COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Sinclair v. T.D.M.C. Holdings Ltd.,*
2026 BCCA 47

Date: 20260206
Docket: CA50786

Between:

Kenneth B. Sinclair, Betty Lee Sinclair, and Donald R. Thonger

Appellants
(Respondents)

And

T.D.M.C. Holdings Ltd., 318080 Alberta Ltd., William Thomas Joseph Karny, and Elizabeth Karny

Respondents
(Claimants)

Before: The Honourable Justice Griffin
(In Chambers)

On appeal from: An order of an arbitrator under the *Arbitration Act*, S.B.C. 2020, c. 2, dated May 28, 2025 (*T.D.M.C. Holdings Ltd. v. Sinclair*).

Counsel for the Appellants:	M. Nied
Counsel for the Respondents:	R.W. Grant, K.C. T.B. Duncan
Place and Date of Hearing:	Vancouver, British Columbia January 20, 2026
Place and Date of Judgment:	Vancouver, British Columbia February 6, 2026

Summary:

The applicants seek leave to appeal from an arbitrator's award in a commercial contract case; the respondents oppose and say the test for leave is not met. Held: Leave granted. The applicants have raised an arguable extricable error of law relating to the scope of the duty to exercise contractual discretion in good faith and its applicability to a contract clause that may be an unenforceable agreement to agree. The issue is of importance to the parties and of general importance.

Reasons for Judgment of the Honourable Justice Griffin:

Nature of the Application

[1] The applicants, Kenneth B. Sinclair, Betty Lee Sinclair, and Donald R. Thonger, seek leave to appeal an arbitral award made under the *Arbitration Act*, S.B.C. 2020, c. 2.

[2] The applicants were the respondents in the underlying arbitration, which arose from a dispute among the beneficial co-owners of an office property in Victoria (the "Building") concerning the enforceability of a proposed amendment to a property management agreement. Because of the changing use of the term respondents in the proceeding, I will refer to the applicants together as the "Sinclair Group".

Background

[3] The respondents on appeal, who were claimants in the arbitration, are T.D.M.C. Holdings Ltd. ("TDMC"), 318080 Alberta Ltd., William Thomas Joseph Karny, and Elizabeth Karny. I will refer to them together as the "TDMC Group".

[4] The Sinclair Group and the TDMC Group co-own the Building as tenants in common. The TDMC Group have a majority interest of 58 percent in the Building, and the Sinclair Group have the remaining 42 percent.

[5] TDMC was the beneficial owner of the legal interest held by Paul Turner in the Building. Paul Turner died in January 2023, and the Sinclair Group subsequently had questions about TDMC's ownership interest in the Building.

[6] The Co-Owners Agreement (the "Agreement"), which became effective in November 2015, governs the co-ownership of the Building. The Agreement established the parties' financial obligations and the voting structure. The sections of the Agreement relevant to this dispute include s. 5 (decision-making thresholds), s. 11 (property management), s. 20 (further assurances), and s. 24 (power of attorney). Also, dispute resolution by arbitration was dealt with in s. 19.

[7] Section 5 of the Agreement sets out the voting thresholds required for certain types of decisions related to the Building:

> 5. Each Beneficial Owner shall be entitled to ten (10) votes for each 1% ownership interest in the Property and in the case of a percentage interest less than 1%, the Beneficial Owner will be entitled to a corresponding proportionate number of votes. For example, .5% will represent 5 votes. Save and except decisions to be made by the Property Manager pursuant to the property management agreement, all decisions relating to the Property shall be by simple majority with the further exception of:
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> a) a sale of the Property;
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> b) any capital expenditure in excess of $200,000;
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> c) financing of the Property from time to time;
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> d) the selection of the Property Manager;
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> e) the pledging, mortgaging, or hypothecation of the individual interest of a Beneficial Owner;
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> f) any amendment to the terms and conditions of this agreement;
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> in which case the required percentage vote approval will be 75% ("Special Majority"). Any Beneficial Owner may propose a motion by written notice to the Property Manager and the Property Manager will provide five (5) days' notice of such motion to each Beneficial Owner. All votes will be administered by the Property Manager. A simple majority vote or Special Majority vote, as the case may be, shall be binding on all Registered Owners and Beneficial Owners.

[8] Section 11 sets out a requirement that the co-owners execute property management agreements with the Building's property managers:

> 11. No Beneficial Owner shall be entitled to reimbursement or payment for services rendered, save and except pursuant to the Property Management Agreement. The Beneficial Owners shall execute and deliver a Management Agreement with Invermay Holdings Ltd. and Fill-A-Niche Holdings Ltd. or such other property manager as the Beneficial Owners shall decide upon

> from time to time pursuant to paragraph 5 hereof, upon terms and conditions as mutually agreed between all the parties.
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> [Emphasis added.]

