IN THE SUPREME COURT OF BRITISH COLUMBIA

2024 BCSC 1994 (CanLII)

Citation: *Argo Mezzanine Financing No. 1 Ltd. v. Plaza 88 Developments Ltd.,* 2024 BCSC 1994

Date: 20241031
Docket: S201596
Registry: Vancouver

Between:

Argo Mezzanine Financing No. 1 Ltd.

Plaintiff

And

Plaza 88 Developments Ltd., Michael Degelder, Patricia Degelder, Degelder Project Management Ltd., Degelder Construction Co. (2010) B.C. Ltd., Philip Louis, Julie Fu, KBK No. 101 Ventures Ltd., Charter Pacific Developments (Azure) Ltd. and PMD Developments Ltd.

Defendants

Before: The Honourable Justice J. Hughes

Reasons for Judgment

Counsel for the Plaintiff:	J.K. McEwan, K.C. A. Dhawan
Counsel for the Defendants:	D.P. Church, K.C. E. Dolinsky
Place and Dates of Trial:	Vancouver, B.C. April 22-25, 2024
Place and Date of Judgment:	Vancouver, B.C. October 31, 2024

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Overview

[1] This action arises out of a transaction in which the defendant, Plaza 88 Developments Ltd. ("Plaza 88"), borrowed $40 million from the plaintiff, Argo Mezzanine Financing No. 1 Ltd. ("Argo"). The funds were used for a joint venture between Plaza 88 and the defendants, PMD Developments Ltd. ("PMD") and Charter Pacific Developments (Azure) Ltd. ("Charter"), for construction of a residential and commercial development in New Westminster (the "Project").

[2] It is common ground that Argo is entitled to repayment of the loan principal with interest, and to participate in the profits from the Project by receiving 10% of the "Net Distributable Cash from the Project" ("NDC"). The formula for calculating the NDC is set out in a participation agreement between Plaza 88, PMD, Charter, and Argo dated October 30, 2006 (the "Participation Agreement").

[3] The loan principal and interest have been repaid. This litigation concerns the calculation of the NDC, and specifically, whether Plaza 88 is entitled to deduct certain costs under the formula prescribed in s. 1.1. of the Participation Agreement. The disputed costs are:

a) $3,050,051 in profit participation payments paid to Azure Investments Ltd. and PMD (the "Profit Participation Payments");

b) $4,138,013 in interest expenses paid to PMD, Charter, and Azure Investments Ltd. (the "Interest Expenses"); and

c) A $413,000 payment to Degelder Construction Co. (2010) Ltd. ("Degelder Construction")

(collectively, the "Disputed Costs").

[4] The amounts of the Disputed Costs are not in dispute. In this respect, KPMG audited Plaza 88's calculation of the NDC, and the parties agreed that KPMG's calculations of the deductions are final and binding. KPMG did not, however, resolve the issue before the Court, namely whether Plaza 88 is entitled to deduct the

Disputed Costs when calculating the NDC under s. 1.1 of the Participation Agreement.

[5] If Argo's position prevails and the Disputed Costs are not permissible deductions, the NDC will increase to $7,601,064. Accordingly, Argo seeks declarations that: (a) the total value of the NDC is increased by $7,601,064; and (b) pursuant to its entitlement to 10% of the NDC, Argo is entitled to a further sum of $760,106.40. Argo also seeks a declaration that its additional share of the NDC is to be paid out of the monies held in trust by Plaza 88's solicitors, together with accrued interest.

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Background Facts

[6] The underlying facts are not in dispute. The parties largely agree on the events that give rise to this claim and the relevant contractual documents.

Joint Venture Agreement

[7] In June 2005, Plaza 88, PMD and Charter Pacific Developments Ltd. ("Charter Pacific") entered into a joint venture agreement effective June 29, 2005 (the "JVA") for the Project.

[8] The JVA included various provisions regarding funding for the joint venture. First, under s. 12.1 of the JVA, Charter Pacific was to advance $13 million (the "JV1 Funds") as and when required by the joint venture, and the joint venture would pay interest on those funds at 12%. That section also contemplated that a third party would advance the first $1.5 million of the JV1 Funds (the "Initial JV1 Funds") and receive profit participation payments in addition to interest.

[9] Under s. 12.2 of the JVA, the joint venture also obtained funding by way of a loan from Quest Capital Corp., some of which would be used to purchase a beneficial interest in land known as the "Site 2 Lands". In the event of a shortfall of funds needed to purchase the Site 2 Lands, PMD, Plaza 88 and Charter Pacific would cover the shortfall by way of a mortgage (the "JV2 Funds Mortgage") on the same terms and conditions as to payout, interest, priority and subordination as the

JV1 Funds Mortgage (as defined in the JVA), and with the same entitlement to profit participation as the Initial JV1 Funds.

[10] Additionally, under s. 4.13 of the JVA, Charter Pacific and PMD each had the option to advance additional funds to the joint venture as necessary, with the joint venture paying 15% interest on any such advances.

[11] Section 3.3 of the JVA addressed priority for the distribution of proceeds from the Project. As between themselves, the joint venturers agreed as follows in this respect:

> 3.3 Distributions: Each Joint Venturer covenants and agrees that the distribution of any monies received upon the sale or lease of the Lands, the Project or any portion of the Project or, as determined by the Management Committee, any surplus funds of the Joint Venture available for distribution, after reserving such portion thereof as the Management Committee feels is reasonable for the purposes of paying the anticipated costs and expenses of the Joint Venture and any anticipated payments on any debts or obligations of the Joint Venture, shall be distributed in the following manner:
>
> a) firstly, in payment of all costs and expenses of the Nominee Company and the Joint Venture;
>
> b) secondly, in payment of the DPM Fee;
>
> c) thirdly, in payment of all debts and obligations of the Joint Venture except loans made to the Joint Venture by the Joint Venturers and lenders who advanced JV1 Funds;
>
> d) fourthly, in payment of JV1 Funds and JV2 Fund[s], *pari passu*;
>
> e) fifthly, to each Contributing Joint Venturer the amount of any Required Funds advanced or loaned to the Joint Venture plus interest thereon on a basis proportionate to the outstanding principal and interest amount of such Required Funds;
>
> f) sixthly, in payment of any Lender Participation Amounts;
>
> g) lastly, to the Joint Venturers in proportion to their respective Interests in the Joint Venture;
>
> and each Joint Venturer hereby approves such distribution without further action or notice thereof.

[12] Effective July 10, 2006, Charter Pacific assigned its interest in the joint venture to Charter.

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[13] Charter Pacific and Charter are controlled by Philip Louis. PMD is controlled by Peter Degelder, who is the principal of both PMD and Plaza 88. Mr. Degelder testified at trial. Mr. Louis did not testify.

