

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *OTBEC3 Holdings Inc. v. Promintory
Developments Limited Partnership*,
2025 BCSC 1059

Date: 20250606
Docket: S223014
Registry: Vancouver

Between:

OTBEC3 Holdings Inc.

Plaintiff

And

**Promintory Developments Limited Partnership, Promintory Developments Inc.
and Boynton Developments (Kelowna) Ltd.**

Defendants

Before: The Honourable Mr. Justice Coval

Oral Reasons for Judgment

Counsel for the Plaintiff:

J.R. Loeb
L.A. Buitendyk

Appearing as Representatives for the
Defendants:

J. Kos
R. Fraser

Place and Dates of Trial:

Vancouver, B.C.
May 26-30 and June 4, 2025

Place and Date of Judgment:

Vancouver, B.C.
June 6, 2025

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Introduction

[1] In this trial, the parties dispute the amount owing from the defendants to the plaintiff under their Private Placement Subscription Agreement, dated August 30, 2019 (“PPSA”).

[2] Under the PPSA, OTBEC paid Promintory Developments Limited Partnership (“PDLP”) \$1 million for one million preferred limited partnership units. Under the terms of the PPSA, PDLP was to repay OTBEC’s \$1 million investment, plus an annual 20% yield of \$250,000, by November 30, 2020.

[3] PDLP needed these funds to commence construction of its multi-phase development of 120 townhouses on Knox Mountain in Kelowna. The project ran into difficulties from the COVID-19 pandemic and construction cost overruns. As a result, PDLP failed to repay OTBEC’s \$1.25 million in November 2020. Instead, from January 2021 to August 2022, PDLP made regular partial payments, totalling \$1,119,000. It has made no payments since.

[4] As the trial progressed, it emerged that the only issues requiring decision were: (i) on what unpaid amounts OTBEC continued to earn its 20% annual yield; and, (ii) whether certain disputed payments were made by PDLP, and if so how they should be accounted for.

[5] On the first issue, the PPSA does not address how OTBEC’s 20% yield would accrue if its investment was not repaid in full on or around November 30, 2020. This is omitted because, when making that agreement, the parties intended that OTBEC’s \$1.25 million would be fully repaid by that time, and so no yield would continue to accrue.

[6] PDLP’s position is that only OTBEC’s initial \$1 million investment continued to accrue the 20% yield until repaid in full in August 2022. It says that no yield accrued on any outstanding yield payments because the PPSA said the 20% yield was “non-compounding”.

[7] PDLP also argued that its partial payments should be allocated, first, to repayment of the \$1 million principal investment, and then to outstanding yield. Its accounting showed outstanding yield still owing of \$205,461.38, as of its last payment on August 17, 2022. It says no yield has accrued on this outstanding amount.

[8] OTBEC's position is that, each year, the unpaid yield was to be added to the outstanding capital payment, and the 20% yield then accrued over the next year on that capital amount plus that unpaid yield. Its position is that PDLP's partial payments should be allocated first to unpaid yield, not unpaid capital. It calculates PDLP owing \$862,379.47 as of May 25, 2025.

[9] On the second issue of disputed payments, PDLP's accounting included credit for some payments that OTBEC argued were extension fees, not repayments, and one \$50,000 payment which OTBEC denied receiving.

[10] At the beginning of trial, Mr. Fraser advised that PDLP was abandoning its counterclaims against OTBEC, and in particular, its damages claim arising from OTBEC's CPL registered on September 1, 2022.

Parties

[11] Promintory Developments Inc. ("PDI") is the general partner of Promintory Developments Limited Partnership. As mentioned, the partnership's business is to develop a residential townhome project in Kelowna, BC.

[12] The project lands are owned in trust for the partnership by the defendant, Boynton Developments (Kelowna) Ltd. (the "Lands"). Mr. Robert Fraser is the principal of all the defendant entities. As I understood the evidence, 60 of the contemplated 120 units are completed with occupancy permits, and around 49 of those have been sold.

[13] OTBEC is in the business of investing in real estate and development projects. Ms. July Ono testified on behalf of the company. She is a 50% owner and director of OTBEC, which she owns together with her husband, Stephen Cain.

Background Facts

[14] Ms. Olga Karan, who testified for OTBEC at trial, was introduced to Mr. Fraser in July 2019 by a realtor marketing the PDLP pre-sale units. Ms. Karan is a CPA and OTBEC'S CFO.