[9] Section 20 contains a further assurances clause:

> 20. Each of the parties agrees to execute and deliver such other additional instruments and documents and to do all such other acts and things as may be necessary to give full effect to this Agreement.

[10] The Building's longstanding property managers, Andrew and Hugh Turner through their companies, resigned in April 2022 due to conflicts with certain co-owners. The parties hired Richmond Property Group Ltd. ("RPG") as the new property manager and recorded RPG's appointment in a Property Management Agreement signed by all co-owners.

[11] Also relevant are ss. 16 and 17 of the Agreement, dealing with default under the Agreement. Pursuant to s. 16, an owner can give another owner notice of default for failure to meet their obligations under the Agreement and to cure the failure within 10 days of the notice. Under s. 17, in the event of a default, a non-defaulting co-owner has a number of remedies, including implementing a buy-sell procedure to buy the defaulting owners' interest at fair market value less 15 percent.

[12] Section 24 of the Agreement, reproduced below, requires all owners to execute a power of attorney ("POA") to the property manager authorizing the property manager to implement the owners' decisions.

> 24. Each Registered Owner and Beneficial Owner shall execute and deliver to the Property Manager from time to time a power of attorney appointing the Property Manager as his, her or its attorney, with the full power and authority to execute and deliver all documents as are necessary to implement decisions by the Registered Owners and Beneficial Owners pursuant to the terms of this Agreement. Such appointment and power of attorney will not be revoked by the bankruptcy, insolvency, winding-up, liquidation, dissolution or incapacity of the Registered Owner and Beneficial Owner and the Registered Owners and Beneficial Owners ratify and confirm all that the Property Manager, as attorney in fact and agent for, in the name of and on behalf of the Registered Owners and Beneficial Owners, may lawfully do or cause to be done by virtue of this section.

[13] RPG operated without a POA, stating that the BC Financial Services Authority rules prohibited it from accepting one. Consequently, RPG was of the view it could not fulfill its responsibilities as the property manager in entering into leases and setting up bank accounts on behalf of the co-owners to pay expenses.

[14] The TDMC Group drafted a Management Agreement Amendment ("MAA") that would authorize RPG to act as agent for the co-owners in executing leases and making financial disbursements. The TDMC Group and RPG endorsed the MAA and demanded that the Sinclair Group sign the MAA.

[15] The Sinclair Group refused to sign the MAA. They advanced three main reasons. Their position was that:

1) The MAA improperly included TDMC as a party. Andrew and Hugh Turner, the former property managers, are directors of TDMC and co-executors of their father Paul Turner's estate, which holds a 25 percent interest in the Building in trust for TDMC. The Sinclair Group disputed TDMC's status as a co-owner.

2) The amendment's substantive terms, particularly the lease execution authority and banking arrangements, were a *de facto* amendment of the Agreement and required 75 percent approval pursuant to s. 5.

3) The MAA sought to retroactively legitimize unauthorized acts by Andrew and Hugh Turner, who continued to be involved in the Building's financial matters after resigning.

[16] The TDMC Group issued a notice of default to the Sinclair Group by letter from their counsel dated July 4, 2024. In the notice of default, the TDMC Group took the position that the Sinclair Group did not have the legal right or discretion to refuse to sign the MAA and stated they would commence arbitration if the default continued.

[17] When the Sinclair Group continued to refuse to sign the MAA, the TDMC Group commenced arbitration on July 30, 2024, in the Vancouver International Arbitration Centre, pursuant to the *Arbitration Act* and Rule 5 of the Vancouver International Arbitration Centre *Domestic Arbitration Rules*.

[18] The TDMC Group sought as relief in the Notice to Arbitrate:

1) A declaration that the Agreement obligates the Sinclair Group to execute the MAA.

2) An order that each member of the Sinclair Group execute the MAA.

3) An order that each member of the Sinclair Group execute the MAA within five days of the pronouncement of the order, failing which the TDMC Group would have leave to seek enforcement through an order of the Supreme Court of British Columbia without further notice.

[19] In their response, the Sinclair Group sought a declaration that the MAA is not binding on the basis that it was neither properly approved nor lawfully presented for execution.

[20] The arbitrator who heard the matter was David Gruber (the “Arbitrator”).

[21] After evidence concluded, the Arbitrator issued a list of written questions to the parties to guide the parties’ post-hearing submissions (the “Arbitrator Questions”). The parties made written submissions in response to the questions (“Response to Questions”).

[22] The Partial Final Award (dealing with all issues except costs) was issued on May 28, 2025 (the “Award”).

