

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Eng v. Canada Construction Lift (2009) Ltd.*,
2025 BCSC 298

Date: 20250225
Docket: S198188
Registry: New Westminster

Between:

Edward Eng

Plaintiff

And

Canada Construction Lift (2009) Ltd., Sit Kin Cheung and Gregory Wong
Defendants

Before: The Honourable Madam Justice Duncan

Reasons for Judgment

Counsel for the Plaintiff: S. Christopher

Counsel for the Defendants: Z.C. Ng

Place and Dates of Trial: New Westminster, B.C.
June 17 – 21 and 24, 2024;
November 8, 2024

Place and Date of Judgment: New Westminster, B.C.
February 25, 2025

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Introduction

[1] The plaintiff, Edward Eng, seeks repayment of \$10,000 which he maintains is the outstanding amount of a \$15,000 loan he made to the defendant Canada Construction Lift (2009) Ltd. (“CCL”) on May 10, 2011 (“the Loan”). He also seeks to enforce an annual compound interest rate of 24%, which brings the total amount owing on the Loan to about \$238,000 at the time of trial in 2024.

[2] The plaintiff’s son Frank Eng testified. For the sake of clarity, I will refer to the Eng’s by their first names.

[3] Edward began this action in Provincial Court as a small claims matter in 2013, but the claim for compound interest exceeded that court’s jurisdiction and it was transferred to this Court in 2018.

[4] The action against the defendant CCL was discontinued some time ago. CCL is no longer in business. The plaintiff continues to pursue repayment from the defendants Kit Cheung Sit and Gregory Wong as personal guarantors of the Loan.

[5] The parties agree that the plaintiff advanced \$15,000 to CCL on May 10, 2011 by writing a cheque and giving it to Mr. Wong, although they disagree on the rationale for the Loan. They agree that Mr. Sit signed on behalf of the borrower, CCL, although at the time he was not a director. Mr. Wong was a director of CCL, but he signed as a personal guarantor.

[6] The parties also agree that the plaintiff received partial repayment of the Loan in the amount of \$5,000 in October 2011.

[7] The defendants maintain that anything left owing to Edward was paid back in the context of settlement discussions in 2013. Those discussions were prompted by the plaintiff placing two Certificates of Pending Litigation (“CPLs”) on an industrial warehouse compound at 12500 Vickers Way in Richmond, B.C. (“Vickers Way”).

[8] Mr. Sit, with others and through business ventures other than CCL, owned Vickers Way and wanted to sell it. The plaintiff had leased part of Vickers Way for

his business and did not want to move without compensation. He also had a grievance against the owners of Vickers Way because the electricity to his business had been cut off for a number of months.

[9] The defendants take the position that a comprehensive settlement agreement was reached on May 1, 2013, after an earlier unsuccessful attempt to settle outstanding matters, including but not limited to the removal of the CPLs. Edward received \$140,000 on the condition that he move out of Vickers Way by a set date. The defendants say the settlement encompassed payment of the Loan as well.

[10] In the alternative, if the Loan was not paid back as part of a comprehensive settlement agreement, the defendants maintain that the Loan document did not clearly state the 24% interest rate was compounded annually and that the penalty clause structure rendered the interest rate illegal because it was in excess of 60% per year.

[11] Edward has abandoned his claim for the penalty.

Background

[12] Starting in about 1999, Edward began importing building materials, specifically wall panels and roll shutters, primarily from China. He called his company “Concord something”, he could not recall the name.

[13] Edward met the defendant Mr. Sit some time before 2009. Edward had installed some wall panels at a karaoke establishment in Richmond and Mr. Sit apparently saw the work and contacted him. Edward entered into a contract with Mr. Sit, or more likely his company Fortune Venture Enterprises (“FVE”), to work on a building in Richmond. Edward knew that Mr. Sit also had a company called Fortune Venture Management Ltd. (“FVM”).

