CITATION: Toronto Standard Condominium Corporation No. 2256 v. Paluszkiewicz, 2018 ONSC 2329
COURT FILE NO.: CV-17-576434
DATE: 20180412

ONTARIO
SUPERIOR COURT OF JUSTICE

APPLICATION UNDER the *Arbitration Act, 1991*, S.O. 1991, c. 17, ss. 1, 45(1), 46(1) and (3), 50 and Rules 6.01, 14.05(2), 38 and 63.02(1)(b) of the *Rules of Civil Procedure*

BETWEEN:	
TORONTO STANDARD CONDOMINIUM CORPORATION NO. 2256 Applicant	*Mark H. Arnold* for the Applicant
– and –	
GERWAZY PALUSZKIEWICZ and IWONA PALUSZKIEWICZ Respondents	*Rahul Shastri* and *David Winer* for the Respondents
	HEARD: March 23, 2018

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] The Applicant, Toronto Standard Condominium Corporation No. 2256, seeks to set aside an Arbitration Award dated May 5, 2017 made by Arbitrator Gary Caplan in which he dismissed the Condominium Corporation's submission to arbitration. The Condominium Corporation submitted that Gerwazy Paluszkiewicz and Iwona Paluszkiewicz, the owners of a unit in the condominium, had not complied with a Section 98 Agreement made pursuant to the *Condominium Act, 1998*.[1] The Arbitrator dismissed the Condominium Corporation's claim, and he awarded the Paluszkiewiczs $216,643.49 in costs.

[1] S.O. 1998, c. 19.

[2] The Condominium Corporation seeks to set aside the Arbitration Award on the basis that it was obtained by Mr. Paluszkiewicz's fraudulent or false testimony. In any event, the Condominium Corporation also seeks leave to appeal and, if leave be granted, an order setting aside the Arbitration Award.

[3] For the reasons that follow, I dismiss the Condominium Corporation's Application.

B. Facts

1. The Renovation of Unit 3 of the Condominium Corporation

[4] In 2012, Elizabeth Johnson owned a nineteenth-century mansion and coach house in the Rosedale area of Toronto. In August 2012, as a declarant under the *Condominium Act, 1998*, Mrs. Johnson converted and registered the property as a four-unit condominium. Mrs. Johnson, her husband Alan, and their son Simon were the first Board of Directors of the Condominium Corporation.

[5] After registration of the condominium declaration, the Johnsons lived in Unit 4 (numbered 400, the coach house, also known as Unit 400).

[6] Unit 1 (numbered 100, on the first floor, also known as Unit 100) was sold to Peter Wright, a businessman. Unit 2 (numbered 200, on the second floor, also known as Unit 200) was sold to Dr. Robin Foster, a psychologist, and Unit 3 (numbered 300, on the third floor, also known as Unit 300) was sold to the Paluszkiewiczs. Mr. Paluszkiewicz is an architect who was trained in his native Poland.

[7] On October 27, 2012, Mr. Paluszkiewicz delivered to Mrs. Johnson a renovation proposal for Unit 3, including two preliminary drawings that had been prepared by his design firm. The drawings illustrated the work to be done to the unit and to the common elements. The drawings, however, were not detailed construction drawings.

[8] The Paluszkiewiczs were not the only occupants planning changes to the condominium. Mr. Wright also had plans to renovate his first-floor unit.

[9] Pursuant to s. 98 of the *Condominium Act, 1998*, a unit owner may not make alternations or improvements to the common elements, unless approved by the condominium board, memorialized by a written agreement. Section 98 of the Act states:

> *Changes made by owners*
>
> 98. (1) An owner may make an addition, alteration or improvement to the common elements that is not contrary to this Act or the declaration if,
>
> (a) the board, by resolution, has approved the proposed addition, alteration or improvement;
>
> (b) the owner and the corporation have entered into an agreement that,
>
> (i) allocates the cost of the proposed addition, alteration or improvement between the corporation and the owner,
>
> (ii) sets out the respective duties and responsibilities, including the responsibilities for the cost of repair after damage, maintenance and insurance, of the corporation and the owner with respect to the proposed addition, alteration or improvement, and

(iii) sets out the other matters that the regulations made under this Act require;

(c) subject to subsection (2), the requirements of section 97 have been met in cases where that section would apply if the proposed addition, alteration or improvement were done by the corporation; and

(d) the corporation has included a copy of the agreement described in clause (b) in the notice that the corporation is required to send to the owners.

No notice or approval

(2) Clauses (1) (c) and (d) do not apply if the proposed addition, alteration or improvement relates to a part of the common elements of which the owner has exclusive use and if the board is satisfied on the evidence that it may require that the proposed addition, alteration or improvement,

(a) will not have an adverse effect on units owned by other owners;

(b) will not give rise to any expense to the corporation;

(c) will not detract from the appearance of buildings on the property;

(d) will not affect the structural integrity of buildings on the property according to a certificate of an engineer, if the proposed addition, alteration or improvement involves a change to the structure of the buildings; and

(e) will not contravene the declaration or any prescribed requirements.

When agreement effective

(3) An agreement described in clause (1) (b) does not take effect until,

(a) the conditions set out in clause (1) (a) and subsection (2) have been met or the conditions set out in clauses (1) (a), (c) and (d) have been met; and

(b) the corporation has registered it against the title to the owner's unit.

Lien for default under agreement

(4) The corporation may add the costs, charges, interest and expenses resulting from an owner's failure to comply with an agreement to the common expenses payable for the owner's unit and may specify a time for payment by the owner.

Agreement binds unit

(5) An agreement binds the owner's unit and is enforceable against the owner's successors and assigns.

[10] On November 30, 2012, the Condominium Corporation and the Paluszkiewiczs entered into a Section 98 Agreement.

[11] The Section 98 Agreement was registered on the title of the Condominium Corporation on December 3, 2012 as Instrument Number AT3188776. It contained the two preliminary design drawings that Mr. Paluszkiewicz had shown Mrs. Johnson. The then Board of Directors, *i.e.*, Mrs. Johnson, Alan Johnson, and Simon Johnson, approved and authorized the Section 98 Agreement. The Section 98 Agreement by its express terms envisioned that there would be other construction drawings to be approved by the Board.

