Court File No. CV-22-00688349-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERICAL LIST

B E T W E E N:

MATTAMY (DOWNSVIEW) LIMITED

Applicant

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-36. AS AMENDED, GUY GISSIN, IN HIS CAPACITY AS THE APPOINTED FUNCTIONARY AND FOREIGN REPRESENTATIVE OF URBANCORP INC. BY ORDER OF THE DISTRICT COURT IN TEL AVIV-YAFO, ISRAEL

Respondents

APPLICATION UNDER RULE 14.05(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and Section 46 of the *Arbitration Act 1991*, S.O. 1991, c. 17

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TABLE OF CONTENTS

Page No.

PART I - OVERVIEW 1

PART II - SUMMARY OF FACTS 3

A. UDPDI's Entitlement to Consulting Fees Under the Agreement 3

B. The Sales Process 7

C. The Arbitration 8

D. The June 3 Hearing 11

E. The June 15 Affidavit and the Handbook 12

F. The June 23 Affidavit 14

G. The Award 15

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES 16

A. The Award Exceeded the Scope of the Arbitration and the Arbitrator's Jurisdiction 16

B. The Award Breached the Requirements of Procedural Fairness 20

PART IV - ORDER REQUESTED 25

PART I - OVERVIEW

1. This is an application by Mattamy (Downsview) Limited ("**Mattamy**") to set aside the arbitral award of the Honourable Frank J.C. Newbould, K.C. (the "**Arbitrator**") dated July 6, 2022, pursuant to section 46 of the *Arbitration Act*, *1991*. In making his award, the Arbitrator (i) exceeded his jurisdiction by considering and deciding an issue that was not raised by the parties, and (ii) acted unfairly by not giving Mattamy the opportunity to present its case by excluding relevant evidence that the parties agreed should be before him. As a result, the arbitration was conducted in a manner that was procedurally unfair to Mattamy.

2. The central issue in the arbitration was whether, pursuant to a Co-Ownership Agreement (the "**Agreement**") between Mattamy and the Respondent, Urbancorp Downsview Park Development Inc. ("**UDPDI**"), UDPDI was entitled to a percentage of *future* gross receipts from the sale of condominium units received *after* UDPDI sold its ownership interest in the relevant project to Mattamy. It was accepted by the parties in the arbitration that those gross receipts had not been received at the time of the transfer of UDPDI's interest to Mattamy and that they would be received at some time after the transfer. This common understanding was reflected in the pleadings before the Arbitrator as well as in the audited financial statements for the development project. The issue to be determined in the arbitration was whether UDPDI was entitled, under the Agreement, to a portion of the gross receipts to be received *after* it had sold its interest to Mattamy.

3. At the hearing, the Arbitrator raised questions about when the disputed gross receipts were to be considered "received" under ASPE accounting principles. The parties to the arbitration had not pleaded the application of ASPE or raised ASPE in their materials.

4. During the hearing, the Arbitrator required the parties to submit new evidence on ASPE accounting principles as applied to the recognition of revenue on the sale of residential condominium units. This supplementary evidence was necessary because there was nothing in the record to address the Arbitrator's new line of inquiry.

5. In accordance with the Arbitrator's direction, Mattamy filed a supplementary affidavit containing, among other things, a handbook from the Real Property Association of Canada that explains that, under ASPE, gross receipts are to be considered "received" upon interim closing, not at the time of the sale of the units. While UDPDI objected to other documents being included in the supplementary record, it consented to the handbook being included.

6. Despite UDPDI's consent, at a case conference held on June 27, 2022, over the objection of Mattamy, the Arbitrator decided to exclude the handbook from evidence. He released his Award nine days later when he granted the relief sought by UDPDI in its entirety.

7. The central and dispositive conclusion of the award is that, under the Agreement, gross receipts are to "be treated as received when the units are sold, not when the sale proceeds are actually collected." In other words, the Arbitrator decided that the gross receipts had been *received* prior to the transfer of UDPDI's ownership interest to Mattamy. That was not a position taken by either UDPDI or Mattamy in the arbitration. If UDPDI had raised the issue of whether gross receipts had already been received prior to UDPDI selling its interest, Mattamy would have made different arguments, led different evidence, and conducted cross-examinations differently.

8. In deciding the arbitration based on a position not taken on an issue not raised by the parties (and was therefore not properly before him), and excluding pertinent and uncontested

evidence directly relevant to that new issue, the Arbitrator deprived Mattamy of its rights to a fair determination of the disputes between the parties.

9. The Award should be set aside pursuant to section 46 of the *Arbitration Act* and a new hearing should be ordered before a different arbitrator.

PART II - SUMMARY OF FACTS

A. UDPDI's Entitlement to Consulting Fees Under the Agreement

10. Downsview Homes Inc. ("**DHI**") owns land located at 2995 Keele St. in Toronto, on the former Downsview airport lands. On those lands, it developed a residential construction project comprised of condominiums, townhomes, semi-detached homes, and rental units.

11. As described below, prior to the sale of its interest in DHI to Mattamy, 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 Agreement. Additional terms incorporated into the Agreement were included in a separate Payment and Profit Distribution Adjustment Agreement dated July 29, 2013.

12. The payment of consulting fees to UDPDI under the Agreement is principally governed by sections 6.6 and 6.15. Under the Agreement, Mattamy is referred to as the "Development Manager" and UDPDI is referred to as "Urbancorp".

