COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pavlov v. Edwards,*
2024 BCCA 155

Date: 20240425
Docket: CA48929

Between:

Alexandre Pavlov

Appellant
(Defendant)

And

James Edwards, Edwards Family Trust, Siarhei "Sergei" Kadach, Kadach Family Trust, and Yuliya Kadach

Respondents
(Plaintiffs)

And

Spektrum Glasses Ltd.

Respondent
(Defendant)

Before: The Honourable Mr. Justice Fitch
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated September 22, 2022 (*Edwards v. Spektrum Glasses Ltd.*, 2022 BCSC 1657, Vancouver Docket S222551).

Counsel for the Appellant:	W.E. Stransky
Counsel for the Respondents:	L.M.A. Kotler
Place and Date of Hearing:	Vancouver, British Columbia December 4, 2023
Place and Date of Judgment:	Vancouver, British Columbia April 25, 2024

Written Reasons by:
The Honourable Mr. Justice Grauer

Concurred in by:
The Honourable Mr. Justice Fitch
The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant appeals a summary trial order finding him liable up to the amount of his guarantee, which secured a part of a vendor-take-back loan in a commercial transaction. The judge found that the respondents' application primarily concerned the interpretation of a series of contracts regarding the loan and proceeded summarily. On appeal, the appellant argues that the issues were not suitable for summary determination and that the judge erred in her interpretation of the agreements.

Held: Appeal dismissed. The judge was aware of the substance of the appellant's counterclaims along with other pending issues and decided to proceeded summarily on narrow issues concerning the interpretation of the contracts. The judge's discretion to do so is owed deference. The appellant established no extricable error of law in the judge's interpretation of the relevant agreements, and her conclusion, again, is owed deference.

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Reasons for Judgment of the Honourable Mr. Justice Grauer:

1. Introduction

[1] Mr. Pavlov appeals from a summary judgment finding him liable to the respondents on a personal guarantee for the amount of US $381,198.83. The judge's reasons for judgment are indexed at 2022 BCSC 1657. Mr. Pavlov argues that the matter was not suitable for summary determination, and that, in any event, the judge misinterpreted the relevant agreements.

[2] The matter arose out of a transaction by which the respondents sold the shares of Spektrum Glasses Ltd to 12114089 Canada Inc ("121"). Mr. Pavlov was the principal and sole director of 121, which was amalgamated into Spektrum Glasses Ltd once the transaction closed (I will refer to the amalgamated entity as "Spektrum").

[3] The Share Purchase Agreement ("SPA"), executed on July 20, 2020, provided for a total purchase price of $3,594.519.80 (all contractual amounts are stated in United States dollars).

[4] The SPA further provided that the purchase price was payable as follows:

a) a cash payment on closing of $2,336,437.87;

b) a Vendor Take-Back Loan ("VTB") of $762,397.65, with the purchaser to make quarterly interest-only payments, beginning three months after the closing date, with interest accruing at a rate of 5% per annum, compounded annually;

c) the balance of $495,684.28 (the "Earn-out Adjustment") to be payable quarterly over two years as adjusted in accordance with the terms of the relevant section.

[5] With respect to the VTB of $762,397.65, the SPA required 121 to sign a promissory note, and further required Mr. Pavlov, as principal of 121, to sign a

personal guarantee for 50% of the VTB. It was on that guarantee that he was found liable to pay the respondents $381,198.83.

[6] The judge also found Spektrum liable on its promissory note in the full amount of the VTB. It is, however, only Mr. Pavlov who appeals.

[7] For the reasons that follow, I would dismiss the appeal.

[8] I turn to the relevant terms of the agreements between the parties before reviewing the procedural history of this matter.

2. The relevant terms

[9] As noted, the VTB required the purchaser to make quarterly interest-only payments on the principal amount of the loan. Pursuant to section 2.3(b) of the SPA, the principal amount of the loan was due three years after the closing date:

> The Purchaser shall make quarterly interest-only payments, with the first payment due three (3) months after the Closing Date. The full amount of the VTB shall be due as a lump-sum payment three (3) years after the Closing date. The Purchaser shall be entitled to prepay any amount of the VTB without prepayment penalty. Alexandre Pavlov, the principal of the Purchaser, shall sign a personal guarantee for fifty percent (50%) of the VTB (the "Personal Guarantee").
>
> [Emphasis added.]

[10] Each quarterly interest payment under the VTB was $9,529.97.

