

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Mr. Justice Marc M. Monnin
Madam Justice Diana M. Cameron

BETWEEN:

<i>10008480 MANITOBA LTD.</i>)	<i>R. A. McFadyen</i>
)	<i>for the Appellant</i>
)	
<i>(Applicant) Appellant</i>)	<i>T. J. Hansell and</i>
)	<i>C. Liebzeit</i>
<i>- and -</i>)	<i>for the Respondent</i>
)	
<i>ALL-FAB BUILDING COMPONENTS LP</i>)	<i>Appeal heard:</i>
)	<i>January 29, 2025</i>
<i>(Respondent) Respondent</i>)	
)	<i>Judgment delivered:</i>
)	<i>June 13, 2025</i>

BEARD JA

I. THE ISSUE

[1] The applicant, 10008480 Manitoba Ltd. (KenCo) is appealing the judgment of the application judge in which he found that the respondent, All-Fab Building Components LP (All-Fab) (the partnership) had validly exercised the employee call option (the call option) in the limited partnership agreement dated August 31, 2019 (the partnership agreement) by notice dated November 5, 2021 (the transaction).

[2] This case is about the interpretation and application of the terms of the partnership agreement that relate to the forced sale of limited partnership units (the partnership units) where one of the limited partners, here, KenCo, is being forced out of the partnership. One of those terms is a power of attorney, found in article 4.20(g) of the partnership agreement, which gives certain powers to the general partner, here, 10010167 Manitoba Ltd., acting for All-Fab, to complete closing documents on behalf of a limited partner where the limited partner refuses to close the transaction. For the limited purpose of this application, the actions of the general partner are those of All-Fab.

[3] At the appeal hearing, the issue narrowed to whether the use of the power of attorney, once KenCo refused to complete the transaction, was mandatory or optional.

II. BACKGROUND

[4] By way of background, All-Fab is a Manitoba limited partnership that consists of one general partner and several limited partners, one of which is KenCo. All-Fab carries on business designing, manufacturing and distributing structural wood-building components for residential, commercial and agricultural applications, as well as prefabricated homes and buildings. The business and affairs of All-Fab and the relationship among the partners are governed by the partnership agreement.

[5] Kenneth Friesen (Mr. Friesen) was the chief financial officer of All-Fab until his employment was terminated without cause on July 7, 2021, after a career of over twenty years. His employment allowed him to participate as a limited partner in All-Fab and to hold partnership units of

some significance. KenCo is the holding company for Mr. Friesen's partnership units and one of the limited partners of All-Fab.

[6] The partnership agreement provided that, upon termination of Mr. Friesen's employment, All-Fab had an irrevocable call option to purchase KenCo's partnership units, including any units that KenCo might purchase pursuant to its options.

[7] The partnership agreement also gave KenCo a similar, although narrower, right to require All-Fab to purchase KenCo's partnership units (the put option), but that was only exercisable within a specified period of time.

[8] The terms and conditions for exercising the put and call options are detailed in articles 4.19 and 4.20 of the partnership agreement. Article 4.19 sets out when and how to give notice to exercise an option, while article 4.20 sets out how the purchase price is to be calculated, how the payment is to be made and what documents are to be prepared to close the transaction. Article 4.20 also includes an irrevocable power of attorney whereby KenCo appoints the general partner as its attorney regarding the execution of the closing documents required under that article (see paragraph 2 herein).

[9] Pursuant to article 4.19, All-Fab delivered a notice to KenCo dated November 5, 2021, that it was exercising its call option to purchase KenCo's partnership units, provided KenCo with documents to sign to complete the transaction, as required by articles 4.20(d) and 4.20(e), and set the closing date.

[10] Prior to the closing date, KenCo, through its counsel, advised All-Fab that it was dissatisfied with the valuation report and settlement that

were part of All-Fab's closing documents and that it was unwilling to close on those terms. In light of KenCo's rejection of the notice, All-Fab did not tender the funds to close the transaction (the funds) on the closing date, having concluded that it would be futile to do so because KenCo was not prepared to proceed, and that the funds, if tendered, would not be accepted.

[11] Subsequent discussions to resolve KenCo's concerns were not successful, so on February 1, 2022, KenCo purported to exercise its put option to force All-Fab to purchase its partnership units and forwarded documents to All-Fab to that effect. All-Fab's position was that the put option was no longer available under the terms of the partnership agreement because it had already validly exercised its call option.

