IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Apex Aluminum Extrusions Ltd. v. KD Sales & Service Limited,* 2024 BCSC 1776

Date: 20240926
Docket: S238578
Registry: New Westminster

Between:

Apex Aluminum Extrusions Ltd.

Plaintiff

And:

KD Sales & Service Limited and Dale Kadler

Defendants

Before: The Honourable Justice Doyle

Reasons for Judgment on Interest and Costs

Counsel for the Plaintiff:	D.K. Magnus E. Watson
Counsel for the Defendants:	K. Miller
Written Submissions of the Plaintiff:	January 17, 2024
Written Submissions of the Defendants:	January 19, 2024
Written Reply Submissions of the Plaintiff:	January 22, 2024
Place and Date of Judgment:	New Westminster, B.C. September 26, 2024

Introduction

[1] On December 13, 2023, oral reasons for judgment were issued on liability in this contract dispute. Judgment was awarded to the plaintiff in the amount of $113,587.30.

[2] At trial, the parties made preliminary submissions on pre-judgment interest and costs, and made additional written submissions after the determination of liability:

1) The plaintiff seeks pre-judgment interest pursuant to the provisions of the contract styled a "Confidential Credit Application and Agreement" (the “Contract”): 2% per month compounded monthly (28.6% per annum). The defendants seek pre-judgment interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

2) The plaintiff seeks costs pursuant to the provisions of the Contract, claiming full indemnity for reasonable legal fees. The defendants seek that costs be assessed in accordance with the regime established by the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

[3] The parties agree that post-judgment interest (as of December 13, 2023) is governed by the *Court Order Interest Act*.

The Contract and Background Summary

[4] The Contract was signed by the defendant, KD Sales & Service Limited, with Mr. Kadler also signing in his personal capacity as guarantor. The agreed statement of facts (Trial Exhibit 3) and joint book of documents (Trial Exhibit 2) set out the details.

[5] The Contract is a brief three pages. Much of it identifies the parties. The key sections for consideration here are entitled “Terms of Sale” and “Co-Covenant Agreement”.

[6] The “Terms of Sale” relevant to the contractual interest claim provide:

> Terms as agreed are due 30 days from invoice date. The customer agrees to pay service charge from the date the account becomes due at the rate of 2% per month compounded monthly (28.6% per annum) subject to change on notification from Apex Aluminum Extrusions Ltd (Apex Aluminum Extrusions).

[7] The "Terms of Sale" relevant to the costs claim provide:

> The customer agrees to pay all cost of collection, legal fees connected with this account should such action be deemed necessary due to non-payment.

[8] The "Co-Covenant Agreement" is at page 3 of 3. It is signed by Mr. Kadler and is relevant to both the interest and costs claims. It provides:

> In consideration of Apex Aluminum Extrusions extending credit to the above named business, the undersigned guarantors hereby each personally guarantee the payment of all sums hereby owing by the Applicant to Apex Aluminum Extrusions, including all reasonable attorney fees and/or cost incurred in connection with this debt.

[9] Paragraphs 14 to 16 of the agreed statement of facts provide that:

1) On November 5, 2020, the plaintiff delivered certain materials ordered by the defendants. The defendants are not advancing any claim for deficiencies in relation to the materials delivered in these proceedings; and

2) On or about November 6, 2020, the plaintiff provided invoice #144813 dated November 6, 2020, in the amount of $113,587.30 (the "invoice") to the defendants (tab 9 in the joint book of Documents). This invoice was for part of the materials ordered.

[10] As fully described in the liability judgment, an unknown, third party fraudster intervened between the date of the invoice and January 21, 2021. Consequently, the defendants wired $113,587.30 on January 21, 2021 in an attempt to pay the invoice. However, due to the fraudster's intervention, the plaintiff never received those funds and the defendants were unable to recover them.

[11] The plaintiff has not otherwise received payment of the invoice (agreed statement of facts, paragraph 19).

[12] There is no issue that the defendants are jointly and severally liable for the damages awarded, as well as interest and costs.

[13] The remaining issues are:

1) Is pre-judgment interest to be determined based on:

    a) The interest provisions in the Contract; or

    b) The *Court Order Interest Act*?