[11] The VTB principal was subject to adjustment pursuant to section 2.4(e) of the SPA which allowed for the principal amount – due three years from closing – to be reduced based on an evaluation of unsold inventory as of October 1, 2021:

> …The Purchaser shall have the right to evaluate the inventory of the Corporation one week before the Closing Date. The Vendors shall provide a detailed inventory list along with documentation as to its value, age, quality, condition, salability [*sic*]… If any inventory that forms part of the Closing Working Capital is not sold by October 1, 2021, the value of such inventory included in the Closing Working Capital will be offset against the lump sum due pursuant to the VTB on the date that is three (3) years from the Closing Date.
>
> [Emphasis added.]

[12] Mr. Pavlov maintains that, pursuant to this clause, the VTB principal was reduced, and hence he was entitled to reduce the interest payments. He did so unilaterally and so did not pay the stipulated quarterly interest payment of $9,529.97 in January 2022.

[13] The promissory note executed by 121 mirrored section 2.3(b) of the SPA:

> … [The Debtor] hereby promises to pay…the sum of $762,397.65 in lawful money of the United States of America (the "Principal Amount") with interest at a rate of 5% per annum calculated and compounded annually, not in advance. The Debtor shall make quarterly interest-only payments, with the first payment due three (3) months after the date of this Promissory Note. The Debtor shall repay the Principal Amount, together with any accrued interest, to the Lender in full on the date that is the third anniversary of the date of this Promissory Note.

[14] Critically, the note contained an acceleration clause in the event of default:

> Upon default of any payment on the date such payment is required to be made pursuant to this Promissory Note, and provided such default is not cured within thirty (30) days of notice provided to the Debtor, the full balance due hereunder will become immediately due and payable.

[15] The respondents' claim against Mr. Pavlov was based upon the proposition that his failure to pay the full interest amount owing constituted a default, so that the full amount of the VTB was due and payable.

[16] In his personal guarantee, Mr. Pavlov unconditionally guaranteed payment and performance to the vendor of all indebtedness, liability and obligations of 121 pursuant to both the VTB and the promissory note, provided that his liability would be limited to the sum of $381,198.83.

[17] In that guarantee, Mr. Pavlov acknowledged the following:

> The Undersigned acknowledges that this Guarantee has been delivered free of any conditions and that no statements, representations, agreements, collateral agreements or promises have been made to or with the Undersigned affecting or limiting the liability of the Undersigned under this Guarantee or inducing the Undersigned to grant this Guarantee, and the Undersigned acknowledges that this Guarantee is in addition to and not in substitution for any other guarantees held or which may hereafter be held by the Lender.

3. Procedural history

3.1 The first action

[18] On August 20, 2021, the respondents filed a notice of civil claim against Spektrum, 121, and Mr. Pavlov, alleging, among other things, breaches of the SPA, failure to act honestly and in good faith, and oppression. They sought damages and declaratory relief relevant to their ongoing commercial relationship.

[19] According to the respondents, the first action arose primarily out of Mr. Pavlov's failure either to pay the Earn-out Adjustment prescribed by section 2.3(c) of the SPA or to provide documents substantiating the earn-out.

[20] On September 13, 2021, Spektrum, 121 and Mr. Pavlov filed a response and counterclaim. The counterclaim included allegations of "initial representations" made by the vendors that inflated the value of the business, claims that the plaintiffs provided unsellable inventory and made unreasonable requests concerning earn-out reports, and allegations of oppression and extortion.

[21] The parties have engaged in discovery related to the first action but it remains largely dormant. According to the respondents, neither party has pursued the action because the earn-out period ended in August 2022.

3.2 The second action

[22] On January 24, 2022, Mr. Pavlov sent an email to counsel for the respondents, stating that he would not be sending a VTB interest payment for that month. The email stated:

> … We have now completed the Unsold Inventory Report for the period since acquisition and until October 1, 2021…
>
> The number of unsold units was calculated as inventory on July 26th, 2020 as provided…
>
> Based on this, and as per Section 2.4 (e) of the [SPA], the total amount that … must [be] deduct[ed] from the VTB owing is **USD $277,054.01**. Please refer to the attached spreadsheet for conversions and calculations.
>
> The above amount would reduce the remining [*sic*] VTB owned [*sic*] by me to USD $485,343.64. As of the Closing date, this has now resulted in a total

> **VTB interest overpayment of USD $17,315.88**. Please refer to the VTB and Earnout Recalculations sheet that was attached in the previous email.
>
> Therefore, I would not be sending a quarterly VTB interest payment today. In 3 months from now, I will deduct the remining VTB interest overpayment amount from the next payment.
>
> [Emphasis in bold original; emphasis by underlining added]

