IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McQueen v. Playgon Interactive Inc.,* 2026 BCSC 791

Date: 20260430
Docket: S242247
Registry: Vancouver

Between:

Dane McQueen

Plaintiff

And:

Playgon Interactive Inc.

Defendant

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

Counsel for the Plaintiff:	J. Schachter R. Smith
Counsel for the Defendant:	D.P. Davison
Place and Date of Hearing:	Vancouver, B.C. June 20, 2025
Place and Date of Judgment:	Vancouver, B.C. April 30, 2026

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I. Introduction

[1] The plaintiff, Dane McQueen, is a businessman. The defendant, Playgon Interactive Inc. (“Playgon Interactive” or “PI”), is a British Columbia corporation. PI became a wholly-owned subsidiary of Playgon Games Inc. (“Playgon Games” or “PG”) on June 19, 2020. Mr. McQueen is the holder of two promissory notes (“Notes”) executed by PI in or about June 19, 2020.

[2] On April 5, 2024, Mr. McQueen filed a notice of civil claim for breach of contract alleging default on the Notes. A response to civil claim was filed on May 17, 2024, and then an amended response was filed on December 6, 2024. PI does not deny the existence, validity or enforceability of the Notes, but denies that it is in default. PI says its obligation to repay under the Notes has yet to be triggered.

[3] On November 7, 2024, Mr. McQueen filed a summary trial application seeking judgment on the entirety of his claim. PI asserts that there has been no default, and also that the matter is not suitable for summary trial.

[4] Mr. McQueen has filed two affidavits. PI has filed two affidavits sworn by Darcy Krogh. Mr. Krogh is currently a director of PI and PG. It has also filed an affidavit sworn by Guido Gunter Ganschow. Mr. Ganschow is currently a director of PI and PG. Prior to June 19, 2020, Mr. Ganschow was a director and Chief Executive Officer of PI. Mr. Ganschow signed the Notes on PI’s behalf.

[5] While inferences are much disputed, few concrete facts are contentious. Except as noted otherwise, the evidence was unchallenged.

[6] The evidence was subject to some objections. I will address this below, but shortly put, Mr. Ganschow’s affidavit sets out his subjective intentions regarding the repayment obligations under the Notes (Affidavit #1, paras. 11-12), and Mr. Krogh’s affidavits include his own inferences and impressions as though these were facts (e.g., Affidavit #1, paras. 13-14), as well as his subjective intentions in relation to the application of the “Undertaking” document (Affidavit #1, para. 17).

II. Background

[7] In the second half of 2018, PI was working on a gaming product to enable a user to play online games with a live dealer, but was running short on funds. Global Daily Fantasy Sports Inc. (“GDFSI”) made an offer to Mr. Ganschow under which GDFSI would buy PI’s shares and take PI public, and provide PI with bridge funding while the transaction was completed.

[8] Mr. Ganschow and Mr. McQueen had known each other as business acquaintances for years. After he received GDFSI’s offer, Mr. Ganschow spoke with Mr. McQueen about PI’s potential to raise investor funds itself as an alternative strategy. Mr. McQueen, who was experienced in investment funding, supported the idea of PI finding its own investors. Mr. Ganschow opted to try to find investors and arranged short-term funding to cover PI’s operating costs while he did that.

[9] As that short-term operational funding began to run out, between November and December 2018, Mr. McQueen incrementally advanced PI additional funds (“Funds”) to cover operating costs. Mr. Ganschow’s evidence is that the Funds were advanced based on a mutual understanding between Mr. McQueen and Mr. Ganschow that, when PI obtained investment funds, Mr. McQueen would participate in PI’s “upside”.

[10] The search for investors did not pan out, however, and PI then resumed discussions about GDFSI’s proposal as between Mr. Ganschow, as Chief Executive Officer of PI, and Mr. Krogh, as Chief Executive Officer of GDFSI.

[11] On November 29, 2019, PI and GDFSI executed a share purchase agreement. GDFSI subsequently announced that agreement by a press release dated December 2, 2019 (“Dec 2019 Press Release”).

[12] The Dec 2019 Press Release included the following statements:

> Vancouver, British Columbia-(Newsfile Corp. - December 2, 2019) - Global Daily Fantasy Sports Inc. (TSXV: DFS) (FSE: 7CR) ("Global" or the "Company") is pleased to announce that it has executed a definitive share purchase agreement (the "Agreement") with Playgon Interactive Inc. ("Playgon") and its shareholders (the "Vendors") pursuant to which Global will

> acquire all of the issued and outstanding common shares in the capital of Playgon Interactive Inc. ("Playgon") in exchange for equity in common shares in the capital of Global (the "Transaction"). The Agreement is dated November 21,2019 and execution by all parties was completed on November 29, 2019.
>
> …
>
> ... Following completion of the Transaction and the closing of the concurrent Financing (as defined below), there will be no new "control person" of Global (as such term is defined by the TSXV). In addition, completion of the Transaction will be subject to … completion of a concurrent financing for proceeds of not less than $5,000,000 (the "Financing"). The Transaction is expected to close on or before January 15, 2020. …
>
> Global also announces a proposed part and parcel private placement financing for gross proceeds of not less than $5,000,000. … Global will issue a subsequent news release outlining the details of the proposed private placement once details are finalized. The proceeds of the Financing will be used for studio launch, sales and marketing, continued software development, and general working capital.

[13] For purposes of these reasons, I will refer to the “concurrent Financing” described above in the Dec 2019 Press Release as the “Concurrent Financing”.

[14] In a press release dated June 17, 2020, GDFSI announced that the Concurrent Financing had closed.

[15] On June 19, 2020, GDFSI announced by press release that the share purchase (i.e., the defined “Transaction” under the Dec 2019 Press Release) had been completed.

[16] On or about June 19, 2020, under Mr. Ganschow’s signature and dated June 19, 2020, PI issued the Notes as follows:

a) a promissory note in favour of Mr. McQueen for the sum of $133,659.73 (CAD) (the “CAD Note”); and

b) a promissory note in favour of Mr. McQueen for the sum of $25,973.61 (USD) (the “USD Note”).

[17] Amounts and currency aside, the material terms of the Notes are identical.

[18] The Notes included the following particulars:

a) An interest rate of 5.0 percent per annum, calculated quarterly in arrears, both before and after maturity, demand, default and judgment;

b) The principal and any other money owing under the Notes were immediately payable if PI made a default in payment of the principal or in payment of any indebtedness or liability of PI pursuant to the Notes when due;

c) A default in payment pursuant to the Note when due is an "Event of Default";

d) PI was to repay all outstanding principal and all interest accrued thereon on the date following an Event of Default for which Mr. McQueen demands repayment in writing.

