COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Farrow v. RLG International Inc.,*
2024 BCCA 198

Date: 20240527
Docket: CA49640

Between:

Brad Farrow, B. Farrow Holdings Ltd.,
Dave Helewka and 0773875 B.C. Ltd.

Appellants
(Claimants/Respondents by Counterclaim)

And

RLG International Inc.

Respondent
(Respondent/Claimant by Counterclaim)

Before: The Honourable Madam Justice Horsman
(In Chambers)

On appeal from: An award of an Arbitrator under the *Arbitration* Act, S.B.C. 2020, c. 2, dated January 3, 2024 (*Farrow v. RLG International Inc.)*.

Counsel for the Appellants:	M.L. Teetaert J.R. Lambert
Counsel for the Respondent:	D.R. Brown J. Buysen
Place and Date of Hearing:	Vancouver, British Columbia May 7, 2024
Place and Date of Judgment:	Vancouver, British Columbia May 27, 2024

Summary:

The applicants apply for leave to appeal the award of an arbitrator under s. 59 of the Arbitration Act. The award dismissed the applicants' claims against the respondent company relating to the manner in which their shares were repurchased on retirement. The applicants say the arbitrator made legal errors in analyzing their claims that: (1) the respondent breached its contractual duty of good faith, and (2) there were material deficiencies in an information circular sent to shareholders in advance of a meeting to determine share price.

Held: Application dismissed. The applicants have not identified an extricable error of law arising out of the award, which is the threshold requirement for granting leave to appeal.

Reasons for Judgment of the Honourable Madam Justice Horsman:

Overview

[1] The applicants, Brad Farrow, Dave Helewka, and their respective holding companies, seek leave to appeal the award of an arbitrator (the "Arbitrator") dismissing their claims against the respondent, RLG International Inc. ("RLG"), pursuant to s. 59 of the *Arbitration Act*, S.B.C. 2020, c. 2.

[2] Mr. Farrow is the former Chief Executive Officer of RLG, and a former managing director. Mr. Helewka is the former Chief Financial Officer. Through their holding companies, they were shareholders in RLG. The arbitration that gives rise to the application for leave to appeal concerns a dispute over the terms of RLG's purchase of the applicants' shares upon their retirement. The alleged errors of the Arbitrator concern his analysis of claims relating to:

a) RLG's decision to purchase Mr. Farrow's shares in one transaction, rather than in three tranches spread over three years; and

b) a shareholders' resolution that set a value for RLG shares in 2021 that was not the actual market value.

[3] In the arbitration, the applicants alleged that RLG's decision to purchase Mr. Farrow's remaining shares in one transaction worked to his financial

disadvantage because the value of the shares at the time of his retirement in 2021 was negatively impacted by the COVID-19 pandemic. The applicants maintained that RLG had led Mr. Farrow to believe that his shares would be purchased in tranches, or at least did not correct his misapprehension to this effect, and that this influenced his decision about when to retire. The applicants alleged that RLG was liable for this decision under various theories, including breach of contract, oppression, estoppel, and breach of the contractual duty of good faith. On the leave application, the applicants confine their argument on this issue to alleged legal errors by the Arbitrator in his application of the law of good faith in contract and in misapprehending evidence.

[4] The applicants also alleged in the arbitration that the shareholders' resolution setting the share price for 2021 was invalid due, in part, to material omissions from the information circular sent to shareholders in advance of the meeting. The Arbitrator also rejected this claim. The applicants say that in so doing, the Arbitrator erred in law in failing to apply the proper legal test to the question of whether the circular was materially deficient.

[5] For the reasons that follow, I conclude that the applicants have not identified an extricable question of law arising from the Arbitrator's award. Therefore, the application for leave to appeal must be dismissed.

Background

The Shareholders Agreement and Memorandum of Agreement

[6] RLG is a management consulting firm incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 [*CBCA*], and headquartered in Vancouver, BC. The corporate history is detailed in the arbitration award. For present purposes, it is sufficient to note that in the early 2000s, RLG transitioned into an employee-owned company, with a majority of the shares held by the four managing directors, including Mr. Farrow.