[23] Mr. Pavlov determined that the new quarterly interest payment, based on the reduced VTB of $485,343.64, was $6,066.80. This was $3,463.18 lower than the interest payment he had been making. He had made five quarterly interest payments by this point and calculated that he had overpaid on interest by $17,315.88:

VTB owing	762,397.65
Unsold inventory	277,054.01
Remaining VTB owing	485,343.64
Previous quarterly interest payments	9,529.97
New quarterly interest payments	6,066.80
Overpayment of interest per quarter	3,463.18
Total overpayment until Oct. 24, 2021	17,315.88

[24] It is undisputed that Mr. Pavlov failed to make a quarterly interest payment in January 2022.

[25] On March 21, 2022, the respondents commenced the present action, alleging that Spektrum had breached the SPA by failing to make the January 2022 payment. They pleaded that "the sole focus of this action is the consequence of the defendants, or any of them, failing to make the Quarterly Payment of $9,529.97 that was due on or about January 24, 2022", and sought judgment against Spektrum for $762,397.65 (pursuant to the promissory note) and against Mr. Pavlov for $381,198.83 (pursuant to his guarantee).

[26] Mr. Pavlov filed a response and counterclaim on May 9, 2022. The judge observed that his counterclaim was "substantively similar to the counterclaim he filed in [the first action]" (at para 24). Mr. Pavlov sought, among other things:

- "A declaration that the plaintiffs have acted in an initial dishonest and misrepresenting manner";

- “A declaration that the plaintiffs have breached parts of the SPA”;
- “An Order that the amount paid for the acquisition of the business be fully refunded, which includes: 1) $2,336,437.87 paid at closing 2) Earnout of $163,486.88, including the initial $60,000 on the day after close 3) Any quarterly VTB interest paid”;
- “An Order that the amount of $277,054.01 for unsold inventory be deducted from the VTB owing.”

[27] On June 15, 2022, the respondents filed a notice of application for summary determination of their claims pursuant to Rules 9-6 and 9-7 of the *Supreme Court Civil Rules*.

[28] Mr. Pavlov filed a cross application a week later. He sought orders converting the respondents’ application “to a regular action”; combining the two actions “since they are related”; and dismissing the respondents’ application on jurisdiction and service grounds.

3.3 The summary trial

[29] The judge granted the respondents’ application and dismissed Mr. Pavlov’s cross application. Mr. Pavlov was not represented by counsel.

[30] The judge found that the VTB did not permit Mr. Pavlov to reduce the quarterly interest payments unilaterally. It followed that Spektrum’s failure to pay the January 2022 interest constituted default of the VTB. Spektrum was ordered to pay the entirety of the VTB principal of $762,397.65: at para 72. Mr. Pavlov was held personally liable up to the amount of his guarantee, $381,198.83, for the obligations of Spektrum: at para 73.

4. The appeal

4.1 Parties to the appeal and the question of mootness

[31] As noted above, only Mr. Pavlov is appealing the decision below. Spektrum did not appeal the judgment against it on its promissory note, and, although named as a respondent, did not participate in this appeal.

[32] According to the respondents, Spektrum was placed in receivership earlier this year. With Spektrum now in receivership, they argue, the company cannot repay the VTB regardless of whether the amount should have been reduced. It follows, they say, that Mr. Pavlov remains fully liable up to the amount of his guarantee even if this Court disagrees with the approach taken by the judge in interpreting the contracts at issue. This is because, by Mr. Pavlov's own accounting, the reduced amount of the VTB principal to be repaid after the inventory set-off is $485,343.64, which exceeds the amount for which Mr. Pavlov is liable under his guarantee ($381,198.83).

[33] The respondents accordingly maintain that this appeal is moot.

[34] The difficulty is that the only evidence of the appointment of a receiver over Spektrum is a bare statement that this occurred "by or about January 20, 2023" contained in an affidavit filed on behalf of the respondents in opposition to the appellant's application to extend the time for filing his notice of appeal. That is not part of the record before the Court on this appeal. The appointment of a receiver should have been the subject of a fresh evidence application by the respondents if they wished to rely on it. That would have allowed this Court to assess the admissibility and significance of the evidence after hearing from both sides.

