COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Seylynn (North Shore) Phase II GP Ltd. v. Seylynn (North Shore) Properties Phase II Limited Partnership,*
2025 BCCA 36

Date: 20250204
Docket: CA50227

Between:

Seylynn (North Shore) Phase II GP Ltd.

Applicant/Appellant
(Claimant)

And

Seylynn (North Shore) Properties
Phase II Limited Partnership

Respondent
(Respondent)

Before: The Honourable Justice Winteringham
(In Chambers)

On appeal from: A partial award of an arbitral tribunal under the *Arbitration Act*, S.B.C. 2020, c. 2, dated October 1, 2024 (*Seylynn (North Shore) Phase II GP Ltd. v. Seylynn (North Shore) Properties Phase II Limited Partnership*, VanIAC File No.: 17947-DCA).

Counsel for the Applicant/Appellant: S.D. Coblin
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Place and Date of Hearing: Vancouver, British Columbia
January 8, 2025

Place and Date of Judgment: Vancouver, British Columbia
February 4, 2025

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Summary:

The parties entered into partnership agreements to develop two separate projects, Seylynn Village and Seylynn Gardens. Over several years, the general partner had withdrawn over $2 million, asserted to be its entitled management fee. The limited partners resolved to remove the general partner. After the removal of the general partner, the parties referred their dispute to arbitration to resolve the issue about the proper interpretation of the management fee provision in the partnership agreement. The Tribunal interpreted the provision such that the general partner was required to return the money it had withdrawn. The general partner seeks leave to appeal the arbitrator's award.

Held: Application for leave to appeal dismissed. The application for leave to appeal from the arbitration award fails to demonstrate an extricable question of law.

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Reasons for Judgment of the Honourable Justice Winteringham:

Introduction

[1] Seylynn (North Shore) Phase II GP Ltd. (the "GP") applies for leave to appeal an arbitral award pursuant to s. 59 of the *Arbitration Act*, S.B.C. 2020, c. 2 [*Arbitration Act*].

[2] The arbitration arose out of an agreement between the GP and four limited partners, Seylynn (North Shore) Properties Phase II Limited Partnership (the "LP"). The GP and the LP entered into an agreement entitled Seylynn (North Shore) Properties Phase II Limited Partnership Agreement, dated December 23, 2011 (the "Phase II PA"). The Phase II PA relates to the development of a condominium project, the Seylynn Gardens Project, in North Vancouver.

[3] The parties entered into the Phase II PA about two weeks after they had executed a similar agreement, Seylynn (North Shore) Development Limited Partnership Agreement, dated December 7, 2011 (the "Phase I PA"), between the same two directors of the GP (Dr. Abo Taheri and Dr. Shapour Hosseini) and the same four limited partners. The Phase I PA relates to the development of lands adjacent to the Seylynn Gardens Project ("Seylynn Village Project").

[4] For several years, the GP took regular draws under the Phase II PA. The GP was removed from their role and the LP sought the return of the draws, an amount exceeding $2 million. The Phase I and II PAs each contained an arbitration clause and the parties proceeded to arbitration at the Vancouver International Arbitration Centre (the "Tribunal"). Following a multi-day hearing and submissions, on October 1, 2024, the Tribunal released its decision in relation to the Phase II PA dispute: VanIAC File No.: 17947-DCA (the "Award"). After the Award was released, the LP sought clarification and reconsideration of specific aspects of the Award, including an interest calculation. Despite an opportunity to do so, the GP did not provide its position on the issues raised for reconsideration. The Tribunal released a "corrected" award on October 18, 2024.

[5] The GP's proposed appeal challenges the Tribunal's decision regarding the entitlement to draws. For the reasons that follow, I would dismiss the GP's application for leave to appeal the Award.

Background

[6] In mid-2011, Dr. Taheri's son, Farbod Taheri, learned that the Seylynn Village Project was being marketed under a court-ordered sale and he told his father about the project. In September 2011, Dr. Taheri and other investors entered into a purchase agreement for the Seylynn Village Project through Dr. Taheri's company, Teknocan Development Corporation. Between September and December 2011, the investors finalized the Phase I PA, executed on December 7, 2011.

