COURT OF APPEAL FOR ONTARIO

CITATION: Campbell v. Toronto Standard Condominium Corporation No. 2600, 2024 ONCA 218
DATE: 20240325
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Simmons, Harvison Young and George JJ.A.

BETWEEN

Walter Campbell and Olakemi Sobomehin

Applicants (Respondents)

and

Toronto Standard Condominium Corporation No. 2600

Respondent (Appellant)

Danielle Marks and Fiona Burnett, for the appellant

Walter Campbell and Olakemi Sobomehin, acting in person

Heard: May 31, 2023

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated May 10, 2022, with reasons reported at 2022 ONSC 2805.

Harvison Young J.A.:

[1] This appeal raises the narrow question of the meaning of the word “fraud” in the *Arbitration Act*, *1991*, S.O. 1991, c. 17, (the “Act”) and, in particular, whether the word as used in s. 46(1)9 and s. 47(2) of the Act includes “constructive fraud”. Section 46(1)9 permits a court to set aside an arbitral award that was obtained by

fraud, and s. 47(2) provides that the normal 30-day time limit for commencing an application or appeal does not apply if fraud or corruption is alleged.

[2] In this case, an arbitrator awarded the appellant, Toronto Standard Condominium Corporation No. 2600 (the "Condo Corp."), costs of $30,641.72 against the respondents, former unit owners in the condominium. The award was premised at least in part on the arbitrator's conclusion that the respondents had breached a rule against short-term rentals and that the Condo Corp. had incurred costs in dealing with the matter.

[3] The respondents brought an application in the Superior Court of Justice to set aside the arbitral award on a number of grounds, including that the award was obtained by fraud (s. 46(1)9). They brought their application after the normal 30-day time limit had passed, relying on the exception for fraud under s. 47(2).

[4] The application judge granted the respondents' application and set aside the arbitral award. Although he held that there was no actual fraud in this case, he found that the Condo Corp. had committed constructive fraud by agreeing to proceed with the arbitration to determine the issue of costs but then expanding the issues to address the entire history of the dispute between the parties. He held that the word "fraud" as it appears in s. 46(1)9 and s. 47(2) includes constructive fraud.

[5] The Condo Corp. was granted leave to appeal and appeals on the basis that the application judge erred in concluding that “fraud” includes the more expansive concept of constructive fraud. As I will explain, I agree and accordingly would allow the appeal.

(1) Factual Background

[6] A lengthy history between the parties culminated in the arbitration which is the subject of this appeal. Given the narrow legal issue raised on this appeal, it is unnecessary to canvass this history in too much detail.

[7] The respondents purchased a unit in the condominium in August 2017.

[8] From about December 2018 to February 2021, various disputes arose between the parties, initially on the basis of complaints received about excessive noise, and subsequently regarding the use of the unit as a short-term rental after the Condo Corp. made a new rule in April 2019 prohibiting any such use. The Condo Corp. sent a number of letters to the respondents about the complaints between December 2018 and July 2019. The letters concerned the noise complaints, many of which came from one other unit owner in particular. One of these letters was a “cease and desist” letter, and another also complained about short-term rentals. During this period, the respondents were occupying the unit with their child, and made complaints that the complaining unit owner was harassing the family.

[9] In June 2019, the respondents entered into a one-year lease with another couple. After another noise complaint in mid-July 2019, the Condo Corp. sent a notice of mediation, which alleged that the respondents had breached the declaration, by-laws and rules of the corporation and that pursuant to s. 132(4) of the *Condominium Act, 1998*, S.O. 1998, c.19, the disagreement would be submitted to a mediator.

[10] In August 2019, the respondents sent the Condo Corp. an email rejecting the proposed mediator and indicating that they would propose alternatives by the end of September. In September 2019, the Condo Corp.'s legal counsel corresponded with the respondents, indicating that if mediation did not proceed, arbitration could become necessary. Counsel also warned that the Condo Corp. would seek recovery of its costs if arbitration was required.

[11] While the respondents agreed to engage Marc Bhalla as a mediator in October 2019, they later withdrew their consent and no mediation was arranged.

[12] Matters dragged on and the Condo Corp.'s legal costs mounted.

[13] In October 2020, counsel for the Condo Corp. wrote to the respondents, demanding that they cease and desist using their unit for short-term rentals.