Argo Loan

[14] In August 2006, Argo Realty Advisors Inc. ("Argo Realty") and Plaza 88, engaged in discussions regarding the prospect of Argo Realty providing funding for the Project. These discussions occurred primarily between Argo's principal, Jason Hong, and Mr. Degelder on behalf of Plaza 88.

[15] In mid-August 2006, Mr. Hong received a proforma budget and project summary from Plaza 88. The proforma budget was outdated at that time as it only dealt with the first two residential towers of the Project, but it nonetheless set out the various hard and soft costs for the Project. It also contained a page of explanatory notes which referred to the anticipated $40,000,000 loan from Argo, along with interest and Argo's profit participation. The explanatory notes disclosed various construction, management and development fees payable to, among others, PMD, Charter Pacific and Argo.

[16] Mr. Hong relied on the proforma budget in deciding to advance funds for the Project. Some of the costs which were later included in s. 1.1 of the Participation Agreement as "Deducted Costs" were expressly included in the August 2006 budget, including the development fees contemplated in s. 1.1(e) of the Participation Agreement. It also referred to other costs contemplated in the JVA.

Commitment Letter

[17] Pursuant to an agreement dated September 1, 2006, Argo Realty agreed to loan $40,000,000 to Plaza 88 with interest payable at 17% (the "Argo Loan"), together with an entitlement to 10% of the NDC from the Project (the "Commitment Letter"). The defendants Mr. Degelder, his wife Patricia Degelder, Degelder Project Management Ltd., Degelder Construction Co. (2010) B.C. Ltd., Philip Louis, Julie Fu,

KBK No. 101 Ventures Ltd. and PMD and Charter Pacific, were all covenantors to the Commitment Letter.

[18] The Commitment Letter describes the purpose of the loan as to provide financing for the Project, which was in turn defined as the construction of up to four residential condominium towers, and approximately 180,000 square feet of retail space.

[19] Argo Realty's entitlement to 10% of the NDC is contemplated in s. 13.1 of the Commitment Letter:

> In addition to all other payments due to the Lender in connection with the Loan, the Lender shall be entitled to receive 10% of the Net Distributable Cash from the Project (the "Lender's Share"), as and when disbursed. For the purposes of this paragraph, "Net Distributable Cash from the Project" means the gross revenues from the Project less, without duplication, the total of all actual costs incurred for the Project identified as a cost category in the Project Budget delivered by the Borrower to the Lender pursuant to section 15.3 hereof, all construction and land acquisition costs, the Placement Fee described in paragraph 10, the Administration Fee described in paragraph 11, and the development fees described in paragraph 14.10, all other non-construction costs of the Project including the cost of any audit which may be requested by the Lender pursuant to paragraph 13.2 hereof, the amount repaid on all loans for the Project and interest thereon (including, without limitation, all construction loans, this Loan, third party investor financing and loans advanced by PMD Developments Ltd. ("PMD") and Charter Pacific Developments (Azure) Ltd. ("Charter") which may have been advanced in respect of the Project) and payment to Charter and PMD of the land value equity of $38,365,500.00 (collectively the "Deducted Costs").

[20] The Commitment Letter was subsequently amended to, among other things, change the lender from Argo Realty to Argo, and decrease the amount of the land value equity as a deducted cost to $22,064,500.

Participation Agreement

[21] Argo's participation rights in the Project, as contemplated in s. 13.1 of the Commitment Letter, were subsequently addressed in the Participation Agreement, dated for reference October 30, 2006, and executed October 31, 2006. The covenantors for the Participation Agreement were the same as the Commitment Letter.

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[22] Section 1.1 of the Participation Agreement is central to this litigation. It prescribes how the NDC is to be calculated, as follows:

> The Developer shall pay to Argo a sum equal to 10% of the Net Distributable Cash from the Project. For the purposes of this Agreement, “Net Distributable Cash from the Project” means the gross revenues generated from the Project, directly or indirectly, less, without duplication, the total of:
>
> a) all actual Project costs incurred by the Developer identified as a cost category in the Project Budget;
>
> b) all actual construction and Land acquisition costs;
>
> c) the Placement Fee;
>
> d) the Administration Fee;
>
> e) the management fees, development fees and commissions described in paragraph 14.10 of the Commitment Letter;
>
> f) all other reasonable non-construction costs of the Project, including:
>
> i. the costs of any audit which may be requested by Argo pursuant to paragraph 1.4 hereof,
>
> ii. the amount repaid on all loans for the Project and interest thereon (including without limitation, all construction loans, the Loan, third party investor financing and loans advanced by PMD and Charter in respect of the Project), and
>
> iii. payment to Charter and PMD of the land value equity of $22,064,500.00.

[23] On October 29, 2007, Mr. Hong received an updated proforma budget for the Project, which again outlined the anticipated costs. Like the August 2006 proforma budget, the October 2007 proforma budget outlined the various costs to complete for the Project.

[24] It is uncontested that the Disputed Costs in issue in this action were not expressly disclosed in the “Project Budgets”. Mr. Hong testified that he did not learn about the Profit Participation Payments and the project manager payment until some years later, when KPMG audited Plaza 88’s calculation of the NDC. Prior to that time, Mr. Hong was under the impression that the joint venturers had made full disclosure of their financial position and prior arrangements.

[25] Over the course of the Project, the joint venture required additional funds to be paid as “Required Funds” under the JVA. The funds advanced were as follows:

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$101,703 from Charter from 2006-2007; $152,082 from PMD between 2005-2008; and $1,000,000 from PMD in late 2009 (collectively, the “Additional Advances”).

[26] In June 2008, Argo, Charter, PMD and Plaza 88 entered into a further agreement pursuant to which a holdback of 10% is being held in trust by Plaza 88’s solicitors (the “Holdback Amendment Agreement”).

[27] On December 29, 2009, Plaza 88 repaid the Argo Loan. This included the principal amount of $40,000,000 (paid in the equivalent of Korean Won) and $24,628,345.97 in interest. On account of currency fluctuations between the Korean Won and the Canadian dollar, Plaza 88 saved $10,073,544 in repaying the Argo Loan.

[28] Argo initially took the position that in calculating the NDC, the currency fluctuation savings should be included as revenue from the Project. That issue proceeded to summary trial. In reasons indexed at 2023 BCSC 2134, Argo’s claim in this respect was dismissed. That order is under appeal.

KPGM Audits & Final Reports

[29] Construction of three strata towers and the commercial portion of the development was completed by fall 2013. Construction work on Tower 4 began in August 2016 and was largely complete by August 2019. Apart from resolution of the issues regarding calculation of the NDC, the Project is now largely complete.

