Incentives Exclusionary Clause was subsidiary to this essential element of the parties' agreement. The manner in which the Incentives Exclusionary Clause was drafted is so vague that it is rendered meaningless, and it must be severed from the remaining portion of the clause providing for the incentives themselves. Mr. Kim is entitled to the RSJV Liquidation Incentive and damages for Argo Venture's breach of the agreement to pay it to him.

Analysis

[25] For the reasons that follow, I conclude on the cross-appeal that the judge erred in deciding the uncertain Incentives Exclusionary Clause was not essential to the incentive provisions of the RSJV Agreement. As a result, the judge's finding that the Incentives Exclusionary Clause is void for uncertainty renders uncertain all of the provisions dealing with incentives. The result is that the RSJV Agreement is enforceable, although in the present circumstances, that is a moot question because the other terms of the agreement have been fulfilled. The result of these conclusions is that it is not necessary to consider the contractual interpretation arguments raised by the appeal. Nevertheless, I will briefly set out my analysis of those issues and explain why I find the judge did not err as alleged.

The Appeal

[26] Mr. Kim does not challenge the judge's statement of the applicable legal principles concerning contractual interpretation. Rather, he argues the judge failed to properly apply those principles and, in the process, committed extricable legal errors. In particular, he submits the judge erred in law in failing to read the RSJV Agreement as a whole and in failing to consider the factual matrix. I see little merit to these arguments in relation to either of the grounds of appeal.

[27] At paras. 111 to 115, the judge laid out the guiding principles of contractual interpretation that he applied to the provisions relevant to the cross-appeal (i.e., the Incentives Exclusionary Clause). The judge later set out his findings on interpretation of the other provisions of the RSJV Agreement including those relevant to the appeal, but without explicitly re-stating that he was applying the same principles. Reading the reasons contextually, and as a whole, I conclude that he applied those principles both to the provisions relevant to the issues on appeal and those on cross-appeal.

[28] The judge stated that:

[112] Fundamentally, the words in a contract should be given their plain and ordinary meaning and must be interpreted in light of the whole of the contract. Contractual provisions are to be interpreted objectively, in view of the meaning that would be given to the words by the properly informed and reasonable bystander in the context of the agreement as a whole: *Group Eight Investments Ltd. v. Taddei*, 2005 BCCA 489 at paras. 19-22; *EOS Holding Ltd. v. Tip Top Developments Ltd.*, 2018 BCSC 2388 at paras. 49-50.

[113] Contracts should be interpreted to align with sound commercial principles and good business sense. The interpretative result ought to be consistent with commercial reality and should not be 'absurd' or 'untenable' ...: *Eli Lilly & Co. v Novopharm Ltd.*, [1998] 2 S.C.R. 129 at paras. 52, 56 and the authorities cited therein, 1998 CanLII 791 (S.C.C.).

[114] The surrounding circumstances (or factual matrix) of a contract leading up to, and at the execution of, the contract which were known or reasonably ought to have been known by the parties to the contract may be used to assist in the interpretation of the contract as long as the consideration of surrounding circumstances does not overwhelm or contradict the words employed: *Sattva Capital Corp. v. Creston Molly Corp.*, 2014 SCC 53 at paras. 50, 57...

[29] In my view, the judge applied the correct principles and arrived at an interpretation of the relevant terms of the RSJV Agreement that was available to him given the language of the agreement and the evidence of the factual matrix. Mr. Kim submits the judge made extricable legal errors but is unable to identify any such errors. As a result, the judge's interpretation of the RSJV Agreement raises questions of mixed fact and law, and his conclusions are entitled to deference. This Court cannot intervene in the absence of a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36.

Did the judge err in deducting the investment principal to determine the AMF3 liquidation surplus?

[30] The relevant language from the RSJV Agreement for both arguments on appeal is referred to by the judge at para. 139:

If there is an amount left after all loans, expenses and investment principal are repaid ... when AMF#3 assets are liquidated, out of up to 25.0% of the AMF#3's liquidation surplus, payment is to be made to the investors in the same proportion as their stakes in [RSJV] assets, according to the absolute contribution ratio (\$2,100,000/\$15,000,000), of the [RSJV] assets. (The absolute contribution ratio was used when restructuring funds were mobilized)

[Emphasis added.]

