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 330

Date: 20250922
Docket: CA50227

Between:

Seylynn (North Shore) Phase II GP Ltd.

Appellant
(Claimant)

And

Seylynn (North Shore) Properties Phase II Limited Partnership

Respondent
(Respondent)

Before: The Honourable Mr. Justice Groberman
The Honourable Madam Justice Horsman
The Honourable Justice Riley

On an application to vary: An order of the Court of Appeal for British Columbia, dated February 4, 2025 (*Seylynn (North Shore) Phase II GP Ltd.* v. *Seylynn (North Shore) Properties Phase II Limited Partnership*, 2025 BCCA 36, Vancouver Docket CA50227).

Counsel for the Appellant:	S. D. Coblin
Counsel for the Respondent:	A.P. Morrison J.E. Shragge
Place and Date of Hearing:	Vancouver, British Columbia March 6, 2025
Place and Date of Judgment:	Vancouver, British Columbia September 22, 2025

Written Reasons of the Court

Summary:

The applicants apply to vary the decision of a Chambers judge refusing leave to appeal an arbitration award. Held: Application to vary dismissed. The Chambers judge was correct to conclude that the grounds of appeal did not raise extricable questions of law arising out of the award, as required by s. 59(2) of the Arbitration Act. As such, this Court had no jurisdiction to entertain an appeal.

Reasons for Judgment of the the Court:

[1] The applicant, Seylynn (North Shore) Phase II GP Ltd. (the "applicant"), applies under s. 29 of the *Court of Appeal Act*, S.B.C. 2021, c. 6, to vary the order of Justice Winteringham in chambers (the "Chambers judge"), dismissing its application for leave to appeal an arbitration award.

Background

[2] This proceeding arises out of a dispute over an agreement between the applicant (as general partner) and four limited partners referred to as Seylynn (North Shore) Properties Phase II Limited Partnership (the "respondent") that related to the development of residential lands in North Vancouver (referred to in the arbitration as the "Seylynn Gardens Project"). The agreement was titled Seylynn (North Shore) Properties Phase II Limited Partnership Agreement, dated for reference December 23, 2011 (the "Phase II PA"). The dispute was determined in an arbitration. The applicant wishes to pursue an appeal from the arbitral award to this Court.

[3] The Phase II PA was concluded in the context of a different project under a different agreement, the Seylynn (North Shore) Development Limited Partnership Agreement, that was executed on December 7, 2011 (the "Phase I PA"). The Phase I PA involved the development of other project lands in North Vancouver (referred to as the "Seylynn Village Project"). The parties to the Phase I PA were Seylynn (North Shore MP Ltd.) and four limited partners referred to as Seylynn (North Shore) Properties Limited Partnership.

[4] The general partner in the Seylynn Village Project (Phase I) commenced a separate arbitration against the limited partnership in relation to the Phase I PA. The

arbitrations were not consolidated. The Phase I PA was not the direct subject of the underlying proceeding, although it has some relevance to the issues.

[5] The dispute in the Phase II PA arbitration concerned the applicant's entitlement to management fees. From April 2012 until March 2020, the applicant took regular draws under the Phase II PA towards its management fees in amounts that eventually exceeded $2 million. The applicant maintained it was entitled to make these draws based on the management fee provision of the Phase II PA. The respondent disputed this. In very general terms, the dispute related to whether the Phase II PA provided that the applicant (as "General Partner") was limited to draws against income anticipated to be earned in the fiscal year when the draws were made, or whether it could draw against future profits.

[6] In March 2021, the limited partners passed a special resolution to remove the applicant as the General Partner and replace it with a new General Partner. In April 2022, the respondent advised the applicant that it was owed no additional management fees and that it must repay the management fees that had been taken as draws.

[7] In April 2023, the applicant commenced the arbitration over the Phase II PA. A three-member Tribunal was appointed to determine the arbitration, as well as a second arbitration concerning the Phase I PA. As noted, the two arbitrations were not consolidated. The Phase II PA arbitration proceeded first. It was heard over five days in July 2024. On October 1, 2024, the Tribunal issued a partial award (the "Partial Award").

The Partial Award

[8] The Tribunal identified two issues in dispute in the arbitration in relation to management fees:

a) whether the applicant was entitled to receive management fees under the Phase II PA and if so, the amount of those fees; and

b) whether the applicant was entitled to take draws under the Phase II PA against the receipt of a fee and, if not, whether the applicant must repay the amounts taken ($2,053,000, plus accrued interest).