[30] Under the Participation Agreement, Plaza 88 was obliged to issue certain reports regarding distribution of the NDC. Plaza 88 issued an initial and two supplemental final reports, each of which calculated the NDC using Plaza 88’s interpretation of s. 1.1 of the Participation Agreement.

[31] First, Plaza 88 issued a final report dated February 11, 2021, setting out its calculation of the NDC for the period up to December 2020. Plaza 88 calculated the total NDC as $29,870,450. Relying on this calculation, Plaza 88 made the following payments: $12,097,530 to each of PMD and Charter Pacific, $2,688,340 to Argo,

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and $2,987,045 (representing 10% of the NDC) into trust. It was anticipated at this time that there would be further distributions of the NDC.

[32] On September 21, 2021, Plaza 88 issued a supplemental final report for the period of January 1 to July 31, 2021. Plaza 88 calculated the additional NDC for this period as $3,147,200. Accordingly, it paid $1,274,616 to each of PMD and Charter Pacific, $283,248 to Argo, and $314,720 into trust.

[33] In October 2021, KPMG was engaged to audit the NDC calculation for the time frame from July 2005 to July 31, 2021. This was the second engagement for KPMG, who had previously been engaged to audit the NDC calculation for the 2005 to July 31, 2012 time frame.

[34] In April 2022, KPMG released its findings in two reports: an Independent Auditor's Report and an Agreed Upon Procedures Report for the auditor's report, both dated April 21, 2021. These reports are before the Court, but were not tendered or admitted as expert opinion evidence in this proceeding. Argo does not rely on these reports for the truth of KPMG's opinions regarding the nature of the funds (e.g. debt or equity/capital) that give rise to the Profit Participation Payments and the Interest Expenses.

[35] On January 29, 2024, Plaza 88 issued a second supplemental final report for the period of August 1, 2021 to October 31, 2023. The NDC for this period was calculated as $4,242,298. Plaza 88 paid $1,718,131 to each of PMD and Charter Pacific, $381,807 to Argo, and $424,230 into trust. Mr. Hong testified that he has not cashed the cheque for this final payment.

Analysis

Principles of Contractual Interpretation

[36] The overriding goal of contractual interpretation is to determine the intent of the parties and the scope of their understanding at the time the contract was made. The central question is, what was the parties' mutual and objective intention as expressed by the words of the contract: *Sattva Capital Corp. v. Creston Moly Corp.,*

2014 SCC 53 at para. 57 [*Sattva*]; *Resolute FP Canada Inc. v Ontario (Attorney General)*, 2019 SCC 60 at paras. 74-80 [*Resolute*], per Brown J. dissenting on other grounds.

[37] The contract must be read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time the contract was formed: *Sattva* at para. 47. In this respect, contractual text derives its meaning, at least in part, from the context: *Resolute* at para. 77.

[38] The surrounding circumstances will vary from case to case and "should consist only of the objective evidence of the background facts at the time of the execution of the contract", namely facts that were or reasonably ought to have been within the common knowledge of both parties at or before the date of contracting: *Sattva* at paras. 58, 60; *Wade v. Duck*, 2018 BCCA 176 at para. 26. However, as *Sattva* makes clear, the surrounding circumstances must not be allowed to overwhelm the words of the contract and cannot be used to deviate from the text such that the court effectively creates a new agreement: *Sattva* at para. 57.

[39] Contractual interpretation also requires consideration of commercial reasonableness and efficacy. Commercial contracts are thus interpreted in accordance with sound commercial principles and good business sense: *Resolute* at para. 79. Ultimately, contractual interpretation involves the application of various interpretive tools, including the surrounding circumstances and the principle of commercial reasonableness—to properly understand the meaning of the words used by the parties to express their agreement: *Resolute* at para. 80.

Interpretation of Clause 1.1 of the Participation Agreement

[40] Section 1.1 of the Participation Agreement provides that NDC means the gross revenues from the Project less specific cost categories that the parties agreed would be deducted. The use of the term "means" indicates that the parties intended to exhaustively define the costs that could be deducted from gross revenues in calculating the NDC. Accordingly, only those costs that fall under subsections (a)

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through (f) can be deducted from gross revenue to calculate the NDC. If a cost does not fall within one of these subsections, it is not deductible under s. 1.1 of the Participation Agreement.

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[41] The categories of costs that the parties agreed would be deducted from gross revenues to calculate NDC that are relevant for present purposes are:

> a) … all actual Project costs incurred by the Developer identified as a cost category in the Project Budget;
>
> b) all actual construction and Land acquisition costs;
>
> …
>
> f) all other reasonable non-construction costs of the Project, including:
>
> …
>
> ii. the amount repaid on all loans for the Project and interest thereon (including without limitation, all construction loans, the Loan, third party investor financing and loans advanced by PMD and Charter in respect of the Project), and
>
> …

[42] Under s. 9.8 of the Participation Agreement, capitalized terms not otherwise defined therein are to be interpreted in accordance with the definitions contained in the Commitment Letter. “Project Budget” is one such term: it is not defined in the Participation Agreement, but is defined in s. 15.3 of the Commitment Letter as “a pro forma Project budget”. It is uncontested that the “Project Budgets” contemplated in s. 1.1(a) of the Participation Agreement were the proforma budgets provided to Argo in mid-August 2006 and on October 29, 2007.

[43] The parties agree that none of the Disputed Costs were disclosed in the proforma budgets that were provided to Argo. Argo relies heavily on this fact in support of its position that the Disputed Costs are not permissible deductions in calculating the NDC. However, project costs identified as a cost category in the proforma budgets are but one category of permissible deductions contemplated by subsection 1.1(a); additional deductions are contemplated in the balance of s. 1.1. The pertinent question for present purposes is thus not whether the Disputed Costs

were disclosed in the proforma budgets, but rather whether they fall within the other permissible deductions under ss. 1.1(b), (e) or (f).

[44] For the purpose of interpreting the Participation Agreement, *Sattva* limits the admissible evidence of the surrounding circumstances, to what both parties knew or ought to reasonably have known at the time the agreement was entered into on October 31, 2006: *Sattva*, at para. 60. The surrounding circumstances thus include in material part: the facts known to both of the parties regarding the Project, the information contained in the August 2006 proforma budget, and the Commitment Letter, portions of which are also expressly incorporated by reference into the Participation Agreement.

[45] Argo's position is that the Profit Participation Payments and the Interest Expenses are not deductible costs because the transactions that gave rise to those costs were not, in reality, loans and interest, but rather equity and profit. In making this submission, Argo relies heavily on the terms of the JVA, especially the distribution scheme set out in s. 3.3, submitting that:

a) the JVA forms part of the surrounding circumstances or factual matrix for the Participation Agreement; and

b) under the related contracts principle, the JVA and Participation Agreement must be construed in light of each other.