[14] Mr. Sit introduced Edward to Vickers Way through FVM. Edward knew Mr. Sit was one of four shareholders along with a Ms. Sun and Matthew Chan and his son, whose name Edward could not recall. Edward rented a place in Vickers Way for

storage purposes. He maintains he did some work on the building for which he was supposed to receive \$100,000, but was only paid \$60,000.

[15] Edward met Mr. Wong in around 2009, through Mr. Sit. FVE built a 15-storey condominium in Richmond, Merry Park, which was finished in 2009. Mr. Wong was a civil engineer. He is now retired.

[16] Frank worked with his father in this timeframe from 2009 through at least 2013. He had experience with heavy industrial machinery maintenance, repair and deliveries.

[17] Around the end of 2010, Mr. Sit asked Frank and Edward to go to a construction site near 42nd and Arbutus. Mr. Sit wanted them to check a construction lift that had been sold to a customer. Edward said this venture of Mr. Sit's did not include the FVE or FVM people. I infer it must have been an early project of CCL.

[18] Edward and Frank were not impressed with the construction lift, as there were mechanical and maintenance issues. Frank noticed the lift was sparking while in use, which is dangerous and in his view the result of improper installation and/or maintenance.

[19] Edward, Mr. Sit and Mr. Wong spoke Cantonese together. Mr. Sit speaks and reads very little English. Mr. Wong is fluently bilingual in English and Cantonese. Edward speaks English and Cantonese and some Mandarin. Frank speaks a bit of Cantonese but does not read or write it.

The Evidence

The Loan

Edward

[20] Edward testified that in May 2011, Mr. Sit and Mr. Wong asked him if he was interested in investing about \$30,000 in CCL, which would have been about 20% of the total shareholding. Edward asked if he could have time to observe the

company's activities, then "he", either Mr. Sit or Mr. Wong, proposed a short-term loan of \$15,000.

[21] As an aside, Edward used the pronoun "he" repeatedly in his evidence and it was difficult to determine at times whether he was referring to both Mr. Sit and Mr. Wong or just one of them.

[22] Edward drafted the Loan agreement after the earlier meeting. On May 10, 2011, Mr. Sit and Mr. Wong had a lunch meeting with Edward. Frank was present as well. Edward had bad eyesight so Frank drove him wherever he needed to go. Edward gave Mr. Wong a cheque for \$15,000 and both Mr. Sit and Mr. Wong signed the Loan agreement as guarantors.

[23] Edward testified that it was a short-term loan because he needed the money to complete the purchase of a home in Surrey on October 1. He thought the house was undervalued because there had been a double homicide in it and he wanted to buy it and later sell it for a profit.

Mr. Sit

[24] Mr. Sit testified that in the first five months of 2011 there were numerous discussions about Edward investing in CCL. Mr. Sit believed that Frank would get his mechanical certifications online and be of value as an employee. Mr. Sit said Edward offered \$30,000 for 20% of the company. Mr. Sit tried to put him off because he wanted to calculate the value of the company and its prospects.

[25] The Loan agreement was signed at Lucky Restaurant in Richmond. Mr. Sit said he invited Mr. Wong, Edward and Frank to lunch. Edward said Frank would take the tests and get the licence to install and maintain the lifts. Edward produced a cheque for \$15,000 and said it was a deposit for joining the company. Mr. Sit cannot read English, but he signed the Loan agreement, which was in English, to keep a record of things.

[26] Mr. Sit said the number of shares would be determined at some later date.

Mr. Wong

[27] Mr. Wong recalled being present on one occasion for discussions about Edward's prospective involvement in CCL before the Loan document was signed. He understood that Frank would take courses and work as an installer for them and Edward would become a shareholder.

[28] Mr. Wong said the Loan agreement came out of the blue, the parties had never discussed a loan. He voiced his concerns at the lunch meeting but Edward said it was only a formality and not to worry about it. Mr. Wong signed as guarantor and accepted the cheque from Edward.