[9] The Tribunal noted that these issues required it to determine the proper interpretation of the Phase II PA, particularly concerning management fees. Other issues to be resolved included: the applicant's request for a rectification of the management fee provision in the Phase II PA; the implication of terms; the applicant's claim that the respondent breached its duty of good faith in removing the applicant as General Partner; and the respondent's counterclaim for reimbursement of fees. The Tribunal confirmed that the proper interpretation of the Phase I PA would be addressed in a separate arbitration: Partial Award at para. 6.

The applicant's entitlement to management fees

[10] The Tribunal began its analysis by setting out the applicable principles of contract interpretation, which were not in dispute. The Tribunal explained, among other principles, the role of surrounding circumstances in interpreting a contract, as set out by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*].

[11] The Tribunal set out the provisions of the Phase II PA that were directly relevant to the parties' dispute. Section 3.6(b) was of particular importance:

> **3.6 Fees and Reimbursement of General Partner**
>
> The General Partner is entitled to:
>
> (a) […]
>
> (b) a fee in an amount equal to 8.0% of the 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.

[12] The Tribunal noted that the term "Net Income" was defined in Section 1 of the Phase II PA as "the income…of the Partnership for a fiscal period determined in accordance with generally accepted accounting principles". Fiscal period was

defined in Section 1 to mean the fiscal period as determined in Section 2.4 of the Phase II PA: “The fiscal period of the Partnership will end on December 31 in each and every year or such other date as the Limited Partners may determine by Ordinary Resolution”.

[13] The Tribunal also set out the provisions of the Phase II PA relating to the removal or resignation and replacement of the General Partner. In summary, Section 3.15 provided that the General Partner may not be removed except by Special Resolution, and that the removal becomes effective only by the appointment of a new General Partner. Section 3.17, addressing replacement, provided that once a new General Partner was appointed, the outgoing General Partner “shall transfer its General Partner Unit and its interest in the Agreement” to the new General Partner. “General Partner Unit” was defined as meaning “the entire interests and rights of the General Partner in the Partnership, as defined in this Agreement”.

[14] The Tribunal reviewed the positions of the parties on the proper interpretation of these provisions. In brief, the applicant asserted that Section 3.6(b) of the Phase II PA entitled it to 8% of the Net Income or profit, whenever such income or profit was achieved. Further, the applicant submitted that it was entitled to that fee despite its removal as General Partner in 2021. The applicant submitted that if Section 3.6(b) did not provide for this entitlement, then the Phase II PA should be rectified. In support of its claim for rectification, the applicant argued that the parties had an antecedent agreement that provided the applicant with a “locked in” entitlement to a management fee equivalent to 8% of the final profits regardless of whether it remained a General Partner at the time the profits were earned.

[15] The respondent argued that the Phase II PA did not allow for the payment of any management fees until the Net Income had been realized, and, further, that the requirement in Section 3.17 that the applicant had to transfer the General Partner Unit upon its removal as General Partner precluded payment of management fees in respect of future Net Income.

[16] The Tribunal concluded that the proper interpretation of Section 3.6(b) and Section 1 of the Phase II PA was that if the respondent earned income within a fiscal year, as determined in accordance with generally accepted accounting principles, then the General Partner was entitled to a management fee of 8% of such income. The Tribunal rejected the applicant's interpretation, finding that Section 3.6(b) did not, on its face and read as a whole, provide that the estimate could be based on an estimate of profit in future fiscal years.

[17] The Tribunal noted in the Partial Award at para. 86 that its interpretation of Section 3.6(b) gave rise to two questions:

> (a) If the income is *already realized* in a fiscal year, why is it necessary that the draws be based on the General Partner's reasonable *estimate* of the income; and
>
> (b) Given that the Respondent was not formed until 23 December 2011, what is the Tribunal to make of the reference to 1 October 2011?
>
> [Italicized emphasis in the original.]

[18] In the Tribunal's view, the answer to the first question was to read Section 3.6(b) "as a whole, and in accordance with commercial efficacy so as to avoid the absurdity of the internal contradiction suggested by the question": Partial Award at para. 87. The Tribunal reasoned that Section 3.6(b) contemplated advance monthly draws; that is, monthly draws before it was determined whether there is Net Income in a fiscal year. However, the discretion of the General Partner to take such draws was limited by the wording of Section 3.6(b)—advance draws could only be taken in accordance with the General Partner's "reasonable estimate of Net Income earnings to be realized during the year in which the draws are taken": Partial Award at para. 87. The Tribunal found that Section 3.6(b), on its face and read as a whole, "does not say that the estimate can be based on anything else, *i.e*., an estimate of profits in future fiscal years": Partial Award at para. 87.