[19] Section 5 of the Notes addresses payment obligations and reads as follows:

> **Payments**
>
> Within sixty (60) days following the end of each calendar quarter of the Issuer, beginning at the end of the Issuer's first calendar quarter after the date hereof, the Issuer shall repay to the Holder an amount equal to the Holder's Pro Rata Interest of Available Cash Flow on account of the Obligations until all Obligations are paid in full; provided that, <u>if after the closing of the Transaction, the Issuer or GDFSI completes a subsequent financing for gross proceeds of $5,000,000 or greater (the "Subsequent Financing"), the Issuer shall repay in full the outstanding Obligations under this Note within five (5) Business Days following the closing of the Subsequent Financing</u>. Payments made hereunder shall first apply to any interest accrued and owing and then to principal amount. Any interest owing under this Note that is not so paid when such amount becomes due and payable shall be accrued and added to the principal amount owing under this Note. The Issuer shall have the right at any time to prepay the Principal Amount, in whole or in part.
>
> [Emphasis added]

[20] Section 9(b) of the Notes provides that no waiver of any provision of the Note shall be binding unless in writing. Section 9(d) provides that the terms of the Note may be amended only with the consent of the Issuer and Holder.

[21] Mr. McQueen attests that the Notes were sent to him by PI's legal counsel, Osler, Hoskin & Harcourt LLP, for his signature. He attests that he did not ask for any revisions to the Notes as sent and did not speak with anyone representing PI before signing. That is, he accepted delivery from counsel and signed the Notes exactly as sent to him. Mr. McQueen's evidence on these points is uncontested.

[22] On July 29, 2020, GDFSI announced that it had changed its name to Playgon Games Inc.

[23] By a press release dated May 3, 2023 ("May 2023 Press Release"), PG made two announcements about financing ("May 2023 Financing"). First, PG announced the completion of a brokered private placement of 10.0 percent unsecured convertible debentures for aggregate gross proceeds of $2,550,000 ("Brokered Financing"), and stated:

> The Company intends to use the net proceeds of the Brokered Offering to fund ongoing sales and marketing efforts in core European jurisdictions, to enter new markets including Latin America and North America, ongoing development costs, new tables with native language speaking dealers as well as for general working capital and corporate purposes.

[24] Second, it announced further financing through an anchor investor in the amount of $6,000,000 ("Anchor Financing"). The May 2023 Press Release stated as follows in respect of the Anchor Financing:

> The Company is also pleased to announce that Ms. Kathleen Crook, a shareholder of the Company invested an additional CAD$6,000,000 in the Company by way of the purchase of additional unsecured convertible debentures, with such debentures issued upon substantially the same terms and conditions as those governing the Debentures issued as part of the Brokered Offering (the "Anchor Financing").
>
> …
>
> The Company intends to use the net proceeds realized from the completion of the Anchor Financing for the same purposes as set forth above, as well as the repayment of certain outstanding debt.

[25] On May 17, 2023, Mr. McQueen emailed Mr. Krogh and Mr. Ganschow stating that the May 2023 Financing was "Subsequent Financing" for purposes of the

Notes and that PI was in default accordingly. He sought immediate repayment under the Notes.

[26] Between May 17 and May 25, 2023, Mr. McQueen and Mr. Krogh exchanged a series of emails in which both expressed a preference to avoid litigation, and Mr. Krogh proposed meeting to "figure out something that makes sense for all parties". I will refer to this series of emails as the "First May 2023 Email Chain".

[27] After the First May 2023 Email Chain, Mr. Krogh, Mr. Ganschow and Mr. McQueen participated in a Zoom conference call. On May 30, 2023, Mr. McQueen emailed the call participants (and some additional people with PG domain email addresses), and set out a summary of his recollection of the conversation:

> Messrs.
>
> Pursuant to a Zoom conference call involving Darcy Krogh, Guido Ganschow, and Dane McQueen conducted at 11.00 am PST, 29 May 2023, the following dispute resolution was proposed by Playgon:
>
> Darcy explained that the recently announced capital raise of 3 May 2023 was primarily a company debt conversion exercise resulting in Playgon realising significantly less capital than the specified gross proceeds of CAD$8,550,000.00.
>
> Consequently, the directors have planned a subsequent capital raise roadshow in Europe to commence on 3 June 2023, seeking between CAD$5 to $10 million.
>
> Darcy claimed that the current financial position of the company precluded the ability to immediately remedy the default of both Promissory Notes; however, he expressed that the company would allocate proceeds from the forthcoming capital raise to fully satisfy the outstanding balances of the subject Promissory Notes.
>
> Furthermore, Darcy proposed a "good faith" payment in the interim which was agreed to be applied to remedy the USD Promissory Note. The calculation of interest and principal effective 30 May 2023 is attached for reference, however, for convenience, the total is USD$30,176.72.
>
> The proposed dispute resolution was agreed upon in principle by Dane McQueen, conditional upon receipt of payment (or remittance receipt) to remedy the USD Promissory Note by close of business (17.00 hrs PST Vancouver BC) 2 June 2023.

[28] I will refer to the proposed dispute resolution set out in Mr. McQueen's May 30, 2023 summary as the "Proposed Plan".

[29] On May 31, 2023, Mr. Krogh emailed in response to Mr. McQueen:

> Thank you for your note, most is accurate as detailed below but the "good faith" payment as detailed below was what you wanted as opposed to what I promised, at least that is my understanding. That being said, we do need to have a further discussion subsequent to our call. I have shared our conversation with our group and articulated your wishes and have some further options to discuss. Let me know if you have some time tomorrow for another zoom call
>
> Thx and appreciate your understanding and your input on this trip Guido and I are taking next week.
>
> [Emphasis added.]

[30] I will refer to this May 30-31, 2023, exchange of emails as the “Second May 2023 Email Chain”. I note that while the email chain closes with Mr. McQueen indicating that he could be available for a Zoom call that day, there is no evidence indicating that any such call occurred.

[31] It is evident that the USD Note was not paid off, either in accordance with the terms set out as part of the Proposed Plan in Mr. McQueen’s May 30, 2023 email, or at any time thereafter. Thus, while the Proposed Plan was acceptable to Mr. McQueen in principle, there is no evidence establishing that there was ever an actual agreement made on the terms of the Proposed Plan.

[32] After the Second May 2023 Email Chain, however, a written document entitled “UNDERTAKING” and dated June 2, 2023 (“Undertaking”) came into existence.