[35] But even if that affidavit were in evidence, I would not accept it as establishing mootness. Given the lack of detail, it is not possible, in my view, to be satisfied that a decision of this Court on the interpretation of the agreements will not resolve a controversy which may affect the rights of the parties: see *Borowski v Canada (Attorney-General)* [1989] 1 SCR 342 at 353, and *Centurion Apartment Properties*

Limited Partnership v Sorensen Trilogy Engineering Ltd, 2024 BCCA 25 at paras 138–140.

4.2 The issues

[36] Mr. Pavlov raises two primary issues on appeal.

- First, he submits that the judge erred in finding that the matter was suitable for summary determination:
    - by failing to consider properly whether the filing of the second action was an abuse of process which facilitated "litigation in slices" given the pending first action;
    - by failing to conclude that Mr. Pavlov's counterclaims rendered the respondents' claims unsuitable for summary disposition;
- Second, he asserts that the judge erred in interpreting the promissory note as an independent obligation, leading her to order acceleration of the full VTB principal without regard to the inventory offset clause found in the SPA.

[37] Mr. Pavlov does not appeal the dismissal of his cross application.

5. Issue #1: Suitability

5.1 Standard of Review

[38] It is trite that a judge's decision to proceed summarily is afforded the same measure of deference as other discretionary decisions. This Court will not interfere with a judge's exercise of that discretion unless it was not exercised judicially or was exercised on a wrong principle: *McLean v Southam Inc et al*, 2002 BCCA 229 at para 10; *Salem v Priority Building Services Ltd*, 2005 BCCA 617 at para 19; *Gichuru v Pallai*, 2013 BCCA 60 at para 34; *Tassone v Cardinal*, 2014 BCCA 149 at para 3. See also *Hryniak v Mauldin*, 2014 SCC 7 at paras 81–83.

[39] Mr. Pavlov accepts this standard.

5.2 Duplicity of actions

5.2.1 The judgment below

[40] The judge found that the respondents' second action was substantively different from their first:

> [8] On August 20, 2021 the plaintiffs filed an earlier action (Action S217534) against the same defendants, claiming various breaches of the SPA and failures of the defendants to act honestly and in good faith in relation to their obligations. The plaintiffs also make claims in relation to representations made by the defendants, and claims in oppression.
>
> [9] In the earlier action there are no claims which duplicate the claims made in this action.
>
> [10] In this action, the plaintiffs allege the defendants breached the VTB entered into as part of the consideration for the sale of the shares, and seek judgment and collateral relief in relation to the breach of the VTB.
>
> [Emphasis added]

[41] The judge concluded that the respondents' second action was suitable for summary determination, noting that the issues came down to the proper interpretation of the SPA and its related agreements:

> [22] With respect to what Mr. Pavlov says are the complicated facts on this application, Mr. Pavlov agreed with me that the only issues for determination are the interpretation of ss. 2.3 and 2.4 of the SPA, together with the VTB, the promissory notes, and the guarantees. He agreed that the issue really came down to whether the language of the agreements provided for a reduction of the quarterly interest payments under the VTB prior to the expiry of three years from the date of closing.

[42] The judge refused to join the first and second action as requested by Mr. Pavlov in his cross application. The respondents (not Mr. Pavlov) advanced an argument in the court below that Mr. Pavlov's filing of his counterclaim in the second action constituted an abuse of process because it was entirety duplicative of his counterclaim filed in the first action. The judge did not accede to this argument.

> [30] For the reasons set out below, I have determined that the plaintiffs' interpretation of the SPA and associated agreements is correct. This interpretation disposes of the issues raised in the notice of civil claim. The defendants have filed a counterclaim, which may continue notwithstanding the resolution of the plaintiffs' claims. As I have already noted, the counterclaim in this action is essentially duplicative of the counterclaim filed in Action S222551. The plaintiffs suggested that the new counterclaim in this

> action is an abuse of process as it repeats existing claims in Action S222551. However, there is no application to strike the counterclaim in this action before me. How the counterclaim in this action is resolved will be left for another day.
>
> [31] I am not satisfied that it is in the interests of justice to join these actions at this time.

5.2.2 Position of the parties

[43] On appeal, Mr. Pavlov submits that the respondents inappropriately commenced the second action for the purpose of separating the issues from related claims in the first action. He argues that this was an abuse of process that was "not properly or sufficiently considered by the chambers judge". He argues that the judge focused her analysis on her ability to dispose of the issues in the second action without regard for the overlap in claims and relief sought in the first action.

[44] The respondents say that, subject to the judge's discretion, there is nothing that prevents them from seeking summary resolution of narrow issues in the context of a broader landscape of litigation.