[46] *Sattva* is clear that the surrounding circumstances comprise facts which were or reasonably ought to have been within the common knowledge of both parties. Mr. Hong's evidence was that while he was generally aware of the existence of the JVA, it had nothing to do with him and he could not recall whether he had a copy of it or was aware of its terms before entering into the Participation Agreement. Given Mr. Hong's evidence, Argo resiled from its position that the JVA forms part of the surrounding circumstances for the Participation Agreement.

[47] I accept Mr. Hong's evidence on this point and find that he was and not ought to reasonably have been aware of the terms of the JVA when the Participation

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Agreement was made. It is also notable that the Participation Agreement does not incorporate the JVA generally or the distribution scheme set out in s. 3.3 thereof specifically, either expressly or by reference. I thus find that in the circumstances, there was no shared mutual and objective intention that the distribution scheme in s. 3.3 of the JVA would inform the interpretation of permissible deductions under s. 1.1 of the Participation Agreement.

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[48] Argo also relies on the “related contracts principle” to assert that the calculation of the NDC under s. 1.1 of the Participation Agreement ought to be interpreted in light of the distribution of profits contemplated in s. 3.3 of the JVA, which subordinates repayment of the akin to treatment of equity or capital. The notion of a global transaction involving interrelated contracts requiring one agreement to be construed in light of another applies only where the agreements are components of one larger transaction and are entered into “on the faith of the others being executed”: *Re Bison Properties Ltd.*, 2018 BCSC 1299 at para. 278 [*Bison*], citing *3869130 Canada Inc. v. I.C.B. Distribution Inc.*, 2008 ONCA 396 at para. 33; see also *Downey v. Ecore International Inc.*, 2012 ONCA 480 at para 38.

[49] The transaction in issue here is the $40,000,000 financing that Argo provided for the Project pursuant to the Commitment Letter and the Participation Agreement. While this funding was obtained in furtherance of the Project being completed by the joint venturers pursuant to the JVA, the Argo financing is a separate and distinct transaction from the JVA. Notably, Argo is not a party to the JVA, and Mr. Hong’s evidence about whether he had a copy of it was equivocal at best. Mr. Hong did not testify that he was aware of the distribution formula set out in clause 3.3 or that he relied on that formula when agreeing to the NDC calculation in s. 1.1 of the Participation Agreement. In these circumstances, it cannot, in my view, be said that the Argo Loan transaction structured through the Commitment Letter and the Participation Agreement was entered into “on the faith of” the JVA.

[50] This is consistent with the result in *Bison*, a bankruptcy proceeding involving a determination of whether certain construction financing equity bonds were deposits

under the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 [*REDMA*]. The claimants were attempting to use provisions of *REDMA* to overcome a contractual priority scheme by arguing that certain bond indenture and bond subscription agreements they signed were inter-related with offers of purchase and sale contracts to be signed by purchasers of strata units. The Court rejected this submission, concluding that the bond agreements and offers of purchase and sale were not entered into on the faith of the other being executed: at para. 279.

[51] I come to the same conclusion here: the evidence does not establish that Argo and Plaza 88 entered into the Participation Agreement on the faith of the JVA also being executed. I therefore conclude that the related contracts principle, as it applies to the Participation Agreement, does not extend to the JVA.

[52] I therefore find that while the fact of the JVA's existence and it having been entered into for construction of the Project forms part of the factual matrix within which the Participation Agreement was made, the evidence does not go so far as to establish that:

a) the terms of the JVA—and in particular the distribution scheme in s. 3.3—were within the common knowledge of the parties when the Participation Agreement was entered into so as to form part of the surrounding circumstances for the Participation Agreement; or

b) that the Participation Agreement was entered into on the faith of the JVA such that the two contracts can be considered interrelated agreements forming part of one global transaction.

[53] With this framework in mind, I now address each of the Disputed Costs.

(a) Profit Participation Payments

[54] Charter Pacific did not advance the full $13 million contemplated in s. 12.1 of the JVA. Instead, Plaza 88, Charter and PMD borrowed $2.6 million from Azure

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Investments Ltd. (the “Azure Funds”). The Azure Funds were advanced pursuant to s. 12.1 of the JVA and constituted JV1 Funds as defined in that agreement.

[55] The Azure Funds were secured by a promissory note dated July 1, 2005 (the “Promissory Note”). The Promissory Note provides for interest payable at 12%, and that Azure Investments Ltd. was also entitled to profit participation of 0.8% of net profit for Towers 1 and 2 of the Project per $100,000 advanced (as defined in the Promissory Note).

[56] Under s. 12.2 of the JVA, the joint venture was required to purchase a beneficial interest in certain lands, described as the Site 2 Lands, for $3,700,000. In the event of a shortfall, the joint venturers and Plaza 88 agreed to grant a legal and beneficial mortgage to secure payment of the shortfall “on the same terms and conditions as to payout, interest, priority and subordination” as the JV1 Funds to be advanced by Charter Pacific under s. 12.1 of the JVA, and which would “enjoy the same Profit Participation as the Initial JV1 Funds calculated in the same manner”.

[57] There was in fact a shortfall in funds necessary to acquire a beneficial interest in the Site 2 Lands. Accordingly, PMD advanced $1,572,400 to cover that shortfall (the “PMD Loan”). Pursuant to s. 12.2(b) of the JVA, the PMD Loan was advanced on the terms contemplated in s. 12.1, namely at 12% interest together with an entitlement to profit participation of 0.8% of net profit for each $100,000 advanced.

[58] The Azure Funds were repaid in June 2012, together with interest of $2,161,775 and profit participation of $1,844,278. The PMD Loan was also repaid in June 2012, with interest of $1,311,511 and profit participation of $1,205,873.

[59] The issue of whether the Profit Participation Payments are permissible deductions turns on the nature of the transactions which gave rise to the Profit Participation Payments and the interpretation of s. 1.1(f)(ii), which contemplates deduction of “all other reasonable non-construction costs” of the Project, including:

> (ii) the amount repaid on all loans for the Project and interest thereon (including without limitation, all construction loans, the Loan, third party

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> investor financing and loans advanced by PMD and Charter in respect of the Project);

[60] Plaza 88 says that the Profit Participation Payments are “similar in nature to the interest and clearly constitutes a cost of” the Azure Funds and PMD Loan and are therefore permissible deductions under s. 1.1(f)(ii). Argo disagrees. First, it says that profit participation is not expressly contemplated as a permissible cost under s. 1.1 of the Participation Agreement. Second, Argo says that these payments do not fall under subsection (f)(ii) because they are not loans or interest, but rather, by their very nature, profits on equity contributions by joint venturers. Finally, Argo asserts that the Azure Funds are not, in any event, third party financing as contemplated under subsection (f)(ii), because they were sourced by Philip Louis, who is the principal of the Charter and a guarantor under both the Commitment Letter and Participation Agreement.