[33] The Undertaking specifically references the Notes and then reads:

> The undersigned hereby undertakes, as representative of and on behalf of Playgon Interactive that, upon consummation of Playgon Games Inc.’s next financing the full amount outstanding under the Promissory Notes will be repaid in full (inclusive of all applicable and accrued interest).

[34] The Undertaking is signed by Mr. Krogh in his capacity as a PI director.

[35] Mr. McQueen’s uncontested evidence is that the Undertaking was sent to him by Mr. Krogh on June 2, 2023. There is no evidence of any communication between Mr. McQueen and any representative of PI regarding the creation, wording or

meaning of the Undertaking. The only factual background to the Undertaking is the portion of Mr. McQueen's May 30, 2023, email where he writes that the company's representatives indicated during the conference call that they were willing to "allocate proceeds from the forthcoming capital raise to fully satisfy the outstanding balances" under the Notes.

[36] In his first affidavit, Mr. Krogh says as follows with respect to the Undertaking:

> 15. On or about June 2, 2023, on behalf of Playgon Interactive and Playgon Games and to express their commitment to good faith dealings, I signed an undertaking (the "Undertaking") in favor of Mr. McQueen indicating Playgon Interactive's commitment and undertaking to pay Mr. McQueen the amounts under the Promissory Notes upon consummation of Playgon Games next financing, which remained subject to the Triggering Event, and in addition provide comfort to Mr. McQueen that he would get paid his outstanding Promissory Notes from his efforts to finance a Privatisation Strategy with his contacts. ...
>
> [Emphasis added.]

[37] I note that the underlined portion of the above-quoted paragraph does not correlate with any terms set out in the Undertaking. The underlined statement (which amounts to a shorthand assertion that the Undertaking was itself subject to the terms governing the second clause of s. 5 of the Notes) is Mr. Krogh's subjective understanding of how the Undertaking would apply.

[38] Mr. Krogh's first affidavit goes on to imply that, by agreeing to assist in the identification of possible investors and entering into the Consultant Agreement, Mr. McQueen agreed to PI's position on the proper interpretation of "Subsequent Financing" under the second clause of s. 5 of the Notes:

> 17. Mr. McQueen had informed Playgon Interactive that he wanted to use his contacts and connections to help facilitate the Privatisation Strategy but had wanted to be compensated for his efforts. Mr. McQueen had also requested for the Promissory Notes to be settled once he was successful in helping Playgon Interactive and Playgon Games raise capital and successfully complete subsequent financing within the scope of the Triggering Event under the Promissory Notes. ...
>
> …

> 20. In no part of the Business Consultant Agreement did it provide that the failure of it or Mr. McQueen's efforts on the Privatisation Strategy would make the Promissory Notes payable immediately.

[39] During June through August of 2023, PI representatives and Mr. McQueen discussed the possibility of Mr. McQueen's assisting PI and PG in the search for investment financing (and an undertaking sometimes referred to by the parties as the "Privatisation Strategy"). To this end, Mr. McQueen eventually signed a business consultant agreement ("Consultant Agreement"). The Consultant Agreement was signed by Mr. Krogh (on behalf of PG), and dated August 21, 2023. The Consultant Agreement gave Mr. McQueen a 5 percent fee on investment funds arranged through Mr. McQueen's introductions. The Consultant Agreement does not make any reference to the Notes or the Undertaking.

[40] By press release dated December 29, 2023 ("Dec 2023 Press Release"), PG announced that it had completed a non-brokered private placement of unsecured convertible debentures "for aggregate gross proceeds to the Company of CAD $4,971,000" ("Dec 2023 Financing"). The Dec 2023 Press Release states that the majority of that financing by way of a further investment made by a key shareholder, Kathleen Crook.

[41] By letter dated March 11, 2024, counsel for Mr. McQueen made a demand to PI for repayment of the full amounts outstanding under the Notes, plus applicable and accrued interest. The letter stated that PI was in default under the Notes:

> … due to, among other things, its refusal to repay our client the full amount owing upon the closing of Playgon Gaming Inc.'s non-brokered private placement on December 29, 2023.

[42] PI did not make any repayment under the Notes further to the March 11, 2024, demand letter.

III. Legal Framework

A. Suitability for Summary Trial

[43] This matter proceeded by way of summary trial pursuant to Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*]. Rule 9-7(15)(a) permits the

court to grant summary judgment, either on an issue or generally, unless: (i) the court is unable, on the whole of the evidence, to find the facts necessary to decide; or (ii) the court is of the opinion that it would be unjust to decide the issues on the application.

[44] Mr. McQueen says the matter can and should be resolved by summary trial. PI takes the opposite view. While they disagree on the outcome to be obtained by application of the principles, there is no dispute regarding the principles to be applied in assessing suitability.

[45] In *Canadian Western Bank v. D.K. Heli-Cropper Int'l Ltd*., 2020 BCSC 1352 [*Heli-Cropper*], Justice Marzari outlined the general principles guiding the considerations:

> [26] The critical question facing the court when hearing a summary trial application is whether the court can find the facts necessary to decide the disputed issues. Even where the court can find the necessary facts, it must still consider whether it would be just to decide the matter summarily, by reference to factors such as the amount involved, the complexity of the matter, its urgency, any prejudice that might arise by reason of delay, the cost of taking the matter forward to a conventional trial, the course of the proceedings, and any other matters which arise for consideration: see *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd*. (1989), 1989 CanLII 229 (BC CA), 36 B.C.L.R. (2d) 202 (C.A.) at 211, 215 and *Gichuru v. v. Pallai*, 2013 BCCA 60, at paras. 30-31.
>
> [27] Summary procedures are important and serve the public interest in deciding cases where there is no issue requiring conventional trial. Summary trial and judgment rules are to be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims: See *Hryniak v. Mauldin*, 2014 SCC 7 and *VFS Canada Inc. v. Shas Tut Contracting Ltd.,* 2015 BCSC 2015 at paras. 33 and 34.
>
> [28] Cases may be decided summarily if the court is able to find the necessary facts, even if there are disputed issues of fact and law, provided that the court does not find it is unjust to do so.
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> [29] It is incumbent upon parties in summary trial proceedings to "put their best foot forward" in terms of the evidence they lead, and not to assume that the matter is not amenable to summary trial, or that other parties will submit key evidence upon which they seek to rely. All parties to an action must come to a summary trial hearing prepared to prove their claim or defence. Parties are obliged to take every reasonable step to put themselves in the best position possible. A party cannot, by failing to take such steps, frustrate the benefits of the summary trial process: *Gichuru* at para. 32.

