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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL 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

REPLY FACTUM OF THE APPLICANT, MATTAMY (DOWNSVIEW) LIMITED

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Matthew Gottlieb LSO #32268B
Tel: 416 644 5353
Email: mgottlieb@lolg.ca
Niklas Holmberg LSO #63696G
Tel: 416 645 3787
Email: nholmberg@lolg.ca

and

CASSELS BROCK & BLACKWELL LLP
Barristers & Solicitors
Scotia Plaza, Suite 2100
40 King St West, Toronto, ON M5H 3C2
Jane Dietrich
Tel: 416 860 5223
Email: jdietrich@cassels.com

Lawyers for Mattamy Homes Limited

TO: **DENTONS CANADA LLP**
Barristers and Solicitors
77 King Street West, Suite 400
Toronto-Dominion Centre
Toronto ON M5K 0A1

Kenneth Kraft LSO#: 31919P
kenneth.kraft@dentons.com
Tel: 416 863 4374

Neil Rabinovitch LSO#: 33442F
neil.rabinovitch@dentons.com
Tel: 416 863 4656

Lawyers for the Respondent,
Guy Gissin, the Israeli Court-appointed functionary officer and foreign representative of Urbancorp Inc.

AND TO: **KSV RESTRUCTURING INC.**
150 King Street West
Suite 2308
Toronto, ON M5H 1J9

Bobby Kofman
bkofman@ksvadvisory.com
Tel: 416 932 6228
Noah Goldstein
Email: ngoldstein@ksvadvisory.com
Tel: 416 932 6027

Respondent and Monitor

AND TO: **DAVIES WARD PHILLIPS & VINEBERG LLP**
Barristers and Solicitors
155 Wellington Street West
37th Floor
Toronto ON M5V 3J7

Robin Schwill LSO#: 38452I
rschwill@dwpv.com
Tel: 416 863 5502

Lawyers for KSV Kofman Inc., in its capacity as Monitor

The Arbitrator's Decision to Exclude Material Evidence Is Not Immune from Review

1. The Respondents assert at paragraphs 13 and 61 of their factum that the Arbitrator's decision to exclude the Handbook from evidence, notwithstanding its introduction as evidence was consented to by the Respondents, is "a procedural decision immune from review under the *Arbitration Act, 1991*". This argument is obviously incorrect and procedural rulings made during a hearing are precisely what can give rise to unfairness in a proceeding. Those decisions are not and cannot be immune from this Court's supervision.

2. Contrary to the Respondents' attempt to mischaracterize the nature of this Application, Mattamy does not seek to set aside the Arbitrator's decision to exclude the Handbook from evidence. Instead, Mattamy seeks to set aside the Arbitrator's Award because it was denied procedural fairness contrary to section 19 of the *Act*.

3. The Arbitrator denied Mattamy's right to procedural fairness by excluding material evidence, that was tendered on consent of the Respondents, and then making a finding that was directly contrary to the evidence he had excluded. Section 402.9.5 of the Handbook explicitly stated 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.[1] In stark contrast to this evidence, which would have been unchallenged had it been submitted, the Arbitrator found that the revenue is received "when the units are sold, not when the sale proceeds are actually collected".[2] The Arbitrator made this finding in the absence of any evidence from the Respondents as to when

[1] Affidavit of David George at **para. 16**, AR, Tab 2, p. 24.
[2] Award at **para. 18**, AR, Tab 2, Exhibit AA, p. 503.

Gross Receipts from the sale of residential condominium units were to be considered "received" and contrary to how they were in fact recorded in the audited financial statements for the Project.

4. Further, the Handbook was excluded from evidence without the benefit of formal submissions from the parties, despite Mattamy's request for a motion. The Arbitrator did not provide written reasons for his decision and disregarded the fact that the Respondents had consented to the inclusion of the Handbook in evidence.[3] It is this confluence of factors which ultimately deprived Mattamy of its right to procedural fairness.