[31] Mr. Kim argues the judge made two interrelated errors. First, by the time the parties entered into the RSJV Agreement, Mr. Hong had already acquired the investors' interests in AMF3: at para. 156. Mr. Kim argues this is significant because it means that the investment principal attributable to Ms. Kim and the other AMF3 investors was \$0. Mr. Kim argues the judge erred in concluding that although the investment principal was no longer in the same form, "the value

remained and was payable to the investors by Mr. Hong”: at para. 155. Second, he acknowledges that Mr. Hong eventually repaid the investment principal to Ms. Kim and the other investors, but says the judge failed to consider that the obligation to repay the investment principal was: a) held by a different entity than AMF3; b) unenforceable as against AMF3; and c) likely unenforceable in any event.

[32] I take Mr. Kim’s argument to be that the judge erred in concluding there was investment principal to be repaid when the RSJV Agreement was made, or that he erred in concluding the promissory notes given by Mr. Hong to the investors represented an obligation to repay the investment principal.

[33] I first note that these alleged errors raise questions of mixed fact and law, not errors of law. Second, Mr. Kim cannot point to any error of fact, let alone a palpable and overriding error. The judge accurately described the circumstances that existed when the investors entered into the Liquidation Agreement and agreed to transfer their interests in AMF3 to Mr. Hong in exchange for the promissory notes. Mr. Kim’s core assertion is that the judge should have arrived at a different conclusion about the parties’ intent in agreeing that the “investment principal” was to be repaid. Mr. Kim argues the judge should have concluded there was no investment principal to be repaid because the investors had transferred their interests in AMF3. In his view they took on the risk the promissory notes might never be repaid. However, the judge was clearly cognizant of those circumstances. As Argo submits, Mr. Kim’s argument stems from a difference of opinion on the weight to be assigned to the underlying circumstances.

[34] However, the judge’s conclusion that the parties agreed the liquidation surplus was to be calculated based on the profit remaining after deducting costs, interests and investment principal, corresponds with the language used by the parties: at para. 139. Further, concluding that the investors intended any incentive to be determined after deducting the \$8.5 million initial investment makes good commercial sense as the determination of a profit or surplus should take into account repayment of the original investment: *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60 at para. 79. As the judge observed, the fact that Mr. Hong had acquired the shares and taken on the risk does not eliminate the existence of “investment principal”.

[35] Second, as stated in his factum, Mr. Kim submits the judge's decision "effectively permitted the respondent to pierce the corporate veil between AMF3 and Mr. Hong, such that a liability owed solely by Mr. Hong could be transposed as a liability of AMF3." He says this is an error of law because it ignores the corporate structure established by Mr. Hong and Argo. Relying on *Meditrust Healthcare Inc. v. Shoppers Drug Mart* (2002), 61 O.R. (3d) 786 (C.A.), he argues that Argo should be held to the burden of the corporate structure it devised.

[36] With respect, I do not see any merit to this position. As Argo submits, the interpretative task faced by the judge was not to determine who was to repay the investment principal. It was to determine what the parties intended in setting out the basis on which the RSJV Liquidation Incentive was to be calculated. Mr. Kim conflates the concept of piercing the corporate veil (by which a directing person may be found liable for the wrongful conduct of a company) which may raise a question of law, with the interpretation of the terms of a contract. The judge's conclusion did not permit piercing of the corporate veil and did not "transpose" a liability from Mr. Hong to Argo. He interpreted the text of the RSJV Agreement by attributing the plain and ordinary meaning to the phrase "investment principal".

Did the judge err in applying a fixed contribution ratio (\$2,100,000/\$15,000,000) to determine the incentive available for RSJV investors?

[37] Mr. Kim's arguments on the fixed contribution ratio are based on his contention the judge should have concluded that the correct ratio to calculate the incentive available for RSJV investors was \$2,100,000/\$2,100,000. He submits the denominator should be \$2.1 million because that is the total sum raised from the mutual aid assets, rather than the \$15 million Mr. Hong had hoped to raise. If the judge had arrived at that finding, the RSJV investors would have been entitled to 100% of the funds available for the incentive. Instead, the judge found they were only entitled to 14% of the funds available (\$2.1 million/\$15 million).