[7] As an employee-owned company, RLG and all its shareholders, including Mr. Farrow and Mr. Helewka, were parties to a Shareholders Agreement. The Shareholders Agreement generally required employees' shares to be repurchased when they left the company at the share price for that year, which was set by a formula based on three times RLG's earnings in the prior fiscal year (the "Calculated Value"). A shareholder was entitled to seek arbitration over the fair market value of the shares if they considered that, because of extraordinary circumstances, the Calculated Value of the shares based on three times the company's prior year's earnings materially misstated the actual fair market value of the shares. However, the Shareholders Agreement also authorized the shareholders, by special resolution on a two-thirds majority, to set a "new fair market value" for the shares without any requirement that it reflect an arms length determination of fair market value. If the share value was set by a shareholders' resolution, this foreclosed the possibility of arbitration to determine the fair market value of the shares.

[8] As a managing director, Mr. Farrow's shareholdings were also governed by a separate agreement, a Memorandum of Agreement dated May 1, 2009 ("MOA"), between RLG and its four managing directors. The object of the MOA was to implement a process that allowed for the gradual reduction of the overall ownership stake of the managing directors, which was 80 percent at the time of the execution of the MOA. Under the terms of the MOA, each managing director had to dispose of their shares over a 10-year period, beginning when the director turned 55 and concluding on the May 1 following the date they turned 64. The MOA gave discretion to the Board to increase or decrease the number of shares sold by a managing director in any year (referred to as "acceleration" and "deceleration"), subject to the general requirement that each managing director divest themselves of all shares within the 10-year period. The requirement to divest shares on retirement was subject only to the ability of a managing director to retain a 2% shareholding if they remained on the Board.

[9] The provisions of the Shareholders Agreement and the MOA differed as it related to the process for RLG's purchase of a shareholder's shares on retirement.

The Shareholders Agreement provided the Board with discretion to purchase the shares in three equal tranches over three years, as opposed to purchasing all of the shares in the year of the shareholder's retirement. In contrast, the MOA provided that RLG could only purchase the shares of a managing director in tranches on retirement if there was an agreement to that effect between RLG and the director.

[10] It was a term of the MOA that in the event of any conflict or inconsistency between the MOA and the Shareholders Agreement, the MOA governed. Section 8.6 of the Shareholders Agreement additionally provided as follows:

> 8.6 REPURCHASE OF ORIGINAL SHAREHOLDER SHARES
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> In order to facilitate the achievement of the objective described in Section 8.1 hereof, the Original Shareholders [defined as parties to the MOA other than RLG] have entered into the MOA providing for a scheduled repurchase and cancellation by the Corporation of certain of the Shares held by one or more of the Original Shareholders over the period therein stated. Each of the Original Shareholders agrees to offer his Shares for repurchase and cancellation by the Corporation in accordance with the MOA over the period therein prescribed. Notwithstanding anything to the contrary contained in this Agreement, the purchase price and other terms applicable to the purchase of Shares from Original Shareholders will be as set forth in the MOA.

[11] The objective described in 8.1 was for the parties to achieve a gradual reduction of the shares of the managing directors (referred to as the "Original Shareholders") through "an orderly repurchase and cancellation by the Corporation of certain of their shareholdings".

RLG's purchase of Mr. Farrow's shares

[12] Beginning in March 2020, COVID-19 had a significant impact on RLG's profitability, and in turn, its share price. To mitigate the risk of employees electing to leave to trigger the share purchase obligation at the higher 2019 or 2020 Calculated Value, RLG's board passed a motion on March 26, 2020. The motion gave management the discretion to purchase shares under the Shareholders Agreement in tranches over three years, meaning that an employee departing before May 1, 2021, could receive one year of the pre-pandemic share price, and two years of the pandemic-impacted share price.