13. Section 6.6. states:

> **6.6 Fees and Disbursements**
>
> The Co-Owners shall pay to the Development Manager a fee for its services equal to FOUR AND ONE HALF PERCENT (4.5%) **of the total amount of Gross Receipts** (the "Development Management Fee") **and for as long as Urbancorp carries out the duties and functions described in Section**

> **6.15** or such lesser duties and functions as may be otherwise agreed by the Co-Owners, **Urbancorp shall be entitled to a consulting fee (the "Urbancorp Consulting Fee") equivalent to ONE AND ONE HALF PERCENT (1.5%) <u>of the total amount of Gross Receipts</u>**, which fee shall be paid to Urbancorp Toronto Management Inc., provided that the Co-Owners acknowledge that management or consulting fees in respect of the Project have been paid to Urbancorp or its Affiliates in the amount of $4,400,274.00 to date and no payments of the Urbancorp Consulting Fee **shall be made until after the Development Manager has been paid a total amount of $13,200,822.00 in respect of the Development Management Fee**. The Development Management Fee shall be paid from construction financing draws in proportion to total estimated costs. After the Development Manager has been paid a total amount of $13,200,822.00 in respect of the Development Management Fee, payments of the Urbancorp Consulting Fee shall then be made by the Co-Owners at the same time as payments of the Development Management Fee.[1] [emphasis added]

14. Pursuant to section 6.6, consulting fees were to be paid as a percentage of "Gross Receipts" received in connection with the sale of residential condominium units and as defined in the Agreement 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 <u>received</u> from the sale of residential dwelling units**, parking units or storage units forming part of the Project; and (2) all rentals or other moneys earned or received from the leasing of or dealing with the Project Property pursuant to any lease, if applicable, including all amounts resulting from the operation of maintenance, escalation, participation and overage clauses; provided however, that the following items of Gross Receipts shall be included on a cash basis: (1) all amounts earned or received as recovery of expenses or for services provided to any tenants or other Person with whom the Co-Owners shall have an arrangement in respect of the Project Property; (2) available insurance proceeds received with respect to the Project Property (except to the extent that such proceeds are used to rectify or correct the damage caused by an insured peril); (3) moneys received as a result of expropriation or moneys received in contemplation thereof; and (4) the sale of all or any part of the Project Property (other than any sale under the Purchase

[1] Co-Ownership Agreement, Application Record ("**AR**"), Tab 2, Exhibit "C", **p. 64**.

> Agreement), other than residential dwelling units, if applicable.[2] [emphasis added]

15. Section 6.15 of the Agreement disentitles UDPDI and its payee, UTMI, from receiving any consulting fees after UDPDI ceases to be a co-owner:

> **6.15 Urbancorp's Duties**
>
> The Development Manager hereby delegates to Urbancorp the duties and functions described in Section 6 of Schedule "E" hereto and for the purposes of the carrying out of those duties and functions only, Urbancorp shall be subject to the obligations of the Development Manager as set out in Sections 6.1, 6.2, 6.4, 6.5, 6.7, 6.16, 6.17, 6.18. 6.19, 6.26, 6.27, 6.28, 6.29 and 6.30 of this Agreement. **In the event that Urbancorp is no longer a Co-Owner, then Urbancorp shall not carry out these duties and functions and shall not thereafter be entitled to the Urbancorp Consulting Fee** [emphasis added].[3]

16. As described further below, Mattamy's position in the Arbitration was that section 6.15 describes an "event" in time (UDPDI ceasing to be a "Co-Owner") and explains what happens after that event has occurred (UTMI is not entitled to consulting fees). This position was premised on the common understanding that future Gross Receipts for the sale of condominium units in Phase 2 (defined below) had not been received prior to UDPDI ceasing to be a Co-Owner.

UDPDI's Indebtedness to Mattamy

17. The sale of UDPDI's interest in DHI to Mattamy was part of a long-running CCAA proceeding. 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*,

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[2] Co-Ownership Agreement, AR, Tab 2, Exhibit "C", **p. 41**.
[3] Co-Ownership Agreement, AR, Tab 2, Exhibit "C", **p. 66**.

R.S.C. 1985, c. C-36, as amended (the "**CCAA**") in a proceeding on the Commercial List bearing Court File Number CV-16-11389-00CL (the "**CCAA Proceeding**").

18. On June 15, 2016, the Court in the CCAA Proceeding approved a debtor-in-possession facility (the "**DHI Facility**") in the amount of $8 million between Mattamy as lender and UDPDI as borrower, secured by a charge in favour of Mattamy over UDPDI's property, including its interest in DHI. The DHI Facility was used by UDPDI to fund its portion of the required equity injection in the Project.[4]

19. On November 3, 2020, the Court approved an amendment to the DHI Facility, which provided for a further secured advance by Mattamy to UDPDI of approximately $6.5 million and an extension of the maturity date to February 3, 2021.[5]

20. On January 25, 2021, Guy Gissin, the Foreign Representative for Urbancorp Inc., served a motion in the CCAA Proceeding requesting that the Monitor deliver a notice of arbitration to Mattamy in connection with UDPDI's alleged entitlement to consulting fees to be paid under the Agreement.[6]

21. On February 11, 2021, the Monitor served a motion in the CCAA Proceeding requesting approval of a sales process for UDPDI's DHI interest in order to satisfy the outstanding DHI Facility, which at that time was approximately $10.1 million.[7]

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[4] *Urbancorp Toronto Management Inc*., 2021 ONSC 8009 at **para. 4** [*Urbancorp*].
[5] *Urbancorp* at **para. 5**.
[6] *Urbancorp* at **para. 7**.
[7] *Urbancorp* at **paras. 5-8**.