[12] KenCo's objection to closing the transaction related, in part, to the determination of the correct valuation date, which, in turn, was determined by the earliest valid notice to either buy (call) or sell (put) the partnership units. The value of the partnership units had increased between the termination of Mr. Friesen's employment on July 7, 2021, the date of All-Fab's call notice on November 5, 2021, and the date of KenCo's put notice on February 1, 2022, by approximately \$1 million. Thus, it was to KenCo's advantage, and to All-Fab's disadvantage, to have a later notice and valuation date.

[13] The issue of the validity of the notices proceeded before the application judge.

[14] One of KenCo's positions on the application was that there was not only an ability but also an obligation on the part of All-Fab to use the power of attorney provisions to close the transaction when KenCo indicated that it

would not do so, and, having failed to do so, All-Fab could not argue that the tendering of documents and the funds on the date of closing would have been futile. It said that All-Fab was required to tender the funds and use the power of attorney to close the transaction. It argued that the failure to tender brought an end to All-Fab's call option, with the result that KenCo's put option became the governing option.

[15] The application judge found that All-Fab's call notice was valid. In his view, based on jurisprudence to that effect, there was no obligation on All-Fab to tender the funds on the date of closing, given that it had received a prior indication from KenCo that it would not complete the closing.

[16] The application judge noted KenCo's argument at the hearing that, had All-Fab purported to use the power of attorney provisions to close the transaction, it would have just invited litigation by KenCo about the use of the power of attorney, instead of the validity of the notices. It would not, however, have led to an actual end to the litigation. He found that All-Fab had done what was necessary to exercise its call option and upheld the validity of its call notice.

[17] As noted, the main issue on this appeal relates to the interpretation and use of the power of attorney in article 4.20(g), including whether All-Fab, through the general partner, was required to use the power of attorney to execute the closing documents and close the transaction when KenCo failed to do so, or whether it was given the option to do so.

III. STANDARD OF REVIEW

[18] The standard of review in an appeal dealing with contractual interpretation was determined by Rothstein J, for the Court, in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 43-55, wherein he applied the standards of review for questions of fact, law and mixed fact and law that were set out in *Housen v Nikolaisen*, 2002 SCC 33. Those well-known standards are correctness for questions of law (see *ibid* at para 8) and palpable and overriding error for questions of fact (see *ibid* at para 10) and mixed fact and law (see *ibid* at para 36).

[19] The key to Rothstein J's decision, however, was his rejection of earlier jurisprudence that held that questions of contractual interpretation were questions of law. He found, instead, that contractual interpretation involved questions of mixed fact and law, except for the rare circumstance where a question of law could be extricated from a question of mixed fact and law (see *Sattva* at paras 1, 42-55, and, in particular, para 50).

[20] Justice Rothstein's decision was recently affirmed by the Supreme Court of Canada in *Earthco Soil Mixtures Inc v Pine Valley Enterprises Inc*, 2024 SCC 20 at paras 27-29, 33. In that decision, Martin J, for the majority, confirmed that:

- questions of contractual interpretation involve questions of mixed fact and law and are ordinarily afforded deference on appellate review; here, the standard of review will be palpable and overriding error (see *ibid* at paras 27-28);
- there is an exception for errors on extricable questions of law, which will, however, be rare and uncommon; here, the standard of review will be correctness (see *ibid*); and

- the tendency of some appellate courts to use *Sattva* to elevate the standard of review is to be resisted (see *ibid* at para 28).

(See also *Heritage Capital Corp v Equitable Trust Co*, 2016 SCC 19 at paras 21-22.)

[21] As stated in *Sattva* at para 53, and confirmed in *Heritage Capital* at para 22, extricable questions of law include “the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor”. An error of law also includes an error in “a trial judge’s declaration of the governing law”, “where a trial judge has simply identified and applied the wrong legal test, . . . the wrong proposition of law . . . the wrong analytical approach, including asking the wrong question” or the “interpretation of the common law” (Donald JM Brown with the assistance of David Fairlie, *Civil Appeals* (Toronto: Thomson Reuters, 2025) (loose-leaf updated 2025, release 2) vol 2, ch 14 at s 14:24) [footnotes omitted].