Frank

[29] Frank was present at the lunch where his father loaned \$15,000 to CCL. He understood it was a short-term loan.

[30] Edward, Mr. Sit and Mr. Wong all seemed to think Frank was going to take courses and obtain the necessary WorkSafe licensing to install and maintain the lifts, on his own time and at his own expense. Nobody appears to have asked him directly if he was taking the courses. Frank quickly concluded it was not worth his time or expense to do so.

The Loan Agreement

[31] Edward drafted the Loan agreement, which I reproduce in its entirety:

LOAN AGREEMENT

10 May, 2011

This loan agreement is made this date 10 May, 2011 in between **Canada Construction Lifts (2009) Ltd.**, which is a body duly incorporated under the Company Acts of British Columbia, Canada, having its registered address at #120-12500 Vickers Way, Richmond, B.C. V6V 1H9 (hereinafter "borrower"), **Mr. Sit Kin Cheung**, of #120-12500 Vickers Way, Richmond (both Mr. Sit Kin Cheung and Mr. Gregory Wong, will be individuals making jointly and severally personal guarantee to the loan repayment from the borrower to the lender pursuant to this loan agreement, hereinafter ("the guarantors") and **Edward Eng** of 419 Garrett St., New Westminster, B.C. (hereinafter "lender") in which the borrower borrows the sum of Canadian dollars fifteen thousand

only from the lender (hereinafter “the loan”) with the following terms and conditions:

- a) The amount of loan – C\$15,000.00. of which loan is hereby acknowledged received by the borrower.
- b) Interest rate on this loan – 6% p.a.
- c) Loan period – 11th August, 2011. This loan, including accrued interest, must be paid back in full to the lender on or before 11 August 2011.
- d) [T]he guarantors will jointly and severally guarantee the lender of the full repayment of the loan that becomes due and payable to the lender, including interests payments, penalty, full cost of collection, including 100% recovery of legal fee the lender may incur in the collection of the loan, interest, penalty, collection and legal costs, etc.

The borrower and the guarantors hereby expressly accept and agree that there will be Penalty in the sum of \$7,000.00 as late payment penalty in the event this full or part of the loan and the accrued interest of the loan is not repaid in full on or before 11th August, 2011.

The borrower and the guarantors further accept that the interest charged on any unpaid balance on the loan, including interest and any other costs as stated above, will be charged at the interest rate of 24% p.a.

[32] On cross-examination, Edward said there were “lots of details” not included in the Loan agreement, but if everything had to be written down, they could not finish the agreement in 10 pages.

Events in the Fall of 2011

Edward

[33] Edward testified that the deadline for repayment was August 11, 2011, pursuant to the terms of the Loan agreement. He said he pressed Mr. Sit and Mr. Wong for repayment in October. Edward said “he” responded on October 10, 2011 to say he would pay \$5,000. The “he” appears to refer to both Mr. Sit and Mr. Wong.

[34] Edward disagreed on cross-examination that between August 11, 2011 and the end of 2012 he made no effort to recover the remaining \$10,000. He said he was pressing “them” for payment and had other dealings with “them”, but this was “just \$10,000” so he wasn’t supposed to keep pressing them because they were friends.

[35] Edward denied that he agreed to freeze interest or the penalty clause in the fall of 2011. He said he should have called the penalty clause a compensation clause when he drafted the agreement.

Mr. Sit

[36] Mr. Sit testified that about five months after signing the Loan agreement, he asked Edward if Frank had passed his exams. Edward said Frank was still working at it, which was not correct. Mr. Sit offered to return \$5,000 of the Loan to Edward, who said “don’t worry, we’re good friends.” In October 2011, Mr. Sit paid Edward back \$5,000 and Edward told him to keep the remaining \$10,000 on account for a future date for Edward to become a shareholder. Mr. Sit also understood Edward to say that there was no need for penalty or interest because they were all good friends and had cooperated well.

