

CITATION: Sitzler Group Holdings No. 1 Limited v. Grall Corporation Limited,
2026 ONSC 2452

COURT FILE NO.: CV-25-00740617-00CL

DATE: 20260424

**SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)**

RE: SITZER GROUP HOLDINGS NO. 1 LIMITED AND CONCORD PROPERTY
MANAGEMENT LIMITED

Applicants

AND:

GRALL CORPORATION LIMITED, NATWEISS INVESTMENTS LIMITED
and 967933 ONTARIO LIMITED

Respondents

APPLICATION UNDER Sections 45, 46 and 50 of the *Arbitration Act, 1991*, S.O.
1991, c. 17 and Rule 14.05 of the Rules of Civil Procedure, R.R.O. 1991, Reg. 194

BEFORE: S. Dunphy J.

COUNSEL: *Andrew Gray and Emily Sherkey*, for the Applicants

Eli Lederman and Andrew Locatelli, for the Respondents

HEARD at Toronto: January 21, 2026 and April 8, 2026

REASONS FOR DECISION

[1] This application arises from an arbitration initiated by the respondents¹ in respect of their interests in a Richmond Hill shopping centre initially acquired on July 15, 1971. The interest of the parties in the development was governed by the terms of a Co-Tenancy

¹ For the purposes of this litigation before me, the applicants (respondents in the arbitration) and respondents (claimants in the arbitration) shall be referred to as “Sitzer” or the “Sitzer Group” and “Weiss” or the “Weiss Group” respectively although the actual related party holding a particular interest or becoming a party to a relevant agreement within each group evolved over time. I shall refer to the groups generally unless the context requires me to specify further.

Agreement (or “CTA”) made as of October 5, 1971 pursuant to which the Co-Tenancy commenced as of July 1, 1971.

[2] The Weiss Group (claimants in the arbitration) alleged the relationship between the parties was that of a partnership and claimed that the acquisition by the Sitzer Group of the lessor’s interest in southern-most parcel within the plaza as a breach of fiduciary duty and claimed a constructive trust interest in 50% of the interest acquired. In his Partial Final Award, the arbitrator ruled that while finding a partnership relationship between the two was contractually excluded despite the criteria otherwise being satisfied, the acquisition of the neighboring parcel of land without having first provided Weiss with the opportunity to participate in it was nevertheless a breach of an ad hoc fiduciary duty owed by Sitzer to Weiss. He awarded the claimant Weiss Group a constructive trust interest in 50% of the parcel of land purchased by an affiliate of the Sitzer Group subject to an accounting to determine what was owing in consequence.

[3] The applicant Sitzer Group seeks to appeal the portion of the ruling regarding the acquisition of the southern-most parcel and the constructive trust remedy granted as the product of an error of law pursuant to s. 45 of the *Arbitration Act, 1991*, S.O. 1991, c. 17 (the “Act”) or to set aside those portions of the ruling as being outside the arbitrator’s jurisdiction pursuant to s. 46 of the Act.

Introduction

[4] Although apparently a single integrated shopping plaza to the eye of a casual observer, the development in fact consists of three separately owned parcels of land. The plaza consists of several contiguous buildings developed on the three rectangular parcels which collectively are arranged roughly in the form of a letter “F”. The buildings are surrounded by a parking lot without any walls or barriers between the portions thereof belonging to each parcel. In terms of size, the North Parcel represents approx. 5.5 acres, the Middle Parcel approx. 2.2 acres and the South Parcel approx. 3.3 acres. An aerial photograph of the plaza showing the dimensions of the three parcels is found at para. 6 of the Partial Final Order.

[5] The North Parcel at the top of the “F” is jointly owned by the Sitzer Group and the Weiss Group. The Middle Parcel is owned by a third party but subject to a long-term ground lease in favour of the Sitzer Group and the Weiss Group also held jointly. The North Parcel and the Middle Parcel have been leased to a variety of retail tenants over the years.

[6] Prior to 2005, the South Parcel at the bottom of the “F” was owned by an unrelated third party but subject to a long-term ground lease to a chain “No-Frills” grocery store. While the grocery store tenant of the South Parcel was described by the arbitrator as the “anchor tenant” of the mall, there were no agreements of any kind between the Sitzer Group or the Weiss group and the owner of the South Parcel (the landlord to the anchor

tenant) prior to the 2005 acquisition that is the subject-matter of this application. The grocery store tenant of the South Parcel had no written agreements of any kind with the parties².

[7] On January 5, 2005, Yonge Leventdale Holdings Ltd. – an affiliate of the Sitzer Group – completed the acquisition of the lessor's interest in the South Parcel. It is common ground that the Weiss Group was neither aware of this acquisition nor offered an opportunity to participate in it. The land in question remained leased to the grocery chain tenant as before. It is this acquisition and its circumstances that lie at the heart of the claim of the Weiss Group pursued through the arbitration proceedings.

[8] It is agreed that this acquisition did not come to the attention of the Weiss Group until December 2007. In July 2008, the Weiss Group protested the acquisition in writing and claimed the South Parcel was subject to a constructive trust in its favour. The Sitzer Group rejected this allegation in writing the same day. It was not until July 2017 that the Weiss Group began these arbitration proceedings, alleging that the parties were partners and claiming a constructive trust remedy.

[9] For a variety of reasons, the arbitration did not proceed beyond the initial July 2017 notice of arbitration that commenced the proceedings until 2020. The Notice of Arbitration was amended in October 2020 for the last time. Those amendments added additional recitals in relation to uncontested facts but did not alter the substance of the Notice as regards the central allegation of partnership and breach of fiduciary duty grounding the claim to a constructive trust.

[10] The parties selected Mr. Sharpe as their arbitrator and, following a discovery phase, the arbitration hearing was held in January 2025 with opening submissions on January 20, 2025 and closing submissions on January 29, 2025.

[11] On March 6, 2025, the arbitrator issued a "Partial Final Award" finding that Sitzer Group holds its interest in the "South Parcel" of this plaza under a constructive trust in favour of the Weiss Group subject to an accounting to be performed. While rejecting the existence of the pleaded partnership relationship between the parties due to the contractual exclusion of such a conclusion, the arbitrator found that the circumstances nevertheless gave rise to an *ad hoc* fiduciary duty binding upon the Sitzer Group

² There is evidence that a Sitzer entity provided maintenance services to the grocery store tenant pursuant to an informal or unwritten arrangement the start date of which is unclear but which arrangement is not material to any issues.

(including the related party that made the acquisition) requiring advance notice and an opportunity to participate in any acquisition of the South Parcel to the Weiss Group.

Summary of conclusions

[12] For the reasons that follow, I find that this application is entitled to succeed on both pleaded grounds. Those portions of the arbitrators Partial Final Award relating to the finding of an ad hoc fiduciary duty and awarding a 50% trust interest in relation to the South Parcel should be struck from the award as being both the product of a extricable errors of law (s. 45) and also as lying beyond the question submitted to the arbitrator and thus outside of his jurisdiction (s. 46). The result under either statutory provision is the same.

[13] The arbitration clause in the CTA does not prohibit appeals to the civil courts on questions of law and s. 45(1) of the *Act* therefore only permits an appeal on questions of law with leave. On the facts of this case, leave ought clearly to be granted. The matter is an important issue to the parties involving the transfer of a 50% interest in a large tract of commercial land in the Toronto region twenty years after its acquisition and it is clear that the legal issues raised are potentially decisive of the question. The criteria for granting leave are satisfied beyond serious question.