2) Are costs to be determined based on:

    a) The provisions of the Contract regarding legal fees; or

    b) The tariff pursuant to the *Supreme Court Civil Rules*, and if so, is the plaintiff entitled to double costs?

[14] For the reasons that follow, I find that:

1) Interest is payable by the defendants, jointly and severally, at the Contract rate of 2% per month, compounded monthly (28.6% per annum) from the date of the filing of the original notice of civil claim on June 2, 2021 to December 13, 2023.

2) Pursuant to the Contract, the plaintiff is entitled to indemnification from the defendants, jointly and severally, for reasonable legal fees and disbursements. The matter is referred to the Registrar, unless the parties otherwise agree on that amount.

Pre-Judgment Interest

[15] The “Terms of Sale” are set out above. They provide for interest at 2% per month, compounded monthly (28.6% per annum).

[16] The invoice date was November 6, 2020, and was due 30 days from that date: December 6, 2020.

[17] The plaintiff submits that the Contract is clear that the defendants were liable for interest as of the December 6, 2020 due date at the rate set out in the Contract.

[18] The plaintiff submits that the *Court Order Interest Act* has no application—pursuant to s. 2 of that Act—since there is an agreement about interest between the parties as set out in the Contract.

[19] The defendants note that the relief sought by the plaintiff in part 2 of both the notice of civil claim and the amended notice of civil claim seek contractual interest not from December 6, 2020, but rather from the date of the original notice of civil claim was filed (June 2, 2021).

[20] The defendants estimate that for that time frame, accrued interest at the Contract rate would eclipse the judgment award of $113,587.30 by several thousand dollars. The defendants submit that "while reasonable in the circumstances of a party being late on payment", the interest rate "takes on the effect of a penalty clause" in the circumstances here, with the defendants being the victims of a third party's fraud, the interest sought by the plaintiff amounts to a penalty and they seek relief.

[21] The plaintiff responds that the defendants are in effect seeking relief pursuant to s. 24 of *Law and Equity Act*, R.S.B.C. 1996, c. 253. The plaintiff says that the amount sought is not a penalty.

[22] Moreover, the plaintiff submits that even if the amount is a penalty, the defendants have not established oppression, and that this Court should not determine that the plaintiff's claim is extravagant and unconscionable in the circumstances.

[23] The plaintiff cites various cases, including:

1) *Bidell Equipment LP v. Caliber Midstream GP LLC*, 2020 ABCA 478, leave to appeal to SCC ref'd, 2021 CanLII 52016 [*Bidell*];

2) *Century Services Corp. v. LeRoy*, 2022 BCCA 239, leave to appeal to SCC ref'd, 2023 CanLII 19765 [*Century Services Corp.*];

3) *Volvo Truck Finance Canada Ltd. v. Premier Pacific Holdings Inc,* 2002 BCSC 1137 [*Volvo Truck Finance*];

4) *Smith v. Mexican Sol Imports Ltd.,* 2000 BCSC 558 [*Mexican Sol*]; and

5) *MTK Auto West Ltd. v. Allen*, 2003 BCSC 1613 [*MTK*].

[24] In *MTK*, Madam Justice Kirkpatrick, then of this Court, addressed the law relating to liquidated damages and penalties:

> [14] There remains to be considered the alternative question, namely whether the clause under which MTK seeks damages is unenforceable. MTK seeks judgment against Ms. Allen for $10,000 in liquidated damages. The statement of defence alleges, among other things that are specifically excluded from the Rule 18A summary trial, that the claim for liquidated damages is in fact a penalty.
>
> [15] The law in this area is well-settled. Lord Dunedin, in ***Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd.***, [1915] A.C. 79 (H.L.), which was accepted in Canada in ***H.F. Clarke Ltd. v. Thermidaire Corp. Ltd.***, 1974 CanLII 30 (SCC), [1976] 1 S.C.R. 319, states at p. 86-88:
>
> > In view of that fact, and of the number of authorities available, I do not think it advisable to attempt any detailed review of the various cases, but I shall content myself with stating succinctly the various propositions which I think are deducible from the decisions which rank as authoritative:-
> >
> > 1. Though the parties to a contract who use the words "penalty" or "liquidated damages" may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.
> >
> > 2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage (*Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda*, [1905] A.C. 6).
> >
> > 3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach (*Public Works Commissioner*

