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

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 LISTED IN SCHEDULE "A" HERETO

AND

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

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 COURT APPOINTED FUNCTIONARY AND FOREIGN REPRESENTATIVE OF URBANCORP INC. BY ORDER OF THE DISTRICT COURT IN TEL AVIV-YAFO, ISREAL

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

JOINT RESPONDING FACTUM
OF THE MONITOR AND GUY GISSIN IN HIS CAPACITY AS ISRAELI COURT APPOINTED FUNCTIONARY OFFICER OF URBANCORP INC.

February 28, 2023

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PART I – OVERVIEW

1. Mattamy (Downsview) Limited ("**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 Urbancorp Toronto Management Inc., et al. CCAA proceedings (Court File No. CV-16-11389-00CL) pursuant to an order of this Court dated September 1, 2022.

2. In its Application, Mattamy seeks an order setting aside the 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*. More particularly, Mattamy brings this Application under subsections 46 (1) 3 and 6 of the *Arbitration Act, 1991* alleging that the Award deals with matters beyond the scope of the arbitration agreement and/or that it was not treated equally and fairly by the Arbitrator.

3. Bluntly, the Application is an appeal disguised as a motion to set aside when the arbitration was agreed to be final and binding without any right of appeal.

4. Mattamy attempts to achieve its result by wrongly asserting that "[t]he 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." This was not the central issue at all but rather is a repeat of the argument that Mattamy made in the arbitration which was wholly rejected by the Arbitrator.

5. As is clear from the Notice of Request to Arbitrate, the only issue in the arbitration was whether Urbancorp Toronto Management Inc. (“**UTMI**”) was entitled to the Urbancorp Consulting Fee (as defined in the Co-Ownership Agreement) and, if so, the quantum in accordance with the Co-Ownership Agreement. This is strictly a matter of contractual interpretation and is exactly what the Arbitrator decided.

6. Mattamy complains that during the arbitration the Arbitrator raised and ultimately decided a “new issue” regarding when Gross Receipts (as defined in the Co-Ownership Agreement) are received based on accounting principles and that Mattamy was then denied the ability to adduce relevant evidence in response.

7. This complaint is unfounded and, even if accepted, is also of no consequence because it had no bearing on the Arbitrator’s decision on the issue actually presented for arbitration.

8. The Ontario Court of Appeal (“**Court of Appeal**”) has recently held in *Mensula Bancorp Inc. v. Halton Condominium Corporation,* 137 (2022) ONCA 769, at para 5:

> Section 46(1)3 of the Arbitration Act, 1991 provides a narrow basis upon which a court may interfere with an arbitration award. It does not create a right of appeal, nor contemplate a review of the correctness or reasonableness of the arbitrator’s decision. It requires that the court not interfere with the arbitrator’s award as long as the issue decided was properly before the arbitrator.

9. Further, as the Court of Appeal held in *Alectra Utilities Corporation v. Solar Power Network Inc.,* (2019) ONCA 254, once the court finds that the arbitrator acted within the authority conferred on him by the arbitration agreement, his task was at an end. It was for the arbitrator, not the court, to interpret the terms of the agreement and “it is of no moment

whether the arbitrator did so reasonably or unreasonably, correctly or incorrectly."[1] The Court of Appeal further held that "[I]n order to succeed on an application to set aside an arbitration award, an applicant must establish either that 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 arbitration agreement."[2]

10. The Award addresses the very issue that was before the Arbitrator pursuant to the arbitration agreement, namely whether UTMI was entitled to be paid the Urbancorp Consulting Fee in accordance with the terms of the Amended and Restated Co-Ownership Agreement entered into on July 30, 2013 between Mattamy, Downsview, Downsview Homes Inc. ("**DHI**"), Downsview Park Homes Inc. and Downsview Park Management Inc. (the "**Co-Ownership Agreement**")[3]. In answering this question, the Arbitrator was required to and did interpret the Co-Ownership Agreement and ultimately concluded that UTMI was entitled to be paid the Urbancorp Consulting Fee.

11. Similarly, resort to relief under section 46(1)6 of the *Arbitration Act, 1991* should also be sparingly applied and only where a party has been treated in an unjust, inequitable or biased manner.

