CITATION: Mattamy (Downsview) Limited v. KSV Restructuring Inc. (Urbancorp), 2023 ONSC 3013
COURT FILE NO.: CV-16-11389-00CL and CV-22-00688349-00CL
DATE: 20230519

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PATRICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. (Collectively the "Applicants") AND THE AFFILIATED ENTITIES

BETWEEN:	
MATTAMY (DOWNSVIEW) LIMITED Applicant	*Matthew Gottlieb* and *Niklas Holmberg*, for the Applicant
– and –	
KSV RESTRUCTURING INC., IN ITS CAPACITY AS THE COURT APPOINTED MONITOR OF URBANCORP DOWNSVIEW PARK DEVELOPMENT INC. PURSUANT TO THE COMPANIES' CREDITORS ARRANGMENT ACT R.S.C. 1985, C. C-6. AS AMENDED, GUY GISSIN, IN HIS CAPACITY AS THE COURT APPOINTED FUNCTIONARY AND FOREIGN REPRESENTATIVE OF URBANCORP INC. BY ORDER OF THE DISTRICT COURT IN TEL AVIV-YAFO, ISRAEL Respondents	*Robin B. Schwill*, for the Respondent KSV Restructuring Inc., in its capacity as Monitor *Neil Rabinovitch*, for the Respondent Guy Gissin, in his capacity as the Court-appointed Israeli Functionary Officer and Foreign Representative of Urbancorp Inc. (the "Foreign Representative")
	HEARD: March 10, 2023

REASONS FOR DECISION
(Application to set aside Arbitral Award)

KIMMEL J.

The Application and Summary of Outcome

[1] Mattamy (Downsview) Limited ("Mattamy") seeks to set aside the arbitration award of the Honourable Frank J.C. Newbould, K.C. dated July 6, 2022 (the "Award") pursuant to s. 46 of the *Arbitration Act*, 1991 S.O. 1991, c. 17 (the "Act"). Mattamy does so on the basis that Mr. Newbould (the "Arbitrator") exceeded his jurisdiction by raising and deciding a New Issue (defined below) and on grounds of unfairness arising from his refusal to permit Mattamy to present certain evidence that it considered relevant to the New Issue, once raised.

[2] The relevant facts for this s. 46 application (having to do with the manner in which the New Issue arose and the submissions and evidence about it were received) and the applicable law regarding the test for a court to set aside a domestic arbitration award are, for the most part, not contentious. The parties disagree about the scope of the questions put to the Arbitrator (that set the parameters of his jurisdiction) and about whether the Arbitrator's exclusion of certain evidence amounts to a procedural unfairness that offends the principles of natural justice.

[3] For the reasons that follow, I find that the Arbitrator had the jurisdiction to raise the New Issue, which came within the broad scope of the questions submitted to arbitration. However, I find that the Arbitrator's refusal to admit certain evidence that Mattamy sought to tender in respect of the New Issue (with the consent of the respondents) was procedurally unfair to Mattamy and led to a failure of natural justice in the arbitration process. In these circumstances, the Award must be set aside and a new arbitration before a new arbitrator is ordered.

[4] The court does not lightly interfere with arbitration awards. Accordingly, I have undertaken a thorough review the history of the proceedings, the context in which the New Issue arose and was considered and the evidence that was permitted, and that which was excluded, in the process.

The CCAA Proceedings

[5] Downsview Homes Inc. ("DHI") owns land located at 2995 Keele St. in Toronto, on the former Downsview airport lands. On those lands, DHI developed a residential construction project comprised of condominiums, townhomes, semi-detached homes, and rental units (the "Downsview Project"). Urbancorp Downsview Park Development Inc. ("UDPDI") held a 51% ownership interest in DHI. The remaining 49% was held by Mattamy. The rights and obligations of UDPDI and Mattamy as co-owners of DHI were set out in the Amended and Restated Co-Ownership Agreement (the "Co-Ownership Agreement") signed in June and amended in July 2013. Additional terms were incorporated into from a separate Payment and Profit Distribution Adjustment Agreement dated July 29, 2013.

[6] UDPDI eventually sold its interest in DHI to Mattamy in the context of a CCAA proceeding that has been ongoing for seven years. On May 18, 2016, KSV Restructuring Inc. was appointed

monitor (the "Monitor") over UDPDI and its affiliated entities pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") in a proceeding on the Commercial List (the "CCAA Proceeding"). Mattamy became a lender in the CCAA Proceeding under a debtor-in-possession facility (the "DIP Facility"), secured by a charge over UDPDI's property that included its interest in DHI.

[7] The court subsequently approved a sale process proposed by the Monitor for the sale of UDPDI's interest in DHI in order to satisfy the outstanding DIP Facility by order dated June 30, 2021 (the "Sale Process Order").

The Arbitration

The Sale Process Order and Direction to Arbitrate the Consulting Fee Dispute

[8] In the Sale Process Order, the court also directed the Monitor to arbitrate various disputes (or assign them to the Court-appointed Israeli Functionary Officer and Foreign Representative of Urbancorp Inc. (the "Foreign Representative" or "Functionary") to arbitrate). The issues to be submitted to arbitration included, among other things, the determination of any Urbancorp Consulting Fees (as defined in the Co-Ownership Agreement) payable to Urbancorp Toronto Management Inc. ("UTMI") under the "Co-Ownership Agreement" (the "Consulting Fee Dispute"). The parties had agreed to submit any dispute arising under the Co-Ownership Agreement to arbitration pursuant to s. 12 thereof.