[23] In the Award at paras. 58–66, the Arbitrator set out his questions and his summary of the parties’ Response to Questions. Among other things, the Arbitrator asked:

2. Section 11 of the 2015 Agreement provides, in part:

   > … The Beneficial Owners shall execute and deliver a Management Agreement with … such other property manager as the Beneficial Owners shall decide upon from time to time …, upon terms and conditions as mutually agreed between all the parties. [emphasis added]

3. Do the words "the parties" in the above-quoted language include the property manager, or do those words only include the parties to the 2015 Agreement?
4. Does the above-quoted language mean that the terms and conditions of any agreement with RPG and the co-owners can only be established through unanimous consent of all parties to the 2015 Agreement?
5. If the answer to the question in paragraph 4 above is "yes", does such unanimous consent have to be established as part of the decision to select a property manager by special majority under section 5(d) of the 2015 Agreement, or is it separate from that decision?
6. Can the granting or withholding of consent of a party to the 2015 Agreement to the terms and conditions referred to in section 11 be understood as the exercise of discretion?
7. If the answer to the question in paragraph 6 above is "yes", what should the Tribunal find were the purposes for which the discretion was granted, and was the withholding of consent by the Respondents to the terms and conditions in the April 2024 Management Agreement Amendment ("MAA") consistent or inconsistent with those purposes?
8. If the answer to the question in paragraph 6 above is "yes", what is the measure of the reasonableness of the exercise of the discretion, and did the Respondents act reasonably or unreasonably in exercising their discretion to withhold consent to the terms and conditions in the MAA?

[24] The Arbitrator summarized the parties' Response to Questions, in part as follows:

> 60. **Interpretation of Section 11: Does "all parties" include the property manager?** – Both sides agree that the phrase "all parties" includes the property manager. The Claimants argue it means parties to the proposed management agreement—not every party to the Co-Owners Agreement—and submit that prior practice reflects mutual agreement with managers before execution. The Respondents similarly interpret "all parties" as broader than just "Beneficial Owners" and suggest it includes the property manager because mutual assent is required for enforceability.
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> 61. **Does the provision require unanimous agreement?** – The parties split here. The Claimants reject a requirement for unanimous agreement, calling it commercially unreasonable and inconsistent with the agreement's structure. They assert a bare majority suffices unless otherwise specified.

> The Respondents argue the language mandates unanimity for terms and conditions, separate from the 75% vote required to select the property manager.
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> 62. **Is unanimous consent part of or separate from the selection under section 5(d)?** – The Claimants argue that if unanimity is required, it would logically have to precede selection, akin to a tendering process—but they dispute this interpretation altogether. The Respondents contend the selection of a property manager and agreement on terms are conceptually and procedurally distinct.
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> 63. **Is the withholding of agreement an exercise of discretion?** – The Claimants say that if unanimity is indeed required, withholding agreement constitutes a discretionary act. The Respondents deny this, arguing that the relevant portion of section 11 constitutes an unenforceable "agreement to agree," meaning no enforceable obligations relating to discretion exist.
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> 64. **Purpose and Reasonableness of Withholding Consent** – The Claimants argue any discretion must be used reasonably, connected to specific, severe prejudice. They contend the Respondents' reasons—like RPG's fee or the absence of POA provisions—are unsubstantiated or pretextual, and that the Respondents' refusal reflects capricious conduct. The Respondents maintain their concerns are valid: the MAA imposes unnecessary fees and circumvents the POA requirement. They argue the decision was connected to preserving the intended framework of section 24 and thus reasonable.

[25] After reviewing the evidence and making findings, the Arbitrator found that neither party had properly interpreted the Agreement. He rejected the Sinclair Group's argument that s. 11 was an unenforceable agreement to agree. But he also rejected the TDMC Group's arguments that unanimity was not required to enter into a new management agreement and that the further assurances clause, s. 20, compelled the Sinclair Group to sign the MAA.

[26] Instead, the Arbitrator held that s. 11 of the Agreement created contractual discretion that had to be exercised in good faith. It did not require a party to the Agreement to sign a new MAA, but it did require it to decide in good faith whether to sign. The Arbitrator found that the Sinclair Group breached this requirement because it refused to sign the MAA for an improper collateral purpose:

> 220. Both approaches misconstrue the structure of the agreement by failing to read section 5 alongside section 11. The former sets out decision-making thresholds, while the latter provides the mechanism through which agreements with property managers are implemented. Reading the agreement as a whole, section 11 applies an unanimity requirement for