> *v. Hills*, [1906] A.C. 368, and *Webster v. Bosanquet*, [1912] A.C. 394).
>
> 4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:
>
> *(a)* It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in *Clydebank Case*, [1905] A.C. 6).
>
> *(b)* It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid (*Kemble v. Farren* 6 Bing. 141). This though one of the most ancient instances is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that when A. promised to pay B. a sum of money on a certain day and did not do so, B. could only recover the sum with, in certain cases, interest, but could never recover further damages for non-timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable, - a subject which much exercised Jessel M.R. in *Wallis v. Smith*, 21 Ch. D. 243 – is probably more interesting than material.
>
> *(c)* There is a presumption (but no more) that it is penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage" (Lord Watson in *Lord Elphinstone v. Monkland Iron and Coal Co.*, 11 App. Cas. 332).
>
> On the other hand:
>
> *(d)* It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties (*Clydebank Case*, Lord Halsbury, [1905] A.C. at p. 11; *Webster v. Bosanquet*, Lord Mersey, [1912] A.C. at p. 398).

[16] In ***Thermidaire***, *supra*, Laskin C.J.C. stated the court's finding on the point at p. 338:

> I regard the exaction of gross trading profits as a penalty in this case because it is, in my opinion, a grossly excessive and punitive response to the problem to which it was addressed; and the fact that the appellant subscribed to it, and may have been foolish to do so, does not mean that it should be left to

> rue its unwisdom. *Snell's Principles of Equity* (27th ed. 1973), at p. 535 states the applicable doctrine as follows:
>
> > The sum will be held to be a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.
>
> [Emphasis in original.]

[25] The plaintiff in *MTK* was a BMW dealer. It alleged that Ms. Allen, the defendant and buyer of a BMW she later exported contrary to the contract, owed $10,000 as liquidated damages for knowingly violating the non-export condition. BMW pursued and obtained from the plaintiff $2,850 upon discovering the car had been exported by the defendant.

[26] Kirkpatrick J. found the $10,000 amount was a penalty. The plaintiff only included the term as required by BMW (which was not a party to the action). She found that the plaintiff gave no consideration to its potential loss when it made the contract with Ms. Allen; the term was only included so that BMW would process the sale. The only obligation the export caused the plaintiff was to pay BMW the $2,850 difference between the retail and effective wholesale price.

[27] *MTK* went on to submit that even if the sum it sought was a penalty, it was not oppressive per *Volvo Truck Finance* (as noted, a case cited by the plaintiff in the present case).

[28] To that, Kirkpatrick J. noted:

> [19] There is higher authority for the proposition put forward by MTK. In ***Elsley v. J.G. Collins Ins. Agencies Ltd.***, 1978 CanLII 7 (SCC), [1978] 2 S.C.R. 916, the Supreme Court of Canada held at p. 937:
>
> > It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression.
>
> [20] Where a party seeks relief from a penalty, the factors to be considered by the court include the conduct of the applicant, the gravity of the breach, and the disparity between the value of the property forfeited and the damage caused by the breach: ***Shiloh Spinners Ltd. v. Harding***, [1973] A.C. 69 (H.L.).