[9] The sale process did not result in any interest from potential purchasers, and eventually the court approved the sale of UDPDI's interest in DHI to Mattamy in consideration for, *inter alia*, the extinguishment of the DIP Facility. The agreement of purchase and sale (approved by this court's approval and vesting order dated December 29, 2021) provided in s. 2.7 that this purchase and sale was:

> Without prejudice to the Purchaser's [Mattamy's] position that neither the Seller [UDPDI]] nor UTMI are entitled to the payment of any amounts in respect of the Urbancorp Consulting Fee, the Purchaser acknowledges that no consideration is being paid to UTMI in respect of the Urbancorp Consulting Fee and as such UTMI retains whatever rights it may have, if any, to recover such amounts.

[10] This purchase and sale transaction (the "Transaction") closed in early January 2022 (the "Transfer Date").

The Terms of Appointment of the Arbitrator

[11] The Arbitrator was appointed pursuant to Terms of Appointment of the Arbitrator signed on May 18 and 19, 2022. The parties agreed that the arbitration "shall be final and binding and shall be the sole and exclusive remedy between the Parties regarding any claims presented to the Arbitrator." The Arbitrator was granted all of the powers of a Superior Court Judge under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 unless otherwise agreed by the parties.

[12] The Terms of Appointment also provided in s. 2.4 that:

> The arbitration shall be conducted in accordance with the agreement of the parties, and any mandatory requirements prescribed by law. The parties shall advise the Arbitrator as to the matters on which they have agreed respecting the conduct of the Arbitration. The Arbitrator shall provide directions, initially and from time to time, as to procedural matters on which the parties are not in agreement.

The Pleadings and Submissions in the Arbitration: Framing the Issues

[13] In the Notice of Request to Arbitrate dated March 23, 2022, the Monitor and the Foreign Representative sought a determination that UTMI was entitled to the Urbancorp Consulting Fee as at the Transfer Date. The amount claimed was $5.9 million. This was based on a calculation of Gross Receipts (as defined in the Co-Ownership Agreement) for the Downsview Project and the corresponding 1.5 percent Consulting Fee entitlement, with an acknowledgement that the threshold payment of $13,200,822 (on account of Mattamy's 4.5 percent Development Fee entitlement) had to first have been earned by, and paid to, Mattamy in accordance with the terms of the Co-Ownership Agreement.

[14] In their factum for the Arbitration, the Monitor and the Foreign Representative explained that the two key principles underlying the Consulting Fees Dispute were:

a. If and when UTMI became entitled to the Consulting Fees; and

b. The mechanics and timing of when they have to be paid.

[15] The evidence and written submissions for the Arbitration were pre-filed. The parties made oral submissions on June 3, 2022.

[16] Various points of dispute were raised during the Arbitration regarding the determination of UTMI's entitlement to the Urbancorp Consulting Fees as at the Transfer Date when UDPDI ceased to be a party to the Co-Ownership Agreement. One area of disagreement involved the interpretation of the definition of Gross Receipts in the Co-Ownership Agreement and whether Gross Receipts include the purchase price payable from the sale of residential condominium units that had been sold but had not closed as of Transfer Date.

[17] The definition of Gross Receipts in the Co-ownership Agreement is as follows:

> "Gross Receipts" means all cash revenues for any Accounting Period as determined in accordance with ASPE, including without limitation, proceeds from sale of all or any part of the Project Property (other than any sale under the Purchase Agreement), recoveries from front-ending of development charges items, revenues of a capital nature and proceeds from any financing derived by or on behalf of the Co-Owners from the ownership and operation of the Project Property *and including*: (1) *all revenues received from the sale of residential dwelling units*, parking units

> or storage units forming part of the Project; and … *provided however, that the following items of Gross Receipts shall be included on a cash basis*: … and (4) *the sale of all or any part of the Project Property (other than any sale under the Purchase Agreement), other than residential dwelling units, if applicable*. [Emphasis added.]

[18] The Monitor and Foreign Representative (on behalf of UDPDI and UTMI, the "Urbancorp parties") asserted in their factum that the definition of Gross Receipts specifically included revenues from the sale of residential dwellings on a non-cash basis and that this implied that revenues from sales were to be included in the Gross Receipts when the units were sold, not when the sale proceeds were actually collected. However nuanced this may be, the Urbancorp parties did not specifically assert in any of their pre-filed material for the Arbitration that the sale proceeds for the sale of residential condominium units in Phase 2 (Block A and P units) had been received, within the meaning of the definition of "Gross Receipts," prior to the Transfer Date.

The New Issue

[19] During the arbitration hearing, the Arbitrator asked questions about the following points that had not been covered in the parties' pre-filed evidence or submissions:

a. What do the ASPE [accounting standards for private enterprises] require for the sale of residential condominium units;

b. How the auditors on the project accounted for the sale of residential condominium units; and

c. The closing status for [Phase 2] Block A and P units, including dates of actual and anticipated closings.

[20] Mattamy says these questions were all directed to the "New Issue" of when the purchase price for residential condominium units in Phase 2, that had been sold but had not closed, ought to be considered or treated as having been received for the purposes of determining the Gross Receipts as at the Transfer Date.

[21] The unchallenged evidence of Mattamy on this application is that, "[b]efore the Arbitrator raised [the New Issue] at the hearing, there was no dispute between the parties as to when Gross Receipts were to be considered received. None of the parties took the position that Gross Receipts for Phase 2 (Block A and P units) had been received prior to the Transfer Date." The Urbancorp parties do not dispute that this was a New Issue raised by the Arbitrator.

[22] Mattamy's evidence that, if the New Issue had been raised before the hearing, Mattamy "would have made different arguments, lead different evidence, conducted cross-examinations differently and considered obtaining expert evidence from an accountant specializing in the application of ASPE accounting principles to the sale of residential condominium units" has also not been challenged.