IV. ANALYSIS

Further Assurances Provisions

[22] As noted earlier, articles 4.19 and 4.20 determine when and how the partnership and a limited partner can initiate and effect a buy-out of partnership units. Articles 4.20(d) and 4.20(e) set out the obligations to complete a buy-out as follows:

4.20 Provisions Applicable to Sale and Purchase of Employee Units

(d) **Releases.** The applicable Employee Holdco shall execute an absolute release in favour of the Partnership dealing with all matters, except payment of the balance of the purchase price and applicable interest, in form and substance acceptable to the solicitors for the Partnership.

(e) **Other Documents.** The applicable Employee Holdco and the Partnership shall execute all such other documents as are necessary to complete the transfer of the Employee Holdco Units being sold and purchased, as required by the solicitors for the Partnership.

[23] Provisions like articles 4.20(d) and 4.20(e) are further assurances provisions. As explained in Cynthia L Elderkin & The Hon Julia S Shin Doi, *Behind and Beyond Boilerplate: Drafting Commercial Agreements*, 5th ed (Toronto: Thomson Reuters, 2024) at s 9:55:

. . . The basic intent and purpose of the further assurances provision is to obligate one or more of the contracting parties to do such things and execute such documents as are necessary to ensure the purpose of their agreement is carried out and fulfilled, and to cure, if necessary, any defect in the transaction contemplated by the agreement.

[24] Further assurance provisions often include a power of attorney whereby one party (i.e., the donor) appoints the other (i.e., the donee) as its attorney to execute additional documents to carry out the further assurances if the donor fails or refuses to do so (see *ibid* at s 9:58).

Power of Attorney

[25] The power of attorney provision of the partnership agreement is found at article 4.20(g), and the general partner's duty of care is found at article 7.3, reproduced as follows:

4.20(g) Power of Attorney. Each Employee Holdco hereby irrevocably constitutes and appoints the General Partner as his or her true and lawful attorney and agent with respect to executing and delivering any document, certificate, transfer or assignment form, or any other instrument required to be executed or delivered by each Employee Holdco pursuant to this Section 4.20.

7.3 Standard of Care

The General Partner shall act in the best interests of the Partnership at all times and shall exercise its powers and discharge its duties under this Agreement honestly, in good faith, and in the best interests of the Partnership and shall exercise the degree of care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances.

[26] Connor McGarry & Michelle Cicchino, “Powers of Attorney in the Commercial Context” (23rd East Region Solicitors Conference, 2017) at tab 22D, online: <canlii.org/en/commentary/doc/2017CanLIIDocs3895>, explains that a power of attorney is a legal document whereby one person (i.e., the donor) appoints and confers authority on another person (i.e., the donee) to act on the first person’s behalf. The authors note that there are three types of powers of attorney—the first is a general power of attorney that authorizes the attorney to manage finances and/or property while the grantor (i.e., the donor) is alive and mentally competent; the second and third are an enduring power of attorney and an advanced health care directive that continue if the grantor becomes mentally incompetent.

Power of Attorney with Interest

[27] Apart from those types of powers of attorney, there is also a common law power of attorney that applies in the commercial context, being a “power of attorney with an interest”, also called a “power of attorney coupled with an

interest” and a “power given as security”. McGarry & Cicchino provide the following example of the use of this power of attorney (at 3):

A common example of a power of attorney coupled with an interest is in the course of a creditor / debtor relationship, where the debtor grants a power of attorney [to the creditor] to secure the creditor’s interest in the event of default.

[footnote omitted]

[28] Another example of power of attorney coupled with an interest is explained by Jennifer A Pfuetzner, “Powers of Attorney: Emerging Issues” in Brian A Schnurr & M Elena Hoffstein, eds, *Estates and Trusts Forum: 2000* (Toronto: The Law Society of Upper Canada, 2000) at 69:

It is not uncommon for a power of attorney for property to be given to secure the performance of an obligation. For example, if shares are pledged as security for a debt, a power of attorney over the shares is often given to enable the secured creditor to transfer the shares in the event of default under the agreement so that the secured creditor can realize on the security.

[29] In Kevin P McGuinness, *The Encyclopedic Dictionary of Canadian Law*, vol 3 (Toronto: LexisNexis Canada, 2021) sub verbo “Powers of attorney coupled with an interest”, a power of attorney coupled with an interest is explained as follows:

A type of power of [attorney] commonly found in commercial agreements. Generally, such a power of attorney may survive not only the mental incapacity of the donor, but also the death of the donor. In order for such a power of attorney to be recognized, two conditions must be satisfied: (a) adequate consideration must have passed between the donee and the donor. (b) The power must have been given for the purpose of securing a benefit to the donee, i.e. security for a debt owed by the donor. . . . [W]here there is a

[power of attorney coupled with an interest] the donee may exercise the powers conferred under the [power of attorney coupled with an interest] in his or her own interests.