[14] Finally, in November 2020, the Condo Corp. delivered a notice of arbitration. In the notice, which reads as follows, the Condo Corp. stated that it had already

incurred costs in the amount of $24,003.43, which it intended to recover along with additional costs going forward:

> WHEREAS pursuant to sections 17 (2) and (3) of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "Act"), the Corporation has a duty to manage the property and assets of the Corporation on behalf of the owners and to ensure that all unit owners and occupiers comply with the Act and the Corporation's registered Declaration, By-laws and effective Rules.
>
> …
>
> AND WHEREAS the Unit Owners have an obligation to comply with the Act and the Corporation's registered Declaration, By-laws and effective Rules
>
> AND WHEREAS the Unit Owners have breached the Declaration, By-laws and Rules of the Corporation as well [as] provisions of the Act, including but not limited to, the following conduct:
>
> > 1. By using the Unit for the purposes of a boarding house, lodging house, rooming house, bed and breakfast, inn, hotel, or other short-term stay lodging facility, including but not limited to, Air BnB and or Vacation Rental by Owner ("VRBO"), contrary to the Rules.
>
> …
>
> AND WHEREAS the Corporation and the Unit Owners previously attempt[ed] to mediate the issues between them, without success and more than sixty (60) days have elapsed since the parties submitted this disagreement to mediation, but were unable to select a mediator.
>
> …
>
> The Condominium has incurred costs to date in this matter in the total amount of $24,003.43. It is the

> Condominium's intention to seek recovery of these costs, and all costs going forward, on a full indemnity basis, in accordance with section 12 of the Condominium's Declaration. [Emphasis added.]

[15] By February 2021, the respondents had retained counsel and agreed that Mr. Bhalla would be appointed arbitrator. At that point, counsel for the Condo Corp. learned that a status certificate had been requested for the unit (suggesting that the respondents could be intending to sell the unit) and exchanged a number of email messages with counsel for the respondents. It is clear from the Condo Corp.'s messages that although the sale of the unit could effectively resolve the substantive issues raised in the arbitration, the costs issue would remain unresolved. Counsel for the Condo Corp. suggested that this could happen either by a negotiated resolution or by agreeing to have the issue resolved by the arbitrator. He added that it was his view that the arbitration agreement should still be finalized.

[16] On March 4, 2021, the respondents signed a conditional agreement for the sale of their unit, and on the same day signed an arbitration agreement with the Condo Corp. That agreement stipulated that the issues in dispute for the arbitration would be (a) the alleged contraventions of the short-term rental rules; and (b) costs, including "all costs pertaining to the Issues incurred by the Parties prior to entering into this Agreement to Arbitrate and beyond the Arbitration." The agreement specified that the arbitrator was to make "a final and binding decision"

on the specified issues. It also specified that the parties “irrevocably agree not to appeal or attempt to set aside any aspect of the Arbitration Award”.

[17] As the application judge notes, there was extensive and acrimonious correspondence between counsel for the Condo Corp. and counsel for the respondents between March 4, 2021 and the closing of the sale of the respondents’ unit on May 30, 2021. It is unnecessary to detail the exchanges, but I note that counsel for the Condo Corp. made clear that if the Condo Corp. “[did] not receive a copy of the [agreement of purchase and sale], or [the parties were] not able to agree to terms of an interim award, then all issues (and not simply costs) [would] be on the table in the arbitration”. He added that his client had already incurred more than $35,000 in legal fees and that an itemized bill of costs would be provided to the respondents in the course of Condo Corp.’s submissions to the arbitrator seeking costs on a full indemnity basis. In response, counsel for the respondents demanded that a bill of costs be provided and that the matter not be further escalated.

[18] The arbitration, which proceeded in writing before Mr. Bhalla, was not completed until August 2021. The arbitrator released his lengthy decision on September 6, 2021, awarding the Condo Corp. $30,641.72 in costs on a partial indemnity basis. In doing so, he rejected the respondents’ statement that they had abided by the rule preventing short-term rentals since its implementation, noting that the Condo Corp. had produced a receipt for a short-term reservation made for

their unit. He stated that his award was "in consideration of all costs surrounding this matter through the date of this order" and that "[a]ny other costs incurred to date are each of the [Parties'] to bear for themselves."

