

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kim v. Argo Ventures Inc.*,
2024 BCSC 763

Date: 20240506
Docket: S205944
Registry: Vancouver

Between:

Young Chul Kim

Plaintiff

And

Argo Ventures Inc. and Jason Hyunwoo Hong

Defendants

Before: The Honourable Justice Majawa

Reasons for Judgment

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Place and Dates of Trial:

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OVERVIEW

[1] This matter arises from a real estate development project in the Olympic Village area of Vancouver and disagreements over various entitlements that flowed from the development's eventual profitability. The defendant, Jason Hong, has a long history as a businessperson involved in developing real estate in Vancouver through a number of companies. One of those companies is the other defendant, Argo Ventures Ltd. ("Argo Ventures"). The plaintiff, Young Kim is also a businessperson. Mr. Kim and Mr. Hong have been involved in various real estate developments over the years, including the Olympic Village development. The investments made by Mr. Kim, or his family, in these projects were generally made through companies controlled by Mr. Hong.

[2] By late 2008, the Olympic Village development experienced financial difficulty, at least in part because of the global financial crisis. At that time, it seemed very unlikely that the Olympic Village development was going to be profitable for the investors. Certain steps were taken by Mr. Hong to satisfy investors and try to inject further funds into the project to keep it going.

[3] Despite the bleak outlook in 2008, by 2018 there was a significant return on the Olympic Village development. Mr. Kim says that this return gives rise to his contractual or equitable right to various incentives related to the investments he made with Mr. Hong. Mr. Hong disputes this. The positions taken by the parties raise a number of issues.

[4] The first is whether Mr. Kim is entitled to an incentive because of the role he played in securing investments for the Olympic Village development. This incentive will be referred to as the "APEM Incentive" later in these Reasons. Mr. Kim values his damages in respect of the APEM Incentive as ranging between approximately \$1 million and \$1.3 million. Mr. Hong says that even if Mr. Kim is entitled to the APEM Incentive, which he argues he is not, its value is between approximately \$275,000 and \$660,000.

[5] Mr. Kim's entitlement to the APEM Incentive turns, in large part, on whether Mr. Kim and Mr. Hong entered into an enforceable oral agreement in respect of that incentive. Alternatively, Mr. Kim argued that his entitlement to the APEM Incentive could be grounded in unjust enrichment. As will be discussed below, I have determined that Mr. Kim is not entitled to the APEM Incentive because the parties did not enter into an enforceable oral agreement and Mr. Hong was not unjustly enriched at the expense of Mr. Kim.

[6] The second issue is whether Mr. Kim is entitled to an incentive related to the role he played as an investor in another of Mr. Hong's projects. The investors in that project agreed to use that project's capital to assist the Olympic Village development. This incentive will be referred to as the "RSJV Liquidation Incentive" later in these Reasons.

[7] Mr. Kim's entitlement to the RSJV Liquidation Incentive first turns on whether the claim is statute-barred. If it is not, then the Court must interpret a clause found in an agreement between the parties that Mr. Hong says operates to exclude Mr. Kim from the incentive. I have determined that Mr. Kim's claim is not statute-barred and Mr. Kim is not excluded from the incentive. The exclusion clause is void for uncertainty and is to be severed from the remainder of the agreement. Thus, Mr. Kim is entitled to damages for Argo Ventures' failure to pay him the RSJV Liquidation Incentive.

[8] Mr. Kim values his damages in respect of the RSJV Liquidation Incentive as ranging between approximately \$135,000 and \$460,000. Mr. Hong says that even if Mr. Kim is entitled to the RSJV Liquidation Incentive, its value is between nil and approximately \$30,000. The amount of damages depends, in part, on whether interest on certain loans made to finance the Olympic Village development is to be accounted for when calculating Argo Ventures' profits from the project. The interest that the defendants seek to have this Court account for was never collected, and the relevant companies made numerous representations in respect of that interest many years ago. I have determined that the interest should not be accounted for in

quantifying Argo Ventures' profit. My application of the calculations relevant to the RSJV Liquidation Incentive results in damages owing to Mr. Kim in the amount of \$34,542.

[9] The following Reasons set out the details of the conclusions I have summarized above.

BACKGROUND FACTS

[10] The factual matrix in this matter is intricate, involving a complex commercial real estate project and a number of legal entities that changed over time. Many of the facts giving rise to this litigation are not contested, and counsel helpfully provided the Court with a thorough and comprehensive agreed statement of facts ("ASF"). I have relied heavily on the ASF and counsels' helpful written submissions for the following background facts and many of the uncontested facts throughout these Reasons.

Mr. Hong, Argo Ventures, and the Olympic Village Project

[11] Mr. Hong is a businessperson and is the sole shareholder and director of Argo Ventures. Argo Ventures is in the business of identifying and managing investment opportunities, including commercial real estate ventures. Argo Ventures typically identifies an opportunity, pools capital from investors, and acquires the business or real estate through a newly incorporated company or newly formed joint venture. Argo Ventures manages the business for the investors and takes a management fee once the investment is liquidated.

[12] In January 2007, Mr. Hong began arranging a group of investors to participate in a partnership with an established developer, the Pappajohn family, to develop a property on West 2nd Avenue in Vancouver (the "Olympic Village Project"). Like many developments in Vancouver, the Olympic Village Project was planned as a mixed-use strata building, with commercial strata units on the ground floor and residential strata units above.

[13] The Olympic Village Project was originally developed by a partnership known as Jameson-Argo Projects Limited Partnership (“JAPLP”). Mr. Hong’s companies held a 70% interest in JAPLP at all material times. The 70% interest was originally held by a company named Argo Debentures Management Ltd., but was transferred in February 2007 to Argo Mezzanine Financing #3 Ltd. (“AMF3”).

Financing of the Olympic Village Project

[14] AMF3 was incorporated on February 16, 2007, for the purpose of providing financing to JAPLP for the Olympic Village Project. Mr. Hong was the sole officer and director of AMF3. Initially, Mr. Hong was a 6% shareholder in AMF3, and several other investors, including Mr. Kim’s wife, Jeong Kim, held the remaining 94% of its shares.

[15] In total, AMF3 provided \$8.5 million in capital for the Olympic Village Project, consisting of an equity investment and a loan. AMF3’s equity investment in JAPLP was \$3.5 million for 70% of the partnership units in JAPLP. In 2007, AMF3 also provided a \$5 million loan to JAPLP: a \$1 million interest-free loan secured by a mortgage and \$4 million loan with interest (the “AMF3 Loan”) secured by a mortgage. The mortgage indicated that the AMF3 Loan was made at an interest rate of 16% per annum. The principal of the AMF3 Loan was repaid in two tranches: the first on January 1, 2015, and the second on January 1, 2018. The financial statements of the partnership as at December 31, 2018, showed a \$0 balance for the AMF3 Loan.

[16] In addition to the loans and investments provided by AMF3, another entity controlled by Mr. Hong, Argo Mezzanine Financing #5 Ltd (“AMF5”), also made loans to JAPLP to finance the Olympic Village Project. In June 2007, AMF5 agreed to loan a total of \$5.5 million at a rate of prime plus 10% pursuant to an agreement dated June 29, 2007, (the “AMF5 Loan”). Most of this amount was advanced in December 2007, and the remainder was advanced over time after December 2007. The AMF5 Loan was secured by a mortgage registered against the West 2nd property on June 29, 2007. The principal of the AMF5 loan was repaid on January 1,

2015. The financial statements of the partnership as at December 31, 2015, show a \$0 balance for the AMF5 Loan.

[17] In 2011 and 2012, AMF3 and AMF5 both amalgamated with Argo Ventures.

[18] Although the loans made by AMF3 and AMF5 provided that interest would be paid by JAPLP, interest was not collected on the loans. The parties disagree on whether interest remains owing on the loans made by AMF3 and AMF5. As will be discussed later, resolving this disagreement is key to determining whether AMF3 made a profit from its involvement in the Olympic Village Project and, in turn, the quantum of Mr. Kim's possible damages. The parties agree that AMF3 made a profit if interest *is not* owed on these loans and AMF3 took a loss on its involvement in the Olympic Village Project if interest *is* owed on these loans.

Management of the Olympic Village Project

[19] Initially, AMF3's investment in the Olympic Village Project was to be managed by an entity named Argo Realty Advisors Inc. ("ARAI") pursuant to a letter of understanding between ARAI, JAPLP and AMF3 investors. ARAI was 50% owned by Argo Ventures and 50% owned by an entity controlled by an individual named Dong-Pyo Seo.

[20] In September 2008, the global financial crisis hit and Mr. Seo indicated that he no longer wanted to be involved in the Olympic Village Project. Argo Ventures took over as the sole manager of AMF3's investment in the project in early 2009. Argo Ventures did not enter a subsequent letter of understanding with its investors regarding the Olympic Village Project.

Mr. Kim's Involvement in the Olympic Village Project

[21] Mr. Hong and Mr. Kim met in 2001 or 2002. Mr. Kim, or members of his family, invested in a variety of Mr. Hong's projects over time. As will be discussed in more detail later in these Reasons, in 2007 and 2009, Mr. and Mrs. Kim invested in the Olympic Village Project in exchange for certain financial incentives from AMF3. Payment of the incentives was contingent upon the Olympic Village Project turning a

profit, which, for many years after the Kims made their investment, did not look likely. AMF3's profit was contingent upon the Olympic Village Project making a profit.