[30] This type of a power of attorney is often found in shareholder agreements, which are analogous in this regard to the partnership agreement. This use is explained in Ricky W Ewasiuk, *Drafting Shareholder Agreements*, 2nd ed (Toronto: Carswell, 2012) at s 8.25 as follows:

It is sometimes useful to grant powers of attorney in the body of a shareholder agreement to better enable the performance of the agreement or to provide protections for other shareholders (usually the majority). For example, to better ensure that a shareholder will deliver the required conveyances on a closing of a buy-sell an attorney clause may be utilized to give a named individual, a particular officer or even the corporation itself the power to execute and deliver those conveyances on the seller's behalf if he or she defaults.

...

Fortunately the law does recognize a second kind of power of attorney [in a shareholder agreement] that can be made irrevocable and which will survive mental incapacity and death, commonly known as a "power of attorney coupled with an interest". A power of attorney coupled with an interest first requires that valuable consideration be given to the donor, something which presumably can be sufficiently constituted within the mutual covenants of the shareholder agreement itself, and second that the power be given for the purpose of securing a benefit to the donee in the subject matter of the power. Note that the "benefit" here is not, of course, the power itself but rather the purpose must be to secure some other benefit that the donee wishes to better secure in the subject matter of the power.

[footnotes omitted]

[31] The difference between a power of attorney and a power of attorney with an interest is explained by McGarry & Cicchino as follows (at 3):

A power of attorney coupled with an interest creates a relationship that is in the interest of the recipient of the power of attorney and must be more than just a mere grant of authority. This differs from the conventional power of attorney . . . which [is] granted solely for the benefit of the grantor.

[32] Article 4.20(g) appoints the general partner as KenCo’s “true and lawful attorney and agent”. On the issue of power and agency, Bryan A Garner, ed, *Black’s Law Dictionary*, 12th ed (2024) sub verbo “power coupled with an interest”, online: (WL) Thomson Reuters, states as follows:

A power to do some act, conveyed along with an interest in the subject matter of the power. •A power coupled with an interest is not held for the benefit of the principal [i.e., KenCo], and it is irrevocable because of the agent’s [i.e., All-Fab] interest in the subject property. For this reason, some authorities assert that it is not a true agency power.—Also termed *power given as security*; *proprietary power*. See *irrevocable power of attorney* under power of attorney. . . .

“[S]uppose that the principal borrows money from the agent and by way of security authorizes the agent to sell Blackacre if the loan is not repaid and pay himself out of the proceeds. . . . The reason why such a case is not properly governed by the considerations usually making an agency revocable is that this is in reality not a case of agency at all. In a normal agency case the power is conferred upon the agent to enable him to do something for the principal while here it is given to him to enable him to do something for himself. Coupled with an interest means that the agent must have a present interest in the property upon which the power is to operate.”

[33] McGarry & Cicchino explain the requirements for such a power as follows (at 3):

According to R.W. Ewasiuk, Q.C., the requirements for a power of attorney coupled with an interest are:

1. that valuable consideration must be given to the donor;
and
2. that the power be given for the purpose of securing a benefit to the recipient of the subject matter of the power.

It should be noted that it must be the recipient that is the beneficiary of the benefit being secured, not someone else.

[footnotes omitted]

[34] In the present case, an irrevocable power of attorney was given by KenCo to the general partner for the benefit of the partnership (see article 7 of the partnership agreement), that being the ability to close its purchase of KenCo's partnership units under articles 4.19 and 4.20 if KenCo failed to do so. Further, there was consideration for the granting of this power of attorney, in that it was part of the consideration for entering into the partnership agreement, as set out in the covenants to that agreement.

[35] In my view, the power of attorney referred to in article 4.20(g) is a power of attorney with an interest. While terms or limits of the power could be contained in a separate power of attorney document, there is no indication that there was such a document in this case. Thus, the terms of the power in this case flow from the partnership agreement and, in particular, article 4.20(g).