22. The Court in the CCAA Proceeding approved the sales process proposed by the Monitor by Order dated June 30, 2021 and directed the Monitor to pursue arbitration against Mattamy as requested by the Foreign Representative (the "**Sales Process Order**").[8]

B. The Sales Process

23. Pursuant to the Court-approved sales process, the Monitor marketed the sale of UDPDI's 51% interest in DHI to potential purchasers. As a result of a lack of any interest by potential purchasers, and pursuant to the Sales Process Order, Mattamy negotiated with the Monitor for the acquisition of UDPDI's interest in DHI in satisfaction of the outstanding DHI Facility.[9]

24. On November 17, 2021, the Monitor and Mattamy entered into an agreement of purchase and sale that provided for Mattamy's acquisition of all of UDPDI's interests in DHI, subject to court approval (the "**Transaction**").[10]

25. On November 19, 2021, counsel for Mattamy provided the Monitor with a document setting out Mattamy's legal positions regarding UDPDI's outstanding claim for alleged unpaid consulting fees under the Agreement. Paragraphs 16 and 17 of that document specifically set out Mattamy's position with respect to the effect of the sale of UDPDI's interest in DHI pursuant to section 6.15 of the Agreement:

> **There is no entitlement to an Urbancorp Consulting Fee based on future Gross Receipts**
>
> 16. Section 6.15 provides that in the event Urbancorp is no longer a Co-Owner, Urbancorp shall thereafter not be entitled to the Urbancorp Consulting Fee.

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[8] *Urbancorp* at **para. 9**.
[9] *Urbancorp* at **paras. 12-14**.
[10] Agreement of Purchase and Sale, AR, Tab 2, Exhibit "A", Tab 5, **pp. 23-39**.

> 17. For this provision to have meaning, it must be that the Gross Receipts received after Urbancorp ceases to be a Co-Owner do not form the basis for the Urbancorp Consulting Fee. Accordingly, at most Urbancorp's entitlement (which it has directed be paid to UTMI under section 6.6 of the Co-Ownership Agreement) can not attach to future receipts.[11]

26. The motion for approval of the Transaction and for a vesting order was heard in the CCAA Proceeding on December 7, 2021. Eighteen days prior to that hearing, UDPDI and the Monitor were fully aware of Mattamy's position that UDPDI's removal as a Co-Owner precluded the payment of any Consulting Fees after the Transfer Date (defined below).

27. Neither the Monitor nor UDPDI raised any objection or sought clarification on or before the December 7 hearing or at any time prior to the Transfer Date.

28. On December 29, 2021, the Court in the CCAA Proceeding approved the Transaction.[12]

29. On December 31, 2021, for good and valuable consideration, the Monitor transferred to Mattamy all of UDPDI's interests in DHI and all rights and obligations under the Agreement, thereby removing UDPDI as a Co-Owner under the Agreement (the "**Transfer Date**").[13]

C. The Arbitration

30. On March 23, 2022, the Monitor, on behalf of UDPDI (for the purposes of the Arbitration, the "**Claimants**"), delivered a Notice of Request to Arbitrate, seeking the payment of unpaid Consulting Fees to UDPI pursuant to the Agreement. In the Notice of Request to Arbitrate, the Monitor sought Consulting Fees relating to Gross Receipts paid in connection with Phase 1 of the Project (which was already complete) and relating to Gross Receipts for Phase 2

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[11] Outline of Position of Mattamy (Downsview) Limited, AR, Tab 2, Exhibit "A", Tab 5, **p. 177**.
[12] Approval and Vesting Order dated December 29, 2021, AR, Tab 2, Exhibit "A", Tab 5, **pp. 171-174**.
[13] Affidavit of David George at **para. 6**, AR, Tab 2, p. 22.

of the Project (which was not yet complete). The Notice of Request to Arbitrate acknowledged that those Gross Receipts for Phase 2 had not yet been received:

> [9] Phase 2 of the Project is almost complete with Gross Receipts for Phase 2 **expected** to total $305,858,775 in accordance with Mattamy's calculation […]. [emphasis added][14]

31. On April 5, 2022, Mattamy delivered a Statement of Defence, which reiterated its position previously communicated to the Claimants prior to the approval of Transaction and the Transfer Date:

> [4] […] By operation of section 6.15 of the Co-Ownership Agreement, UDPDI, and by extension UTMI, lost any entitlement to be paid consulting fees on Gross Receipts received after the Transfer Date.
>
> [5] Prior to the Transfer Date, if UDPDI had performed its duties and functions under the Co-Ownership Agreement when it was requested to do so (it did not), UTMI would have been entitled to 1.5% of Gross Receipts of the Project—defined in parts as "all revenues received from the sale of residential dwelling units…". UTMI has no entitlement to a percentage of future Gross Receipts *received* after the Transfer Date. The Co-ownership Agreement is explicit: "in the event that [UDPDI] is no longer a Co-Owner, then [UDPDI] shall not carry out these duties and functions and **shall not thereafter be entitled to the Urbancorp Consulting Fee**."
>
> […]
>
> [14] For this provision to have any meaning, it must be interpreted to mean that Gross Receipts received after UDPDI ceases to be a co-owner cannot form the basis for any further consulting fees to be paid to UTMI.[15]

32. The dispute in the Arbitration, as defined in the pleadings, centered on how the provisions in the Agreement relating to the payment of Consulting Fees applied to Gross Receipts received *after* the Transfer Date. There was no dispute between the parties about whether those

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[14] Schedule "A" of the Notice of Request to Arbitrate, AR, Tab 2, Exhibit "D", **p. 109**.
[15] Statement of Defence of Mattamy, AR, Tab 2, Exhibit "E", **pp. 114, 116**.