[12] At the arbitration hearing, Mr. Paluszkiewicz testified that following the execution of the Section 98 Agreement, he met with the Directors; *i.e.*, with the Johnsons, and he provided them with a set of architectural drawings disclosing the details of the work to be undertaken. The Arbitrator accepted this testimony and disagreed with the position taken by the Condominium Corporation that the Board of Directors had never approved the further drawings that had been

envisioned by the Section 98 Agreement. The Arbitrator stated at paragraphs 26-27 of his Award:

> 26. Gerry [Mr. Paluszkiewicz] says that he gave the working drawings to Mrs. Johnson and reviewed them with her and others in December 2012. To that extent, he says that he has complied with section 2(a) of the Section 98 Agreement. The corporation in this hearing said that it cannot find in its records a copy of the working drawings. The corporation argues that I should find that no such working drawings were submitted, or consent provided. The corporation says that such an adverse inference should be drawn from the fact that Mrs. Johnson was not called by the respondents to give evidence corroborating the position.
>
> 27. I disagree with the position taken by the corporation. Either party could have called the declarant. In my view having given the evidence he did, the onus shifted to the corporation to rebut it. They did not do so. But as will be seen later, I find that it was also incumbent on Gerry and his co-directors to ensure that his working drawings were in corporate hands after turnover.

[13] In early 2013, the turnover meeting for the Condominium Corporation took place and a new Board of Directors was elected. The directors were Mr. Paluszkiewicz, who was President of the Condominium Corporation, Mr. Wright, the Treasurer, and Dr. Foster, the Secretary.

[14] The new Board of Directors of the Condominium Corporation never asked for a copy of the construction drawings for Unit 3, and the drawings were not produced until the arbitration, which occurred several years later.

[15] On May 15, 2013, there was a meeting of the Board of Directors. The minutes note that both Mr. Wright and the Paluszkiewiczs had obtained building permits for their units.

[16] Construction began on Unit 3 with the exterior work. Mr. Paluszkiewicz was his own project manager and general contractor.

[17] Between January 2013 and September 2013, there is nothing in the minutes or records of the Condominium Corporation that discloses any discussion of the existence of the working drawings or the permit drawings for Unit 3. There is no mention of compliance with the Section 98 Agreement.

[18] In September 2013, the Johnsons fell into arrears of their common expense obligations, and they put Unit 4 up for sale. Before the year end, their unit was acquired by its mortgagee, O'Shanter Developments, whose principal, Adam Krehm, a professional engineer, took possession.

[19] On October 10, 2013, there was a meeting of the new Board of Directors. By this time, Dr. Foster and Mr. Wright had concerns with the scope of the exterior work undertaken for Unit 3. Dr. Foster and Mr. Wright had reviewed the Section 98 Agreement, and they told Mr. Paluszkiewicz that the construction work did not correspond to the drawings attached to the Agreement; *i.e.*, to the preliminary design drawings. Mr. Paluszkiewicz was surprised because the exterior work had been proceeding without opposition.

[20] Although the Condominium Corporation disputed and continues to dispute the finding, the Arbitrator concluded that by November 2013, the dispute about the construction of Unit 3 had been resolved. He concluded that the exchange of emails in October and November 2013 were an extension of the October 10, 2013 Board of Directors meeting, and, as such, this correspondence constituted the written resolution of the Board approving compliance with the Section 98 Agreement. Thus, the Arbitrator stated at paragraphs 42 and 43 of the Award:

> 42. It is my finding that on and as of November 5, 2013, a binding agreement was reached among the Unit owners/directors Wright, Foster and Paluszkiewicz. I find that most of the aspects of the exterior work on Unit 300 were agreed to: the shed dormer, the north east porch, the windows on the dormer, and the side balcony extension, the skylights, and windows on the south side of the living room. Dr. Foster and Mr. Wright inspected or could have inspected the work done up to that point. Dr. Foster and Mr. Wright, constituting the majority of the board, by November 5, 2013, knew or could have known of the scope of all of the exterior work. They certainly knew of the contents of the Section 98 Agreement. They knew or ought to have known about the existence of the permit drawings which had been approved by the City back in June 2013. Mr. Hyman, [the Condominium Corporation's lawyer] already retained by the corporation, was not asked for legal advice on this point at that time. No board resolution was passed one way or another regarding the October 10 to November 5 interactions. Regardless, I find that it was the reasonable expectation of the respondents that the complaints and issues raised, or which could have been raised, regarding all of the exterior work had been resolved.
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> 43. If it is necessary to do so, I find that the email exchanges described above are indeed extensions of the October 10 directors meeting and as such constitute the written resolution of the board.

[21] By December 2013, the exterior work on Unit 3 was substantially completed.

[22] In early January 2014, Dr. Foster circulated her minutes of the meeting of October 10, 2013.

[23] On January 14, 2014, after reviewing Dr. Foster's minutes of the meeting of October 10, 2013, Mr. Paluszkiewicz wrote a corrected version of the minutes (which was marked as Exhibit 3 in the Arbitration). In his notes, Mr. Paluszkiewicz stated that he had submitted to Mrs. Johnson construction plans that were almost identical to the as-built plans and that in November 2012, there was a meeting with the Johnson Board and a real estate agent named Kevin Loberg in the coach house to discuss the architectural drawings.

[24] No objection was made to the revised minutes. When Dr. Foster and Mr. Wright received the corrected minutes they made no effort to contact the Johnsons or Mr. Loberg. Dr. Foster did not ask Mr. Paluszkiewicz for the working drawings or the drawings used to obtain a building permit.

[25] On March 10, 2014, the Condominium Corporation notified the Paluszkiewiczs that they had breached the Section 98 Agreement by constructing their unit and the common areas in a way that was not compliant with the Section 98 Agreement.

[26] The Paluszkiewiczs went on to complete their renovations, and in April 2014, the interior work was completed and the Paluszkiewiczs moved into Unit 3.

[27] On October 31, 2014, Mr. Paluszkiewicz completed his term as an officer and director of the Condominium Corporation.

2. The Submission to Arbitration

[28] The dispute between the Paluszkiewiczs and the Condominium Corporation continued. The dispute was submitted to mediation under s. 132(1)(a) of the *Condominium Act, 1998*. The mediation failed.

[29] The dispute then moved to arbitration pursuant to s. 132(1)(b) of the *Condominium Act, 1998*. The parties appointed Gary Caplan as Arbitrator.