[19] As to the reference to the date October 1, 2011 in Section 3.6(b), the Tribunal found that the evidence was insufficient to determine the purpose of backdating draws to that date given that it was clear no income would be earned in 2011.

Nevertheless, the Tribunal found that the term had to be given effect in a manner consistent with Section 3.6(b) and the Phase II PA as a whole. Section 3.6(b) stipulated that the draw was to be based on the General Partner's estimate "made acting reasonably and adjusted from time to time, of Net Income". The Tribunal reasoned that in these circumstances "no General Partner, acting reasonably, would take draws representing 8% of the income of the Partnership" in 2011: Partial Award at para. 94, emphasis in the original. In fact, the applicant did not do so, as it only began to take draws in April 2012. The Tribunal concluded:

> 95. In other words, irrespective of why the reference to 1 October 2011 was included in the Phase II PA, the payment of draws under it—retroactively to 1 October 2011 or prospectively from the date of the Agreement—was always governed by Section 3.6(b), read together with Sections 1 and 2.4, which required the Partnership earn income in the year. So understood, the inclusion of that reference is consistent with the Tribunal's interpretation of Section 3.6(b)'s effect on the Claimant's entitlement, under its terms, to management fees.

[20] The Tribunal rejected the applicant's submission that despite its removal as General Partner in 2011, it had a "locked in" entitlement to 8% percent of the partnership's final profit. The Tribunal found that the applicant's position could not be reconciled with Section 3.17 of the Phase II PA, which provided that upon removal by special resolution and the appointment of a new General Partner, the outgoing General Partner must relinquish all entitlements ("rights and interests") that it possessed as General Partner. In the Tribunal's view, this would include payment of any management fees after removal. The Tribunal found that the applicant's interpretation of the Phase II PA would also lead to commercial absurdity as it would result in successive General Partners each being entitled to a payout of 8% of Net Income in management fees.

[21] It followed from the Tribunal's interpretation of the Phase II PA that the applicant breached Section 3.6(b) when it took draws for management fees because the partnership had not realized any income from its formation until the applicant's removal as General Partner in 2021.

The applicant's claim for rectification of the Phase II PA

[22] The Tribunal then turned to the applicant's argument that the Phase II PA should be rectified to accord with an antecedent agreement whose terms had mistakenly been omitted from the Phase II PA.

[23] The applicant argued that a common mistake in the drafting of the Phase II PA was demonstrated by evidence of the circumstances surrounding the antecedent agreement, and the subsequent conduct of the parties after the execution of the Phase II PA. The applicant maintained that the antecedent agreement was reached in part at a December 7, 2011 meeting between representatives of the parties, and recorded in a document prepared following another meeting on December 14, 2011 (the "December 14 Agreement"). The December 14 Agreement stated, among other terms, that "it was agreed that 8% of the final profit of [the] Seylynn Project will belong to the managing directors", and that directors would receive advance monthly payments of $50,000 from the allocated profit.

[24] Based on this evidence, the applicant argued that the December 14 Agreement demonstrated the parties' agreement that: (1) the applicant was entitled to 8% of net income or profit of the partnership, whenever it was achieved; (2) this entitlement was locked in at the time the Phase II PA was signed; and (3) the applicant's removal as General Partner in 2021 did not affect this entitlement. The applicant sought rectification of Section 3.6(b) of the Phase II PA so that the term "Net Income" was removed and replaced with the term "final profit".

[25] The Tribunal found that the applicant had not established that the parties had reached a prior agreement whose terms were "*definite* and *ascertainable in respect of the Phase II PA*": Partial Award at para. 134, italicized emphasis in the original. The Tribunal reviewed the conflicting evidence and concluded that the meetings on December 7 and December 14, 2011, and the December 14 Agreement, "did not relate to the Phase II Partnership": Partial Award at para. 134. The Tribunal declined to make any pronouncement as to whether evidence regarding these matters might have an impact on the Phase I PA arbitration.

[26] The Tribunal concluded that the lack of reliable evidence to support the applicant's assertion that the parties intended the December 14 Agreement to apply to the Phase II PA was "sufficient to dispose of the claim for rectification": Partial Award at para. 149. However, the Tribunal additionally observed that the evidence was unclear as to what the parties intended by the reference to "final profit" in the December 14 Agreement.

[27] In respect of the claim for rectification, the Tribunal 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"….The threshold of "clear, convincing and cogent" is simply not met.

[28] Accordingly, the Tribunal dismissed the applicant's claim for rectification.