> [21] The assessment of oppression was addressed in ***Dimensional Investments Ltd. v. Canada***, 1967 CanLII 85 (SCC), [1968] S.C.R. 93, which sets out a broad framework in determining whether a penalty clause is or is not oppressive, or as Ritchie J. asks, whether it would be unconscionable for the party who claims the penalty amount to retain the money. Ritchie J. states at p. 101 that "the question of unconscionability must depend upon the circumstances of each case at the time when the clause is invoked" rather than on the agreement itself, which is the difference between the characterization of the clause as being a penalty in the first place versus its being oppressive.
>
> [22] A court should not strike down a penalty clause as being unconscionable lightly because it is a significant intrusion on freedom of contract. There must be clear evidence of oppression for the court to intrude (see ***32262 B.C. Ltd. v. See-Rite Optical Ltd.***, [1998] A.J. No. 312 at ¶ 13 (C.A.) (QL)).
>
> [23] The factors that are relevant to the assessment of oppression in the case at bar include:
>
> > (a) Both parties are sophisticated clients (see ***Edmonton (City) v. Triple Five Corp.*** (1994), 1994 CanLII 9024 (AB KB), 158 A.R. 293 at ¶ 74 (Q.B.)).
> >
> > (b) MTK was not genuinely concerned with whether or not the vehicles it sold were to be exported; rather this was a concern of BMW Canada (see ***Edmonton (City)***, *supra*, at ¶ 74).
> >
> > (c) $10,000 is over three times more than MTK's greatest loss - $2,850 (see ***Ashland Scurlock Permian Canada Ltd. v. NESI Energy Marketing Canada Ltd.*** (1998), 1998 CanLII 29737 (AB KB), 226 A.R. 242 at ¶ 11 (Q.B.)).
> >
> > (d) Ms. Allen knowingly breached the contract and in fact intended to do so before signing the contract (see ***Vohra Enterprises Ltd. v. Creative Industrial Corp.*** (1988), 1988 CanLII 2990 (BC SC), 23 B.C.L.R. (2d) 394 at ¶ 11-12 (S.C.)).
>
> [Emphasis in original.]

[29] I have also considered a Saskatchewan Law Review article provided by counsel for the defendants entitled "The Penalty Doctrine, Relief against Forfeiture, and Unconscionability in Anglo-Canadian Law" (2023 CanLIIDocs 2289). Counsel included the following excerpts from pages 211 and 212 in his written submissions:

> What rationale, then, have Canadian courts articulated? In *H.F. Clarke*, Laskin C.J.C. put it in the following terms: "The primary concern in breach of contract cases...is compensation, and judicial interference with the enforcement of what the courts regard as penalty clauses is simply a manifestation of a concern for fairness and reasonableness."[115]

> This suggests the rationale is ensuring fairness and reasonableness, which is assessed by reference to the principle of compensation. The first strand of Canadian penalty cases identified by Veel, which utilize the genuine pre-estimate of loss test, are consistent with this rationale. If a clause genuinely pre-estimates loss, it has a compensatory purpose and is therefore fair and reasonable. If a stipulated sum is "grossly excessive" or "extravagant and unconscionable" as compared to the innocent party's predicted (or perhaps actual) loss, then the clause is not compensatory and is accordingly unfair and unreasonable.[116] The Singapore Court of Appeal recently reached a similar conclusion, rejecting the *Cavendish* version of the penalty doctrine and instead opting to retain *Dunlop*'s genuine pre-estimate of loss test because the latter is "wholly consistent" with the defendant's obligation "to pay damages by way of compensation."[117]
>
> As Worthington points out, however, this rationale does not articulate *why* clauses that depart from the common law's default compensation standard ought to be considered unfair or unreasonable. [118] If the parties have genuinely agreed to the stipulated sum, why should the default compensation standard be mandatory?[119]
>
> The "why" may be provided by the theory of corrective justice, which the Supreme Court of Canada has repeatedly endorsed, even describing it as the "orientation of contract law."[120] At the risk of (gross) oversimplification, this theory holds that remedies for breach of contract achieve justice through their corrective function; they correct—that is, undo—the wrong (the breach of contract) committed by the defendant against the plaintiff by compelling the defendant to place the plaintiff in the position they would have been in had the contract been performed.[121] This may explain why Canadian courts are wary of penalty clauses that depart from the compensatory principle: such clauses can produce injustice.[122]
>
> [Emphasis in original.]

[30] Counsel for the defendants asserts that this is a contract of adhesion (a convenient description of which is a "Take it or leave it" contract: *Apps v. Grouse Mountain Resorts Ltd*., 2020 BCCA 78 at para. 3).

[31] The validity of the Contract is not disputed. As noted above, the Contract, including the "Terms of Sale", were detailed in the agreed statement of facts, and the Contract itself is in evidence.

[32] I have no evidence regarding the circumstances, if any, leading to the interest rate provision in the Contract. It may or may not be a standard form used by the plaintiff and familiar to the defendants based on other dealings.