[30] On March 11, 2015, the parties entered into an Arbitration Retainer Agreement. Article 4 of the Agreement provides that the decision of the arbitrator shall be final and binding on the parties subject only to any rights they may exercise under the *Arbitration Act, 1991*.[2]

[31] The Condominium Corporation's Submission to Arbitration sought, among other things, an order that the Paluszkiewiczs remove the additions, alterations or improvements to the common elements that were alleged to go beyond the Section 98 Agreement.

3. The Arbitration Hearing

[32] The arbitration hearing commenced on June 5, 2015, and after the Condominium Corporation had closed its case, the Arbitrator, on his own motion, adjourned the hearing to allow the parties to obtain further documents.

[33] Before the adjournment, Mr. Paluszkiewicz had testified that he had provided the Condominium Corporation with the architectural drawings for Unit 3 and had reviewed the drawings with the Johnson Board of Directors.

[34] After the adjournment, the Condominium Corporation retained new counsel.

[35] On November 24, 2015, the Paluszkiewiczs' counsel delivered to the Condominium Corporation's counsel the architectural drawings that allegedly had been presented to the Johnson Board of Directors.

[36] In June 2016, a year after the adjournment, the Arbitrator allowed the Condominium Corporation to re-open its case, and there were five days of hearing between September 30, 2016 and November 13, 2016, the last day of which was used for another unsuccessful mediation.

[37] On November 10, 2016, the Condominium Corporation's counsel advised that it intended to call Elizabeth and Alan Johnson as witnesses to testify that the Board of Directors had never approved the renovations as constructed.

[38] On February 8, 2017 and again on March 3, 2017, the Condominium Corporation's counsel advised that he intended to call Elizabeth Johnson as a witness and that the Condominium Corporation would bring a motion for the evidence to be given by video teleconference.

[39] However, on March 22, 2017, the Condominium Corporation's counsel advised that it would not be calling Mrs. Johnson as a witness because of the expense of doing so.

[40] The arbitration hearing continued. All of the unit owners, other than Mr. Wright, gave evidence at the hearing. In addition, each side called expert engineering evidence: Mr. Genge for the Condominium Corporation, and Mr. Belanger for the Paluszkiewiczs. The Condominium Corporation obtained and submitted expert engineering reports dated February 19 and September 20, 2016, prepared by GRG Building Consultants. The Paluszkiewiczs obtained and submitted an expert report dated August 17, 2016, prepared by Belanger Engineering.

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[2] S.O. 1991, c. 17.

[41] At the hearing on April 29, 2017, Mr. Paluszkiewicz testified that in November 2012, he submitted detailed building plans containing the totality of his intended renovations and alterations to Mrs. Johnson.

[42] The hearing continued on April 30, 2017 and it concluded on May 1, 2017.

4. The Arbitrator's Award

[43] On May 5, 2017, the Arbitrator released his Award. For present purposes, paragraphs 11, 68-73, and 94, which are set out below, are pertinent:

> 11. For the reasons set out below, I find for the respondents on all counts. The relief sought by the corporation is dismissed and I order the discharge and vacating from the title of Unit 300 all liens which arise from, are in relation to, or are in connection with legal fees expenses which the corporation has levied by way of special assessment or otherwise.
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> ….
>
> 68. The Section 98 Agreement and the Declaration must be read together. The Proposal portion of the Section 98 Agreement contains the clear and unambiguous representation that no work would be undertaken until the necessary building permits and City approved drawings were done and provided to the corporation. The AAIA portion of the Section 98 Agreement requires that working drawings be prepared by a design professional and be delivered to the corporation. The Declaration requires corporate approval for any non-cosmetic change to a non-common element.
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> 69. To any third-party reader, it is plain and obvious that the Proposal and drawings Al and A2 were the beginning of the story not the end. To make any sense of the Section 98 Agreement compared to the as built conditions, the reader is put on notice that regard must be had to the working and permit drawings, all of which should have been in the corporation's records.
>
> 70. To summarize, I am of the view that the Proposal and drawings Al and A2 portions of the Section 98 Agreement must be read together with and with reference to the working and permit drawings, together with any changes or modification to them that the corporation allowed. ….
>
> 71. If I am correct in this view, none of the sixteen alleged violations identified by Mr. Genge run afoul of the Section 98 Agreement simply because they all appear on the working and permit drawings. Moreover, as I have found any of the exterior elements that were arguably not referred to in the Proposal or the Al and A2 drawings were the subject of director approval during the Johnson reign (which I have found did have the working drawings) and during the period October 10 to November 5, 2013.
>
> 72. In my view, I need not go further. But if I am wrong, I will now proceed to examine the sixteen contentious variances on the basis of the four comers of the Section 98 Agreement alone without reading into it the working and permit drawings. The exercise here is to read the Section 98 Agreement as a stand-alone document and compare its contents with the as built condition, all the while appreciating that on its face the Proposal and drawings attached to it were preliminary and pre-purchase. Again, the inquiry must proceed on two levels: (a) interior non-common element, and non-decorative work which requires Board approval as required by the Declaration, and (b) interior and exterior common element changes which must fall within the Section 98 Agreement or Section 6 written board approval in accordance with the AAIA.
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> 73. But here again, the reader of the Section 98 Agreement faces the challenge how to read the contents of the Proposal and the Al and A2 drawings. I have already noted that I believe the reading of these documents must not be limited to an engineering or legal point of view. They are to be read to indicate, generically, the changes to the common elements in and appurtenant to the Unit that the respondents would undertake and for which they were to be responsible. The design details and specifications were to be the subject of architectural, engineering working and permit

> drawings and municipal compliance. Therefore, I read the Proposal and drawings to say that there would be no major structural changes to the interior and exterior common element features of the Unit, except for those items which were expressly or by necessary implication referred to in the Proposal and its drawings. If there was to be any other structural work, outside of the exceptions, then it would be only minor and code compliant. In other words, I read the Section 98 Agreement to be a list of the changes that the respondents intended to undertake and be responsible for. But the details and particulars of construction were to be set out in the working and permit drawings.
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> ….
>
> 94. The corporation's claim is dismissed. I have found two bases for this dismissal. The first is that the Section 98 Agreement incorporates by reference the working and permit drawings, and all must be read together. When read together, there are no variances. Alternatively, all of the items of alleged variance were referred to in the Section 98 Agreement or were approved by the directors in the October 10 to November 5 email exchange which I treat as an extension of the October 10, 2013 meeting. I read the Section 98 Agreement to mean that except for alteration features expressly or by implication referred to in the Proposal or drawings, or otherwise approved by the corporation, there could no major structural changes to common elements inside and outside the Unit. The dormer, skylights, cathedral ceiling, wall openings, and alteration of partitions together with all changes that flow directly or indirectly therefrom, were all referred to in the Proposal and thus form exceptions to the proscription against major structural change.