[7] The GP submits that Dr. Taheri, Dr. Housseini and Mr. Hashemi (another investor and limited partner) met in person on December 14, 2011, to discuss Dr. Taheri and Dr. Housseini's right to management fees. At the end of that meeting, the parties executed an agreement that purported to set out Dr. Taheri and Dr. Hosseini's entitlement to management fees as general partners ("December 14, 2011 Agreement"). The parties provided two translations of the December 14, 2011 Agreement. The December 14, 2011 Agreement included the following terms:

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> A - It was agreed that 8% of the final profit of Seylynn Project[s] will belong to the managing directors.
>
> B - It was agreed that from the allocated profit payable to the directors, advance payments of 50,000 CAD per month to be paid to the managing directors …
>
> [Emphasis added.]

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[8] The GP's translation pluralizes "Seylynn Project". The LP's translation does not.

[9] The December 14, 2011 Agreement was signed by representatives of the limited partners, Dr. Taheri (representing Teknocan), Dr. Hosseini (representing Pan Pacific Business Corporation), and Mr. Hashemi (on behalf of 0924404 B.C. Ltd. and on behalf of Mohammed Rashidpour, director of Bluemont Development Corporation).

[10] In November 2011, Dr. Taheri learned about other properties available for sale on lands adjacent to the Seylynn Village Project. The parties agreed to purchase these properties and on December 20, 2011, Dr. Taheri instructed a solicitor to prepare a second partnership agreement. On December 23, 2011, the GP was incorporated. The Phase II PA was executed on the same day.

[11] The Phase I and II PAs contain identical management fee provisions. The parties point to the following provision in the Phase II PA that they say governs the GP's entitlement to compensation:

> **3.6 Fees and Reimbursement of General Partner**
>
> The General Partner is entitled to:
>
> …
>
> (b) a fee in an amount equal to 8.0% of Net Income (calculated excluding such fee), payable by way of a monthly draw commencing retroactively as of October 1, 2011, based on the General Partner's estimate, made acting reasonably and adjusted from time to time, of Net Income [("Management Fee Provision")].

[12] "Net Income" is a defined term in the Phase I PA and provides as follows:

(k) “**Net Income**” or **Net Loss**” means the income or loss of the Partnership for a fiscal period determined in accordance with generally accepted accounting principles …

[13] Starting in April 2012, the GP took monthly draws of $10,000. That amount was reduced to $5,000 between October 2013 and July 2015. It then reverted to $10,000 until May 2017. From then until December 2018, the GP took monthly draws of $50,000 increasing to $60,000 from January 2019 until March 2020.

[14] In March 2021, the LPs passed a special resolution to remove the GP as the general partner and replace it with a new general partner. On April 24, 2023, the GP obtained derivative leave to commence proceedings relating to the arbitration against the LP. The GP of the Seylynn Village Project commenced a separate arbitration against the LPs with respect to that agreement (the Phase I PA). The arbitrations were not consolidated and are proceeding separately. The Tribunal members are the same for both arbitrations.

The Decision

[15] The dispute before the Tribunal related to the entitlement to fees under the Management Fee Provision of the Phase II PA and whether:

a) the GP was entitled to receive a fee under the Phase II PA as the party tasked with day-to-day management of the Partnership and the project; and, if so, the amount of that fee; and,

b) whether the GP must repay $2,058,000 plus accrued interest, being the amount disbursed to the GP.

[16] The Tribunal identified its main task as interpreting the Management Fee Provision in the Phase II PA. A secondary task was to determine whether the GP’s removal as the general partner breached the LP’s duty of good faith.

