KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 121**

Date: **2025 07 31**
File No.: KBG-RG-01559-2023
Judicial Centre: Regina

BETWEEN:

GENCORE PROPERTIES GP INC., AVENS ROAD PROPERTIES LP, PATRICK BREHM, RICHARD CLAUDE, and JANELLE CLAUDE

PROPOSED APPLICANTS

- and -

DEBORAH KOWBEL, 0967345 BC LTD., LORI STRAZA, ROCKY STRAZA, DAVID GOWER, CHRISTINE GOWER, 0967373 BC LTD., and HENRY SU

PROPOSED RESPONDENTS

Counsel:

Virgil A. Thomson, K.C.	for the proposed applicants
Milad Alishahi and Haley Stearns	for the proposed respondents

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DECISION ON APPLICATION FOR LEAVE — TOCHOR A.C.J.
July 31, 2025

I. INTRODUCTION

[1] This application raises a very large number of issues, all arising from the applicants' dissatisfaction with the decision of an Arbitrator to award damages, pre-judgment interest, and solicitor-client costs against them.

[2] The applicants, Gencore Properties GP Inc., Avens Road Properties LP,

Patrick Brehm, Richard Claude, and Janelle Claude (hereinafter referred to as the [applicants] or [Gencore]) make two primary requests in this application.

[3] First, they seek leave to appeal from the decisions of the Arbitrator dated June 9, 2023, and September 22, 2023, pursuant to ss. 45(2) of *The Arbitration Act, 1992*, SS 1992, c A-24.1 [*Act*].

[4] Second, and alternatively, they seek an order setting aside the decisions of the Arbitrator under s. 46 of the *Act*.

[5] The applicants also made preliminary objections to the affidavit of one of the respondents and to an appendix attached to the respondents' brief of law.

[6] The respondents raised a preliminary point about whether the applicants are precluded from seeking leave to appeal, or from an order setting aside the award, under the *Act*.

[7] Therefore, I am required to address the following issues:

(i) The applicants' preliminary objections to the respondents' materials;

(ii) The respondents' preliminary point of law;

(iii) The application for leave to appeal under ss. 45(2) of the *Act*;

(iv) The application to set aside the award under ss. 46(1) of the *Act*; and

(v) Costs of these applications.

[8] I address each of these issues below.

[9] During the hearing, I addressed the applicants' preliminary objection to the respondents' materials by permitting them to file an additional written submission

after the hearing. In these reasons, I also dismiss the respondents' preliminary point of law.

[10] For the reasons that follow, I grant the application of Gencore for leave to appeal the decision of the Arbitrator on the sole ground of whether prejudgment interest should have been awarded.

[11] I dismiss Gencore's application for leave to appeal the decision of the Arbitrator on any other ground. In particular, I dismiss the application of Gencore for leave to appeal from the award of solicitor-client costs.

[12] I also dismiss Gencore's application to set aside the Arbitrator's award pursuant to s. 46 of the *Act*.

II. BRIEF BACKGROUND

A. Introduction

[13] In 2013, a number of investors invested in the ownership of apartments in Moose Jaw, Saskatchewan, by purchasing 9 of 22 units in a limited partnership. A Limited Partnership Agreement dated April 11, 2013, [LPA] was executed by the respondents, Deborah Kowbel, 0967345 BC Ltd., Lori Straza, Rocky Straza, David Gower, Christine Gower, 0967373 BC Ltd., and Henry Siu (hereinafter collectively referred to as the [Claimants]).

[14] The LPA was also executed by Gencore. The applicant, Patrick Brehm, is the president of Gencore, which has three directors: Mr. Brehm, Janelle Claude, and Richard Claude. Mr. Brehm is the father of Janelle Claude and the father-in-law of Richard Claude.

[15] When disputes arose as to how Gencore was managing the affairs of the limited partnership, the Claimants filed a statement of claim against Gencore on June

17, 2018. By order of the Court on August 21, 2018, the claim was referred to arbitration in accordance with the LPA and the *Act.*

[16] A lengthy arbitration hearing was conducted over many days before the Arbitrator, the Honourable Eugene A. Scheibel; and the award was delivered on June 9, 2023: *Kowbel v Gencore Properties GP Inc.* (9 June 2023) (Sask ARB) (Arbitrator Scheibel) [*Award*]. In the *Award*, the Arbitrator found Gencore liable for damages on a variety of bases and, in the Addendum to the Award delivered on September 22, 2023, the Arbitrator awarded a specific sum damages and solicitor-client costs against Gencore: *Kowbel v Gencore Properties GP Inc.* (22 September 2023) (Sask ARB) (Arbitrator Scheibel) [*Addendum*].