12. Mattamy's fundamental complaint here is that the Arbitrator refused to admit into evidence a portion of an accounting handbook prepared by the Real Property Association of Canada (the "**Handbook**") that Mattamy sought to adduce. The admissibility of the

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1 Alectra Utilities Corporation v. Solar Power Network Inc. ["***Alectra***"], 2019 ONCA 254 at para 41.

2 *Alectra* at para 25.

3 Mattamy's Application Record at Exhibit C, at p. 3.

Handbook was the subject of argument before the Arbitrator, who ruled it was inadmissible. Accordingly, Mattamy was not treated in an unjust, inequitable or biased manner. Rather, Mattamy merely disagrees with the Arbitrator having exercised his discretion not to admit certain proffered evidence.

13. The Arbitrator's decision not to admit evidence is a procedural decision immune from review under the *Arbitration Act, 1991*: *Nasjjec Investments Ltd. v. Nuyork Investments Ltd.*, 2015 ONSC 4978 at para. 130 and *Inforica Inc. v. CGI Information Systems & Management Consultants Inc.*, 2009 ONCA 642 at para. 18.

14. Further, and in any event, the decision to refuse to admit the Handbook had no bearing on the principal and dispositive holding of the Arbitrator and, therefore, could not have resulted in Mattamy being treated unjustly, inequitably or in a biased manner.

15. Accordingly, this Application should be dismissed.

PART II – SUMMARY OF FACTS

A. Background

16. DHI owns land located at 2995 Keele Street in Toronto, Ontario which has been developed into condominiums and other residences (the "**Downsview Project**"). The shares of DHI were owned by Downsview (51%) and Mattamy (49%).[4]

17. Downsview's only material assets were its common shares in DHI and the agreements (the "**Project Agreements**") relating to the Downsview Project (collectively,

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[4] 54th Report of KSV Restructuring Inc. dated November 11, 2022 ("**Monitor's Report**") at para 1 of Section 2.0 (Background) at p. 2.

the "**Downsview Interest**"). In accordance with an approval and vesting order (the "**AVO Order**") issued by this Court on December 29, 2021, the Court approved a sale of the Downsview Interest to Mattamy in full satisfaction of all obligations owing by Downsview to Mattamy (the "**Transaction**"). The Transaction closed in early January 2022 (the "**Transfer Date**").

18. Pursuant to the terms of the AVO Order and the Transaction, UTMI retained its rights, if any, to recover management fees (approximately $5.9 million) under the Project Agreements, without prejudice to Mattamy's position that neither Downsview nor UTMI is entitled to the payment of the Urbancorp Consulting Fee (the "**Management Fees Dispute**").

19. The Monitor, Mattamy and Guy Gissin, in his capacity as the Israeli court appointed Functionary of Urbancorp Inc. (the "**Functionary**") agreed to have the Arbitrator determine the Management Fees Dispute (the "**Arbitration**") because the Co-Ownership Agreement[5] contained an arbitration clause, Mattamy wished to enforce the arbitration clause due to the alleged confidential nature of relevant evidence, and the Arbitrator is a former judge who initially had been seized of these proceedings and therefore had knowledge of the history of these proceedings.

20. This is the second arbitration before the Arbitrator of an issue concerning the Downsview Project in these proceedings. The Arbitration was final, binding and with no right of appeal. The Arbitration proceeded on the basis of affidavits, reports of the Monitor,

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[5] Mattamy's Application Record at Exhibit C, at p. 3.

as well as facta. Oral argument took place on June 3, 2022. Following the oral hearing, additional materials were filed by Mattamy and the Monitor concerning their respective positions, as set out below.

21. On July 6, 2022, the Arbitrator issued the Award granting the Monitor the full amount it claimed as owing to UTMI ($5.9 million) in respect of the unpaid Urbancorp Consulting Fee. Costs were also awarded to the Monitor and the Foreign Representative.