[14] The award of a 50% interest in the South Parcel by an affiliate of a Co-Tenant under the CTA to the other Co-Tenant is the product of multiple extricable errors of law. The South Parcel itself lies outside of the Premises that exploitation of which is the sole object of the Co-Tenancy under the CTA absent amendment to the CTA which the parties alone can consent to. The award of an interest in it violates the clear prohibition in the CTA on claims to “any interest in any other property owned by the other” and the provisions of the CTA confirming the “absolute right” of the Co-Tenants to engage in any other business including the acquisition of real estate. The finding of an Ad Hoc Fiduciary Duty based on a pleading of partnership ignored the unambiguous terms of the CTA in s. 8.10 that the partes were not partners.

[15] Accordingly, I find that the ruling is the product of an extricable errors of law in failing to give effect to the clear and unambiguous language employed by the parties and may be reversed under s. 45 of the *Act*: *Niagara Falls Shopping Centre Inc. v. LAF Canada Company*, 2023 ONCA 159 (CanLII) at 24.

[16] The award of a trust interest in the South Parcel was also the product of the arbitrator exceeding his jurisdiction, limited as it was by the agreement of the parties and the claim actually made. The *only* source of the claimed fiduciary duty referenced in the Notice of Arbitration was partnership. The arbitrator’s finding that it was not open to him to find a partnership among the Co-Tenants in the face of the unambiguous exclusionary language of s. 8.10 of the CTA has not been challenged. No other fiduciary duty was pleaded and the arbitrator had no jurisdiction to investigate, still less declare, the

existence of any other non-pleaded fiduciary duty. The alternative claim raised in the course of hearing the arbitration of the existence of an Ad Hoc Fiduciary Duty was not pleaded nor were any of its constituent elements apart from the pleading of the rejected claim of partnership. No factual foundation other than partnership was pleaded in the Notice of Arbitration and that pleading could not be amended twenty years after the acquisition to add a new fiduciary duty on the fly at the hearing. The claimed interest in land beyond the Premises as defined in the CTA could not be part of the Co-Tenancy under the CTA absent amendment to the CTA and was not a claim under the CTA either within the meaning of s. 8.04 either. Giving effect to such an unpleaded cause of action amounts to a reversible excess of jurisdiction under s. 46(1) of the Act.

[17] There was neither waiver nor lack of diligence in protesting this excess of jurisdiction on the part of the applicants. The applicants protested the lack of pleading of an Ad Hoc fiduciary duty immediately after the respondent first raised it with the arbitrator. The arbitrator considered but rejected the objection in his reasons. Despite finding that the “Notice of Arbitration clearly pleads breach of fiduciary duty and pleads the material facts necessary to support that claim”, the only material facts pleaded by the Notice of Arbitration were of the existence of partnership. Finding that relationship contractually excluded, it is a clear excess of jurisdiction to apply the same duty on the same facts but applying a different name in the face of the recognized and applied exclusion in s. 8.10. The applicants are entitled to succeed pursuant to s. 46 of the Act as well.

[18] Given my conclusions summarized above, I set aside or vary in part the arbitration award in accordance with s. 45 and s. 46 of the *Act*. My more detailed reasons and a description of the portions of the award being varied/set aside follow.

Background facts

[19] At the relevant times, the dealings between the parties in respect of the North Parcel and the Middle Parcel were governed by a Co-Tenancy Agreement (or “CTA”) dated October 5, 1971 and amended December 20, 1991. The original Sitzer Group party to the CTA was “Victern Developments Limited” whose 50% interest in the Co-Tenancy has devolved into the hands of “Sitzer Group Holdings No. 1 Limited” (the details of which devolution are not material here). The Weiss Group members initial party to the CTA were Allan Weiss, Grace Weiss, Grall Corporation Limited and Natweiss Investments Limited. Those interests are now held by the respondents Grall Corporation Limited, Natweiss Investments Limited and 967933 Ontario Limited. Once again, the details of the evolution of the ownership of the Weiss Group interests internally is of no particular relevance here.

[20] Through the CTA, the parties agreed to form a “Co-Tenancy” (s. 1.01) commencing as of July 1, 1971 (s. 1.02). The acquisition by the parties of the Premises (as so defined) followed the commencement date of the Co-Tenancy by approximately two weeks on or

about July 15, 1971. The plaza had been built prior to the acquisition of the freehold and leasehold interests in the North and Middle Parcels on behalf of the Co-Tenancy.

[21] The CTA contained the following additional terms:

- a. The fifth recital to the CTA states that the parties “desire to form a Co-Tenancy for the principal purpose of owning, improving and managing the Premises and to set forth their rights, obligations and interests as Co-Tenants.”
- b. S. 1.04 “The *sole purpose* of the Co-Tenancy is to acquire, own, improve, manage, lease, mortgage, sell and otherwise operate *the Premises* for the mutual benefit of the Co-Tenants. Each party covenants and agrees that *such purposes* shall only be pursued in the manner and subject to the restrictions provided for herein. Title to all property, real and personal, now or hereafter owned by the Co-Tenancy shall be held in the name of the Parties hereto, as tenants in common, each owner to have an undivided interest therein...” (emphasis added).
- c. S. 3.01 “Except as hereinafter expressly provided otherwise, the purposes of the Co-Tenancy shall be carried out and managed by [Sitzer] provided, however that [Sitzer] agrees that no other lands shall be purchased leased or licensed by the Co-Tenancy nor shall any building agreement be entered into with respect to the Co-Tenancy without the approval of Weiss”.
- d. S. 3.02: “Each Party shall have the *absolute right* to engage in other businesses and other ventures for its own individual profit, including, without limitation, the ownership, improvement and operation of real estate. No party by reason of this agreement shall have any interest in any other property owned by the other or in any other business venture engaged in by the other, whether or not similar to the purposes of the Co-Tenancy” (emphasis added).
- e. S. 3.03: “The Co-Tenancy shall engage the services of [Sitzer] to manage the premises for the Co-Tenants or such other management firm as [Sitzer] may designate, and in connection therewith the Co-Tenants undertake and agree to enter into a Management Agreement”.
- f. S. 3.06: “The Parties agree on the following matters *in connection with the day-to-day operation of the Co-Tenancy*:....(ix) Neither Co-Tenant without the consent of the other, except as hereinafter expressly provided to the contrary shall:...(c) do any act which is detrimental to the best interests Co-Tenancy or which would make it difficult or impossible to carry out the purposes of the Co-Tenancy” (emphasis added).

- g. S. 8.03: “This Agreement ... sets forth the entire agreement between the Parties concerning the subject matter thereof”.
- h. S. 8.04: “In the event of a dispute between the Parties as to any matter under this Agreement ... then the matter shall be submitted to arbitration in the Province of Ontario of three disinterested persons, one of whom shall be chosen by each of the Co-Tenants and the third by the arbitrators so chosen, and the award and finding of the said arbitrators, or of any of them, shall be final and conclusive upon the matters so submitted to them”.
- i. S. 8.10: “No party shall be, and shall not by any reason of any provisions hereof be deemed to be, the partner, agent, joint venturer or legal representative of any other party for *any purposes of the Co-Tenancy* or otherwise, nor shall any party have any authority or power to act for or to assume any obligation or responsibility on behalf of the Co-Tenancy or any party. *This Agreement shall not, and shall not be construed to create any partnership or other agency whatsoever*” (emphasis added).

[22] The CTA was amended on December 20, 1991. The recitals to that amendment referred to the parties having “entered into a co-tenancy agreement ... relating to the ownership of the ... Premises ... which Premises are legally described in the first recital to the agreement”. After making minor amendments not material to this application, the amending agreement provided that “in all other respects the Agreement remains in full force and effect unamended”.

[23] The arbitrator found that the parties had in fact discussed the possible purchase of the South Parcel in the 1980’s when the issue was raised by Weiss which discussions were not pursued at that time.