> owners in respect of the terms of a management agreement, even when the selection of the manager itself requires only a special majority under section 5(d). This avoids both the interpretive gap posited by the Claimants and the overextension of section 5 advocated by the Respondents. Properly construed, the Co-Owners Agreement creates a two-step framework: selection of a property manager by special majority under section 5(d), and then agreement on the terms of engagement through the unanimous consent required by section 11.
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> …
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> 224. Section 11 provides that beneficial owners shall execute a management agreement "upon terms and conditions as mutually agreed between all the parties." The phrase "all the parties" includes the beneficial owners, as the parties agreed in their submissions. While the provision does contemplate unanimous agreement on the terms of the property management agreement, such discretion cannot be exercised in a manner that defeats the contractual structure of majority-based decision-making under section 5. As the Court emphasized in *CivicLife.com Inc. v. Canada (Attorney General)*, 2006 CanLII 20837 (Ont CA), a party cannot exercise discretion in a way that undermines the purposes for which that discretion was granted. I find that the discretion of a Beneficial Owner to withhold consent to the terms and conditions of a proposed management agreement under Section 11 is not unbounded. It must be exercised reasonably and in accordance with the purpose for which the discretion was granted—namely, to ensure that the proposed terms and conditions reflect a proper implementation of the co-owners' validly made decision under Section 5 to retain a particular property manager.
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> 225. Accordingly, I find that each beneficial owner's discretion under section 11 to agree or withhold agreement to a management agreement is bounded by principles of reasonableness and good faith, consistent with the Supreme Court's decision in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7. It must be exercised in a manner that accords with the purpose of the provision and the agreement as a whole.
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> 226. I reject the Respondents' submission that section 11 constitutes a mere "agreement to agree" akin to the unenforceable clause in *Mannpar Enterprises Ltd. v. Her Majesty the Queen*, 1999 BCCA 239. Unlike in *Mannpar*, here any dispute about actions under section 11 can be resolved through arbitration and the overarching decision-making architecture of the Co-Owners Agreement provides sufficient objective standards and context to enable the Tribunal to determine whether a party has exercised its discretion improperly.
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> [Emphasis added.]

[27] In the latter paragraph, it was unclear whether the Arbitrator was suggesting that if the parties could not agree on terms to a new MAA, the Agreement provided that an Arbitrator could craft the terms for them. The Sinclair Group submit that this

would be an error in law because it would exceed the Arbitrator's jurisdiction, as the Agreement did not create such a role for the Arbitrator. However, at para. 237 the Arbitrator seemed to state this was not his role. I will return to para. 237 shortly.

[28] The Arbitrator rejected the reasons given by the Sinclair Group for their refusal to sign the MAA. Instead, he found that the Sinclair Group was motivated by an improper collateral purpose of removing RPG as the property manager based on unsubstantiated suspicions of alignment between RPG and the Turners. He concluded that their refusal was not a legitimate use of the discretion contemplated under s. 11 of the Agreement.

> 230. Concerns about the proposed $250 monthly fee payable to RPG under the MAA may not be entirely without merit, though the evidence was insufficient for me to reach any definitive conclusion on the point. This concern alone, absent improper purpose, might support a reasonable refusal to agree to the MAA. Similarly, the omission of certain legal owners as signatories in their own right may raise valid drafting issues. However, these issues were not the genuine basis of the Respondents' refusal, and do not excuse their breach of the Agreement. I find that if the Respondents had not acted for a collateral and improper purpose and instead acted in good faith, it is more likely than not that all parties would have reached agreement as to the terms of an amendment to the Property Management Agreement, although I cannot say those terms would be identical to those of the MAA.
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> [Emphasis added.]

[29] As mentioned, the Arbitrator also rejected the TDMC Group's argument that the s. 20 "further assurances" clause compelled the execution of the MAA by the Sinclair Group:

> 235. Section 20 of the 2015 Agreement cannot override the explicit requirements of section 11. As explained in *Apex Mountain Resort Ltd. v. British Columbia*, 2000 BCSC 907, a "further assurances" clause is facilitative, not substantive. It cannot be used to compel execution of the MAA where the express governance structure in section 11 requires unanimity.
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> 236. The MAA is not a document required merely to implement prior decisions—it substantively amends RPG's authority. It therefore falls under Section 11, not Section 20. Moreover, the evidence does not establish that the MAA is the only feasible method for RPG to discharge its duties as property manager. As such, section 20 does not provide an independent basis to compel execution.

[30] The Arbitrator did not grant the specific performance order sought by the TDMC Group, noting that while he found that the Sinclair Group had refused to sign the MAA for an improper reason, he did not find that the refusal was unreasonable. Instead, he declared that the Sinclair Group had breached the Agreement by refusing to sign the MAA based on an improper reason:

> 237. Specific performance is not appropriate in this case. As illustrated in *Royal Bank of Canada v. Peace Bridge Duty Free Inc.*, 2025 ONCA 54, courts (and by the same token arbitrators) will not impose contractual terms where there is no single standard of reasonableness applicable to those terms. Although the Respondents breached the Co-Owners Agreement, the Tribunal lacks jurisdiction to substitute its own judgment for that of the parties in determining the precise terms of an amendment to the Property Management Agreement that it would be unreasonable for any beneficial owner to refuse to execute. On the evidence before me, I did not conclude that the Respondents necessarily acted unreasonably in refusing to sign the MAA, only that they did so for an improper collateral purpose. Whether or not the terms of an agreed amendment would have been identical to or different from those of the MAA but for the Respondents' breach was not established on a balance of probabilities. Accordingly, I make no order compelling execution of the MAA.
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> [Emphasis added.]