[33] There was evidence at trial that the defendants dealt with both the plaintiff and the plaintiff's related company, Vitrum Glass Ltd. ("Vitrum"). Indeed, the defendants successfully paid a Vitrum invoice the day before the wire transfer to the fraudster.

[34] As noted in *Mexican Sol* at para. 85 (citing *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage & Motor Co*., [1915] A.C. 79 (H.L.)), the time which must be considered in determining whether an interest provision is extravagant or unreasonable, and thus a penalty, is at the time the contract is made. The Contract in this case was made on or about February 13, 2020, just shy of nine months before the plaintiff issued the invoice dated November 6, 2020.

[35] Tab 4 of Exhibit 2 shows "Apex Aluminum Extrusions Ltd. Customer Transactions with KD Sales" from June 30, 2020 to May 13, 2021. It reveals invoices paid by the defendants to the plaintiff. The invoice at issue was not paid, and at that time (July 12, 2021) shows as 218 days overdue. It is in the midst of several other invoices, which all indicated payment in full and zero days overdue.

[36] *Mexican Sol* goes on at that same paragraph to note two Alberta cases in which there was evidence to support the finding of a penalty in relation to alleged extravagant or unreasonable interest rates.

[37] *Bidell* summarizes the distinction between a penalty clause and liquidated damages:

> [23] Courts have enforced contract provisions that are a *bona fide* pre-estimate of damages suffered on breach or non-performance of a contract. These are commonly known as liquidated damages clauses. Conversely, courts have refused to enforce penalty provisions, which are essentially designed to deter a party from breaking a contract, irrespective of the anticipated loss. But a more fundamental issue here is whether this analysis applies at all to the present appeal. We say it does not. This analysis only applies on breach or non-performance of the contract; it does not apply to a conditional event that is governed by the contract.

[38] I note the comments of our Court of Appeal in *Century Services Corp.,* paras. 87 to 94, and in particular para. 89:

> [89] Notwithstanding cases such as *Magnum Leasing, supra,* most courts are reluctant to interfere with contractual interest rates, especially those agreed upon by commercial parties. While the day has passed when "Chancery mend[ed] no man's bargain" (see *Maynard v. Moseley* [1676] 3 Swan 651 at 655, cited by Harman L.J. in *Campbell Discount Co. v. Bridge* [1961] 2 All ER 97 (C.A.), *rev'd* [1962] 1 All ER 35 (H.L.)), modern courts do not regard themselves as having some free-floating discretion to ignore or vary contractual terms of which they disapprove. Equity 'follows the law' and still operates on certain principles to this day. It will not enforce penalties; it will relieve against certain mistakes; it will relieve against an unconscionable bargain or fraud. But I am not aware of any equitable principle that would permit a court to rewrite a commercial loan agreement solely by virtue of the judge's opinion that an interest rate (though legal) was excessive, or that a party's misconduct was deserving of punishment in the form of the denial of interest at the rate agreed upon. This was a high-risk loan and as such was always going to exact a high rate of return for the lender. The Loan Agreement was entered into by TLT in an effort to obtain more time in the very difficult circumstances facing it. Ms. Leroy has not challenged the judge's finding that there was no inequality of bargaining power resulting in an "improvident bargain". (At para. 130.) I assume that she has remained in occupation of the property since 2008.

[39] The defendants say that the amount owing in interest calculated at the Contract rate is now slightly in excess of the amount of the invoice. That may be, but that is due to the passage of time, during which contractual interest on the principal sum owed under the invoice has accrued as that invoice remains unpaid.

[40] This is an unfortunate matter in which a third party fraudster has damaged both the plaintiff and the defendants. After a trial, the plaintiff was granted judgment for the amount of the invoice dated November 6, 2020.

[41] I agree that this is not a case where the defendants have been holding on to, and benefiting from, the funds equivalent to the invoice. Sadly, they paid those funds to a third party fraudster. No party has benefitted from those funds since the date that the fraud crystalized.

[42] Nonetheless, the plaintiff has not had those funds, and the Contract agreed upon by the parties provides for interest for late payment at the rate agreed to at the time the Contract was made, which was February 2020.