[44] For reasons that will become clear below, it is necessary to note that in deciding that Unit 3 had been renovated in accordance with the Section 98 Agreement, the Arbitrator made a finding of fact that the registered condominium description, which is mandated by s. 8 of the *Condominium Act, 1998*, contained an error in that the building survey indicated that there was a void in the configuration of the exterior wall but there was in fact no void or recess. It is also necessary to note that the Act provides a procedure by which the court may amend errors in the registered description.[3]

5. The Request to Introduce New Evidence

[45] Following the release of the Award, counsel for the Condominium Corporation contacted Elizabeth Johnson and Alan Johnson at their residence in California and Kevin Loberg in Toronto. Counsel questioned them about their recollection of the meeting that Mr. Paluszkiewicz had testified had occurred in the Johnsons' coach house while the Johnsons were the Directors of the Condominium Corporation. The Johnsons indicated that there was no meeting and that they would not have approved the drawings, which they had just seen for the first time.

[46] On June 2, 2017, the Condominium Corporation commenced this Application in the Superior Court to set aside the Award for fraud and for leave to appeal the Award on the grounds that the Arbitrator had erred on a matter of law.

[47] Meanwhile, the matter of the costs of the Arbitration remained outstanding, and in the course of making costs submissions, the Condominium Corporation submitted that the Arbitrator

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[3] *Condominium Act, 1998*, ss. 107-110.

should consider the circumstance that Mr. Paluszkiewicz had given false testimony. In these circumstances, the Arbitrator adjourned the costs adjudication, and he directed that if the Condominium Corporation wished to pursue this matter, it should do so by a formal motion.

[48] On September 6, 2017, the Condominium Corporation brought a motion before the Arbitrator asking him to set aside the Award. The motion was supported by a joint affidavit from Elizabeth and Alan Johnson, which stated:[4]

> We, Elizabeth Johnson and Alan Johnson residing in Irvine, State of California, MAKE OATH AND SAY:
>
> 1. We have personal knowledge of the matters sworn to in this affidavit.
>
> 2. Elizabeth Johnson was the original declarant for the condominium building that became Toronto Standard Condominium Corporation No. 2256. The original board members were Elizabeth, Alan Johnson, and Simon Johnson.
>
> 3. On May 22, 2017, we were contacted by Mark Arnold. Mr. Arnold inquired whether we recalled having held or attended a meeting with a real estate agent by the name of Kevin Loberg and our son Simon Johnson in the coach house in November 2012 at which time Mr. Paluszkiewicz presented a detailed set of architectural drawings to us setting out the details of the renovations that he planned to carry out to his unit.
>
> 4. We have discussed Mr. Arnold's request among ourselves. To the best of our knowledge, information and belief, the meeting described in the previous paragraph did not take place. We can confirm that we never had any meeting at which Mr. Paluszkiewicz and Mr. Loberg attended discussing proposed plans or renovations to Unit 300. In addition, it is our recall that Simon Johnson was not in Canada during that period of time. Mr. Paluszkiewicz never requested board approval for anything. There were no board meetings, no board minutes, no board notices issued, no emails and no paperwork. In fact, the Board never held any meetings during the period of November or December 2012. We have never before seen the 6 pages of drawings marked as Exhibit 12 that Mr. Arnold emailed to us. Had we seen those drawings we would not have agreed to the changes. In addition, Mr. Paluszkiewicz never asked for any modification to his proposal and drawings that became part of the original Section 98 Agreement. Mr. Paluszkiewicz never requested a board meeting.
>
> 8. [sic, 5] I do recall that Mr. Paluszkiewicz and his wife did ask to see the newly built coach house. It was my understanding that as an architect he wanted to look at the work of our architect, Peter Turner, who designed the coach house. I do not recall when this meeting took place. It was informal and there were no other people present. What I do recall is that Mr. Paluszkiewicz and his wife came into the coach house one evening, looked over the house and left.
>
> 9. [sic, 6] Mr. Arnold asked us if we would be prepared to swear a confirming affidavit and we are pleased to do so.

[49] The motion was also supported by an affidavit from Mr. Loberg, in which he deposed:

> I, Kevin Loberg, Real Estate Broker residing in Toronto, Ontario, MAKE OATH AND SAY:
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> 1. I have personal knowledge of the matters hereafter sworn to in this affidavit except where otherwise stated.
>
> 2. I am a Real Estate Broker working with Royal LePage Terrequity Realty in Toronto, Ontario.

[4] There is a question about whether the Johnsons' affidavit was sworn or unsworn, but for the purposes of this motion, I shall treat the Johnsons' affidavit as constituting testimony under oath.

> 3. In 2012, I listed and sold two condominium units located at 80 Crescent Road, Toronto, Ontario.
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> 4. On May 23, 2017, I received a telephone call from Mark Arnold who told me and I believed was acting as legal counsel to Toronto Standard Condominium Corporation No. 2256. Mr. Arnold further told me that this condominium corporation is responsible for managing and administering the common elements at the condominium building at 80 Crescent Road.
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> 5. Mr. Arnold told me and I believed that the condominium corporation and Gerwazy (Gerry) Paluszkiewicz, the owner of Unit 300, were involved in lengthy litigation with respect to renovations conducted by Gerry to the third floor (Penthouse) of this converted Rosedale residential building. I was the listing agent for that unit and Iwona Paluszkiewicz, of Right at Home Realty Inc. acted as the selling agent.
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> 6. Mr. Arnold asked me if I recalled having a meeting with Mr. Paluszkiewicz, Liz Johnson, Alan Johnson and their son Simon in the coach house in November 2012 at which time Mr. Paluszkiewicz presented a detailed set of architectural drawings setting out details of the renovations he planned to carry out to his unit.
>
> 7. I told Mr. Arnold during that telephone conversation with him that I had no recall of having attended the meeting described by Mr. Paluszkiewicz but that I would check my file and my records. Subsequently, after checking my files and records, I confirm that I have no recall of having attended such a meeting with Mr. Paluszkiewicz or any of the Johnsons.
>
> 8. Mr. Arnold asked if I would be prepared to swear a confirming affidavit and I am pleased to do so.