[37] Every three or four months, Mr. Sit would offer to return the \$10,000 to Edward, who would say not to worry, “give us the opportunity”, which Mr. Sit understood meant Edward eventually wanted to be a shareholder in CCL.

[38] Mr. Sit said Edward’s attitude changed in January 2013 when he filed a lawsuit in small claims court. At that point, Edward began to pursue repayment of the money.

Mr. Wong

[39] From the time of the Loan until December 2012, Mr. Wong said he had no discussions about the Loan agreement with Edward. Edward did not ask Mr. Wong for repayment in that timeframe.

[40] Mr. Wong learned from Mr. Sit and Sally Sun, who had some involvement with CCL and the ownership of Vickers Way, that there were discussions about repayment of the Loan in early 2013, but he was not present for them. Mr. Wong understood from Mr. Sit that the outstanding Loan had been resolved in 2013, then later received the small claims notice from Edward.

The Sale of Vickers Way and the Settlement Agreement

[41] In February 2012, someone offered to purchase Vickers Way from FVM. The original completion date was December 2012 but was later extended to May 2013.

[42] On June 6, 2012, Edward filed a Notice of Civil Claim (BCSC New Westminster Registry Action No. S142741) regarding his lease registered against Vickers Way and also filed a CPL. This was the first CPL, number BB1489801.

[43] Edward had a meeting with Ms. Sun, who held more than 50% of the shares in FVM and held shares in CCL, to have her pay back the Loan. It appears that she was upset that Mr. Sit had taken the Loan from Edward, because at the time he did so, Mr. Sit was not actually a director of CCL. Edward said Ms. Sun offered him \$10,000 in satisfaction of the outstanding Loan. Edward rejected this and wanted \$20,000.

[44] Ms. Sun was not produced as a witness at trial. I was not asked to admit her statements to Edward for their truth.

[45] In January 2013, Ms. Sun, Mr. Sit and another individual, Matthew Chan, met with Edward and Frank to talk about how the sale of Vickers Way could be completed. Apparently, an agreement was reached that FVM would pay \$120,000 to Edward and he would cancel the CPL.

[46] It seems that Edward believed he was not going to be paid the initial \$60,000 settlement payment by FVM on March 23, 2013 as agreed, so he filed another Notice of Civil Claim (BCSC New Westminster Registry Action No. S149769) on March 12, 2013 and filed another CPL, number BB1502850.

[47] Further negotiations between FVM and Edward and Frank took place later in the spring of 2013. The result of those negotiations was a settlement dated May 1, 2013 for Edward and Frank in the amount of \$140,000 as compensation for all of their grievances against FVM (the "Settlement Agreement").

[48] The Settlement Agreement provided:

WHEREAS:

- A. Edward Eng and Frank Eng (the "Plaintiffs") commenced two civil actions in the New Westminster Registry (the "Action") against Fortune Venture Management Ltd. (the "Defendant").
- B. The Defendant is the registered owner of a property located at 12500 Vickers Way, Richmond, B.C., [legal description omitted] (the "Property").
- C. The Plaintiffs have filed two Certificates of Pending Litigation against the Property and the CPL under BB1489801 is still on title.
- D. The parties have entered into a Settlement Agreement and Release on April 30, 2013.
- E. The Plaintiffs and the Defendant have agreed to finally settle all the remaining issues including the two court actions and the Lease Agreement signed between the parties dated May 1, 2011 according to the terms of this Agreement.