[46] The court will generally also consider whether credibility is a critical factor in the dispute, whether summary trial may result in unnecessary complexity, and whether a summary trial would give rise to litigation in slices: *Dahl et al. v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, aff'd 2006 BCCA 369; *Gichuru v. Pallai*, 2013 BCCA 60 at para. 31. Finally, the court may conclude that a summary trial would be unjust in the circumstances, even though satisfied that the facts could be found on all of the evidence: *Saran v. Cartonio, Inc*., 2020 BCSC 556 at para. 31.

B. Contractual Interpretation

[47] Here, too, although the parties cited different cases for various principles, they parties were in essential agreement as to what the guiding principles are. Notably, both sides place primary reliance on *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 [*Sattva*].

[48] In my view, the summary found in the reasons of Justice Riley (then of this Court) in *H.R.S. Resources Corp. v. Thompson Creek Metals Company Inc*., 2024 BCSC 1847 [*HRS*], at paras. 129–139, helpfully distills and breaks down the modern principles. (Although the outcome in *HRS* was overturned, neither the parties nor the Court of Appeal took any issue with Justice Riley's summary of the law: see 2026 BCCA 6 at paras. 28 and 42.)

[49] In *HRS*, Justice Riley wrote:

> [129] The court's goal in the interpretation of a contract is to ascertain the objectively discernible intention of the contracting parties based on the words the parties chose to use in their agreement: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 at para. 47, 57. The intention of the parties is determined on an objective basis. The question is how a reasonable person would understand the contract based on its text and in light of the surrounding circumstances: *Prairiesky Royalty Ltd. v. Yangarra Resources Ltd*., 2023 ABKB 11 at para. 60.
>
> [130] To achieve the goal of discerning contractual intent, one must "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract", and also consistent with the relevant commercial realities and good business sense: *Sattva* at paras. 47; *Prism Resources Inc. v. Detour Gold Corporation,* 2022 ONCA 326 at para. 16(ii). I find it helpful to break down this succinct summary of the proper approach by focusing on four discrete but overlapping points of interpretation.

> [131] First, the interpretive exercise should always start with the text of the contract itself. In the case of a written contract, the contracting parties have chosen to express their agreement in particular terms. The starting point should be that the parties "intended what they said in the written document": *Prism* at para. 16(i).
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> [132] Second, it is "a fundamental principle of contractual interpretation that a contract must be construed as a whole": *Sattva* at paras. 47, 64. This means that interpretation of a particular contractual provision must always be "grounded in the text and read in light of the entire contract": Sattva at para. 57. The court must adopt an interpretation that "gives meaning to the terms" of the agreement, in a manner that does not render any of those terms "ineffective": *Prism* at para. 16(ii); *Prairiesky* at paras. 59-60.
>
> [133] Third, courts have acknowledged the difficulty in ascertaining contractual intent based on the words in the contract alone. Words on a page do not necessarily have a singular or immutable meaning, and they often take on shape based on the context in which those words are used: *Sattva* at para. 47. For this reason, it is necessary for the court to consider the surrounding circumstances – sometimes referred to as the factual matrix – in which the agreement was made as part of the interpretive exercise: *Sattva* at paras. 46, 50, 58; *Prairiesky* at paras. 60-61; *Prism* at para. 16(iii); see also *St. Andrew Goldfields Ltd. v. Newmont Canada Limited*, 2009 CanLII 40549 (ON. S.C.) at para. 15, aff'd 2011 ONCA 377; *Lake Louise Limited Partnership v. Canad Corp. of Manitoba Ltd.*, 2014 MBCA 61 at para. 33.
>
> [134] Fourth, courts must also strive to interpret the text of the contract in a manner that accords with "sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed": *Prism* at para. 16(iv); see also *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.,* 1979 CanLII 10 (SCC), [1980] 1 S.C.R. 888 at para. 26. ...

[50] I note, in particular, that the *HRS* review addresses those principles that were specifically relied upon by counsel here in support of their submissions. For example, PI emphasized *Khajavi v. Eghtesadi*, 2016 BCSC 1127 at para. 30; and *Bene (Oval) Development Ltd. v 1148538 B.C. Ltd,* 2024 BCSC 2080 [*Bene*] at paras. 113-115. The corresponding principles are referenced in *HRS* at paras. 129-139.

IV. Parties' Positions

[51] Mr. McQueen says the dispute here is straightforward: did the May 2023 Financing constitute "Subsequent Financing" for purposes of s. 5 of the Notes. Mr. McQueen says there are no material conflicts in the evidence, and that all of the principles of contractual construction point to the same conclusion here: i.e., that the

May 2023 Financing was patently a “Subsequent Financing” that triggered the obligation to repay under the second clause in s. 5 of the Notes.

[52] PI submits that “Subsequent Financing” is an ambiguous term. PI submits that the term, as used in the second clause of s. 5 of the Notes, is amenable to at least two reasonable interpretations. It might be interpreted to mean “any financing over $5,000,000”, but could also be interpreted as meaning “any surplus financing over $5,000,000.00 which does not involve repayment of prior debts or coverage of ‘already spent money’”. PI says the factual matrix for the Notes strongly indicates that the latter interpretation was intended.

[53] PI argues that interpreting “Subsequent Financing” to mean “any financing over $5,000,000” does not make any practical or commercial sense from PI’s perspective. PI argues that unless “a large amount of new funds was available, [PI would] effectively, [be] borrowing from Peter to pay Paul”, whereas tying the repayment the receipt of “new money” would make commercial sense.

[54] PI also says that the subsequent conduct of the parties in continuing to make joint efforts to raise funds for PI/PG from investors in furtherance of Privatisation Strategy also supports the latter interpretation.

[55] PI submits that the dispute over the interpretation of “Subsequent Financing” renders the present matter unsuitable for summary determination. PI points, in particular, to *Bene*, where Justice Giaschi found there were gaps in the record regarding the discussions and negotiations leading up to the contract, and that the evidence of key witnesses to the negotiations was not included in the summary trial application record: see paras. 33, 36, 47, 112-21, and 142-44.

[56] PI says the evidence of the factual matrix and the parties’ intentions here must be addressed through testimony and cross-examination. PI says the Court will be far better positioned to resolve the conflicts following discovery and trial on the merits.

[57] PI also says there are important credibility issues here. PI says the evidence shows that Mr. McQueen initially acceded to PI's position regarding the meaning of "Subsequent Financing" and agreed that neither the May 2023 Financing nor the December 2023 Financing constituted "Subsequent Financing" for purposes of triggering repayment under the second clause of s. 5 of the Notes, and that Mr. McQueen is now taking a contrary position in this litigation and has sworn affidavits that contradict with his earlier position. PI says this change of position gives rise to a credibility issue that cannot be resolved on affidavits.