[17] At the outset of the Decision, the Tribunal stated:

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> 6. During the course of this arbitration, the parties relied on, pleaded and disputed several facts relating to the negotiation and conclusion of the Phase I PA. In this Partial Award, the Tribunal has limited its decisions and orders to the Phase II PA and the Management Fee issue for the Seylynn Gardens Project. No consideration is given, and no pronouncement is made, to the proper interpretation of the Phase I PA and the Management Fee issue for the Seylynn Village Project. That, as we say, is the subject of a separate arbitration; moreover, the surrounding circumstances of the two agreements are not identical.

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[18] The GP points to para. 6 as proving that the Tribunal failed in its obligation to interpret the Management Fee agreement in accordance with the surrounding circumstances.

[19] For reasons set out below, in my view, para. 6 simply informs the parties that the Tribunal has not pre-judged the issues to be determined in the second arbitration between the parties. When reviewing the Award, it is evident that the Tribunal considered surrounding circumstances as it embarked on its task of interpreting the Management Fee Provision in the Phase II PA.

[20] The Tribunal found the GP had breached the Phase II PA by taking management fee draws under s. 3.6(b) to which it was not entitled. The Tribunal dismissed the GP’s claim for rectification and for the imposition of an implied term and/or variation of the Phase II PA. The Tribunal dismissed the GP’s claim that LP had breached its duty to act in good faith in removing the GP as the general partner under the Phase II PA.

[21] Regarding the LP’s counterclaim, the Tribunal awarded the LP $2,058,000, plus pre-judgment interest in the amount of $276,873.27 and post-judgment interest, and costs in the amount of $744,887.50.

[22] On October 11, 2024, the LP requested three corrections to the Award pursuant to s. 56 of the *Arbitration Act* relating to computation, clerical, typographical or similar errors, including: (1) correcting the amount claimed from $2,053,000 to $2,058,000; (2) reducing the LP’s costs claim by approximately $3,000; and (3) correcting a reference to a statutory provision. The LPs also provided a calculation

of pre-judgment interest in the amount of $276,873.27. The Tribunal invited submissions from the GP regarding the reconsideration request. The GP did not provide a response. The Tribunal issued a "Corrected Partial Award" in accordance with the request, on October 18, 2024 (at paras. 262–267 of the Award).

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Legal Framework

[23] Section 59 of the *Arbitration Act* governs appeals from arbitration proceedings; it reads:

> **Appeals on questions of law**
>
> **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
>
> (a) all the parties to the arbitration consent, or
>
> (b) subject to subsection (3), a justice of that court grants leave to appeal under subsection (4).
>
> (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.
>
> (4) On an application for leave under subsection (3), a justice of the Court of Appeal may grant leave if the justice 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,
>
> (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
>
> (c) the point of law is of general or public importance.
>
> (5) If a justice of the Court of Appeal grants leave to appeal under subsection (4), the justice may attach to the order granting leave conditions that the justice considers just.
>
> …

[24] Three requirements must be met before a justice can grant leave to appeal an arbitration award:

a) the appeal must be based on a question of law;

b) the justice must be satisfied that one of the three circumstances identified in s. 59(4) exists; and

c) the justice must be prepared to exercise the residual discretion implicit in the phrase "the court may grant leave…"

[*MSI Methylation Sciences, Inc. v. Quark Venture Inc.*, 2019 BCCA 448 at para. 54.]

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[25] In *Desert Properties Inc. v. G&T Martini Holdings Ltd.*, 2024 BCCA 320 (Chambers), Justice Skolrood, as he then was, identified the importance of restraint when it comes to appellate intervention in commercial arbitration, stating:

> [10] This Court has taken a narrow approach to appellate intervention in commercial arbitration. In *On Call Internet Services Ltd. v. Telus Communications Company*, 2013 BCCA 366 at para. 35, Justice Kirkpatrick noted that the substantial restraints on granting leave play an important role in preserving the integrity of the arbitration system and maintaining one of its key beneficial and distinguishing features — finality (citing *Ed Bulley Ventures Ltd. v. Eton-West Construction Inc.*, 2002 BCSC 826 at paras. 5–6). While these cases were decided prior to the enactment of the new *Act* in 2020, the language of the *Act* has remained the same in respect of the test that applies for leave to appeal in the courts.