5.2.3 Discussion

[45] I would not accede to this ground of appeal.

[46] While the two actions arose out of the same contractual arrangement, they concern discrete issues and sets of facts. The facts that grounded the second action – Mr. Pavlov's failure to pay the January 2022 interest payment – arose well after the filing of the first.

[47] When the first action was filed, Mr. Pavlov was still making VTB quarterly interest payments. The complaint related to other differences, and sought declarations intended to govern their future dealings—not to terminate those dealings.

[48] Mr. Pavlov altered that landscape in January 2022 when he took the position that he had overpaid interest and therefore would not be making a quarterly interest

payment that month. The sole question for the judge below was whether this was contrary to his contractual obligations.

[49] As the respondents note, Rule 3-7(5) only goes so far as to state that "[a] party may plead a matter that has arisen since the start of the proceeding" (emphasis added) but does not mandate a party to do so.

[50] Mr. Pavlov argues that it is an abuse of process for a plaintiff to file a second action against a defendant, seeking relief that could have been claimed against the same defendant in the first action, while that first claim is still pending. He relies on *Brandreth-Gibbs v The Attorney General of Canada*, 2007 BCSC 1645, *Berscheid v Ensign*, [1999] BCJ No 1172, 1999 CanLII 6494, and *Allarcom Ltd v Canwest Broadcasting Corp*, 28 BCLR (2d) 371, 1988 CanLII 2897 (BCCA).

[51] In my respectful view, none of these authorities compels the conclusion that he seeks.

[52] In *Brandreth-Gibbs*, the court struck the plaintiff's second action because "the only substantive difference between the First and Second Actions, [was] the express pleading in paras 21 to 23 of malicious prosecution" at para 21. The court held that there was "no question that the specific plea of malicious prosecution could have been sought in the First Action": at para 27. In the case at hand, the filing of the second action was prompted by actions that arose well after the filing of the first.

[53] The remaining cases are similarly inapposite. The court in *Berscheid* noted that "much of what the plaintiff [was] claiming in the present action [was] claimed by the plaintiff in his concurrent petitions" at para 26. The court held that the filing of "subsequent civil proceedings seeking substantially the same remedies against the same parties" constituted an abuse of process because they were collateral attacks on an administrative decision that was subject to judicial review: at paras 52, 126.

[54] Lastly, *Allarcom* stands for the unremarkable proposition that a court has the power to grant leave to allow a plaintiff to amend an existing claim to add a cause of action arising after the date of issuance of a writ. The court was concerned with the

risk that the addition of a new cause of action would deprive the defendant of a limitations defence. This case is now frequently cited for the principle that a party must seek leave to add a time-barred cause of action. This case effectively undermines Mr. Pavlov's position as it canvasses possible risks of allowing a party to amend an existing pleading.

[55] In this case, the relief sought by the respondents in the second action primarily comprised judgment against Spektrum for the full amount of the VTB principal and judgment against Mr. Pavlov for half that amount. This was not the relief that was sought in the first action and was entirely predicated on Mr. Pavlov's failure to pay the January 2022 quarterly interest payment. The judge expressly found that the respondents' second action was substantively different from their first.

[56] In these circumstances, I am not persuaded that it was an abuse of process for the respondents to file and pursue their second action. While alternatives were available, including applying to amend the first claim or applying for consolidation of the two, the process undertaken by the respondents did not expose the appellants to litigating the same claim in two proceedings (note that Mr. Pavlov has *not* appealed the judge's order dismissing his cross application seeking to join the two actions). On the contrary, it enabled the court to deal with an application that, however resolved, would dispose of the second action.

[57] In this regard, the judge referred at para 29 to the parties' agreement that the sole issue to be decided was "one of interpretation of the agreements between the parties".

[58] Mr. Pavlov asserts that this amounted to a misapprehension by the judge, as he never agreed that the issue came down to whether the language of the agreements provided for a unilateral reduction of the quarterly interest payments.

[59] The difficulty is that Mr. Pavlov has not adduced any evidence to substantiate his assertion, which is denied by the respondents, and is contrary to what the judge understood. He could have obtained transcripts or submitted an affidavit, but did not

do so. There is no extrinsic evidence on which we could rely to determine whether the chambers judge erred in stating that Mr. Pavlov made this concession.

[60] Nor can I accept Mr. Pavlov's argument that it is evident, based purely on the substance of his counterclaims (which he characterizes as a claim for rescission) that he never conceded this point. The chambers judge expressed at paras 24–29 why Mr. Pavlov's counterclaims did not get in the way of a summary determination. As I discuss further below, the existence of a counterclaim on its own cannot bar summary determination of related issues.