[58] Finally, PI asserts that an understanding of accounting principles is necessary to resolve this matter. PI says the Court has not been put in a position to consider accounting principles under the application record.

[59] In reply, Mr. McQueen stresses it's view that s. 5 is an unambiguous provision, and thus PI's evidence of subsequent conduct is all inadmissible. Mr. McQueen further submits that, even if the subsequent conduct evidence put forward by PI was admissible, it actually supports Mr. McQueen's position. PI says, in particular, that Mr. Krogh's execution of the Undertaking amounted to an acknowledgement that PI was in default under the Notes.

V. Analysis

A. Evidence on the Application

[60] Here, the Notes are written documents signed by the parties. The parties' outward expressions are manifest. The starting point is that the parties meant what they said, as determined by the ordinary and grammatical meaning of the words they used.

[61] The second clause of s. 5 of the Notes is central to the dispute. For convenience, I will set it out again:

> **Payment**
>
> … provided that, if after the closing of the Transaction, the Issuer or GDFSI completes a subsequent financing for gross proceeds of $5,000,000 or greater (the "Subsequent Financing"), the Issuer shall repay in full the

> outstanding Obligations under this Note within five (5) Business Days following the closing of the Subsequent Financing. …

[62] The "Issuer" is PI. Following GDFSI's name change, the Note specifies that the "Subsequent Financing" can be completed by either PI or PG.

[63] "Subsequent" is defined under the *Concise Oxford English Dictionary*, 12th ed. (Oxford, England: Oxford University Press, 2011), as "coming after something in time".

[64] The relevant definition for "gross" set out in the *Concise Oxford English Dictionary* (12th ed.) reads "without deduction of tax or other contributions; total". In *Eddie Willox Agencies Ltd. v. Great-West Life Assurance Co*., [1984] 6 W.W.R. 193 at 208, 30 Man. R. (2d) 215 at 225 (Q.B.), the defendant party sought to have the commission payable on "gross proceeds" under a contract calculated on a basis that excluded a prepayment and a bonus. The Court disagreed:

> 61 There is nothing in that. From the *Shorter Oxford English Dictionary* "gross" means "nothing being omitted or withheld"; the *Century Dictionary* shows "whole; entirely; total; specifically without deduction, opposed to net; as the gross sum or amount, gross profits, income, or weight." *Ibid* (*Century*) for "net", "clear of anything extraneous, without deductions such as charges, expenses, commissions, taxes etc, as net proceeds." *Black's Law Dictionary* shows "gross" as "before or without diminution or deduction; whole, entire, total, opposed to net," *ibid* "net proceeds, gross proceeds, less charges which may be rightly deducted".
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> 62 "Gross" is the antithesis of "net." …
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> ...
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> 64 Clearly, the "gross proceeds" of the sale here was to be four million dollars. Had Great-West intended to restrict Willox to payment on the basis suggested by its actuary, it could have (but did not) use words apt to that purpose. If - and this would put Exhibit 3 at its highest - the phrase is ambiguous, then the ambiguity must be resolved against the author, i.e. Great-West.
>
> [Emphasis added.]

[65] Neither party provided the Court with a dictionary definition or case law dealing with the ordinary and grammatical meaning of "financing". There is, however, a *Black's Law Dictionary* definition. The *Black's Law Dictionary* definition, along with

an earlier Prince Edward Island trial case, was considered in *Octagon Capital Corporation v. Niko Resources Ltd*., 2016 ONSC 3946 [*Octagon*]:

> [15] The *Oxford Dictionary* does not define "financing". However it does define "finance" to mean to "provide funding for (a state, organization or person)". *Black's Law Dictionary* defines "financing" as "the act or process of raising or providing funds". In *Ellen Creek Developments Inc. v. Charlottetown Area Development Corp*. 2008 PESCTD 14, [2008] P.E.I.J. No. 16, the court stated, at para. 53:
>
> > The word "financing", as a concept, does not mean simply that some bank be prepared to lend some money to a borrower. Indeed, partial self-financing is a necessary component of almost all bank-assisted purchases, and 100% self-financing of a project is certainly one way of doing it: the definition of financing does not presume involvement by a lending institution. *Webster's New Collegiate Dictionary*, and also *Merriam-Webster's Dictionary of Law* define "financing" as "the act or process or an instance of raising or providing funds, also: the funds this raised or provided". The *American Heritage Dictionary* defines "financing" as "the supplying of funds or capital".
>
> [16] Based on the above sources, I find that the ordinary and grammatical meaning of "financing" is the supplying of funds.

[66] I agree that the plain and grammatical meaning of "financing" is the "supplying of funds".

[67] Turning to consideration of the contract as a whole, the Notes are brief.

[68] The parties did not specifically identify any other terms of the Notes as particularly relevant to the interpretation of "Subsequent Financing" in s. 5. I note, however, the following defined terms included in s. 1:

> **1. Definitions**
>
> In this Note, the terms defined below shall have the indicated meanings set forth below:
>
> "**Available Cash Flow**" means an amount equal to 25% of free cash flow from operations of the business conducted by the GDFSI, after deducting any expenses of GDFSI, calculated on a fiscal quarterly basis.
>
> …
>
> "**Transaction**" means the acquisition of the outstanding securities of the Issuer by GDFSI together with a concurrent financing by GDFSI for proceeds of not less than $5,000,000.

[69] The definition of “Available Cash Flow” is relevant to the first clause of s. 5 of the Notes, which reads:

> Within sixty (60) days following the end of each calendar quarter of the Issuer, beginning at the end of the Issuer’s first calendar quarter after the date hereof, the Issuer shall repay to the Holder an amount equal to the Holder’s Pro Rata Interest of Available Cash Flow on account of the Obligations until all Obligations are paid in full; ….

[70] The definition of “Available Cash Flow” shows that the drafter turned their mind in the drafting of the Note to the question of whether repayment obligations should be restricted to certain categories of funds (e.g., funds immediately at hand and/or funds surplus to PI’s operational needs). Further, the term “Available Cash Flow” is not simply used in the same contract, it is used in the same provision and in the clause immediately preceding the disputed clause. That is, within s. 5, the phrase “subsequent financing for gross proceeds of $5,000,000” is part of the second clause which is structured as an *exception* to the “Available Cash Flow” repayment arrangement (that does includes restrictions of the type of funds). Thus, the drafter not only turned their mind to the possibility of putting restriction on the types of funds available for making repayment, the drafter did so in drawing a contrast between the first and second clauses of s. 5.