[31] The Arbitrator also did not award damages since they were not claimed, nor were "any of the other contractual remedies set out in section 17" of the Agreement claimed other than specific performance. The Arbitrator made a declaration:

> 238. However, I do declare that the Respondents have breached the Co-Owners Agreement by refusing to execute the MAA for a collateral purpose inconsistent with the intent and structure of the Co-Owners Agreement. That breach gives rise to a claim for relief, although damages were not claimed and are not awarded in this Partial Final Award nor were any of the other contractual remedies set out in section 17 of the Co-Owners Agreement aside from specific performance.
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> [Emphasis added.]

[32] In the result, the Arbitrator dismissed the claim for specific performance and made the following declaration:

> 239. The Tribunal dismisses the Claimants' claim for an order that each of the Respondents sign the Management Agreement Amendment to the property management agreement between the Carnegie Building Co-owners and Richmond Property Group Ltd. In the form provided to them on 4 July 2024 appended to the Claimants' Notice of Default (the "MAA").

> 240. The Tribunal Awards a declaration that the Respondents breached the Co-Ownership by refusing to sign the MAA when requested to do so and that such breach constitutes a default under section 16(a) of the Co-Ownership Agreement dated 10 November 2015.
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> 241. The Tribunal reserves jurisdiction to make an additional award on account of costs.

[33] The Sinclair Group filed a notice of appeal noting leave was required on June 27, 2025.

[34] The TDMC Group filed a notice of cross-appeal on July 14, 2025, which has since been quashed for lack of jurisdiction because it was brought after the 30-day deadline under s. 59 of the *Arbitration Act*: *Sinclair v. T.D.M.C. Holdings Ltd.*, 2025 BCCA 402.

[35] During the course of the leave to appeal application before me, the Sinclair Group pointed out errors in para. 240 of the Award, including the fact that they had never received a notice of default on terms consistent with the Arbitrator's findings and that this specific default had not been claimed in the arbitration.

[36] The TDMC Group responded by conceding that the Arbitrator erred at para. 240 of the Award and agreed on the record to henceforth treat that paragraph as struck from the Award and to not rely on it in the future in any way. The conceded errors are:

a) The Arbitrator's declaration at para. 240 is in error as written but can be understood as short-form for the longer declaration at para. 238, which is the declaration consistent with the Award and is the declaration on which the TDMC Group relies. In other words, according to the Award, the Arbitrator did not find that the Sinclair Group breached the Agreement for refusing to sign the MAA. Rather, the Arbitrator declared that the Sinclair Group breached the Agreement by refusing to sign the MAA <u>for an improper collateral purpose</u>.

b) The TDMC Group had never issued a notice of default to the Sinclair Group for their refusal to exercise their discretion in good faith when considering

> whether to sign the MAA. Rather, the alleged default was that the Sinclair Group was required to sign the MAA and had no discretion to refuse, a point on which the TDMC Group did not prevail. Thus, it was in error for the Arbitrator to declare the Sinclair Group in default under s. 16(a) of the Agreement.

[37] Consistent with this concession, the TDMC Group took the position in the hearing before me that a letter written by their prior counsel on their behalf to the Sinclair Group dated June 12, 2025, following the Award, was withdrawn and of no effect. That letter purported to rely on para. 240 of the Award and the Arbitrator's statement that the Sinclair Group was in default under s. 16(a) of the Agreement. In this post-Award letter, the TDMC Group took the position that based on this default, the Sinclair Group was required to pay the TDMC Group's full costs related to the arbitration in the amount of $213,923.78.

[38] The TDMC Group's concession that the Arbitrator was in error at para. 240, and willingness to remove that paragraph from the Award, removes one ground of appeal from the Sinclair Group.

[39] However, the Sinclair Group remains of the view that leave to appeal should be granted on other grounds.

[40] To date, the parties have not returned to the Arbitrator seeking costs. In my view, the outcome of a costs hearing cannot be assumed, given that each prevailed on some arguments and lost on others as part of the Award.

Legal Framework

[41] Section 59 of the *Arbitration Act* establishes a right of appeal directly to this Court if the parties consent or, if the arbitral agreement does not prohibit it, with leave of this Court on a question of law:

> **Appeals on questions of law**
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> **59** (1) There is no appeal to a court from an arbitral award other than as provided under this section.