Gross Receipts had already been received prior to the Transfer Date. It was common ground that they had not been received.

33. The Claimants delivered their written argument on May 27, 2022. Those submissions focused on the timing of when UDPDI's "entitlement" to be paid Consulting Fees arose. The Claimants argued that those fees were payable if such "entitlement" arose prior to the Transfer Date, not that the Gross Receipts had been *received* prior to the Transfer Date. The Claimants distinguished this issue from "the mechanics and timing of when such obligations are to be paid" – two distinct concepts that, the Claimants argued, Mattamy had erroneously conflated.[16]

34. The Claimants stated in their written submissions that "this entitlement was not extinguished upon Downsview ceasing to be a Co-Owner. The fact that the Urbancorp Consulting Fee may have become payable after the Transaction Date does not eliminate DHI's obligation to pay it".[17] It was not the Claimants' position that the Gross Receipts for Phase 2 had *already* been "received" and were therefore payable on that basis.

35. It was uncontested, and agreed, that Phase 2 of the Project was ongoing as at the Transfer Date and at the time of the Arbitration hearing. Most of those units had not closed, or even reached "interim closing". The Gross Receipts figures relied on by the Claimants in the Arbitration were explicitly identified as "projected" amounts.[18]

[16] Written Argument of the Claimants at **paras. 3-4**, AR, Tab 2, Exhibit "A", Tab 8, p. 1.
[17] Written Argument of the Claimants at **para. 4**, AR, Tab 2, Exhibit "A", Tab 8, p. 1.
[18] Supplementary Affidavit of David George at **para. 17,** AR, Tab 2, Exhibit "A", Tab 7, p. 9.

D. The June 3 Hearing

36. At the June 3 hearing of the Arbitration, there was no real dispute about the facts. The parties presented their legal arguments to the Arbitrator based on a common understanding that Gross Receipts for Phase 2 had not yet been received.

37. However, in the course of counsel making their submissions, the Arbitrator raised questions not raised by the parties respecting when Gross Receipts from the sale of residential condominium units were to be considered "received" under the Agreement and pursuant to ASPE accounting principles. Specifically, the Arbitrator asked:

(a) What ASPE accounting principles say regarding the recognition of revenue from 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 Block A and P units, including dates of actual and anticipated closings.[19]

38. Before the Arbitrator raised these new issues at the hearing, there was no dispute between the parties as to when Gross Receipts were to be considered received pursuant to ASPE (nor had the parties otherwise raised ASPE). None of the parties took the position that Gross Receipts for Phase 2 had been considered "received" prior to the Transfer Date. The Claimants did not take that position in any of its materials before the Arbitrator.[20]

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[19] Affidavit of David George at **para. 11**, AR, Tab 2, p. 23; Reply Affidavit of David George sworn December 21, 2022 at **para. 2**, Reply Application Record, Tab 1, p. 6.
[20] Affidavit of David George at **para. 12**, AR, Tab 2, p. 23.

39. There was no evidence in the record respecting the new issues raised by the Arbitrator. The Arbitrator adjourned the hearing and directed the parties to deliver supplementary evidence on the issues he raised for the first time at the hearing.

E. The June 15 Affidavit and the Handbook

40. On June 15, 2022, as directed by the Arbitrator, Mattamy delivered a Further Supplementary Affidavit sworn by Mattamy's affiant, David George, to the Claimants for their review (the "**June 15 Affidavit**").

41. Among other things, the June 15 Affidavit attached relevant portions of ASPE as well as a handbook published by the Real Property Association of Canada 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 to be applied to 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** [emphasis added].[21]

42. The above provision of the Handbook is consistent with the position taken by the parties in the Arbitration: that Gross Receipts from the sale of Phase 2 residential condominium units

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[21] Handbook, AR, Tab 2, Exhibit "H", **p. 239**.

had not been received prior to the Transfer Date as interim closing for Phase 2 had not yet occurred.

43. On June 17, 2022, counsel for the Claimants provided comments on the June 15 Affidavit and suggested deletions necessary to make the June 15 Affidavit an "agreed statement of facts". Counsel for the Claimants did not object to the inclusion of excerpts from the Handbook.[22]

44. Mattamy did not agree with the Claimants' proposed deletions and, on June 22, 2022, counsel for Mattamy provided the Arbitrator with a further update and advised him that the Claimants were objecting to the filing of the June 15 Affidavit. Counsel for Mattamy requested a case conference to "discuss next steps".[23]

45. A case conference with the Arbitrator was scheduled for June 27, 2022.

46. On June 22, 2022, the Arbitrator requested to review the June 15 Affidavit in advance of the case conference. Counsel for Mattamy agreed that it would be appropriate for the Arbitrator to review the affidavit and advised that "[i]f there is a maintained objection to the affidavit being admitted in this arbitration, we will provide a motion record to support the request".[24]

47. On the same day, counsel for the Claimants confirmed that they had no issue with the Arbitrator being provided with a copy of the June 15 Affidavit and proposed to also send the Arbitrator the Claimants' "mark-up" of the affidavit.[25]

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[22] Affidavit of David George at **para. 20**, AR, Tab 2, p. 25.
[23] Affidavit of David George at **para. 23**, AR, Tab 2, pp. 25-26.
[24] Affidavit of David George at **para. 25**, AR, Tab 2, p. 26.
[25] Affidavit of David George at **para. 26**, AR, Tab 2, p. 26.