[17] The applicants now seek leave to appeal the *Award* of the Arbitrator pursuant to ss. 45(2) and 46 of the *Act*.

B. The *Award* and the *Addendum*

[18] At the outset of his *Award*, the Arbitrator recited key provisions of the LPA, particularly those dealing with the parties' obligation to resolve disputes by arbitration. He then set out the position of each of the Claimants and Gencore, and identified the issues raised by both parties.

[19] The Arbitrator also commented on the nature and scope of the evidentiary record in this hearing. He noted a large number of affidavits and expert reports were filed, and that *viva voce* evidence was heard for the cross-examination of parties on their respective affidavits. He summarized the evidentiary record, consisting of several thousand pages, as "enormous" at para. 15 of the *Award*:

> [15] The parties have submitted an enormous amount of material in this Arbitration which includes several thousand pages of documents, ledgers, discovery evidence, cross-examinations on the affidavits, transcripts of evidence, written

> arguments, oral submissions, transcribed lengthy briefs of law and numerous legal decisions with respect to the argument on this Arbitration. In view of all the material filed, it is not possible to refer to each and every document and every submission made in detail.

[20] After working his way through this voluminous record, he made several critical findings of fact.

[21] As a result of these findings, he concluded the applicants, as Gencore in the limited partnership, failed to act honestly and in good faith to the limited partners. His reasons leave no room for doubt as to his findings against the applicants:

> [89] However, the evidence, which I accept, shows that there were numerous instances where the General Partner [the applicants] failed to act honestly, in good faith ad [*sic*] in the best interest of the Partnership. In addition, the directors of the General Partner failed to ensure "that the General Partner exercises its powers and discharges its duties under this Agreement honestly, in good faith, in a manner that is in the best interest of the Partnership and in accordance with its fiduciary obligations to the Partnership" and failed to "exercise a degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."
>
> [90] The evidence proves that there were numerous blatant times where this duty was breached to the detriment of the Claimants.

[22] After reviewing s. 4.11 of the LPA, which provides for indemnity to Gencore for acts undertaken in good faith, the Arbitrator found Gencore did not act in good faith on many occasions. He set out this finding at para. 92:

> [92] However, the evidence establishes that the General Partner [the applicants] and its officers, directors, employees and agents failed, on many occasions, to act in "good faith" but rather acted in bad faith as a result of their wanton and wilful misconduct and breach the LP Agreement both in contract and in negligence.

[23] He also re-iterated this finding at para. 96:

> [96] The evidence which I accept as a finding of fact establishes that the General Partners [the applicants] and its directors breached numerous sections of the LP Agreement and also failed to comply with *The Partnership Act* [RSS 1978, c P-3]. In some respects the Respondents treated this project as their sole proprietary venture with little concern for the rights of the Claimants.

[24] The Arbitrator then went on to provide a detailed list of the specific breaches of the LPA he found and the specific sections of the LPA that were breached.

[25] In addition, his reasons articulate the evidence upon which he was relying to support each of those critical findings. This identification of the supporting evidence was sometimes in the form of a reference to the evidence recited in the Claimant's Brief of Law, and these references display an evidentiary pathway for the findings he made.

[26] For other critical findings, there is a direct recitation of the evidence provided by Gencore's representatives in cross-examination. The Arbitrator explains this sourcing of evidentiary support as follows, at para. 113:

> [113] After an extensive review of the evidence in detail I am satisfied that the following breaches by the Respondents [the applicants] of the LP Agreement have been established by the evidence which I accept as a finding of fact. Rather than repeating details of each of the breaches, reference is made to the Claimants' closing Arbitration Brief for the particulars of the evidence which satisfy the burden of proof to establish a series of breaches by the Respondents of the LP Agreement: …

[27] The Arbitrator then identified, at paras. 113-168, 12 specific breaches of the LPA committed by Gencore. I reproduce his list below:

(a) Breach of section 4.2 (of the LPA) by failing at times to distribute quarterly reports and year-end financial and income tax information.

(b) Breach of sections 4.3 and 4.2 by failing to obtain the required approvals for paying themselves for services rendered to the limited

partnership which required the approval by a special resolution of the limited partners.

(c) Breach of section 4.7 by failing to keep safe, the assets of the limited partnership.

(d) Breach of s. 4.17(c) by undertaking other business activities not related to the limited partnership.

(e) Breach of sections 4.2, 4.17(d), 4.17(e) and 4.17(l) by failing to provide proper financial documents and reporting to the limited partnership.