[71] The Note’s definition of “Transaction” is noteworthy in that it specifically includes the “Concurrent Financing” described in the Dec 2019 Press Release as part of the Note’s definition of “Transaction”. As a result, under the Note, “Subsequent Financing” contrasts with the “Concurrent Financing” that is defined to be part of the “Transaction”. In short, “subsequent” describes financing following in time after receipt the Concurrent Financing: i.e., the *next* financing reaching the minimum gross proceeds threshold.

[72] I will now consider the “surrounding circumstances” or “factual matrix”. Again, I take guidance from the principles set out in *HRS.* I note Justice Riley’s additional paragraphs providing the following elaboration:

> [135] Many of the leading cases acknowledge the importance of the surrounding circumstances to the interpretive exercise. In this regard, a few further points must be noted.
>
> [136] The goal in considering evidence of the surrounding circumstances is to "deepen a decision maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract": *Sattva* at para. 57. As Madam Justice L.B. Roberts put it in *St. Andrew Goldfields* at para. 15, "even when the terms of an agreement are not ambiguous, the evidence of surrounding circumstances and of custom or usage may be admitted as an aid in interpreting and giving business efficacy to those terms".
>
> [137] It is important to bear in mind that the factual matrix is limited to facts that were "known or ought reasonably to have been known to the parties" at the time the contract was formed: *Prairiesky* at para. 61, citing *Sattva* at paras. 58, 60, and *IFP Technologies (Canada) Inc. v. Encana Midstream and Marketing*, 2017 ABCA 157 at para. 83; see also *Prism* at para. 16(iii). This "necessarily includes" the "genesis of the agreement", "its aim or purpose", the "nature of the relationship created by the agreement", and the "nature" and "customs" of the industry: *Prairiesky* at para. 61, citing *Sattva* at para. 47 and *IPF* at para. 83; see also *Prism* at para. 16(iii). The surrounding circumstances can also include the degree of sophistication of the parties, and the nature of the risks considered by those parties in negotiating the contract: *Sattva* at para. 66.
>
> [138] The factual matrix does not include evidence of "the subjective intention of the parties", "negotiations", or the "subsequent conduct of the parties" after the execution of the contract: *Lake Louise* at para. 34. Indeed, evidence as to the subjective intentions of the parties, along with evidence of their post-contract conduct, is presumptively inadmissible. Such evidence is only admissible to resolve ambiguity, where the words of the written contract read in the context of the surrounding circumstances are genuinely ambiguous in the sense that they could reasonably support multiple, equally plausible meanings: *Prairiesky* at para. 62.
>
> [139] Finally, the factual matrix cannot be allowed to "overwhelm" the words of the contract, or change the words so as to undermine the obligations and rights that the parties assumed when they entered the contract. Thus, while the surrounding circumstances are a relevant and important part of the interpretive process, courts "cannot use them to deviate from the text such that the court effectively creates a new agreement": *Sattva* at para. 57; *Prism* at para. 17.

[73] The origin story of the Notes is an unusual one. The Funds were not originally conceived of as a loan, but rather as akin to an investment. After PI returned to considering GDFSI's proposal, PI's auditors flagged the lack of accounting records for the Funds, and then *PI and GDFSI* agreed that the Funds should be treated as a loan from Mr. McQueen to PI. At some point after that decision was made, PI's legal

counsel sent the Notes to Mr. McQueen. Mr. McQueen simply accepted them as sent. There were no discussions or exchanges between the parties regarding the repayment of the Funds or the terms of the Notes.

[74] This case is unlike *Bene*. In *Bene*, the application record disclosed that there had been discussions and counteroffers, but there was nonetheless "relatively little evidence about what transpired during the discussions and negotiations" that led to the contract (paras. 36-40). The record in *Bene* indicated that two real estate agents had, in fact, participated in negotiations, but neither had provided an affidavit (para. 47). The *Bene* application record also indicated that representations had been made during negotiations, but provided no meaningful details regarding same (para. 59). Justice Giaschi was concerned that these "gaps" in the record made the case unsuitable for summary determination (along with concerns about conflicts in the affidavit evidence and the state of the affidavit evidence provided by the tax experts.)

[75] Here, nothing in the evidence suggests that there were discussions or exchanges between the parties in the lead-up to the existence and execution of the Notes. The unusual genesis of the Notes explains why that is so. Nor is there any evidence in the record that indicates there were any earlier agreements or any course of dealings between the parties that might bear on the interpretation issues.

[76] The background to the Undertaking is similar to that of the Notes. At best, the concept of such a promise was introduced in the discussion summarized in the Second May 2023 Email Chain. After that, the evidence before me indicates that PI unilaterally drafted the Undertaking and then emailed a signed version to Mr. McQueen. As with the Notes, there is no evidence indicating that there were any discussions, exchanges, or communications between the parties regarding the wording of the Undertaking.

[77] There is no suggestion that any custom or industry practices are relevant to the interpretation of the Note or the Undertaking.

[78] The basic fact that there is little evidence of "surrounding circumstances" here does not demonstrate that there is a "gap" in the application record as in *Bene*. Here, there is no suggestion that additional evidence of "surrounding circumstances" exists. If additional surrounding circumstances do not exist to be marshalled into evidence by the parties, then the fact that evidence of additional surrounding circumstances is in the application record does not indicate a "gap".

[79] The factual matrix is that Mr. McQueen advanced the Funds to sustain PI operations while he and Mr. Ganschow sought out potential investors. After that investment search was abandoned, PI unilaterally proposed terms for repayment of the Funds. As already noted, Mr. McQueen accepted them as proposed.

[80] I am satisfied that the information set out in the Dec 2019 Press Release was information that was known or ought reasonably to have been known to both the parties at the time of execution of the Notes. No doubt the parties both understood the share purchase and concurrent financing references in the Note to be the "Transaction" and "Concurrent Financing" described in the Dec 2019 Press Release. (This is significant in that although the Note does not reference to amount of the Concurrent Funding, both parties were aware from the Dec 2019 Press Release that was required to amount to at minimum of $5,000,000 in gross proceeds.

[81] The factual matrix for the Undertaking is the existence of the Notes, and the contents of the First and Second May 2023 Email Chains. Further, I am satisfied that the information in the May 2023 Press Release was information known or that ought reasonably to have been known to both PI and Mr. McQueen at the time the Undertaking was given.