F. The June 23 Affidavit

48. On June 23, 2022, Mr. George swore a revised Further Supplementary Affidavit accepting some of the Claimants' proposed changes (the "**June 23 Affidavit**"). On the same day, counsel for Mattamy sent a copy of the June 23 Affidavit to the Arbitrator, and counsel for the Claimants sent a copy of their mark-up of the affidavit to the Arbitrator. The Claimants' mark-up allowed for, and did not object to, the inclusion of the Handbook.[26]

49. On June 24, 2022, the Arbitrator wrote to counsel: "I am prepared to rule on what can be adduced by Mattamy. Do either have submissions to make before I do so? I see no point in a formal motion."[27]

50. On the same day, counsel for Mattamy responded:

> Yes, we will have submissions to make. I understood we had the case conference on Monday to discuss next steps about this.
>
> It is important that we have the opportunity to ensure there is evidence/agreement on what was agreed to at the hearing and make submissions. I would respectfully suggest that we leave it to Monday to discuss how that will be done.

51. The Arbitrator responded: "I want this over and not drag on. If there are submissions to be made, I see no reason why they cannot be made on Monday."[28]

52. The case conference was held by Zoom on June 27, 2022.

53. At the case conference, the Arbitrator orally ruled on which portions of the June 23 Affidavit would be allowed into evidence. Among other deletions, the Arbitrator struck any

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[26] Affidavit of David George at **paras. 27-29**, AR, Tab 2, p. 26.
[27] Affidavit of David George at **para. 30**, AR, Tab 2, p. 27.
[28] Affidavit of David George at **paras. 31-33**, AR, Tab 2, p. 27.

reference to the Handbook from the June 23 Affidavit. It is undisputed that the Arbitrator did not provide written reasons for his rulings and disregarded the fact that the Claimants did not object to the inclusion of the Handbook in evidence stating that, despite the consent of the Claimants, he had a “mind of his own”.[29]

54. One June 30, 2022, counsel for Mattamy delivered to the Arbitrator an amended June 23 Affidavit removing the portions struck by the Arbitrator. A blackline comparison was provided as well as brief supplementary submissions respecting the new evidence from both parties that the Arbitrator had allowed into the record.[30]

55. The amended June 23 Affidavit included DHI’s audited financial statements for fiscal year 2020. While the Arbitrator struck portions of the Affidavit describing those audited financial statements, the statements themselves confirm that revenue was not recognised for units sold as part of Phase 2 at the time that they were sold.[31]

G. The Award

56. On July 6, 2022, the Arbitrator released his Award (the “**Award**”). With respect to when Gross Receipts are to be considered received under the Agreement, the Arbitrator held:

> [18] 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.[32]

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[29] Affidavit of David George at **para. 37**, AR, Tab 2, p. 28.
[30] Affidavit of David George at **para. 38**, AR, Tab 2, p. 28.
[31] Further Supplementary Affidavit of David George (Mark-Up Version) at **para. 6**, AR, Tab 2, Exhibit “Y”, p. 479.
[32] Arbitration Award, AR, Tab 2, Exhibit “AA”, **p. 503**.

57. This was the central conclusion of the Award. It was dispositive of the entire dispute. On this basis, the Arbitrator granted UDPDI all of the relief it sought on the Arbitration.

58. This was an unfair result derived from an unfair process. It is undisputed on this Application that if the Claimants had pleaded that Gross Receipts for the sale of Phase 2 were received prior to the Transfer Date, Mattamy would have adopted an entirely different approach to the Arbitration. It would have made different arguments, led different evidence, and conducted cross-examinations differently. Mattamy would have also considered obtaining expert evidence from an accountant specializing in the application of accounting principles to the sale of residential condominium units.[33] Mattamy was provided with no such opportunity.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

59. There are two issues on this Application:

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

(b) Should the Award be set aside pursuant to section 46(1)6 of the *Arbitration Act* for breach of the requirements of procedural fairness?

60. It is respectfully submitted that the answer to both issues is yes.

A. The Award Exceeded the Scope of the Arbitration and the Arbitrator's Jurisdiction

61. An arbitration award is not immune from judicial intervention. The *Arbitration Act, 1991* (the "***Act***") reserves for the Court a critical supervisory role over arbitral proceedings. Pursuant to section 46(1)3 of the *Act*, the Court may set aside an arbitral award if the "award deals with a

[33] Affidavit of David George at **para. 13**, AR, Tab 2, pp. 23-24.

dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement".[34]

62. The standard of review on the question of an arbitrator's jurisdiction under section 46(1)3 is correctness.[35] Simply put, the Court must ask whether any aspect of the arbitration award exceeded the arbitral tribunal's jurisdiction as conferred by the parties.[36] If so, the Court may exercise its jurisdiction to set aside the award.

63. To succeed on an application to set aside an arbitration award pursuant to section 46(1)3, the applicant must establish that either: (1) the award deals with a dispute that the arbitration agreement does not cover; or (2) the award contains a decision on a matter beyond the scope of the agreement.[37] Both criteria are met in this case.

