Court of Appeal File No. COA-23-OM-0172
Court File No. CV-16-11389-00CL
Court File No. CV-22-00688349-00CL

COURT OF APPEAL FOR ONTARIO

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 LISTED IN SCHEDULE "A" HERETO

AND

B E T W E E N:

MATTAMY (DOWNSVIEW) LIMITED

Applicant
(Responding Party)

- 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-36. 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
(Moving Parties)

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

JOINT NOTICE OF MOTION FOR LEAVE TO APPEAL

The court appointed monitor, KSV Restructuring Inc. ("**KSV**" or the "**Monitor**"), and Guy Gissin in his capacity as the Court appointed functionary and foreign representative of Urbancorp Inc. (the "**Foreign Representative**" and together with the Monitor the "**Moving Parties**") will make a motion for leave to appeal to the Court of Appeal for Ontario, pursuant to sections 13 and 14 of the *Companies' Creditors Arrangement Act* (the "**CCAA**"). Subject to any motion for directions, the Court will hear the motion at Osgoode Hall, 130 Queen Street West, Toronto, Ontario M5H 2N5.

PROPOSED METHOD OF HEARING: The motion is to be heard in writing, 36 days after service of the Moving Parties' motion record, factum and transcripts, if any, or on the filing of the Moving Parties' reply factum, if any, whichever is earlier, unless the Court orders an oral hearing.

THE MOTION IS FOR:

1. An order for leave to appeal the Order of Justice Kimmel (the "**Application Judge**") dated May 19, 2023 (the "**Decision**") setting aside the arbitration award of the Honourable Frank J.C. Newbould K.C. (the "**Arbitrator**") dated July 6, 2022 (the "**Award**") pursuant to section 46 of the *Arbitration Act, 1991*; and

2. Such further and other relief as may be requested and this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

A. Overview

3. In hearing a “set aside” application under section 46 of the *Arbitration Act, 1991*, the Application Judge substituted her own views as to the correctness of the Arbitrator’s procedural decision regarding the admissibility of certain evidence. The Application Judge determined that the Arbitrator’s decision to exclude the evidence resulted in procedural unfairness requiring the Award to be set aside, even though she also found that the Arbitrator had determined the question he had been asked to determine.

4. The consequence of the Decision, if left undisturbed, will be that any evidentiary ruling made by an arbitrator will attract a set aside proceeding. The Courts will thus be invited to become second guessers of purely procedural rulings. This would be contrary to the very limited scope of review under section 46 of the *Arbitration Act, 1991* - and the equivalent Model Law provisions in international arbitrations - as previously held by this Court.

5. The proposed appeal would also afford this Court an opportunity to clarify the extent of alleged procedural unfairness required to interfere with an arbitral award. In this case, did the refusal, following a complete hearing by the Arbitrator, to admit a single piece of additional evidence in response to an ancillary question posed by the Arbitrator constitute a breach of procedural fairness that was “sufficiently serious to offend our most basic notions of morality and justice” such that it “cannot be condoned” and, therefore, warrants setting aside the entire Award?

B. Background

6. There is no question that an arbitrator has the authority to determine the procedure and make rulings regarding the admissibility of proposed evidence.

7. During oral argument at the conclusion of a fully briefed commercial arbitration, the Arbitrator challenged certain submissions made by the Responding Party. The Arbitrator adjourned the arbitration to allow the Responding Party to seek to adduce additional evidence.

8. The Arbitrator established the following procedure to allow both parties to be heard on the discreet issue:

(a) the Responding Party filed an affidavit containing the proposed additional evidence;

(b) the Moving Parties were permitted to mark up the Responding Party's affidavit so they could identify the portions of the affidavit to which they objected;

(c) the Responding Party requested a formal motion on admissibility. The Arbitrator concluded that such a step was neither expedient nor necessary. Instead, the Arbitrator convened a case conference to allow the parties to make oral submissions and in respect of which the Responding Party filed written submissions;

(d) This was followed by a hearing to receive oral submissions regarding the admissibility of the proposed evidence, and provide oral reasons in which

the Arbitrator reviewed and decided on the admissibility of the affidavit on a paragraph-by-paragraph basis; and

(e) Finally, on the basis of that decision, the Arbitrator then invited and considered further written submission from the parties on the basis of the established evidentiary record.