[38] Mr. Kim advances several arguments in support of this proposition but is unable to direct us to any error in the judge's findings of fact and cannot identify an error of law. His arguments ask this Court to come to a different conclusion than the trial judge arrived at by reweighing evidence that the judge considered.

[39] First, Mr. Kim says the judge failed to consider that the Liquidation Agreement provided for a fixed 25% payment to the investors unrelated to AMF3 and AMF5 who helped raise funds for the AMF3 restructuring. The judge instead placed considerable weight on the statement in the RSJV Agreement that the RSJV investors would be paid “according to the absolute contribution ratio”. By finding the RSJV Agreement provided that investors would only receive “up to” 25% of the liquidation surplus, the judge disregarded the statement in the Liquidation Agreement that the mutual aid investors would receive 25% of the liquidation surplus. Mr. Kim describes the judge’s error as reading the RSJV Agreement “in isolation”.

[40] There is no merit to this argument. While the Liquidation Agreement is part of the factual matrix, it was not the governing agreement between the parties. At trial, Mr. Kim even took the position that the Liquidation Agreement (also referred to as the MOU in the trial judgment) is “not in issue” and “referenced only for narrative purposes”. The judge was tasked with interpreting the language in the RSJV Agreement. Mr. Kim’s proposed interpretation is directly contrary to the language chosen by the parties: the ratio of funds available to the RSJV investors was an “absolute contribution ratio” of \$2,100,000/\$15,000,000. As the judge noted, “[n]owhere in the RSJV Financing Proposal is there a provision that provides for the absolute contribution ratio of \$2,100,000/\$15,000,000 to change based on the amount actually raised from the mutual aid assets”: at para. 161

[41] Mr. Kim also claims Argo intended to raise a total of \$15 million, and that if this was not raised, the denominator would change. He relies on provisions in the two other proposals delivered to investors in mutual aid assets, in addition to the Liquidation Agreement, for this claim.

[42] The judge was entitled to ascribe little weight to the terms of the Liquidation Agreement and the two other proposals. The other two proposals were directed at different (although overlapping) audiences and like the Liquidation Agreement formed part of the surrounding circumstances. The judge knew this and interpreted the plain language in the RSJV Agreement instead of a different interpretation premised on the surrounding circumstances. His interpretation of “the plain words” of the RSJV Agreement (at para. 162) is in accordance with the principle that the factual matrix should not be allowed to overwhelm the language of an agreement: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 57. The

potential risk of differences in the translations from the Korean between all the documents complicates the analysis and supports the judge's focus on the governing agreement.

[43] Although the judge did not comment on Mr. Kim's pleadings, this argument is directly contrary to the plea advanced in his amended notice of civil claim. At para. 41(c)(ii), he claims to be entitled to "14% of the 25% of the net profit earned" by AMF3.

[44] Mr. Kim also argues the trial judge's interpretation of the contribution error is inconsistent with "Mr. Hong's own evidence". He claims Mr. Hong testified the denominator in the contribution ratio would change based on the total amount raised. However, examination of the transcript shows Mr. Hong did not concede that the \$15 million was variable.

[45] In summary, I would not give effect to either of Mr. Kim's alleged errors and would dismiss the appeal.

Cross-Appeal

[46] Argo submits the judge made two legal errors in deciding to sever the Incentives Exclusionary Clause, and that the applicable standard of review of these two grounds is correctness.

[47] First, Argo claims the judge failed to apply the principle that a term in a contract can only be severed where the remaining obligations can fairly be said to be sensible and reasonable such that the parties would unquestionably have agreed to them without any change to their bargain (the "unquestionable agreement principle"). Argo would apply that principle to submit that "blue-pencil severance" was not available here because removing the Incentives Exclusionary Clause created a new agreement that Argo would not have accepted.

[48] Second, Argo says the judge erred in concluding that the Incentives Exclusionary Clause was not vital to the agreement, and that he permitted irrelevant considerations to influence this decision. The clause determined both the identity of investors who would receive the incentive as well as the amount of the incentive to be paid to each—in other words, both "parties" and "price"—making the term neither minor nor trivial.

[49] Mr. Kim argues that both grounds of appeal raised by Argo involve questions of contractual interpretation and that the standard of review is deferential.