(f) Breach of sections 4.17(j) and 4.17(n) by failing to notify the Claimants of material and adverse changes in the financial condition of the limited partnership.

(g) Breach of section 4.17(m) by failing to punctually pay amounts owing thereby incurring additional costs to the limited partnership.

(h) Breach of section 9 by failing to make distribution of distributable cash as set out in sections 9.1 and 9.2.

(i) Breach of section 10.8 by failing to obtain a fair valuation of the units of the limited partnership.

(j) Breach of sections 3.5 and 10.9 by failing to allow the limited partners to continue with their rights and privileges after opt-out vote until the date of transfer of the units.

(k) Breach of section 11 by failing to adhere to the requirements with respect to regular meetings of the limited partnership.

(l) Breach of section 13.1 by failing to provide proper financial statements of a review engagement quality.

[28] For seven of his findings of breaches of the LPA, the Arbitrator supported these findings with the evidence set out in the Claimants' Brief [findings (a), (b), (c), (g), (h), (k) and (l)].

[29] For five of his findings of breaches, he supported these findings with both a reference to the evidence set out in the Claimants' Brief and direct testimony from the cross-examination of witnesses and various documentary exhibits [findings (d), (e), (f), (i) and (j)].

[30] The Arbitrator also made a finding, at para. 170 of the *Award*, that where the evidence of the Claimants differed from the evidence of Gencore, he accepted the evidence of the Claimants.

[31] Two other passages from the *Award* summarize the gist of the Arbitrator's reasons. At para. 177, he concluded:

> [177] While I am not convinced the evidence proves that the Respondents [the applicants] acted fraudulently in a criminal sense, they did on several occasions act in bad faith and with wanton and wilful misconduct which resulted in serious breaches of the LP Agreement and caused financial loss to the Claimants by breaching the duty of care owed to the Claimants, and in so doing were negligent and in breach of contract of the LP Agreement.

[32] He also concluded that, as a result of the breaches by Gencore, the limited partners were entitled to damages, at para. 188:

> [188] The evidence of breaches is overwhelming and establishes that the General Partner [the applicants] and its Directors, on numerous occasions, breached the LP Agreement which resulted in a loss to the Claimants for which they are entitled to damages.

[33] However, because the Arbitrator did not accept one of the damage claims made by the Claimants, he asked for further submissions on: the total amount of damages sought; whether pre-judgment interest could be ordered in these circumstances; and costs.

[34] In the *Addendum*, the Arbitrator awarded damages to the Claimants in the sum of $844,373.05 (plus proportionate costs of arbitration fees, expert witness costs, and Court Reporter fees); half of the pre-judgment interest in accordance with *The Pre-Judgment Interest Act*, SS 1984-85-86, c P-22.2; and the solicitor-client costs of the Claimants.

C. Gencore's Application for Leave to Appeal

[35] Gencore sought leave to appeal many aspects, if not every aspect, of the Arbitrator's *Award*.

[36] However, it is not easy (and arguably impossible) to readily identify and categorize the numerous alleged errors that are put into play by Gencore in this application. It is not easy to readily discern whether there exists an error of law which satisfies the requirement set out in ss. 45(2) of the *Act*.

[37] This is so for at least two reasons. First, Gencore uses different categories of alleged errors in its Amended Amended Originating Application than it used in its Written Brief. Second, the sheer number of alleged errors makes an analysis of every submission, and an attempt to cross-reference every alleged error between the Originating Application and the Brief, highly cumbersome and perhaps unattainable.

[38] Gencore's list of alleged errors, as set out in its written submission, is divided into 11 categories:

(a) Interpretation errors regarding the LPA;

(b) Failure to properly plead causes of action and jurisdiction;

(c) A lack of supporting evidence or ignorance of relevant evidence by the Arbitrator;

(d) Lack of reasons;

(e) Failure to properly apply legal test for negligent misrepresentation;

(f) Failure to properly apply the test for breach of contract;

(g) Failure to apply the test for bad faith under the LPA;

(h) Failure to properly apply the legal test for limitation periods and wilful concealment;

(i) Failure to apply proper test for unjust enrichment;

(j) Failure to provide adequate reasons in terms of ordering solicitor/client costs and also taking into account matters that were not properly before the Arbitrator; and

(k) Failure to apply the law regarding the need to particularly request pre-judgment interest in the Notice to Arbitrate.

[39] However, a listing of all alleged errors of law derived from the Amended Amended Originating Application filed on October 5, 2023, reveals a total of 123 alleged errors of law.

[40] During the hearing, the Claimants complained that Gencore alleges over 120 errors of law. This part of the Claimant's submission was not challenged by Gencore and, by my count, the Claimant's calculation is largely accurate.