[50] The Arbitrator dismissed the motion. He agreed with the Paluszkiewiczs' argument that save for the matter of costs, the Arbitration Award was a final award and, therefore, he was *functus officio*. For present purposes, paragraphs 12-16 of the Arbitrator's ruling, which are set out below, are pertinent:

> 12. It then follows and it is beyond controversy, that when a Tribunal publishes an interim or final award that conclusively deals with the matters that had been put before it for determination, the Tribunal is *functus officio* with regard to those matters. There is no statutory jurisdiction to reopen the hearing.
>
> 13. A corollary of the concept of *functus officio*, is that a Tribunal cannot address fresh evidence after the publication of an award.
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> 14. The only recourse open to the Corporation is to seek court intervention as described in Section 46 of the Act, which it has in fact done.
>
> 15. Even if I am incorrect in this regard, such that I am not *functus officio* and I do retain jurisdiction to entertain fresh evidence be it under the Act or the Rules, I am satisfied that on the evidentiary record before me, no such evidence should be entertained or received. The *Palmer* test (including its limited exceptions) has not been met: first, there is no doubt in my mind that the evidence which the Corporation now wishes to have introduced could have been tendered in the course of the hearing; and second, the evidence would not have changed the result of the Award, given in part, the alternative findings set out in the Award.
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> 16. Finally, I do not agree with the Claimant's submission that if the evidence of the Johnsons and Loberg is preferred over that of the Respondents, it follows that the evidence of the Respondents was fraudulent. It is commonplace for witnesses to recollect events differently and it does not necessarily follow that a recollection not accepted by the trier of fact is the product of an intent to deceive.

C. Law

1. Setting Aside an Arbitral Award on the Grounds of Fraud

[51] Paragraph 9 of s. 46(1) of the *Arbitration Act, 1991* provides that an arbitral award may be set aside on the grounds of fraud; the paragraph states:

> 46(1) On a party's application, the court may set aside an award on any of the following grounds:
> …
>
> 9. The award was obtained by fraud.

[52] Courts have an inherent jurisdiction and will set aside a judgment when it is in the interests of justice to do so.[5] In *International Corona Resources Ltd. v. LAC Minerals Ltd.*,[6] Justice Osborne, as he then was, identified the following prerequisites to setting aside a judgment on the basis of fraud: (1) the fraud must be proved on a balance of probabilities, and the more serious the fraud, the more cogent should be the evidence; (2) the fraud must be material and go to the foundation of the case; (3) evidence of the fraud must not have been known to the party seeking to set aside the order at the time of the hearing; and (4) the party seeking to set aside the order must have acted with due diligence and constructive knowledge of the fraud cannot be imputed.[7]

[53] A judgment will not be set aside on the basis of perjury or other fraudulent conduct unless the misconduct relates to a material issue, which is to say that the misconduct might have affected the outcome.[8] The plaintiff or the moving party has the burden of satisfying the court that unless the matter is reopened, a miscarriage of justice will occur.[9] An action or a motion to set aside an order for fraud must be proved on a reasonable balance of probability.[10] A party seeking to set aside a judgment is required to show circumstances that warrant deviation from the fundamental principle that a final order, unless appealed, marks the end of the litigation.[11]

[54] In order for the court to set aside a judgment on the basis of subsequently discovered facts: (1) the plaintiff or moving party must show that the new evidence could not have been discovered by the exercise of reasonable diligence; and (2) taking into account (a) the cogency of the new evidence, (b) any delay in moving to set aside the order, and (c) any prejudice to parties or persons who acted in reliance on the judgment, it is just to make an exception to the rule that

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[5] *Stoughton Trailers Canada Corp. v. James Expedite Transport Inc.*, 2008 ONCA 817; *Cookish v. Paul Lee Associates Professional Corp.*, 2013 ONCA 278.
[6] (1988), 66 O.R. (2d) 610 at paras. 54-62 (H.C.J.).
[7] *Mould Clean Laboratories Ltd. v. Fort Albany First Nation*, 2013 ONSC 66.
[8] *Vale v. Sun Life Assurance Co. of Canada* (1998), 39 O.R. (3d) 444 (Gen. Div.); *100 Main Street East Ltd. v. Sakas* (1975), 8 O.R. (2d) 385 (C.A.); *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1988), 66 O.R. (2d) 610 (H.C.J.).
[9] *Neger v. Erez*, [2005] O.J. No. 4715 at para. 1 (S.C.J.); *1307347 Ontario Inc. v. 1243058 Ontario Inc. (c.o.b. Golden Seafood Restaurant)*, [2001] O.J. No. 257 at para. 9 (S.C.J.); *Stone v. Hipp*, [2008] O.J. No. 1002 at paras. 45-50 (S.C.J.).
[10] *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1988), 66 O.R. (2d) 610 (H.C.J.).
[11] *Clatney v. Quinn Thiele Mineault Grodzki LLP*, 2016 ONCA 377 at paras. 59-60.

judgments are final.[12]

[55] Similar principles to those used by courts in determining whether to set aside a judgment are applied by courts in deciding whether or not to set aside an arbitrator's award on the grounds of fraud.[13]

2. Appeal of an Arbitral Award

[56] Section 45(1) of the *Arbitration Act, 1991*, provides that a party may only appeal an award of an Arbitrator to the Superior Court on a question of law, with leave. Section 45 states:

> *Appeal on question of law*
>
> 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.
>
> *Idem*
>
> (2) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law.
>
> *Appeal on question of fact or mixed fact and law*
>
> (3) If the arbitration agreement so provides, a party may appeal an award to the court on a question of fact or on a question of mixed fact and law.
>
> *Powers of court*
>
> (4) The court may require the arbitral tribunal to explain any matter.
>
> *Idem*
>
> (5) The court may confirm, vary or set aside the award or may remit the award to the arbitral tribunal with the court's opinion on the question of law, in the case of an appeal on a question of law, and give directions about the conduct of the arbitration.
>
> …

[57] Under s. 45(1), an appeal may only be on a question of law, not a question of mixed fact and law, and if the proposed appeal involves a question of law, then subsections (a) and (b) must also be satisfied before the court can grant leave.[14]

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[12] *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (C.A.), leave to appeal refused [1998] S.C.C.A. No. 518; *1117387 Ontario Inc. v. National Trust Co.*, 2010 ONCA 340; *Mehedi v. 2057161 Ontario Inc. (c.o.b. Job Success)*, 2015 ONCA 670; *Kantor v. Fry*, 2015 ONSC 6857.