[24] As contemplated by s. 3.03 of the CTA, the parties entered into a management agreement with Concord Property Management Limited (“Concord”). Concord is not a party to the CTA but is an affiliate of the Sitzler Group. The first Property Management Agreement (the “First PMA”) was dated January 1, 1986, and continued until January 1, 1992 when it was replaced by the Second Property Management Agreement (the “Second PMA”). Both of these management agreements governed the management of the interest of the Co-Tenants in the North and Middle parcels.

[25] The expired First PMA contained no arbitration clause. The second PMA which replaced it and was in force in 2005 contains a narrow arbitration clause applicable solely in connection with the right of a Co-Tenant to seek a termination of the PMA upon the occurrence of a “Major Cause” in which case any arbitration would be “subject to arbitration under the Arbitration Act of Ontario”.

[26] The arbitration giving rise to the Partial Final Award was actually two arbitrations of two separate claims advanced by the Weiss Group heard together. Under the CTA, Weiss claimed a constructive trust interest in the South Parcel as discussed above. Under the Second PMA, Weiss sought a termination of the Second PMA on the basis of the occurrence of a “Major Cause”. By agreement of the parties, both arbitrations were heard together. This application, however, concerns solely the portions of the Partial Final Award arising from the award made in connection with arbitration under the CTA.

Issues to be Decided

[27] This application raises four issues for decision:

- a. Whether s. 8.04 of the CTA precludes an appeal on questions of law?
- b. If not, ought leave to appeal on questions of law be granted?
- c. If leave is granted, is the arbitrator’s ruling the product of an extricable error of law or a palpable and overriding error?
- d. Was the alternative claim of an Ad Hoc Fiduciary Duty validly submitted to arbitration by the Notice of Arbitration?

Issue 1: Does s. 8.04 of the CTA preclude an appeal on questions of law?

[28] Section 45(1) of the *Act* provides as follows:

45(1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,

- (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
- (b) determination of the question of law at issue will significantly affect the rights of the parties.

[29] While the CTA was entered into before the *Act* came into force on January 1, 1992, s. 2(2) of the *Act* provides that the *Act* applies to an arbitration agreement made before the *Act* came into force. Prior to 1992, the predecessor Arbitration Act permitted appeals on questions of law only where the arbitration agreement expressly authorized them.

[30] Section 3 of the *Act* provides that “the parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act” except certain named provisions (s. 45 is not one of those so named).

[31] The combined effect of s. 45(1) and (2), s. 2(2) and s. 3 of the *Act* when read together in relation to appeals on questions of law for a pre-1992 arbitration agreement is thus as follows:

- a. The parties may expressly agree to allow appeals on questions of law in which case appeals on questions of law without leave are permitted;
- b. The parties may not deal with appeals on questions of law in their agreement expressly or impliedly in which case leave is required to appeal; or
- c. The parties may positively determine, expressly or impliedly, that appeals on questions of law are not permitted in which case no appeals on questions of law can be brought.

[32] Clearly s. 8.04 of the CTA does not expressly provide for an appeal nor does it explicitly preclude such an appeal. Indeed, s. 8.04 does not expressly deal with the subject of appeals at all. It *does* provide that the decision of the arbitrators³ is “final and conclusive”. Therefore, unless it can be determined pursuant to s. 3 of the *Act* that the parties have agreed by *implication* in s. 8.04 of the CTA to *exclude* the application of s. 45(1) of the *Act*, an appeal of the arbitrator’s award on questions of law is available, but only if leave of this court is first obtained.

[33] The applicant urged me to follow the example of *D Lands Inc. v. KS Victoria and King Inc.*, 2022 ONSC 1029 (CanLII) where Dietrich J. found that the correct approach to the task is to “take a fact-driven approach to determine the intention of the original parties to the [agreement] regarding a right of appeal” (at para. 33). In that case, a lease contained an arbitration clause that described the decision of the arbitrators as “conclusive upon the parties and judgment upon the same may be entered”. Dietrich J. found that this language, interpreted in its context, did not preclude appeals on questions of law and, accordingly, s. 45(1) of the *Act* applied to permit an appeal on questions of law with leave.

[34] The Weiss parties on the other hand turn to cases such as *Labourers' International Union of North America, Local 183 v. Carpenters and Allied Workers Local 27*, 1997 CanLII 1429 (ON CA) and *Baffinland Iron Mines LP v. Tower-EBC G.P./S.E.N.C.*, 2023 ONCA 245 (CanLII) where arbitration agreements employing the word “final” were held to exclude appeal rights under s. 45(1) of the *Act*.

³ The arbitration agreement called for a panel of three arbitrators – the parties agreed to proceed with a single arbitrator. Nothing turns on that decision.

[35] In view, there is no inconsistency between *D Lands*, *LIUNA* and *Baffinland*. The exercise in each case is a matter of determining the intention of the parties to a particular agreement in relation to the subject of appeals on questions of law in the light of the language that they used and interpreted in its true context. This is potentially challenging where a pre-1992 arbitration agreement is being reviewed in light of a question – the availability of appeals on questions of law – that was not required to be dealt with under the law as it stood when the clause was first drafted.

[36] The predecessor statute in force when the CTA was drafted – the *Arbitrations Act*, R.S.O. 1960, c. 18 – allowed appeals only where there was specific agreement. Section 16 of the former *Arbitrations Act* provided for an appeal “where it is agreed by the terms of the submission that there may be an appeal”. It would have been unnecessary to expressly preclude appeals on questions of law in a pre-1992 arbitration agreement since such appeals were only permitted where explicitly allowed.

[37] In effect, the predecessor versions of the Act had an “opt in” appeal right whereas the 1991 Act adopted an “opt out” regime. However, the newer (and currently applicable) statute was made expressly applicable to agreements put in place under the former regime without any creating any transitional presumption regarding appeal rights under older agreements.

[38] Ordinary principles of statutory construction require that the transition provisions in the current Act must be interpreted as remedial and representing the deliberate, intentional policy choices of the legislator in this regard.

[39] The transitional provisions of the new Act might, for example, have *presumed* an intent to exclude appeals in the case of existing agreements drafted before 1992. The legislator did not choose to do so.

[40] As with many reforms, there was a gap in time between the reform being enacted by the Legislature and its being proclaimed into force. This left the parties time to review and revise their outstanding agreements in light of the new law if they so chose.

[41] The parties to this case were not lacking in legal representation or sophistication. Indeed, the parties happened to adopt a minor revision to the CTA just a few days before the new Act came into force (but after its passage by the Legislature). They made no effort to revise the arbitration clause in relation to appeals and confirmed the CTA as written (subject to the minor and irrelevant to this issue amendments made at the time).

[42] *LIUNA* was a transition case. In *LIUNA* the Court of Appeal found that the proper approach to construction of the arbitration agreement drafted under a prior statute was to assess the parties’ intentions in the context – including the legislative context – in which it was written. However, the task remains the same: to interpret the words used by the parties in their agreement in the context in which the agreement was drafted to establish

their intentions having regard to the issues required to be determined by the later statutory regime.

[43] Obviously, interpreting in context is not the same as presuming any particular intention *in the absence of evidence to support it* and the Court of Appeal in *LIUNA* did not do so.

[44] *LIUNA* and *Baffinland* both involved quite different factual circumstances and are of limited utility in ascertaining the intentions of the parties in this case. The full contractual context in *both* cases provided ample grounds to infer a positive intention of the parties NOT to permit appeals on questions of law independent of the prior statutory regime:

- a. *LIUNA* involved the interpretation of a broad and expansive arbitration clause that referred to the predecessor *Arbitrations Act* and agreed to “speedy resolution of *any* dispute which may arise amongst them in the interpretation, application or administration or any alleged violation of these Minutes of Settlement ... by final and binding arbitration ... within fourteen (14) days” (emphasis added). As well, the arbitration arose in the context of labour relations where arbitration is the norm⁴. In this context, implying an *actual* intention to preclude recourse to the courts on appeal in the overall context of the agreement was both straightforward and unsurprising.
- b. *Baffinland* involved an arbitration agreement that required disputes to be “finally settled” by arbitration but also incorporated by reference the Rules of the International Chamber of Commerce. This therefore included rule 36(5) of those Rules which described the award as “binding” and the parties “shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made”. There was thus a quite express exclusion of appeal rights as far as could legally be accomplished.