[19] The respondents commenced an application to set aside the arbitrator's award on November 2, 2021, which was nearly two months after the release of the award.

[20] The Condo Corp. brought a cross-application and a separate application, which were dismissed. They are not material to this appeal.

(2) The Application Judge's Reasons

[21] The application judge acknowledged that no appeal was available to the respondents as the parties had agreed that the arbitrator's decision would be final and that there would be no right of appeal. Moreover, even if an appeal were available, the respondents were out of time and, in any event, would require leave to appeal on a question of law, which would not be available in this case.

[22] While there was no appeal available, he granted the respondents' application to set aside the arbitral award, which alleged both fraud on the part of the Condo Corp. and constructive fraud on the part of the arbitrator.

[23] The application judge correctly held that there was no actual fraud in this case. He expressly declined to attribute "any actual fraud or moral turpitude" to the Condo. Corp.

[24] He held, however, that it was appropriate to set aside the award on the basis of s. 46(1)9 since, in his view, the word “fraud” in that provision includes “constructive fraud” and the respondents were “victims of constructive fraud”. He cited his prior decision in *Holley v. The Northern Trust Company, Canada*, 2014 ONSC 889, 10 C.B.R. (6th) 1, aff’d 2014 ONCA 719, 18 C.B.R. (6th) 162, in describing the difference between fraud at common law and the broader equitable concept of constructive fraud, which “does not necessarily involve dishonesty or moral fraud in the ordinary sense, but a breach of [the] sort that would be enforced by a court of conscience”: *Holley*, at para. 130. Similarly, he explained that constructive fraud “focuses on unfairness more than it does on deceit.” In his view, it was “unconscionable and unfair” that the Condo Corp. “lured [the respondents], their legal counsel, and the Arbitrator” into adjudicating issues beyond those of costs. He explained, at paras. 90-91:

> … [T]he critical matter that justifies setting aside his arbitral award on the grounds of constructive fraud is that it was unconscionable and unfair that an arbitration notionally or purportedly about costs became something much different. The substantive issues intended by both parties to be removed from the dispute were not removed; they were adjudicated.
>
> Indeed, the substantive issues that were adjudicated went beyond the Notice of Arbitration, which initially was to focus on the short-term rental issue, and included the issues raised in the Notice of Mediation, which focused on the noise complaint. …

(3) The Arguments on Appeal

[25] The Condo Corp. takes the position that the application judge erred in reading "constructive fraud" into s. 46(1) and s. 47(2) of the Act and accordingly erred in setting aside the arbitral award.

[26] The respondents take the opposite position. In their view, the Condo Corp.'s interpretation of the Act is unduly restrictive. Citing the dissenting judgment in *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, the respondents assert that all Ontario statutes should be read in the spirit of s. 64(1) of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, which favours a "fair, large and liberal interpretation". As such, their position is that the application judge's interpretation of fraud is consistent with the Act's objectives of promoting access to justice and maintenance of public confidence in the justice system.

(4) Relevant Statutory Provisions

[27] It will be useful to set out s. 46(1) and s. 47 of the Act at this point for easy reference in the course of the following discussion.

[28] Section 46(1) sets out an exhaustive list of grounds on which a court may set aside an arbitral award, including under s. 46(1)9 "if the award was obtained by fraud":

> 46 (1) On a party's application, the court may set aside an award on any of the following grounds:

> 1. A party entered into the arbitration agreement while under a legal incapacity.
>
> 2. The arbitration agreement is invalid or has ceased to exist.
>
> 3. The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement.
>
> 4. The composition of the arbitral tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with that matter, was not in accordance with this Act.
>
> 5. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
>
> 6. The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator.
>
> 7. The procedures followed in the arbitration did not comply with this Act.
>
> 8. An arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias.
>
> 9. The award was obtained by fraud.
>
> 10. The award is a family arbitration award that is not enforceable under the *Family Law Act*. [Emphasis added.]

[29] Section 47(1) of the Act sets out the time limit for appealing or applying to set aside an award. Section 47(2) specifies that the time limit does not apply if the appellant or applicant alleges corruption or fraud:

> 47 (1) An appeal of an award or an application to set aside an award shall be commenced within thirty days after the appellant or applicant receives the award, correction, explanation, change or statement of reasons on which the appeal or application is based.

> (2) Subsection (1) does not apply if the appellant or applicant alleges corruption or fraud.