[50] Mr. Kim says the first error raised is a matter of interpretation as it involves an analysis of the parties' intent and the scope of their understanding of the contract provisions. He notes that Argo's position on appeal relies on statements in *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, a decision concerned with the severability of a restrictive covenant in an employment contract. Mr. Kim argues the unquestionable agreement principle has no application in a commercial agreement that does not involve the imbalance of power between an employer and employee.

[51] Mr. Kim argues the second alleged error, whether the clause was vital, must be assessed by considering the factual matrix. He says this is also a question of contractual interpretation that raises questions of mixed fact and law. He submits that Argo is unable to identify any palpable and overriding errors made by the judge.

The Incentives Exclusionary Clause and the effect of its severance

[52] To assess the parties' arguments, it is useful to first consider the intent of the Incentives Exclusionary Clause within the incentive provisions of the RSJV Agreement and the effect of the judge's decision to sever the clause.

[53] When the RSJV Agreement was made, investors in AMF3 and AMF5 were in danger of losing their investments in the Olympic Village Project. Mr. Hong's three proposals, which included a proposal to all members of RSJV, were directed mainly to AMF3 and AMF5 investors who had an interest in preserving their Olympic Village Project investments.

[54] Argo's proposal to RSJV members offered three incentives in exchange for the use of equity from the RSJV project. Two of those incentives, including the RSJV Liquidation Incentive, were not offered to investors who fell within the Incentives Exclusionary Clause: those investors "related to" AMF3 and AMF5. The RSJV Agreement thus contemplated two groups who would receive different incentives, depending on whether the investors were "related to" AMF3 and AMF5. Argo did not offer to pay the RSJV Liquidation Incentive to those investors who

already risked losing their Olympic Village Project investment if circumstances did not change. I infer no additional incentives were offered because investors “related to” AMF3 and AMF5 already stood to receive benefit of the possible success of the Olympic Village Project if the equity from RSJV was put towards that project.

[55] When the judge determined the Incentives Exclusionary Clause was void for uncertainty, he had to decide how to treat that provision to preserve the intent of the incentive provisions in the RSJV Agreement. If the judge severed only the Incentives Exclusionary Clause, it would mean the RSJV Liquidation Incentive would be payable to all investors. If he severed both the Incentives Exclusionary Clause and incentives (b) and (c) from the incentive provisions, it would mean that these “conditional incentives” would not be payable to any investors. In my view, it is immediately evident that either of those choices fundamentally alters the incentive scheme that was set out in the uncertain incentive provisions of the RSJV Agreement.

[56] The judge chose to sever only the Incentives Exclusionary Clause. In doing so, he created certainty of parties regarding payment of the incentives but violated the incentive structure agreed to by the parties. In essence, the judge engaged in “notional severance” rather than blue-pencil severance as he effectively altered a vital term of the incentive provisions—the identity of the parties who would receive those incentives.

Standard of Review

[57] While appellate courts can intervene for extricable errors of law in contractual interpretation, courts should be cautious in making this determination and adopting this standard of review: *Sattva* at para. 54. Departure from deference requires identifying extricable questions of law including: “the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor”: at para. 53.

[58] For this Court to intervene, the appropriate standard of review is correctness. The issue is whether the trial judge applied the correct legal principles when he found the uncertain Incentives Exclusionary Clause to be minor, divisible, or subsidiary to the incentive provisions in the RSJV Agreement. In my view, he

did not. The judge erred in finding the Incentives Exclusionary Clause was not essential and in purporting to apply blue-pencil severance in these circumstances.

[59] Having arrived at this conclusion, I need not consider whether the “unquestionable agreement principle” applies outside of employment agreements involving restrictive covenants. I will begin my analysis by referring to *Shafron*, which sets out the principles identified in *Khela v. Clarke*, 2021 BCSC 503 [*Khela SC*] that lead to the conclusion that blue-pencil severance of this exclusionary clause was not available here.

Severance of an uncertain term that is essential

[60] In *Shafron*, the Court noted the difference between the two forms of severance. Notional severance involves reading down a contractual provision to make it legal and enforceable, while blue-pencil severance consists of removing part of a contractual provision. The Court found notional severance “had no place in the construction of restrictive covenants in employment contracts” and that “blue-pencil severance may be resorted to sparingly and only in cases where the part being removed is clearly severable, trivial and not part of the main purport of the restrictive covenant”: at paras. 36–37.