> (2) A party to an arbitration may appeal to the Court of Appeal on any question of law arising out of an arbitral award if
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> (a) all the parties to the arbitration consent, or
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> (b) subject to subsection (3), a justice of that court grants leave to appeal under subsection (4).
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> (3) A party to an arbitration may seek leave to appeal to the Court of Appeal on any question of law arising out of an arbitral award unless the arbitration agreement expressly states that the parties to the agreement may not appeal any question of law arising out of an arbitral award.

[42] The parties neither agree to an appeal nor say that the arbitral agreement prohibits an appeal.

[43] Pursuant to s. 59(4), an applicant's application for leave may be granted if a justice of this Court determines that:

> (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
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> (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
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> (c) the point of law is of general or public importance.

[44] The *Arbitration Act* allows for appeals only on pure questions of law. The threshold question is whether questions of law "can be clearly perceived and identified": *Grewal v. Mann*, 2022 BCCA 30 at para. 32, citing *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 104 [*Sattva*]. The question is not whether the arbitrator was correct, but whether the applicant has demonstrated an extricable question of law in the arbitrator's analysis. If the proposed question is not a question of law arising out of the award, then there is no jurisdiction to grant leave to appeal: *MSI Methylation Sciences, Inc. v. Quark Venture Inc.*, 2019 BCCA 448 at para. 72 [*MSI Methylation*].

[45] In *MSI Methylation* at para. 61, Justice Hunter quoted the classic definition by Justice Iacobucci for the Supreme Court of Canada in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 1997 CanLII 385:

> [35] ... questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. ... I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult.

[46] When there are no extricable questions of law, issues of contractual interpretation are usually questions of mixed fact and law and cannot be appealed under s. 59 of the *Arbitration Act*: *Sattva* at paras. 50, 53–55.

[47] Questions of law include questions of procedural fairness: see *Green Light Solutions Corp. v. Kern BSG Management Ltd.*, 2025 BCCA 408 at para. 48.

[48] To summarize, there are three requirements that must be met before leave can be granted to appeal an arbitration award:

1) The appeal must be based on a question of law arising out of the award.

2) The leave judge must be satisfied that one of the three circumstances identified in s. 59(4) of the *Arbitration Act* exists.

3) The leave judge must be prepared to exercise the residual discretion implicit in the phrase “the Court of Appeal may grant leave”.

Seylynn (North Shore) Phase II GP Ltd. v. Seylynn (North Shore) Properties Phase II Limited Partnership, 2025 BCCA 330 at para. 44.

Positions of the Parties

The Sinclair Group

[49] In essence, the Sinclair Group submit that the Arbitrator made the following errors of law in concluding that they breached the Agreement by refusing to execute the MAA:

1) The Arbitrator applied a cause of action, the duty to exercise contractual discretion in good faith, and granted a declaration in that regard that the TDMC Group never advanced. They argue that the cause of action is

inconsistent with the TDMC Group's claim, which was that the Sinclair Group were required to execute the MAA and had no discretion to refuse, not that their exercise of discretion was unreasonable. They further argue that: (a) the Arbitrator breached procedural fairness by making findings and granting a declaration that was not pleaded; and (b) the declaration serves no purpose.

2) The Sinclair Group's refusal to execute the MAA presented to it pursuant to s. 11 was not a "discretionary" decision subject to the duty to exercise contractual discretion in good faith. Rather, s. 11 of the Agreement is an agreement to agree and therefore unenforceable, and the Arbitrator erred in finding otherwise.

3) The Arbitrator's conclusion that the Sinclair Group had an improper collateral purpose in refusing to execute the MAA arose from forgetting, ignoring, or misconceiving evidence given during the hearing, which affected the result.

4) The Arbitrator made inconsistent conclusions that cannot co-exist with the finding of a duty to exercise contractual discretion in good faith in this case. As an example, on the one hand, he held that the Sinclair Group's objection to the MAA lacked merit and was for an improper purpose: at paras. 226–227, 231. On the other hand, he held that he could not say whether it might be reasonable to refuse to sign the MAA (at para. 237); indeed, he said other concerns, absent improper purpose, might support a reasonable refusal to sign (at para. 230). He also held that he could not say whether if the parties reached agreement, it would have been identical to the terms of the MAA: at para. 230.

[50] A fifth alleged error was the Arbitrator's declaration at para. 240 of the Award. As I have noted, the TDMC Group has conceded this point. They have agreed to not rely on para. 240 and agree that the Award should be read as though para. 240 was struck out.

The TDMC Group

[51] The TDMC Group oppose the application for leave on the basis that the Sinclair Group's grounds of appeal do not raise questions of law.