The Arbitrator's Decision Regarding the Supplementary Evidence

[23] Since the parties had not filed any evidence or made any submissions about the New Issue raised by the Arbitrator, the hearing was adjourned and the parties were directed to deliver supplementary material. The further evidence that Mattamy sought to adduce in respect of the New Issue included a June 15, 2022 affidavit that attached portions of the ASPE as well as a handbook published by the Real Property Association of Canada ("REALPAC") entitled "Recommended Accounting Practices for Real Estate Investment and Development Entities Reporting in Accordance with ASPE" (the "Handbook"). The Handbook gives specific guidance on how ASPE is applied to sales of condominium units:

> 402.9.5. In Canada, the accounting for the sale of condominium units demonstrates the practical application of the requirements for significant acts of performance to be completed before revenue is recorded. Typically, a unit purchaser arranges to make the purchase and occupy the unit long before it is legally possible to obtain title because the declaration of the condominium corporation has not been registered. The date the declaration is registered is referred to as the date of final closing. However, unless there is reason to believe that the declaration would not ultimately be obtained, the sale is recorded once the purchaser has paid all amounts due on the interim closing, has undertaken to assume a mortgage for the balance of the purchase price, has the right to occupy the premises and has received an undertaking from the developer to be assigned title in due course.

[24] The Urbancorp parties objected to some aspects of Mattamy's proposed June 15, 2022 affidavit (although not the Handbook) and a case conference was scheduled for June 27, 2022. Mattamy advised that if there continued to be objections to its proposed supplementary evidence that it would bring a motion for leave to file the evidence based on a proper record. Further revisions were made to Mattamy's proposed supplementary evidence submitted in a June 23, 2022 affidavit (the "June 23 Affidavit") and negotiations between the parties continued in respect of same.

[25] The Arbitrator indicated on June 24, 2022 that he would rule on the evidence at the case conference. Mattamy asked that it be permitted to bring a formal motion for leave to file the June 23 Affidavit and to make submissions about it. The Arbitrator determined that he would make a decision about the proposed supplementary evidence at the case conference and invited the parties to make submissions at that time, which they both did in writing and orally.

[26] The Arbitrator orally ruled on which portions of the June 23 Affidavit would be allowed into evidence. He admitted the financial statements of DHI that state that they adopted a revenue recognition policy for pre-sold condominium units in accordance with ASPE. Revenue for the residential condominium sales was recognized in the financial statements as at the date of interim occupancy under the *Condominium Act*, 1998, S.O. 1998, c. 19, which had not been achieved as of the Transfer Date for units sold in Phase 2 Blocks A and P.

[27] However, among other deletions, the Arbitrator struck any and all references to the Handbook from the June 23 Affidavit. The ASPE revenue recognition policy adopted in DHI's financial statements was consistent with the guidance provided in the Handbook. The Handbook elaborates upon the rationale for this policy.

[28] The Arbitrator did not provide written reasons for his rulings. He was aware that the Urbancorp parties did not object to the inclusion of the Handbook references in evidence, but stated that, despite their consent, he had a "mind of his own".

The Arbitrator's Determination of the Consulting Fees Issue

[29] In accordance with the Arbitrator's ruling, Mattamy delivered a revised version of the June 23 Affidavit without the parts and exhibits that the Arbitrator struck. References to the Handbook and its excerpts were removed. Mattamy relied upon the DHI financial statements and their application of ASPE to support its contention that Gross Receipts should not include revenue from sales until that revenue had been recognized from an accounting point of view, at the interim closing date. That would have excluded the Phase 2 condominium sales, none of which reached the interim closing stage until after the Transfer Date.

[30] The Urbancorp parties provided supplementary submissions in response. They argued that revenue recognition principles for accounting purposes were not relevant to the calculation of Gross Receipts, which is not an accounting concept and was not stated to be tied to how a particular revenue item was recorded in the financial statements. To include non-cash revenues of a sale implies inclusion of the revenues when the units are sold and not when the sale proceeds are collected. They argued that, as a matter of contract interpretation, the definition of Gross Receipts provides "that revenues from sales are to be included even though certain amounts remain to be collected."

[31] The Arbitrator released the Award on July 6, 2023. The Award granted the Monitor the full amount claimed as owing to UTMI ($5.9 million) in respect of unpaid Urbancorp Consulting Fees, plus costs.

[32] The Arbitrator found that s. 6.15 of the Co-Ownership Agreement, read together with s. 6.6 and other provisions of that agreement, entitled Urbancorp to receive the Urbancorp Consulting Fee as long as it carried out its prescribed and assigned duties. The Arbitrator determined that the fact that Mattamy never requested Urbancorp to carry out any duties was irrelevant.

[33] The Arbitrator concluded that that the entitlement to the Urbancorp Consulting Fees was absolute until UDPDI ceased to be a co-owner under the Co-Ownership Agreement on the Transfer Date, to be calculated under s. 6.6 of the Co-Ownership Agreement based on 1.5 percent of Gross Receipts. The Arbitrator further ruled that Mattamy's obligation to pay the Consulting Fee was deferred until Mattamy received the agreed threshold amount of $13,200,822. There is no dispute that Mattamy has been or will eventually be paid this amount. This deferral did not impact UTMI's entitlement to the calculated fees accrued prior to the Transfer Date.

[34] Later in the Award, at paragraph 18, the Arbitrator stated that:

> I interpret the definition of Gross Receipts to not require that cash has actually been received before being included in Gross Receipts. I agree with Urbancorp that for the purposes of the Co-Ownership Agreement, revenues to determine Urbancorp's entitlement to its 1.5% consulting fee are to be treated as received when the units are sold, not when the sale proceeds are actually collected.

[35] Mattamy maintains that the decision to treat proceeds from the sale of Phase 2 condominium units as having been "received" prior to the Transfer Date was a function of the New Issue that the Arbitrator identified at the June 3, 2022 hearing. Mattamy complains that this issue was outside of the scope of the Arbitrator's jurisdiction and/or that it was unfair and a breach of the principles of natural justice for the New Issue to be decided without the evidence about the Handbook that the Arbitrator refused to allow Mattamy to file.