[13] *Chantiers de L'Atlantique v. Gaztransport*, [2011] EWHC 3383 (Comm. Ct.); *Homes Inc. v. Triple-A Classic Homes Ltd.*, 2017 ABQB 510.

[14] *School of Dance (Ottawa) Pre-Professional Programme Inc. v. Crichton Cultural Community Centre*, [2007] O.J. No. 3111 at para. 7 (S.C.J.); *Lombard Canada Co. v. Axa Assurance Inc.*, [2007] O.J. No. 601 at paras. 10-11

[58] Issues of law are questions about what the correct legal test is.[15]

[59] Issues of fact are questions about what actually took place between the parties.[16]

[60] Issues of mixed fact and law are questions about whether the facts satisfy the legal tests; *i.e.*, they involve applying a legal standard to a set of facts.[17] If the application of a legal test to a set of facts raises an extricable question of how the legal test has been applied, then an issue of law arises.[18]

[61] Certain legal errors constitute extricable errors of law including: applying an incorrect legal principle or misapplying a principle of contract interpretation; the failure to consider a required element of a legal test; the failure to consider a relevant factor; the failure to consider the substantive elements of contract formulation.[19] However, courts should be cautious in identifying extricable questions of law.[20] In *Teal Cedar Products Limited v. British Columbia*,[21] Justice Gascon stated:

> 45. Courts should, however, exercise caution in identifying extricable questions of law because mixed questions, by definition, involve aspects of law. The motivations for counsel to strategically frame a mixed question as a legal question - for example, to gain jurisdiction in appeals from arbitration awards or a favourable standard of review in appeals from civil litigation judgments - are transparent *(Sattva*, at para. 54; *Southam*, at para. 36). A narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings. Courts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law; *Sattva*, at para. 53), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question).

[62] A question of statutory interpretation is normally characterized as a legal question.[22]

[63] The failure to apply the governing principle that emerges from the cases is an error of

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(S.C.J.); *York Condominium Co. No. 359 v. Solmica Chemical International Inc.*, [2005] O.J. No. 6268 (S.C.J.); *Gore Mutual Insurance Co. v. TTC Insurance Co.*, [2004] O.J. No. 1359 (S.C.J.).

[15] *Teal Cedar Products Limited v. British Columbia*, 2017 SCC 32 at para. 43; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 49; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35.

[16] *Teal Cedar Products Limited v. British Columbia*, 2017 SCC 32 at para. 43; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 58; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35.

[17] *Teal Cedar Products Limited v. British Columbia*, 2017 SCC 32 at para. 43; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 49; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35; *Housen v. Nikolaisen*, 2002 SCC 33.

[18] *Teal Cedar Products Limited v. British Columbia*, 2017 SCC 32 at para. 44-46; *Highbury Estates Inc. v. Bre-Ex Ltd.*, 2015 ONSC 4966 at para. 58; *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 at para. 54.

[19] *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.*, 2017 ONCA 293 at para. 55; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.

[20] *Teal Cedar Products Limited v. British Columbia*, 2017 SCC 32 at paras. 44-46; *Highbury Estates Inc. v. Bre-Ex Ltd.*, 2015 ONSC 4966 at para. 58; *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 at para. 54.

[21] 2017 SCC 32 at para. 45.

[22] *Teal Cedar Products Limited v. British Columbia*, 2017 SCC 32 at para. 47.

law.[23] The constitutional validity of legislation is another question of law.

[64] The finding of a fact on no evidence is an error of law. Failure to appreciate the issues or the evidence may, in a particular case, amount to an error of law,[24] and the admissibility of evidence is a question of law. It is an error of law to ignore uncontested sworn evidence on the central matter in issue without giving any reasons for so doing.[25]

[65] The failure to directly address the sole argument made by a party is an error of law.[26]

[66] Reasons that are so inadequate as to foreclose meaningful appellate review constitute an error in law.[27]

[67] Other than for certain standard form contracts, the exercise of applying the principles of contractual interpretation is typically a question of mixed fact and law because contracts are to be interpreted in a factual matrix.[28] The factual matrix consists of the background facts at the time of the making of the contract that both parties knew or reasonably ought to have known at or before the contracting.[29]

[68] The standard of appellate review for standard form contracts is the correctness standard for issues of law only where the interpretation at issue is of precedential value and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process.[30] In these circumstances, the factual matrix does not meaningfully assist in interpreting standard form contracts and their construction has broad application beyond the litigants before the court. Adopting the correctness standard of review for these contracts best ensures that provincial appellate courts are able to fulfil their responsibility of ensuring consistency in the law.[31]

[69] In rare cases, the correctness standard will be applied to matters of contract interpretation where it is possible to identify an extricable question of law.[32]

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[23] *R. v. Morin*, [1992] 3 S.C.R. 286 at 294; *R. v. Luedecke*, 2008 ONCA 716 at para. 48; *R. v. Kukemueller*, 2014 ONCA 295 at para. 14.
[24] *R. v. Harper*, [1982] S.C.J. No. 108 (S.C.C.); *Canada (Director of Investigation and Research, Competition Act) v. Southam, Inc.*, [1997] 1 S.C.R. 748; *R. v. H. (J.M.)*, [2011] 3 S.C.R. 197 at paras. 13-39 (S.C.C.).
[25] *O'Dowda v. Halpenny*, 2015 ONCA 22.
[26] *West Van Inc. v. Daisley*, 2014 ONCA 232 at para. 15, leave to appeal ref'd, [2014] S.C.C.A. No. 236.
[27] *Law Society of Upper Canada v. Neinstein* (2010), 99 O.R. (3d) 1 (C.A.); *R. v. Sheppard*, 2002 SCC 26; *Maple Ridge Community Management Ltd. v. Peel Condominium Corp. No. 231*, 2015 ONCA 520.
[28] *Teal Cedar Products Limited v. British Columbia*, 2017 SCC 32 at para. 47.
[29] *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.*, 2017 ONCA 293.
[30] *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37; *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.*, 2017 ONCA 293; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53; *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842, leave to appeal refused [2016] S.C.C.A. No. 39.
[31] *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842, leave to appeal ref'd [2016] S.C.C.A. No. 39.
[32] *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 53; *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.*, 2017 ONCA 293 at paras. 16-23.