[26] The threshold question on this application is whether a question of law "… can be clearly perceived and identified …": *Grewal v. Mann*, 2022 BCCA 30 at para. 32. Justice Fenlon, in *Colony Construction Corporation v. Scott Steel Erectors Ltd.*, 2024 BCCA 306 (Chambers), provided this useful summary of this Court's jurisprudence on this point:

> [14] … 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. "If the question of law is explicit in the award, the statutory precondition is met. If the asserted question of law is implicit in the award, in the sense that it must be extricated from the application of the law to the facts, care must be taken to distinguish between an argument that a legal test has been altered in the course of its application (a question of law) and an argument that application of the legal test should have resulted in a different outcome (a question of mixed fact and law)": *MSI Methylation* at para. 72.

> [15] Issues of contractual interpretation are generally questions of mixed fact and law and, as such, cannot be appealed under s. 59 of the *Arbitration Act* unless the applicant identifies an extricable question of law: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 50, 53–55; *Escape 101 Ventures Inc. v. March of Dimes Canada*, 2021 BCCA 313 at para. 20. An extricable question of law may be based on the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor. Courts should be "cautious in identifying extricable questions of law in disputes over contractual interpretation": *Sattva Capital Corp.* at para. 53.

[27] For the purposes of the present application, the following proposition from *Metro Paving and Roadbuilding Ltd. v. Fortitude Structures Inc.*, 2020 BCCA 126 at para. 114, is relevant: "… the implication of a term into a contract is always a question of the objective intentions of the parties and is by necessity a fact-driven exercise requiring evidence to support the inference that the parties intended the term to be implied".

Positions of the Parties on Leave

[28] The GP submits that the Court must be wary of the LP's attempt to dress up properly constituted questions of law as factual (or mixed fact and law) when they are not. The GP submits that the errors identified are clearly errors of law such that leave should be granted. The GP contends that it must identify a question of law arising out of the Award and states that the legal questions arise in various circumstances, including where an arbitral tribunal fails to apply the correct legal principles; interprets the factual matrix of a contract in isolation from the words of the contract; makes findings of fact unsupported by evidence; and misconceives the evidence in a way that affects the decision. The GP contends that each of the errors identified by it constitutes an extricable question of law.

[29] The LP counters with a similar warning. That is, the Court must be wary of the GP's attempt to characterize the complaints as questions of law when they are nothing more than factual findings of the Tribunal. The LP submits that this was a "fact-rich" arbitral award rendered by a highly experienced Tribunal after considering extensive documentary evidence, cross-examination of the witnesses, and submissions. The LP submits that the GP "… has parsed the Award in the

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hope of finding an error." The "errors" identified are little more than complaints about factual findings of the Tribunal or are based on the GP's "mischaracterization of those findings". The LP contends that the GP has neither met the threshold requirement of identifying an error of law, nor shown that the determination of those "errors" may prevent a miscarriage of justice.

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Analysis

[30] The GP identified six errors of law in the Award. In the paragraphs that follow, I consider each of these "errors" and ask whether a question of law "… can be clearly perceived and identified …": *Grewal* at para. 32.

[31] First, the GP states that the Tribunal erred in law by interpreting the Phase II PA without considering or interpreting various related contracts between the same parties, entered into at around the same time, regarding related development projects. Relying on *Samson Cree Nation v. O'Reilly & Associés,* 2014 ABCA 268 at para. 82 [*Samson*], the GP states that the Tribunal ignored a "fundamental rule of contractual interpretation", that the surrounding circumstances of the Phase II PA be considered. The GP submits that para. 6 of the Award made clear that the Tribunal was not considering any of the surrounding circumstances.

[32] The GP says that the Tribunal needed to consider the Phase I PA and the December 14, 2011 Agreement when it interpreted the Management Fee Provision. The GP submits that the Tribunal was required to consider the Phase I PA to determine what the parties meant when they entered into the Phase II PA. As for the December 14, 2011 Agreement, the GP contends the Tribunal was in error when it concluded that the agreement "… did not relate to the Phase II Partnership." Even if the December 14, 2011 Agreement applied to the Phase I PA only, the Tribunal needed to consider it before it could properly interpret the same Management Fee Provision in the Phase II PA.