This Application – Issues and Analysis

[36] Mattamy commenced an application on the regular civil list in Toronto (under court file No. CV-22-00685084-0000) asking the court to set aside the Award and order a new arbitration under s. 46 of the Act. Upon a motion by the respondents, on September 1, 2022, Morawetz C.J. transferred Mattamy's application to the Commercial List to be heard in the CCAA proceedings (under court file No. CV-16-11389-00CL).

[37] Mattamy asks the court to determine whether:

a. the Award should be set aside pursuant to s. 46(1)3 of the Act for exceeding the scope of the Arbitration and the Arbitrator's jurisdiction?

b. the Award should be set aside pursuant to s. 46(1)6 of the Act for breach of the requirements of procedural fairness?

[38] This is not an appeal from the Arbitrator's Award. This application is concerned with the Arbitrator's approach to the determination of UMTI's entitlement to the Urbancorp Consulting Fees from a jurisdictional and fairness perspective.

a) Did the Arbitrator Exceed his Jurisdiction?

[39] Pursuant to s. 46(1)3 of the Act, the court may set aside an arbitral award if the "award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement".

[40] An arbitrator does not have inherent jurisdiction. Rather, an arbitrator's jurisdiction is derived exclusively from the authority conferred by the parties in their arbitration agreement and the terms of appointment of the arbitrator. See *Cricket Canada v. Bilal Syed*, 2017 ONSC 3301, at para. 35 and *Advanced Explorations Inc. v. Storm Capital Corp.*, 2014 ONSC 3918, 30 B.L.R. (5th) 79, at para. 57. This lack of inherent jurisdiction is not changed by the parties' agreement (in the Terms of Appointment) to give the Arbitrator all of the powers of a judge of the Ontario Superior Court of Justice.

[41] In any event, judges, even with inherent jurisdiction, do not have the jurisdiction to decide matters that fall outside of the scope of what the parties have claimed. See *Labatt Brewing Company Ltd v. NHL Enterprises Canada, L.P.*, 2011 ONCA 511, 106 O.R. (3d) 677, at para. 5.

[42] That said, the Urbancorp parties' Notice of Request to Arbitrate expressly sought a determination that UTMI was entitled to the Urbancorp Consulting Fees, calculated to be $5.9 million in accordance with the Co-Ownership Agreement.

[43] This Consulting Fee Dispute was broken down in the pre-filed factum of the Urbancorp parties to include the following determinations:

a. If and when UTMI became entitled to the Urbancorp Consulting Fees; and

b. The mechanics and timing of when they must be paid.

[44] The Arbitrator decided both the issues of UTMI's entitlement to Consulting Fees and the mechanics and timing of payment of same. It was decided that UTMI was entitled to unpaid Consulting Fees of $5,911,624 as at the Transfer Date which are to be paid at the same time as any further Development Management Fees beyond the amount of $13,200,822 are paid to Mattamy.

[45] According to the Court of Appeal in *Mexico v. Cargill, Incorporated*, 2011 ONCA 622, 107 O.R. (3d) 528, at para. 52, the determination of whether the Award went beyond the scope of the Arbitrator's jurisdiction involves the consideration of three questions:

a. What was the issue that the arbitral tribunal decided?

b. Was that issue within the submission to arbitration?

c. Is there anything in the arbitration agreement, properly interpreted, that precluded the tribunal from making the award?

[46] The questions of UTMI's entitlement to any Consulting Fees and the mechanics and timing of when they have to be paid that were decided by the Arbitrator fell squarely within the relief claimed in the Notice of Request to Arbitrate. These were the issues set out in the pleadings, which were provided to the Arbitrator prior to the Terms of Appointment being executed. They reflect the parties' agreement as to the matters in dispute and the bounds of the Arbitrator's jurisdiction. There was nothing in the Co-Ownership Agreement (that contains the parties' agreement to arbitrate) or the Terms of Appointment of the Arbitrator that precluded the Arbitrator from making the Award he did.

[47] Within the framework of the pleadings, there was always a dispute with respect to Phase 2 of the Project about entitlement to Consulting Fees on amounts received after the Transfer Date. The Urbancorp parties maintained that UTMI was entitled to Urbancorp Consulting Fees on those receipts for the reasons set out in their Request to Arbitrate and written submissions. Mattamy disagreed.

[48] The New Issue raised by the Arbitrator shifted the analysis by introducing a new point of interpretation and raising the question of whether monies paid after the Transfer Date could be considered or treated to have been received before the Transfer Date within the meaning of the

definition of Gross Receipts. Although this was a new way of looking at the question of entitlement to Consulting Fees and the determination of their quantum, I find that it did not fall outside of the scope of the broad questions that had been submitted to the Arbitrator to decide.

[49] The Arbitrator decided that UTMI had an entitlement to be paid Urbancorp Consulting Fees as at the Transfer Date, and determined the quantum of those fees and the mechanics and timing of when they must be paid. These were precisely the issues submitted to him to decide. The issues of entitlement (and quantum) of Urbancorp Consulting Fees as at the Transfer Date was tied to the competing interpretations that the parties put forward of the definition of Gross Receipts and what should be included in that calculation as at the Transfer Date. The New Issue was simply another data point and perspective to be considered as part of the entitlement and quantum questions.

[50] I find that the Arbitrator did not exceed his jurisdiction by having raised and considered the New Issue. I find no basis upon which the Award should be set aside under s. 46(1)3 of the Act.

b) Was there a Procedural Unfairness As a Result of the New Issue Raised by the Arbitrator?

[51] While I have determined that it was open to the Arbitrator to identify a New Issue that might inform the analysis and determination of a question that was been submitted to Arbitration, it remains to be determined whether the manner in which the evidence and submissions about the New Issue was received and considered was procedurally unfair to Mattamy.

[52] Section 19 of the Act requires that each party be treated equally and fairly. This incorporates the requirements of natural justice and procedural fairness, and not only the right to be heard but the right to an independent and impartial hearing. See *Baffinland v. Tower-EBC*, 2022 ONSC 1900, at para. 77.