[61] Taking everything into account, I cannot agree with Mr. Pavlov that the judge erred by deciding to proceed summarily.

5.3 Counterclaims "inextricably interwoven"

5.3.1 The judgment below

[62] The judge concluded that Mr. Pavlov's counterclaims did not bar summary determination:

> [24] Mr. Pavlov filed a counterclaim in this action, which is substantively similar to the counterclaim he filed in Action S217534. He argues that the issues in the counterclaim should be determined at the same time as the issues raised in the notice of civil claim. The counterclaim seeks a return of all quarterly interest payments under the VTB as a result of various alleged breaches of the SPA and misrepresentations made by the plaintiffs, and seeks a reduction in the VTB principal in the amount of $277,054.01 in relation to unsold inventory.
>
> [25] The SPA provides for a reduction in the VTB principal, on account of deductions related to inventory. This is not disputed by the plaintiffs. However, on this application the plaintiffs argue that Mr. Pavlov's breach in failing to make the required quarterly interest payments results in a number of remedies set out in the security agreements, including an acceleration of the full amount of the promissory note, enforcement of Mr. Pavlov's guarantee, and a declaration that the non competition agreement is of no force and effect.
>
> [26] Mr. Pavlov's response is that the SPA provides for a reduction in the principal of the VTB on account of inventory and all quarterly interest payments must be adjusted to reflect the reduced principal amount, even though the payment of the principal is deferred until three years after the closing date.

> [27] If Mr. Pavlov's interpretation of the SPA and associated agreements is correct, his counterclaim in relation to the reduction of the principal of the VTB will be unaffected.
>
> [28] I am satisfied that the counterclaim does not need to be heard at the same time as this preliminary issue. Further, if the plaintiffs are correct and payment of the full principal amount of the VTB is required as a result of the defendants' breaches, this will be an efficient use of the court's time as it will eliminate all outstanding issues relating to inventory claims under the SPA.

5.3.2 Position of the parties

[63] Mr. Pavlov argues that the judge erred in granting the respondents' summary trial application in the face of his two counterclaims which are "inextricably interwoven" with the respondents' claim.

[64] According to him, the relief the respondents sought in the second action took the VTB's validity for granted. He states that this runs contrary to his counterclaims which allege that he was fraudulently induced into entering into the agreements at issue. In his second counterclaim, he seeks the return of all aspects of the purchase price, and characterizes this as a functional rescission claim. In sum, his position is that the judge had to consider that what was being sought by the respondents may be undercut, or ultimately set off, by his success on his counterclaims. According to Mr. Pavlov, the judge failed to do so.

[65] The respondents argue that Mr. Pavlov engaged in strategic ambiguity by including broad-brush claims in his pleadings. It was incumbent on Mr. Pavlov to bring forward at least some evidence if he wished to demonstrate that his counterclaims were inextricably interwoven, but he failed to do so.

[66] According to the respondents, Mr. Pavlov has raised only a "spectre of a potential set-off claim." A mere allegation that he has claims against the respondents cannot prevent them from obtaining judgment and it was open to the judge to proceed summarily.

5.3.3 Discussion

[67] In my view, it was open to the judge to find that Mr. Pavlov's counterclaims did not render the matter unsuitable for summary determination.

[68] She turned her mind to the existence and substance of Mr. Pavlov's counterclaims and came to the explicit conclusion that they did not preclude her from deciding the issues before her. Her exercise of discretion is owed deference.

[69] The mere existence of a counterclaim is not a bar to summary determination: *Kaspersky Lab Inc v Bradshaw*, 2010 BCSC 68 at para 13 citing *Natco International Inc v Photo Violation Technologies Corp*, 2009 BCSC 1504 at para 10. Like Justice Griffin (then of the Supreme Court of British Columbia) in *Natco* at para 10, the judge was not persuaded that the issues raised by the respondents for determination by summary trial were inextricably interwoven with the issues to be determined concerning the appellant's counterclaims.

[70] In my view, that conclusion was open to the judge, and ought not to be disturbed. The appellant has not demonstrated that his counterclaims amount to a complete defence or set-off. Indeed, he adduced very little evidence to substantiate his counterclaims and any relevance they had to the issues raised by the respondents in their application for summary determination. This was particularly important because his claims were inconsistent. As such, I consider that it was open to the judge to conclude that the allegations raised in the counterclaim did not properly constitute a set-off to the respondents' claim, which was based on an acceleration clause triggered by the borrower's default.