[45] When s. 8.04 of the CTA was drafted, the former *Arbitrations Act* then in force drew no material distinction between a positive intention to preclude appeals and simple indifference to the question. There was no need for the parties to turn their minds to the question *unless* they positively wanted to provide for an appeal. As noted, the transitional rules in the new *Act* did not presume older clauses intentionally precluded appeal if silent

⁴ While the dispute in question was between two unions, the overall description of the context of *LIUNA* as being in the labour relations sphere where the parties are well used to arbitration as a dispute resolution mechanism is a fair one.

on the subject – to the contrary, it applied the new “opt in” regime to new and old contracts alike.

[46] The mere presence of the word “final” in a pre-1992 agreement provides only highly equivocal evidence of the parties’ intentions in relation to a question they may not have considered at all and had no legal requirement to do so.

[47] There was no need before 1992 to use “final and binding” language in the CTA to preclude a non-existent appeal right. Indeed, submissions to arbitration governed by the *Arbitrations Act*, R.S.O. 1960, c. 18 were *already* deemed to contain a provision that the arbitrator’s award would be “final and binding” (s. 5 and clause 11 of Schedule B thereto) whether or not the parties used that phrase.

[48] “Final and binding” language found in an arbitration clause, whether included or simply deemed to be included in an arbitration agreement prior to 1992 *did* have a function in arbitration clauses quite apart from the subject-matter of appeals. In *D. Lands*, Dietrich J. cited the Alberta Court of Appeal in *Enmax Energy Corporation v TransAlta Generation Partnership*, 2015 ABCA 383 (CanLII) which referred to the clear law in England that “the expression “final and binding” in the context of arbitration, and arbitration agreements, has long been used to state the well-recognized rule in relation to arbitration, namely that an award is final and binding in the traditional sense and creates a *res judicata* between parties” (at *Enmax*, para. 35).

[49] A key legislative objective of arbitrations acts generally has been to create a clear path to permitting private arbitration awards to result in publicly executable judgments. There would be little point in going to arbitration if the parties were free to ignore the outcome. Finality for the purposes of enforceability was *and remains* a critical component of that public policy goal and is quite entirely separate and distinct from any consideration of appeal rights.

[50] The incorporation of finality language in an arbitration agreement most certainly indicates the intention of the parties to have an enforceable award at the end of the process. It may or may not *also* be indicative of their views on appeals. The exercise of examining that question is fact-driven and context-driven not presumption-driven. This is a logical corollary of the Legislature not made the new *Act* applicable to older agreements without creating any presumption in relation to appeals.

[51] The use of the words “final” or “final and conclusive” are at best equivocal expressions of intent in relation to the subject of appeal, particularly if considered in the light of the state of the law in 1971. Such language certainly evinces an intent that the award itself should be enforceable in court if need be. There is nothing particular about the phrase used or its context when drafted that suggests any views that can be attributed to these parties at time of their agreement on the matter of appeals. There is no evidence that they turned their mind to the subject of appeals on questions of law at all.

[52] The arbitration clause resorted to by the parties here did not cast a wide net as is very commonly the case. For example, it did not apply to any and all disputes “in any way arising from, connected to or in relation to” the CTA. It applied only to disputes as to any matter “under this Agreement”. For example, nothing in the context implies any particular requirement for prioritizing speed over certainty (indeed, the glacial progress of this arbitration from initial notice to hearing belies any such requirement). There was no requirement for arbitration to be preceded by business meetings among the parties. There is also nothing in the nature of the actual relationship between the parties that was suggestive of any particular intention in relation to appeals at all.

[53] Management of the investment was vested in a company to be nominated by Sitzer and was to be subject to the terms of a management agreement which the CTA required the parties to enter into. That management agreement (the Second PMA) contains only a very narrow arbitration clause restricted to a single issue and, being entirely silent on appeals, most certainly *is* subject to appeals under s. 45(1) of the Act. That agreement is in the context of the same relationship and subject-matter and provides at least tangential information about the expectations of the parties in relation to the subject of appeals from an arbitral award on matters of law. It would be somewhat anomalous to infer an actual intention to preclude appeals on questions of law under one agreement but not the other given the close relationship between the two agreements.

[54] Given the silence of the CTA on the matter of appeals and the addition of s. 45(1) with effect from January 1, 1992, the parties can be taken to have known that appeals on questions of law from arbitral awards were henceforth at least a possibility. The decision to amend the CTA in December 1991 in unrelated areas while leaving the arbitration clause untouched and indeed re-affirmed “as is” days before the new Act came into force is consistent with indifference to or even actual support of the application of the new legislative approach to appeals. It does not suggest a positive view of the parties against appeals.

[55] I can find no clear basis to infer an intention to preclude appeals on questions of law in this particular contract viewed in its context. Neither the legal nor business context provide any convincing basis for me to make such an inference and I do not do so here.

[56] I do not consider the picture to be materially altered by the terms of Procedural Order No. 1 agreed to by the parties during the early stages of this arbitration. Procedural Order No. 1 provided that “[a]ny appeals from any award of the arbitrator shall be governed by the PMA and the CTA”. It was undoubtedly open to the parties to amend their agreement regarding arbitration in this fashion if such were their intention and that would not be an instance of “subsequent conduct” being used to interpret the contract. However, I cannot construe the language of this procedural order as conferring a right of appeal on questions of law if the CTA or the Act did not so provide. It must be recalled that there were multiple issues submitted to resolution in the context of a single arbitration proceeding. There was an arbitration under the CTA and the PMA which contained quite

differently worded arbitration clauses and there is no credible basis to allege that s. 45(1) does not apply to the PMA regardless of one's views on the CTA.

[57] In conclusion on this point, I find that s. 8.04 of the CTA does not preclude an appeal on questions of law expressly or by implication with the result that s. 45(1) of the *Act* applies to any arbitration conducted under its terms.

Issue 2: If not, ought leave to appeal be granted?

[58] Where the parties have not expressly or impliedly chosen to permit appeals on questions of law, s. 45(1) of the *Act* requires leave of this court in order to do so. Leave may only be granted if the court is satisfied that the importance to the parties of the matters at stake in the arbitration justifies an appeal and that the determination of the question of law will significantly affect the rights of the parties.

[59] I am fully satisfied that both pre-conditions for granting leave are satisfied in this case.

[60] The very high level of the importance of the issue to the parties is self-evident. The claimed fiduciary duty would see the transfer of one half of a very significant parcel of land from one party to another along with one half of the gains accrued on that investment over more than twenty years. It would create a gaping ambiguity in the on-going management of the other two parcels subject to the CTA as there is simply nothing in the Partial Final Award nor the ad hoc fiduciary duty found to exist by the arbitrator that would govern the new state of co-ownership of that additional parcel going forward. It is a certainty that consequential amendments to the CTA would be required.

[61] The real nub of the respondents' position on the second branch of the leave test is the merits of the appeal itself. The Weiss Group submits that because an appeal would be limited to questions of law with deference being owed to the trier of fact on factual matters, the appeal would have no object since the entire decision must be viewed as built on inextricably mixed findings of fact and law.

[62] That may or may not prove to be the case. The position of the applicant is fundamentally that the arbitrator ignored the express terms of the CTA and of the Notice of Arbitration neither of which positions suggesting on their face much in the way of inextricable factual issues. However, absent an appeal which is obviously doomed to fail, the respondents' position places the cart before the horse. In considering leave, I must start by examining the prospective appeal as presented.