[33] The GP points to para. 134, a section of the Award addressing rectification, in support of its position that the Tribunal erred. The GP asserts that the Tribunal violated a fundamental rule of contractual interpretation by failing to interpret the

two contracts (Phase I and II PAs) which were made by the same parties, together and not in isolation. While this kind of error is so tied to the factual matrix that it likely raises a question of mixed fact and law, *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*] provides that “failure to consider a relevant factor” can constitute an error of law made in the course of contractual interpretation: at para. 53. Further, courts have held that interpreting clauses of the same contract, or two or more contracts made by the same parties at the same time on the same related subject, is a fundamental rule of contractual interpretation: *Samson* at para. 82. As such, it is possible that that the first error may raise an extricable error of law.

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[34] On this point, the GP relies on *Samson*, to demonstrate they properly raise a question of law. In my view, *Samson* is of limited use in this application. *Samson* was decided in a different jurisdiction and did not arise in the context of the *Arbitration Act*. Further, the interpretation rule set out in *Samson* was aimed at resolving doubt by concluding that two clauses, or two related contracts, were likely not intended to “clash”: at para. 82. Failure to apply the rule set out in *Samson* does not, in my view, constitute an error in law where the improbability of a potential “clash” could assist in the interpretation exercise.

[35] Here, whether the Tribunal’s failure to consider the Phase I PA in its interpretation of the Phase II PA constitutes a question of law will likely turn on whether the Phase I PA was necessary to resolve any doubt about the meaning of the Phase II PA, and if the Tribunal therefore failed to consider relevant factors in its analysis. The GP asserts that this is the case, and that the Phase I PA constitutes part of the “surrounding circumstances” the Tribunal was required to consider, and the failure to do so constitutes an error of law.

[36] In my view, this error is “so tied to the factual matrix” that it raises a question of mixed fact and law, not a question of law. Further, the Tribunal had found that the Phase I PA was of little value as it was formed in different circumstances, and

instead considered the “overall intent and purpose” of the Phase II PA in its analysis: Award at para. 101.

[37] The Award, when read functionally, contextually, and in light of the live issues and the record before it, makes clear that the Tribunal fully considered the surrounding circumstances. The Tribunal accurately set out the principles of contractual interpretation, including the requirement to consider surrounding circumstances (at para. 62) and explained, “… the first task… is to interpret those key provisions in the context of the Phase II PA read as a whole, taking into account the above-noted principles of contract interpretation”: Award at para. 73. At para. 134, the Tribunal correctly considered the “overall intent and purpose” of the Phase II PA. Further, the Tribunal was not persuaded that either the Phase I PA or the December 14, 2011 Agreement were of much value because the Phase II PA had not been formed at that time: Award at para. 134.

[38] I cannot conclude that the Tribunal failed to take into account the surrounding circumstances when it embarked on the interpretation of the Management Fee Provision. As such, the GP has not demonstrated an extricable question of law on this point.

[39] Second, the GP asserts that the Tribunal erred in law by concluding that the Tribunal was prohibited from considering evidence of the parties’ subsequent conduct, notwithstanding that the Tribunal had found an ambiguity in the terms of the Phase II PA. Here, the GP states that the Tribunal “… expressly found that there was ambiguity involving the meaning of the clause in the Management Fee Provision making payments retroactive as of October 1, 2011”, relying on para. 90 of the Award for support of this proposition.

[40] The second error—that the Tribunal found ambiguity and therefore should have considered subsequent conduct—involves an error in contractual interpretation.

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[41] The GP submits that the Tribunal did find ambiguity, despite stating it had not. On this point, the GP references the Tribunal's decision where it stated, "[t]his evidence, and the evidence as a whole on this point, is insufficient for the Tribunal to identify the purpose of the backdating of draws back to 1 October 2011 in the Phase II PA": Award at para. 90. The GP submits that the Tribunal, having found ambiguity, erred by not considering subsequent conduct to resolve the ambiguity, which constitutes an error in law.