[13] Mr. Farrow's retirement as of June 1, 2021, triggered RLG's obligation to purchase his remaining shares. At this time, Mr. Farrow, through his holding company, owned 28.56% of RLG's outstanding shares. Mr. Farrow had achieved that shareholding by taking advantage of the option of decelerating the reduction of his shares after the MOA was signed in 2009. As the Arbitrator noted in the award, Mr. Farrow's investment in RLG was "not altruistic" (at para. 225). As a result of his shareholdings, Mr. Farrow received approximately $25.9 million in dividends between 2009 and 2019.

[14] In the arbitration, Mr. Farrow maintained that by 2020, RLG's Board had decided to purchase his shares in three equal tranches across three years, rather than in a single year, and that this decision was communicated to him through the Board's conduct and written communication. Mr. Farrow's position that he relied on such communications to make decisions about the timing of his retirement was a key issue at the arbitration.

[15] On May 5, 2021, Mr. Farrow requested that a motion be put to the Board that his remaining block of shares be purchased in three tranches over three years. On May 10, 2021, the Board considered and denied this request. Instead, the Board determined that RLG would purchase Mr. Farrow's shares in one single purchase, based on the 2021 share value. The Board also approved the convening of a special shareholders' meeting to consider approving a "bridge value" for RLG shares in 2021, as set out in an Ernst & Young report. The bridge value was higher than the share value would have been on the usual formula (three times prior years earnings), but less than a conventional fair market value.

[16] At the shareholders' meeting on August 6, 2021, the shareholders passed a special resolution approving the bridge value of the shares of RLG at $23,772,000, which was at the midpoint of the range proposed in the Ernst & Young report. The result was a share price of $28.52. The fact that the 2021 share price was set by a special resolution prevented shareholders, such as Mr. Farrow and Mr. Helewka,

from arbitrating the fair market value of the shares, as they were otherwise entitled to do under the Shareholders Agreement.

[17] In the arbitration, Mr. Farrow argued, among other things, that if he had been aware of RLG's intention not to tranche his share buyback, he would have retired before RLG's 2020 fiscal year end of April 30, 2021. In that event, RLG would have been obliged to buy Mr. Farrow's outstanding shares at the 2020 share price of $51.70, rather than the 2021 bridge value price of $28.52.

The Award

[18] The arbitration proceeded over 15 days and the Arbitrator released his reasons for the award on January 3, 2024 (the "Award").

[19] The Award is comprehensive—over 400 paragraphs in length. It sets out the governing agreements, applicable law, history of the proceedings, issues to be determined, and evidence provided by witness statements for both parties. While the award addressed six principal issues and multiple sub-issues, including issues raised in RLG's counterclaim, only the following issues are directly relevant to the proposed appeal:

a) whether RLG breached its contractual obligation of good faith; and

b) whether the statutory information circular issued by RLG in advance of the August 6, 2021 shareholders' meeting was materially deficient.

Duty of good faith and honest performance of contractual obligations

[20] The alleged breach of the duty of good faith concerned RLG's decision not to tranche Mr. Farrow's share buyback, and RLG's purported failure to correct his misapprehension that the share purchase would be tranched. Mr. Farrow alleged that RLG's conduct gave rise to liability in contract, estoppel, oppression, and good faith performance of contractual obligations. As the Arbitrator noted, the applicants' evidence and submissions on these issues overlapped: Award at para. 128.

[21] The Arbitrator accepted the accuracy of the applicants' statement of the principles governing the duty of good faith and honest performance of contractual obligations. In particular, the Arbitrator accepted that a breach of the duty of honest performance may be found "where a party fails to correct a misapprehension caused by one's own misleading conduct": Award at para. 100, citing to *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 at para. 90 [*Callow*].