[61] In my view, Argo’s position prevails. The Profit Participation Payments are not deductible under s. 1.1 of the Participation Agreement.

[62] First, interpreting the Participation Agreement as a whole and giving the words used in s. 1.1(f)(ii) their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time, I do not accept that the parties’ mutual and objective intention was that the Profit Participation Payments would be deductible under s.1.1(f)(ii). That section contemplates deduction of “the amount repaid on all loans for the Project and interest thereon”—it says nothing about profit participation. It was open to the parties to include the Profit Participation Payments as deductible costs in calculating the NDC, but they did not do so.

[63] In this respect, Mr. Hong testified that he had no recollection of receiving a copy of the Promissory Note. Mr. Degelder gave a different version of events; he testified that the Promissory Note was provided to Mr. Hong and that they discussed it in detail in the first two weeks of August 2006. Mr. Degelder testified that Plaza 88 wanted interest and profit participation to be deductible, that this was discussed with Mr. Hong, who agreed that the Azure Funds and the PMD Loan would be deductible.

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[64] I have significant concerns with Mr. Degelder's evidence on this point and ultimately conclude that I cannot accept it. Mr. Degelder's evidence about the discussions he says he had with Mr. Hong regarding the JVA and the Promissory Note, and in which he asserts Mr. Hong agreed to deduction of profit participation, appears to have been disclosed for the first time in this testimony at trial. No such evidence was alluded in his opening statement—a notable omission which I find is, in the circumstances, suggestive of recent fabrication.

[65] Moreover, Mr. Degelder testified after hearing Mr. Hong's evidence, and the discussions he alleges that occurred were not put to Mr. Hong on cross-examination. Mr. Hong therefore did not have any opportunity to confirm or refute Mr. Degelder's assertions. This runs contrary to the rule in *Browne v. Dunn* (1893), 1893 CanLII 65 (FOREP), 6 R. 67 (H.L.). While the rule set out therein is not absolute (*Bains v Innes*, 2021 BCSC 2037 at para. 12), I nonetheless find that in the present circumstances, this negatively impacts the weight that can be given to Mr. Degelder's evidence.

[66] I also have serious concerns about the reliability of Mr. Degelder's evidence on this point. Memories fade over time, and the discussions he now says he had with Mr. Hong would have happened over 18 years ago, in the summer of 2006. It is also troubling that despite the issue of deductibility of the Profit Participation Payments being alive between the parties for many years, Mr. Degelder appears to have not recalled having these discussions until he took the stand to testify at trial.

[67] Regardless, negotiations between the parties are not admissible in construing a contract: *Midwest Ventures Ltd v. 0935203 BC Ltd*, 2014 BCSC 2178 at para. 107; see also *1001790 B.C. Ltd. v. 0996530 B.C. Ltd.,* 2021 BCCA 321 at para. 44. Accordingly, Mr. Degelder's evidence of his discussions and negotiations with Mr. Hong do not, in any event, assist in establishing that the parties' shared mutual and objective intention was that the Profit Participation Payments would be deductible in calculating the NDC.

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[68] Second, I do not accept that the Profit Participation Payments are similar in nature to interest and therefor fall under s. 1.1(f)(ii). Plaza 88 did not articulate any principled basis for treating the Profit Participation Payments as interest. Its submission to this effect ignores the express terms of the Promissory Note, which treat interest and profit participation as separate and distinct from one another. In that respect, interest is defined and dealt with in s. 1.01 of the Promissory Note and does not include profit participation, which is in turn exhaustively defined in s. 5.01(h). Interest was payable concurrent with payment of the principal, with a right to prepay. Profit participation was payable on a fixed date: the repayment date. Likewise, s. 12.2 of the JVA treats interest and profit participation as separate and distinct from one another.

[69] I therefore reject Plaza 88's assertion that the Profit Participation Payments are "similar in nature to interest". That submission is inconsistent with the clear and unequivocal language used and the separate and distinct treatment given to them in the Promissory Note and the JVA. The Profit Participation Payments may well be considered costs of borrowing, but that does not mean that they are the same as interest, or are to be treated as such, under s. 1.1 of the Participation Agreement. The Profit Participation Payments were paid over and above the principal and interest on the Azure and PMD Loans, and are not deductible as interest under s. 1.1(f)(ii) of the Participation Agreement.

[70] Plaza 88 also asserts that the profit participation paid in respect of the PMD Loan constitutes a "Land acquisition cost" under s. 1.1(b) of the Participation Agreement because the proceeds were used to acquire a beneficial interest in the Site 2 Lands. Subsection (b) provides for deduction of "all actual construction and Land acquisition costs". Land acquisition costs are not defined in either the Commitment Letter or the Participation Agreement. The "Lands" are defined in recital A of the Participation Agreement, and presumably include the Site 2 Lands. Assuming that the "Lands" as defined in the Participation Agreement include the Site 2 Lands, the evidence about the cost of acquiring the beneficial interest in the Site 2

Lands is limited to clause 12.2 of the JVA, which suggests a purchase price of $3,700,000 payable by the joint venturers to Plaza 88's principals.

[71] Interpreting the Participation Agreement as a whole and giving the words used in s. 1.1(b) their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time, I find that the "actual … Land acquisition costs" refers to the direct cost of purchasing land itself, not the indirect cost of capital used to in turn acquire land. Put differently, this term, properly interpreted, includes the cost of purchasing or acquiring the "Lands" themselves, not the cost of raising additional funds to cover off a shortfall of money necessary to fund the purchase of the "Lands".

[72] If this were not the case, then the express inclusion of interest in s.1.1(f)(ii) becomes unnecessary as it relates to any loans for which the proceeds were used to acquire the "Lands" or pay actual construction costs. The explicit inclusion of interest costs on construction loans in s.1.1(f)(ii) also suggests that interest was not intended to be deductible under s. 1.1(b), because if s.1.1(b) included both the costs of construction and the costs of any loans to finance it, including interest under s. 1.1(f)(ii) would be extraneous. Such an interpretation ought to be avoided because contracts are to be interpreted in a manner that gives each word and clause of a contract meaning, not in a manner which renders terms ineffective or meaningless: *Blackmore Management Inc. v. Carmanah Management Corporation,* 2022 BCCA 117 at para. 50.