[42] At para. 90 of the Award, the Tribunal indicated it was unable to reconcile the evidence concerning the purpose of the back-dating term. However, the Tribunal went on and stated at para. 95 that "irrespective of why" the back-dating term was included, the Tribunal was able to reconcile its inclusion in a "… manner that is consistent with the rest of Section 3.6(b) and the Phase II PA": Award at para. 93. In other words, the Tribunal did not consider the term ambiguous. The Tribunal determined that the Phase II PA was "comprehensive and operational" and thus would not consider subsequent conduct to interpret it: Award at para. 184.

[43] If there was indeed ambiguity, then subsequent conduct could be considered: *Wade v. Duck*, 2018 BCCA 176 at para. 28. However, it is not an error law not to do so, as a court is not obligated to consider subsequent conduct even in the presence of ambiguity; the language relating to its admission is permissive, not instructive: *Wade* at para. 29. The Tribunal did not err even if it had found ambiguity.

[44] Whether the Tribunal erred in its finding of no ambiguity is a question of fact and is therefore not reviewable on appeal: *Trilogy Energy LP v. SemCAMS ULC*, 2009 ABCA 275 at para. 14 (Chambers). The second error alleged is, in substance, an error that does not raise a question of law.

[45] Third, the GP asserts that the Tribunal erred in law by failing to afford any meaning to key terms of the Phase II PA and interpreting key terms of the Phase II PA in isolation from the factual matrix. This third alleged error is related to the second, wherein the GP submits that the Tribunal proceeded to interpret the backdating clause in the Management Fee Provision in isolation from, or based on

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a misapprehension of, the factual matrix, which could raise extricable questions of law.

[46] The GP submits the third proposed error involves misapprehensions of evidence: interpreting the backdating clause in isolation from, or based on a misapprehension of, the factual matrix; and interpreting the Management Fee Provision without affording any meaning to the clause making payments retroactive to October 1, 2011.

[47] The GP asserts that a misapprehension of evidence constitutes an extricable error of law; however, to constitute an extricable error of law, the misapprehension must be "… palpable and overriding, such that it is plain to see or obvious and goes to the very core of the outcome of the case …": *Escape 101 Ventures Inc. v. March of Dimes Canada*, 2022 BCCA 294 at para. 43, citing *Bayford v. Boese*, 2021 ONCA 442 at para. 28, internal citations omitted.

[48] The third error alleges the Tribunal erred by interpreting the Management Fee Provision "… without affording any meaning to the clause making payments retroactive to October 1, 2011". On its own, this alleged misapprehension does not constitute a question of law. Whether the error meets the threshold of a question of law requires the misapprehension to be one which is "… palpable and overriding … and goes to the very core of the outcome of the case": *Escape 101 Ventures Inc.* at para. 43. Here, the Tribunal considered the clause and how it was to operate, noting that the "… term must be given effect in a manner that is consistent with the rest of [the section] …": Award at para. 93. Even if the Tribunal did not afford any meaning to the clause, it is not apparent that the alleged failure to consider the clause went to the core of the outcome of the case.

[49] The fourth and fifth errors pertain to rectification of the Phase II PA. In its written submissions presented to the Tribunal, the GP asserted that "… [the Phase II PA] was not written as properly as it should have been in some respects and thus the [GP's] main assertion is that the [Phase II PA] … with respect to management fees ought to be rectified in accordance with the parties' antecedent agreement".