[22] The Arbitrator did not agree with the factual underpinnings of Mr. Farrow's claim of a breach of the duty of good faith; that is, that RLG had misled him into believing that it would buy back his shares in tranches, which in turn influenced his decisions about the timing of retirement. The Arbitrator found that RLG had never agreed to buy back Mr. Farrow's shares in tranches, had never communicated such an intention to him, and that Mr. Farrow could not have reasonably believed that his shares would be purchased in tranches. The Arbitrator's reasoning included the following passages:

> 210. Based on the evidence as a whole, I have come to the conclusion that Mr. Farrow did not, at any relevant time, consider that the Board, by its statements as particularized, represented that it would buy all his shares by way of a Tranche Buyback. Reinforcing this conclusion is the fact that when he was invited to attend a Board meeting on May 12, 2021, for the consideration of his request to have the repurchase of his remaining shares tranched, neither he nor Mr. Helewka said anything about the alleged representations or "agreement" that his remaining shares would be purchased by way of Tranche Buyback. No explanation was given for that omission. The inference I draw from that omission is that the agreement or representation to tranche which he claims he relied on, to the effect that his remaining shares would be purchased by way of Tranche Buyback, did not come into mind until after the Directors voted against the motion.
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> …
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> 216. In addition to my findings that there was no contract to be performed, I find that on the evidence, there is no basis to find that there was a knowing misleading of Mr. Farrow by RLG or any of its Directors with respect to a decision or agreement having been made to repurchase his remaining shareholding by way of a three-tranche buyback.
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> …
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> 222. Nor did RLG breach its duty of honest contractual performance in failing to correct Mr. Farrow's "misapprehension" that his shares would be repurchased using the Tranche Buyback.
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> …

> 226. By operation of the express and unequivocal terms of the MOA, all of the shares that Mr. Farrow owned came due for sale to RLG on May 1, 2021 subject to a 2 percent retention if he remained on the Board of Directors. Given the very large investment in shares and the anticipated benefit he would receive on a Tranche Buyback in respect of the final repurchase of his shares, he took an enormous risk in not ensuring that the contract required by s. 4(d)(i) or (ii) of the MOA had been agreed upon.
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> 227. Mr. Farrow knew, or certainly ought to have known, that a decision to enter into an "alternate arrangement" with RLG for the repurchase of his shares would have to be governed by the Directors' (excluding Mr. Farrow) consideration of other proposed alternate arrangements and of whether this was in the best interest of the company, compared to a single purchase transaction. Being aware of this requirement, I do not accept that Mr. Farrow believed that the Board had made a decision to tranche his shares in a casual process tied to the Board's March 26th Board resolution to manage the repurchase of shares under the SHA. This reinforces my finding that Mr. Farrow did not believe that his shares would be tranched and therefore there was no breach of the good faith obligation in not correcting a misapprehension of Mr. Farrow, which he did not reasonably hold.
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> …
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> 230. Considering the evidence as a whole I do not find circumstances which could support a finding that RLG or its Board acted in bad faith with respect to their communications to and with Mr. Farrow concerning the repurchase of his shares and certainly not in the Board's exercise of its duty to deny the request of Mr. Farrow to be tranched, when those Directors applied their assessment that to do so would not be in the best interests of RLG.
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> …
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> 237. Mr. Farrow created the risk to himself if he assumed that RLG would tranche his shares, without being led to that belief by RLG, as I have found as a fact in this Award.
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> [Emphasis added.]

[23] Tied to Mr. Farrow's allegation of a breach of the contractual duty of good faith was his claim that he would have retired before April 30, 2021, but for RLG inducing him to delay his retirement date through a promise to tranche the repurchase of his shares. The Arbitrator found that this submission was "not tethered to the facts in evidence": Award at paras. 153–154. In regards to Mr. Farrow's retirement plans, the Arbitrator concluded:

> 155. There was no evidence that Mr. Farrow was considering early retirement, that RLG was of the impression or was concerned that Mr. Farrow might retire early, or a realization on the part of RLG that Mr. Farrow's early retirement could case FLG to "…face a catastrophic cash obligation of having