[53] Section 46(1)6 of the Act empowers the Court to set aside an award on the basis that the applicant was not treated equally and fairly, or was not given an opportunity to present a case or to respond to another party's case. Having regard to the context of the proceeding as a whole, if the court determines that the applicant was denied natural justice or procedural fairness, any resulting award must be set aside. See *Nasjjec v. Nuyork*, 2015 ONSC 4978, 51 B.L.R. (5th) 182, at paras. 40, 41.

[54] When assessing the level of procedural fairness, courts examine various factors including sufficiency of opportunity granted to parties' counsel to present their case and the thoroughness of the procedure engaged by the parties. See *Baffinland*, at paras. 84, 89.

[55] The parties agree that the Arbitrator raised a New Issue not previously identified by either side. The three specific points about which the Arbitrator invited the parties to submit further evidence were focused on the New Issue (namely, whether the purchase price payable for residential condominium units in Phase 2 Blocks A and P that were under contract for sale before the Transfer Date had been "received" for the purposes of determining the Gross Receipts as at that date, even though the purchase monies had not actually been paid).

[56] As described earlier in this endorsement, during the Arbitration hearing, the Arbitrator asked about the following three points that had not been covered in the parties' pre-filed evidence or submissions about whether UTMI was entitled to any Consulting Fees as at the Transfer Date:

a. What the ASPE accounting principles require for the sale of residential condominium units?

b. How the auditors on the project accounted for the sale of residential condominium units?

c. The closing status for [Phase 2] Block A and P units, including dates of actual and anticipated closings.

[57] This led to further evidence from Mattamy and submissions from each side. However, the Arbitrator declined Mattamy's request to schedule a motion to determine the admissibility of its proposed evidence on these points. Instead, at a June 27, 2022 case conference, the Arbitrator refused to admit certain of Mattamy's proposed new evidence about the Handbook, but admitted some of its other proposed evidence.

[58] The Urbancorp parties maintain that the Arbitrator was entitled to rule on the admissibility of evidence proffered, that the Arbitrator was not required to make this determination on a formal motion, and that there was nothing procedurally unfair about proceeding in this manner. This submission (found at paragraph 60 of their factum) finds support in the relevant statutes:

> Section 20(1) of the *Arbitration Act*, 1991 provides that the arbitral tribunal may determine the procedure to be followed in the arbitration. Further Section 21 of the *Arbitration Act*, 1991 provides that Sections 14-16 of the *Statutory Powers and Procedures Act*, 1990 (the "SPPA") apply to an arbitration. Section 15 of the SPPA provides that a tribunal may admit into evidence any document that is relevant. Sections 21 of the *Arbitration Act*, 1991 and 15 of the SPPA do not require any particular evidence to be admitted, but rather provide discretion to the adjudicator or arbitrator to admit evidence that might otherwise not be admissible in court. Ultimately, the issue of whether or not to admit any given evidence is a discretionary and procedural decision of the arbitrator.

[59] There is no question that the Arbitrator had the authority to determine the procedure and make rulings regarding the admissibility of the proposed evidence. However, that does not mean that the rulings he made did not result in a procedural unfairness. That entails a further inquiry as to whether a sufficient opportunity was afforded to Mattamy's counsel to present their case and whether the procedure engaged to do so was thorough: see *Baffinland*, at paras. 84 and 89.

[60] Mattamy argues that when the Arbitrator ruled the Handbook excerpts and evidence related to it inadmissible, he denied it the opportunity to file relevant evidence in response to a New Issue that the Arbitrator himself had raised. He thereby denied Mattamy the opportunity to present its case

without having engaged in a thorough procedure for the determination of the admissibility of that evidence and the appropriate way for it to be received. I agree.

Was Mattamy Afforded a Sufficient Opportunity to Present its Case on the New Issue?

[61] The Handbook is relevant to the New Issue. It addresses the very points that the Arbitrator specifically asked the parties to address in their supplementary evidence and submissions when the New Issue was raised:

a. It provides context and guidance and an explanation about the ASPE accounting principles applicable to the recognition of revenue from the sale of residential condominium units; which in turn

b. Provide the rationale for why the Phase 2 residential condominium sales were not included in DHI's revenue in its financial statements for the year in which the Transfer Date occurred; because

c. The anticipated closing dates for those purchases were not until future undetermined dates, and the purchases had not yet even reached the stage of interim closing.[1]

[62] Section 402.9.5 of the Handbook explains why, from an accounting and financial reporting perspective, revenue from the sale of residential condominium units is to be recognized at the time of interim closing and not at the time the units are contracted for sale or at the time that the sale closes. The Handbook explains the rationale for the ASPE accounting principles that were applied for purposes of recognizing revenue in the DHI financial statements and explains why the sales of these units would not have been recorded as revenue as at the Transfer Date, and more specifically, why they are treated as having be received for revenue recognition purposes as at the date of interim closing.

[63] In the context of a hearing in which, at the Arbitrator's request, the parties' evidence and submissions became focused upon a New Issue, the question of how and when revenues from the sale of residential condominium units are or should be considered to be recognized from an accounting and financial reporting perspective, and the rationale for so doing, became relevant and important. The fact that other evidence (the applicable ASPE and the DHI financial statements for the relevant years) was admitted reinforces this. There were no reasons given for the Arbitrator's ruling regarding the inadmissibility of the Handbook excerpts and related evidence. The justification for differentiating between the Handbook and the other evidence in the June 23 Affidavit that the Arbitrator did admit, about the ASPE principles and how they were in fact applied, is not obvious.