(5) Analysis

(a) Principles of interpretation

[30] This appeal turns on a question of statutory interpretation, specifically whether "fraud" in s. 46(1)9 and s. 47(2) includes constructive fraud.

[31] It is trite law that an Act must be interpreted in a manner that is purposive and in keeping with its objects: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, citing Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87. As Professor Ruth Sullivan explained in her text, statutory interpretation cannot be founded on the wording of the legislation alone. Rather, the words of an Act "are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Ruth Sullivan, *Construction of Statutes*, 7th ed. (Markham, ON: LexisNexis, 2022), at § 2.01. The majority's decision in *Wellman* confirmed that this is the approach to apply when interpreting the Act: at para. 47.

(b) Purposes and objects of the *Arbitration Act, 1991*

[32] The purposes and objects of the Act are interrelated and well established.

[33] The central purpose of arbitration is to provide contracting parties with access to a method of dispute resolution that "can be more expedient and less costly than going to court": *Uber Technologies Inc. v. Heller*, 2020 SCC 16, [2020] 2 S.C.R. 118, at para. 117, quoting *Wellman*, at para. 83.

[34] Relatedly, having agreed to resort to arbitration pursuant to the Act, parties must "hold to that course": *Wellman*, at para. 49, quoting *Ontario Hydro v. Denison Mines Ltd.*, [1992] O.J. No. 2948 (Gen. Div.), at para. 8; see also J. Kenneth McEwan & Ludmila B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (Thomson Reuters Canada Ltd., 2023) at § 1:4. The Act "entrenches the primacy of arbitration proceedings over judicial proceedings, once the parties have entered into an arbitration agreement, by directing the court, generally, not to intervene…": *Wellman*, at para. 49, quoting *Denison Mines*, at para. 9.

[35] Efficiency and finality are therefore central objectives which underpin the Act: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, at paras. 1, 74 and 83.

(c) Scheme of the Act: limited court intervention

[36] The Act itself clearly manifests the legislative intent to limit court intervention in arbitral matters.

[37] For example, s. 6, which falls under the heading “Court intervention limited”, states as follows:

> 6 No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:
>
> 1. To assist the conducting of arbitrations.
>
> 2. To ensure that arbitrations are conducted in accordance with arbitration agreements.
>
> 3. To prevent unequal or unfair treatment of parties to arbitration agreements.
>
> 4. To enforce awards.

[38] Consistent with the notion of limited court intervention, the Act includes five “no appeal” provisions: see e.g., ss. 7(6), 10(2), 15(6), 16(4), 17(9).

[39] Furthermore, s. 45, which permits appeals, “makes clear that the parties are free to establish or to preclude an appeal to the court on a question of law, fact, or a mixed question of law and fact”, and, “if an arbitration agreement is silent on this point, an appeal to the court on a question of law lies only with leave”: *Alectra Utilities Corporation v. Solar Power Network Inc.*, 2019 ONCA 254, 145 O.R. (3d) 481, at para. 20 (emphasis added), leave to appeal refused, [2019] S.C.C.A. No. 202.

[40] If parties have agreed to an appeal on a question of law alone, courts are admonished to avoid strategic attempts to broaden the scope of the appeal by turning questions of mixed fact and law into questions of law: *Teal Cedar*, at

para. 45. See also *Tall Ships Development Inc. v. Brockville (City)*, 2022 ONCA 861, 476 D.L.R. (4th) 500, leave to appeal refused, [2023] S.C.C.A. No. 29. In *Teal Cedar*, Gascon J. issued the following warning, at para. 45:

> Courts should … 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.… A narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings. [Emphasis added.]

[41] In summary, "appeals from private arbitration decisions are neither required nor routine" and courts are warned to guard against strategic attempts to enlarge the scope of appeal beyond what the parties have agreed to: *Alectra*, at para. 20

(d) Case law interpreting s. 46: applications to set aside

[42] In this case, as the application judge explained, no appeal was available, and so the issue was whether there was a basis for setting aside the award under s. 46.

[43] While the parties have not pointed to any case law interpretating s. 46(1)9, there is recent case law from this court interpreting s. 46. This case law takes a narrow approach to the interpretation and application of this section.