> to purchase Mr. Farrow's shares." Without that evidence it cannot be contended that RLG chose to make Mr. Farrow subject to the Tranche Buyback to ensure his continued employment.
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> …
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> 165. On my review of the evidence as a whole, I find that Mr. Farrow did not consider retiring before May 1, 2021 or communicate an intention to do so to the Board or any of its members either in writing, as one would expect from a seasoned executive such as Mr. Farrow, or even in conversation, such that the factual foundation for the Company's representation or gratuitous promise to avoid an early retirement by Mr. Farrow, is not established.
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> …
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> 180. I have found that the evidence does not support a finding that Mr. Farrow considered retiring prior to May 1, 2021 or ever informed the Board of that consideration, so as to come under the ambit of the Shareholders Agreement. The same finding applies to Mr. Farrow's contention of reliance described in paragraph 486 of the Claimants' submissions.
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> …
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> 205. …I find that there was no reasonable basis for Mr. Farrow to believe that RLG had decided to repurchase his shares in tranches. There is no clear evidence of Mr. Farrow making a decision to postpone his retirement in fiscal 2021, and accordingly, RLG was not responsible for any consequences of such a decision.
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> [Emphasis added.]

[24] As I will explain, these passages reflect the alleged misapprehension of evidence by the Arbitrator that is one of Mr. Farrow's proposed grounds of appeal.

The information circular

[25] This aspect of the claim related to the information circular sent to shareholders in advance of the August 2021 meeting, which the applicants alleged was materially deficient. The Arbitrator found that the purpose of the Board's resort to a special resolution to set a share value for 2021 was to avoid the "potentially catastrophic" impact on RLG's financial situation if a shareholder, such as Mr. Farrow, pursued an arbitration to set the purchase price of their shares at a conventional fair market value: Award at para. 281.

[26] The applicants alleged that the information circular was deficient in a number of respects, including:

a) it did not disclose a rough calculation prepared by Ernst & Young, based on a discounted cash flow, indicating a "Business Enterprise" purchase price of RLG of over $60 million, as opposed to the bridge value of just under $24 million;

b) it did not include a caution that the bridge value was a notional concept of value, which may not represent the actual fair market value; and

c) it left the shareholders without any guidance on the comparison between the bridge value and an actual fair market value, which they might achieve if the special resolution was defeated and an arbitration to determine the fair market value proceeded.

[27] The Arbitrator concluded that the alleged deficiencies were "not material": Award at para. 302. His findings included:

a) the difference between the bridge value and the Calculated Value or fair market value of the shares was adequately explained by reading the information circular as a whole, in the context of the covering letter provided by RLG's Board;

b) the information circular did not require a caution to shareholders that the bridge value was a notional concept of value, because this was well-understood;

c) the risk of allowing the issue of share value to proceed to arbitration was well-known to the shareholders, as was the purpose for setting a bridge value by way of special resolution; and

d) the information circular was not deficient in failing to refer to Ernst & Young's rough calculation of a "Business Enterprise" value of $60 million, because the Board was transparent with shareholders that the bridge value did not reflect actual market value.

Award, paras. 302–305.

[28] The Arbitrator addressed the evidence relied on by the applicants to demonstrate that there were "complaints" about the process from certain shareholders. He explained why he considered this evidence to be of limited evidentiary or persuasive value: Award at paras. 306–320. The Arbitrator was satisfied that there was no misconduct by RLG or its management to improperly coerce or influence the vote: Award at para. 321.

[29] The Arbitrator dismissed all of the applicants' claims: Award at para. 403.

[30] The applicants filed the Notice of Application for leave on February 2, 2024.

Legal framework

[31] Section 59 of the *Arbitration Act* provides:

> **59** (1) There is no appeal to a court from an arbitral award other than as provided under this section.
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> (2) A party to an arbitration may appeal to the Court of Appeal on any question of law arising out of an arbitral award if
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> (a) all the parties to the arbitration consent, or
>
> (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.
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> (4) On an application for leave under subsection (3), a justice of the Court of Appeal may grant leave if the justice determines that
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> (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
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> (c) the point of law is of general or public importance.