IN CONSIDERATION OF THE MUTUAL PROMISES CONTAINED IN THIS AGREEMENT, THE PARTIES AGREE AS FOLLOWS:

- 1. The Defendant shall give irrevocable directions to the lawyer Grant Meng to undertake to pay to the Plaintiffs additional sum of \$65,000 by bank draft from the proceeds of the sale, on or before May 3, 2013. This sum of \$65,000 shall be on top of \$75,000 as specified in the Settlement Agreement and Release dated April 30, 2013.
- 2. The Plaintiffs shall forthwith execute all necessary documents to cancel the CPL registered against the Property on June 4, 2012 under BB1489901.
- 3. The Plaintiffs shall cause the Lease registered in the Land Title Office under BB3007450 to be released from the title of the Property on or before May 2, 2013.
- 4. The Plaintiffs and the Defendant agree [sic] that the Lease Agreement dated May 1, 2011 be terminated and cancelled and the Plaintiffs shall have three months time to move out of the Property.
- 5. The Defendant shall negotiate with the new owner to obtain three months rent after the completion of the sale of the Property for the Plaintiffs and in the event the Plaintiffs are required to pay rent by the new owner, the Defendant shall be responsible for the three months rent for the Plaintiffs.
- 6. The Defendant shall return the deposit to the Plaintiffs when the Plaintiffs move out of the Property and present the deposit receipt.
- 7. Plaintiffs shall not make any claim, take any proceedings, or take any further steps in a proceeding against the Defendant or against the new owner of the Property, with respect to any matters to which this Settlement Agreement and release relates.
- 8. In the event that the Plaintiffs refused to move out of the Property after three months when the new owner purchased the Property, the Plaintiffs shall pay back a total sum of \$140,000 to the Defendant.

9. In the event that the Property is not sold due to the issue of the Lease registration, this Settlement Agreement and Release shall not be enforceable.

[49] The Settlement Agreement was signed by Frank and Edward as the Plaintiffs. Mr. Sit and Ms. Sun signed on behalf of FVM. Mr. Wong was apparently not involved in the negotiations leading up to the Settlement Agreement and did not sign it.

[50] On May 1, 2013, Edward filed a cancellation of CPL number BB1502850. On May 2, he filed a cancellation of CPL number BB1489801.

Events After Settlement Agreement

[51] In May 2014, Edward began to take steps to prosecute the small claims action he had filed in January 2013. Edward and Mr. Sit exchanged email correspondence about the state of affairs concerning the Loan. The position taken by each largely replicates the positions they advanced at trial and thus they are largely self-serving prior consistent statements that add nothing to the narrative.

[52] After several false starts and difficulties with serving Mr. Sit and Mr. Wong, a Provincial Court judge ordered January 12, 2018 that the action be transferred to the Supreme Court. Edward filed his notice of civil claim on April 3, 2018 and the defendants filed their responses shortly thereafter.

Discussion

Credibility and reliability

[53] Credibility relates to the truthfulness of a witness; reliability relates to the accuracy of the testimony: *Ford v. Lin*, 2022 BCCA 179 at para. 104.

[54] The events at the heart of this dispute occurred more than a decade before this matter came on for hearing. While the trial was short and the issues fairly discrete, the evidence revealed a baffling tapestry of dealings between Edward and Mr. Sit *qua* guarantor for CCL and as a principal of FVM and FVE, and a cast of characters who were not witnesses at trial, including Ms. Sun.

[55] I have no doubt that all the witnesses came to court prepared to tell the truth, but I have serious reservations about the reliability of much of the evidence due to the passage of time. It was generally difficult to follow the evidence of Edward and Mr. Sit, as both tended to wander off into seemingly unrelated subject areas when answering questions. There was a lack of clarity and certainty in some aspects of their evidence. They seemed to assume things were happening or would happen, without taking steps to make sure.

[56] As one example, Mr. Sit and to a lesser extent Mr. Wong seemed to believe Frank was pursuing the WorkSafe and other licences to install and maintain construction lifts. It was abundantly clear to me that Frank had no intention of doing so, yet nobody asked him for any kind of clarity or proof of progress.

[57] I find that Edward fell into the same quicksand of equivocation about his son, more or less assuring Mr. Sit and Mr. Wong that Frank was making progress when nothing could be further from the truth.