[22] In late May 2018, Mr. Kim became aware that the residential units in the Olympic Village Project had eventually been sold at a profit. As mentioned earlier, the amount of profit is dependent upon whether interest that AMF3 and AMF5 were entitled to charge, but never did, is factored in. For the purposes of this litigation, the parties have agreed that AMF3 made a net profit of \$18,369,337 from its involvement in the Olympic Village Project if interest is not owed on the AMF3 and AMF5 Loans.

[23] I must decide on Mr. Kim's entitlements, if any, that arose from his investments with Mr. Hong and the Olympic Village Project.

IS MR. KIM ENTITLED TO THE APEM INCENTIVE?

The APEM Incentive and the Alleged Oral Agreement

[24] The first issue to decide is whether Mr. Kim is entitled to the APEM Incentive. In January or February 2007, Mr. Hong asked Mr. Kim for his assistance in procuring equity investment for AMF3. The two discussed forming a company which would assist in arranging financing for the Olympic Village Project. They also discussed the compensation that would eventually flow to Mr. Kim through this company if he was successful in arranging equity financing: this compensation is the "APEM Incentive". The APEM Incentive was never paid to Mr. Kim.

[25] On February 28, 2007, Mr. Hong and Mr. Kim incorporated Argo Private Equity Management Ltd. ("APEM"). Mr. Hong and Mr. Kim were the sole directors at all material times. Argo Ventures (controlled by Mr. Hong) and Mr. Kim were equal shareholders of APEM.

[26] Mr. Kim obtained \$1.53 million of equity financing for the Olympic Village Project. The investment was made in the name of Mr. Kim's wife, Mrs. Kim, pursuant to a letter of understanding dated February 26, 2007, in exchange for shares in

AMF3 (the “AMF3 Investment”). The investment was paid sometime between March and June 2007.

[27] In August 2007, Mr. Hong and Mr. Kim entered into a shareholders’ agreement for APEM (the “APEM Shareholders Agreement”) which, among other things, memorialized the terms of the APEM Incentive. Schedule 1 of the APEM Shareholders Agreement stated that APEM was to receive payment for its services by way of Argo Ventures’ management fee collected on a project-by-project basis, in proportion to APEM’s interest in the project. After APEM’s expenses were paid, Argo Ventures was to receive the first 20% of whatever portion of Argo Ventures’ management fee was paid to APEM, and the remainder of the management fee was to be split equally between Mr. Kim and Argo Ventures.

[28] Schedule 2 of the APEM Shareholders Agreement addressed the financial incentives APEM’s shareholders were entitled to arising from a different investment related to a real estate development project called the Buffalo Hills Project (the “Buffalo Hills Investment”).

[29] By early 2009, the likelihood that AMF3 would make a profit was very low, given the global financial crisis and its impact on the Vancouver real estate market. On April 14, 2009, Mr. Hong and Mr. Kim had a telephone conversation (the “April 14 Call”). The content of that telephone conversation is key to determining whether Mr. Kim is entitled to damages arising from Argo Ventures’ failure to pay the APEM Incentive.

[30] Mr. Kim argues that an enforceable oral agreement was reached during the April 14 Call. Mr. Kim alleges that he and Mr. Hong, on behalf of Argo Ventures, agreed to honour the terms of the APEM Shareholder Agreement, including paying Mr. Kim his portion of the APEM revenue due and owing from the Olympic Village Project in accordance with the terms of the APEM Shareholder Agreement, despite any subsequent dissolution of APEM (the “Dissolution Agreement”).

[31] APEM was dissolved on December 5, 2011, for failure to file its annual report. Therefore, Mr. Kim is not entitled to the APEM Incentive by virtue of the APEM Shareholder Agreement as it is common ground that at the time APEM was dissolved, there were no management fees owing to APEM from Argo Ventures in respect of the Olympic Village Project. Whether Mr. Kim is entitled to the APEM Incentive despite APEM's dissolution turns on whether the parties reached an enforceable agreement that provided for this. The plaintiff alleges that such an agreement was made orally during the April 14 Call: i.e. the Dissolution Agreement.

[32] Whether the Dissolution Agreement was formed as alleged by the plaintiff turns on what was said during the April 14 Call and whether what was said resulted in an enforceable oral agreement. Mr. Kim bears the onus of proving that the April 14 Call occurred as he testified and that the Dissolution Agreement was made during the April 14 Call.

What was Discussed during the April 14 Call?

[33] In *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at para. 328 [*Le Soleil*], Justice Dickson, as she then was, held that when faced with an alleged oral agreement, the Court must first “consider what the parties said and did” before determining the legal ramifications of the discussion. Mr. Hong concedes that he does not remember what was said during the April 14 Call. The evidence of the content of the April 14 Call at trial came entirely from Mr. Kim.

[34] Mr. Kim's evidence with respect to the circumstances and content of the April 14 Call was generally consistent throughout the litigation, and I generally accept his evidence as to what was said during the call and how the call came to be.

[35] By April 2009, the Olympic Village Project was in financial trouble. As discussed above, neither Mr. Kim nor Mr. Hong expected the project to be profitable. Nor did they expect that AMF3 would collect any management fees from Argo Ventures that could then be shared with APEM and its shareholders in accordance with the APEM Shareholder Agreement.

[36] On April 14, 2009, Mr. Kim had a telephone discussion with Mr. Hong while Mr. Kim was parking his car. The parties discussed whether, in the circumstances, they should permit APEM to be dissolved. They discussed that if they did not take any steps to maintain APEM, it would automatically dissolve over time, and Mr. Hong suggested that they let this happen. The parties decided that they would obtain APEM's articles of incorporation from the company's lawyer, Jay Shin.

[37] During the April 14 Call, Mr. Kim's mind turned to earlier discussions he had with Mr. Hong in respect of the Buffalo Hills Investment. Mr. Kim expressed some concern regarding that investment, the fruits of which were to flow to Mr. Kim through APEM. Mr. Hong told Mr. Kim that he would honour his commitment and said words in Korean to the effect that he would not "say two words with one mouth".

[38] Mr. Kim made a handwritten note in Korean sometime following the April 14 Call, which in my view, is consistent with what I have found was said during the call. The English translation of the note reads:

I don't speak with forked tongue (Buffalo Hills Land)
I always keep my promise.
Get the bylaw from lawyer Shin.
I will keep my promise even if APEM disappears.
It will automatically disappear as time goes by.

[39] I accept Mr. Kim's evidence that he wrote down as much as he could remember of the April 14 Call in the handwritten note and that the note was a complete record of what was discussed during the April 14 Call. Mr. Kim confirmed on cross-examination that he wrote all of the important parts of the call in the note and that he cannot remember any parts of the call that he did not record.

[40] What was not discussed during the April 14 Call is also important. I accept Mr. Kim's testimony elicited on cross-examination that he and Mr. Hong did not specifically reference the AMF3 investment during the April 14 Call. I also accept that Mr. Kim and Mr. Hong did not specifically discuss any sharing of management fees that might be paid by AMF3 to Mr. Kim, Mr. Hong, or Argo Ventures during the

April 14 Call. All of this is consistent with the contents of the handwritten note and Mr. Kim's testimony about what he included in that note.

[41] During the trial, I permitted certain portions of Mr. Hong's evidence provided at examination for discovery to be admitted for the limited purpose of making factual findings as to what was said by the parties during the April 14 Call given Mr. Hong's lack of memory of the contents of the call during trial. I have considered the discovery evidence and have concluded that it is of little assistance. While Mr. Hong answered some questions about the contents of the call during his examination for discovery, his answers were equivocal at best. When asked whether Mr. Kim's entitlement to the sharing of management fees in respect of the AMF3 and Buffalo Hills Investment was not affected by APEM's dissolution, Mr. Hong used words to the effect of "it could have been" and "that's theoretically correct". I prefer Mr. Kim's unequivocal evidence, which is consistent with the note he made following the call: that neither the AMF3 Investment nor the APEM Incentive as it related to the AMF3 Investment were discussed during the call.

Was an Enforceable Oral Agreement Reached During the April 14 Call?

[42] Having determined what was discussed during the April 14 Call, the next step is to determine whether that discussion resulted in an enforceable oral agreement as Mr. Kim alleges.

The Law

[43] A contract is formed when there is an objective intention to contract, the essential terms are agreed to by the parties, and the essential terms are sufficiently certain: *Oswald v. Start Up SRL*, 2021 BCCA 352 at paras. 33-34 and the authorities cited therein.

[44] In *Go Transport Ltd. v. Moore*, 2021 BCSC 1099 at paras. 17-19 [*Go Transport*], Justice D. MacDonald summarized the key principles that apply when determining whether an enforceable oral agreement was reached between parties.