The applicant's claim for an implied term

[29] The applicant asked the Tribunal to imply a term to fill an alleged gap in the Phase II PA in that it failed to contain a clause to address the payment of management fees to a General Partner who is removed prior to the end of the project. The applicant argued that a term should be implied to the effect that if a General Partner was removed prior to the end of the project, its management fee would be based on 8% of the notional profit (current value of the property less acquisition costs and other expenses), after deduction of draws to date. The applicant maintained that such a term was necessary to give business efficacy to the Phase II PA.

[30] The Tribunal concluded the proposed implied terms would not be obvious to an officious bystander, as evidenced by the "sheer magnitude of the uncertainty" of the proposed terms: para. 182. The Tribunal stated:

> 183. Moreover, as described above with respect to rectification, the witness evidence reveals no presumed shared intention on which a term could be implied, *i.e.*, in order to imply a term, the Tribunal would be required to rewrite the parties' contract guessing at what the parties may or may not have

> intended over a decade ago. The subjective views and subsequent conduct of the various individuals involved do not provide an adequate or appropriate basis on which the Tribunal could try to imply a term or terms to plug the gaps alleged by the Claimant.
>
> 184. Rather, the Tribunal has determined the proper interpretation of the Phase II PA; it is comprehensive and operational and there are no gaps to be filled in order to give business efficacy to its purpose.

[31] Therefore, the Tribunal dismissed the applicant's claim for implying terms into the Phase II PA.

Other claims

[32] The Partial Award addresses other claims by the applicant that have less relevance to the issues on appeal. Specifically, the Tribunal dismissed the applicant's arguments that: (1) the parties varied the Phase II PA in January 2018; and (2) the respondent breached its duty of good faith in removing the applicant as General Partner in 2021 and in advising the applicant that no further management fees were owed.

[33] The Tribunal allowed the respondent's counterclaim for reimbursement of management fees that the applicant took in breach of Section 3.6(b) of the Phase II PA, and for interest on those amounts.

[34] In the result, the applicant's claim was dismissed, the respondent's counterclaim was allowed, and the Tribunal ordered that the respondent was entitled to costs of the arbitration on an indemnity basis.

[35] Subsequently (on October 18, 2024), the Tribunal issued a "Corrected Partial Award" which made three corrections to the Partial Award that were requested by the respondents. These corrections are not material to the present application.

The chambers judgment

[36] The applicant filed an application for leave to appeal the Partial Award pursuant to s. 59 of the *Arbitration Act*, S.B.C. 2020, c. 2, which in relevant part provides:

> **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).
>
> […]
>
> (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.
>
> […]
>
> [Emphasis added.]

[37] In reasons indexed at 2025 BCCA 36, the Chambers judge dismissed the leave application (the "Chambers Decision").

[38] Before the Chambers judge, the applicant identified six alleged errors of law in the Partial Award. The Chambers judge found that none of the alleged errors constituted an extricable question of law, which is a condition for the grant of leave to this Court under s. 59 the *Arbitration Act*. Instead, the Chambers judge interpreted the applicant's arguments to take issue with the Tribunal's ultimate interpretation of the Phase II PA in the context of the factual matrix, raising issues of mixed fact and law.

[39] On its application to vary the order of the Chambers judge, the applicant has narrowed its focus to three alleged extricable legal questions, and advances arguments as to how the Chambers judge is said to have erred in her treatment of

these questions. In light of the applicant's narrowed framing, a comprehensive review of the Chambers Decision is unnecessary. We will address the analysis of the Chambers judge in respect of the three remaining issues in considering the appellant's arguments.

The variation application

[40] The standard of review on an application under s. 29 of the *Court of Appeal Act* is highly deferential. The review is not to be treated as a re-hearing. For a review division to interfere with the order of a justice in chambers, an applicant must demonstrate that the justice was wrong in law, wrong in principle, or misconceived the facts: *Seattle Environmental Consulting Ltd. v. Workers' Compensation Board of British Columbia*, 2017 BCCA 386 at paras. 5–7.

[41] The issue of whether a leave application under the *Arbitration Act* raises an extricable question of law is, itself, a question on which no deference is owed. Where there is an extricable question of law, deference is owed to a justice's exercise of discretion under s. 59(4) of the *Arbitration Act* in deciding whether to grant leave: *Greata Ranch Holding Corp. v. Concord Okanagan Developments Ltd.*, 2019 BCCA 304 at paras. 45–50.