[32] This Court in *MSI Methylation Sciences, Inc. v. Quark Venture Inc.*, 2019 BCCA 448 at para. 54, described the requirements before leave can be granted as:

> (1) the appeal must be based on a question of law;

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

(3) the judge must be prepared to exercise the residual discretion implicit in the phrase "the court may grant leave ..."

[33] 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. In *MSI Methylation*, the Court provided the following guidance on what constitutes an extricable question of law in the context of applications 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.

[34] The substantial restraints on granting leave are in place to preserve the integrity of the arbitration system and advance its central aims: efficiency and finality: *On Call Internet Services Ltd. v. Telus Communications Company*, 2013 BCCA 366 at para. 35; *Teal Cedar Products Ltd. v. British Columbia,* 2017 SCC 32 at para. 1.

Analysis

Have the applicants' raised a question of law?

[35] The principal issue on this application is whether the applicants have identified a question of law arising out of the Award. The applicants say that the Arbitrator made three extricable errors of law:

a) he misapprehended the law of good faith contractual performance;

b) he misapprehended the facts and law in relation to the question of Mr. Farrow's retirement plans; and

c) he did not apply a legal test in assessing the sufficiency of the information circular.

[36] RLG argues that none of the errors alleged by the applicants raise a pure question of law, and, therefore, there is no jurisdiction to grant leave to appeal.

Alleged error (a): The Arbitrator misapprehended the law of good faith contractual obligations

[37] The applicants contend that the Arbitrator asked the wrong question and undertook none of the analysis required by the law of good faith. They state that the Arbitrator improperly focussed on his finding that there was no decision or agreement between RLG and Mr. Farrow regarding the buyback of his shares in tranches. Instead, they argue, he should have considered whether, even absent such a decision, RLG acted in good faith in keeping Mr. Farrow "in the dark" about its planning for his retirement or that Mr. Farrow was "led to believe" his shares would be repurchased in tranches: Applicants' Memorandum of Argument at

paras. 22–26. The applicant draws a parallel between this case and *Callow*, where the Supreme Court of Canada held that the duty of honesty in performance of a contract may capture conduct that misleads by omission, for example where a party fails to correct a misapprehension caused by its own misleading conduct: *Callow* at para. 90.

[38] The premise of the alleged error of law—that the Arbitrator improperly focussed on whether there was an agreement between RLG and Mr. Farrow—is not borne out by a review of the Arbitrator's reasons. The Arbitrator understood Mr. Farrow's claim to be grounded not only in breach of contract, but also in estoppel, oppression, and bad faith contractual performance. The Arbitrator addressed each theory of liability although, as he noted, the submissions and evidence overlapped. In relation to the alleged bad faith contractual performance, the Arbitrator accepted the applicants' statement of the law, which included the principles that the applicants now maintain he overlooked.

[39] The applicants' submissions on this point proceed on factual assumptions that are inconsistent with the Arbitrator's findings. The Arbitrator addressed the applicants' arguments that RLG had misled Mr. Farrow into believing that his shares would be purchased in tranches. The Arbitrator made factual findings that: Mr. Farrow never communicated to any of the directors, other than possibly to Mr. Helewka, that he was contemplating the possibility of early retirement; Mr. Farrow did not, at any relevant time, consider that the Board represented that it would buy all his shares by way of a tranched buyback; there is no basis to find that RLG or its directors knowingly misled Mr. Farrow; RLG did not breach its duty of honest contractual performance in failing to correct Mr. Farrow's alleged "misapprehension" that the shares would be repurchased in trances; RLG did not lie, knowingly mislead, or have a reckless disregard to the truth in performing its contractual obligations; and if Mr. Farrow assumed that RLG would tranche his shares, he was not led to that belief by RLG: Award at paras. 164, 210, 216, 236–237.