[41] In fact, I conclude the number of alleged errors exceeds 123 because some

of the paragraphs in the Amended Amended Originating Application contain more than one alleged error. I have not taken the time to specifically count how many errors are alleged in each paragraph; however, I estimate that the total number of alleged errors may well be in the range of 130 to 140.

[42] Because of the practical difficulties in sorting out a workable method of categorizing this number of alleged errors, I will attempt to consider the alleged errors by reference to, and in the sequence of, those set out in the Amended Amended Originating Application. While I do not pretend this is the only way to approach this task, I see no other readily available alternative.

III. PRELIMINARY ISSUES

[43] The Claimants, as a preliminary matter, argue that Gencore's agreement to the terms of the LPA precludes the applicants from seeking leave to appeal the decision of the Arbitrator. The Claimants submit that by entering into this Agreement, the applicants contracted out of the right to appeal the *Award*. On this basis, the Claimants seek to dismiss Gencore's application for leave.

[44] I am not persuaded by this submission. The parties agreed, in the LPA, to be subject to the provisions of the *Act*, including ss. 45(2) which expressly provides for a right of an appeal from an arbitral award where a question of law is established. On this basis, I conclude it is open to Gencore to bring an application for leave to appeal under ss. 45(2). I dismiss the Claimant's submission in this regard.

[45] The applicants, during the hearing of the leave application, objected to the inclusion of Schedule 3 to the Written Brief of the Claimants, arguing that it did not receive an adequate opportunity to respond. In response to this concern, I permitted Gencore to provide a written response to Schedule 3, which was received on November 10, 2023, and considered by me in this decision.

IV. LEAVE TO APPEAL UNDER s. 45(2) OF THE *ACT*

A. The Legal Framework

[46] The statutory basis for an application for leave to appeal from an arbitral award is set out in s. 45 of the *Act*:

> **45**(2) If the arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that:
>
> (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
>
> (b) determination of the question of law at issue will significantly affect the rights of the parties.

[47] In *Graham Design Builders LP v Black & McDonald Limited*, 2019 SKQB 161 at para 14, the Court articulated three requirements that must be met before leave to appeal under the *Act* may be granted:

(a) the issue raised by the applicant is a question of law;

(b) the matters at stake in the arbitration are sufficiently important to justify an appeal; and

(c) the determination of the question of law at issue will significantly affect the rights of the parties.

[48] See also: *Elchuk v Gulansky*, 2019 SKQB 23, 87 BLR (5th) 31, where the Court emphasized that an appeal from an arbitral award is limited to only those three avenues prescribed in ss. 45(2) of the *Act*.

[49] In this application, argument by the parties was focused only upon whether any of the issues raised by the applicants are questions of law. No submissions

were made with respect to whether matters at stake are sufficiently important to justify an appeal, or whether the determination of an issue will significantly affect the rights of a party. It is clear, in these circumstances, that the latter two requirements of the test in ss. 45(2) of the *Act* are met.

[50] Therefore, in light of this, I need only address the first requirement set out in ss. 45(2); that is, whether the applicant has identified an error of law.

[51] In *Teal Cedar Products Ltd. v British Columbia,* 2017 SCC 32, [2017] 1 SCR 688 [*Teal Cedar*], the Supreme Court of Canada held an error of law is found where an arbitrator interprets the factual matrix outside of the words of the contract and effectively creates a new agreement. The Court said, at para. 65:

> [65] … To extricate a question of law based on the alleged error of having overwhelmed the contract, a reviewing court must be satisfied that the decision-maker interpreted the factual matrix isolated from the words of the contract; an approach which could effectively create a new agreement. …

[52] However, *Teal Cedar* also provided an important caution to reviewing courts when considering whether an error of law exists. The Court points out the importance of discerning whether the arbitrator applied the principle properly – a question of mixed fact and law – or whether the arbitrator applied the proper principle – a question of law. The Court explained, also at para. 65:

> [65] Again, contractual interpretation is a fact-specific exercise. It follows that a question of law premised on the failure to apply the principle that the factual matrix must not be interpreted in isolation from the words of the contract will be very difficult to extricate in practice. On closer examination, it will often amount to nothing more than a complaint about how much weight was allocated to the factual matrix – in effect, a disagreement about *how* the decision-maker interpreted the words of a contract in light of the factual matrix (*Sattva* [*Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53], at paras. 50 and 65). In short, the supposed question of law will often reveal itself to be a question about whether the decision-maker applied

> the principle properly – a mixed question – and not about whether the decision-maker applied the proper principle. …
>
> [Emphasis in original]

[53] In *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53 at para 50, [2014] 2 SCR 633 [*Sattva*], the Court held exercises of contractual interpretation are questions of mixed fact and law:

> [50] … Contractual 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.