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[50] The GP submits that the Tribunal erred in law by misconceiving the evidence to conclude that the parties had not entered into an antecedent agreement related to the terms of the Phase II PA and thereafter, failed to apply the correct legal test for rectification. Related to this point, the GP submitted that the Tribunal held that the term “final profit”, as set out in the December 14, 2011 Agreement, was ambiguous: Award at paras. 155–157. The GP submits that this is not the test. Rather, there was “clear, convincing and cogent evidence that the parties agreed that the [GP] would be paid 8% of the final profit, as that agreement was signed by the parties to the Phase II PA”. The GP submits that the Tribunal was required to apply the ordinary principles of contractual interpretation to resolve the alleged ambiguity of the term “final profit” and it did not. Instead, submits the GP, the Tribunal relied on the witness’ subjective interpretation of the term “final profit” to conclude that the “… threshold of ‘clear, convincing and cogent’ is simply not met”: Award at para. 157.

[51] The GP states that the Tribunal misconceived the evidence when it concluded that the December 14, 2011 Agreement did not relate to the Phase II PA. According to the GP, the Tribunal relied on evidence from a witness said to have attended the December 14, 2011 meeting when he did not. In addition to the misconceived evidence, the GP submits that the Tribunal failed to consider and interpret the December 14, 2011 Agreement during the rectification analysis. The GP submits this constituted an error because misconceiving the evidence and failing to apply a required element of a legal test are both questions of law.

[52] If there was a misapprehension regarding the witness’ attendance at the meeting, this could go to the outcome of the rectification analysis and therefore raises a question of law. In my view, however, the Tribunal clearly set out several bases in its rectification analysis for finding that the December 14, 2011 Agreement did not relate to the Phase II PA. In reciting a submission from the GP, the Tribunal referred to the December 14 meeting and listed Mr. Marzbani as one of those in attendance: Award at para. 46. The GP said this determination was critical because the Tribunal later relied on Mr. Marzbani’s evidence on a critical point when it stated,

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"[t]he definitive evidence of Mr. Marzbani, which we accept on this point, is that at no time prior to the execution of the Phase II PA was there any discussion of management fees or of a draw for the [GP] in respect of Phase II …": Award at para. 135. At this point in its reasons, the Tribunal lists those in attendance at the meeting of December 14, 2011 and they did not include Mr. Marzbani in the list of attendees: Award at para. 127.

[53] In my view, when I read the reasons as a whole, the Tribunal did not commit the error alleged. That is, the Tribunal did not rely on Mr. Marzbani's evidence about what occurred at the December 14 meeting. Though the Tribunal did consider the evidence of Mr. Marzbani in its consideration, it also considered the evidence of several witnesses and the recording of the December 14 meeting to conclude that the agreement did not relate to the Phase II PA.

[54] On the evidence before it and based on the parties' submissions, the Tribunal was entitled to find as a fact that the December 14, 2011 Agreement did not relate to the Phase II PA. The Tribunal considered whether the parties intended to import the concept of "final profit" into the Phase II PA. The Tribunal found that it was too vague and imprecise a term to displace the presumption that the Phase II PA accurately set out the terms agreed to by the parties at paras. 150–157 and concluded:

> 157. Having considered all of the evidence, there are insufficient grounds to justify rectification of the Phase II PA. The Phase II PA is clear and operable as written and the rectified term sought is too imprecise and lacking definition; it does not displace the "inherent probability that the written instrument truly represents the parties' intention because it is a document signed by the parties" (and, in this case, a document which is in all significant respects identical to the Phase I PA, which was reviewed extensively and repeatedly by Dr. Taheri during the process of its drafting). The threshold of "clear, convincing and cogent" is simply not met.

[55] The fifth error alleges the Tribunal applied the incorrect standard of proof to the wrong subject matter to support a rectification claim, which raises a question of law. The GP submits the facts of the case disclosed a common mistake based on the parties' "… common continuing intention that the [GP] was entitled to 8% of the 'final profit' of the… [p]roject, not Net Income, as referred to and defined in the

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Phase II PA": Award at para. 121. The GP states that the Tribunal was required to apply the ordinary principles of contract interpretation to resolve the alleged ambiguity with the term "final profit" but instead relied on Mr. Marzbani's subjective interpretation to conclude that the threshold for rectification had not been met.