[43] The provision for interest in the Contract in this case is very similar to an equivalent term in *Epoch Press Inc. v. Sewak*, 2011 BCSC 323 [*Epoch*].

[44] In *Epoch*, the "credit agreement" provided:

> I/we further agree to pay your account within your terms of payment (60 days), following receipt of invoice. To pay 2% interest and services charges per month (24% per annum), on overdue accounts and I/we assure full responsibility for costs incurred, including legal fees or collection of the account.
>
> [Emphasis in original.]

[45] Recall that the Contract in this case is styled "Confidential Credit Application & Agreement".

[46] In *Epoch*, Madam Justice Gropper had no difficulty finding that the contractual interest rate applied (paras. 13 and 14).

[47] I do not agree with the defendants that an award of contractual interest is a supposed windfall to the plaintiff. It is what is due under a contract into which defendants freely entered. At the time the Contract was made, the expectations were clear and unequivocal: the interest on overdue invoice amounts was "2% per month compounded monthly (28.6% per annum)".

[48] The reason for any alleged windfall now is due to interest accrued on the outstanding invoice while the defendants resisted the plaintiff's claim for payment. The defendants were perfectly entitled to do that. However, having done so and ultimately been found liable, they now seek to avoid liability for the full amount of interest that accrued consequent upon their choice to defend the claim through to trial.

[49] The interest rate is higher than some of the other cases noted, but many of those cases do have substantial interest rates in excess of 20%. Those interest rates are not illegal, and nor is the one in the Contract. Indeed, the defendants do not quibble with the general proposition of the interest rate at issue being "reasonable in the circumstances of a party being late on payment".

[50] The defendants are familiar with these types of contracts, and indeed, are well-familiar with this plaintiff and its related company Vitrum.

[51] The Contract is not one of adhesion. The defendants chose to enter it of their free will. The interest payable compensates the plaintiff for the inability to use the funds over the years. The rate is relatively high, but not out of line with other cases and certainly not illegal. In my view, this is not a situation where this Court should opine that this particular rate, though legal, is excessive, and thereby rewrite this Contract and fashion some lower rate.

[52] In accordance with the principles set out above, I find that the interest provision in this Contract does not amount to a penalty. It amounts to interest on a debt, in accordance with the terms of a valid, clear and unequivocal contract freely entered into by commercial parties, and in particular with defendants who are well-familiar with the industry and this plaintiff (*Century Services Corp.*, para. 89).

[53] Since there is no penalty clause, no relief from it is warranted at common law or pursuant to the *Law and Equity Act*.

[54] Given the pleadings, interest is payable at the Contract rate of 2%, compounded monthly (28.6% per annum) from the date claimed in the original notice of civil claim (June 2, 2021) to the date of judgment (December 13, 2023).

[55] I expect that the parties can determine the interest owing, but if not, they may make further application in that regard.

Costs

[56] The Contract sets out the provisions regarding costs, in one instance for the defendant, KD Sales & Service Limited, and in the other for the guarantor, Mr. Kadler.

[57] For the defendant, KD Sales & Service Limited, the Contract states at page 2 under “Terms of Sale”:

> The customer agrees to pay all cost of collection, legal fees connected with this account should such action be deemed necessary due to non-payment.

[58] For the defendant, Mr. Kadler, the Contract states at page 3, under Co-Covenant Agreement":

> In consideration of Apex Aluminum Extrusions extending credit to the above named business, the undersigned guarantors hereby each personally guarantee the payment of all sums hereby owing by the Applicant to Apex Aluminum Extrusions, including all reasonable attorney fees and/or cost incurred in connection with this debt.

[59] As before, the defendants are jointly and severally liable for costs.

[60] The plaintiff submits that reasonable legal costs are payable pursuant to the Contract. The plaintiff notes that the term "reasonable" appears only in the "Co-Covenant Agreement" portion, but concedes that the word "reasonable" must be read into the "Terms of Sale" with regard to assessing costs under that provision.

[61] The defendants submit that costs should be assessed in accordance with the *Supreme Court Civil Rules*.