[44] For example, in the recent *Alectra* decision, this court addressed whether the arbitrator's decision should be set aside pursuant to s. 46(1)3 of the Act, which allows an award to be set aside if it "deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement". In *Alectra*, Huscroft J.A. described s. 46 as authorizing a court to set aside an arbitral award on "limited and specific grounds", which "are, in general, not concerned with the substance of the parties' dispute": at paras. 23-24. He emphasized that "s. 46(1)3 allows only for limited review for jurisdictional error" and that the provision "neither requires nor authorizes review of the substance of an arbitrator's award": at para. 43 He observed, at para. 27, that arbitrators must act within the bounds of the authority granted by the arbitration agreement pursuant to which they are appointed – "no less, but no more". He rejected the respondent's attempt to import a more elastic concept of jurisdiction into s. 46 of the Act: see paras. 28-34.

[45] This court also considered the application of s. 46(1)3 in *Mensula Bancorp Inc. v. Halton Condominium Corporation No. 137*, 2022 ONCA 769, leave to appeal refused, [2023] S.C.C.A. No. 120. The court reiterated that s. 46(1)3 of the Act "provides a narrow basis upon which, a court may interfere with an arbitration award", "does not create a right of appeal", and "allows only for limited review for jurisdictional error": see paras. 5, 40.

[46] In *Tall Ships*, this court again reiterated, at paras. 2 and 95, that the basis for setting aside an arbitral award under s. 46 of the Act is narrow, is not concerned with the substance of the parties' dispute, and is not to be treated as an alternate appeal route.

[47] In short, the court's recent trilogy of cases has made clear that the grounds for setting aside an arbitral award listed in s. 46 are narrow and that s. 46 is not an alternate appeal route. This interpretation gives effect to the Act's objectives of efficiency and finality.

(e) Case law interpreting s. 47: time limit for bringing appeals or applications

[48] Under s. 47(1), an appeal of an award or application to set aside an award "shall be commenced" within 30 days after the decision. This court has affirmed that there is no judicial discretion to extend the 30-day time limit: *R & G Draper Farms (Keswick) Ltd. v. 1758691*, 2014 ONCA 278, 24 B.L.R. (5th) 175, at paras. 16-21. This interpretation is not only consistent with the wording of the statute, but also with the principles of efficiency and finality.

[49] Section 47(2) recognizes two exceptions to the 30-day time limit: there is no such limit if the appellant or applicant alleges corruption or fraud. Notably, like fraud, corruption also requires evidence of dishonesty: see e.g., *Toronto Standard Condominium Corporation No. 1466 v. Weinstein*, 2021 ONSC 1306, at para. 22,

leave to appeal refused, 2021 ONCA 470, leave to appeal refused, [2021] S.C.C.A. No. 369.

[50] The parties have not pointed to any appellate case law interpreting s. 47(2) but do point to Superior Court decisions interpreting "fraud" as actual fraud: see e.g., *Weinstein*; *1323257 Ontario Ltd. v. Hyundai Auto Canada Corp.* (2009), 55 B.L.R. (4th) 265 (Ont. S.C.). As I will explain, these decisions were correct in interpreting "fraud" as actual fraud.

(f) Fraud v. constructive fraud

[51] In this case, the application judge gave the word "fraud" an expansive interpretation, including not only fraud but also the equitable concept of constructive fraud. As can be seen from his description of the difference between fraud and constructive fraud, in *Holley*, at para. 130, it is readily apparent that constructive fraud is a much broader concept than fraud, in that it eliminates the requirements of knowledge and intent to deceive:

> To summarize, at its core, common law fraud involves dishonest and moral turpitude. The fraud elements of common law fraud are that the defendant has an intent to deceive and makes a false statement that he or she knows is false or the defendant makes a false statement that he or she is indifferent to its truth value. Constructive fraud does not necessarily involve dishonesty or moral fraud in the ordinary sense, but a breach of sort that would be enforced by a court of conscience. [Emphasis in the original.]

[52] In the words of the application judge, constructive fraud focuses on the concept of “unfairness”.

(g) “Fraud” does not include constructive fraud

[53] The word “fraud”, which is not defined in the Act, is used twice in the Act: in ss. 46(1)9 and 47(2). Given the presumption of consistent expression – the presumption that within a statute the same words have the same meaning and different words have different meanings – the word “fraud” has the same meaning in both sections: Sullivan, at § 8.04.