From *Go Transport, Oswald* and the jurisprudence cited therein, I have determined that the following principles are particularly relevant to the case at bar:

- a) The party relying on the contract must prove its existence. In this case, that is Mr. Kim.
- b) The onus is on Mr. Kim to establish that he and Mr. Hong, on behalf of Argo Ventures, intended to form a contract during the April 14 Call and that the essential terms of that contract can be determined with a reasonable degree of certainty: *Copcan Contracting Ltd. v. Ashlaur Trading Inc.*, 2010 BCCA 597 at para. 8.
- c) Whether Mr. Kim or Mr. Hong subjectively intended to contract is irrelevant. The test with respect to intention is objective; did they indicate to the outside world their intention to contract and the terms of such contract? *Berthin v. Berthin*, 2016 BCCA 104 at para. 46 and the authorities cited therein.
- d) The surrounding circumstances (i.e. the factual matrix) known to both parties at the material time is relevant to determining the parties' intention to contract. In determining if this objective intention exists, "a court is not confined to the four corners of the agreement, but may look at 'all the circumstances' or 'all the material facts'", including "evidence of past agreements involving other parties, the circumstances in which the alleged agreement was made, and future actions and representations by both parties": *Leemhuis v. Kardash Plumbing Ltd.*, 2020 BCCA 99 at para. 17. The court can consider the conduct of the parties before and after the alleged agreement was made and what was said, communicated or done by the parties: *Oswald* at paras. 34, 57.
- e) In situations involving oral contracts such as the present case, the court can consider the subsequent conduct of the parties to help determine whether the parties' objectively intended to enter into a binding contract:

Oswald at para. 50; *Gilchrist v. Western Star Trucks Inc.*, 2000 BCCA 70 at paras. 17–18.

[45] Courts have more flexibility to rely on subsequent conduct in determining whether an oral contract was made, and the meaning of its terms, than when dealing with a written contract: *Broer v. Multiguide GmbH*, 2023 BCCA 134 at para. 53 and the authorities cited therein. However, subsequent conduct evidence must be approached cautiously because it may be “an unreliable guide” to the true intentions of the parties at the time the contract was made: *Thunder Bay (City) v. Canadian National Railway Company*, 2018 ONCA 517 at para. 63.

[46] The more flexible use of subsequent conduct evidence in oral agreements makes sense because oral agreements tend to be more ambiguous than written ones. However, even when flexibly employing subsequent conduct evidence, courts must not stray too far from the words of the agreement. This is particularly so when the alleged terms of the oral agreement do not lend themselves to ambiguity. The actual words used by the parties in an oral agreement remain important; the meaning of the agreement, if there is one, is rooted in the language used by the parties. A meaning that strays too far from the actual words used by the parties does not give effect to the way in which the parties chose to express and define their obligations: *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60 at para. 76.

Analysis

[47] I do not agree with the plaintiff that an enforceable oral agreement was reached during the April 14 Call in respect of the APEM Incentive.

[48] Mr. Kim seeks to have this Court find that the parties intended to enter into the Dissolution Agreement and that the agreement included the following essential terms:

- a) the parties agreed to take no steps to maintain APEM such that it would eventually be dissolved;

- b) Argo Ventures and Mr. Kim would forebear incurring any further expenses required to maintain APEM as a corporation; and
- c) Mr. Hong and Argo Ventures agreed to honour the terms of the APEM Shareholders' Agreement, including paying the APEM Incentive to Mr. Kim, despite any subsequent dissolution of APEM.

[49] I agree with the plaintiff that the parties agreed to terms (1) and (2) above. However, I do not find that the Dissolution Agreement included term (3) above. In my view, the parties did not reach an enforceable agreement during the April 14 Call about the payment of the APEM Incentive. While the parties may have come to an agreement about Mr. Kim's entitlements flowing from the Buffalo Hills Investment, it is not necessary for me to come to a final conclusion on this point as it is not at issue in this litigation.

[50] The parties' intention to enter into a binding agreement to allow APEM to dissolve is consistent with the surrounding circumstances known to both parties at the time. As discussed, in April 2009, neither party expected the Olympic Village Project to be successful. Both parties were aware that APEM would dissolve if annual reports were not filed. There were costs associated with maintaining APEM's corporate status which could be avoided if APEM dissolved. While these costs were not significant to the parties, they were more than nothing.

[51] In my view, I cannot determine how the parties decided to treat the APEM Incentive following APEM's dissolution with reasonable certainty. As discussed earlier, neither party discussed nor mentioned the AMF3 Investment during the April 14 Call. This is not surprising given that, at that time, both Mr. Kim and Mr. Hong realized that the AMF3 Investment was at risk and neither expected it to be profitable.

[52] According to Mr. Kim, the only project he and Mr. Hong discussed during the April 14 Call was the Buffalo Hills Project, and they discussed the management fees that may be earned from the project. Mr. Kim testified that he was reminded of a

note that Mr. Hong wrote following a meeting that Mr. Kim and Mr. Hong had in November 2007. In Mr. Kim's view, that note suggested that in satisfaction of Mr. Kim's entitlement respecting the Buffalo Hills Investment, Mr. Hong had committed to paying APEM 50% of the management fees Argo Ventures earned from the Buffalo Hills Project if the deal fell apart. Mr. Kim says that they discussed this note during the April 14 Call. Given that Argo Ventures' obligation to share management fees it received from the Buffalo Hills Project with APEM would be affected by APEM's dissolution, it makes sense that Mr. Kim's focus was on securing the incentives available to him arising from the Buffalo Hills Investment.

[53] Mr. Kim's claim that a contract was formed during the April 14 Call to share management fees from the Olympic Village Project and AMF3 is essentially based on Mr. Hong's statement during that call that he "would not say two words with one mouth" and that he said that he would honour his commitment. Mr. Kim argues that when Mr. Hong stated that he would honour his commitments, he meant all of the commitments that flowed from the APEM Shareholders Agreement, not just the commitment to share management fees paid on the Buffalo Hills Project. I do not agree.

[54] I agree with counsel for the defendants that Mr. Hong stating that he "would not say two words with one mouth" and that he would "honour his commitment" are too vague to create a binding contract on their own. Nonetheless, those words could create a contract if the context in which they were said was sufficiently clear that the Court could determine that Mr. Hong intended to honour the commitment with respect to the APEM Incentive (i.e. the management fees attributable to the AMF3 Investment). However, the context of the conversation, as discussed above, does not lead to such a conclusion.

[55] As discussed earlier, the context of the call was the Buffalo Hills Investment. As Mr. Kim explained during his cross-examination, and consistent with the handwritten note that Mr. Kim made following the call, neither the AMF3 Investment nor the APEM Incentive as it related to the AMF3 Investment were discussed during

the call. Mr. Kim conceded that Mr. Hong did not explicitly make any promises during the April 14 Call, or afterwards, as to the management fees that might be paid by AMF3 in respect of the Olympic Village Project (i.e. the APEM Incentive):

Q: Oh, yes, I know that, sir. In – in – at any time in April of 2009 or afterward, Mr. Hong has not made you any promise to pay you anything in respect of the management fee that might be paid by Argo Number 3; right?

A: That's right. He didn't say anything about that; however, we were not even sure if AMF3 was going to make any profit.

[56] In circumstances where neither party discussed the APEM Incentive as it related to the AMF3 Investment, Mr. Hong's statement during the April 14 Call that he would honour his commitments cannot be extended to create a binding agreement in that respect.

[57] In my view, Mr. Kim's assertion that the Dissolution Agreement included a term that Mr. Hong and Argo Ventures agreed to honour the terms of the APEM Shareholders' Agreement, including paying the APEM Incentive to Mr. Kim, despite any subsequent dissolution of APEM, is based upon Mr. Kim's subjective understanding of what was agreed to during the April 14 Call. Mr. Kim acknowledge as much during cross-examination:

Q: Right. That's why in your April 14 telephone call you and Mr. Hong were discussing Buffalo Hills only, not AMF3; right?

A: Even though we didn't talk about that; however – even if – he said that, "Even if APEM dissolves I will keep my promises," and in that APEM, the Argo Number 3 deal is included.

...

Q: Right. That's your opinion, right? That's not something Mr. Hong said to you in that call?

A: That's correct.

[58] However, Mr. Kim's opinion and subjective interpretation of what Mr. Hong and he agreed to during the April 14 Call, or his opinion of what Mr. Hong intended to convey, is not relevant to determining whether an agreement was reached. A reasonable bystander's perspective informs whether a binding contract is formed, not the parties' subjective intention.

[59] To the extent that is relevant, the parties conduct after the April 14 Call also does not support a conclusion that they reached the agreement alleged by Mr. Kim. On April 30, 2009, two weeks after the April 14 Call, Mr. Hong entered into two agreements with Mr. and Mrs. Kim. In the first agreement, Mrs. Kim (whose name the AMF3 Investment was in), signed a memorandum of understanding whereby Mr. Hong acquired her AMF3 shares. In return, Mrs. Kim received a promissory note from Mr. Hong for the principal amount of the AMF3 Investment and a share of any profit AMF3 may eventually earn from the Olympic Village Project (the “MOU”). By accepting Mr. Hong’s offer and signing the MOU, Mrs. Kim was no longer obliged to indemnify AMF3, the other AMF3 investors, ARAI, and Mr. Hong (and others) from losses they may have sustained in respect of the Olympic Village Project.

[60] The second agreement made on April 30, 2009, was in respect of the Buffalo Hills Project. In a handwritten note addressed to Mr. Kim, Mr. Hong confirmed that Argo Ventures would pay 20% of the management fees it received from the Buffalo Hills Project to Mr. Kim “or a legal entity or individual person designated by him” (the “Buffalo Hills Agreement”). Thus, by way of the Buffalo Hills Agreement, the parties agreed to divert payment of management fees owing to Mr. Kim related to the Buffalo Hills Investment from APEM (as was stipulated in the APEM Shareholders Agreement) to Mr. Kim or another designated entity. This is consistent with the parties’ agreement to let APEM dissolve during the April 14 Call.