64. It is well-established that a decision-maker's conclusions must be grounded in the pleadings and evidentiary record.[38] In *Labatt Brewing Company Ltd v. NHL Enterprises Canada, L.P.*, where the "central conclusion" of the application judge was not anchored in the pleadings, evidence, or submissions of the parties, the Court of Appeal for Ontario set aside the judgment, finding that it was "procedurally unfair, or contrary to natural justice, for the application judge to reach this conclusion on this record."[39]

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[34] *Arbitration Act, 1991*, S.O. 1991, c. 17, **s. 46(1)3** [*Arbitration Act*].
[35] *Baffinland v. Tower-EBC*, 2022 ONSC 1900 at **para. 32** [*Baffinland*], citing *Smyth v. Perth & Smiths Falls District Hospital*, 2008 ONCA 794 at **para. 17**.
[36] *Baffinland* at **para. 35**.
[37] *Alectra Utilities Corporation v. Solar Power Network Inc.*, 2019 ONCA 254 at **para. 25** [*Alectra*].
[38] *Union Building Corporation of Canada v. Markham Woodmills Development Inc.*, 2018 ONCA 401 at **para. 13**.
[39] *Labatt Brewing Company Ltd v. NHL Enterprises Canada, L.P.*, 2011 ONCA 511 at **para. 5**.

65. The same reasoning applies with equal, if not greater, force to the arbitration context. Unlike a Superior Court judge, a privately appointed arbitrator does not have inherent jurisdiction. Rather, an arbitrator's jurisdiction is derived exclusively from the authority conferred by the parties.[40]

66. An arbitrator cannot exceed the scope of the jurisdiction given to him by an arbitration agreement.[41] In *Cricket Canada v. Bilal Syed*, the Ontario Superior Court of Justice set aside an arbitration award pursuant to section 46(1)3 on the basis that the arbitrator's decision was on a matter beyond the scope of the arbitration agreement. In that case, the arbitrator was only permitted to consider matters relating to "the participation of a Person in a sport program or sport organization".[42] The court concluded that the arbitrator erred by "creating jurisdiction for himself" to dictate the future policies and internal governance requirements of the applicant corporation.[43]

67. More recently, in *Mensula Bancorp Inc. v. Halton Condominium Corporation No. 137*, the arbitrator's jurisdiction was established by a condominium by-law which expressly excluded from its scope disputes that must be resolved in the courts. Justice Vermette found that the arbitrator "crossed the line" between interpretation and amendment of the condominium declaration by correcting errors and inconsistences in the declaration, a matter which was squarely within the jurisdiction of the Superior Court.[44]

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[40] *Cricket Canada v. Bilal Syed*, 2017 ONSC 3301 at **para. 35** [*Cricket Canada*]; *Advanced Explorations Inc. v. Storm Capital Corp.*, 2014 ONSC 3918 at **para. 57**.
[41] *Intact v. Gore*, 2019 ONSC 4508 at **para. 88**.
[42] *Cricket Canada* at **para. 37**.
[43] *Cricket Canada* at **para. 38**.
[44] *Mensula Bancorp Inc. v. Halton Condominium Corporation No. 137*, 2021 ONSC 2575 at **para. 30**.

68. Under section 2.4 of the Arbitration Agreement on this Application, the parties agreed that "the arbitration shall be conducted in accordance with the agreement of the parties".[45] The issues set out in the pleadings, which were provided to the Arbitrator prior to the Arbitration Agreement being executed, reflect the parties' agreement as to the matters in dispute and the bounds of the Arbitrator's jurisdiction.

69. The only issue between the parties with respect to Phase 2 of the Project was whether UDPDI was entitled to the payment of Consulting Fees on Gross Receipts received after the Transfer Date.[46] UDPDI maintained that it was entitled to those fees for the reasons set out in its claim and in its written submissions at the hearing. Mattamy disagreed.

70. Had the parties intended the scope of the Arbitration to include the issue of whether the Gross Receipts for Phase 2 had been received prior to the Transfer Date and/or pursuant to ASPE principles, they could have explicitly included language to that effect in the Arbitration Agreement or the pleadings.[47] The parties did not do that. The Arbitrator therefore had no authority to consider that issue.

71. Nevertheless, the central conclusion of the Arbitrator's Award is on the issue of when Gross Receipts from the sale of residential condominium units are to be considered "received". Before the Arbitrator raised this issue at the hearing, it was never in dispute. The parties had not taken the position in their pleadings or otherwise that the Gross Receipts for Phase 2 had already been received. The Project's audited financial statements reflect this baseline understanding

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[45] Arbitration Agreement, s. 2.4, AR, Tab 2, Exhibit "F", **p. 123**.
[46] Schedule "A" of the Notice of Request to Arbitrate, at **para. 2**; AR, Tab 2, Exhibit "D", p. 108; Statement of Defence at **para. 3**, AR, Tab 2, Exhibit "E", p. 114.
[47] *Smyth v. Perth & Smith Falls District Hospital*, 2007 CarswellOnt 7163 at **para. 9** (Sup. Ct.).

between the parties. So did the Claimants, who admitted in their Notice of Request to Arbitrate that Gross Receipts for Phase 2 had *not* been received.[48] Yet the Arbitrator decided the parties' "dispute" on this very issue. In so doing, the Arbitrator exceeded his jurisdiction and rendered an award that was beyond the scope of this jurisdiction.

72. As explained by the Court of Appeal in *Alectra Utilities Corporation v. Solar Power Network Inc.*, the court may set aside an award for want of jurisdiction even in circumstances where the award is reasonable:

> [26] For example, if an arbitration agreement provides that an arbitrator shall resolve a particular question and the arbitrator does so, the court has no authority to set aside the award on the basis that the arbitrator's jurisdiction is unreasonable or incorrect. **If, however, in the course of resolving the particular question remitted the arbitrator asks and answers an additional second question, the award may be set aside – not because the arbitrator's answer to the second question is unreasonable or incorrect, but because the arbitrator had no authority to reach *any* conclusion on the second question at all** [emphasis added].[49]

73. Respectfully, the Arbitrator in this case went one step further. Not only did the Arbitrator ask and answer a question that had not been referred to him, but he also decided the dispute solely based on his answer to that question. In so doing, the Arbitrator created jurisdiction where none existed. An arbitrator's authority does not extend that far. The Award should be set aside on this basis alone.