[42] On the variation application, the applicant argues that the following three questions are extricable questions of law arising from the Partial Award:

a) Did the Tribunal err in failing to interpret the Phase I PA and the December 14 Agreement when interpreting the Phase II PA?

b) Did the Tribunal err in failing to give any meaning to the backdating clause in Section 3.6(b) of the Phase II PA?

c) In its analysis of the applicant's claim for rectification, did the Tribunal err in failing to interpret the terms of the December 14 Agreement before deciding that it did not relate to the Phase II PA and it was not "clear, convincing and cogent" evidence of an antecedent agreement?

[43] The applicant says the Chambers judge was incorrect in concluding that these were not extricable questions of law.

Analysis

Legal framework

[44] As summarized by the Court in *MSI Methylation Sciences, Inc. v. Quark Venture Inc.*, 2019 BCCA 448 at para. 54 [*MSI Methylation*], there are three requirements that must be met before leave can be given 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. 31(2) [now 59(4)] of the *Act* exists; and
>
> (3) the leave judge must be prepared to exercise the residual discretion implicit in the phrase "the court may grant leave …"

[45] The threshold question on such an application is whether questions of law "can be clearly perceived and identified": *Grewal v. Mann*, 2022 BCCA 30 at para. 32. 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* at para. 72.

[46] Legal questions are about "what the correct legal test is"; factual questions are about "what actually took place between the parties"; and questions of mixed fact and law are about "whether the facts satisfy the legal tests", that is, they involve "applying a legal standard to a set of facts": *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 43 [*Teal Cedar*], citing *Sattva* and *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 1997 CanLII 385. If the allegation is that the arbitrator has altered a legal test in the course of applying it to a set of facts, then a legal question may arise. However, the Court in *Teal Cedar* offered the following caution:

> [45] Courts should, however, exercise caution in identifying extricable questions of law because mixed questions, by definition, involve aspects of law. The motivations for counsel to strategically frame a mixed question as a legal question — for example, to gain jurisdiction in appeals from arbitration

> awards or a favourable standard of review in appeals from civil litigation judgments — are transparent (*Sattva*, at para. 54; *Southam*, at para. 36). A narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings. Courts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law; *Sattva*, at para. 53), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question).

[47] In *MSI Methylation*, the Court provided the following additional guidance on what constitutes an extricable question of law in the context of an application for leave to appeal an arbitral award:

> [72] …
>
> (b) A question of law may be explicit or implicit in the award. 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).
>
> (c) One means of determining whether the challenged proposition is a question of law or part of a question of mixed fact and law is to consider the level of generality of the question. If the answer to the proposed question can be expected to have precedential value beyond the parties to the particular dispute, the question is more likely to be characterized as a question of law. On the other hand, if the answer to the proposed question is so tied to the particular circumstances of the parties to the arbitration that its resolution is unlikely to be useful for other litigants, the question will likely be considered a question of mixed fact and law. I would add to this that when the "question" is stated as a ground of appeal that is integrally tied to the facts of the case, it will more likely be characterized as a question of mixed fact and law, the answer to which cannot be of general application because of the integration of the particular facts of the case to the question. The more the question can be abstracted from the particular facts to a question of principle, the more likely it is that the challenged proposition will be characterized as a question of law with potential precedential value.

[48] The limited jurisdiction of this Court to hear an appeal from an arbitration award preserves the integrity of the arbitration system and advances its central aims of efficiency and finality: *Teal Cedar* at para. 1.

Has the applicant identified an extricable question of law?

[49] Although not a focus of the hearing, the parties directed submissions to the question of whether the Chambers judge refused leave on the sole basis that there was no question of law, or whether her decision also relied on the discretion to refuse leave under s. 59(4) of the *Arbitration Act*. We interpret the Chambers Decision to rest primarily, if not exclusively, on her finding that the applicant had not identified an extricable question of law, and therefore there was no jurisdiction to grant leave. For the reasons that follow, we conclude that the Chambers judge was correct in concluding that the three questions the applicant pursues on the variation application are not questions of law arising out of the Partial Award. As such, it is unnecessary for us to consider whether any portion of the analysis of the Chambers judge invoked the Court's discretion to refuse leave.

[50] Before turning to the three grounds that were the focus of the review application, it is first necessary to address the applicant's more general submission that the Chambers judge erred by determining the merits of the applicant's arguments and then "worked back from that position" to conclude that the applicant failed to identify any question of law. To borrow a phrase from Justice Gascon in *Teal Cedar* at para. 60, it would have been improper for the Chambers judge to "put the cart before the horse", by skipping ahead to a determination of the merits of the proposed grounds of appeal, rather than determining whether those grounds raise questions of law conferring jurisdiction on the appeal court. Such an approach erroneously "skips the jurisdiction stage and immediately proceeds with a review of the arbitrator's analysis": *Teal Cedar* at para. 59.