[61] Notably, the Buffalo Hills Agreement does not mention the AMF3 Investment nor the related APEM Incentive. It does not matter whether Mr. Kim asked Mr. Hong to write the Buffalo Hills Agreement or if Mr. Hong wrote it spontaneously on his own accord. Either way, the agreement was written by Mr. Hong in Mr. Kim’s presence, and Mr. Kim read it at that time. There is no evidence that Mr. Kim rejected the Buffalo Hills Agreement or demanded that it include reference to management fees received by AMF3 or the APEM Incentive. Surely if Mr. Kim had been of the view that the April 14 Call gave rise to the agreement he says it did in respect of the Olympic Village Project and payment of the APEM Incentive after APEM’s dissolution, he would have said something or insisted that it be included in the

Buffalo Hills Agreement. In my view, the Buffalo Hills Agreement, and Mr. Kim's acceptance of it, is consistent with the April 14 Call being limited to the Buffalo Hills Investment and creating no enforceable agreements about the APEM Incentive.

[62] Mr. Kim argues that certain actions that occurred on or around June 28, 2018, support his position that an enforceable agreement was made regarding the payment of the APEM Incentive during the April 14 Call, some nine years earlier. On June 28, 2018, Mr. Hong met with Mr. Kim to discuss Mr. Kim's request for a buyout of the Kim family interests in two other projects, neither of which was related to the Olympic Village or Buffalo Hills Projects. During that meeting, Mr. Hong wrote and provided Mr. Kim with a note titled "(LP (JAPLP) Agreement. AMF#3)", which the two men signed (the "June 28 Note"). The June 28 Note provided that Mr. Hong would repay the principal amount for the two other investments Mr. Kim and Mrs. Kim had made by November 6, 2018. The note also stated "[t]he share for Mr. and Mrs. Kim shall be paid even before that date once W 2nd Commercial is settled. With this, all the matters between the two parties will end. After one week of careful deliberation, the two parties shall enter into a formal agreement".

[63] Mr. Kim argues that the title of the June 28 Note and its reference to AMF3 and JAPLP are evidence that the parties believed that the APEM Incentive was not yet concluded and an agreement had been reached to pay Mr. Kim the APEM Incentive despite APEM's dissolution. Mr. Kim questions why Mr. Hong would refer to AMF3 in the June 28 Note if he no longer had any obligations to the Kims with respect to the AMF3 Investment.

[64] I do not agree that the June 28 Note supports the existence of an agreement being reached during the April 14 Call. In my view, the reference to the JAPLP and AMF3 in the June 28 Note was likely made because Mr. Kim, who one month earlier had become aware that the Olympic Village Project had been profitable, expected to be repaid the principal of the unrelated investments (which were in financial trouble) from money that Argo Ventures had received from the Olympic Village Project.

[65] In any event, it is clear that Mr. Hong did not agree to the terms set out in the June 28 Note at the time it was made given that it provides for a one-week period of “careful deliberation”. No payments were made pursuant to the June 28 Note. While the June 28 Note might suggest that there was some lingering obligation to share AMF3 management fees with Mr. Kim, it is at least equally plausible that the June 28 Note reflects terms proposed by Mr. Kim to exit the other unrelated investments, given his likely dissatisfaction with the recent revelation regarding the Olympic Village Project’s profitability. Those terms were ultimately not accepted. Thus, the June 28 Note is not a subsequent agreement that supports the existence of the Dissolution Agreement.

[66] In my view, the June 28 Note is of limited evidentiary value in determining whether an agreement was reached during the April 14 Call. As discussed above, the June 28 Note is not an agreement and its relation to the obligations then existing between the parties is equivocal. Moreover, the June 28 Note involves events that occurred over nine years after the April 14 Call. Finally, the use of this after the fact conduct in the way suggested by the plaintiff would result in the formation of a contract that strays far from the words used and, importantly, the words not used during the April 14 Call. I prefer the evidence of the events of April 30, 2009, and the Buffalo Hills Agreement, which occurred two-weeks after the April 14 Call and are only consistent with one conclusion: that no agreement was reached during the April 14 Call on the AMF3 Investment and the related APEM Incentive.

Conclusion

[67] The April 14 Call did not give rise to an enforceable agreement to pay Mr. Kim the APEM Incentive despite the subsequent dissolution of APEM. Consequently, neither Argo Ventures nor Mr. Hong are liable to Mr. Kim for any of the obligations agreed to under the APEM Shareholders Agreement in relation to the AMF3 Investment. As no enforceable agreement was reached, it is not necessary for me to consider whether Argo Ventures breached any duties it may have had to Mr. Kim under any such agreement.

Was Argo Ventures Unjustly Enriched?

[68] Given that I have found that Mr. Kim does not have a contractual right to the APEM Incentive, the plaintiff submits that, in the alternative, he is entitled to a monetary remedy for the APEM Incentive on the basis of unjust enrichment. Mr. Kim advances this argument on the basis that the defendants had no legitimate expectation of receiving the benefit of Mr. Kim's efforts to secure financing for AMF3 without paying him anything in return.

[69] To establish a claim for unjust enrichment, Mr. Kim must prove that (1) the defendants were enriched; (2) the plaintiff suffered a corresponding detriment; and (3) there is no juristic reason that would permit the defendants to retain the enrichment: *Kerr v. Baranow*, 2011 SCC 10 at para. 32.

[70] For the reasons that follow, I have found that Mr. Kim has not made out his claim for unjust enrichment.

Enrichment of the Defendants

[71] Mr. Kim submits that the defendants were enriched by the services he provided in fulfilling obligations under the APEM Shareholders' Agreement, including securing a \$1.53 million equity investment in AMF3 for the Olympic Village Project.

[72] As Justice Francis discussed in *Sharp v. Royal Mutual Funds Inc.* 2020 BCSC 1781 at para. 121, aff'd 2021 BCCA 307, there are two types of unjust enrichment claims. The first is where the gain is the result of a direct transfer of funds from the plaintiff to the defendant. The second is where there is a causal link between the enrichment and the deprivation even where there is no quantifiable transfer of funds. These latter claims are commonly the basis of unjust enrichment claims in family law cases: see, for example, *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 1980 CanLII 22 (S.C.C.).

[73] Mr. Kim has not pleaded nor argued that he made a direct transfer of funds to the defendants. Indeed, Mr. Kim made no direct transfer to Argo Ventures or to Mr. Hong. As I understand his submission, Mr. Kim is arguing that Argo Ventures

was enriched by the services he provided to Argo Ventures, including securing an investment in AMF3 by Mrs. Kim.

[74] Argo Ventures and Mr. Hong are the defendants in this case. I agree with Mr. Kim that the AMF3 Investment may have been beneficial to AMF3 but I do not see how it was of value to Argo Ventures. There is no evidence that Argo Ventures' ability to receive a management fee from AMF3 was impacted by Mrs. Kim's investment. I do not see how the AMF3 Investment, or the services provided by Mr. Kim in securing it, enriched the defendants.

Deprivation of the Plaintiff

[75] Mr. Kim submits that the defendant's refusal to pay him the APEM Incentive is the deprivation he suffered.

[76] I do not agree that Mr. Kim has been deprived of anything that would ground his claim. Under the APEM Shareholders' Agreement, Mr. Kim did not have a direct right to receive management fees from AMF3; that right belonged to APEM which has long been dissolved. As I have found that the April 14 Call did not create an enforceable agreement in respect of the payment of the APEM Incentive as it related to the AMF3 Investment, there is no requirement that Argo Ventures was to share management fees it received from AMF3 with Mr. Kim.

[77] As discussed earlier, Mr. Kim's own admission at trial was that no direct reference or promises were made during the April 14 Call, or at anytime afterwards, that Argo Ventures would pay him a share of management fees received on account of the Olympic Village Project if APEM was dissolved. Thus, management fees received by Argo Ventures, if any, were not payable to Mr. Kim. In my view, Mr. Kim has not established that Argo Ventures obtained a benefit that rightfully belonged to him.

Juristic Reason

[78] In any event, I find that there is a juristic reason for Mr. Kim to not receive the APEM Incentive.

[79] Mr. Kim argues that he secured the \$1.53 million AMF3 Investment on the understanding that he would receive the APEM Incentive and not with a donative intent. However, that does not negate the fact that Mr. Kim's expectation to receive the APEM Incentive was based on a contractual relationship between him as a shareholder of APEM and its agreement with Argo Ventures. Contractual rights are a well-established juristic reason to permit a party to retain a benefit.

[80] I agree with the defendants that the dissolution of APEM is also a juristic reason to permit Argo Ventures to retain any benefit it has obtained. Mr. Kim agreed to allow APEM to dissolve during the April 14 Call. As Mr. Kim submitted in support of his position with respect to the validity of the oral agreement alleged to have been created during the April 14 Call, Mr. Kim knew that he was giving up the right to receive benefits he held as a shareholder of APEM if the company was dissolved. Those rights included the right to receive the APEM Incentive pursuant to the APEM Shareholders' Agreement. As a result, Mr. Kim no longer has any right to a share of AMF3 management fees. As counsel for the defendant's submitted:

The consequence of Mr. Kim's decisions is that he no longer has any right to a share of AMF3 management fees. That is not unjust or contrary to commercial good conscience. It is the inevitable consequence of Mr. Kim's decision.