[64] The Urbancorp parties try to rationalize its exclusion by suggesting that the Handbook adds nothing to the evidence about the ASPE principles and the financial statements that was admitted. They further argue that even if there was a procedural unfairness in the refusal to admit the Handbook

[1] It is, and was, undisputed that interim closing had not occurred for the Phase 2 units prior to the Transfer Date.

it was simply a third piece of evidence that reinforced the same points made in the two admitted pieces of evidence. They contend that, in these circumstances, its exclusion was not egregious enough to rise to the level of a failure of natural justice. Since the entire analysis under s. 46 of the Act is discretionary, it was suggested that this case is distinguishable from *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471, in which the refusal to allow any evidence on a point was found to be a failure of natural justice (at p. 491-92, at para. 43).

[65] I disagree with this characterization of the Handbook. I am not satisfied that the proposed evidence regarding the Handbook excerpts can be said to be simply corroborative of the other evidence admitted. It provides additional context.

[66] The Urbancorp parties also contend that the Handbook was not relevant or important, and the Arbitrator's decision to exclude it did not rise to the level of a denial of natural justice, because neither the New Issue nor any of the evidence and submissions that the Arbitrator received in connection with it were central to the eventual outcome of the Arbitration. They maintain that the Arbitrator ultimately decided that the definition of Gross Receipts was not tied to, nor dependent upon, the manner in which revenue was recognized and accounted for in financial statements from an accounting point of view. I will come back to this point later, as the leading authorities are clear that the court should not engage in any assessment of whether the outcome would have been different if the procedural unfairness had not occurred.

[67] However, in this case the Arbitrator did not completely disregard the other evidence that was admitted regarding the ASPE and accrual accounting methods employed by DHI in its financial statements. The Arbitrator's reasoning (at paras. 15-17 of the Award) reveals that the focus of his assessment was on the contractual interpretation point that the proceeds of residential condominium sales were not required to be considered on a cash basis for purposes of determining Gross Receipts.

[68] The Arbitrator approached the question of when revenues were to be treated as received as binary: either on a cash basis when actually collected or when the units were sold (when the agreements of purchase and sale were signed). Paragraph 18 of the Award reads as follows:

> I interpret the definition of Gross Receipts to not require that cash has actually been received before being included in Gross Receipts. I agree with Urbancorp that for the purposes of the Co-Ownership Agreement, revenues to determine Urbancorp's entitlement to its 1.5% consulting fee are to be treated as received when the units are sold, not when the sale proceeds are actually collected.

[69] The Arbitrator's reasoning about when consideration is said to have been received on a non-cash basis did not have the benefit of the full context which, in the accounting realm, differentiates not only between the date of the sale (contract) and the date of the actual receipt of funds on final closing, but also allows for revenue recognition at the intermediary stage of interim closing. This is when, according to the Handbook, significant acts of performance will have been completed by the purchaser, including: payment of the amounts due on the interim closing, undertaking to assume a mortgage for the balance of the purchase price, receipt of the right to occupy the premises and receipt of an undertaking from the developer to be assigned title in due course.

[70] The Handbook is an interpretative guide that explains the rationale for the accounting treatment and why, in residential condominium sales, performance is considered to have been achieved at the time of the interim closing. From an industry perspective, according to the Handbook, this is when there exists a reasonable assurance of the measurement and collectability of the agreed purchase price, which is the point at which the ASPE principles allow for revenue to be recognized.

[71] Questions were asked by the Arbitrator about ASPE and the accounting principles that were actually applied when the New Issue was raised. Even if ultimately the accounting approach to recognition of this type of revenue was found not to be determinative of the specific contract interpretation question of when it is to be treated as received for purposes of the definition of "Gross Receipts", the complete accounting rationale is still a relevant data point that Mattamy should have had the opportunity to present in support of its submissions in respect of the New Issue.

[72] If the Arbitrator's concern about the Handbook was that it was not properly supported by an expert opinion, that is something that Mattamy says it would and could have rectified and maintains that it should have been given the opportunity to do so, even if it resulted in a delay of the Arbitration.

[73] Mattamy's uncontroverted evidence is that, if the issue of when the Gross Receipts were to be considered "received" had been raised prior to the hearing, Mattamy would have led independent expert evidence on the proper application of accounting principles to revenue recognition on the sale of residential condominium units. Mattamy was not given that opportunity.

[74] By the Arbitrator's refusal to allow Mattamy to submit the Handbook excerpts into evidence, Mattamy was deprived of the opportunity to present the complete evidentiary context and rationale for the accounting treatment before the Arbitrator dismissed it in favour of another approach. I find that Mattamy was not afforded a sufficient opportunity to present its case on the New Issue.

<u>Did the Arbitrator Engage in a Thorough Procedure to Determine Whether to Admit the Handbook Excerpts into Evidence?</u>

[75] The Arbitrator's decision made at the June 27, 2022 case conference to strike the portions of the June 23 Affidavit and exhibits referencing the Handbook was made despite:

a. The lack of any objection from the respondents to this evidence;

b. Mattamy's request for an opportunity to bring a motion for leave to file the June 23 Affidavit if there was a question about the admissibility of any of the evidence contained in it; and

c. The admission of other evidence about the application of ASPE principles (expressly referred to in the definition of Gross Receipts) and about how the Phase 2 Parts A and P residential condominium sales were actually accounted for in the financial statements of the project company.

[76] It is this confluence of factors which Mattamy contends deprived it of its right to procedural fairness. The Arbitrator's decision, made without the benefit of a motion and supporting record, to

exclude evidence that Mattamy sought to rely upon to address a New Issue that the Arbitrator himself had raised appears (in the absence of any reasons) to have been arbitrary and was unfair to Mattamy.

[77] The learned Arbitrator is a former judge of this court with extensive trial experience. There is a high threshold to meet under s. 46 of the Act for the court to intervene in the conduct of an arbitration proceeding. However, without any reasons given, aside from the remark by the Arbitrator that he had a "mind of his own," I am not satisfied that a thorough procedure was engaged in to determine whether the admit the Handbook excerpts into evidence.