B. The Award Breached the Requirements of Procedural Fairness

74. Section 19 of the *Act* provides that the parties to an arbitration shall be treated equally and fairly, and each party shall be given an opportunity to present its case and respond to the

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[48] Schedule "A" of the Notice of Request to Arbitrate at **para. 9**, AR, Tab 2, Exhibit "D", p. 109.
[49] *Alectra* at **para. 26**.

case against it.[50] The obligation of fair and equal treatment is distinct from the requirement that each party be given an opportunity to present its case. The arbitrator must satisfy *both* requirements.[51]

75. An arbitrator's obligation to treat the parties "equally and fairly" incorporates the requirements of natural justice and procedural fairness, and in particular, the right to be heard and the right to an independent and impartial hearing.[52] As the Court explained in *Hercus v. Hercus* in the context of an application to set aside a family arbitration award, the right to be heard demands that the parties know the case they are expected to meet:

> [75] It is settled law that the right to a fair hearing is an independent and unqualified right. Arbitrators must listen fairly to both sides, give parties a fair opportunity to contradict or correct prejudicial statements, not receive evidence from one party behind the back of the other and ensure that the parties know the case they have to meet. […][53]

76. A denial of procedural fairness or natural justice contrary to section 19 amounts to an excess of jurisdiction.[54] A court has the authority to intervene pursuant to section 46(1)6 of the *Act* where a tribunal has exceeded its jurisdiction by making a decision that amounts to a denial of natural justice.[55] Section 46(1)6 empowers the Court to set aside an award on the basis that "[t]he applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator".[56]

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[50] *Arbitration Act*, **s. 19**.
[51] *Lockman v. Rancourt*, 2017 ONSC 2274 at **paras. 22-23**.
[52] *Baffinland* at **para. 77**.
[53] *Hercus v. Hercus*, [2001] O.J. No. 534 at **para. 75** (Sup. Ct.).
[54] *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471 at **para. 43** [*Larocque*].
[55] *Webster v. Wendt*, [2001] O.J. No. 622 at **para. 62** (Sup. Ct.) [*Webster*].
[56] *Arbitration Act*, **s. 46(1)6**.

77. The standard of review under section 46(1)6 is whether the parties have been afforded the requisite level of procedural fairness.[57] Such a determination must be made having regard to the context of the proceeding as a whole.[58] If the court determines that the applicant was denied natural justice or procedural fairness, any resulting award *must* be set aside.[59]

78. In determining whether an applicant was denied a fair hearing because the arbitrator failed to consider relevant evidence, the court must assess the significance of the rejected evidence to the issues under consideration. The Supreme Court of Canada in *Université du Québec à Trois-Rivières v. Larocque* held that an arbitrator's rejection of evidence that is crucial to the fairness of the proceeding constitutes a denial of natural justice.[60] In the context of an application to set aside an arbitration award pursuant to section 46 of the *Act*, the Court in *Webster v. Wendt* applied this principle to conclude that the arbitrator's refusal to admit certain hearsay evidence which was material to the outcome of the case amounted to a denial of natural justice.[61]

79. In reaching that conclusion, the court was guided by section 15(1) of the *Statutory Powers Procedure Act* ("***SPPA***"), which prescribes a lower evidentiary threshold for the admissibility of evidence in a tribunal hearing than in a court proceeding.[62] Section 15 provides tribunals "wide powers concerning the admission of evidence".[63] Section 21 of the *Act*

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[57] *Baffinland* at **para. 80**.
[58] *Nasjjec v. Nuyork*, 2015 ONSC 4978 at **para. 40** [*Nasjjec*].
[59] *Nasjjec* at **para. 41**.
[60] *Larocque* at **para. 47**.
[61] *Webster* at **paras. 67-70**.
[62] *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, **s. 15(1)**.
[63] *Connor Homes v. Director*, 2021 ONSC 3195 at **para. 47** (Div. Ct.), citing *M.R. v. D.E.*, 2016 ONSC 1542 at **para. 21** (Div. Ct.).

specifically provides that section 15 of the *SPPA* applies to arbitrations.[64] An arbitrator therefore has wide latitude in determining the admissibility of evidence generally and is not bound by strict rules of evidence. In civil cases such as this, the rules of evidence may always be relaxed by consent of the parties.[65]

80. In this case, the Arbitrator denied Mattamy the opportunity to file relevant evidence in response to an issue that the Arbitrator himself had raised, to Mattamy's detriment. If the parties had raised the issue of when the Gross Receipts were to be considered "received" prior to the hearing (which they had not), it is uncontroverted that 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. In the context of a hearing that suddenly turned on this issue, evidence as to how and when revenues from the sale of units are to be recognised as Gross Receipts was crucial.

81. The Handbook that Mattamy sought to adduce as supplementary evidence at the hearing was directly responsive to this issue. Section 402.9.5 of the Handbook indicates that 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 sold.[66] It is, and was, undisputed that interim closing had not occurred on Phase 2 prior to the Transfer Date. The Handbook's application of ASPE principles also accords with how those principles were actually applied to Phase 2 in the audited financial statements.[67] Notably, the Claimants consented to the filing of this evidence at the hearing.[68]

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[64] *Arbitration Act*, **s. 21**.
[65] *Industrial Acceptance Corp. Ltd. v. The Queen*, [1953] 2 S.C.R. 273 at **p. 291** [Cartwright J.].
[66] Affidavit of David George at **para. 16**, AR, Tab 2, p. 24.
[67] Further Supplementary Affidavit of David George at **para. 7**, AR, Tab 2, Exhibit "Q", p. 278.
[68] Affidavit of David George at **para. 20**, AR, Tab 2, p. 25.