Findings of fact

[58] Despite the difficulties with finding a path through a confusing narrative, the following facts have been established:

- a) Edward, Mr. Sit and Mr. Wong discussed Edward becoming a shareholder in CCL in the months leading up to May 10, 2011;
- b) Edward wrote a cheque to Mr. Wong in the amount of \$15,000 on May 10, 2011;
- c) Edward prepared the Loan document, but as he admitted on cross-examination, it did not contain all of the terms the parties had agreed on;
- d) Mr. Wong was surprised that the payment by Edward was characterized as a loan, but did not voice his concerns at lunch at the unfortunately named Lucky Restaurant;

- e) the Loan was not paid back by August 2011;
- f) I accept Mr. Sit's evidence that Edward told him in the fall of 2011 not to worry about the penalty or the interest, but neither Mr. Sit nor Mr. Wong is relying on a defence of promissory estoppel, in whole or in part, in their pleadings or arising from the evidence;
- g) Mr. Sit effected repayment of \$5,000 to Edward in October 2011, but Edward was content to leave \$10,000 with CCL in anticipation of future opportunities;
- h) Edward became aware in early 2012 that Vickers Way was going to be sold so he started an action and placed the first CPL on the property in June 2012;
- i) Edward started the small claims action for repayment of the Loan against CCL, Mr. Sit and Mr. Wong in January 2013;
- j) the first CPL delayed the completion of the sale of Vickers Way;
- k) Mr. Sit and others, including Ms. Sun but not Mr. Wong, negotiated with Edward and Frank to end the litigation that was tying up the sale of Vickers Way;
- l) the first round of negotiations concluded at the end of February with an apparent agreement, but Frank placed another CPL on Vickers Way, causing a wave of panic for the owners of Vickers Way and prompting a fresh round of negotiations; and
- m) on May 1, 2013, the Settlement Agreement was signed.

Applicability of the Settlement Agreement

[59] The resolution of this case largely turns on what Edward and Mr. Sit intended to resolve in the Settlement Agreement signed on May 1, 2013. Edward is adamant it did not include settlement of the Loan. Mr. Sit is adamant that it did.

[60] Whether the Settlement Agreement included settlement of the Loan is a matter of contractual interpretation. Interpreting a contract such as the Settlement Agreement involves applying contractual interpretation principles to the words of the contract in the context of the factual matrix: *Ryan Mortgage Income Fund Inc. v. Alpine Credits Limited*, 2017 BCCA 206 at para. 17; citing *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 50.

[61] As Madam Justice Matthews recently explained in *iFortune Homes Inc. v. 1011066 B.C. Ltd.*, 2024 BCSC 1974:

[25] The goal of contractual interpretation is to ascertain the objective intent of the parties at the time the contract was entered into: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 49; and *Chudy v. Merchant Law Group*, 2008 BCCA 484 at para. 207. In undertaking this exercise, a decision-maker must read the contract as a whole, giving the words their ordinary and grammatical meaning consistent with the circumstances known to the parties at the time the contract was made. The circumstances at the time the contract is entered into are relevant because the meaning of words can vary depending on the context in which they are used and so it is not necessary to find ambiguity in order for evidence of the surrounding circumstances to be admissible: *Sattva Capital* at paras. 47, 50; and *British Columbia (Minister of Technology Innovation and Citizens' Services) v. Columbus Real Estate Inc.*, 2016 BCCA 283 at paras. 41–44.

[62] The Settlement Agreement was the culmination of several months of discussions, primarily between Edward, Mr. Sit and Ms. Sun. Mr. Sit and Ms. Sun were anxious to sell Vickers Way, which Edward had complicated with the CPL filed in June 2012. They had gone back and forth with Edward on a settlement amount for vacating Vickers Way for some time prior to May 1, 2013.

[63] Edward also made demands of Ms. Sun for repayment of the Loan in the months leading up to May 1, 2013. Ms. Sun was involved with CCL. She refused to pay \$20,000 but suggested \$10,000 would be appropriate repayment. Edward disagreed.