[52] The TDMC Group submit that the Arbitrator did not err in law by concluding that the Sinclair Group's refusal to execute the MAA breached the Agreement for the following reasons:

1) The TDMC Group implicitly raised the issue of good faith before the Arbitrator when they pleaded breach of contract. The Supreme Court of Canada in *Bhasin v. Hrynew*, 2014 SCC 71, clarified that the obligation of good faith performance applies to all contracts, so the parties cannot interpret the Agreement as excluding the duty of good faith performance. Further, the Arbitrator Questions and the Response to Questions made it clear that the question of whether the contract required the exercise of discretion in good faith was before the Arbitrator, so there was no procedural unfairness. The TDMC Group sought a different declaration, but the declaration granted by the Arbitrator was within his jurisdiction. The declaration serves a useful purpose of clarifying the parties' rights and obligations.

2) Section 11 of the Agreement imposes a duty to act in good faith and was not merely an "agreement to agree". This is a question of mixed fact and law, not law alone.

3) The Arbitrator made a finding of fact, not law, that none of the Sinclair Group's stated objections to the MAA were the genuine basis of their refusal, which was for a collateral purpose.

4) The Arbitrator's findings are not mutually inconsistent in relation to the finding of a duty to exercise contractual discretion in good faith.

Analysis

Is the Proposed Appeal Based on a Question of Law Arising out of the Award?

[53] The first proposed issue is procedural fairness, which I will return to.

[54] I turn to the second issue, which engages principles of contract law. As set out in the summary of legal principles, courts must exercise caution in identifying extricable errors of law in contract disputes because an exercise of contractual interpretation is primarily one of mixed fact and law.

[55] Keeping this caution in mind, I am nevertheless persuaded that the Sinclair Group has identified an arguable extricable question of law in respect of the second issue advanced on appeal. The question is: did the Arbitrator err in principle by extending the duty to exercise contractual discretion in good faith to s. 11 of the Agreement? Specifically, did s. 11 contain an "agreement to agree", which is unenforceable and as a matter of principle cannot be rendered enforceable by overlaying it with the duty to exercise contractual discretion in good faith?

[56] It is a longstanding principle of contract law that a promise to enter into a contract of unknown terms is an unenforceable "agreement to agree". In Angela Swan, Jakub Adamski, and Annie Y. Na's *Canadian Contract Law*, 4th ed. (Toronto: LexisNexis Canada, 2018), at §4.179, the authors cite *Courtney & Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd.* (1975), [1975] 1 W.L.R. 297 at 301, [1975] 1 All E.R. 716 (Eng. C.A.) for this proposition:

> If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through: or if successful, what the result would be. It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law.

[57] The law is evolving on whether there can be, in some circumstances, a duty to negotiate in good faith: see *Canadian Contract Law* at §4.196. The authors refer

to Canadian case law where courts have denied that there is an enforceable duty to negotiate in good faith: see e.g., *Martel Building Ltd. v. Canada*, 2000 SCC 60 at para. 73. However, they argue that *Bhasin* "has the potential to alter radically the landscape of this area of the law": *Canadian Contract Law* at §§4.196, 4.241.

[58] In *Bhasin* at paras. 47 and 50, Justice Cromwell noted that a duty of good faith performance has been found to exist in three different circumstances, including where one party has discretionary power under the contract, citing J.D. McCamus's *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012), and *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, [1995] 2 S.C.R. 187, 1995 CanLII 87.

[59] In *Bhasin* at para. 63, Cromwell J. held that there is "an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily". However, he tied the duty to the existing law of contract to mitigate any concerns that it would undermine certainty: at para. 71. He stated the principles as follows:

> [93] A summary of the principles is in order:
>
> (1) There is a general organizing principle of good faith that underlies many facets of contract law.
>
> (2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.
>
> (3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

[60] The second issue proposed by the Sinclair Group on appeal raises the question of the scope of the duty of honest contractual performance and its relevance to a clause that could be an agreement to agree. It is an interesting question, and the parties have not directed me to appellate authority clearly on point.

[61] I note that there is precedent for granting leave to appeal an arbitral award on the legal question of the scope of the parties' duty of good faith contractual performance, namely the case of *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7. In that case, the arbitrator decided in favour of Wastech that the Greater Vancouver Sewerage and Drainage District had breached a duty of good faith contractual performance.

[62] On appeal in *Wastech*, this Court set aside the arbitrator's decision on the basis that the arbitrator erred in law by applying the wrong legal test in determining whether the Greater Vancouver Sewerage and Drainage District breached a duty of good faith. The Supreme Court of Canada upheld the appeal judgment.

[63] I, of course, recognize that simply describing an issue as involving the scope of the duty of good faith contractual performance does not necessarily mean that it truly is an extricable question of law. The division hearing the appeal may decide that in this case it is not. But I am satisfied that the second issue advanced by the Sinclair Group meets the threshold for identifying an issue of law alone. This question engages the intersection between the principles of contract law that deem agreements to agree as unenforceable and the scope of the duty to exercise contractual discretion in good faith.