[15] Ms. Karan was told that PDLP needed short-term bridge financing of \$1 million for around a year so that it could begin construction. Mr. Fraser did not wish the project to take on further debt or additional regular investors. Instead, he sought a short-term equity investor, and was offering a 20% annual yield, with the capital and yield to be repaid from a refinancing or pre-sale deposits.

[16] Ms. Ono and Ms. Karan's evidence was that Mr. Fraser's proposal was appealing to them because OTBEC was holding substantial funds in a GIC, which were not needed until approximately December 2020 when they would be called on for another project.

[17] Ms. Ono testified that she would have preferred to provide OTBEC'S funds as a bridge financing loan rather than an investment, but was told that was not feasible for PDLP.

[18] After a few weeks of negotiations, the parties signed the August 30, 2019 PPSA, by which OTBEC purchased the preferred limited partnership units for \$1 million (the "Units") from PDLP.

The PPSA

[19] For purposes of the trial the key terms of the PPSA were:

- i. The funds would be employed for development capital to construct residential units on the Lands.

- ii. The Units had the following rights and terms:
 - (i) The Units have a fixed annualized yield (“Yield”) of 20%, non-compounding, payable on redemption or retraction of the Units;
 - (ii) Retraction or redemption of the Units shall occur on or after November 30, 2020 at the election of either party (Yield is \$250,000 at such date);
 - (iii) Full payment of Capital and Yield (together the “Preferred Return”) shall be made prior to any profit distribution from the Property to any other party;
 - (iv) On redemption or retraction full Preferred Return (Capital and Yield) shall be made within three business days of call for redemption or retraction.
- iii. The Preferred Return was guaranteed by PDI and Boynton.

[20] Pursuant to the PPSA, OTBEC received 1 million class A, series 2, preferred shares in PDLP, issued August 29, 2019.

First Extension Agreement

[21] In July 2020, when Ms. Karan checked that re-payment was on track for November, Mr. Fraser told her it was and wrote to her that “We are just in for a refinance and things look good so I don’t think we will have a problem.”

[22] As the November 30, 2020 deadline approached, however, Ms. Karan had difficulty getting responses from Mr. Fraser and his team. Eventually, they told her PDLP needed a one-month extension. Mr. Fraser’s evidence was that this was necessary because construction and sales were delayed by COVID-19.

[23] As confirmed in emails between the parties between November 30 and December 2, OTBEC agreed with PDLP’s request to extend repayment until January 7, 2022. The parties agreed that the 20% yield continued to accrue and PDLP would pay a \$20,000 extension fee.

[24] By email of December 2, PDLP’s lawyer, Mr. Peter Jensen, sent Ms. Karan a Subscription Amendment Agreement, dated November 30, 2020, signed by

Mr. Fraser (“SAA#1”). It extended the redemption date to January 7, 2021, with the \$20,000 extension fee.

[25] Ms. Karan’s evidence was that SAA#1 was not signed by OTBEC because it did not make clear that the 20% yield was now to apply to the entire unpaid amount of \$1.25 million, not just the original \$1 million capital contribution.

[26] Before that issue could be resolved, it became clear that PDLP would not be able to repay OTBEC by the January 7 deadline. Instead, on January 8, PDLP paid OTBEC \$190,000, and then began making regular monthly payments of approximately \$50,000/month.

[27] By email of January 22, 2021, Mr. Jensen apologized for the “delays in paying your investment and return”. He said that PDLP would do its best to pay at least \$50,000/week and “seek to retire your investment plus interest as soon as possible”.

[28] Ms. Karan’s email in response included this:

Thank you for your response. Repayment is now 2 months behind. \$1.2M has already been committed to another project and now we are at risk of being sued. \$190,000 is not even close to what we need to satisfy our contractual obligations. I have been following up with Bob since last June and have been told that repayment is on track and they are not anticipating any delays. Back in September I got another confirmation that funds are ready for November 30th repayment. We are going to need a large chunk of it repaid in the next week or so. \$50,000 a week proposal would equate to \$400,000 repayment to date (8 weeks delay) and not \$190,000.

Second Extension Agreement

[29] On July 8, 2021, there was a meeting at PDLP’s offices of Ms. Karan, Ms. Ann Peters, Mr. Jensen and Mr. Fraser. Ms. Peters was the controller for the Promintory group from April 2021 to June 2022. She testified at trial for OTBEC.