[40] In sum, the applicants' argument regarding the Arbitrator's alleged misapprehension of the law of the contractual duty of good faith is integrally tied to the Arbitrator's factual findings on the evidence regarding: (1) RLG's conduct, and (2) the state of Mr. Farrow's knowledge and belief. The Arbitrator acknowledged that a breach of the contractual duty of good faith could be grounded in a misleading omission by one party to the contract, but found there was no misleading omission here. The applicants' objection is, in essence, that the application of the law of good faith in contract should have led to a different outcome. This raises a question of mixed fact and law rather than a question of pure law.

[41] Accordingly, I conclude that the applicants have not met the threshold for leave to appeal in relation to the first alleged error.

Alleged error (b): The Arbitrator's analysis of Mr. Farrow's retirement plans misconceived the facts and law

[42] The applicants next argue that the Arbitrator misapprehended the evidence of Mr. Farrow's retirement plans. They submit that the Arbitrator found first that "there was no evidence that Farrow was considering early retirement", then went on to excerpt and acknowledge Mr. Farrow's evidence to the contrary: Award at paras. 155, 164. The Arbitrator also noted, apparently in error, that a will-say statement from a former client of RLG, Peter Rosenthal, had not been placed in evidence: Award at para. 104. Mr. Rosenthal's statement included the following paragraph:

> 2. That Mr. Farrow informed Mr. Rosenthal in or around April or May 2020 of his retirement plans and RLG's implementation of the repurchase of departing shareholders' shares over three years, specifically:
>
> …
>
> (d) That Mr. Farrow told him that he remained a large owner of RLG's shares and that he was not going to immediately retire with the understanding that his shares were going to be bought out over three years instead of one.

[43] A misapprehension of evidence that is palpable and overriding and goes to the core of the outcome of the case can be an error of law under s. 59 of the

Arbitration Act: *A.L. Sims and Son Ltd. v. British Columbia (Transportation and Infrastructure)*, 2022 BCCA 440 at para. 82; *Escape 101 Ventures Inc. v. March of Dimes Canada*, 2002 BCCA 294 at paras. 43, 76.

[44] There is no dispute that the Arbitrator misstated the evidence in the discrete passages cited by the applicants, although the parties dispute the significance of the misstatement. The Arbitrator was incorrect in stating there was "no evidence" that Mr. Farrow was contemplating early retirement because he gave evidence to that effect. Mr. Rosenthal's will-say statement addressed the same point. However, as the respondent emphasizes, the Arbitrator was clearly aware of Mr. Farrow's evidence. The Arbitrator quoted at length from Mr. Farrow's Witness Statement on the topic of "MY RETIREMENT PLANS BEFORE COVID-19": Award at para. 164. Immediately following his review of Mr. Farrow's evidence, the Arbitrator found as a fact that any private contemplation of early retirement by Mr. Farrow was never communicated to any of the directors: Award at para. 164. This is the core of the Arbitrator's reasoning.

[45] The fact that Mr. Farrow may have shared his thoughts about the timing of his retirement with a third party, Mr. Rosenthal, does not undermine the Arbitrator's findings that Mr. Farrow never communicated his private contemplation of early retirement, or his "understanding" that his share buyback would be in tranches, to the Board. It also does not undermine the Arbitrator's finding that any expectation Mr. Farrow may have had that his shares would be repurchased in tranches was not reasonable.

[46] I conclude that, read in context, the Arbitrator's statements that: (1) there was "no evidence" that Mr. Farrow was contemplating early retirement, and (2) that Mr. Rosenthal's will-say statement was not in evidence, were inconsequential misstatements of the evidence rather than material misapprehensions. The misstatements do not go to the core of the Arbitrator's reasoning, and do not affect the outcome of the case. The Arbitrator's errors in stating the evidence do not rise to the level of a material misapprehension of evidence that amounts to an error of law.