[54] As the application judge recognized, the word “fraud” has an established legal meaning at common law. The Supreme Court has recognized that “[w]ords that have a well-understood legal meaning when used in a statute should be given that meaning unless Parliament clearly indicates otherwise”: *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 20. Thus, had the Legislature intended to extend the meaning of “fraud” to include the different and broader concept of “constructive fraud” one would have expected it to do so explicitly.

[55] Reading “fraud” to include the concept of “constructive fraud” would be out of step with appellate case law. As set out above, this court has consistently stated that s. 46 provides a narrow basis upon which a court may interfere with an arbitral award and does not create an alternate appeal route. The approach is consistent with the objectives of the Act – to promote efficiency and finality. While this court

has not opined on s. 47(2), it has affirmed that there is no judicial discretion to extend the 30-day time limit under s. 47(1), which is also consistent with the principles of efficiency and finality.

[56] Case law has also repeatedly emphasized the exceptional nature of applications to appeal or set aside arbitral awards and the primacy of the terms of the arbitration agreement under which parties may restrict or preclude appeals. It has also cautioned courts to be aware of strategic attempts by losing parties to expand the scope of review beyond what they had agreed to under the arbitration agreement.

[57] In my view, expanding the meaning of the word fraud in s. 46(1)9 and s. 47(2) to include constructive fraud would be at odds with this case law. It risks significantly undermining the principles of efficiency and finality, because the nature of constructive fraud is much broader than that of fraud itself, as the application judge recognized. Unlike civil fraud, actual dishonesty or intent to deceive is not required to establish constructive fraud.

[58] Expanding the meaning of “fraud” also risks inviting strategic enlargement of the grounds for setting aside an arbitral award, as illustrated by this case.

[59] In this case, had the parties applied to set aside the arbitral award within the 30-day period set by s. 47(1), it is conceivable that their claims might have fallen within some of the other grounds enumerated in s. 46 for setting aside an award,

such as the invalidity of the agreement, as set out in s. 46(1)2, or procedural unfairness, as set out in s. 46(1)6 of the Act, though I do not want to be taken as suggesting that such grounds would or could have succeeded in the circumstances. Those routes were no longer open to the respondents after the expiration of 30 days by the express terms of ss. 46 and 47: see e.g., *Mattamy (Downsview) Limited v. KSV Restructuring Inc. (Urbancorp)*, 2023 ONSC 3013, at paras. 39-40.

[60] Instead, the respondents sought to circumvent the time limit by alleging fraud and constructive fraud. The application judge delved into the merits of the arbitrator's decision in the course of reaching his conclusion that constructive fraud is included in the meaning of fraud. Each side had a different view of what "costs" meant. This was at the heart of the merits of the case. But it was not open to the respondents to argue that the arbitrator had erred, or wrongly or even unfairly interpreted the terms of the agreement in seeking to have the award set aside under s. 46(1)9. For these reasons, I conclude that the application judge erred in interpreting "fraud" to include constructive fraud in s. 46(1)9 and s. 47(2).

[61] In any event, to the extent that the arbitrator did determine substantive issues that were not simply "costs" in the narrowest sense, it did not amount to constructive fraud in the circumstances. It was appropriate and necessary for him to consider factors such as the history and nature of the complaints, the length of

the proceedings and the reasonableness of the parties' conduct in the course of exercising his costs discretion: Act, s. 54; see also s. 4 of the Notice of Arbitration.

(6) Conclusion and Costs

[62] The application judge's decision to set aside the arbitral award rested on his conclusion that "fraud" under s. 46(1)9 and s. 47(2) included constructive fraud. Given that he erred in his interpretation of "fraud", his decision cannot stand.

[63] Accordingly, I would allow the appeal and restore the arbitral award.

[64] The appellant is entitled to its costs of the proceedings in this court on a partial indemnity basis. I would award costs in the amount of $20,125.41, inclusive of the costs of the leave application, HST and disbursements. If the parties are unable to reach an agreement concerning costs in the court below, the appellant may make brief written submissions not to exceed three pages within ten days of the release of these reasons and the respondent may respond on the same terms within ten days after receipt of same.

Released: March 25, 2024 "J.S."

"A. Harvison Young J.A."
"I agree. Janet Simmons J.A."
"I agree. J. George J.A."