[54] A helpful explanation of the distinction between errors of law and errors of fact or mixed fact and law is provided in *Schafer v Schafer*, 2023 ABKB 448 [*Schafer*]. There, Devlin J. explained it is useful to examine the specific error alleged by an applicant. If the specific issue is capable of only one conclusion, it will often be considered a question of law. However, if the specific issue is capable of a range of reasonable outcomes, that issue "almost always" is considered to be a question of fact or a question of mixed fact and law. The Court set this out in *Schafer* at para 33:

> [33] In the arbitration context, where parties are limited to appeals on questions of law, it will often be useful to ask whether the point at issue is one on which the arbitrator could only reach one conclusion, or one of which their conclusion would be afforded deference as falling within a range of reasonable outcomes. Matters in the first category often have the character of legal questions, whereas those in the latter are almost always questions of fact or mixed questions of fact and law on which the parties gave the arbitrator the last word.

[55] Important assistance is also provided in *Association of Academic Staff of the University of Alberta v University of Alberta (Board of Governors)*, 2024 ABCA 350 at para 8 [*U of A*], where two important points can be extracted.

[56] First, courts must "exercise caution" and conduct a "robust analysis"

when deciding whether an applicant's framing of an issue truly establishes an error of law as required by statute. The Court in *U of A* explained at para. 8:

> [8] … Courts must exercise caution when considering an applicant's framing of the alleged errors given the statutory requirement for identifying a question of law before permission to appeal can be granted: ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at para 54, [2014] 2 SCR 633 [***Sattva***]; ***Teal Cedar Products Ltd v British Columbia,*** 2017 SCC 32 at para 45, [2017] 1 SCR 688 [***Teal Cedar***]. Upholding the legislative policy to limit second appeals to this Court requires a robust analysis of whether the questions proposed are indeed questions of law. …
>
> [Emphasis in original]

[57] In specific, the Court – citing *Schafer* at para 34 – cautioned against allowing "generalized complaints about the outcome, masquerading as questions of law".

[58] Second, *U of A* points out at para. 8 that an applicant for leave has the burden to establish a genuine question of law: "It is an applicant's responsibility to clearly define and articulate the proposed question of law…".

[59] A final noteworthy point is illustrated in *Whalen v British Columbia*, 2024 BCSC 1015 at para 80, where the Court held that preferring the evidence of one witness over the evidence of another does not give rise to an error of law: *Housen v Nikolaisen*, 2002 SCC 33 at para 46, [2002] 2 SCR 235 [*Housen*]; and *Clark v British Columbia (Superintendent of Motor Vehicles)*, 2015 BCCA 487 at para 28.

[60] It is within this legal framework that I must consider Gencore's application for leave to appeal under ss. 45(2) of the *Act*.

B. Consideration of the Applicant's Alleged Errors of Law

[61] As explained above, in an attempt to address each of Gencore's alleged

errors of law, I will follow the sequence of alleged errors as listed in the Amended Amended Originating Application filed on October 5, 2023. The following chart sets out the alleged errors and my determination of whether a question of law exists.

[62] Before embarking on this task, I repeat some foundational points that are highlighted above. These foundational points provide a simple working template to categorize the alleged errors set out below.

[63] First, courts must be cautious of generalized complaints about the outcome "masquerading as questions of law": *Schafer* at para 34. Second, whether an arbitrator properly interprets a contract is a question of mixed fact and law: *Sattva* at para 50. Third, whether an arbitrator properly applies a legal principle is a question of mixed fact and law: *Teal Cedar* at para 65. Fourth, an arbitrator's preference for the evidence of one witness over that of another witness is not, on its own, an error of law: *Housen* at para 46. Fifth, an allegation that a trier of fact failed to provide sufficient reasons is not a stand-alone ground for an appeal: *F.H. v McDougall*, 2008 SCC 53 at para 99, [2008] 3 SCR 41; and *1307839 Ontario Limited v Klotz Associates*, 2024 ONSC 1120 at para 30.