[64] The Settlement Agreement was drafted by a lawyer, Grant Meng. I understand he was the lawyer for the buyers of Vickers Way who was brought into the picture to effect the sale.

[65] The Settlement Agreement did not specifically refer to the Loan or repayment of the Loan, but it did say:

E. The Plaintiffs and the Defendant have agreed to finally settle all the remaining issues including the two court actions and the Lease Agreement signed between the parties dated May 1, 2011 according to the terms of this Agreement.

[Emphasis added.]

[66] The use of the word “including” lends some credence to Mr. Sit’s evidence that the Settlement Agreement was intended to cover off all disputes between Edward and himself, including the Loan. No doubt Ms. Sun, also a signatory to the Settlement Agreement, also wanted the Loan dealt with. The difficulty with that proposition is that Mr. Wong, who was also a guarantor of the Loan, did not participate in the discussions leading up to, or sign, the Settlement Agreement.

[67] Further, it is a fundamental principle of contractual interpretation that the contract as a whole must be considered. The words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context: *Ryan Mortgage* at para. 22; citing *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at para. 64.

[68] A term of the Settlement Agreement that militates against the finding that it included the Loan was this:

8. In the event that the Plaintiffs refused to move out of the Property after three months when the new owner purchased the Property, the Plaintiffs shall pay back a total sum of \$140,000 to the Defendant.

[Emphasis added.]

[69] One might ask, as I did during submissions, why Edward would agree to pay back \$140,000 if he failed to move out within three months if that sum included at least \$10,000 which he was entitled to as repayment of the Loan.

[70] I did not receive a satisfactory answer from counsel for the defendants.

[71] I conclude that the Settlement Agreement did not include settlement of the Loan. Mr. Sit might have wanted to include it, but the written documents, viewed in the context of the factual matrix in this case, do not bear the interpretation he seeks to advance. Accordingly, I find that Edward has proven on a balance of probabilities that Mr. Sit and Mr. Wong are jointly and severally liable for the outstanding amount of \$10,000, as guarantors of the Loan.

What rate of interest should apply to the Loan?

[72] Edward asserts that the interest rate of “24% p.a.” stipulated in the Loan was intended to be compound interest.

[73] The defendants argue that if the Loan agreement is read in three distinct parts, the penalty clause and the 24% interest cumulatively yield a criminal interest rate.

[74] The difficulty with that submission is that Edward has abandoned his claim to the penalty clause.

[75] Further, the defendants could have pleaded estoppel to “stop the clock” in relation to the 24% interest rate for the period of time between Edward’s assurances that he was not seeking the penalty or interest, in the fall of 2011, and his filing of the small claims action, in January 2013. They did not do so and did not seek to amend their pleadings based on Edward’s answers in cross-examination.

[76] I turn now to the issue of whether the rate of interest is simple or compound.

[77] In *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, the Court dispensed with the historical presumption in favour of awarding simple interest unless a contract specifically stipulated otherwise: see *CSRS Ltd. v. Embley*, 2008 BCCA 533 at para. 51. As Madam Justice Ross explained in *Laidar Holdings Ltd. v Lindt & Sprungli (Canada) Inc.*, 2019 BCSC 83:

[15] The question of whether a provision for interest in a contract is to be construed as simple or compound interest is a matter of contractual interpretation. Interest provisions are to be interpreted pursuant to the

ordinary rules of contractual construction. Justice Levine, for the court, articulated this proposition in *CSRS Ltd. v. Embley*, 2008 BCCA 533 at para. 53 as follows:

In the absence of the presumption of simple interest, the interest provisions in the promissory notes must be construed in accordance with the ordinary principles for the construction of all written contracts. The question is what the parties intended with respect to interest on the promissory notes. That question is answered by reference to the language used in the context of the surrounding circumstances, including the wording and structure of the promissory notes as a whole, and the terms and structure of the entire transaction between the parties: see A.G. Guest, *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes*, 16th ed. (London: Sweet & Maxwell, 2005) at para. 2-170, citing *Macdonald v. Whitfield* (1883), 8 App. Cas. 733 at 745 (P.C.), in turn cited in *Yorkshire and Canadian Trust Ltd. v. Scott*, 1919 CanLII 723 (BC CA), [1919] 2 W.W.R. 87, 27 B.C.R. 5 at 10 (C.A.); *McIntosh v. McNaughton*, 1935 CanLII 100 (ON CA), [1935] O.R. 155 at 159 (C.A.); *Re McKay's Dairy Ltd. (Bankrupt)* (1995), 1995 CanLII 17012 (NB CA), 163 N.B.R. (2d) 343 at para. 17 (C.A.). *Chalmers and Guest* references H.G. Beale, *Chitty on Contracts Volume I General Principles*, 29th ed. (London: Sweet & Maxwell, 2004) at para. 12-118, for the following general principles of interpretation:

Evidence of surrounding circumstances. ... So the court is entitled (and, indeed, bound) to enquire beyond the language of the document and see what the circumstances were with reference to which words were used, and the object appearing from those circumstances which the person using them had in view. The court must place itself in the same "factual matrix" as that in which the parties were. [Footnotes omitted.]

[78] In *Laidar*, the contractual language at issue stated:

(c) if the Tenant shall fail to pay any Rent promptly when due, shall be entitled, if it shall demand it, to interest thereon at a rate of 5% per annum in excess of the rate of interest charged and published from time to time by the main branch in the City in which the Building is located, of the Landlord's bank, as its most favourable rate of interest to its most creditworthy and substantial commercial customers commonly known as its prime rate, from the date upon which the same was due until actual payment thereof;...

[79] Madam Justice Ross observed that the language of the lease did not make express reference to compound interest, as phrases like "[s]uch interest shall be compounded on a monthly basis" or "compounded monthly" or "calculated annually" might indicate: *Laidar* at para. 21. Ross J. considered a variety of factors, such as the sophistication of the parties, the complexity of the agreement, the suggestion

that compound interest is the norm in commercial dealings and an absence of evidence that simple interest was intended. She concluded that the interest term was analogous to one in an earlier decision of the court, *Tri-City Contracting Ltd. v. Brighton Land Development Corp.*, [1994] B.C.J. No. 1001 (S.C), where the wording “interest at 15.5% per year on the unpaid amount” was found to be a provision for simple interest: *Laidar* at paras. 26–28.

[80] The language of the Loan agreement in this case provides:

The borrower and the guarantors further accept that the interest charged on any unpaid balance on the loan, including interest and any other costs as stated above, will be charged at the interest rate of 24% p.a.

[81] Edward drafted the contract. It was well within his control to specifically stipulate that the interest was compound. He did not do so. His subjective intention is irrelevant: *Sattva Capital* at paras. 58–60.

[82] In my view, the language in the Loan is analogous to the clauses at issue in *Laidar* and *Tri-City Contracting*. Having regard to the authorities cited, the language of the Loan and the evidence of the surrounding circumstances, I have concluded that the interest owing is simple interest.

[83] For the first three months of the Loan, May 10 through August 11, 2011, Edward is entitled to three months of simple interest on \$15,000 calculated at 6% per year.

[84] Edward is entitled to 24% simple interest on \$15,000 from August 12, 2011 until October 15, when the \$5,000 was paid back. Edward has abandoned his claim for the penalty and I make no provision for interest on the penalty at any point in the life of the Loan.

[85] From October 15 to the date of judgment, Edward is owed 24% simple interest on \$10,000.

Conclusion

[86] Unless there are matters the parties wish to draw to my attention, which must be done within 30 days of release of these reasons, the defendants are entitled to their costs at Scale B.

[87] If the parties cannot agree on the calculation of the amount owing, they make take out an appointment before the Registrar.

“Duncan J.”