[81] Mr. Kim says that the dissolution of APEM is not a juristic reason to for Argo Ventures to retain the APEM Incentive because Mr. Kim had reasonable expectation to receive his share of management fees received by AMF3 based on promises made by Mr. Hong and Argo Ventures as recorded in the APEM Shareholders' Agreement. The fundamental problem with this argument is that in order to find this, I would have to find that Mr. Hong or Argo Ventures had made a promise to Mr. Kim in respect of AMF3 management fees that survived APEM's dissolution. In essence, this is the same argument that Mr. Kim made in respect of the alleged existence of the Dissolution Agreement arising from the April 14 Call. As discussed earlier, I do not find that such a promise or agreement was ever made.

Conclusion

[82] The subject matter of Mr. Kim’s unjust enrichment claim is essentially the rights that he was entitled to under the APEM Shareholders Agreement. However, Mr. Kim gave up these rights when he agreed in 2009 to allow APEM to be dissolved. It is not unjust for Argo Ventures to retain any benefits it received from APEM’s dissolution by virtue of the Olympic Village Project’s ultimate profitability. While Mr. Kim may not have intended this to happen when he agreed to permit APEM to be dissolved and entered into the Buffalo Hills Agreement, the equitable remedy of unjust enrichment cannot serve to address the unintended consequences of Mr. Kim’s intentional actions by essentially creating a contract that the parties did not negotiate.

[83] Mr. Kim’s claim in unjust enrichment is dismissed.

IS MR. KIM ENTITLED TO THE RSJV LIQUIDATION INCENTIVE?

The Raven Song Joint Venture and the Incentive

[84] As mentioned earlier, Mr. Kim has been involved in a variety of projects associated with Mr. Hong. In 2005, Mr. Kim became a member and investor in one such project through an entity known as Raven Song Joint Venture (“RSJV”). At all material times, Mr. Kim held a 10% interest in RJSV. RSJV held a beneficial interest in a property located on Ontario Street in Vancouver, which housed the Raven Song Community Health Centre (the “RSJV Property”). Argo Ventures managed the RSJV Property on behalf of RSJV.

[85] As discussed above, by 2009, the Olympic Village Project was in financial trouble. In September 2009, Mr. Hong approached the investors in certain “mutual aid assets”, which were also owned or managed by Argo Ventures, and requested that they provide financial assistance to AMF3 for the Olympic Village Project. In return, the owners of the mutual aid assets were offered certain incentives. The RSJV was one of the mutual aid assets approached to assist AMF3.

[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.

[88] Mr. Kim accepted the RSJV Financing Proposal. However, Mr. Kim did not receive either the RSJV Management Fee Incentive or the RSJV Liquidation Incentive. Only Mr. Kim’s entitlement to the RSJV Liquidation Incentive is at issue in this litigation. Mr. Hong says that Mr. Kim is not entitled to the RSJV Liquidation Incentive for two reasons:

- a) Mr. Kim is statute-barred from making a claim for the RSJV Liquidation Incentive; and
- b) Mr. Kim is not entitled to the RSJV Liquidation Incentive by virtue of the Incentives Exclusionary Clause (see para. [87] above), which Mr. Hong

says disqualifies RSJV investors who had a direct or indirect interest in AMF3 or AMF5 from the RSJV Incentive.

[89] If Mr. Kim is entitled to the RSJV Liquidation Incentive, then the value of the incentive is also at issue. This is because the value of the RSJV Liquidation Incentive is dependant upon the amount of profit AMF3 realized from its involvement in the Olympic Village Project. The amount of profit depends upon whether or not interest now claimed, but never collected, by AMF3 and AMF5 is accounted for.

Is Mr. Kim’s Claim for the RSJV Incentive Statute-Barred?

[90] In my view, Mr. Kim’s claim for the RSJV Incentive is not barred by the *Limitation Act*, S.B.C. 2012, c. 13. Although there was a repudiatory breach, it was anticipatory: Mr. Kim decided to wait and see if Mr. Hong would eventually refuse to pay the RSJV Liquidation Incentive when the obligation came due. Mr. Kim’s limitation period did not begin to run until Argo Ventures had determined the AMF3 liquidation surplus and declined to pay Mr. Kim the RSJV Incentive on May 31, 2018.

[91] On December 1, 2009, RSJV caused a second mortgage to be registered against the RSJV Property in the amount of \$2.1 million; the funds were provided to Argo Ventures and used to finance the Olympic Village Project. On January 12, 2010, the RSJV Property was sold to a third party, and the second mortgage was paid off.

[92] On January 15, 2010, Argo Ventures prepared a reconciliation of the RSJV project (the “RSJV Reconciliation”), and members were paid out from the sale proceeds in accordance with their membership interests. Mr. Kim was paid \$620,000 as his portion of the sale proceeds on January 15, 2010.

[93] However, Mr. Kim was not paid the RSJV Management Fee Incentive in January 2010 when it became due to those eligible. Only three individuals who were noted by Mr. Hong as “Impartial to AMF#3 & AMF#5” received the RSJV Management Fee Incentive. Mr. Hong says that Mr. Kim was not paid the RSJV

Management Fee Incentive because of the Kim family's investment in AMF3 and the operation of the Incentives Exclusionary Clause.

[94] In January 2010, AMF3 was not profitable and the Olympic Village Project was far from complete. Therefore, there was not yet any liquidation surplus that would give rise to the RSJV Liquidation Incentive. The RSJV Reconciliation referenced this and clearly indicated that Mr. Hong did not intend to pay the RSJV Liquidation Incentive to Mr. Kim if and when it became payable. The final page of the RSJV Reconciliation stated:

AMF#3 Development Profit Share (if any) will be distributed upon the complete liquidation of the Project (This Award, if any, will be applicable to Young Kyu Kim, Sung Hee Lee and Jong Hwa Lee only).

[95] As referenced earlier, despite significant uncertainty surrounding the project in 2010, the residential units in the Olympic Village Project were eventually sold at a profit meaning that AMF3 had a surplus upon liquidation of its assets. On May 31, 2018, Mr. Hong provided a report to AMF3's investors in respect of the liquidation of its assets, and he made an offer to repay investors on certain terms (the "May 2018 Notice"). It is at this time that the RSJV Liquidation Incentive became payable to those eligible to receive it.

[96] Mrs. Kim, whose name the \$1.5 million AMF3 Investment was in, accepted the terms of the May 2018 Notice on June 19, 2018, received her payment of \$1,774,817.46, and signed a release.

[97] Mr. Kim received the May 2018 Notice from Mrs. Kim sometime relatively shortly after it was sent. It was at this time that Mr. Kim says he first became aware that construction and sale of the majority of the Olympic Village Project had completed and that there was a surplus that might entitle him to the APEM Incentive (as discussed earlier). He also says this was the first time he realized that the RSJV Liquidation Incentive was to be distributed to the RSJV members and that he was not going to receive it.

Analysis

[98] Pursuant to the transition provisions of the *Limitation Act*, the discoverability provisions of s. 8 are applicable to Mr. Kim's claim for the RSJV Liquidation Incentive. Section 8 provides that a claim is discovered on the first day on which a person knew, or reasonably ought to have known, all of the following:

- a) that injury, loss or damage had occurred;
- b) that the injury, loss or damage was caused by or contributed to by an act or omission;
- c) that the act or omission was that of the person against whom the claim is or may be made; and
- d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[99] The defendants submit that Mr. Kim is statute-barred because he became aware that Mr. Hong was not going to pay him the RSJV Liquidation Incentive when Mr. Kim received the RSJV Reconciliation on, or around, January 15, 2010. Given that Mr. Kim did not commence this action until June 5, 2020, the defendants say that he was clearly out of time when he filed his claim.

[100] The defendants' limitation position hinges on this Court concluding that Mr. Kim knew or ought to have been reasonably aware that "injury, loss or damage had occurred" when he received the January 15, 2010, RSJV Reconciliation report, which stated that the RSJV Liquidation Incentive would only be payable to three individuals, not including Mr. Kim.

[101] I agree with the plaintiff that the RSJV Reconciliation report is an anticipatory repudiation of its obligation to pay the RJSV Incentive and that an anticipatory repudiation does not cause damage for discoverability purposes. The RSJV Reconciliation report addresses both the RSJV Management Incentive and the

RSJV Liquidation Incentive. The former was payable at the time the reconciliation report was made in January 2010, and the limitation period for an alleged breach the RSJV Management Incentive began at that time. Mr. Kim is not claiming a breach in respect of this incentive.

[102] Unlike the RSJV Management Incentive, the RSJV Liquidation Incentive was not yet payable in January 2010: there was not yet a liquidation surplus in AMF3 because the Olympic Village Project was not yet complete. As Mr. Hong stated in the RSJV Reconciliation, the RSJV Liquidation Incentive was to be paid, if there was a profit in AMF3, upon complete liquidation of the Olympic Village Project – and then only to certain individuals, not including Mr. Kim. While Mr. Kim must have been aware that Mr. Hong did not *intend* to pay him the RSJV Liquidation Surplus if there was a profit, the obligation to *actually* pay that incentive did not arise in January 2010. I pause to note that Mr. Kim’s reluctance or refusal to acknowledge that he became aware of this in January 2010 was simply not believable. I do not accept his evidence that he read everything except for the last page when he received the RSJV Reconciliation. However, this does not affect my determination of whether Mr. Hong’s statement in the RSJV Reconciliation was an anticipatory breach.