[64] I turn now to a recitation of the paragraphs in which errors of law are alleged by Gencore. The paragraph numbers are in reference to the paragraph numbers found in the Amended Amended Originating Application. I also set out my determination as to whether the applicant has established the existence of a question of law on any of the alleged errors:

Para. #	Description of Alleged Error	Determination
5	Arbitrator's interpretation of contract to determine excessive management fees	Question of mixed fact and law
6	Arbitrator's determination on liability	Question of mixed fact and law
7	Evidence relied on by Arbitrator when assessing fees	Question of fact

7(a)	Arbitrator's use of certain evidence	Question of fact
8	Evidence relied on by Arbitrator when assessing fees	Question of fact
9	Arbitrator's determination on contractual obligation	Question of mixed fact and law
9(a)	Arbitrator's finding on Gencore's responsibility	Question of fact
10	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
10(a)	Arbitrator's interpretation of contractual language	Question of mixed fact and law
11	Arbitrator's findings of liability	Question of mixed fact and law
12	Arbitrator's damages order	Question of fact
13	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
14	Arbitrator's findings of liability	Question of mixed fact and law
14(a)	Evidence relied on by Arbitrator	Question of mixed fact and law
15	Deficient pleadings	No question of law
16(a-c)	Arbitrator's treatment of budget as contractual term	Question of mixed fact and law
17	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
18	Arbitrator's finding of liability and damages award	Question of mixed fact and law
19	Arbitrator's budget determination	Question of fact
20	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
21	Arbitrator's consideration of the evidence	Question of fact
22	Arbitrator's damages award	Question of mixed fact and law
23	Arbitrator's damages award	Question of mixed fact and law
24(a-e)	Arbitrator's limitation defences decision	Question of mixed fact and law
25	Arbitrator's finding of liability	Question of mixed fact and law
26	Arbitrator's decision regarding financing fee	Question of mixed fact and law
27	Arbitrator's finding of liability	Question of mixed fact and law
28	Reasons provided by Arbitrator	Not a stand-alone ground of appeal

29	Arbitrator's finding of liability	Question of mixed fact and law
30-31	Arbitrator's consideration of the evidence	Question of fact
31(a)	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
31(b)	Arbitrator's factual finding	Question of fact
32	Arbitrator's finding of liability	No question of law
34	Arbitrator's finding of liability	No question of law
35	Arbitrator's application of contract law	Question of mixed fact and law
36	Arbitrator's application of legal test	Question of mixed fact and law
37	Arbitrator's consideration of the evidence	Question of fact
38	Arbitrator's consideration of the evidence	Question of fact
39	Arbitrator's application of law of damages	Question of mixed law and fact
40	Arbitrator's application of contract law	Question of mixed law and fact
41	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
42(a)	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
42(b)	Arbitrator's application of legal test	Question of mixed fact and law
42(c)	Arbitrator's consideration of the evidence	Question of fact
42(d)	Arbitrator's consideration of the evidence	Question of fact
42(e)	Arbitrator's application of the law	Question of mixed fact and law
43	Arbitrator's finding of liability	Question of mixed fact and law
44(c)	Arbitrator's application of contract law	Question of mixed fact and law
44(d)	Arbitrator's contractual interpretation	Question of mixed fact and law
45	Arbitrator's decision of claim	No question of law
46	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
48	Arbitrator's consideration of the evidence	Question of fact
49	Arbitrator's application of law of damages	Question of mixed fact and law

50	Arbitrator's finding of liability	Question of mixed fact and law
51(a)	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
51(b)	Arbitrator's application of legal test	Question of mixed fact and law
51(c)	Arbitrator's consideration of evidence	Question of fact
51(d)	Arbitrator's consideration of evidence	Question of fact
51(e)	Arbitrator's application of the law	Question of mixed fact and law
53	Arbitrator's determination of issue	No question of law
54	Arbitrator's application of contract law	Question of mixed fact and law
55	Arbitrator's interpretation of contract	Question of mixed fact and law
56	Arbitrator's findings	Question of fact
57	Arbitrator's consideration of issue	No question of law
58	Arbitrator's determination	Question of fact
59(a-f)	Arbitrator's application of contract law	Question of mixed fact and law
60	Arbitrator's consideration of evidence	Question of fact
61	Arbitrator's consideration of evidence	Question of fact
62	Arbitrator's consideration of evidence	Question of fact
63	Arbitrator's application of law of damages	Question of mixed fact and law
64	Arbitrator's consideration of the evidence	Question of fact
65(a)	Arbitrator's consideration of evidence	Question of fact
65(b)	Arbitrator's determination of damages	Question of mixed fact and law
65(c)	Arbitrator's determination of liability	Question of mixed fact and law
66	Arbitrator's acceptance of evidence	Question of fact
67(a)	Arbitrator's application of the law	Question of mixed fact and law
67(b)	Arbitrator's application of legal test	Question of mixed fact and law
67(c)	Arbitrator's acceptance of evidence	Question of fact
67(d)	Arbitrator's consideration of issue	No question of law
67(e)	Arbitrator's consideration of evidence	Question of fact
68	Arbitrator's determination of liability	Question of mixed fact and law
69(a)	Arbitrator's application of legal test	Question of mixed fact and law