82. Notwithstanding the lack of any objection from UDPDI to the filing of the Handbook, the Arbitrator unilaterally struck all references to the Handbook from the June 23 Affidavit. No written reasons were provided.[69]

83. The Arbitrator excluded this evidence without the benefit of formal submissions from the parties. Mattamy's multiple requests to have the issue of admissibility determined by way of a formal motion were rejected. Mattamy had advised the Arbitrator in advance of the June 22 case conference that if UDPDI objected to the admissibility of the June 15 Affidavit, Mattamy would provide a motion record in support of its request.[70] On June 24, 2022, the Arbitrator denied Mattamy's request for a formal motion. In response, Mattamy suggested that its request for a motion be discussed at the case conference. The Arbitrator once again denied Mattamy's request solely in the interest of expediency.[71]

84. At the case conference, the Arbitrator summarily determined that portions of the June 23 Affidavit, including all references to the Handbook, would be excluded.[72] As a result, Mattamy was denied the opportunity to present a full case to respond to the issues raised for the first time by the Arbitrator at the hearing.

85. The Arbitrator's refusal to permit Mattamy to file the Handbook as evidence amounts to a denial of natural justice and a breach of procedural fairness. This evidence was not merely beneficial but crucial. The Arbitrator's unilateral decision to exclude evidence which was dispositive to an issue that he himself had created was arbitrary and prejudicial. At a minimum,

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[69] Affidavit of David George at **para. 37**, AR, Tab 2, p. 28.
[70] Email from M. Gottlieb to F. Newbould dated June 22, 2022, AR, Tab 2, Exhibit "O", **p. 268**.
[71] Email from F. Newbould to M. Gottlieb dated June 24, 2022, AR, Tab 2, Exhibit "V", **p. 427**.
[72] Affidavit of David George at **para. 37**, AR, Tab 2, p. 28.

Mattamy should have been given a fulsome opportunity to make formal submissions on the admissibility of this evidence. In these circumstances, judicial intervention is warranted to secure fair and equal treatment for the parties and preserve the integrity of the arbitral process.

PART IV - ORDER REQUESTED

86. The Applicant respectfully requests:

(a) An Order setting aside the Award dated July 6, 2022 and directing a new hearing before a different arbitrator; and

(b) The costs of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of February, 2023.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Baffinland v. Tower-EBC*, 2022 ONSC 1900

2. *Smyth v. Perth & Smiths Falls District Hospital*, 2008 ONCA 794

3. *Alectra Utilities Corporation v. Solar Power Network Inc.*, 2019 ONCA 254

4. *Union Building Corporation of Canada v. Markham Woodmills Development Inc.*, 2018 ONCA 401

5. *Labatt Brewing Company Ltd v. NHL Enterprises Canada, L.P.*, 2011 ONCA 511

6. *Cricket Canada v. Bilal Syed*, 2017 ONSC 3301

7. *Advanced Explorations Inc. v. Storm Capital Corp.*, 2014 ONSC 3918

8. *Intact v. Gore*, 2019 ONSC 4508

9. *Mensula Bancorp Inc. v. Halton Condominium Corporation No. 137*, 2021 ONSC 2575

10. *Smyth v. Perth & Smith Falls District Hospital*, 2007 CarswellOnt 7163 (Sup. Ct.)

11. *Lockman v. Rancourt*, 2017 ONSC 2274

12. *Hercus v. Hercus*, [2001] O.J. No. 534 (Sup. Ct.)

13. *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471

14. *Webster v. Wendt*, [2001] O.J. No. 622 (Sup. Ct.)

15. *Nasjjec v. Nuyork*, 2015 ONSC 4978

16. *Connor Homes v. Director*, 2021 ONSC 3195 (Div. Ct.)

17. *M.R. v. D.E.*, 2016 ONSC 1542 (Div. Ct.)

18. *Industrial Acceptance Corp. Ltd. v. The Queen*, [1953] 2 S.C.R. 273

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Arbitration Act, 1991, S.O. 1991, c. 17

Equality and fairness

19(1) In an arbitration, the parties shall be treated equally and fairly.

Idem

(2) Each party shall be given an opportunity to present a case and to respond to the other parties' cases.

Setting aside award

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

1. A party entered into the arbitration agreement while under a legal incapacity.

2. The arbitration agreement is invalid or has ceased to exist.

3. The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement.

4. The composition of the arbitral tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with that matter, was not in accordance with this Act.

5. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.

6. The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator.

7. The procedures followed in the arbitration did not comply with this Act.

8. An arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias.

9. The award was obtained by fraud.

10. The award is a family arbitration award that is not enforceable under the Family Law Act.

Evidence

21 Sections 14, 15 and 16 (protection of witnesses, evidence at hearings, notice of facts and opinions) of the *Statutory Powers Procedure Act* apply to the arbitration, with necessary modifications.

***Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22**

Evidence

15 (1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

(a) any oral testimony; and

(b) any document or other thing,

relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

MATTAMY (DOWNSVIEW) LIMITED -and- KSV RESTRUCTURING INC.et al.
Applicant Respondents

Court File No. CV-22-00688349-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

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