[47] The applicants also argue that the Arbitrator erred by failing to consider that, as a matter of law, Mr. Farrow's retirement plans were irrelevant. Citing *Callow* at para. 116, the applicants say that the law of good faith presumes that a party will take steps to protect its interests even if the party cannot conclusively prove what would have happened but for the counterparty's dishonesty. They say the Arbitrator overlooked the point that Mr. Farrow could have retired if RLG had been honest about its plans, and was deprived of that opportunity by RLG's dishonesty.

[48] This argument depends on characterizing RLG's behaviour as dishonest. For the reasons I have already explained, such a characterization is contrary to the Arbitrator's factual findings that RLG was not dishonest, did not mislead Mr. Farrow, and that RLG had no knowledge of any misapprehension Mr. Farrow may have held regarding RLG's commitment to tranche his share re-purchase. Once again, the applicants' argument that the Arbitrator erred in law is integrally related to the underlying facts and evidence in this case. It does not raise an extricable error of law.

[49] I conclude, therefore, that the second issue identified by the applicants, whether characterized as a misapprehension of the evidence or a misapplication of the law, does not ground an appeal on a question of law alone under s. 59 of the *Arbitration Act*.

Alleged error (c): The Arbitrator applied no legal test for sufficiency of the information circular

[50] Finally, the applicants argue that the Arbitrator erred in concluding that the information circular was not deficient without reference to "any law or legal requirements" and disregarding "undisputed evidence on point": Applicants' Memorandum of Argument at paras. 34–35. The applicants acknowledge that the question of materiality is inherently fact-specific, but say it still involves the application of an objective legal standard. Here, they say, there was evidence that shareholders were confused about RLG's actual fair market value, and unchallenged evidence that at least one shareholder would have voted differently had he known

about the Ernst & Young “Business Enterprise” valuation of RLG at $60 million. The applicants say the Arbitrator disregarded this evidence in concluding that the omissions from the information circular were not material.

[51] There was common ground between the parties in their submissions to the Arbitrator regarding the governing legal principles. The parties agreed that RLG was required to provide shareholders with the information necessary to cast an informed vote, and that s. 154 of the *CBCA* permits a court to intervene where an information circular contains untrue statements of a material fact or omits a material fact. Both parties cited *Roland Larsen v. Royal Standard Minerals Inc.*, 2012 ONSC 276, for the propositions that:

a) a fact is material if there is a substantial likelihood that it would have been considered important by a reasonable investor; and

b) the question of whether a fact is material must be assessed in light of the full circumstances.

The disputed question was whether, as a matter of fact, the information circular in this case omitted material information.

[52] The principle that a trial judge is presumed to know the law and does not need to cite uncontroversial legal principles applies to this ground of proposed appeal. Furthermore, if reasons are ambiguous, interpretations that are consistent with a correct application of the law are to be preferred: *Hague v. Hague*, 2022 BCCA 325 at paras. 22–28.

[53] In this case, the applicable law was well-settled and not in dispute. The Arbitrator clearly had the legal test in mind in his analysis, and applied it. He reviewed the alleged deficiencies in the information circular, and explained why he found they were “not material”: Award at para. 302. To the extent there was evidence of confusion on the part of shareholders, the Arbitrator reviewed that evidence and explained why he considered the evidence to be of limited evidentiary value.

[54] The applicants' argument on the leave application is, in essence, that the Arbitrator ought to have found the omissions to be material, and that he should have placed greater weight on the evidence of shareholder confusion. In other words, this ground of appeal relates to the Arbitrator's application of an uncontroversial legal test to the facts and evidence before him. This raises a question of mixed fact and law that cannot be the basis of an appeal under s. 59 of the *Arbitration Act*.

Disposition

[55] In light of my conclusion that the applicants have not identified an extricable question of law, it is unnecessary to address the remaining requirements for leave to appeal under s. 59 of the *Arbitration Act*. In the absence of an extricable question of law, leave to appeal cannot be granted.

[56] Accordingly, I dismiss the application, with costs to the respondent.

"The Honourable Madam Justice Horsman"