[63] If the pleaded error of law were established, the legal status of the parties would be significantly altered in that the claimed constructive trust interest in the neighboring land owned by a Sitzler affiliate would be rejected.

[64] The appeal on its face is not *ex facie* doomed to failure and, if established, the errors alleged clearly pass the hurdle for granting leave based on the importance of the issue and the significance of the issue determined to the rights of the parties.

[65] Leave to appeal is hereby granted.

Issue 3: If leave is granted, is the arbitrator's ruling regarding the existence of an Ad Hoc Fiduciary Duty the product of an extricable error of law or a palpable and overriding error?

[66] I do not think a particularly detailed explanation of the basis for my findings contained in the summary of my conclusions above is required. The core of the arbitrator's decision was his attribution to the CTA of an unexpressed but nevertheless positive prohibition, binding on Sitzer, to refrain from acquiring the South Parcel without first offering the "opportunity" to Weiss to add it to the Co-Tenancy. Indeed, by retroactively imposing a constructive trust on the land acquired by a related party to the CTA, the arbitrator effectively concluded that the acquisition was actually made by the Co-Tenancy from the beginning. Literally *nothing* in the CTA says anything of the sort and while its terms provide contrary directions in as explicit drafting language as could reasonably be required of a 1971 contract and the state of the common law at the time.

[67] The CTA went to great lengths to exclude any suggestions along those lines by limiting the scope of the Co-Tenancy quite narrowly to the two properties owned (Recitals 1 and 5, s. 1.03 and s. 1.04), by restricting the management responsibility of Sitzer to those premises (s. 3.03 and the Property Management Agreements), by rejecting explicitly the status of partnership, joint venture or agency being applied to the Co-Tenancy (s. 8.10), by erecting explicit barriers to one party incurring *any* obligations on behalf of the Co-Tenancy without the express consent of the other beyond narrowly confined circumstances (s. 8.10, s. 3.01 and by affirming the absolute right of the Co-Tenants to invest in other ventures, including real estate, without any claim by other Co-Tenants to an interest in them (s. 3.02). By imposing a constructive trust in the face of these provisions, the arbitrator failed to apply these unambiguous and explicit terms. To arrive at his conclusions, the arbitrator relied in significant measure upon decades of subsequent conduct of the parties, including conduct under the PMA which, while contemplated by the CTA, was entered into years later and which contained no arbitration clause governing the claims arising from the conduct in question.

[68] A foundational error of the arbitrator's construction of the CTA appears to lie in an initial finding by the arbitrator that the CTA "contemplates that the Co-Tenancy could acquire additional property" (Partial Final Award para. 35 and para. 124). In fact, the CTA quite explicitly confined its objects to the Premises, defined quite narrowly by the legal description of the North Parcel and the Middle Parcel. While the parties to any contract can agree at any time to amend it, elevating *prohibitions* on acquiring additional property without consent into a positive *object* of the contract to explore external investment

opportunities for which consent must thereafter be sought ignores the clearly expressed objects of the Co-Tenancy and was an error of law.

[69] The fifth preamble to the CTA described as the “principal purpose” the of the Co-Tenancy the “owning, improving and managing” of the “Premises” which term is defined in the first recital by the legal descriptions of the North and Middle Parcels. Section 1.04 refers to the “sole purpose” of the Co-Tenancy as being “to acquire, own, manage” etc. the “Premises”. While the word “acquire” is found in the first sentence of s. 1.04, it refers to acquiring the “Premises” as so defined not to some unknown and undefined “other” property. It must also be read in the context of the recitals and s. 1.02 of the CTA which provided that the Co-Tenancy commenced on July 1, 1971 at which point the acquisition by the Co-Tenants of the Premises was still 15 days in the future. The intention of the parties in 1971 as to the objects and purpose of the Co-Tenancy they created could not have been more explicit and could not have more explicitly excluded acquisitions of real estate beyond the acquisition of the Premises themselves. This does not mean that the parties could not revise their arrangements in future if they chose to do so – that is a truism applicable to any contract.

[70] The second sentence of s. 1.04 does not add support to the existence of an initial “acquisition purpose” of the Co-Tenancy. It subjects the purposes of the Co-Tenancy to the requirement that these shall “only be pursued in the manner and subject to the restrictions provided for” in the CTA. The CTA contains NO reference to the South Parcel of any kind nor does it contain any explicit provisions applying any duty at all to consider, still less to acquire, any properties beyond the Premises on behalf of the Co-Tenancy of any kind. Nothing in the CTA could lead to such an inference.

[71] The third sentence in s. 1.04 refers to title to “all property, real and personal, now or hereafter owned by the Co-Tenancy” being held in the name of the parties as tenants in common on a 50:50 basis. This phrase cannot be read as introducing the acquisition of *other* real properties *beyond* the Premises as an actual existing goal of the Co-Tenancy from the outset. The language used makes perfect sense when read in its actual context and has nothing to do with external investment opportunities or the South Parcel.

[72] The first recital referred to the fact that Victern (the predecessor of Sitzler) was the *registered* owner of the Premises described therein. S. 1.04 clarified the intention of the parties that that *title* to the Premises, the management of which was the ‘sole’ or “principal” purpose of the CTA, should be held in their joint names as tenants in common despite the legal locus of title on July 15. The same provision applied to other property acquired in future – a term that made perfect sense bearing in mind the personal property and fixtures that the Co-Tenancy would naturally come to require to operate the business of the Co-Tenancy of the portion of the plaza situate on the North and Middle Parcels in the coming years. Ladders, snow plows, maintenance supplies – all such property acquired in future by the Co-Tenancy will be the property of it.

[73] No other references in the CTA could reasonably be referenced as bringing potential future acquisitions into the ambit of the CTA as a stated purpose. Section 3.01 confided the management of the Co-Tenancy to Victern, but “provided, however, that Victern agrees that no other lands shall be purchased...by the Co-Tenancy without the approval of Weiss”⁵. This provision is obviously a prohibition *against* acquiring land and cannot be confused with an actual mandate *to seek* still less to propose acquisitions. To the contrary, this language must be read in its context as ensuring that the conferring of management authority to one Co-Tenant did not confer the authority to incur obligations on behalf of the Co-Tenancy as a whole except in carefully limited circumstances.

[74] The same overriding concern of restricting the power of a single Co-Tenant to bind the Co-Tenancy was also repeated and underscored in the provisions of s. 8.10 which precluded findings of agency and expressly denied the ability to incur obligations on behalf of the Co-Tenancy. Reading the CTA as a whole, it is clear that the Co-Tenancy created was tightly and narrowly constrained, with strict limits on the ability of one Co-Tenant to bind or restrain the activities of the other, not a first step in an expansion-oriented joint enterprise. It was *not* a joint venture – it was a simple Co-Tenancy with the limited additional features specified.

[75] While management of the Co-Tenancy was conferred upon Victern, Victern could designate another manager to do so or the Co-Tenancy could engage the services of a trust company to manage it: CTA s. 3.03. Management was in turn to be governed by a future Management Agreement. The two written Management Agreements in evidence contained nothing linking the manager to a putative object of seeking out or proposing future acquisitions of the South Parcel or any other property. Any link between management of the Co-Tenancy and an supposed object of considering or seeking acquisitions, strategic or otherwise, is entirely absent from the CTA or the Property Management Agreements subsequently entered into under it.