[71] In *Bertone v Robins*, [2009] OJ No 2918, 2009 CanLII 35728 (ONSC)—a case on which Mr. Pavlov relies—the court refused to grant summary determination because there was "substantial evidence put forward by the defendants that would support a finding that the alleged misrepresentations were material to the transaction and were relied upon by the defendants": at para 38 (emphasis added). That is not the case here.

[72] As the judge found, Mr. Pavlov's counterclaim in the second action was "essentially duplicative of the counterclaim filed in Action S222551": at para 30. Importantly, as noted, his pleadings were also fundamentally inconsistent and contradictory. At points, Mr. Pavlov affirms the SPA by seeking a deduction of unsold inventory from the VTB principal, and at other points, disclaims the SPA by seeking a return of all funds paid for the acquisition of Spektrum. There was very little before the court below (and this Court) compelling the conclusion that proceeding summarily would be manifestly unjust for Mr. Pavlov.

[73] Moreover, Mr. Pavlov's contention that he sought a functional rescission is not only missing from the pleadings, but is also belied by the record. In fact, he repeatedly sought to rely on contractual provisions in supporting the positions he took in dealing with the respondents, both before and after the filing of his second counterclaim.

[74] The judge assessed Mr. Pavlov's counterclaims as they were before her, noting their limited particularity. She was alive to the fact that Mr. Pavlov's second counterclaim sought "a return of all quarterly interest payments under the VTB as a result of various alleged breaches of the SPA and misrepresentations made by the plaintiffs": at para 24. She noted the appellant's position concerning the correct interpretation of the agreements and his obligation to make quarterly interest payments. She observed that if his position prevailed, his counterclaim would be unaffected. She concluded, properly in my view, that a summary determination of the respondents' claims would be "an efficient use of the court's time as it [would] eliminate all outstanding issues relating to inventory claims under the SPA": at para 28.

[75] I am not persuaded that the judge erred in principle or in fact in failing to conclude that the existence of the appellant's counterclaims rendered the respondents' application unsuitable for determination by way of summary trial.

6. Issue #2: Interpretation of the agreements

6.1 The judgment below

[76] The judge set out sections 2.3(b) and 2.4(a) of the SPA, and referred to the terms of the promissory note and the guarantee. She observed that the promissory note did not provide either for any adjustment in the principal amount, or for any recalculation of or reduction in the interest payments during its term (at para 53). She noted that the promissory note was an additional independent obligation for which the parties bargained, rather than relying solely on the obligations under the SPA.

[77] In the judge's view, to accede to the appellant's position that he was entitled unilaterally to reduce the interest payments based on his calculations of the proper reduction to the VTB principle, would be to rewrite the agreement between the parties:

> [55] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*], the Supreme Court of Canada confirmed that the surrounding circumstances around the contract formation may be used to assist in contractual interpretation. The court may use the surrounding circumstances to understand the objective mutual intentions of the parties. In this sense, I agree that I can look to the SPA when interpreting the promissory note. However, at paras. 57-58 *Sattva* makes it very clear that the surrounding circumstances "must never be allowed to overwhelm the words of that agreement".
>
> [56] I am satisfied that the clear mutual objective intention of the parties was that, pursuant to the promissory note, the defendant 12114089 Canada Inc. was obliged to make quarterly interest payments on the full USD $762,397.65 for three years after the closing date. If 12114089 Canada Inc. defaulted on this obligation, the entire principal and interest became immediately due and owing. The parties negotiated this remedy for default to ensure that 12114089 Canada Inc. would not default.
>
> [57] The parties did not include any language in the promissory note which would support an interpretation permitting the borrower, 12114089 Canada Inc., to unilaterally reduce the required quarterly interest payments at any time.
>
> [58] I find the language of the SPA, which permits a reduction in the VTB principal amount payable after three years, is not sufficient to support the interpretation urged by Mr. Pavlov. While it is clear that the parties agreed that three years after closing the VTB principal may be reduced by the value of acceptable inventory remaining, it does not follow that one party can unilaterally reassess the clear ongoing interest payments.

> [59] Mr. Pavlov argues that it is clear that the parties agreed that interest would only be payable on the principal and, if the principal is reduced, it follows that the interest must also be reduced. However, it is equally plausible that the parties agreed to fix the interest payment obligation for three years at the amount calculated against the principal owing on closing, providing that the principal could only be reduced three years after closing in accordance with s. 2.4(e) of the SPA. There is no language in the SPA which supports a recalculation of the interest payments owing over the past three years if the principal was reduced three years after closing.
>
> [60] In the result, I find that the clear language of the promissory note, in light of all the surrounding circumstances, does not permit 12114089 Canada Inc. to unilaterally reduce the specified quarterly interest payments.