22. The Arbitrator's decision on the Management Fees Dispute can be found right at the beginning of the 23-paragraph Award at paragraphs 6 through 9 as follows (not at paragraph 18 as alleged by Mattamy):

> [6] Mattamy says that it has not been paid its $13,200,822 and that until it has been paid that amount Urbancorp has no right to be paid anything. Urbancorp says that under section 6.6 it has an entitlement, or right, to its Urbancorp Consulting Fee calculated on 1.5% of the Gross Receipts and that the payment of its fee may be deferred until Mattamy has received its $13,200,822 but that payment deferral does not mean that it is not entitled to its fee. I agree with Urbancorp as to the meaning of section 6.6.
>
> [7] Urbancorp's right to the Urbancorp Consulting Fee is clearly stated as an entitlement:
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>> …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 <u>shall be entitled</u> to a consulting fee (the "Urbancorp Consulting Fee"). (emphasis added)
>
> [8] Section 6.6 begins the Co-Owners "shall pay" to Mattamy its Development Management Fee of 4.5% of Gross Receipts. It does not then say that the Urbancorp Consulting Fee is to be paid to Urbancorp, the reason being that that payment is to be deferred until Mattamy has received its $13,200,822. Once Mattamy has been paid its $13,200,822, payments of the Urbancorp Consulting Fee "shall then" be made. It does not say that once Mattamy has received its $13,200,822 only then is Urbancorp entitled to its Urbancorp Consulting Fee.
>
> [9] Describing Urbancorp at that stage as being entitled to the Urbancorp Consulting Fee makes sense. It spells out Urbancorp's right to its fee. Entitlement means having a right.[footnote omitted] I construe section 6.6 as giving Urbancorp

> the right to its Urbancorp Consulting Fee based on 1.5% of Gross Receipts so long as it carries out its duties as described in section 6.6. It is common ground that Urbancorp was never delegated any duties to perform under section 6.15 or otherwise. Thus Urbancorp has a right to its Urbancorp Consulting Fee of 1.5% of Gross Receipts to be paid once Mattamy has first been entitled to be paid its $13,200,822. (emphasis supplied)

23. Most of the remainder of the Award simply sets out the Arbitrator's responses to Mattamy's numerous counterarguments, all of which are rejected. There is no dispute that Mattamy has been or will be paid the $13,200,822 referenced above.

24. As to Mattamy's argument on section 6.15 of the Co-Ownership Agreement which Mattamy says was premised on the understanding that future Gross Receipts for the sale of condominium units in Phase 2 had not been received prior to UDPDI ceasing to be a Co-Owner, the Arbitrator held as follows:

> [11] Mattamy's argument is that the last sentence simply means that once Urbancorp is no longer a Co-Owner, it is not entitled to its Urbancorp Consulting Fee. I do not agree. This section pertains to duties, if any, to be carried out by Urbancorp under section 6 of Schedule E. Once Urbancorp is no longer a Co-Owner it shall not carry out such duties and "thereafter", i.e. after it no longer carries out such duties, it shall not be entitled to its Urbancorp Consulting Fee.
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> [12] This is consistent with section 6.6 of the Co-Ownership Agreement. It provides "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")". Section 6.6 does not say that only so long as Urbancorp is a Co-Owner it is entitled to its Urbancorp Consulting Fee, but only that so long as it carries out its duties it is entitled to its fee. The intent of section 6.15, as I interpret it, is consistent with that in that once Urbancorp no longer carries out its duties as prescribed, its entitlement to its Urbancorp Consulting Fee ends. The fact that Mattamy never requested Urbancorp to carry out any duties is irrelevant. Section 6.15 does not stand alone. It must be read together with section 6.6 and the other provisions of the Co-Ownership Agreement.

25. This holding is predicated in no way on the timing of "the receipt" of Gross Receipts.

26. In light of the foregoing, Mattamy is simply wrong to say that paragraph 18 of the Award was the “central conclusion” and “dispositive of the dispute”. That is plainly not true when one reads the entire Award. The dispute was decided and disposed of well before paragraph 18 and rested in no way on the timing of the receipt of Gross Receipts.

PART III – STATEMENT OF ISSUES

27. The sole issue for consideration before this Court is whether Mattamy has satisfied the statutory threshold for setting aside the Award, as provided under section 46(1) of the *Arbitration Act, 1991*. It has not.

28. Each of the grounds asserted in the Application and why Mattamy fails to meet them are discussed below. Mattamy’s factum only argues the application of paragraphs 3 and 6 of section 46(1).

PART IV – LAW AND ARGUMENT

A. The Award deals with a dispute that was within the scope of the Arbitration and the Arbitrator’s jurisdiction.

29. Paragraph 3 of section 46(1) of the *Arbitration Act, 1991* empowers the court to set aside an award when such 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.