[82] Turning to evidence of subjective intentions, Mr. McQueen objects that PI is improperly seeking to rely on Mr. Ganschow's subjective intentions as part of the factual matrix. Mr. Ganschow's affidavit includes the following paragraphs:

> 11. In or about August 2019, Playgon Interactive's auditors identified the undocumented and unrecorded Funds advanced by Mr. McQueen to Playgon Interactive. For accounting purposes, Playgon and GDFSI decided to record the Funds through the Promissory Notes as a loan, even though they had not

> been originally structured as such. This was primarily done to acknowledge Mr. McQueen's past support and provide a mechanism for repayment from free cash flow or a subsequent gross proceed of 5M or greater.
>
> 12. The Promissory Notes were made on the understanding that they were only payable when Playgon Interactive would reach positive free cashflow or would complete a subsequent financing for gross proceeds of $5,000,000 or greater. This meant that the Funds would only to be paid to Mr. McQueen when Playgon Interactive would have substantial positive and free cash flow or financing, which included new money or future profits and did not include financing of previous debts.
>
> [Emphasis added.]

[83] I agree that the underlined portions set out Mr. Ganschow's subjective intentions in signing the Notes, and his subjective understanding of how the terms would operate with respect to repayment and, as such, are *prima facie* inadmissible.

[84] Mr. Krogh's attestations regarding the Undertaking are similarly flawed. Mr. Krogh's first affidavit includes the following paragraph:

> 15. On or about June 2, 2023, on behalf of Playgon Interactive and Playgon Games and to express their commitment to good faith dealings, I signed an undertaking (the "Undertaking") in favor of Mr. McQueen indicating Playgon Interactive's commitment and undertaking to pay Mr. McQueen the amounts under the Promissory Notes upon consummation of Playgon Games next financing, which remained subject to the Triggering Event, and in addition provide comfort to Mr. McQueen that he would get paid his outstanding Promissory Notes from his efforts to finance a Privatisation Strategy with his contacts. Attached to this my affidavit and marked Exhibit "I" is a true copy of the Undertaking dated June 2, 2023.
>
> [Emphasis added.]

[85] The underlined passage reflects Mr. Krogh's subjective view as to how the Undertaking would apply. His subjective intentions are *prima facie* inadmissible. Further, as there were no exchanges between the parties about the drafting of the Undertaking or discussing the relationship (if any) between the Undertaking and the Notes, there are no exchanges among the parties in relation to the Undertaking that assist in the interpretation of "Subsequent Financing' in the Notes.

[86] There is also the evidence of the parties' subsequent conduct in continuing to search for investors. PI, relying on Mr. Krogh's affidavit, submits that Mr. McQueen's conduct after the May 2023 Financing amounted to a concession that Mr. McQueen

had “misunderstood” the Notes when he alleged default based on the May 2023 Financing. PI asserts that Mr. McQueen’s subsequent conduct included conceding that PI’s interpretation of “Subsequent Financing” in s. 5 was correct. PI then goes further and submits that the fact that Mr. McQueen made such concessions but then changed his position in pursuing this litigation position gives rise to serious credibility issues with respect to Mr. McQueen’s affidavit evidence.

[87] In response, Mr. McQueen submits that evidence of subsequent conduct is *prima facie* inadmissible evidence under *Sattva*. Mr. McQueen also takes issue with the propriety and accuracy of the conclusions set out in Mr. Krogh’s affidavit, and in PI’s submissions, given the actual evidence. Mr. McQueen submits that the attachments to Mr. Krogh’s affidavit do *not* support the factual conclusions he sets out in the body of his affidavit. I agree that they do not.

[88] On review of the attachments, in my view, Mr. McQueen consistently maintained that the May 2023 Financing was “Subsequent Financing” and that PI’s failure to pay the Notes following that financing was a default under the Notes. Mr. McQueen did not make the concessions attributed to him by Mr. Krogh. Mr. Krogh’s conclusory statements regarding the nature and meaning of Mr. McQueen’s conduct subsequent to the execution of the Notes are not only unsupported, but misleading in that they misrepresent the content and import of the email communications his statements purport to be based upon.

[89] The First and Second May 2023 Email Chains were put into evidence as attachments to Mr. Krogh’s first affidavit. (No objection was taken on the basis of the emails amounting to without prejudice communications.) Mr. Krogh attests as follows based on his reading of the email chains:

> 13. Mr. McQueen had been under the misunderstanding that Playgon Interactive and Playgon Games had received new surplus funds exceeding the threshold of $5,000,000.00 which triggered the payment clauses under the Promissory Notes. Due to this misunderstanding, on or between May 17 to 25, 2023, Mr. McQueen and Playgon Interactive exchanged email correspondences arguing on their respective positions. Attached to this my affidavit and marked Exhibit “G” are true copies of the [First May 2023 Email Chain].

> 14. However, through the discussions and disclosures between the parties, Mr. McQueen finally understood what had actually transpired during the May Financing and that Playgon Games had only received funds to cover its previous longstanding debts in order to continue operations to generate further surplus funds in order reach the point of the Triggering Event to be able to repay Mr. McQueen the amounts under the Promissory Notes. On or between May 30 to 31, 2023, Mr. McQueen acknowledged that he understood what the May Financing was about and offered to explore alternative methods to resolve the issues. Mr. McQueen had also requested for a good faith payment of the USD Promissory Note. Attached to this my affidavit and marked Exhibit "H" are true copies of the [Second May 2023 Email Chain].

[90] The emails establish that Mr. McQueen initiated the First May 2023 Email Chain with an unambiguous assertion that PI was in default following the May 2023 Financing. In his subsequent emails, Mr. McQueen did not abandon his assertion that there had been a May 2023 default nor purport to waive the default so asserted. Mr. McQueen never conceded that he had "misunderstood" anything in alleging default, nor did he indicate that he "finally understood" anything about s. 5.

[91] In the emails, Mr. McQueen did acknowledge that Mr. Krogh and Mr. Ganschow had described a "Privatisation Strategy". Mr. McQueen also acknowledged that Mr. Krogh and Mr. Ganschow had indicated that they hoped to be able to pay out the Notes soon as a result of the Privatisation Strategy efforts. However, no reasonable interpretation of those acknowledgements could be cast as an implied concession by Mr. McQueen that there had been no default in May 2023.

[92] To the contrary, in Mr. McQueen's May 30, 2023 summary email, he stated that PI's representatives had said during the May 29, 2023 conference call that PI's financial position "precluded the *ability* to immediately *remedy the default*" (emphasis added). Mr. Krogh confirmed that the summary was "mostly correct", and while he went on to specifically dispute what he disagreed with (about payment of the USD Note), he did not deny that the discussion had been about how to remedy PI's *default*.

[93] Mr. McQueen's emails were consistent with his current litigation position, it is Mr. Krogh's that were not.