69(b)	Arbitrator's application of legal test	Question of mixed fact and law
69(c)	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
69(d)	Arbitrator's determination of liability	Question of mixed fact and law
69(e)	Arbitrator's interpretation of agreement	Question of mixed fact and law
69(f)	Arbitrator's determination of claim	Question of fact
69(g)	Arbitrator's determination of liability	Question of mixed fact and law
70	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
70(a)	Arbitrator's consideration of evidence	Question of fact
71(a)	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
71(b)	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
71(c)	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
71(d)	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
71(e)	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
71(f)	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
71(g)	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
71(h)	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
71(i)	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
71(j)	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
71(k)	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
73	Arbitrator's determination of claim	Question of mixed fact and law
74	Arbitrator's consideration of evidence	Question of fact
75	Arbitrator's application of legal test	Question of mixed fact and law
76/75(a)	Arbitrator's application of legal test	Question of mixed fact and law
77	Arbitrator's interpretation of contract	Question of mixed fact and law
78(a)	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
78(aa)	Arbitrator's determination of claim	Question of fact
78(b)	Arbitrator's application of legal test	Question of mixed fact and law
78(c)	Arbitrator's consideration of evidence	Question of fact
78(d)	Arbitrator's consideration of evidence	Question of fact
79	Arbitrator's consideration of evidence	Question of fact
80	Arbitrator's determination of claim	Question of mixed fact and law

81	Arbitrator's determination of claim	Question of mixed fact and law
82	Issue raised on cross-examination	No question of law
83(a)	Reasons provided by Arbitrator	Not a stand-alone ground of appeal
83(b)	Arbitrator's order of pre-judgement interest	Question of law

[65] In summary, as set out above in the last entry, the only question of law established by the applicant in these circumstances is whether the Arbitrator's order for pre-judgment interest is correct.

[66] To use the words employed in *Schafer* at para 33, "[i]f the specific issue is capable of only one conclusion, it will often be considered a question of law." Here, the question of whether pre-judgment interest is available is capable of only one conclusion: it is either available or it is not. It is, therefore, a question of law which allows Gencore a foundation upon which it can be granted leave to appeal that portion of the *Award*.

[67] Many of the applicants' alleged errors of law relate to a complaint that the Arbitrator accepted the evidence of the Claimants over the evidence proffered by the Gencore. This complaint is not an error of law.

[68] Many of the alleged errors suggest the Arbitrator gave insufficient reasons for certain rulings or statement. However, aside from a bald assertion of insufficiency, there is no specific articulation as to why the reasons are insufficient. There is no identification of what is missing from the reasons, or what specific evidence has not been adequately addressed in the reasons. Further, a complaint about insufficient reasons must be tethered to some suggestion that the reasoning pathway of the Arbitrator cannot be discerned. A simple statement that the reasoning is insufficient does not automatically elevate the allegation into a question of law. If that were the case, dissatisfaction with a ruling could improperly masquerade as a question of law:

Schafer at para 34.

[69] As well, some of the alleged errors relate to complaints that the Arbitrator granted relief for certain things that were not set out in the Claimants' pleading. The Arbitrator addressed this argument in his ruling and pointed out that his jurisdiction permitted him to grant "such further and other relief as counsel may advise and the arbitrator may allow" (*Addendum* at paras 41-42). Further, the Arbitrator pointed out that the parties are represented by competent counsel who "are deemed to know the law" (*Addendum* at para 40). The alleged errors which fall into this category do not constitute an error of law.

C. Solicitor-Client Costs

[70] Finally, although not set out in the Amended Amended Originating Application, the applicant submits the Arbitrator's award of solicitor client costs, as set out in the *Addendum*, raises a question of law. I do not accept this submission.

[71] The Arbitrator relied upon the provisions set out in the LPA and the *Act* which permit him to make orders for costs related to an arbitration (*Addendum* at paras 51-62). The applicant does not suggest the Arbitrator cited incorrect law or proceeded without jurisdiction in law to award solicitor-client costs to a party. In reality, the applicant is simply dissatisfied with the Arbitrator's discretionary ruling to make such an award.

[72] Further, the Arbitrator also approached this issue from an alternative basis. After pointing out that case law relating to solicitor-client costs in non-arbitration cases does not necessarily apply to arbitration cases (*Addendum* at para 59), he also made a finding that the conduct of the applicant met the test to impose an award of solicitor-client costs on the traditional litigation case law (*Addendum* at para 63). Again, there is no specific quarrel with case law or legal principles relied upon by the

Arbitrator. It is only the costs award that the applicant is dissatisfied with.