[64] The outcome of this question could be a useful development in the law of contract and a useful precedent for the general benefit of other contracting parties. If the general duty to exercise contractual discretion in good faith now arises when presented with a draft agreement pursuant to an "agreement to agree" clause, it could have a significant impact on the law. As recognized in *Sattva*:

> [51] ... One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation.

[65] Further, the Sinclair Group's second proposed ground of appeal has arguable merit. This is demonstrated by the points made by the Sinclair Group in relation to

the first proposed ground regarding the utility of the Arbitrator's declaration. It is also demonstrated by the points made by the Sinclair Group in relation to the fourth proposed ground of appeal, the Arbitrator's alleged inconsistent findings. These arguments fall under the umbrella of the second ground of appeal because they are an illustration of the Sinclair Group's argument that it is illogical and inconsistent with the law of contract to, in effect, remedy an unenforceable agreement to agree by overlaying a duty to exercise discretion in good faith, because a declaration of the breach of such a duty will still result in no enforceable agreement.

[66] In other words, the Sinclair Group's position is that if a party has no contractual obligation to agree to a future contract of unknown terms, it would be inconsistent to find that they must nevertheless have good faith reasons for not agreeing to terms of the future contract proposed to them.

[67] As for the broader "procedural fairness" issue in the first proposed ground of appeal here, the TDMC Group has made a strong argument that there was nothing procedurally unfair about the Arbitrator raising the duty to exercise contractual discretion in good faith in his approach to s. 11. They say not only is this duty engaged in every contract, they point to the Arbitrator Questions, which included questions such as whether withholding consent to a proposed agreement is an exercise of discretion and what was the measure of the reasonableness of the exercise of the discretion. They also point to the parties' Response to Questions, which referenced leading cases on this issue, *Bhasin* and *Wastech*.

[68] I agree with the points made by the TDMC Group on this issue. I am not persuaded that there is arguable merit to the ground of appeal based on a lack of procedural fairness arising from the Arbitrator's consideration of whether s. 11 engages a contractual discretion that needed to be exercised in good faith.

[69] I also do not agree with the Sinclair Group that a question of law arises from the third proposed ground of appeal, the Arbitrator's findings regarding the reasons for their refusal to sign the MAA. I accept the argument of the TDMC Group that

there was evidence to support the Arbitrator's findings in this regard, which are findings of fact.

[70] In conclusion on whether the proposed grounds raise an error of law, I am satisfied that the second proposed ground of appeal raises an error of law and that granting leave to appeal on that ground would allow the Sinclair Group to also argue that the declaration granted by the Arbitrator was of no utility and that the Arbitrator's findings in relation to the duty to exercise contractual discretion in good faith (as described in the fourth issue above) were mutually inconsistent.

[71] However, I am not satisfied that there is an error of law arising from a broader "procedural fairness" issue or from the Arbitrator's findings as to the Sinclair Group's reasons for not signing the MAA.

Should Discretion be Exercised to Grant Leave?

[72] To establish that a miscarriage of justice may be prevented, the applicant must demonstrate that the determination of the point of law on appeal is material to the result in dispute, and if decided differently, would lead to a different result, and that the appeal has some merit in the sense that it is arguable: *Sattva* at paras. 69–74. I have already indicated that I consider the second issue proposed on appeal to have arguable merit.

[73] If the Arbitrator erred in applying the duty to exercise contractual discretion in good faith to s. 11, a ruling by this Court to that effect could avoid a miscarriage of justice for the Sinclair Group, who have maintained that they did not have a contractual obligation to sign the MAA.

[74] The result has importance to the parties, given their ongoing co-ownership of the Building, as they continue to need clarity on the scope and enforceability of s. 11 of the Agreement. The outcome of the appeal will be important to guide them in their future decision-making regarding the management of the Building and management contracts. Further, the matter is of general importance, as it relates to the evolution of the law of contract.

[75] I have concluded it would be appropriate to exercise discretion to grant leave to appeal on the second proposed issue.

Disposition

[76] The Sinclair Group's application for leave to appeal should be granted in part. The Sinclair Group have leave to appeal on the second proposed issue described in these reasons. That issue is whether the Arbitrator erred in finding that the Sinclair Group's refusal to execute the MAA presented to it pursuant to s. 11 was a "discretionary" decision subject to the duty to exercise contractual discretion in good faith, when the proper characterization of s. 11 of the Agreement is an unenforceable agreement to agree. In support of the argument on this ground of appeal, the Sinclair Group have liberty to argue that the declaration granted by the Arbitrator had no practical utility and that the Arbitrator made findings inconsistent with his conclusion that there was a duty to exercise contractual discretion in good faith.

"The Honourable Justice Griffin"