30. Mattamy argues that the Arbitrator raised and decided “new issues” respecting when Gross Receipts from the sale of residential condominium units are to be considered “received” under the Co-Ownership Agreement and that in doing so the Award contains a decision on a matter that is beyond the scope of the arbitration agreement.

31. The Arbitrator's response and conclusions concerning an argument made and pled by Mattamy in the arbitration does not answer a separate question unrelated to the matter in dispute. To the contrary, the Arbitrator determined that this issue was in any event irrelevant to his fundamental determination as to the appropriate interpretation of the Co-Ownership Agreement regarding whether UTMI was entitled to be paid the Urbancorp Consulting Fee.

32. Jurisprudence on section 46(1) of the *Arbitration Act, 1991* holds that the "proper approach" in determining whether an arbitration award goes beyond the scope of a tribunal's jurisdiction involves three questions: (i) what was the issue that the arbitral tribunal decided; (ii) was that issue within the submission to arbitration; and (iii) is there anything in the arbitration agreement, properly interpreted, that precluded the tribunal from making the award?[6]

(i) What was the issue that the arbitral tribunal decided?

33. As noted above, the issue of whether UTMI is entitled to be paid the Urbancorp Consulting Fee was specifically contemplated in the AVO Order and Transaction. It is uncontested that the Management Fees Dispute is framed by the Monitor's Notice of Request to Arbitrate[7] as well as Mattamy's Statement of Defence[8]. As is plainly evident from the Notice of Request to Arbitrate, the central issue in the Arbitration was whether UTMI was entitled to be paid the Urbancorp Consulting Fee and, if so, the quantum in

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6 *Mexico v. Cargill Incorporated*, 2011 ONCA 622 at para 52.

7 Mattamy's Application Record at Exhibit D, at p. 104.

8 Mattamy's Application Record at Exhibit E, at p. 112.

accordance with the Co-Ownership Agreement. These are the very issues that the Arbitrator decided.

34. As noted above, the Arbitrator's decision on the Management Fees Dispute can be found at paragraphs 6 through 9 of the Award.

(ii) Was that issue within the submission to arbitration?

35. As outlined above, the central issue in the arbitration was whether UTMI was entitled to the Urbancorp Consulting Fee and, if so, the quantum in accordance with the Co-Ownership Agreement.

36. The issue and determination of when Gross Receipts are to be considered "received" under the Co-Ownership Agreement was a subsequent response to one of the counterarguments made by Mattamy, as is evident from the Award itself.

37. The issues of "actual received Gross Receipts" and the "total amount of Gross Receipts" clearly formed part of the Management Fees Dispute given the relevant provisions in the Co-Ownership Agreement and Mattamy's arguments concerning their interpretation. In particular, Mattamy's Statement of Defence includes the following pleadings:

(a) UTMI would have been entitled to 1.5% of Gross Receipts of the Project – defined in part as "all revenues received from the sale of residential dwelling units …" [emphasis in original][9];

9 Mattamy's Application Record at Exhibit E, at para 5 on p. 114.

(b) UTMI has no entitlement to a percentage of future Gross Receipts *received* after the Transfer Date. [emphasis in original][10];

(c) Mattamy has been paid over $13.2 million in development management fees, which are paid from *received* Gross Receipts [emphasis in original][11];

(d) For this provision [Section 6.15 of the Co-Ownership Agreement] to have any meaning, it must be interpreted to mean that Gross Receipts received after UDPDI ceases to be a co-owner … [emphasis added]; and

(e) Section 6.6 [of the Co-Ownership Agreement] calculates the relevant management and consulting fees based on actual received Gross Receipts[12]. [emphasis added]

38. The proper interpretation of Section 6.6 of the Co-Ownership Agreement, the definition of Gross Receipts, and whether or not UTMI's entitlement to the Urbancorp Consulting Fee was at all dependent on when Gross Receipts "were received" were all known and pleaded elements of the Management Fees Dispute.

39. 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 (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

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10 Mattamy's Application Record at Exhibit E, at para 5 on p. 114.

11 Mattamy's Application Record at Exhibit E, at para 6 on p. 115.

12 Mattamy's Application Record at Exhibit E, at para 17 on p. 117.

> 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 Agreement), other than residential dwelling units, if applicable.