3. Standard of Appellate Review

[70] The applicable standard of review is a question of law to be decided by the reviewing court.[33]

[71] For appeals of court decisions, the nature of the question (whether legal, factual, or mixed is dispositive of the standard of review, but this is not the case with respect to appeals from arbitrators and administrative tribunals.[34] For the decisions of arbitrators and administrative tribunals, the standard of review is the reasonableness standard for: (a) questions of fact; (b) questions of mixed fact and law; and (c) questions of law, unless the question of law is a general question of law that transcends the specific regime or that is both of central importance to the legal system as a whole and also outside the adjudicator's specialized area of expertise.[35]

[72] In *Sattva Capital Corp. v. Creston Moly Corp.*,[36] the Supreme Court of Canada held that save in rare situations, a deferential standard of review - reasonableness - applies to arbitration awards. Justice Gascon expanded on this point in *Teal Cedar Products Limited v. British Columbia*,[37] at para. 74, where he stated:

> 74. In an arbitral context like this one, where the decision under review is an award under the *Arbitration Act*, *Sattva* establishes that the standard of review is "almost always" reasonableness (para. 75). This preference for a reasonableness standard dovetails with the key policy objectives of commercial arbitration, namely efficiency and finality. In *Sattva*, Rothstein J. emphasizes that in "commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard" (para. 106). He suggests that this may arise only in rare circumstances, such as where a constitutional question or a question of law of central importance to the legal system as a whole and outside the adjudicator's expertise is at issue (paras. 75 and 106).

[73] There is a presumption that the reasonableness standard applies where the decision-maker is interpreting its home statute or statutes closely connected to its function.[38]

[74] Where the reasonableness standard applies, a decision of law, of mixed fixed fact and law, or of law will be reasonable if it falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law.[39]

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[33] *Unifund Assurance Co. v. Dominion of Canada General Insurance Co*., 2018 ONCA 303 at para. 26; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, at para. 6; *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609 at para. 22.
[34] *Teal Cedar Products Limited v. British Columbia*, 2017 SCC 32 at para. 76.
[35] *Unifund Assurance Co. v. Dominion of Canada General Insurance Co.*, 2018 ONCA 303; *Belairdirect Insurance v. Dominion of Canada General Insurance Co. (Travelers)*, 2018 ONCA 101; *Victoria University v. GE Canada Real Estate Equity*, 2016 ONCA 646, leave to appeal to the SCC ref'd, [2016] S.C.C.A. No. 462; *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609.
[36] 2014 SCC 53 at paras. 75, 104 and 106. See also *Teal Cedar Products Limited v. British Columbia*, 2017 SCC 32.
[37] 2017 SCC 32 at para. 74.
[38] *Unifund Assurance Co. v. Dominion of Canada General Insurance Co.*, 2018 ONCA 303; *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609.
[39] *Unifund Assurance Co. v. Dominion of Canada General Insurance Co*., 2018 ONCA 303; *Belairdirect Insurance v. Dominion of Canada General Insurance Co. (Travelers)*, 2018 ONCA 101 at para. 56; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47.

D. Discussion

1. Should the Arbitral Award be Set Aside on the Grounds of Fraud?

[75] I need not decide whether the Arbitrator was right or wrong in his opinion that he was *functus officio,* and I shall confine myself to deciding whether, pursuant to paragraph 9 of s. 46(1) of the *Arbitration Act, 1991*, the court should set aside the Arbitration Award on the grounds that the Award was obtained by fraud.

[76] In this regard, in my opinion, for at least three reasons, the Condominium Corporation has failed to satisfy the test for setting aside an award because of fraud.

[77] First, the Condominium Corporation has not met the onus of showing that a fraud was committed.

[78] On the issue of whether false testimony was given, Mr. Loberg's evidence is neutral at best and amounts to no more than evidence that he personally does not recall there being a meeting at the coach house at which he was in attendance.

[79] The Johnsons' evidence is more substantial. They confirm a meeting at the coach house, but they do not recall a meeting to discuss building plans and they go further and state that there were no Board of Directors meetings between November and December 2012. There is, however, the strong prospect that the Johnsons are mistaken in their evidence. Their evidence is weak and ultimately is based just on their recollection of events that were five-and-a-half years' old when they were contacted by the Condominium Corporation's counsel.

[80] Further, it does not follow from the Johnsons' denial of a meeting to discuss the construction drawings that Mr. Paluszkiewicz must have lied about the meeting nor does it follow that the Johnsons are lying. The better explanation is that the Johnsons are mistaken. Their management of the Condominium Corporation was informal and erratic at best. They were under personal financial stress at the time of the alleged meeting or meetings. There is an email message from Mrs. Johnson dated May 21, 2013, in which she notes to a third party that the Paluszkiewiczs' plans were quite spectacular, which suggests that she may have imperfect memory. Moreover, the Johnsons' evidence that there was no activity by the Board of Directors does not square with the fact that the Board was registering Section 98 Agreements and preparing to hand over the Condominium Corporation to a new Board of Directors.

[81] In comparison, Mr. Paluszkiewicz's account of a meeting to discuss the detailed drawings was no recent fabrication. In January 2014 – before the parties had even submitted their dispute about the Section 98 Agreement to mediation or arbitration – Mr. Paluszkiewicz asked that the minutes of the Board of Directors meeting be corrected, and thus he was on record that he had met with the Johnsons for approval of his construction plans.

[82] Second, the Condominium Corporation did not act with due diligence in discovering and disclosing the alleged fraud. The evidence of the Johnsons and of Mr. Loberg was easily discoverable and obviously relevant from the outset of the protracted arbitration hearings. The issue of communications between Mr. Paluszkiewicz and the original Board of Directors was raised at the outset of the arbitration hearings and the Condominium Corporation was allowed to re-open its case. The Condominium Corporation raised and then abandoned the idea of calling

the Johnsons to testify. Thus, the Condominium Corporation cannot show that the so-called new evidence could not have been discovered by the exercise of reasonable diligence.