What Flows from the Finding of Procedural Unfairness?

[78] The Urbancorp parties contend that the New Issue was not critical, central or dispositive to the dispute being arbitrated because the Arbitrator found that UTMI's entitlement to the Urbancorp Consulting Fee: (a) is governed by s. 6.6 of the Co-Ownership Agreement (not the definition of Gross Receipts); (b) existed on and survived the Transfer Date; and (c) is payable when Mattamy is paid its Development Management Fee (as defined in the Co-Ownership Agreement).

[79] I am not sure I agree that (or fully understand how) the final outcome of the Award could have been reached without any consideration of the amount of Gross Receipts as at the Transfer Date and whether the Phase 2 pre-sales of residential condominiums should be included in that calculation. Even if the timing and mechanics for payment is deferred, as I understand it, there needed to be some amount of accrued and unpaid Gross Receipts as at the Transfer Date for there to be any entitlement to Consulting Fees as at that date.

[80] However, this is not something I need to understand to decide this motion. Having found that there was a procedural unfairness and failure of natural justice, there is a strong line of authority (*Laroque*, *Baffinland*, *Nasjjec*, above) that states that where there is a finding of procedural unfairness, the Award must be set aside and the court should not engage in any assessment of whether the outcome would have been different if the procedural unfairness had not occurred. A new arbitration must be ordered.

[81] The Supreme Court of Canada stated in *Laroque*, at p. 493:

> [T]he rules of natural justice have enshrined certain guarantees regarding procedure, and it is the denial of those procedural guarantees which justifies the courts in intervening. The application of these rules should thus not depend on speculation as to what the decision on the merits would have been had the rights of the parties not been denied. I concur in this regard with the view of Le Dain J ., who stated in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 661:
>
> > ... the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.

See also *Nasjjec*, at para. 41.

[82] The hindsight perspective (that the entitlement to Urbancorp Consulting Fees could be determined without regard to the New Issue and was not dependent upon the application of accounting principles) offered by the Urbancorp parties cannot remedy the procedural unfairness that arose from the Arbitrator having raised the New Issue, requested further evidence and submissions about it and then refused to allow Mattamy to tender the complete package and full context. The test is whether evidence was sufficiently important that its exclusion at the time was a denial of natural justice (as I have found it was). It is not a test that is applied in hindsight based upon the eventual reasoning of the Award.

[83] I have not considered or been influenced by the substance of the dispute or any consideration of the correctness of the Arbitrator's decision or of the outcome of the Arbitration.

[84] The Urbancorp parties argue that this application is just an attempt to appeal the Award (from which the parties agreed there would be appeal) dressed up as a s. 46(1) review. Quite to the contrary, I make no assessment and offer no observations about whether consideration of the Handbook excerpts would make any difference to the outcome, or about whether the accounting treatment (on a non-cash basis) should inform the court's interpretation of Gross Receipts or any other aspect of the Co-Ownership Agreement on the question of UTMI's entitlement to Consulting Fees as at the Transfer Date.

[85] I am mindful of the caution from the Court of Appeal in *Tall Ships Development Inc. v. Brockville (City)*, 2022 ONCA 861, at para. 2, that:

> This court has recently emphasized the narrow basis for setting aside an arbitral award under s. 46 of the *Arbitration Act*, which is not concerned with the substance of the parties' dispute and is not to be treated as an alternate appeal route: *Alectra Utilities Corporation v. Solar Power Network Inc.*, 2019 ONCA 254 ... *Mensula Bancorp Inc. v. Halton Condominium Corporation No. 137*, 2022 ONCA 769, at paras. 5, 40.

Are Procedural Decisions of Arbitrator's Immune from Review by the Court?

[86] I turn now to briefly address one further argument raised by the Urbancorp parties, namely that procedural decisions of arbitrators are immune from review by the court. This is very much a context driven proposition. If it were to be applied to a so-called "procedural" decision to exclude evidence, that would be directly contrary to the decision of the Supreme Court in *Laroque*, which found a failure of natural justice arising from the exclusion of evidence. Arguably, decisions about the admission or exclusion of evidence are substantive rather than procedural, in any event.

[87] Similarly, there must be a distinction drawn between a procedural decision and a consideration of whether a procedure that was adopted was thorough, because that too has been held to be a ground for a finding of procedural unfairness. See *Baffinland*, at paras. 84, 89.

[88] There is a difference between discrete procedural interim motions in the cases relied upon by the Urbancorp parties, dealing with the admission of fresh evidence (*Nasjjec*, at para. 130) or for

security for costs (*Inforica Inc. v. CGI Information Systems and Management Consultants Inc.*, 2009 ONCA 642, 97 O.R. (3d) 161, at para. 18) and determinations such as were made in this case that resulted in a party not having been afforded a sufficient opportunity to present their case.

[89] The issues in this case do not fall within any blanket category of procedural decisions of arbitrators that are immune from review.

Conclusion: Procedural Unfairness and Failure of Natural Justice

[90] The confluence of circumstances in this case, of:

> the Arbitrator having decided at a case conference without a formal motion not to admit some of the evidence tendered by Mattamy and not objected to by the Urbancorp parties in response to the New Issue raised by the Arbitrator, despite his invitation to the parties to provide further evidence, and the absence of any principled distinction between the relevance or admissibility of the Handbook excerpts and the other evidence that was admitted about the ASPE and actual accounting treatment of revenues from the sale residential condominium units in Phase 2 of the Downsview Project,

in my view, amounts to a procedural unfairness to Mattamy and a failure of natural justice.

[91] I find that Mattamy was unable to present a full case in response to the New Issue raised for the first time by the Arbitrator at the hearing and that the decision not to admit the Handbook excerpts was not the product of a thorough procedure. Section 46(1)6 of the Act expressly authorizes the court to intervene in such circumstances to prevent the unfair treatment of parties and to protect the integrity of the arbitral process. I order that the Award be set aside and that the parties proceed to a new arbitration before a different arbitrator, in accordance with such procedure and based on such evidence and submissions as the new arbitrator may direct.