[103] In John D. McCamus’ *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020) at 746 [*McCamus*], Professor McCamus defines an anticipatory breach as follows:

An anticipatory repudiation of an agreement occurs when one party manifests, through words or conduct, an intention not to perform or not to be bound by provisions of the agreement that require performance in the future.

[104] In my view, Mr. Hong’s statement about the RSJV Liquidation Incentive in the RSJV Reconciliation report in January 2010 was an anticipatory breach. As Professor McCamus explains at 749 and 760, an anticipatory repudiation confers an option on the innocent party to disaffirm the contract and commence an action for breach of contract. However, the innocent party is under no obligation to do so, and they may elect to passively wait and see whether the party that has indicated a plan

to breach the contract nevertheless performs when the obligation becomes due. This principle was articulated in *Ali v O-Two Medical Technologies Inc*, 2013 ONCA 733:

[24] Once the counterparty shows its intention not to be bound by the contract, the innocent party has a choice. The innocent party may accept the breach and elect to sue immediately for damages -- in which case, the innocent party must "clearly and unequivocally" accept the repudiation to terminate the contract: Brown, at para. 45. Alternatively, the innocent party may choose to treat the contract as subsisting, "continue to press for performance and bring the action only when the promised performance fails to materialize"; by choosing this option, however, the innocent party is also bound to accept performance if the repudiating party decides to carry out its obligations: S.M. Waddams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010), at para. 621.

[105] The Ontario Court of Appeal quoted its earlier decision in *Ali* with approval recently and held that, where there is an anticipatory breach, a cause of action does not arise until a plaintiff accepts the defendant's breach or repudiation: *Hurst v. Hancock*, 2019 ONCA 483 at para. 19. In other words, there is no cause of action if the innocent party passively waits to see if the breach actually occurs.

[106] Applied to this case, Mr. Kim had the option to accept the breach and commence an action when he received the RSJV Reconciliation in January 2010, or he could wait and see if Mr. Hong eventually refused to pay the RSJV Liquidation Incentive when the obligation came due. Mr. Kim chose the latter. Therefore, no cause of action arose until the obligation came due, and Mr. Kim's limitation period did not begin to run until Argo Ventures had determined the AMF3 liquidation surplus and declined to pay Mr. Kim the RSJV Incentive on May 31, 2018. Given the one-year suspension of limitation periods that was put in place as a result of the COVID-19 pandemic, Mr. Kim's limitation period would have expired on May 31, 2021. Mr. Kim's claim was filed on June 5, 2020. Consequently, the claim for the RSJV Liquidation Incentive is not statute-barred.

Is Mr. Kim Eligible for the RSJV Liquidation Incentive?

[107] Because the claim is not statute-barred, I will now consider whether Mr. Kim is eligible for the RSJV Liquidation Incentive in light of the Incentives Exclusionary Clause.

[108] The parties initially characterized this issue as hinging on whether the AMF3 Investment was made by Mrs. Kim in her personal capacity or if it was made indirectly on behalf of Mr. Kim. However, I do not find it necessary to determine whether the investment was made by Mr. or Mrs. Kim. This is because the Incentives Exclusionary Clause is void for uncertainty and it must be severed from the rest of the agreement respecting the RSJV Liquidation Incentive.

The Incentives Exclusionary Clause is Void for Uncertainty

The Applicable Exclusionary Language

[109] Including the RSJV Financing Proposal, Mr. Hong made three proposals to raise funds for the Olympic Village Project from other investments. Each of these proposals was made for a different audience of investors in either the RSJV, Argo Ventures or other assets that Mr. Hong identified as “mutual aid assets”. Two of the proposals included an exclusionary provision with respect to the incentives and one did not. Although not entirely clear, it seems that Mr. Kim may have received all of these proposals given the breadth of his family’s investments with Mr. Hong.

[110] In any event, the applicable exclusionary clause in this case is the one found in the RSJV Financing Proposal (i.e. the Incentives Exclusionary Clause) because it is that proposal that sets out the terms that were accepted by the RSJV investors, including Mr. Kim. Moreover, the RSJV Financing Proposal was delivered solely to the RSJV investors and was focused solely on the terms on which the RSJV Property could be leveraged for the benefit of Argo Ventures and the Olympic Village Project. Moreover, the RSJV Financing Proposal is expressly linked to the consent form the RSJV investors were asked to sign and return, and that Mr. Kim did sign and return, when accepting the RSJV Financing Proposal.

The Applicable Principles of Contractual Interpretation and Severing an Uncertain Term

[111] I am guided by the following principles in the interpretation of the Incentives Exclusionary Clause.

[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. Taddej*, 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’ in a commercial context: *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. The surrounding circumstances are considered to help interpret the terms of the contract, as this evidence can shed light onto the parties’ mutual and objective intentions as expressed in the contract: Geoff Hall, *Canadian Contractual Interpretation Law*, 3rd ed (Toronto, Ont.: LexisNexis, 2016) at 24, 30-33. The factual matrix or surrounding circumstances does not include subsequent conduct: *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912 at paras. 39-50.

[115] If a provision is ambiguous after considering the factual matrix surrounding the contract’s creation (i.e., where the words, viewed objectively, bear two or more reasonable interpretations), extrinsic evidence is admissible to resolve the ambiguity. This includes evidence of the parties conduct in making their agreement, such as the course of their negotiations, as well as the conduct of the parties in

performing their agreement (i.e., subsequent conduct): *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2006 BCCA 459 at paras. 25, 27; *Wade v. Duck*, 2018 BCCA 176 at paras. 27-29.

[116] Certainty is important in contractual relationships. Certainty is not a technicality; rather, it is “an integral part of the very heart of contract”: *Ko v. Hillview Homes Ltd.*, 2012 ABCA 245 at para. 74. A contractual term is certain where the words of the contract are capable of being given a reasonably certain meaning by the court: G.H.L. Fridman, Q.C., *The Law of Contracts in Canada*, 6th ed (Toronto: Thomson Reuters Canada Limited, 2011) at 17-25; *Khela v. Clarke*, 2021 BCSC 503 at para. 83, aff’d 2022 BCCA 71. A contractual provision may be so vague that it will fail to be enforceable on the grounds of uncertainty: *McCamus* at 110.

[117] In *Khela* at paras. 71-75, Justice Bernard recently reviewed and summarized the authorities on the issue of when an uncertain term can be severed from the remainder of an agreement and the consequences of doing so. At para. 76, Bernard J. concluded that the following three principles govern the severance of uncertain contractual terms:

- a) uncertain terms can be severed where they are meaningless, minor, or subsidiary to an otherwise enforceable agreement;
- b) uncertain terms can be severed where they are in a divisible part of an agreement; and
- c) 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.

Analysis

[118] In my view, the Incentives Exclusionary Clause is void for uncertainty and should be severed from the rest of the RSJV Financing Proposal.

[119] For ease of reference, the Incentives Exclusionary Clause states:

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

[120] The defendants argue that the proper interpretation is that the Incentives Exclusionary Clause restricts RSJV investors with a direct or indirect interest in AMF3 or AMF5 from receiving the RSJV Liquidation Incentive. The defendants say that Mr. Kim is thus excluded because he had an interest in AMF3 through the investment made in the name of Mrs. Kim or, alternatively, Mr. Kim was the real investor and is excluded.

[121] In my view, what is meant by “investors of the mutual aid assets related to AMF#3 and AMF#5” is uncertain. On the plain words of the provision, it is not clear if “related” applies to the investors or the assets. The provision applies either to investors who are related to AMF3 and AMF5, or it applies to all investors of mutual aid assets that are themselves related to AMF3 and AMF5. Or perhaps those that have a direct or indirect interest. The use of the word “related” in the provision requires an inquiry into the relationship between the RSJV investors and AMF3 and AMF5. To make matters more uncertain, the term “related” is not defined in the RSJV Financing Proposal (or in any of the other proposals circulated to the various investor groups at that time). It is entirely unclear what is meant by “related” and how it is to be applied.

[122] If “related” was intended to refer to familial relations, Mr. Hong had no way of confirming or definitely determining whether investors of AMF3 and AMF5 were relatives of the investors in RSJV. And given the length of time that the Argo Ventures investment spanned, Mr. Hong had no way of knowing or monitoring if the relationship bonds between RSJV investors and AMF3/AMF5 investors would remain or be severed over time, or if new relationships would develop. The Incentives Exclusionary Clause does not impose a temporal aspect on the concept of “related” investors, leaving it unclear whether “related” is in reference to the parties’ relationship at the outset of the project or at the point of liquidation in addition to what the term “related” actually refers to.

[123] The plaintiff has helpfully illustrated the uncertainty with respect to the application of this provision in his written submissions by pointing to a number of examples that might possibly fit within the term “related”:

- a) a mutual aid asset investor whose relative (whatever “relative” may mean) was an investor in AMF3 or AMF5;
- b) a mutual aid asset investor that is a corporation whose principal is an investor in AMF3 or AMF5;
- c) a mutual aid asset investor who is a shareholder of a corporation that is an investor in AMF3 or AMF5;
- d) a mutual aid asset investor who is an officer of AMF3 or AMF5;
- e) a mutual aid asset investor who is a lender to or borrower from AMF3 or AMF5;
- f) a mutual aid asset investor who is a beneficial owner of shares in AMF3 or AMF5;
- g) a mutual aid asset investor who is otherwise engaged in business with AMF3 or AMF5; or
- h) a mutual aid asset investor who held shares in ARAI, which had a contract to manage AMF3’s investment in the Olympic Village project.