[78] As there was no dispute that the appellant missed the January 2022 payment, the judge was "satisfied that the plaintiffs [were] entitled to the remedy set out in the promissory note, namely immediate payment of the full balance outstanding under the note": at para 64. In accordance with the terms of the promissory note, the appellant's liability was limited to half that amount.

6.2 Standard of review

[79] As the Court explained in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, "[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix" (at para 50). The standard of review for questions of mixed fact and law is palpable and overriding error.

[80] As discussed below, the appellant argues that, in this case, the judge committed an extricable error of law that, accordingly, attracts the less deferential correctness standard.

[81] While the Court in *Sattva* acknowledged at para 53 that it may be possible to identify an extricable question of law from what was initially characterized as a question of mixed fact and law, it warned of the need to be cautious in identifying extricable questions of law:

> [54] However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory

> requirement to identify a question of law in a leave application pursuant to s. 31(2) of the *AA*, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in [*Housen v Nikolaisen*, 2002 SCC 33] to exercise caution in attempting to extricate a question of law is relevant here:
>
> > Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" . . . . [para. 36]
>
> [55] Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. . . .
>
> [Emphasis added.]

[82] As I explain below, I am not persuaded that this case turns on extricable questions of law. In my view, the issues raised by the appellant all come down to an argument that the judge should have preferred a different interpretation. No real question of law can be extracted.

6.3 Position of the parties

[83] The primary error of law upon which the appellant relies is the proposition that the judge failed to construe the promissory note and guarantee in the context of the agreements as a whole, particularly s. 2.4(e) of the SPA, which contemplated a reduction of the amount owing to reflect an inventory offset.

[84] If the judge had interpreted the obligation under the promissory note and guarantee in the context of the agreements as a whole, the appellant asserts, she would have recognized that the inventory offset would have applied to the VTB principal in the promissory note as soon as the offset crystallized – when the unsold inventory as of October 1, 2021 was determined. The parties should not have to wait

for the loan to fully mature. It would follow that if the debt was reduced, the interest payments would have to be reduced as well.

[85] Otherwise, the appellant submits, the acceleration provision becomes a penalty or liquidated damages clause – Spektrum would be responsible for more on default than they would have been on full maturity. The judge's interpretation also contravenes the principle of "co-extensiveness" by rendering Spektrum and Mr. Pavlov liable for an amount greater than that secured.

[86] The respondents say that the judge did not interpret the promissory note or guarantee in a vacuum – she carefully considered all three of the agreements in concluding that the reduction in the principal owing under the promissory note would occur only three years after closing.

6.4 Discussion

[87] I can see no reversible error in the judge's interpretation. She did not construe the promissory note, guarantee or any other document in a vacuum. On the contrary, she had regard to all of the relevant contractual agreements, concluding that nothing in them supported the proposition that if the principal were to be reduced in accordance with s. 2(4)(e) of the SPA, the appellant and Spektrum could unilaterally reduce interest payments. As the judge noted, there was no mechanism for recalculation of interest, or even for determining precisely the amount of any reduction in principal. Rather, the agreements, viewed as a whole, appeared to contemplate all of this taking place at the end of the three-year period. The conclusion that there was nothing to detract from the clear language of the promissory note and guarantee was accordingly open to her, and is entitled to deference.

[88] The appellant then argues that if the judge's interpretation is correct, he and Spektrum would be liable for an amount greater than that secured by the promissory note and guarantee. I disagree. The point of the judge's interpretation of the agreements as a whole is that there would be no reduction in the amount owing until the end of the three-year period. The promissory note and the guarantee refer only

to the full amount owed by Spektrum, with default before the due date leading to the clear consequences spelled out in the promissory note. As to the appellant, his liability as limited under the guarantee is for an amount comfortably less than what was owing by Spektrum even if he is correct about the amount by which the debt should have been reduced—though the evidence adduced by the appellant did not adequately establish the appropriate reduction in any event.

[89] The real problem is that the appellant chose to proceed unilaterally, instead of first reviewing the circumstances with the respondents and then, if necessary, obtaining the guidance of the court on the appropriate way forward.

7. Disposition

[90] For these reasons, the appeal is dismissed.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"