9. The procedure that the Arbitrator imposed cannot on any fair interpretation of " procedural fairness" be argued to have offended the principles of natural justice. The Application Judge concluded just that, however.

10. In doing so, she erred in two reviewable ways:

(a) She substituted her own views as to the relevance of the additional evidence in concluding that the Arbitrator's ruling not to admit such evidence resulted in a procedural unfairness; and

(b) She failed to consider, in the context of the arbitration as a whole, whether the breach of procedural fairness was "sufficiently serious to offend our most basic notions of morality and justice" such that it "cannot be condoned" which warranted setting aside the Award. Rather, she held that a breach of procedural fairness *requires* that the court set aside an arbitral award.

11. Stripped to its core, the Decision to set aside the Award is inconsistent with this Court's recent decision in *Tall Ships Development Inc. v. Brockville (City)*, 2022 ONCA 861. There, it was reiterated that "s. 46 of the *Arbitration Act* cannot be used as a broad appeal route to bootstrap substantive arguments attacking an

arbitrator's findings which the parties had agreed would be immune from appeal". [para 95]

12. The appeal is *prima facie* meritorious because:

(a) appellate case law clearly provides that the court should not substitute its own decisions for those of arbitrators;

(b) appellate case law clearly demonstrates that the process used by the Arbitrator in this case to deal with ruling on the admissibility of the additional evidence in question cannot be said to be a breach of procedural fairness rising to the level of a breach of natural justice; and

(c) it is wrong to hold that a breach of procedural fairness *requires* that the court set aside an arbitral award.

13. The appeal will not unduly hinder progress of the action as these CCAA proceedings have been ongoing since 2016, all of the material assets have been monetized and almost all creditors have already been paid out in full. In fact, re-arbitrating the dispute and obtaining a new award will itself take a considerable amount of time.

D. The Motion Below and the Decision

14. Mattamy commenced an Application under Rule 14.05(2) of the *Rules of Civil Procedure* and Section 46 of the *Arbitration Act, 1991* (Court File No. CV-22-00688349-00CL) (the "**Application**") which was transferred to the Commercial List to be heard in the CCAA Proceedings (Court File No. CV-16-11389-00CL) pursuant to an order of the Court dated September 1, 2022.

15. Justice Kimmel heard the Application on March 10, 2023.

16. By way of Endorsement and Order dated May 19, 2023, the Application Judge granted the Application and set aside the Award directing the parties to conduct a new arbitration before a new arbitrator. The sole basis for the Application Judge's holding was that the Arbitrator's ruling not to admit a particular, single piece of additional evidence amounted to procedural unfairness towards Mattamy and a failure of natural justice.

17. Unlike other types of determinations often made by supervising judges in CCAA proceedings, the Decision did not involve an exercise of discretion by the Application Judge in the context of managing an ongoing restructuring process. To the contrary, Justice Kimmel is not the supervising judge of the CCAA Proceedings – in fact, she was overruling the decision of the former supervising judge in the CCAA Proceedings – and the Decision arose from the Application alone and was heard by Justice Kimmel on a one-off basis.

D. Leave to Appeal Should be Granted

18. Leave to appeal the Decision should be granted in the present case. There is good reason to doubt the correctness of the Decision, the proposed appeal is *prima facie* meritorious and the proposed appeal involves matters of importance to the Monitor, the Foreign Representative, the creditors of the UTMI, and arbitrators and the arbitration bar generally. The appeal will not unduly hinder progress of the action.

19. Rules 37, 61.03.1 and 61.16 of the *Rules of Civil Procedure*.

20. Sections 11, 13 and 14 of the CCAA.

21. Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The materials that were before Justice Kimmel on the Motion below;

2. The Endorsement and Order of Justice Kimmel dated May 19, 2023; and

3. Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

June 9, 2023

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IN THE MATTER of the Bankruptcy of URBANCORP MANAGEMENT INC. et al

Court of Appeal File No.
Court File No.CV-16-11389-00CL

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

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

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

JOINT NOTICE OF MOTION FOR LEAVE TO APPEAL

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