Mandatory or Optional

[36] KenCo argues that the use of the power of attorney was mandatory, rather than optional, such that, when KenCo refused to close the transaction,

All-Fab was required to exercise its power as KenCo's attorney under article 4.20(g) to execute the closing documents on behalf of KenCo. KenCo says that, because All-Fab had the ability to close but failed to use its power as KenCo's attorney to do so, it could not rely on KenCo's failure as a reason not to tender the funds to complete the purchase of the partnership units. It argues that failing to take these steps ended All-Fab's call option.

[37] In determining whether the use of the power of attorney under article 4.20(g) was mandatory or optional, I note that there is nothing in the wording of that provision that suggests that it is mandatory.

[38] This conclusion is supported by the plain meaning of the word "power", as opposed to duty or obligation. As McGuinness explains, "power" is "[t]he ability to do something or act in a particular way" or "[t]he capacity, potential or competence to possess and exercise a type of authority, especially a legal authority of some kind." *Black's* defines "power" as "[t]he ability to act or not act; esp., a person's capacity for acting in such a manner as to control someone else's responses". *Black's* further states that it is "[t]he legal right or authorization to act or not act; a person's or organization's ability to alter, by an act of will, the rights, duties, liabilities, or other legal relations either of that person or of another."

[39] Further, I note that KenCo has not pointed to any jurisprudence that supports its position that the use of the power of attorney was mandatory.

[40] I am of the view that the use of the power of attorney in this case was optional, not mandatory. It was given to the general partner, 10010167 Manitoba Ltd., acting for All-Fab, to assist with closing a transaction under articles 4.19 and 4.20 over the objection of an uncooperative limited partner.

There is, however, nothing in the wording of the partnership agreement, in article 4.20(g), or in the jurisprudence that suggests that the general partner must exercise its power as KenCo’s attorney to execute documents on behalf of KenCo and complete the transaction where KenCo refused to do so. As noted earlier, article 7.3 of the partnership agreement requires that the general partner act in the best interests of All-Fab when exercising its powers and duties under the partnership agreement (see paragraph 25 herein).

Waiver

[41] The power of attorney, being in aid of the further assurances, was inserted for All-Fab’s benefit, to give it the right to act for KenCo if it refused to do so. This raises the doctrine of waiver. “Waiver occurs when one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right” (*Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co*, [1994] 2 SCR 490 at 499, 1994 CanLII 100 (SCC)). Further, waiver can be inferred from conduct (see *Federal Business Development Bank v Steinbock Development Corporation Ltd*, 1983 ABCA 91 at para 20).

Application to the Facts

[42] KenCo argues that the application judge made two errors—first, he misstated KenCo’s position regarding the nature of further litigation and, second, he erred regarding the applicable legal principles.

[43] Regarding the first error, the application judge stated that “in the course of argument counsel for KenCo acknowledged that had All-Fab used its power of attorney in that fashion, the parties probably would have found themselves litigating that issue, instead of the efficacy of the Employee Call

Option.” KenCo argues that that was an error because it was a misstatement of its position. It states that its position was that, if All-Fab had used the power of attorney to close the transaction, there would have been further litigation to determine whether the notice provided for payment of the fair market value of the partnership units and a claim for damages, not about the use of the power of attorney.

[44] Even if the application judge made a palpable and overriding error in his understanding of the nature of the further litigation, in my view, that error was not material to his decision. The material point was that the use of the power of attorney would not have ended the proceedings—a point with which KenCo agreed.

[45] Regarding the second error, the application judge found that “KenCo’s argument that All-Fab ought to have exercised its power as attorney [was] without merit [because] KenCo cited no authority for the proposition that an attorney in these circumstances could use its authority to its advantage over the stated objections of its beneficiary.”

[46] In my view, that finding is not correct as it applies to a power of attorney with an interest. The law is clear that the very purpose of this type of power of attorney is to provide protection for the donee, not the donor, and to enable the donee to take the steps required to be taken by the donor to complete an agreed step or transaction if the donor defaults in its obligation to do so. Unfortunately, this type of power of attorney was not raised or argued before the application judge by either party.

[47] While the application judge erred by finding, in effect, that All-Fab could not use its power as attorney over KenCo’s objections, the result was

the same as finding that All-Fab could, but was not required, to do so, as both would result in All-Fab not being required to use its power as attorney when KenCo defaulted. In the end, the fact that All-Fab did not use its power as attorney, whether by law or choice, led to the same result—All-Fab could rely on KenCo’s stated refusal to close, it was not required to correct that default, it was not required to tender the funds, and its failure to do so did not invalidate All-Fab’s call option.