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[56] The Court in *Canada (Attorney General) v. Fairmont Hotels Inc*., 2016 SCC 56, held that the applicable standard of proof to be applied to evidence adduced in support of a rectification claim is the balance of probabilities. However, the Court went on to note, "[a] party seeking rectification faces a difficult task in meeting this standard, because the evidence must satisfy a court that the true substance of its unilateral intention or agreement with another party was not accurately recorded in the instrument to which it nonetheless subscribed": at para. 36.

[57] Following a review of the Award as a whole, the Tribunal's reference to Mr. Marzbani's evidence, and its findings regarding his testimony, did not constitute a misapprehension of the evidence. The Tribunal specifically listed those in attendance at the December 14, 2011 meeting and did not list Mr. Marzbani. The GP has not presented an extricable question of law regarding the Tribunal's rectification analysis with respect to either its use of Mr. Marzbani's evidence or its conclusions regarding the meaning of "final profit" as it related to the Management Fee Provision.

[58] Finally, the GP submits that the Tribunal mischaracterized the duty of good faith and that this mischaracterization raises a question of law: *Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd*., 2016 BCSC 68 at para. 59; aff'd 2016 BCCA 393. On this point, the GP alleges that the Tribunal erred by finding that no good faith obligation arose from the Phase II PA after the GP was removed and was no longer a party to the contract: Award at para. 201. The Tribunal found that the GP's termination was not a termination of the Phase II PA, but rather was an exercise of discretion to remove the applicant; while that exercise of discretion triggers the obligation of good faith, the Tribunal found that discretion was exercised for the purpose it was conferred: Award at para. 204. In reaching its

conclusion, the GP submits that the Tribunal's analysis was too narrow. The GP expressed its submission as follows:

> … the Tribunal erred in holding that good faith performance of the Phase II PA as contemplated in ***Callow*** [*C.M. Callow Inc. v. Zollinger*, 2020 SCC 45], a case about the duty of honest performance, was not "at issue" [Award at para. 203]; and thereby, restricting its analysis to the duty to exercise contractual discretion reasonably. The duty of honest performance is obligatory in all contracts and is the *sin qua non* of a partnership.
>
> [Emphasis in original, internal citations omitted.]

[59] In *Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd.*, the Court held that it is possible to identify an extricable question of law arising from what is initially characterized as a question of mixed fact and law, including the characterization of the duty of good faith. Similar to the application of this principle in the context of contractual interpretation, a question of law may arise where a legal error made in the course of the characterization includes "… the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor …": *Sattva* at para. 53, internal reference omitted.

[60] Here, a question of law does arise so long as it can be traced to an error in the Tribunal's characterization—and not simply its application—of the principles of the duty of good faith. However, the Tribunal did not find that the duty of good faith was "not at issue", as alleged by the GP; the Tribunal found the duty was a live issue, but that it was triggered by the exercise of contractual discretion and not by the termination of the Phase II PA: Award at para. 203. In my view, the substance of the GP's issue with the Tribunal's decision on this point goes to its interpretation and application of the principle, rather than a mischaracterization of the principle that constitutes a question of law.

<u>**Summary**</u>

[61] This was a dispute about the interpretation of a management fee provision in a partnership agreement. The Tribunal assessed the evidence and set out the correct legal principles applicable to the issues before it. As I consider each of the

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issues identified by the GP, I am of the view that the gist of the GP's submission is that the application of the legal test should have resulted in a different outcome. It is clear from the Award that the Tribunal considered the relevant provisions of the Phase II PA and the differing interpretations offered by the parties. The Tribunal set out the relevant principles governing contractual interpretation and considered thoroughly the various legal issues advanced by the GP. In my view, the Tribunal's analysis does not give rise to any extricable question of law which can be clearly identified. It is apparent that the GP takes issue with the Tribunal's ultimate interpretation of the Management Fee Provision in the context of the factual matrix.

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Disposition

[62] For the reasons given, the GP has failed to establish that its proposed appeal raises questions of law. Given this conclusion, it is unnecessary to address the other leave criteria in s. 59(4) of the *Arbitration Act*. The application for leave to appeal the Award is dismissed.

"The Honourable Justice Winteringham"