[51] Read as a whole, the Chambers Decision does not reveal any such error. While there are passages where the Chambers judge disagreed with the applicant's submission that the Tribunal erred in its assessment of the record (para. 39), or that the Tribunal was "entitled" to make certain factual findings (para. 54), or an alleged error did not "go to the core" of the case (para. 48), in each instance the Chambers judge was making the point that the grounds advanced by the applicant involve questions of fact or mixed fact and law, rather than questions of law affording a basis

for an appeal under s. 59 of the *Arbitration Act*. The Chambers judge was required to engage with the reasons of the Tribunal in assessing whether the applicant had identified an extricable question of law "arising out of an arbitral award".

Question 1: Did the Tribunal err in failing to interpret the Phase I PA and the December 14, 2011 Agreement when interpreting the Phase II PA?

[52] The applicant argues that the "related contracts doctrine" required the Tribunal to interpret the Phase I PA and the Phase II PA together, and that the Tribunal's failure to do so is an error of law. The applicant cites *Samson Cree Nation v. O'Reilly & Associés*, 2014 ABCA 268 at para. 82 [*Samson*], as support for the principle that where "the same parties make two or more contracts at the same time on the same or related topics, the court interprets them together, not in isolation". The applicant says the doctrine is clearly applicable here because the Phase I PA and the Phase II PA are related contracts within the meaning of this principle. Yet at para. 6 of the Partial Award, the Tribunal expressly stated that, "No consideration is given, and no pronouncement is made, to the proper interpretation of the Phase 1 PA".

[53] The Chambers judge concluded that whether the Tribunal erred in failing to consider the Phase I PA turned on whether such consideration was necessary to resolve doubt about the meaning of the Phase II PA. The Chambers judge found that this error was "so tied to the factual matrix" that it raised a question of mixed fact and law and not a question of law: Chambers Decision at para. 36. She found that *Samson* was of limited use because: (1) it was decided in a different jurisdiction and did not arise in the context of the *Arbitration Act*; and (2) the principle in *Samson* was directed at avoiding "clashes" in the interpretation of related contracts, and such a clash was improbable here: Chambers Decision at para. 34.

[54] The applicant contends that the Chambers judge erred in finding that *Samson* did not apply in this jurisdiction and could be restricted to its facts. *Samson* does not appear to have been applied to date by the British Columbia courts. However, the applicant says that the related contracts doctrine is simply an extension of

foundational principles of contractual interpretation. Further, the applicant says that the doctrine is clearly engaged in this case. In oral submissions on the present application, counsel for the applicant suggested that the question of law could be formulated as: “is the related contract doctrine the law of British Columbia?”

[55] We perceive at least two difficulties with this submission.

[56] First, the question of whether the related contract doctrine is the law in British Columbia might be a question of law. However, it is not a question of law “arising from an arbitral award”, as required by s. 59(2) of the *Arbitration Act*. The Tribunal did not reference *Samson* or the related contracts doctrine in its reasons, and did not conclude that *Samson* does not apply in this jurisdiction. This is not surprising because the applicant did not advance an argument based on the related contracts doctrine to the Tribunal. Specifically, in its closing submissions to the Tribunal (which are in the record before us), the applicant did not argue that the Tribunal could not interpret the Phase II PA without interpreting the Phase I PA, and it did not cite *Samson*. Instead, the applicant submitted that the wording of Section 3.6(b) of the Phase II PA did not properly reflect what the applicant maintained was an antecedent agreement between the parties. The applicant’s “main assertion” was that Section 3.6(b) ought to be rectified to accord with the antecedent agreement: Partial Award at para. 72. Aside from the claim for rectification, the applicant appeared “substantially to accept the Respondent’s interpretation of the management fees provision” in the Phase II PA: Partial Award at para. 74.

[57] The second difficulty with the applicant’s submission is that, even assuming the related contracts doctrine is the law in British Columbia, the question of whether the doctrine applies in a particular case is a question of mixed fact and law. The applicant’s submissions assume that the Phase I PA, the December 14 Agreement, and the Phase II PA are related contracts that, according to *Samson*, had to be interpreted together. However, this assumption appears contrary to the Tribunal’s findings of fact. The Phase I PA and the Phase II PA involved different projects, different contracting parties, and they were executed at different times. With the

apparent acquiescence of the parties, the two agreements were the subject of separate arbitrations that proceeded on separate timelines. The Tribunal noted that relevant surrounding circumstances were not the same for the two agreements: Partial Award at para. 6. The Tribunal also expressly found that the December 14 Agreement "did not relate to the Phase II Partnership": Partial Award at para. 134, emphasis added. As such, the applicant's submission is inconsistent with the Tribunal's factual findings.