[73] In conclusion, the applicants' complaints about the award of solicitor-client costs does not raise an issue of law. If it is not a question of fact, it is at best an issue of mixed fact and law (the application of facts to settled legal principles).

[74] I therefore do not grant leave to appeal on this issue.

V. APPLICATION UNDER S. 46 OF THE *ACT*

[75] The applicants also seek an order under s. 46 of the *Act* setting aside the Award of the Arbitrator. This section provides:

> **Setting aside award**
>
> **46**(1) On a party's application, the court may set aside an award on any of the following grounds:
>
> (a) a party entered into the arbitration agreement while under a legal incapacity;
>
> (b) the arbitration agreement is invalid or has ceased to exist;
>
> (c) the award deals with a matter in dispute that the arbitration agreement does not cover or contains a decision on a matter in dispute that is beyond the scope of the agreement;
>
> (d) the composition of the arbitral tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with the matter, was not in accordance with this Act;
>
> (e) the subject-matter of the arbitration is not capable of being the subject of arbitration under Saskatchewan law;
>
> (f) the applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator;

> (g) the procedures followed in the arbitration did not comply with this Act or the arbitration agreement;
>
> (h) an arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias;
>
> (i) the award was obtained by fraud.

[76] The applicants rely upon ss. 46(1)(c) and 46(1)(f) of the *Act.*

[77] After considering the submissions of the parties, in the context of the evidentiary record and the written submissions filed, I dismiss the applicants' arguments in this respect.

[78] With respect to the application under s. 46(1)(c), Gencore submits the Arbitrator ruled on matters raised by the Claimants which were not set out in the Notice to Arbitrate. This includes, Gencore submits, breaches of *The Partnership Act*, RSS 1978, c P-3. Further, the applicants submit the Arbitrator lacked jurisdiction to address claims not specified in the Notice to Arbitrate.

[79] I am unable to accept this submission.

[80] As set out above, the Arbitrator pointed out that he had jurisdiction to grant "such further and other relief as counsel may advise and the arbitrator may allow" (*Addendum* at paras 41-42). Again, the Arbitrator further pointed out that the parties are represented by competent counsel who "are deemed to know the law" (*Addendum* at para 40).

[81] When I look to the entirety of this section of the *Act*, I do not accept that this section was intended to address this kind of complaint. Further, as pointed out by the Claimants, the applicants did not raise this complaint at any time before or during the hearing. I therefore dismiss this part of the application made under ss. 46(1)(c).

[82] With respect to the application under s. 46(1)(f), Gencore claims it was

treated unfairly because it did not receive notice a 2016 appraisal would be relied upon. The applicant also claims the Arbitrator ruled on a claim that one of the Claimants indicated would not be pursued.

[83] Again, I do not accept that this section of the *Act* was intended to ground complaints such as those raised by Gencore. In the context of expedited proceedings in an arbitration hearing, I am not satisfied the applicants were treated unfairly or unequally. Accordingly, I dismiss this part of the application made under ss. 46(1)(f).

VI. COSTS

[84] Rule 11-8(1) of *The King's Bench Rules* states costs in interlocutory proceedings must follow the outcome of the application; however, this Rule is still subject to the overall discretion regarding costs found in Rule 11-1(1) and is subject to the many considerations listed in Rule 11-1(4).

[85] I am mindful of the large number of issues the applicant has raised in this leave application. These issues could, and should, have been refined to the extent that a consideration of 123 (or more) separate grounds was not required. I am also mindful of the need to consider the relative success of the parties.

[86] In assessing the relative success of the parties in this application under Rule 11-1(4)(a) of *The King's Bench Rules*, the Claimants are largely successful. Therefore, it is appropriate to award costs against Gencore.

[87] In these circumstances, I conclude an appropriate award of costs payable to the Claimants by Gencore is the sum of $7,000, inclusive of any fees and disbursements. These costs shall be payable forthwith.

VII. CONCLUSION

[88] In summary, I make the following orders:

(a) Gencore has leave to appeal the sole issue of whether pre-judgment interest was properly awarded by the Arbitrator;

(b) The application for leave to appeal on any other issue is dismissed;

(c) The application for an order setting aside the ruling of the Arbitrator pursuant to s. 46 of the *Act* is dismissed; and

(d) Gencore shall pay the costs of this leave application, in the total sum of $7,000 to the Claimants forthwith.

A.C.J.
M.D. TOCHOR