[83] Third, the Johnsons' evidence, even if found reliable and believable, would not affect the outcome of the Arbitration. The alleged fraud is not material and does not go to the foundation of the case. In this last regard, the best foundation case for the Condominium Corporation was that the actual construction drawings are not to be read into the Section 98 Agreement and, as constructed, Unit 3 was not compliant with the drawings actually attached to the Section 98 Agreement.

[84] The Arbitrator, however, did consider the Condominium Corporation's best case, and he found that the Condominium Corporation's best case failed. In other words, ultimately it does not matter whether there was a meeting where the Johnsons or a majority of them approved the construction plans.

[85] Moreover, and this point seems to have been missed by the parties arguing the Application now before the court, the Arbitrator had two and not just one independent reason for finding in favour of the Paluszkiewiczs.

[86] In addition to his decision that the Condominium Corporation had failed to show that the building as constructed was not compliant with the design drawings in the original Section 98 Agreement, the Arbitrator concluded that the Section 98 Agreement included the working and permit drawings that should have been in the Condominium Corporation's records which drawings were approved "during the Johnson reign … **and** during the period October 10 to November 5, 2013." In other words, in addition to finding that the Johnsons had approved the drawings, the Arbitrator found that the successor Board of Directors had approved the plans. Thus, it ultimately does not matter whether the drawings were approved by the Johnsons at a meeting in a coach house in the fall of 2012.

[87] For these reasons, I reject the Condominium Corporation's request that the Arbitrator's Award be set aside on the grounds of fraud.

2. Should Leave to Appeal be Granted?

[88] I turn to the Condominium Corporation's request for leave to appeal the Arbitrations Award.

[89] The Condominium Corporation identified three categories of alleged legal error by the Arbitrator; namely: (1) interpreting the Section 98 Agreement by reading into it the as-built construction drawings for Unit 3; (2) determining that the registered survey was in error; and (3) ordering that the liens registered by the Condominium Corporation that were in relation to legal fees that the corporation levied by way of special assessment or otherwise be discharged.

[90] I can quickly conclude that assuming but without deciding that the second and third categories of alleged legal error constitute genuine questions of law, they do not satisfy the other prerequisites for leave. The importance of these matters to the parties does not justify an appeal and the determination of the question the question of law at issue will not significantly affect the rights of the parties.

[91] For the record, I note that the Paluszkiewiczs do not dispute that the Arbitrator erred in discharging the liens, which is a matter that will have to be resolved in accordance with the provisions of the *Condominium Act, 1998*.

[92] Whether to grant leave for the first category of alleged legal error in interpreting the Section 98 Agreement by reading into it the as built drawings for Unit 3 is a more complex question, but I come to the same conclusion; that leave should not be granted.

[93] Without being categorical about whether the interpretation of a Section 98 Agreement is an issue of law, I find that in the case at bar its interpretation was a matter of fact or a matter of mixed fact and law and accordingly the Condominium Corporation does not have an appeal of a question of law under s. 45 of the *Arbitration Act, 1991*.

[94] If I am wrong and the matter of the interpretation of the Section 98 Agreement in general or in particular is a question of law open for an appeal, in the circumstances of the immediate case, while the importance of the issue to the parties might justify an appeal, the determination of the question of law will not significantly affect the rights of the parties. As already noted above, the Arbitrator went on to decide the case on the basis that the Section 98 Agreement did not incorporate the as built drawings. What followed was a fact-based analysis that raises no palpable or overriding error of fact. If the Condominium Corporation was totally successful on an appeal of the interpretative issues, there was a sound basis for the Arbitration Award. Thus, I am not satisfied that the appeal of the interpretative issues, assuming that they are questions of law, will significantly affect the rights of the parties.

[95] Therefore, I shall not grant leave to appeal, and it follows that the Condominium Corporation's Application should be dismissed.

3. Should the Appeal be Granted?

[96] Since I have not granted leave to appeal, it is not necessary, for me to decide what is the standard of appellate review or what is the outcome of the Condominium Corporation's appeal. However, given the possibility of further appeals and because the points were fully argued, for completeness, I add that had I granted leave to appeal, I would have applied the reasonableness standard and dismissed the appeal.

[97] In arguing that a correctness standard applied, the Condominium Corporation relied on Justice G.P. Smith's decision in *90 George Street v. Ottawa Carleton Standard Condominium Corporation No. 815*,[40] for the general proposition that the standard of appellate review of arbitral decisions under the *Condominium Act, 1998* is correctness. The *90 George Street* case, however, is distinguishable because it did not deal with a matter of contract interpretation but rather with the first year budget provisions of the *Condominium Act, 1998*. Moreover, the case was decided before the recent decisions of the Ontario Court of Appeal and the Supreme Court of Canada that emphasize that arbitral decisions even of issues of law are reviewable on the

[40] 2015 ONSC 336.

standard of reasonableness, save in rare cases where significant general issues of law are the subject matter of the appeal. The case at bar does not fall within that category.

[98] In *Louiseize v. Peel Condominium Corp. No. 103*,[41] which was an appeal of an arbitral decision under the *Condominium Act, 1998*, Regional Senior Judge Gordon applied the presumption that questions of law should be subject to a reasonableness standard of review.

[99] The Arbitration Award in the case at bar raises no general issue of law and raises a very fact-specific problem of little importance beyond the parties. The Arbitrator's decision, which in my opinion was correct, was in any event reasonable.

E. Conclusion

[100] For the above reasons, I dismiss the Condominium Corporation's Application. If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Paluszkiewiczs' submissions within 20 days of the release of these Reasons for Decision followed by the Condominium Corporation's submissions within a further 20 days.

Perell, J.

Released: April 12, 2018

[41] 2017 ONSC 4031.

CITATION: Toronto Standard Condominium Corporation No. 2256 v. Paluszkiewicz, 2018 ONSC 2329
COURT FILE NO.: CV-17-576434
DATE: 20180412

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

TORONTO STANDARD CONDOMINIUM CORPORATION NO. 2256

Applicant

– and –

GERWAZY PALUSZKIEWICZ and IWONA PALUSZKIEWICZ

Respondents

REASONS FOR DECISION

PERELL J.

Released: April 12, 2018