Residual Issue: Will this Decision Give Rise to an Order Made Under the CCAA?

[92] An issue was raised at the conclusion of oral argument about whether the decision in this application would give rise to an order made in the CCAA proceedings. The applicant argued that it would not; the respondents argued that it would. The parties requested that the court determine this question so that they have certainty regarding the appeal route from this decision which, pursuant to s. 13 of the CCAA, would require leave to appeal if it is found to be "an order, or a decision made under [the CCAA]."

[93] Following the most recent appellate authority on this question, the answer is yes, this decision will give rise to an order made under the CCAA. I find that the decision in this application is "bound up with and incidental to the CCAA proceedings out of which the present proceedings arose." It arises out of an Arbitration that was expressly authorized by an order made in the CCAA proceedings dating back to June 30, 2021. Further, this application was ordered to be heard in the CCAA proceedings by Morawetz C.J. on September 1, 2022.

[94] The analytical framework for this determination was recently endorsed by the Court of Appeal in *Urbancorp Inc. v. 994697 Ontario Inc.*, 2023 ONCA 126, at paras. 9-12, adopting the framework conveniently summarized by Brown J. (as he then was) in *Essar Steel Algoma (Re)*, 2016 ONCA 138, 33 C.B.R. (6th) 172, at para. 34:

> To aid that purpose-focused inquiry, the case law has identified some indicia about when an order is "made under" the CCAA. In [*Redfern Resources Ltd. (Re)*, 2011 BCCA 333, 94 C.B.R. (5th) 53], Tysoe J.A. stated a court should ask whether the order was "necessarily incidental to the proceedings under the CCAA" or "incidental to any order made under the CCAA": at paras. 9 and 10. In [*Monarch Land Limited v. CIBC Mortgages Inc.*, 2014 ABCA 143, 575 A.R. 46], O'Brien J.A. looked at whether the order required the interpretation of a previous order made in the CCAA proceeding or involved an issue that impacted on the restructuring organization of the insolvent companies: at paras. 8 and 15. As mentioned, in [*Sandhu v. MEG Place LP Investment Corporation*, 2012 ABCA 91], Paperny J.A. stated that s. 13 of the CCAA would apply if "CCAA considerations informed the decision of and the exercise of discretion by the chambers judge" or "if a claim is being prosecuted by virtue of or as a result of the CCAA": at paras. 16 and 17. [Emphasis added in *Urbancorp Inc.*; citations edited in *Urbancorp Inc*.]

[95] This decision and any order arising from it is necessarily incidental to the proceedings under the CCAA and to orders made under the CCAA. It involves an issue that impacts at least one of the companies that is the subject of these CCAA proceedings (UTMI). It further involves claims that are being prosecuted as a result of the CCAA proceedings that led to the restructuring of Urbancorp. As the Court of Appeal stated in *Urbancorp Inc.*, at para. 20, where the court's jurisdiction to hear a matter, such as in this case,

> [E]manates from both the CCAA and another statute, it is unhelpful to deconstruct the proceedings to determine which elements of the case fall under the CCAA and therefore require leave. Rather, as Paperny J.A. noted in *Sandhu*, at para. 17, "if a claim is being prosecuted by virtue of or as a result of the *CCAA*, section 13 applies.

[96] I do not accept the applicant's contention that the September 1, 2022 order transferring this application to the Commercial List "to be heard in these [CCAA] proceedings" was just a means of getting it onto the Commercial List to be heard more quickly. Applications seeking to set aside arbitration awards made in connection with commercial contract disputes (as the Award was) can be commenced on, or transferred to, the Commercial List in their own right. To give full meaning and effect to the September 1, 2022 order, it must be read as intending that this application be heard in the CCAA proceedings.

Costs and Final Disposition

[97] For the foregoing reasons, this application is granted and the Award is set aside. The parties are directed to submit their Consulting Fees Dispute to arbitration before a new arbitrator to be agreed upon, or, failing agreement, to be appointed by the court. The procedure for the new arbitration, including the pleadings and the timing and manner in which the arbitrator will receive the evidence and submissions, shall be determined by the new arbitrator. The court encourages the parties to make use of the extensive materials and submissions that have already been prepared, subject to the discretion and directions of the new arbitrator.

[98] In accordance with the parties' agreement, the Urbancorp parties shall pay forthwith (within 30 days) to Mattamy its all-inclusive partial indemnity costs of this application fixed in the amount of $30,000.

KIMMEL J.

Released: May 19, 2023

CITATION: Mattamy (Downsview) Limited v. KSV Restructuring Inc.(Urbancorp), 2023 ONSC 3013
COURT FILE NO.: CV-16-11389-00CL and CV-22-00688349-00CL
DATE: 20230519

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND
IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PATRICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. (Collectively the "Applicants") AND THE AFFILIATED ENTITIES

BETWEEN:

MATTAMY (DOWNSVIEW) LIMITED

Applicant

– and –

KSV RESTRUCTURING INC., IN ITS CAPACITY AS THE COURT APPOINTED MONITOR OF URBANCORP DOWNSVIEW PARK DEVELOPMENT INC. PURSUANT TO THE COMPANIES' CREDITORS ARRANGMENT ACT R.S.C. 1985, C. C-6. AS AMENDED, GUY GISSIN, IN HIS CAPACITY AS THE COURT APPOINTED FUNCTIONARY AND FOREIGN REPRESENTATIVE OF URBANCORP INC. BY ORDER OF THE DISTRICT COURT IN TEL AVIV-YAFO, ISRAEL

Respondents

REASONS FOR DECISION
(Application to set aside Arbitral Award)

Kimmel J.

Released: May 19, 2023