[30] Ms. Karan’s evidence was that the parties agreed to the following, which was then confirmed in emails between them on July 9, 2021:

- i. The principal balance as of December 1, 2020 was \$1,250,000;

- ii. The 20% interest would accrue on that principal balance;
- iii. \$545,000 had been paid so far;
- iv. If the loan was not repaid by July 31, 2021, there would be a further extension fee of 3% of the \$1,250,000, or \$37,500, and then repayment in full would be due on December 1, 2021; and
- v. OTBEC's lawyers would draft the SAA to reflect these terms.

[31] On July 28, Ms. Karan sent an invoice for the \$37,500 and the proposed SAA#2, effective as of December 1, 2020, signed by OTBEC. SAA#2 confirmed that the 20% yield now applied to the \$1.25 million. It extended the repayment date to September 30, 2021, and confirmed the \$37,500 extension fee.

[32] Ms. Karan's evidence was that she discussed SAA#2's terms with Messrs. Fraser and Jensen, and they agreed with them. She testified that, after she sent SAA#2 to them on July 28, 2021, Mr. Jensen told her Mr. Fraser was away in Mexico and would sign on his return. However, Mr. Fraser never signed SAA#2.

[33] On July 29, 2021, Ms. Peters emailed Ms. Karan to say that Mr. Fraser approved the \$37,500 extension fee being deducted from a \$50,000 payment PDLP had just sent to OTBEC.

Third Extension Agreement

[34] In October 2021, the parties negotiated a third extension.

[35] On November 24, 2021, Ms. Karan emailed Mr. Fraser and Ms. Peters that "As per our conversation, \$21,000 out of \$30,000 paid today was allocated towards extension fee invoice". The invoice itself was dated October 1, 2021. Ms. Karan's evidence was that she and Mr. Fraser agreed to this over the phone. Mr. Fraser did not testify about this.

[36] On November 3, 2021, Ms. Karan emailed Mr. Fraser, Mr. Jensen and Ms. Peters to say that no payments had been made for over a month, her email said:

Hi All,

Bob, I left 2 messages over the past few days but haven't heard back. I think we need to have a meeting to go over the plan. It has been over a month since we gotten any cheques from you. Based on information provided you only needed to extend the loan by a few weeks so I requested 1 month extension. It's November the 3rd, extension period ended on October 31st. If balance is not paid off by Friday, November the 5th there will be another extension fee sent to you.

[37] Ms. Karan's evidence was that Mr. Fraser then told her that he was just finalizing a refinancing with Freedom Capital and would write OTBEC a cheque paying them out in full right then and there, but this never happened.

[38] In the end, PDLP made no further payments to OTBEC after August 17, 2022. The parties were unable to agree about the accounting of PDLP's indebtedness, and these proceedings were the result.

The Accounting Evidence

[39] Ms. Karan put in evidence her accounting of PDLP's debt to OTBEC, indicating \$862,379.47 due as of May 25, 2025. Her calculation charged the 20% yield on the outstanding balance, calculated annually in advance.

[40] She applied the 20% annual yield, in advance, to the full amount owing (i.e. principal plus yield) as of the following dates:

Sept 1, 2019 – Nov 30, 2020

Dec 1, 2020 – Nov 30, 2021

Dec 1, 2021 – Nov 30, 2022

Dec 1, 2022 – Nov 30, 2023

Dec 1, 2023 – Nov 30, 2024

Dec 1, 2024 – May 25, 2025

[41] Her accounting shows PDLP having repaid \$1,119,000 from January 2021 to August 2022. In addition, PDLP paid OTBEC \$78,500 in fees for the three

extensions. Ms. Karan testified that she had ensured all PDLP payments were accounted for.

[42] Mr. Fraser's accounting, which he prepared with the assistance of his finance director, Mr. John Kos, showed PDLP owing \$205,461.38, as of August 17, 2022, with no yield having accrued since that time.

[43] This accounting treated the principal amount of the investment as only the original \$1 million principal investment, not the \$1.25 million. Thus, it applied the 20% yield to only the \$1 million. It allocated all payments first to reducing this unpaid principal and then to unpaid yield. By this accounting, OTBEC earned no return on its unpaid yield.

Analysis

[44] Mr. Fraser's position was that he never wavered from the terms of the PPSA. That is, the 20% yield continued to accrue only on the principal balance of \$1 million. The yield was non-compounding, and so did not accrue on the \$250,000 yield owed as of November 30, 2020, or any other outstanding yield.