[76] None of the provisions of the CTA can reasonably be construed as imposing *any* restrictions of any kind in relation to the acquisition by either Co-Tenant of the South Parcel or indeed of any other real estate beyond the Premises. The language of s. 3.02 is as explicit and clear as can be: “No party by reason of this agreement shall have any interest in any other property owned by the other”. This is not a qualified statement. Imposing a constructive trust over property acquired by a non-party affiliate of one Co-Tenant in the face of such clear exclusionary language is an extricable error of law.

[77] Further, the finding of an ad hoc fiduciary duty by the arbitrator relied extensively upon the subsequent history of the Co-Tenancy after the CTA and in particular on years

⁵ A similar prohibition is found in s. 3.06(ix)(b).

of management of the Co-Tenancy by Sitzer. The vulnerability of Weiss— a central feature of the reasoning that led to the finding of a fiduciary duty – was attributed in large measure to the fact of Weiss’ absence from the day to day management of the Co-Tenancy. Paragraph 133 of the Partial Final Award referred to the “powers granted to the Sitzer Group under the Co-Tenancy and the Property Management Agreement [that] enabled the Sitzer Group also to acquire knowledge and ... extensive insight into the operations of the [plaza]” and (at para. 134) found that the “Weiss Group reasonably relied on the Sitzer Group to inform it of any risks or opportunities that would significantly affect the Co-Tenancy”. The Property Management Agreements were entered into several years after the CTA and contained no relevant arbitration clause. Paragraph 136 concluded that evidence of one of the next generation of members of the Sitzer Group that “everything we did, we did in the best interest of the shopping centre” could be construed as evidence of the actual acceptance of an obligation to act in the best interests of the Weiss Group in relation to a property – the South Parcel – that was not part of the Co-Tenancy nor mentioned in the CTA.

[78] The subsequent conduct of the parties, and in particular their conduct under a different contract containing no relevant arbitration clause is of very limited value in interpreting the actual meaning of the CTA which was entered into in 1971.

[79] In summary, the CTA contained the explicit, written agreement of the parties that, among other things, (i) the CTA governed their respective rights, powers and obligations as Co-Tenants; (ii) the “sole purpose of the Co-Tenancy” was to acquire, own, manage ... and otherwise operate the Premises for the mutual benefit of the Co-Tenants” after having defined the “Premises” to be specifically confined to the North and Middle parcels (by their legal descriptions) in the preamble; (iii) each party had the “absolute right” to engage in other businesses including the ownership of real estate and that neither party “shall have any interest in any other property” owned by the other; (iv) the CTA set forth the entire agreement between the parties and any waiver or amendment thereof must be in writing; and (v) no party shall be “the partner, agent, joint venturer or legal representative of any other party for any purpose of the Co-Tenancy” nor shall the CTA “be construed to create any partnership or other agency whatsoever”.

[80] These unambiguous provisions read in context are utterly inconsistent with any fiduciary duty arising in respect of the ownership of the South Parcel. The mere existence of synergies between two separately owned and operated parcels of land does not make them into a single business unless the agreement specifically provided and this one did not.

[81] I have reviewed the decision of Kimmel J. in *Ontario Minister of Transportation v. Link 427 General Partnership*, 2025 ONSC 2375 and in particular the discussion therein regarding the applicable standard of review for errors of law in arbitration decision in the light of the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII) contrasted with earlier decisions such as

Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53 (CanLII) and the reaffirmed admonition of the Supreme Court in *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20 (CanLII) in relation to the caution to be exercised in identifying extricable questions of law from mixed questions of fact and law. Extricable questions of law included failing to construe the contract as a whole, failing to give meaning to all of the terms of an agreement and arriving at conclusions inconsistent with the whole of the agreement: *Link 427* at para. 21. The errors of law raised by the appellant Sitzer that I have found to be present satisfy these conditions. I have not referred herein to any facts which were not found by the arbitrator or, in rare cases, admitted by the respondent Weiss. All of the errors found by me are tightly tied to the failure of the arbitrator to give effect to the explicit and unambiguous terms of the CTA which it was not open to the arbitrator to depart from.

[82] In *Jirna v. Mister Donut of Canada*, 1973 CanLII 31 (SCC), a finding of a fiduciary relationship in a franchisee/franchisor relationship was rejected due to the contractual stipulation that “the relationship between the parties is only that of independent contractors. No partnership, joint venture or relationship of principal and agent is intended”. The Supreme Court affirmed the Court of Appeal’s finding that full effect must be given to the contractual stipulation of the parties and the fiduciary relationship finding of the trial judge was overturned.

[83] In *Burwell v. Wozniak*, 2023 ONSC 1685 (CanLII) the court overturned an arbitration award that found the claimant ex-spouses of the respondent in the arbitration entitled to a 50% trust interest in shares of a company that had been sold. In the circumstances, the court hearing the appeal found that the arbitrator had “incorrectly ignored the written Burwell Family Trust agreement and used the evidence of surrounding circumstances, including the October 18 email, to overwhelm the words of the agreement. These constitute errors of law” (at para. 72).

[84] I also refer generally to the approach taken by the Court of Appeal in *Niagara Falls Shopping Centre Inc. v. LAF Canada Company*, 2023 ONCA 159 (CanLII) para. 32-36 in relation to the identification of extricable questions of law.

[85] The contract in this case explicitly precluded partnership and with it the attributes of partnership including fiduciary obligations. It was not open to the arbitrator to impose the very status the parties rejected by the expedient of using a different name based on the identical facts. It was not open to the arbitrator to ignore the explicit statement of the object of the Co-Tenancy being restricted to the Premises as narrowly defined by adding to it an unstated object to pursue acquisitions. It was not open to the arbitrator to ignore the explicit prohibition on asserting claims to any other property owned by a Co-Tenant or by finding that the other Co-Tenant had a 50% claim in property unquestionably lying beyond the Co-Tenancy, whether abutting or otherwise, which could not be part of the Co-Tenancy absent an amendment to the CTA which the parties have not consented to.

[86] I find that the award of a 50% interest in the South Parcel by the arbitrator was the product of multiple extricable errors of law described above and the award must be varied accordingly pursuant to s. 45 of the Act.

Issue 4: Was the alternative claim of an Ad Hoc Fiduciary Duty validly submitted to arbitration by the Notice of Arbitration?

[87] Unlike a judge, an arbitrator's jurisdiction to hear a dispute is not inherent. It is based exclusively upon the authority conferred by the parties in their arbitration agreement and by the terms of appointment they have agreed upon: *Mattamy (Downsview) Limited v KSV Restructuring Inc. (Urbancorp)*, 2023 ONSC 3013 (CanLII) at para. 40-41.

[88] An arbitrator's decision may be set aside under clause 3 of s. 46(1) of the Act if "[t]he 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". The merits of the arbitrator's decision are not relevant to the question of jurisdiction. The arbitrator must act within the bounds of the authority granted by the arbitration agreement pursuant to which he was appointed: *Alectra Utilities Corporation v. Solar Power Network Inc.*, 2019 ONCA 254 (CanLII) at para. 27.

[89] Answering a question not submitted amounts to an excess of jurisdiction under clause 3 of s. 46(1) of the Act. It may also be considered as a failure to accord fair treatment under clause 6 since the respondent in the arbitration prepared its case and assembled its evidence and made all of its tactical decisions on the basis of the case pleaded and not the alternative ground proposed in the claimant's opening. On the facts of this case, I do not consider there to be a substantive difference between the two.

[90] The foundation of the claim advanced by the Weiss Group to a trust interest covering 50% of the South Parcel was the existence of a fiduciary duty arising from the alleged partnership relationship between the parties. That fiduciary relationship was very specifically pleaded in the Arbitration Notice⁶ (by which this arbitration was commenced) to have arisen in 1971 when the parties were alleged to have formed a partnership.