[61] The Court’s focus in *Shafron* was on restrictive covenants in employment contracts, but its caution about severance is consistent with the statements of principle summarized in *Khela SC*. As the Court reflected more generally, a court must be wary about altering the terms of a contract when utilizing severance as a remedy:

[32] It must be recognized, however, that the court is altering the terms of the original contract between the parties by applying the doctrine of severance, whether blue-pencil or notional. In *Transport, Arbour J.* observed at para. 30, that “[i]ndeed, all forms of severance alter the terms of the original agreement”. Where severance is applied, whether blue-pencil or notional, the purpose is to give effect to the intention of the parties when they entered into the contract. However, courts will be restrained in their application of severance because of the right of parties to freely contract and to choose the words that determine their obligations and rights.

[62] The Court in *Shafron* provided further caution about the use of notional severance in stating that “it is apparent that Arbour J. would not have applied the doctrine of notional severance where there was no bright-line test for illegality”: at

para. 31. Justice Arbour's decision in *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7, involved notional severance of a provision that offended the criminal interest provision (s. 347) of the *Criminal Code*. In *Transport*, the Court applied notional severance to read down the interest rate provision to the maximum legal rate to preserve as best it could the original intentions of the parties: at para. 30.

[63] Restraint in using severance, whether notional or blue-pencil, means that courts should avoid altering contract provisions to create new obligations. If notional severance is used when there is no bright-line for illegality, the result alters the contract to impose a court's view of what is reasonable instead of enforcing the objective intentions of the parties determined through principles of contractual interpretation.

[64] The judge correctly summarized the proper approach to severance with reference to *Khela SC*. In that case, Justice Bernard canvassed the authorities and concluded:

[76] ... The jurisprudence is clear that severance of uncertain terms is limited to those that are: (a) meaningless, minor, or subsidiary to an otherwise enforceable agreement; or (b) in a divisible part of an agreement. Vague or uncertain terms that the parties intended to govern a vital aspect of the parties' relationship are not severable; they vitiate the entire agreement.

[65] The judge further outlined essential terms of a valid contract. He noted, at para. 43, with reference to *Oswald v. Start Up SRL*, 2021 BCCA 352, at paras. 33–34, that a valid contract requires essential terms that are both sufficiently certain and mutually agreed upon by the parties. The Court also noted the well-settled principle found in *Khela v. Clarke*, 2022 BCCA 71, in a situation where the contract price was uncertain, that the essential terms of a contract for the sale of land are certainty of parties, property and price: at para. 30. An essential term is also a vital term.

[66] However, it is my view the judge erred in applying the principles he outlined by concluding that the identity of the parties entitled to the RSJV Liquidation Incentive was not a vital aspect of the incentive provisions of the agreement. As Argo submits, severance of the exclusion clause would significantly increase the cost of the incentives to Argo and would provide increased incentives to parties

clearly related to AMF3 and AMF5. Severance would therefore alter both the price (cost of the incentives) and the parties (identity of the investors who would receive them).

[67] Both parties argued that the interpretation of the contractual provisions must be responsive to the circumstances of the case and the nature of the transaction at issue: *Concord Pacific Acquisitions Inc. v. Oei*, 2022 BCCA 16 at paras. 38–39. Depending on the circumstances, that may allow a court to resolve a question of interpretation by finding an agreement where one has clearly been intended. However, where a provision has been found to be uncertain, a court cannot resolve the uncertainty by making a new agreement for the parties based on what it considers to be reasonable. Such actions amount to an impermissible form of notional severance.

[68] The judge resolved the uncertainty by severing only the Incentives Exclusionary Clause from the incentive provisions. The result was a reading down of the incentive provisions in the RSJV Agreement to affect a new agreement. Two incentives became payable to all the investors, even though the terms of the incentive provisions clearly intended the incentives to be available to only some of the investors. As the identity of the parties entitled to receive incentives—and the amount of those incentives—are uncertain and essential, the Incentives Exclusionary Clause cannot be severed from the incentive provisions of the RSJV Agreement.

[69] Before concluding my analysis, I will comment briefly on the three principal reasons the judge provided in support of his conclusion. He reasoned that: the exclusion clause was not included in all the proposals Mr. Hong sent to investors; it is unfair to conclude that the provisions respecting the payment of incentives is void; and the agreement was partially performed to a significant degree.