[45] Ms. Karan's evidence was that the parties agreed that, commencing December 1, 2020, the 20% annualized yield would accrue on the principal balance of \$1.25 million, not merely the original \$1 million.

[46] I accept Ms. Karan's evidence over Mr. Fraser's on this issue, and generally regarding the dealings between the parties. I find that, commencing December 1, 2020, the parties did agree that the 20% annualized yield would accrue on the principal balance of \$1.25 million, not merely the original \$1 million. I base this on the following:

- i. I found Ms. Karan a careful, credible witness, and I accept her evidence that these terms were agreed to in the meetings between the parties. I agree with Ms. Loeb's submission that Ms. Karan "was able to recall events in a consistent and coherent manner, and her statements of fact were supported by the documents".

- ii. The email chain of November 30 to December 2, 2020, between Mr. Jensen, Ms. Karan, and Mr. Fraser, discussing the parties' agreement to extend the redemption date to January 7, 2021, refers to the "\$1,250,000 principal" and that the 20% interest "will continue to accumulate."
- iii. The email chain of July 9, 2021, between Ms. Karan, Ms. Peters, Mr. Jensen and Mr. Fraser, following their meeting on July 8, refers to the "original amount borrowed which was \$1,250,000". It also says that "the balance as of November 30, 2020 was \$1,250,000" and that "Interest will accrue on this balance as previously discussed with Bob". It also refers to updating "the outstanding amount to reflect the new amount of \$1.25 million." It also confirms that the "date of the loan for the \$1.25m" was December 1, 2020.

[47] This finding also makes commercial sense. It is undisputed that, under the PPSA, as of November 30, 2020, PDLP should have paid OTBEC \$1.25 million. Thus, it was \$1.25 million of OTBEC's funds, not \$1 million, which the parties agreed PDLP would continue to hold. I therefore disagree with PDLP's submission that OTBEC "never injected an additional \$250,000 to earn a yield on this, yet they are claiming they are entitled to a yield on this amount."

[48] I do not accept Mr. Fraser's denial of the agreement to pay the 20% yield on \$1.25 million. It is contradicted by the documentary evidence summarized just above. Further, I found his evidence about the parties' agreements about repayment vague and unreliable. Some examples of his problematic testimony were:

- i. Although he agreed that OTBEC's 20% yield always continued to accrue on unpaid principal, he provided no clear explanation for why it did not also apply to the \$250,000 yield after that amount should have been paid to OTBEC on November 30, 2020.
- ii. In direct and cross-examination, he testified that he never paid the \$37,500 extension fee invoiced because the parties never came to terms on it. But in cross-examination, when confronted with the contemporaneous documents and his examination for discovery, he agreed he did authorize Ms. Peters to pay it.
- iii. He testified that he did not agree to pay the \$21,000 extension fee to extend the redemption date to October 31, 2021. But he could not reconcile this with an email from Ms. Karan to him of November 24, 2021, confirming the agreement to pay.

- iv. On this point, there was also Ms. Peters' evidence, which I accept, that Mr. Fraser was aware of the extension fee invoices and payments. She testified that she could not have paid them without his knowledge and authorization, as he was the second signing authority on the bank account.
- v. He testified that he never agreed to extend the redemption date to September 30, 2021, but the agreement to that extension date was confirmed in an email of July 9, 2021, which was forwarded to him on that date as part of an email chain.
- vi. Despite lengthy questioning, he was unable to explain why he refused to sign SAA#2.

[49] Regarding whether the 20% yield applied to any further unpaid yield after December 1, 2020, I find that it did not. The PPSA said the yield was non-compounding. The evidence indicated no agreement between the parties that subsequent unpaid yield would accrue the 20% return. There was no evidence of discussions or agreement to that effect, other than with respect to the \$250,000 of yield owed as of November 30, 2020.

[50] Nor do I find an agreement that yield was to accrue annually in advance. Counsel for OTBEC referred to Ms. Peters' spreadsheet which appears to take that approach, but there was no evidence that this specific issue was discussed or agreed on between the parties. In my view, calculating in advance is commercially unfair as it creates an overpayment at those times where the principal balance had been paid down below \$1.25 million.

[51] Regarding the specific payments in dispute, firstly, I find that the three fee extension payments are not to be treated as repayment of principal or yield. That was clear from the contemporaneous emails and the testimony at trial. Ms. Karan's accounting on Ex. 6 correctly omitted these from that calculation. PDLP's accounting on Ex. 7 incorrectly included them. These payments are: \$20,000 on December 2, 2020; \$37,500 on August 18, 2021; and \$21,000 on November 24, 2021 (as part of the \$30,000 paid on that day).