⁶ The Arbitration Notice of July 7, 2017 shall be the version that I will refer to. Amendments were made in 2020 which expanded the original in certain respects, primarily by adding further recitals of uncontested background facts. The parties concur that the 2020 amendments were not substantive and thus did not require consideration of the *Real Property Limitations Act*, R.S.O. 1990, Chapter L.15. I have accordingly confined myself to reviewing and quoting from the original 2017 Notice of Arbitration delivered less than ten years after the circumstances giving rise to the claimed constructive trust were discovered. The notice shall be referred to herein as the "Arbitration Notice" or merely the "Notice".

[91] It follows logically from this framing that subsequent conduct could not *create* the pleaded fiduciary duty but could only be *evidence* of its breach. Subsequent conduct is seldom of significant weight in assessing the intent of the parties on formation of a contract – it cannot be referred to as the source of an obligation.

[92] Paragraphs 1- 3 of the Arbitration Notice reads as follows:

“1. The Premises operates as a strip mall known as ...

2. Although describing their relationship as that of co-tenants, the Sitzer Group and Weiss Parties entered into a partnership *in 1971* for the purpose of carrying on business acquiring, owning, improving, developing, managing, leasing, mortgaging, selling and otherwise operating the Premises for the mutual benefit of the partners. (emphasis added)

“3. As such, the parties owe fiduciary duties to each other”

[93] These three paragraphs represent the *only* pleaded fiduciary duty. The breach of *this* duty was particularized in paragraphs 5 through 8. Paragraph 4 pleaded a *contractual* duty not to do any act which is detrimental to the Co-Tenancy pursuant to s. 3.06(ix)(c) of the CTA which cannot under any construction create a stand-alone fiduciary duty even if it may supply a constituent element of a fiduciary duty. I shall discuss that question below.

[94] The Notice provided the following particulars of breach of the pleaded fiduciary duty:

- a. It referred to the acquisition of the South Parcel by an affiliate of the Sitzer Group named Levendale Holdings Limited on January 4, 2004 without the knowledge of the Weiss parties (paragraph 5);
- b. It described the South Parcel as having been developed at or around the same time as the plaza, effectively functioning as part of the plaza “for certain purposes such as parking” and noted that the three parcels are “commonly treated as a single site by the relevant municipal authorities” (paragraph 6);
- c. It stated that the Weiss parties first learned of the acquisition in December 2007 (paragraph 7); and
- d. It concluded that the “Sitzer Group breached its fiduciary duties and contractual duties to the Weiss Parties by purchasing the Abutting Parcel without providing the Weiss Parties an opportunity to participate in such purpose” (paragraph 8).

[95] It is to be noted that the Notice makes no explicit claim that the South Parcel's business was the *same* business as the business of the Co-Tenancy referred to in s. 3.02 of the CTA and not merely a similar business. Rather, it was described as "part of the plaza for certain purposes such as parking".

[96] The arbitrator found that the well-known definition of partnership – a business carried on in common with a view to a profit – was clearly satisfied by the CTA which described purpose of the Co-Tenancy in almost identical terms.

[97] At the hearing of the arbitration, Weiss strenuously argued that the exclusion in s. 8.10 did not preclude a finding that the parties had created what was in substance a partnership and that the arbitrator should examine the substance of the business relationship to determine whether a partnership with its attendant fiduciary duties existed. The Sitzer Group respondents took the contrary position that s. 8.10 was conclusive of the matter regardless of whether, absent that clause, a partnership might otherwise be found to exist.

[98] Section 8.10 of the CTA reads in full as follows:

8.10 No party shall be, and shall not by any reason of any provisions hereof be deemed to be, the partner, agent, joint venturer or legal representative of any other party for any purpose of the Co-Tenancy or otherwise, nor shall any party have any authority or power to act for or to assume any obligation or responsibility on behalf of the Co-Tenancy or any party. This Agreement shall not and shall not be, construed to create any partnership or other agency whatsoever.

[99] The arbitrator's conclusion at paras. 107-108 of the Partial Final Award was that "in light of the clear language of the Co-Tenancy Agreement stating that the parties are not to be considered to be partners, it is not open to me to find that they are partners". The parties have taken no issue with that conclusion. It was plainly correct and mandated by the language of s. 8.10.

[100] The pleaded basis of a fiduciary relationship was partnership and the arbitrator correctly applied s. 8.10 of the CTA to reject that claim. Partnership was the *only* source of fiduciary duty pleaded and the claim for a 50% trust interest in the South Parcel was based solely on the pleading of breach of fiduciary and contractual duties (I shall consider the sole pleaded contractual duty below).

[101] Having correctly determined that the parties did *not* create a partnership in 1971 as pleaded, the appellant Sitzer Group says the arbitrator had completely answered the only question put to him and there was none other to consider. That position is plainly correct. The arbitrator was not asked to enquire into an Ad Hoc Fiduciary Duty by the Arbitration Notice and the respondents on the arbitration correctly focused their case on

rebutting the suggestion that a partnership could be imposed upon this relationship notwithstanding s. 8.10 of the CTA.

[102] This is not a mere technical defect. Particulars of a claimed fiduciary duty are required to be pleaded with specificity: *RH20 North America et al v. Bergmann et al*, 2023 ONSC 2378 (CanLII) at para. 30-31. If the fiduciary duty does not arise inherently from a pleaded recognized fiduciary relationship, then the party alleging the existence and breach of a fiduciary relationship must plead the particular circumstances giving rise to its existence and breach: *Kozeyah v. Serpent River First Nation*, 2007 CanLII 6236 (ON SC) at para. 26-27. None of the requirements of an ad hoc fiduciary duty were pleaded even if the name was not used. There was no pleading of vulnerability or the basis for vulnerability. There was no pleading of the nature of the interest adversely affected or how: *Kang v. Sun Life Assurance Company of Canada*, 2011 ONSC 6335 (CanLII) at paras. 133-141.

[103] This failing is not saved by the cryptic reference in the Notice to s. 3.06(ix)(c) of the CTA. That provision reads as follows:

S. 3.06: “The Parties agree on the following matters *in connection with the day-to-day operation of the Co-Tenancy*:....(ix) Neither Co-Tenant without the consent of the other, except as hereinafter expressly provided to the contrary shall:...(c) do any act which is detrimental to the best interests Co-Tenancy or which would make it difficult or impossible to carry out the purposes of the Co-Tenancy” (emphasis added).

[104] The opening words of s. 3.06 have relevance to its construction. It records the parties’ agreement “in connection with the day-to-day operation of the Co-Tenancy”, a qualification which already suggests caution before freighting what follows with consequences in relation to a transaction which in no way could be considered any part of the “day-to-day” management or operation of the Co-Tenancy. The acquisition of title to land subject to long term lease to the grocery store tenant of the abutting parcel has little of the day-to-day about it.

[105] As well, the language of s. 3.06(ix)(c) is further modified by “except as hereinafter expressly provided to the contrary” which brings into prospect, among other things, the provisions of s. 8.10 that have already been examined at some length.

[106] Taken at its highest, this provision could potentially be taken to stand as a pleading of but one of the constituent elements of an Ad Hoc Fiduciary Duty: the existence of undertaking to act in the best interests of the alleged beneficiaries. Even that conclusion remains problematic given the broad exclusion of traditional fiduciary relationships in s. 8.10 and the broad license to pursue transactions and investments outside of the Co-Tenancy in s. 3.02.

[107] Nothing in section 3.06 satisfies the requirement to plead any of the other elements of fiduciary duty including the means by which the impugned purchase actually harms the interest of the Co-Tenancy. Indeed, while the arbitrator speculated about possible future harms that might befall the Co-Tenancy (without contrasting these to the *status quo ante* under which a third parties held complete control of the South Parcel), the arbitrator conceded that there were benefits to the Co-Tenancy arising from the purchase of the South Parcel by Sitzer: “The interests of the Co-Tenancy were probably better served by having the Sitzer Group own the South parcel tha[n] a third party” (para. 140). It is also to be noted the distance between the speculative future harms and anything to do with the day-to-day operation of the Co-Tenancy which governs the interpretation of s. 3.06.