[70] In my view, these reasons do not support a finding that identification of the parties entitled to the incentives was not essential to the incentive provisions of the RSJV Agreement.

The exclusion is not found in all three proposals

[71] The judge notes at para. 132 that the three proposals did not contain the same exclusion clause. One proposal contained no exclusion clause and the

English translations of the other two were somewhat different. He observes that “[i]f an exclusion was vital, it would have likely been present in all of the proposals.”

[72] In my view, the judge’s logic does not hold given the context of the proposals. Earlier in his reasons the judge correctly found that the proposal which became the RSJV Agreement was delivered “solely to the RSJV Investors and was focused solely on the terms on which the RSJV Property could be leveraged”: at para. 110. The incentives agreed to were specific to those investors and that property. The other two proposals were sent to different groups of investors and concerned different properties. This alone provides a rationale for differences in the proposals. One of these two other proposals (the “crisis management proposal”) singled out by the judge at para. 132, did not include the exclusionary language. Yet the reason the crisis management proposal lacked an exclusionary clause was because it was not project specific and was sent to all Argo investors to describe the overall situation with the Olympic Village Project and Mr. Hong’s proposed course of action.

[73] In reply, Argo submits that the original Korean in the two proposals that contained exclusion clauses is identical and that the difference in the terms arises from translation. To support that position, it asks the Court to refer to the text of the two exclusion clauses in the appeal books. On appeal we cannot determine if that is correct. However, I would note that when working with documents translated from a foreign language it may be unsafe to place undue weight on small wording differences.

Unfairness

[74] The judge commented at para. 133 that “it would be entirely unfair to accede to the defendants’ argument” as it would render the provisions respecting the incentives void and would give Argo “a windfall” at the expense of investors. Mr. Kim is unable to identify any jurisprudential basis for the proposition that unfairness is a relevant consideration for the severance analysis. In my view, unfairness is irrelevant in most cases when determining whether to apply severance to a term of a commercial contract.

[75] I agree with Argo's submission that the Court's statements in *Shafron* suggest that fairness is not a proper consideration. In *Shafron*, the Court had attempted to resolve the ambiguity in the term "Metropolitan City of Vancouver" by reading down the restrictive covenant "according to its notion of reasonableness and what it thought the parties might have intended": at para: 47. The Court found:

[39] In the case of an unreasonable restrictive covenant, while the parties may not have had the common intention that the covenant be unreasonable, there is no objective bright-line rule that can be applied in all cases to render the covenant reasonable. Applying notional severance in these circumstances simply amounts to the court rewriting the covenant in a manner that it subjectively considers reasonable in each individual case. Such an approach creates uncertainty as to what may be found to be reasonable in any specific case.

[Emphasis added.]

[76] In my view, the judge took a similar approach here. Having found the exclusion clause uncertain, he attempted to rewrite the incentive provisions in a manner that he considered to be fair. Severance is a remedy to be used sparingly. It is not to be used to alter an agreement to make it fair in the eyes of the court.

[77] I would add that the judge's view of fairness was one-sided. As I have observed, the intent of the parties' agreement was to make incentives available to some, but not all, investors. It is equally unfair to require Argo to pay greater incentives to more investors.

Partial performance

[78] The judge noted that the parties relied on having entered a binding agreement and taken steps to carry out its terms including registration of a mortgage against the RSJV Property. He was of the view that partial performance and reliance was "indicative of the divisibility of the Incentives Exclusion Clause": at para. 135.

[79] I do not see how the parties' reliance and partial performance in this case indicate divisibility. The circumstances of this case meant that the amount of the incentives to be paid for agreeing to use the RSJV equity could not be determined until long after the investors had entered into the RSJV Agreement. As I have noted, some RSJV investors also had their investments in AMF3 and AMF5 at risk and wanted to proceed without being eligible for the RSJV Liquidation Incentive. In

these circumstances, I find that partial performance is not indicative of divisibility. I agree with the judge's comment in the same paragraph that partial performance cannot remedy "defective"—meaning uncertain—terms in an agreement.

Disposition

[80] I would dismiss the appeal.

[81] I would allow the cross-appeal and set aside para. 3 of the order that required Argo to pay \$34,542, plus pre-judgment interest, to Mr. Kim.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Justice Mayer"