[124] I am unable to resolve the uncertainty by reference to the context and surrounding circumstances. There were three proposals made in respect of raising funds for the Olympic Village Project: two of the proposals included an exclusionary provision and one did not. It is impossible to reconcile the language used in each, and, I do not find that the other proposals are of assistance in interpreting the Incentives Exclusionary Clause. The meaning of “related” remains unclear.

[125] In one proposal, there is no exclusionary language at all. In another proposal, the exclusionary clause does not require an inquiry into what “relatedness” means – it is unambiguous and simply reads “... investors of the related AMF#3 and AMF#5 Mutual Aid Assets will not be eligible to receive the incentives.” However, the exclusionary language found in the RSJV Financing Proposal refers to a different concept of “relatedness”: “[I]nvestors of the mutual aid assets related to AMF#3 and AMF#5 are excluded from the beneficiary list for the incentives.” In my view, it is impossible to reconcile the different proposals because there is no specific category of people that would be caught by all three proposals. Thus, I find the different proposals to be of no assistance in constructing the Incentives Exclusionary Clause.

[126] Having found that the Incentives Exclusionary Clause is ambiguous after analyzing the words and the surrounding circumstances, I may turn to extrinsic evidence, including conduct of the parties in performing their agreement, to interpret the clause. The defendants argue that the subsequent conduct of the parties supports a finding that RSJV Financing Proposal excludes investors like Mr. Kim who have a direct or indirect interest in AMF3 or AMF5 from the RSJV Liquidation Incentive. I disagree.

[127] While Mr. Hong may have treated other investors with an indirect familial interest in AMF3 or AMF5 the same way he treated Mr. Kim, this extrinsic evidence cannot be used to undermine the agreement itself. Although Mr. Hong says that he treated everyone as if the contract stated that those with a direct or indirect interest in AMF3 or AMF5 would be excluded, the Incentives Exclusionary Clause simply says “related”. Extrinsic evidence can be used as an interpretive aid, but it cannot overwhelm the actual words in the agreement.

[128] The fact that Mr. Kim did not contest his exclusion from the RSJV Liquidation Incentive when he received the RSJV Reconciliation in January 2010 does not assist me in interpreting the impugned clause. The defendants submit that Mr. Kim’s decision to not contest his anticipated exclusion means that it must have been obvious to him that Mr. Hong did not believe he was eligible for the RSJV Liquidation

Incentive because of his familial investments in AMF3 and AMF5. While this may be the case, in the face of an anticipatory breach, Mr. Kim had the option to wait and see if Mr. Hong did in fact operate in that manner when the obligation came due. Moreover, Mr. Kim's subjective belief of Mr. Hong's subjective belief is not, in my view, the type of objective extrinsic evidence that can properly inform the interpretation of a contract. Mr. Kim's decision to wait does not, in my view, resolve the ambiguity in the Incentives Exclusionary Clause.

[129] The Incentives Exclusionary Clause is void for uncertainty. Having concluded this, the next question is whether the Incentives Exclusionary Clause can be severed from an otherwise enforceable agreement. If not, the entire agreement is vitiated. The plaintiff argues that the Incentives Exclusionary Clause is severable and that the remainder of the RSJV Financing Proposal that was accepted by Mr. Kim is enforceable. The defendants argue that the Incentives Exclusionary Clause is not severable and that the entire agreement is void if the exclusionary clause is void for uncertainty.

[130] If the Incentives Exclusionary Clause is vital to the parties' relationship, it cannot be severed. If the clause is minor, divisible or subsidiary, the clause can be severed: *Khela* at paras. 71-76. In my view, the Incentives Exclusionary Clause is divisible and can be severed.

[131] 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. Each of the three proposals discussed earlier provided for the right to use the equity from the mutual aid assets in exchange for various incentives. Clearly, Mr. Hong, who wrote all three proposals, did not expect to use the RSJV equity at no cost. The RSJV participants' acceptance of the RSJV Financing Proposal, and any of the other proposals, demonstrates that all parties did not intend the RSJV's equity to be used *gratis* by the defendants. It is very likely that had that been the case, the various investors would never have agreed to accept the defendants' proposals that RSJV provide financing for AMF3's benefit without receiving anything in return.

[132] Unlike the incentives themselves, I find the Incentives Exclusionary Clause to be subsidiary to the vital aspect of the agreement. As mentioned numerous times, Mr. Hong's three proposals contained two differently worded exclusionary clauses and one proposal contained no such exclusion. If an exclusion was vital, it would have likely been present in all of the proposals. This suggests that the Incentives Exclusionary Clause was not fundamental to the parties' agreement and was not intended to govern the vital aspect of the agreement.

[133] Moreover, it would be entirely unfair to accede to the defendants' argument that the Incentives Exclusionary Clause renders the provisions respecting the incentives themselves void. If the incentives are not payable at all, then the defendants will receive a windfall at the expense of the RSJV investors. As the plaintiff points out, Argo Ventures will have received the benefit of the use of \$2.1 million in funds secured by the mortgage registered against the RSJV Property at essentially no borrowing cost. Conversely, the RSJV investors, including those that the defendants say are "unrelated" to the AMF3 and AMF5 investments, will not receive any incentives for having agreed to leverage RSJV's primary asset at significant risk. This is not what the parties bargained for. Allowing Mr. Hong to benefit from the deficiencies in his own drafting of the Incentives Exclusionary Clause would not be fair.

[134] In my view, it is also noteworthy that the agreement was partially performed to a significant degree. In *Khela* at para. 71, Bernard J. cited several passages from S.M. Waddams' *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book Inc., 2010) at 37–41. Professor Waddams noted that courts will go some way to protect reasonable reliance. The implication is that the parties' mutual reliance on having come to a binding agreement, and their partial performance of the obligations under that agreement, favours a finding that a binding agreement was reached.

[135] In this case, both Mr. Kim and the defendants relied on having entered a binding agreement and took steps to perform that agreement, including registration of a mortgage against the RSJV Property to secure the loan, the provision of funds

from RSJV to Argo Ventures for use in the Olympic Village Project, and the sale of the RSJV Property to a third party and the consequent discharge of the second mortgage. While partial performance cannot remedy an entirely defective agreement, the performance and reliance in this case is indicative of the divisibility of the Incentives Exclusionary Clause: the clause is separate and apart from the incentives themselves.

[136] Even though the Incentives Exclusionary Clause is part of the same clause that provides for the incentives themselves, I find that it is appropriate to sever the impugned clause. In *Khela* at paras. 73-75, Bernard J. discussed the circumstances in which an uncertain term can be severed from an agreement with reference to authorities from British Columbia and Alberta:

[73] In *Khajavi v. Eghtesadi*, 2016 BCSC 1127 at para. 27, Madam Justice Dillon, citing para. 49 of *Hole v. Hole*, 2016 ABCA 34, [*Hole*], leave to appeal ref'd [2016] S.C.C.A. No. 138, stated that "[u]ncertain or meaningless terms that are not an essential part of the agreement may be severed".

[74] In *Hole*, at para. 49, the court said:

An agreement that is otherwise enforceable does not fail for uncertainty simply because some of the words in it may be vague or difficult to interpret: *Mitsui & Co (Point Aconi) Ltd v Jones Power Co Ltd*, 2000 NSCA 95 at para 52, 189 NSR (2d) 1. In determining whether the terms of a contract are sufficiently certain, a court is entitled to consider the surrounding context that is known to all the parties: *Klemke Mining Corporation v Shell Canada Limited*, 2008 ABCA 257 at para 18, 433 AR 172. Uncertain terms that are not an essential part of the contract will not be fatal to its enforcement; uncertain or meaningless terms that are subsidiary may be severed from the contract: *Continental Insurance Company v Law Society of Alberta*, 1984 ABCA 261 at para 25, 56 AR 98...

[75] In *Continental Insurance Company v. Law Society of Alberta*, 1984 ABCA 261 at para. 25, Mr. Justice Lieberman stated:

If a contract contains a meaningless phrase it can be ignored and in effect severed from the contract so long as it is a subsidiary term. *Chitty on Contracts* 25th Edition, para. 122 at pp. 69-70; *Nicolene Ltd. v. Simmonds* [1953] 1 Q.B. 543. In the case at bar the second portion of section 4 is, in the face of the clear words of the first portion of that section, meaningless. It purports to refer to a further condition or qualification of the limit of liability and is in these circumstances a "subsidiary term" within the meaning of that phrase as it is used in Halsbury's Laws of England, Fourth Edition, Vol. 9, para. 268 where the principle is stated in these words:

"Where there is agreement on all substantial terms the court may disregard a subsidiary term on the ground that it is meaningless."

[Emphasis added by Bernard J.]

[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.

The Damages for Argo's Failure to Pay Mr. Kim the RSJV Liquidation Incentive

Interest on Certain Loans is not to be Accounted for in AMF3's Share of the Profit from the Olympic Village Project

[138] The value of the RSJV Liquidation Incentive is dependent upon the amount of profit realized by AMF3 on the Olympic Village Project.