[48] Thus, while the application judge erred in law by misstating the common law and by failing to apply the correct legal principles, in my view, the error was not material to the outcome because the application of the correct legal principles would have led to the same result—that All-Fab’s call option was valid (see *Brown* at ss 6:2, 6:5; *Davis v R*, 2019 MBCA 78 at para 61).

[49] Further, in my view, All-Fab’s conduct in not invoking the power of attorney provision leads to the inference that it was waiving its right to do so, particularly given the probability of further legal proceedings even if it had exercised that right. I am of the view that All-Fab waived its right to execute the closing documents as KenCo’s attorney when it chose to rely on KenCo’s failure to close and withheld the tendering of the funds.

Western Larch Ltd

[50] KenCo relies on the decision in *Western Larch Ltd v Di Poce Management Ltd*, 2013 ONCA 722, leave to appeal to SCC refused, 35704 (10 April 2014), to support its position. Justice Lauwers wrote unanimous reasons for the Ontario Court of Appeal in *Western Larch*, in which he explained the issue in that case as follows (at para 1):

The motion judge, sitting as a judge on the Commercial List, granted partial summary judgment in a commercial dispute about the exercise of a shotgun buy-sell provision in a partnership agreement. He ruled that although the respondents' buy-sell offer did not comply perfectly with the shotgun buy-sell provision, it was nonetheless valid and enforceable. He directed a trial on the appellants' claims for damages for three breaches of contract.

[51] He further found (*ibid* at para 64):

[T]he buy-sell offer [was] sufficiently compliant with the shotgun buy-sell provision in the PA to meet the strict compliance standard. As I have said, strict compliance is not perfect compliance. Neither the law, nor the requirements of commercial certainty in this area, requires perfect compliance.

[52] Ultimately, he concluded (*ibid* at para 78):

[T]he motion judge did not err in fixing the applicable measure of damages as the appellants' full compliance with Alternative 2. This measure reflects the commercially reasonable expectations of these parties in the context of a triggered shotgun buy-sell offer under their PA.

[53] In my opinion, *Western Larch* is primarily about the use of shotgun buy-sell provisions in a partnership context. While a power of attorney was used to close the transaction in that case, that fact did not figure prominently in the Court's decision. Although the Court did not take issue with the use of the power of attorney in that case, it made no comments regarding that use.

[54] A review of the application of *Western Larch* in subsequent jurisprudence shows that it is most often referenced in relation to buy-sell provisions, a court's unwillingness to rescue parties from carefully crafted business arrangements and showing deference to trial judges on the subject of

remedies. Similarly, no commentaries on the decision, or on the use of such powers of attorney, relate to whether that use is mandatory or optional.

[55] In my opinion, while *Western Larch* is an example of a case in which a similar power of attorney was apparently used, that use was not the subject of the litigation and, in my view, the case is of no assistance in determining any issues in this appeal.

V. CONCLUSION

[56] In my view, the power of attorney in article 4.20(g) of the partnership agreement is an irrevocable power of attorney with an interest, by which KenCo appointed All-Fab as its attorney to execute and deliver “any document, certificate, transfer or assignment form, or any other instrument required to be executed or delivered by each Employee HoldCo [including KenCo] pursuant to this [article] 4.20”.

[57] Given that the power of attorney in article 4.20(g) is a power of attorney with an interest, All-Fab, as the donee, was entitled to exercise the power in its own interest, including to correct a default by KenCo, as the donor, in executing and delivering the documents set out in article 4.20 to close the transaction. That said, the use of the power of attorney was not mandatory, so All-Fab was not required to act on it to close the transaction. It was open to it to waive that right, which it did by its conduct in relying on KenCo’s refusal to sign the closing documents and not tendering the funds to close.

[58] Thus, I would agree with the application judge, albeit for different reasons, that All-Fab was entitled to rely on KenCo’s refusal to close the

transaction and, therefore, it was not required to tender the funds to close on the closing date. As a result, I am of the view that the failure to tender did not bring All-Fab's call option to an end, and the application judge did not err in upholding the validity of All-Fab's call option.

VI. DECISION

[59] For the above reasons, I would dismiss the appeal and order tariff costs on the appeal to All-Fab.

_____ JA

I agree: _____ JA

I agree: _____ JA