[52] The second issue is a disputed \$50,000 payment on July 13, 2021. PDLP claims this was paid. OTBEC denies receiving it. Mr. Kos put in evidence PDLP

bank statements and ledger and journal entries. The bank statements show PDLP obtaining a \$50,000 certified cheque on July 13, 2021. The PDLP internal accounting records show the cheque was paid to OTBEC. The actual certified cheque itself was not in evidence.

[53] Ms. Karan testified that OTBEC had no record of receiving those funds. She put in evidence OTBEC's bank statements showing the other July 2021 payments from PDLP but not this one. She testified that OTBEC was a small business with only one bank account and so, if the payment had been received, it would have been immediately deposited and indicated on this statement.

[54] I find that, on a balance of probabilities, the \$50,000 payment was not made. I base this on Ms. Karan's evidence that it was not deposited in OTBEC's account, OTBEC's banking records, and the fact that there is no direct evidence of it having been delivered to OTBEC. There is no contemporaneous emails or other communications indicating the cheque being provided to OTBEC. Mr. Kos was not personally involved in this payment and so was only able to speculate about what happened based on PDLP's records. Mr. Fraser did not testify about this issue. Finally, one possibility which I believe is consistent with the records from both sides, is that PDLP obtained the certified cheque intending to deliver it to OTBEC but in the end, for some reason, decided not to deliver it.

[55] PDLP submitted that, as an equity investor as opposed to a lender, OTBEC took the risk that funds from the project were not available for distribution as planned, particularly given that this occurred for reasons beyond PDLP's control, including the pandemic. They point to the form, which OTBEC signed in conjunction with the PPSA, stating "Warning! This investment is risky. Don't invest unless you can afford to lose all the money you pay for this investment."

[56] PDLP did not provide a legal theory, however, for why OTBEC being an investor somehow diminished its contractual repayment rights under the PPSA, or otherwise provide any defence to its claims herein. I note that "force majeure" was

neither pleaded nor argued by PDLP, which was represented by counsel for most of the proceedings including in the drafting of its Response.

[57] Regarding whether PDLP's payments should be allocated first to principal or yield, I accept Ms. Karan's evidence that it is standard accounting practice to allocate first to yield and then to principal. This approach also makes commercial sense in circumstances of a non-compounding yield because otherwise OTBEC loses the benefit of yield accruing on the full amount of its principal, while PDLP still has the benefit of the use of that money (*First Queensborough Shopping Centres Limited v. Wales McLelland Construction Company (1988) Ltd.*, 2014 BCSC 764, para. 83).

[58] In sum, the total amount owed by PDLP to OTBEC, and guaranteed by PDI and Boynton, is to be calculated based on the following:

- i. A principal balance of \$1.25 million as of December 1, 2020;
- ii. Yield on this \$1.25 million at 20% per year, commencing December 1, 2020, non-compounding, and accruing daily not in advance; and
- iii. PDLP is to be credited with the payments shown on Ms. Karan's accounting on Ex. 6, being the \$1,119,000 payments in the payment column, as and when made. Such payments are to be allocated first to repayment of yield and then to repayment of the principal balance.

[59] It may be the case that this precise calculation was done by Ms. Karan on Sheet 3 of OTBEC's closing submissions, showing \$681,240.75 due and owing as of May 25, 2025. However, PDLP was not given a fair chance to review this accounting during the trial.

[60] In my view, the reasonable and fair approach is that, if the parties cannot agree on the outstanding amount calculated as set out in paragraph 58, then they may have that accounting determined and certified by a Registrar.

Conclusion

[61] The outstanding amount owed by the defendants, jointly and severally, to OTBEC, is to be calculated as set out in paragraph 58.

[62] If the parties are unable to agree on this calculation, they may set down a pre-hearing conference before the Registrar to organize and schedule a hearing for the Registrar to certify this accounting.

[63] Once the full amount due and payable has been paid by PDLP to OTBEC, the OTBEC units shall be deemed redeemed by PDLP.

[64] OTBEC is entitled to post-judgment interest at the statutory rate.

[65] Unless the parties wish to speak to costs, OTBEC is entitled to its costs against the defendants at Scale B.

“Coval J.”