[73] Finally, interpreting s. 1.1(b) as being limited to the actual cost of land is, in my view, a more commercially reasonable and efficacious. Accepting Plaza 88's interpretation of "Land acquisition costs" to include costs over and above the purchase price of the land itself—e.g. the indirect costs of acquiring capital to fund the purchase price—without limitation, could place Argo in a position of indeterminate risk in the absence of any indication that this was intended by the parties. This is evident when comparing the language used in s. 1.1(b) with s. 1.1(f). The limitation of the catch-all costs of s.1.1(f) to "reasonable" non-construction costs

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indicates that the parties turned their minds to this risk and sought to limit it. The lack of a comparable limitation in s.1.1(b) suggests that the parties did not contemplate it as a similarly expansive interpretation of that subsection which would allow the deduction of any indirect cost related to land acquisition.

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[74] In the result, I conclude that the Profit Participation Payments are not permissible deductions in calculating the NDC under either of subsections 1.1(b) or (f)(ii) of the Participation Agreement.

(b) Interest Expenses

[75] The Interest Expenses are interest that accrued and was paid in respect of the Promissory Note, the PMD Loan, and the Additional Advances. It is uncontested that the principal amounts that gave rise to the Interest Expenses were used for the Project and that the Interest Expenses are properly attributable to the principal.

[76] Plaza 88 submits that the Interest Expenses fall squarely within s. 1.1(f)(ii) as interest payable on loans for the Project. Argo says the Interest Expenses are not, in reality, interest on loans, but rather profit on equity contributions made by the joint venture partners. In support of its position, Argo relies on the JVA and says that the advances contemplated in ss. 12.1 and 4.13 of the JVA are capital contributions and by consequence, the payments described as interest in the JVA are not interest on principal, but rather profit on capital.

[77] I disagree. In my view, the Interest Expenses are interest on loans for the Project and therefore permissible deductions under s. 1.1(f)(ii) as “other reasonable non-construction costs of the Project”. The Azure Funds were advanced under the Promissory Note, which defines Plaza 88, Charter and PMD collectively as the “Borrower” and clearly characterizes the funds being advanced as a loan comprising principal and interest:

> … [the Borrower] promises to pay [Azure Investments Ltd.] on or before the Repayment Date the Principal sum of $2,600,000 in lawful money of Canada (hereinafter called the “Principal”), <u>and to pay interest on the amount of unpaid Principal</u> calculated from the date of advance thereof to the date of payment, … at an annual simple interest rate equal to twelve per cent

> (12.00%) per annum (herein after called the "Interest"), payable as set out hereinafter.

[78] Section 12.1 of the JVA provides the terms under which the PMD Loan was advanced. It provides that "The Joint Venture shall pay interest … at a rate of twelve per cent (12%) per annum, compounded annually". The Additional Advances were made under s. 4.13 of the JVA, which, on its face, contemplates these advances being made in the event that third party financing in unavailable in a manner satisfactory to the joint ventures, and expressly provides that these funds "<u>shall bear interest at</u> a rate of Fifteen (15%) per annum compounded annually" (emphasis added).

[79] Thus, as a starting point, the contractual documentation pursuant to which the Additional Advances were made contemplated the nature of the transactions as debt, not equity. That said, the determination of whether an advance is debt or equity requires the examination of the substance of the transaction and consideration of all the surrounding circumstances: *Ghassemvand v. Premium Weatherstripping Inc.*, 2017 BCCA 309 at para. 51 [*Ghassemvand*]. This involves a consideration of the intentions of the parties as reflected in the transaction document, the manner in which the transaction was implemented and the economic reality of the surrounding circumstances: *Broer v. Multiguide GmbH*, 2023 BCCA 134 at para. 46 [*Broer*]; *Tudor Sales (Re)*, 2017 BCSC 119 at para. 35 [*Tudor*]. The words of the documentation of the transaction are not determinative in this analysis: *Broer* at para. 62.

[80] In the present case, an analysis of the substance of the transactions pursuant to which the Additional Advances were made is considerably hampered as there is little in the record which would permit the Court to undertake such a consideration. Other than the plain language of the Promissory Note and s. 4.13 of the JVA, there is little evidence of the circumstances in which the Additional Advances were made. There is no evidence as to how any of those advances were treated in the parties' respective financial records. Nor is there any evidence that the joint venturers' respective interests in the joint venture changed as a result of the PMD Loan or the

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Additional Advances. These gaps in the evidence are particularly problematic given that, as set out above, the characterization of advances as loans or capital contributions is to be determined by reference to all the circumstances at the time the advance was made: *Ghassemvand* at para. 35.

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[81] *Tudor* was a bankruptcy proceeding in which the issue was characterization of advances made by a shareholder in the absence of any loan documentation as debt (shareholder loans) or equity. The Court considered the substance of the transaction and determined that the advances were equity. The variable nature of the interest payments, which fluctuated with the company's profitability, weighed heavily in the analysis: *Tudor* at paras. 38-39. The fact that the advances were made in close proximity in time to the initial acquisition and subsequent increase in shareholding was also found to be indicative that the advances were in the nature of equity, not shareholder loans: *Tudor* at paras. 40-42.

[82] The present circumstances are, in my view, distinguishable from *Tudor*. The transactions pursuant to which the Additional Advances were made and the Interest Expenses arose were documented in the Promissory Note and JVA, both of which characterize the funds as debt, repayable with interest. The interest payable was also at a set rate, not variable, and unlike *Tudor*, did not fluctuate with the profitability of the joint venture. Nor is there any indication that PMD's interest in the joint venture increased on account of the Additional Advances, or that Azure Investments Ltd. acquired an equity interest as a result of advancing the Azure Funds under the Promissory Note.

[83] Argo asserts that the joint venturers' characterization of the transactions that resulted in the Additional Advances cannot be accepted at face value because they are related parties, and that I should infer that the Additional Advances must have been capital contributions, not debt. However, there is little in the evidence to support such an inference, and I decline to draw it. Argo has not established that the substance of the transactions which gave rise to the Interest Expenses was different than as set out in the Promissory Note and ss. 12.1 and 4.13 of the JVA.

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[84] A finding that the principal amounts of the loans in issue were in fact capital is also difficult to make when Argo does not appear to dispute deduction of the Additional Advances that gave rise to the Interest Expenses. If the Interest Expenses are not deductible because they are not truly interest but rather profit on capital, one would have expected Argo to also dispute the deductibility of the Additional Advances.

[85] Finally, Argo says that the distribution of profits contemplated in s. 3.3 of the JVA demonstrates that PMD and Charter injected funds into the Project in exchange for the right to earn profits. I am not persuaded by this submission. In my view, Argo is attempting to use the terms of the JVA to contradict the express terms of the Promissory Note. If the funds advanced under the Promissory Note were intended to be treated as something other than principal and interest as expressly contemplated therein, then one would have expected sophisticated commercial parties such as these to have expressed themselves accordingly in the agreements they entered into. Likewise, if the parties to the JVA intended to treat advances made under s. 12.1 or s. 4.13 as capital contributions, they could have said so expressly.