[108] The claim to a retroactive (to the date of acquisition) 50% trust interest over the South Parcel cannot rest upon the claimed breach of s. 3.06(ix)(c) of the CTA and the arbitrator did not rule that it could.

[109] Accordingly, I find that the Arbitration Notice did not place the question of an Ad Hoc Fiduciary Duty before the arbitrator and that accordingly he did not have jurisdiction to consider it after having found that the pleaded fiduciary duty in partnership did not exist. Those parts of his ruling affirming the existence of an Ad Hoc Fiduciary Duty and providing a remedy for breach of that duty must accordingly be struck from the ruling for want of jurisdiction.

[110] This same reasoning leading to the conclusion of a lack of jurisdiction to consider Ad Hoc Fiduciary Duty can be re-cast as an error of law under s. 45 of the Act with few modifications needed:

- a. Had the CTA been silent on the subject, there can be no doubt that the relationship between the parties would have been characterized as a partnership. However, the parties are free to contract out of some or all of those consequences and in s. 8.10 they did so. In so doing, the parties rejected both the label of partnership but also necessarily the substantive fiduciary responsibilities that come with that label that the CTA would otherwise have attracted.
- b. Our courts are justifiably reluctant to find a fiduciary duty within arm’s length commercial relationships because the parties have an adequate opportunity to prescribe their own mutual obligations and contractual remedies ought to be sufficient: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, 1989 CanLII 34 (SCC), [1989] 2 SCR 574 per Laforest J. at SCR 27 and 41, per Sopinka J. at SCR 12. This is *not* a case of confidential information confided to one party or an opportunity available to one and not the other – it was Weiss who first proposed acquiring the South Parcel to Sitzer in the 1980’s

without the latter evincing any interest at the time⁷. Sitzler made unsuccessful attempts to acquire the South Parcel later before succeeding in doing so in 2005.

- c. In the present case, the parties contractually chose to reject the label of partnership and with it the bundle of rights and responsibilities that come with it *including the fiduciary responsibilities partners undertake to each other* despite an agreement otherwise contained all of the attributes of partnership. Section 8.10 excludes as exhaustively as could fairly be demanded of a contract drafted in 1971 any idea of fiduciary relationship arising from the obligations undertaken by the parties under the CTA. Joint venture, and agency or other forms of representation were disclaimed.
- d. The surrounding circumstances in terms of the relationship of the Co-Tenancy to the business carried on by the tenant of the South Parcel were known to the parties when they made their agreement which must be presumed to have taken then into account. Neither those circumstances nor the subsequent actions of the parties, including when acting under Management Agreements drafted fifteen or more years later, can be permitted to overwhelm the clear stipulation in s. 8.10 read in the context of the full agreement.
- e. It was error of law for the arbitrator to apply the very bundle of obligations the parties had so expressly rejected in s. 8.10 by the simple expedient of applying a different name to the substantively same relationship. The arbitrator failed to give full effect to the express intentions of the parties. The fiduciary duty found is nothing other than partnership by a different name and failing to apply s. 8.10 to exclude that was a clear error of law.
- f. The arbitrator's finding in para. 113 of the Partial Final Award that the "Notice of Arbitration clearly pleads breach of fiduciary duty and pleads the material facts necessary to support that claim" conclusively demonstrates that the Ad Hoc Fiduciary Duty he found was indistinguishable from the fiduciary duty arising from partnership since the only fiduciary duty pleaded and the only material facts pleaded were the existence of a partnership. No other material facts necessary to demonstrate an Ad Hoc Fiduciary Duty were contained in the Arbitration Notice. Section 8.10 of the CTA was

⁷ P. 35 of the Weiss opening in the arbitration noted "[Weiss] suggested the Families pursue the South Parcel, with [Weiss] felt provided a strong income, AAA tenant with an existing lease and an agreeable capitalization rate. Although it was [Weiss]'s idea, the Sitzler Group went ahead and took steps to purchase the South Parcel without notice to the Weiss Family". See also para. 43 of Partial Final Award

clearly applicable to the pleaded fiduciary duty regardless of how it was named.

- g. Accordingly, the arbitrator's finding of an Ad Hoc Fiduciary duty failed to give appropriate weight to the express language and unambiguous intent of s. 8.10 excluding same and was thus the product of an error of law.

[111] Whether characterized as an error of law for failing to apply s. 8.10 through the simple expedient of applying a different name or characterized as an excess of jurisdiction for having considered an issue not pleaded in the Notice of Arbitration is a distinction without a difference. The decision to consider Ad Hoc Fiduciary Duty was beyond the jurisdiction of the arbitrator and his conclusion on that question was fatally infected with an error of law. The decision is reversible under either or both s. 45 and s. 46 of the Act.

[112] It may also be observed that the arbitrator's jurisdiction is also restricted to matters "under" the CTA since the submission to arbitration in s. 8.04 of the CTA is to "any matter under this Agreement". The claim to a 50% ownership in land which is explicitly not within the CTA definition of the "Premises" which in turn defined the scope of the Agreement is by definition not "under this Agreement". It could not be a part of the Co-Tenancy absent amendment of the CTA by the parties and an arbitrator has no inherent jurisdiction to require such an amendment.

[113] For the foregoing reasons I find that the award of a 50% interest in the South Parcel was beyond the jurisdiction of the arbitrator to order and must be set aside from the Partial Final Award.

Disposition

[114] For the foregoing reasons, I find as follows:

- a. The arbitration agreement of the parties does not preclude appeals on questions of law;
- b. The test under s. 45(1) of the *Act* for granting leave to appeal on a question of law is satisfied;
- c. The learned arbitrator's decision that the applicant owed a fiduciary duty to the respondents in connection with the acquisition of the South Parcel was the product of an extricable error of law in that it failed to give effect to the express language of the parties in the CTA and must be accordingly set aside in part under s. 45(5) of the *Act*;
- d. The learned arbitrator exceeded his jurisdiction under the arbitration agreement by which he was appointed in considering the existence of an unpleaded ad hoc fiduciary duty after rejecting the claimed fiduciary duty

arising from partnership and his ruling in relation to the South Parcel must be set aside in part pursuant to s. 46(1) of the *Act*;

- e. The learned arbitrator's award must therefore be varied and the following paragraphs of the Partial Final Award must be struck in accordance with s. 45(5) and s. 46(1) of the *Act*:
 - i. Paragraphs 109-156;
 - ii. Paragraph 163; and
 - iii. Paragraph 173(a), (b) and (c).

[115] If the parties are unable to agree on the matter of costs, I shall receive written submissions from them to decide the matter. In light of the very constructive and professional working relationship between counsel in this matter, I shall confine myself to suggesting a deadline by which to advise me either of the resolution of the question of costs if agreed or to advise me of a timetable for filing written submissions on the subject (and reasonable size limitations in relation thereto).

[116] In the unlikely event of difficulties in settling a timetable, the parties may simply request a short case conference on a convenient date before me from the Commercial List office. Whichever route is to be followed to resolve the question of costs, I would ask only to be advised of it by the end of May 2026 or, if more time is needed, by such other date as the parties jointly request by then.

[117] I would like to take this opportunity to extend my thanks to all parties for their professional and constructive presentation of these issues. While the paper (or electronic) file to be reviewed was daunting, the parties did an admirable job of boiling the issues down to their most essential elements and presenting these in a manageable and constructive manner. That is not a common skill and I would be remiss in failing to congratulate and thank both sides on that account.

[118] "Orders accordingly".

S.F. Dunphy J.

Date: April 24, 2026