[94] Paragraphs 17 and 20 of Mr. Krogh's first affidavit imply, without any evidentiary support, that Mr. McQueen had agreed that PI was not required to repay the Notes unless or until a "Triggering Event" (i.e., a "Subsequent Financing" as defined by PI) occurred. There is no evidence establishing any such agreement.

[95] With respect to the December 2023 Financing, Mr. Krogh attests as follows:

> 28. The December Financing was like the May Financing, except the conversion price in the December Financing was lower than the conversion price in the May Financing. ...
>
> 29. Out of the total of $4,971,000.00 in the December Financing, the new money only amounted to $2,030,000.00. Firstly, this did not fall within the scope of the Triggering Event as it fell under the subsequent financing threshold of $5,000,000.00 under the Promissory Notes and secondly, the financing had involved Playgon Games and not Playgon Interactive.
>
> 30. Being aware that the December Financing was simply a debt financing not amounting to new funds sufficient enough to come within the scope of the Triggering Event, Mr. McQueen continued his attempts to advance the Privatisation Strategy by sourcing out other potential investors. Attached to this my affidavit and marked Exhibit "S" are true copies of the emails exchanged by the parties on January 17, 2024.
>
> [Emphasis added.]

[96] The January 17, 2024, email chain does not provide any support for the underlined statement. A review of the attached emails reveals only that Mr. McQueen did continue to try to put PI/PG in touch with potential investors, as contemplated by the Consultant Agreement.

[97] I reject PI's assertion that Mr. McQueen's entering into the Consultant Agreement and continuing to assist with the search for investors somehow demonstrates that Mr. McQueen had accepted PI's interpretation of "Subsequent Financing" or had abandoned his May 2023 assertion of default. Both sides had expressed a desire to avoid litigation on the Notes if possible. If Mr. McQueen successfully helped PI/PG find investors, he could get the Notes paid without having to litigate *and* earn Consultant Agreement fees in the process. His conduct in continuing to assist was consistent with his own best interests in terms of being repaid. It cannot reasonably be construed as an admission or concession.

[98] As the evidence does not establish that Mr. McQueen took an inconsistent position prior to this litigation, there are no credibility issues arising from his conduct in having subsequently having sworn the affidavits filed on this application.

B. Suitability for Summary Trial

[99] I am satisfied that summary trial is appropriate here and will provide a just outcome. There are no concerning gaps in the evidence. There are no material conflicts in the affidavit evidence. To the extent that there are credibility issues, they can be resolved on the record. The total amount at stake is between $200,000 and $300,000 (CAN).

[100] The issues are not complex. Determining the application will not give rise to litigation in slices. While there is no particular urgency here, nor any particular prejudice that would arise from further delay, proportionality under the *Rules* strongly favours dealing with the matter sooner rather than later. Both parties had ample notice and opportunity to put their best foot forward on this application. Neither the time nor the expense involved in conducting a conventional trial is warranted here.

[101] PI argues that the matter “requires further expert or technical evidence such as accounting reports and financial documents which interpret or give context to technical commercial and accounting phrases” in order to be resolved, but it did not explain how or why that is so. PI did identify which phrases were said to merit such attention. In any event, I am satisfied that there is no such need here (see below regarding the plain and grammatical meaning).

[102] I am satisfied that I can find the facts necessary to resolve the issue on the application record. I conclude that there is nothing unjust in resolving the matter by means of summary determination in the circumstances of the case.

C. “Subsequent Financing” & Default

[103] In my view, the meaning of the term “Subsequent Financing” as used in s. 5 of the Notes is clear and unambiguous.

[104] The plain and grammatical meaning of the term is any funding, completed after the Concurrent Financing, that involves receipt, by PI or by PG, of gross proceeds of more than $5 million. There is no reason to depart from the plain and grammatical meaning.

[105] Had the intention been for the obligation to make full payment to be engaged only when and if a certain type of financing were involved or where the funds received by the financing would provide PI/PG with a minimum amount of “free cash” or “new money” at hand, the drafter could easily have indicated that. Instead, the clause was drafted specifically using the term “gross” proceeds. Using the term “gross” specifically adopts an approach contrary to that PI argues in favour of: i.e., an approach that involves deductions and categorization. Notably, one of the benefits the parties obtain by setting a “gross” threshold for triggering obligations is obtain certainty by eliminating the possibility of disputes about what amounts were available for what purposes.

[106] The Notes were drafted by PI with the involvement of its legal counsel. PI could have proposed limited or restrictive language regarding the payment threshold under the second clause of s. 5 of the Note if it wished. Further, the first clause of s. 5 (by the reference to, and definition of, “Available Cash Flow”) did impose limitations under that clause. The use of “gross proceeds” in the second clause can only reasonably be viewed as deliberately used in contrast.

[107] PI argues that interpreting “Subsequent Financing” as meaning any financing involving more than $5 million in “gross proceeds” results in a financially and commercially impractical interpretation of s. 5. PI says it would make no sense for it to have agreed to fully repay on receipt of financing used to restructure debts. It says it would not have agreed to terms that oblige it to take “from Peter to pay Paul”.

[108] As an initial point, however sound the proverb may prove as applied to *robbery*, it is not at all uncommon to *borrow* from Peter to pay Paul. Debts are not all equal. Some are under vastly better or worse terms.

[109] In any event, interpreting “Subsequent Financing” as extending to “any type of financing” is neither commercially impractical nor financially unrealistic. Between the Concurrent Financing and the Subsequent Financing, the Notes contemplate that PI/PG will have received a total of $10 million gross before being obliged to repay a total debt in the range of $200-300,000. In other words, the Notes provided PI/PG with a $9.7 million buffer.

[110] Taking all of the above into consideration, I find that the meaning of “Subsequent Financing” in s. 5 is unambiguous. Any form of financing meeting the gross proceeds threshold triggers the obligation to make full repayment. The May 2023 Financing triggered the obligation to repay the Notes in full under s. 5. When PI failed to pay Mr. McQueen within five business days of the completion of the May 2023 financing, PI was in default under the Notes.

VI. Disposition

[111] This matter is appropriate for determination by summary trial.

[112] Mr. McQueen’s claim that PI defaulted on the Notes, in failing to pay out in accordance with the second clause of s. 5 of the Notes following the May 2023 Financing, is allowed.

[113] Mr. McQueen’s notice of application sought specific orders, but all orders sought included alternatives and no submissions were made by either party as to the form of order that was suitable and appropriate. It is not apparent from the notice of application as to whether the various alternatives are different in substance. If counsel are unable to agree on the particular form of order, they are at liberty to contact Scheduling to arrange to provide submissions as to form.

“Tucker J.”