[86] While I recognize that the substance of the transaction must be considered, there is little in the record before me to establish that the substance of the transactions in issue was substantively different from how the parties chose to characterize them in the Promissory Note and the JVA. Further, the fact that a participation agreement contains both debt and equity features does not necessarily mean that it is not a loan agreement: see e.g. *Ghassemvand* at para. 41.

[87] Nor do I find Argo's assertion that the Interest Expenses are not deductive because the Additional Advances were made by related parties, i.e. corporations affiliated with Mr. Louis or other non-arms length entities, persuasive. The source of funds is not determinative of whether they are deductible under s. 1.1(f)(ii) of the Participation Agreement. Rather, that subsection provides that "the amount repaid on all loans for the Project and interest thereon" is deductible (emphasis added).

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Section 1.1(f)(ii) is thus not limited to loans made by non-arms-length parties; it applies to "all loans for the Project".

[88] Regardless and in any event, s. 1.1(f)(ii) specifically contemplates deduction of principal and interest on loans made by PMD and Charter. Mr. Hong testified that he was aware of these loans prior to entering into the Participation Agreement, but did not ask any specific questions about them. The reference to "third party investor financing" in s. 1.1(f)(ii) cannot, in my view, be construed, as Argo suggests, to limit deductibility to only loans advanced by third parties. This would be inconsistent with the use of "including without limitation" in that subsection and the express reference to loans from PMD and Charter.

[89] It would be contrary to the objective intentions of the parties as expressed by the language of s. 1.1(f)(ii) to find that the Interest Expenses are not deductible because PMD and Charter are not arms' length parties. By way of s. 1.1(f)(ii) of the Participation Agreement, Argo agreed to deduct principal and interest for all loans for the Project, including those advanced by PMD and Charter. While that agreement may in hindsight now prove disadvantageous when calculating the NDC, Argo cannot now seek to effectively amend s. 1.1(f)(ii) by asserting that interest on funds advanced by PMD and Charter were really profit on capital, not interest on principal.

[90] I therefore conclude that Argo and Plaza 88 mutually and objectively contemplated that loans would be made by PMD and Charter and that such loans would be deductible in calculating the NDC.

[91] In the result, I find that the Interest Expenses are deductible in calculating the NDC under s. 1.1(f)(ii) of the Participation Agreement.

(c) Payment to Project Manager

[92] Plaza 88 and Degelder Construction entered into a construction management contract under which Degelder Construction provided construction services for the project. Section 12.6 of the JVA provides for Degelder Construction to receive 5% of the actual construction cost of Tower 1, payable on a percentage basis as part of

monthly progress draws submitted pursuant to the construction contract. Section 12.5 of the JVA also provided that a different entity, Degelder Project Management Ltd., would be paid a project management fee of 1% of the hard cost of the construction of the Project to a maximum of $340,000 in respect of Tower 1.

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[93] On January 15, 2013, Degelder Construction issued an invoice to Plaza 88 in the amount of $462,560 ($413,000 plus HST) (the "Invoice"). The Invoice stated that it was issued:

> For Project Manager's bonus related to the following Plaza 88 projects in New Westminster, B.C.: Azure 1, Azure 2, Marinus & Shopping Centre (Job #260, 261, 262, 263).

[94] It is undisputed that the project manager referred to in the Invoice is John Gildersleeve. Mr. Gildersleeve was an employee of Degelder Construction, and a senior project manager responsible for all phases of the Project. Mr. Gildersleeve was not a party to the construction management contract between Plaza 88 and Degelder Construction.

[95] Plaza 88 paid the Invoice on January 22, 2022, by way of a cheque made payable to Degelder Construction. However, there is no evidence of any documented agreement establishing Mr. Gildersleeve's entitlement to the bonus referred to in the Invoice, nor is there any documentation confirming that Degelder Construction in fact paid the bonus to Mr. Gildersleeve. Mr. Degelder testified that he "vaguely" remembered Mr. Gildersleeve asking for two condominium units in lieu of payment.

[96] Plaza 88 takes the position that the Invoice falls under s. 1.1(b) of the Participation Agreement as an "actual construction cost" of the Project or, in the alternative, falls under s. 1.1(f) as a reasonable non-construction cost. Plaza 88 says this is the case because the payment reflected in the Invoice was necessary because of the extended timeline for completion of the Project, Mr. Gildersleeve's contributions to the Project, and the importance of ensuring that he remained

committed to the Project. Little, if any, evidence was adduced in support of this submission, aside from Plaza 88's bare assertions to this effect.

[97] Argo submits that on a plain reading of s. 1.1, the payment to Degelder Construction is not an actual construction cost and not reasonable, and is thus not deductible. I agree. For the reasons set out below, I am not satisfied that the bonus referred to in the Invoice constitutes either an "actual construction cost" under s. 1.1(a) of the Participation Agreement, or a "reasonable non-construction cost" under subsection (f).

[98] When it issued the Invoice in 2013, Degelder Construction described the payment as a "Project Manager's bonus". However, Plaza 88 and Mr. Degelder subsequently provided varying and inconsistent explanations for the payment. In February 2015, in the context of the KPGM audit, KPMG understood from discussions with Mr. Degelder that Degelder Construction made a mistake in charging a bonus of $413,000 to the Project, but took the position that the expense was nonetheless justified as back wages because Mr. Gildersleeve had only billed for eight hours of work per day when he actually worked 10 hours per day. KPMG understood Plaza 88's position to be that the difference between 8 and 10 hours per day at the project manager's hourly rate of $150 amounted to underbilling of $369,000.

[99] At trial, Mr. Degelder testified that KPMG misunderstood his explanation for the Invoice. However, his evidence at trial was similar to what KPMG appears to have understood. He testified that had Mr. Gildersleeve charged the correct time to the Project for the hours he actually worked, $369,000 "could have been" the correct amount. He also disavowed the description in the Invoice, asserting that the payment was back wages, not a bonus.

[100] Mr. Degelder went on to testify that the payment to Mr. Gildersleeve was made pursuant to some form ill-defined "arrangement" between him and Degelder Construction because Mr. Gildersleeve's salary had been frozen over the course of

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the project. Mr. Degelder's evidence on this point was difficult to follow and inconsistent with the Invoice.

[101] Mr. Degelder's evidence as to whether this "arrangement" was ever reduced to writing was also internally inconsistent. He testified on direct that the arrangement was drafted into a legal agreement. However, he resiled from that assertion on cross-examination, testifying that he did not in fact know whether a written document was prepared or not and confirmed that no documentation substantiating the alleged "arrangement" had been provided to KPMG.