40. Mattamy alleges that the issue of when ASPE deems receipts from the sale of a condominium unit to have been received was a "new issue" raised for the first time by the Arbitrator at the hearing. The definition of Gross Receipts clearly refers to ASPE, so the relevance of ASPE in interpreting the definition of Gross Receipts cannot be a "new issue" as alleged in the affidavit of David George sworn on October 3, 2022 (the "**October Affidavit**") as part of the Application.

41. As is clear from the foregoing, the issues decided by the Arbitrator were all well within the submission to arbitration.

<u>(iii) Is there anything in the arbitration agreement, properly interpreted, that precluded the tribunal from making the award?</u>

42. As regards the third prong of the test, the arbitration clause set out in section 12 of the Co-Ownership Agreement specifically provides that "*any dispute between the parties hereto arising under or by virtue of this Agreement (including a dispute whether a matter is arbitrable) shall be resolved by arbitration*" with no preclusions or exclusions.

43. In addition, there is nothing in the arbitration agreement, properly interpreted, that precluded the Arbitrator from making the Award and responding to Mattamy's counterarguments. The arbitration agreement appoints the Arbitrator to serve as sole arbitrator of the "dispute" which itself was framed by the Monitor's Notice of Request to Arbitrate as well as Mattamy's Statement of Defence. The arbitration agreement also

provides that the Arbitrator will have all of the powers of a Superior Court Judge under the Ontario *Courts of Justice Act, 1990*.

44. Notwithstanding the foregoing, even if it is concluded that the Arbitrator's determination of when Gross Receipts are to be considered received under the Co-Ownership Agreement is somehow outside the agreed scope of the arbitration, that cannot be grounds to set aside the Award because that determination in and of itself had no bearing on the Arbitrator's decision on the Management Fees Dispute.

45. The Award rests in no way on whether or not the Gross Receipts for the sale of Phase 2 units had been received prior to the Transfer Date as eluded to in the October Affidavit.

46. The Arbitrator also clearly addressed Mattamy's argument that Gross Receipts had not been "received" prior to the Transfer Date at paragraphs 13 and 14 and then 21 and 22 of the Award:

> [13] Mattamy also contends that as Gross Receipts had not been paid to Mattamy up to the Development Management Fee threshold of $13,200,822 at the time of the Transfer Date, Urbancorp was not entitled at the Transfer Date to its Urbancorp Consulting Fee. This is because it says that Gross Receipts means amount paid, and Mattamy has not been paid $13,200,822.
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> [14] This argument is contrary to my finding of the meaning of section 6.6 of the Co-Ownership Agreement. Further, I do not read the definition of Gross Receipts to mean cash revenues paid. [emphasis added]
>
> [21] … As I have held, it was not necessary at the Transfer Date that Mattamy had been paid its Development Management Fee of $13,200,822 for Urbancorp to be entitled to its Urbancorp Consulting Fee.
>
> [22] … Urbancorp says the amount to be paid should await knowing what the total amount of Gross Receipts will be at the end of the project, and that so long as the Gross Receipts on completion is in excess of the $13,200,822 to be paid to Mattamy, the Urbancorp Consulting Fee must be paid at that time. I agree, and if Mattamy is paid its $13,200,822 before final completion, Urbancorp is entitled

to be paid its Urbancorp Consulting Fee at the same time afterwards as any further Development Management Fee beyond $13,200,822 is paid to Mattamy.

47. The fact that the principal holding in the Award is further bolstered by the Arbitrator's interpretation of Gross Receipts and the provisions of ASPE as they relate thereto is of no moment to the fundamental and governing determination made at paragraph 6 of the Award, namely the proper interpretation of Co-Ownership Agreement.

48. There is simply no basis to set aside the Award given the foregoing.

B. Mattamy was treated equally and fairly and given an opportunity to file additional materials related to questions asked by the Arbitrator.

49. When assessing the level of procedural fairness, courts examine various factors including sufficiency of opportunity granted to parties' counsel to present their case and thoroughness of the procedure engaged by the parties.[13]

50. Mattamy alleges that during the arbitration hearing the Arbitrator requested that he be provided with the provisions of ASPE pertaining to the recognition of revenue for the sale of condominium units, as well as the financial statements for the Project and details of how many units had closed as at the date of the hearing. The Monitor alleges that Mattamy offered to provide such evidence in response to certain questions posed by the Arbitrator.