[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)

[140] For the purposes of this litigation, the parties have agreed that AMF3's notional share of the overall partnership's net profit from the Olympic Village Project

was \$18,369,337 before taking into account interest that AMF3 and AMF5 were entitled to charge on the funds they injected into the partnership (i.e. the AMF3 Loan and the AMF5 Loan). What the parties do not agree on is whether the interest not charged should now be accounted for when determining AMF3's profit.

[141] Thus, the key issue that will determine, in large part, the "liquidation surplus" is whether AMF3's notional profit of approximately \$18 million should be reduced to account for interest accrued, but not charged, on the \$4 million loan advanced by AMF3 in 2007 and the \$5.5 million loan largely advanced by AMF5 in 2007. The defendants argue that the interest should be accounted for as it is an expense that is required to be deducted by the definition of liquidation surplus in the Liquidation Incentive Clause. If this interest is accounted for, the defendants say there is no liquidation surplus at all.

[142] In my view, AMF3's notional share of the partnership's profit from the Olympic Village Project should not be reduced by the interest that accrued but was never charged on the AMF3 Loan and the AMF5 Loan.

[143] I agree with the plaintiff: the defendants' position that the Olympic Village Project ended in a loss because interest is owed on the AMF3 and AMF5 Loans is artificial. The conclusion that the interest accrual is a fiction, likely employed to thwart any claim made by Mr. Kim, is supported by a number of facts that I find on the evidence.

[144] There is conflicting evidence in respect of the interest that AMF3 was entitled to charge on the AMF3 Loan. The mortgage for the AMF3 Loan indicated an interest rate of 16%. In cross-examination, Mr. Hong stated that the interest rate was actually prime plus 10%. No agreement has been tendered to support this interest rate, and no loan agreement has been tendered in respect of the AMF3 Loan.

[145] The terms of the AMF5 Loan agreement were not complied with. Principal and interest were not paid on the due date, and no notices of default were provided by either the lender or borrower.

[146] No interest from the AMF3 Loan was recorded in AMF3's financial statements. No interest from the AMF5 Loan was recorded in AMF5's financial statements. The only financial statements in which any interest on the AMF3 or AMF5 Loans were booked was an entry in the JAPLP financial statements made before the Pappajohn family exited the project and without any involvement of Mr. Hong. The relevant entities have not recorded any interest payable or receivable for these loans in either their financial statements or tax returns. No demands have been made on the applicable promissory notes. No reference was made to the AMF3 or AMF5 Loans in the RSJV Reconciliation report to investors in May 2018. Both AMF3 and AMF5 are well past their applicable limitation periods to commence any claims related to the loans and the related interest.

[147] Mr. Hong confirmed that at some point between 2008 and 2011, and quite possibly as early as before August 2009, he made a business decision to forgo the interest due and owing on the AMF3 and AMF5 Loans. Consistent with this, there is no indication in any of the documents that AMF3 or AMF5 have taken any steps to recover interest owed on the aforementioned loans.

[148] I am satisfied that the amalgamation of AMF3 with Argo Ventures in 2011 and the amalgamation of AMF5 with Argo Ventures in 2012 were both done so that Argo Ventures could receive a tax benefit from the significant losses on the books of both AMF3 and AMF5. The tax value of those losses was directly related to the fact that AMF3 and AMF5 did not earn income from interest on the loans. This is what was represented to the Canada Revenue Agency in the companies' tax returns - a representation that was consistent with the financial statements. Mr. Hong's reluctance to admit that AMF3's and AMF5's losses would have been smaller if the companies had reported that interest was accruing and owing is simply not believable. Mr. Hong is a very experienced businessperson, and the evidence demonstrates that he is intimately involved with the operation and management of numerous entities. By virtue of Mr. Hong's decision to not collect interest on the AMF3 and AMF5 Loans, Argo Ventures received a significant tax benefit upon amalgamation with these entities.

[149] I find that Mr. Hong's motive in taking the position that interest continued to accrue and was payable is an attempt to artificially diminish the profit in AMF3 and, consequently, the amounts owing to investors such as Mr. Kim. I note that although I have found that Mr. Kim was not entitled to the APEM Incentive, had he been entitled to it, the defendants' position with respect to interest on the AMF3 and AMF5 Loans would have also served to negate the value of the APEM Incentive. Mr. Hong's motive in taking this position is made clear in email exchanges with Mr. Hong's accountant, Jason Haylock, in March 2018 (shortly before Mr. Hong provided the RSJV Reconciliation report to investors at the end of May 2018).

[150] It appears that Mr. Hong had decided that the amount he was prepared to pay the AMF3 investors was \$10 million even though the proceeds from the Olympic Village Project were much larger. In the emails with Mr. Haylock, Mr. Hong noted that the AMF5 Loan was "still there (theoretically)" and proposed to pay the full amount of the loan interest to himself to reduce the amount owing to AMF3 investors to the \$10 million he had already decided to pay to these investors in satisfaction of his obligations to them. He then suggested that they could look to the interest on the AMF3 Loan if the AMF5 Loan was not sufficient to reduce the obligations to the investors:

The above [proposal to pay out AMF3 investors] shall require over \$10 million from the LP proceeds (total around \$35 million after income tax obligations) – I have to figure out how to handle this (Jay told me that I have \$3.2 million of shareholders loan, way below what I need). Again, I am looking at the AMF#5 loan + accrued interest (more-or-less \$14 million, in my rough calculation). If necessary, we can start to look into AMF#3's loans for that matter.

[151] If this doesn't make it clear that Mr. Hong's intent was to reverse engineer the amount of profit from the Olympic Village Project (and, consequently, AMF3's share of it), the proposed distribution that Mr. Hong attached to the email exchange certainly does. In that proposed distribution, Mr. Kim had labelled the amounts owing by AMF3 to Argo Ventures as "FLEXIBLE", the interest rate on those amounts as prime plus 0.5% (also labelled "FLEXIBLE"), and had proposed to distribute \$10,293,835 to AMF3 investors with the note "How to arrive here???".

[152] After making a decision to forego interest some twelve years earlier, a decision relied upon in tax filings that permitted Argo Ventures to receive a large tax benefit, Mr. Hong cannot now say that a different reality exists and interest actually continued to accrue and is owing: a position that would essentially thwart Mr. Kim's claims. Interest on the AMF3 and AMF5 Loans should not be accounted for when determining AMF3's notional share of its profit from the Olympic Village Project. Thus, the "liquidation surplus", as defined in the RSJV Liquidation Incentive clause, is \$18,369,337, before investment capital is considered.

AMF3's Share of the Profit from the Olympic Village Project should be reduced by the Investment Principal in AMF3

[153] The next step in determining the value of the RSJV Liquidation Incentive is deciding how to treat the AMF3 investment principal. This is because the definition of liquidation surplus in the RSJV Liquidation Incentive clause is calculated after "all loans, expenses, and investment principal are repaid."

[154] The plaintiff argues that the investment principal of AMF3's investors is zero, because Mrs. Kim, and the other third-party investors holding nearly all the shares in AMF3, surrendered their investment to Mr. Hong in April 2009 in exchange for a promissory note from him. In response, the defendants argue that the liquidation surplus must be reduced by the cost of paying the AMF3 investors pursuant to the surrender of their shares for the MOU. Ms. Kim signed the MOU on April 30, 2009.

[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.

[157] AMF3’s agreed upon notional profit of \$18,369,337 is to be reduced by \$8.5 million such that AMF3’s liquidation surplus pursuant to the RSJV Incentive is \$9,869,337.

The Value of the RSJV Liquidation Incentive

[158] Having determined the value of the liquidation surplus, the final task is to determine the value of Mr. Kim’s entitlement under the RSJV Liquidation Incentive.

[159] The RSJV Financing Proposal 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)”.

[160] Mr. Kim had a 10% interest in the RSJV and thus the proportion of his entitlement is 10% of the absolute contribution ratio. The plaintiff argues that the “absolute contribution ratio” is \$2,100,000/\$2,100,000 because the only funds that Mr. Hong was able to raise from the mutual aid assets was the \$2.1 million raised from the RSJV Property equity. Thus, the plaintiff argues that no further reduction is required by virtue of the absolute contribution ratio. I disagree.

[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.

[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.

DISPOSITION AND COSTS

[164] For the foregoing reasons, Mr. Kim’s claim for damages in respect of the APEM Incentive is dismissed. The April 14 Call did not give rise to an enforceable agreement with respect to the payment of the APEM Incentive to Mr. Kim following the subsequent dissolution of APEM. Nor is Mr. Kim entitled to the APEM Incentive on the basis of unjust enrichment.

[165] Mr. Kim is entitled to damages in the amount of \$34,542, plus pre-judgment interest for Argo Ventures’ failure to pay him the RSJV Liquidation Incentive when it came due on May 31, 2018.

[166] I agree with the defendants that Mr. Kim has not established any claim against Mr. Hong personally as he is not a party to the RSJV Financing Proposal. Mr. Hong was acting as a representative of Argo Ventures throughout his dealings with Mr. Kim. It is Argo Ventures that is liable to Mr. Kim for the damages arising from the failure to pay the RSJV Liquidation Incentive.

[167] The parties requested the opportunity to make submissions on costs after judgment was rendered. Consequently, should the parties be unable to come to an agreement on costs, they may arrange with Supreme Court Scheduling to speak to the matter before me.

[168] I thank all counsel for their comprehensive and helpful submissions.

“Majawa J.”