[58] In short, the question of whether the related contracts doctrine applied, obliging the Tribunal to interpret the Phase 1 PA and the Phase II PA at the same time, turns on the application of the law to the facts; that is, it is a question of mixed fact and law. Put another way, the answer to the applicant's proposed question is "so tied to the particular circumstances of the parties to the arbitration that its resolution is unlikely to be useful for other litigants": *MSI Methylation* at para. 72.

[59] Accordingly, we conclude that the Chambers judge was correct to find that Question 1 was not an extricable question of law. This conclusion is sufficient to dispose of the variation application as it relates to this question. If it had been necessary for us to proceed to the discretion stage of the leave analysis, an issue would have arisen as to whether leave ought to be refused on the basis that this was a new issue not raised before the Tribunal. In the arbitration context, parties should not be readily permitted to adopt different positions in court than they took in the arbitration, as this risks subverting the goals of efficiency and finality that are central to the arbitration process: *VIH Aviation Group Ltd. v. CHC Helicopter LLC*, 2012 BCCA 125 at paras. 47–48. This would have been a proper consideration at the discretion stage of the test for leave in this case, particularly given that the entire structure of the arbitral process was premised on the Tribunal's separate consideration of the Phase I PA and the Phase II PA.

Question 2: Did the Tribunal err in failing to give any meaning to the backdating clause in Section 3.6(b) of the Phase II PA?

[60] The applicant maintains that the Tribunal erred in interpreting Section 3.6(b) of the Phase II PA without affording any meaning to the clause that permitted draws for management fees retroactive to October 1, 2011. The applicant relies on the principle of contractual interpretation that courts must strive to avoid interpretations that render one of the contract terms ineffective.

[61] Before the Chambers judge, the applicant submitted that this error involved a misapprehension of the evidence, which was an error of law because it was palpable and overriding and went to the core of the case: Chambers Decision at para. 47, citing *Escape 101 Ventures Inc. v. March of Dimes Canada*, 2022 BCCA 294 at para. 43. The Chambers judge held in this case that the Tribunal's alleged failure to consider the clause was not an error of law because it did not go to the core of the case: Chambers Decision at para. 48.

[62] The applicant argues the Chambers judge was incorrect in her conclusion that the alleged error of the Tribunal in its contractual interpretation had to go to the core of the case in order to constitute a question of law. While this is a requirement where the alleged error relates to a misapprehension of evidence, it does not apply where the alleged error concerns contractual interpretation.

[63] The Chambers judge's analysis was premised on the arguments made to her by the applicant about Question 2, which were based, at least in part, on alleged misapprehensions of the evidence by the applicant. In any event, the applicant has now reframed its arguments and does not assert in relation to Question 2 that the Tribunal misapprehended evidence. The question, then, is whether the applicant has identified an extricable question of law arising out of the award in relation to the Tribunal's alleged failure to ascribe meaning to the backdating term.

[64] A judge or arbitrator may, in theory, commit an error of law in interpreting a contract by failing to ascribe meaning to a contractual clause or adopting an interpretation that renders a clause ineffective: *Blackmore Management Inc. v.*

Carmanah Management Corporation, 2022 BCCA 117 at para. 50; *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107 at para. 42. However, this is not a question of law that arises from the Tribunal's award in this case. The Tribunal did address the backdating provision in Section 3.6(b) of the Phase II PA and did ascribe it a meaning.

[65] After reviewing the parties' evidence on how the reference to October 1, 2011 came to be included in Section 3.6(b), the Tribunal stated that the term "must be given effect in a manner that is consistent with the result of Section 3.6(b) and the Phase II PA": Partial Award at para. 93, emphasis added. As we have reviewed, the Tribunal found that the reference to October 1, 2011 was consistent with the Tribunal's interpretation of Section 3.6(b)'s effect on the applicant's entitlement to management fees: the payment of draws, whether prospectively or retroactively to October 1, 2011, had to be based on the General Partner's reasonable estimate of Net Income.

[66] The applicant disputes this interpretation. It argues that the Tribunal should have interpreted the backdating clause as consistent with the parties' intention that the General Partner could make draws based on anticipated future profit. In effect, the applicant argues that the application of principles of contractual interpretation should have led to a different outcome. This does not raise an extricable question of law, but a question of mixed fact and law, which is not appealable under s. 59 of the *Arbitration Act*.