51. In any event, it was anticipated at the time that such evidence would be uncontroversial.

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[13] *Baffinland v. Tower-EBC*, 2022 ONSC 1900, at paras. 84, 89.

52. However, the parties could not agree on the content of Mattamy's proposed supplementary affidavit and the Monitor and the Foreign Representative objected to any further submissions being made by Mattamy without the benefit of any reply. As a result, a case conference by zoom was held by the Arbitrator on June 27, 2022 to rule on the admissibility of the further supplementary affidavit of David George.

53. The Arbitrator was provided with a draft of the proposed supplementary affidavit of David George (containing all of the evidence Mattamy wished to adduce) and the Monitor's mark-up of it. Mattamy also filed an Aide Memoire.

54. At the case conference, the Arbitrator heard submissions from each counsel on each paragraph of the draft Affidavit, and asked questions. The Arbitrator then ruled on what was admissible on a paragraph-by-paragraph basis, providing oral reasons for each paragraph. Mattamy did not object to this process. No party requested written reasons from the Arbitrator in respect of his determinations of admissibility.

55. On June 30, 2022, Mattamy submitted a mark up of the supplementary affidavit of David George reflecting the Arbitrator's rulings together with written supplementary submissions. The supplementary affidavit of David George contained the financial statements and details of how many units had closed as of the date of the hearing. The parties had agreed on the applicable provisions of ASPE, which were identified for the Arbitrator. The Monitor then submitted responding supplementary submissions.

56. Given the foregoing, it cannot be said that Mattamy was not treated equally and fairly and not given an opportunity to file additional materials related to questions asked by the Arbitrator.

C. Mattamy was granted sufficient opportunity to file evidence relevant to the Arbitrator's questions.

57. As noted above, one of the considerations that courts take into account while assessing the level of procedural fairness is the sufficiency of opportunity granted to the parties' counsel to present their case.

58. Given the same facts as outlined above, it cannot be said that Mattamy was not granted sufficient opportunity to file evidence relevant to the Arbitrator's questions. The Arbitrator was entitled to rule on the admissibility of any evidence proffered.

59. To the extent that Mattamy's complaint rests on the Arbitrator not admitting certain evidence on revenue recognition that Mattamy believed critical, the Award reflects that ASPE revenue recognition principles are, in any event, irrelevant to the Arbitrator's principal holding. As the Arbitrator found, UTMI's entitlement to the Urbancorp Consulting Fee: (a) is governed by Section 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).

60. 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. In the case at bar, the Arbitrator determined that the proposed admission of the Handbook was of no value to him in his interpretation of the Co-Ownership Agreement and accordingly did not admit it.

61. Procedural decisions are immune from review under the *Arbitration Act, 1991*:

> In my view, the Arbitrator's decision not to admit fresh evidence is a procedural decision. As such, it is immune from review under the Act.

Nasjjec Investments Ltd. v. Nuyork Investments Ltd., 2015 ONSC 4978 at para. 130.

> A significant feature of the modern approach limiting access to the courts to review decisions of arbitrators is that there are no appeals from procedural or interlocutory orders.

Inforica Inc. v. CGI Information Systems & Management Consultants Inc., 2009 ONCA 642 at para. 18.

62. Furthermore, an entirely discretionary decision is entitled to deference and should not be interfered with.

D. The procedures followed in the Arbitration complied with the Arbitration Act.

63. There is no evidence that Mattamy was denied the opportunity to seek to present any evidence that it wanted to present before the Arbitrator. There is also no evidence that Mattamy did not have a full and fair opportunity to challenge the case put forward by the Monitor.

64. The arbitration agreement provided the Arbitrator with all of the powers of a Superior Court Judge. The Arbitrator had the jurisdiction and discretion to admit or refuse

to admit evidence adduced by any party.[14] In this instance, the Arbitrator exercised his discretion in determining which portions of the proposed supplementary affidavit of David George were admissible. That exercise of discretion with respect to the admissibility of evidence is not reviewable under Section 46 absent a denial of due process to seek to adduce that evidence.[15] In this instance, the issue of the admissibility of the Handbook was argued before the Arbitrator, who refused its admission. As set out above, in any event, this issue is irrelevant to his ultimate finding that UTMI was entitled to be paid the Urbancorp Consulting Fee.