[102] I do not accept Mr. Degelder's evidence about the nature of the payment reflected in the Invoice, especially that which suggested an "arrangement" or contractual entitlement to back wages. His evidence in this respect was vague, internally inconsistent, lacked corroborative documentation, and at odds with the description of the payment set out in the Invoice itself. Notably, Plaza 88's purported recharacterization of the bonus as "back wages" that Degelder Construction was obliged to pay was made long after the Invoice was issued and paid, lacks any corroborative documentation, and rests solely on Mr. Degelder's unconvincing evidence. The variety of different explanations that Mr. Degelder provided for this payment negatively impact the credibility of his evidence. Notably, in this respect, Mr. Gildersleeve did not testify.

[103] In my view, the best evidence as to the nature of the payment is the description set out in the Invoice: it was a bonus, not back wages or any other form of payment to which Mr. Gildersleeve was contractually entitled.

[104] Neither the Participation Agreement or the Commitment Letter define what constitutes "actual construction or Land acquisition costs" for the purpose of s. 1.1(b). However, various categories of costs were outlined in the proforma budgets, including costs relating to the actual physical construction of the Project expressed as a dollar value per square foot, and various types of "soft costs" that were incidental to the physical construction process – e.g. management fees, permitting costs, and design fees.

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[105] The hard construction costs reflected in the proforma budgets are set out as costs per square foot. There is nothing in the evidence to suggest that the bonus reflected in the Invoice was payable on a per square foot basis. The soft construction costs included fees to third parties, including engineering costs, government fees and permits, marketing and sales commissions. The soft costs contemplated in the proforma budgets did not include construction management or project management fees; these types of fees were included separately in the accompanying notes to the proforma budgets.

[106] Plaza 88 provided no reasoned basis for interpreting s. 1.1(b) to include a discretionary bonus payment by Degelder Construction to one of its employees as an actual construction cost. I thus conclude that the bonus payment reflected in the Invoice is not the type of “actual construction” cost contemplated in s. 1.1(b).

[107] Further, the varying and inconsistent explanations provided by Mr. Degelder, which are at odds with the Invoice, leave me in a position where I am unable to assess the reasonableness of the payment at the time and in the circumstances within which it was made. Accordingly, I cannot conclude that the Invoice falls under s. 1.1(f) as “reasonable non-construction cost”.

[108] In my view, deduction of discretionary bonuses to employees of Degelder Construction were not within the parties’ contemplation, reasonably and objectively assessed within the surrounding circumstances, at the time that the Participation Agreement was made. Plaza 88 is attempting to recharacterize the payment as something it was not so that it can be deducted for the purpose of calculating the NDC. I conclude that the Invoice is not a permissible deduction in calculating the NDC under s. 1.1 of the Participation Agreement.

Pre-judgment interest

[109] Argo submits that it should be awarded pre-judgment interest at 17%, namely the same interest rate as the parties agreed in the Commitment Letter would be payable on the Argo Loan. The Participation Agreement does not contemplate interest accruing on the NDC, and Argo did not articulate any legal or other basis

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upon which the contractual interest rate from the Commitment Letter should apply to amounts owing under the Participation Agreement. Accordingly, I decline to award pre-judgment interest at 17% as sought.

[110] Neither party engaged with this issue in any substance, nor did they address the applicability of the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 [*COIA*] to the present case. This is particularly problematic as Argo seeks only declaratory relief.

[111] Section 1 of the *COIA* applies only to a “pecuniary judgment”, which is one that orders the payment of a fixed sum of money to a person or otherwise "sounds in money": *Century Services Inc. v. LeRoy*, 2022 BCCA 239, at paras. 84-85. Remedies granted by way of declaratory relief do not fall within the meaning of a pecuniary judgment under s. 1 of the *COIA*: *0731431 B.C. Ltd. v. Panorama Parkview Homes Ltd*., 2024 BCSC 614, at para. 37, citing *Crown Zellerbach Canada Limited v. British Columbia Forest Products Limited* (1979), 101 D.L.R. (3d) 240, 1979 CanLII 611 at para. 15 (B.C.C.A.).

[112] It is also questionable whether Argo has as of yet suffered any pecuniary loss, given that Plaza 88’s obligation to make final payment under clauses (f) and (g) of the Holdback Amendment Agreement does not arise until after disputed issues are resolved and the audit complete. Thus, even if the *COIA* did apply, an award of interest would be precluded under s. 2, which prohibits an award of interest on “pecuniary loss arising after the date of the order”.

[113] Finally, an award of pre-judgment interest may give rise to an issue of double compensation as the amounts held in trust as security for Argo’s claim are earning interest, which Plaza 88 accepts Argo will be entitled to on its share of the funds in trust. Thus, even if the *COIA* applied, awarding prejudgment interest would, in my view, give rise to concerns regarding interest on interest and double recovery as articulated in *British Columbia (Forests) v. Teal Cedar Products Ltd*. 2013 SCC 51, at paras. 19-20.

[114] Argo has not established an entitlement to prejudgment interest on a contractual basis or under the *COIA*. I therefore make no award in this respect.

Conclusion

[115] In the result, I conclude that the Interest Expenses are permissible deductions in calculating the NDC as reasonable non-construction costs under s. 1.1(f)(ii) of the Participation Agreement. However, the Profit Participation Payments are not permissible deductions under ss. 1.1(b) or (f)(ii) of the Participation Agreement, and likewise, the Invoice is not a permissible deduction under either of ss. 1.1(b) or (f).

[116] I therefore make the following declaratory orders:

a) The total value of the NDC is to be increased by $3,463,051, comprising the following amounts that I have concluded are not permissible deductions in calculating the NDC:

    i. $3,050,051 in profit participation payments paid to Azure Investments Ltd. and PMD; and

    ii. $413,000 paid as a bonus to the construction project manager; and

b) The interest expenses paid to PMD, Charter, and Azure Investments Ltd. in the amount of $4,138,013 are permissible deductions in calculating the NDC.

[117] I leave it to the parties to calculate the additional payment on account of 10% of the NDC that Argo is entitled to, resulting from the declaratory relief granted in the preceding paragraph. In the event that the parties cannot agree on the appropriate calculation, they are granted leave to reappear. The agreed-upon amount is to be paid out of the monies being held in trust pursuant to the Holdback Amendment Agreement, together with accrued interest.

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[118] Argo is presumptively entitled to its costs at Scale B. If any party seeks an alternative costs award, they have leave to request a further hearing before me within 30 days of the date of this judgment.

"Hughes J."

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