> ***Question 3: In its analysis of the applicant's claim for rectification, did the Tribunal err in failing to interpret the terms of the December 14 Agreement before deciding that it did not relate to the Phase II PA and it was not "clear, convincing and cogent" evidence of an antecedent agreement?***

[67] The applicant says that the Tribunal erred by finding as a fact that the December 14 Agreement did not apply to the Phase II PA without first interpreting the Agreement. The applicant makes two arguments related to this alleged error by the Tribunal: (1) the test for rectification required the Tribunal to interpret the

December 14 Agreement, but instead the Tribunal relied on the subjective evidence of one witness (Mr. Marzbani) to interpret what the parties intended; and (2) the Tribunal acknowledged that the applicant had to show "clear, convincing and cogent evidence" of the antecedent agreement, but the Tribunal only applied this test to the words "final profit".

[68] The Chambers judge concluded that on the evidence before the Tribunal, and based on the parties' submissions, the Tribunal was entitled to find as a fact that the December 14 Agreement did not relate to the Phase II PA: Chambers Decision at para. 54. The applicant contends that she erred in this conclusion.

[69] The applicant cites *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 [*Fairmont*], for the proposition that the initial step in the test for rectification required the Tribunal to interpret the December 14 Agreement before determining whether the Agreement applied to the Phase II project. The applicant does not identify the passage from *Fairmont* that is said to support this proposition. *Fairmont* does state that "an order for rectification is predicated upon an applicant showing that the parties had reached a prior agreement whose terms are definite and ascertainable": at para. 14, emphasis added. The Tribunal cited *Fairmont*, and set out the general principles of rectification at paras. 111–120 of the Partial Award. The applicant has not pointed to any error by the Tribunal in its statement of the governing principles.

[70] The Tribunal concluded that the parties had not reached a prior agreement with definite and ascertainable terms because the December 14 Agreement did not relate to the Phase II PA. Having reached that conclusion, the Tribunal did not need to definitively interpret the December 14 Agreement, and it was understandably reluctant to do so given the arbitration concerning the Phase I PA was pending. We cannot perceive how the Tribunal's failure to interpret the terms of an unrelated prior agreement in addressing the claim for rectification could constitute an extricable question of law.

[71] As for the applicant's submission regarding the Tribunal's treatment of Mr. Marzbani's evidence, it is not borne out by a review of the Tribunal's reasons. The significance the Tribunal placed on Mr. Marzbani's evidence concerned the fact that the development of the Phase II project was so uncertain as of December 2011 that it would take a period of years for any profit to be earned. The Tribunal found that this evidence was "consistent with the considerable evidence in the record that there would be no Net Income (or profit) for several years": Partial Award at para. 136. Relying on its review of all the evidence, the Tribunal concluded that there were "no profit projections to support *any* structure of management fees for the Phase II project", which supported its conclusion that the December 14 Agreement did not relate to the Phase II PA: Partial Award at paras. 141, 134.

[72] The applicant's second argument related to Question 3 is that the Tribunal erred in altering the test for rectification by applying it only to the words "final profit" and not the entire December 14 Agreement. Once again, this is not an error that arises from the Partial Award. The Tribunal concluded that the lack of reliable evidence from the applicant to establish that the parties intended the December 14 Agreement to apply to the Phase II PA was "sufficient to dispose of the claim for rectification": Partial Award at para. 149. The Tribunal did go on to explain its reasons for concluding, additionally, that the meaning of the words "final profit" was unclear. This was relevant because the applicant's argument that there was an antecedent agreement with "definite and ascertainable terms" was directed at persuading the Tribunal that Section 3.6(b) of the Phase II PA should be rectified by replacing the term "Net Income" with the term "final profit": Partial Award at para. 130. The applicant does not identify where in the Tribunal's analysis it is alleged to have erred in law by altering the test for rectification. The real complaint is with the Tribunal's application of the test, which is a question of mixed fact and law.

[73] In summary, we agree with the Chambers judge that Question 3 is not an extricable question of law, but rather concerns the Tribunal's application of the law of rectification to the facts of this case. It is impossible to extricate this ground of appeal from the factual matrix that was before the Tribunal.

Disposition

[74] The application to vary the order of the Chambers judge is dismissed. As requested by the parties at the hearing of this application, they have leave to provide further brief written submissions on the issue of costs.

"The Honourable Mr. Justice Groberman"

"The Honourable Madam Justice Horsman"

The Honourable Justice Riley