E. Mattamy's application is an appeal disguised as a motion to set aside the Award.

65. The court's authority to set aside an award under paragraph 3 of section 46(1) depends on the mandate the arbitration agreement confers on the arbitrator to resolve a particular dispute.[16]

66. The Rule of Arbitration set out under section 12.6(d) of the Co-Ownership Agreement provides that "*the award of the arbitrator(s) shall be in writing and signed by the arbitrator(s) or a majority of them and shall be final and binding upon the Co-Owners and there shall be no appeal from the award and the Co-Owners shall abide by such award and perform the terms and conditions thereof.*"

67. Section 3.1 of the arbitration agreement also states that: "The award of the Arbitrator shall be final and binding and shall be the sole and exclusive remedy between

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14 *Nasjjec Investments Ltd. v. Nuyork Investments Ltd.*, 2015 ONSC 4978 at para 130.

15 *Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières c. Université du Québec à Trois-Rivières,* [1993] 1 S.C.R. 471.

16 *Alectra* at para 25.

the Parties regarding any claims presented to the Arbitrator (the "Award")."

68. The above rule is in line with Section 45 of the Act which makes clear that parties are free to establish or to preclude an appeal to the court on a question of law, fact, or a mixed question of law and fact.

69. In *Alectra*, the Court laid down that Section 46(1)3 is not an appeal route and must not be treated as such.[17] In this case, the Court also recognized that appeals from private arbitration decisions are neither required nor routine.

70. The Monitor and the Functionary submit that Mattamy's Application is a "second kick at the can"[18] disguised as a motion to set aside the Award which should not be allowed in view of its failure to satisfy the grounds provided under Section 46(1) of the Act.

PART V – ORDER REQUESTED

71. In view of Mattamy's failure to establish any deficiencies in the Award which would engage section 46 of the Arbitration Act, 1991, the Monitor and the Functionary respectfully request an order (i) dismissing the application filed by Mattamy; (ii) upholding the Award; and (iii) their respective costs in responding to this Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of February, 2023.

Robin B. Schwill

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17 *Alectra* at para 27.

18 *D Lands Inc. v. KS Victoria and King Inc.*, 2022 ONSC 1029 at para 135.

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Schedule "A"

LIST OF AUTHORITIES

1. *Alectra Utilities Corporation v. Solar Power Network Inc*., (2019) ONCA 254
2. *Baffinland v. Tower-EBC*, 2022 ONSC 1900
3. *D Lands Inc. v. KS Victoria and King Inc., 2022 ONSC 1029*
4. *Inforica Inc. v. CGI Information Systems & Management Consultants Inc.,* 2009 ONCA 642
5. *Mensula Bancorp Inc. v. Halton Condominium Corporation*, 137 (2022) ONCA 769
6. *Mexico v. Cargill Incorporated*, 2011 ONCA 622
7. *Nasjjec Investments Ltd. v. Nuyork Investments Ltd.*, 2015 ONSC 4978
8. *Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières c. Université du Québec à Trois-Rivières,* [1993] 1 S.C.R. 471

Schedule "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

Procedure

20 (1) The arbitral tribunal may determine the procedure to be followed in the arbitration, in accordance with this Act. 1991, c. 17, s. 20 (1).

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. 1991, c.17, s.21.

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.1991, c.17, s.46 (1); 2006, c.1, s.1(7).

Courts of Justice Act, R.S.O. 1990, c. C.43

Superior Court of Justice judges

4(2) A judge of the Superior Court of Justice is, by virtue of his or her office, a judge of the Court of Appeal and has all the jurisdiction, power and authority of a judge of the Court of Appeal.

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

Evidence

15 (1) What is admissible in evidence at a hearing

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.

(2) What is inadmissible in evidence at a hearing

Nothing is admissible in evidence at a hearing,

(a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

(b) that is inadmissible by the statute under which the proceeding arises or any other statute.

(3) Conflicts

Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceeding.

[…]

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
PROCEEDING COMMENCED AT
TORONTO

JOINT RESPONDING FACTUM
OF KSV RESTRUCTURING INC.,
IN ITS CAPACITY AS MONITOR AND GUY GISSIN IN HIS CAPACITY AS ISRAELI COURT APPOINTED FUNCTIONARY OFFICER OF URBANCORP INC.

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