[62] The plaintiff's alternative submission is that if the defendants are right and costs are to be assessed in accordance with the *Supreme Court Civil Rules*, then the plaintiff is entitled to double costs from December 17, 2021 onward, pursuant to Rule 9-1 (in that regard, an affidavit #2 of Alyshia Pisarski was filed by the plaintiff on January 10, 2024).

[63] As with the provision for interest in the Contract in this case, the terms of the Contract regarding costs are very similar to those in *Epoch*.

[64] In *Epoch*, the "credit agreement" provided:

> I/we further agree to pay your account within your terms of payment (60 days), following receipt of invoice. <u>To pay 2% interest and services charges per month (24% per annum) on overdue accounts and I/we assure full responsibility for costs incurred, including legal fees or collection of the account</u>.
>
> [Emphasis in original.]

[65] General principles regarding interpretation of commercial contracts are set out in *Group Eight Investments Ltd. v. Taddei*, 2005 BCCA 489 at paras. 20 to 21.

[66] As stated by Justice Donegan (now Donegan JA) in *Eisler Estate v. GWR Resources Inc.*, 2020 BCSC 562 at paras. 30 to 32 [*Eisler*]:

> [30] Contractual costs are different. Courts have recognized that in entering into a contract, the parties may agree that one party will reimburse the other for actual legal fees and other expenses in certain circumstances. When those circumstances arise, entitlement to recovery of those actual legal fees and other expenses is derived from the terms of the contract and not from the statutory costs regime in the *Civil Rules*: *Tanious* at para. 52.
>
> [31] Where such a contract exists, the right to be indemnified for actual legal fees and expenses must be "clearly and unequivocally expressed." However, it is important to remember that no "magical incantation" is required in order for a party to be entitled to a specific order for costs: *Bakshi v. Shan*, 2013 BCSC 969 at para. 44.
>
> [32] Like all questions of a contractual interpretation, the reasonable intention of the parties falls to be determined on the basis of the language used: *Bakshi* at para. 44.

[67] The Court of Appeal had occasion to consider the trial decision in *Eisler* in *Eisler Estate v. GWR Resources Inc.*, 2021 BCCA 247. In so doing, the Court stated at paras. 4 and 5:

> [4] The contract in question was a written contract drafted by the appellant pursuant to which the respondents were to provide services to the appellant. Its provisions addressed not only termination and the payment of severance, but also indemnity, as follows:
>
> > 6.03 The Company shall pay all legal fees and expenses incurred by Eisler in contesting or disputing any termination or in seeking to obtain or enforce any right or benefit provided by this Agreement, provided that Eisler is successful in any such action.
>
> [5] Before us, as they did before Justice Donegan, the respondents rely on this clause in seeking full indemnity for their legal fees and expenses incurred in relation to this appeal. Like Justice Donegan, we can see no reason not to make the order requested.

[68] The Court of Appeal went on to note at para. 7 that the appellant's obligation "arises under contract", citing para. 30 of the *Eisler* trial decision of Donegan J. set out above.

[69] In *Epoch*, Madam Justice Gropper addressed a credit agreement provision, finding that Mr. Sewak bore “full responsibility for any costs incurred, including legal fees or collection of the account”. Further, Gropper J. found that the wording “including legal fees” included “legal fees and disbursements (para. 13).

[70] In this case, I find the terms of the Contract are clear and unequivocal.

[71] Assessing the terms of the Contract in a manner consistent with the authorities above, I find that the defendants are liable for reasonable legal fees, including disbursements, “connected with this account should such action be deemed necessary due to non-payment”.

[72] In this case, there was:

1) An account, for $113,587.30;

2) There was non-payment of that account; and

3) These legal proceedings transpired, leading to a finding after trial that the defendants were liable.

[73] The plaintiff relies on the Contract to seek full legal indemnity of its reasonable legal fees and disbursements.

[74] In these circumstances, I find the plaintiff is entitled to full indemnification by the defendants for its reasonable legal fees and disbursements in the prosecution of this matter.

[75] In the event that the parties cannot otherwise resolve that amount, the parties shall set the matter down for assessment by the Registrar.

[76] Given my finding that the plaintiff is entitled to contractual costs, I need not deal with the issue of double costs or the related affidavit evidence referred to above.

“Doyle J.”