5. The Respondents improperly characterize Mattamy's position on this Application as an attempt to interfere with "a discretionary and procedural decision of the arbitrator".[4] The Respondents' attempt to mischaracterize the subject matter of this Application ignores the totality of the circumstances that resulted in a breach of procedural fairness. The case law is clear that a determination of whether a party was denied procedural fairness must be made having regard to the context of the proceeding as a whole.[5]

6. The Respondents seek to have this Court adopt a narrow view of this Application that is contrary to binding Supreme Court authority and would significantly undermine the protections that section 46(1)6 of the *Act* affords to parties in an arbitration. In *Université du Québec à Trois-Rivières v. Larocque*, the Supreme Court of Canada confirmed that an arbitrator's rejection of evidence that is crucial to the fairness of a proceeding constitutes a denial of natural justice.[6] In that case, the respondent terminated the employment of two part-time professional researchers

---

[3] Affidavit of David George at **para. 37**, AR, Tab 2, p. 28.
[4] Respondents' Factum at **para. 60**.
[5] *Nasjjec v. Nuyork*, 2015 ONSC 4978 at **para. 40**.
[6] *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471 at **p. 491** [*Larocque*].

due to "a lack of funds". At the arbitration hearing, the respondent sought to adduce evidence that the lack of funds had been caused by the poor quality of the researchers' work. The arbitrator refused to consider this evidence.

7. The Supreme Court held that the arbitrator's rejection of relevant evidence had such a significant impact on the fairness of the proceeding that it amounted to a breach of natural justice:

> [The arbitrator] found himself in the position of disposing of an extremely important point in the case before him – namely the lack of cause attributable to the employees – without having heard any evidence whatever from the respondent on the point, **and even having expressly refused to hear the evidence which the respondent sought to present on the point. This quite clearly amounts to a breach of natural justice**. [Emphasis added][7]

8. Similarly, in this case, the Arbitrator denied Mattamy the opportunity to establish the very fact upon which the Arbitrator disposed of the Arbitration, namely, when the disputed gross receipts were "received". It is important to note that the Respondents did not take the position that the tendered evidence was either irrelevant or inadmissible – they therefore accepted its relevance.

9. Mattamy was unable to present a full case in response to the issues raised for the first time by the Arbitrator at the hearing. Section 46(1)6 of the *Act* expressly authorizes the Court to intervene in such circumstances to prevent the unfair treatment of parties and to protect the integrity of the arbitral process.

---

[7] *Larocque* at **p. 492**.

10. The Respondents' reliance on the Ontario Court of Appeal's decision in *Inforica Inc. v. CGI Information Systems & Management Consultants Inc.* in support of its argument that the Arbitrator's decision is "immune from review" is misplaced. First, that decision concerned the jurisdiction of an application judge to set aside an arbitrator's order for security for costs. The jurisdictional question turned on whether the order amounted to a ruling on the arbitrator's "jurisdiction to conduct the arbitration" pursuant to section 17(1) of the *Act*. The issue before the Court was *not* whether the arbitrator's order was procedural in nature and therefore not within the jurisdiction of the application judge to review.[8] Second, the arbitrator's order for security for costs was a "Procedural Order" and not an "award" within the meaning of section 46(1).[9] An order for security for costs is "much closer to procedure than to substance".[10] There is no dispute that, in this case, the subject of this Application is the Arbitrator's final award, which was determinative of the parties' substantive rights and obligations in the proceeding.

11. The Respondents' position, if accepted, would effectively give arbitrators *carte blanche* to reject pertinent and necessary evidence purely in the interest of expediency, without regard to the impact of that decision on the fairness of the proceeding. An Arbitrator's discretion does not go that far.

The Procedural Unfairness of the Arbitration Is Sufficient to Set Aside the Award

12. The Respondents state at paragraphs 14 and 44 of their factum that the Arbitrator's decision to exclude the Handbook from evidence "had no bearing on the principal and

---

[8] *Inforica Inc. v. CGI Information Systems and Management Consultants Inc.*, 2009 ONCA 642 at **para. 23** [*Inforica*].
[9] *Inforica* at **para. 29**.
[10] *Inforica* at **para. 24**.

dispositive holding of the Arbitrator" and therefore could not have resulted in a breach of procedural fairness. This argument is simply wrong and without support. If a party to an arbitration is treated unfairly, the remedy is to require a new hearing. It is not to then have the Court determine what the outcome would have been had the party been treated fairly. Unfairness undermines the process and ends the inquiry. Otherwise, the Court is being asked to reconsider the issues, assuming different evidence (and procedures) than what occurred.

13. The Respondents' position is directly contrary to the Supreme Court of Canada's holding in *Larocque*, where the Court rejected the appellant's invitation to assess whether the outcome of the arbitration would have been the same but for the arbitrator's decision to exclude material evidence:

> [T]he rules of natural justice have enshrined certain guarantees regarding procedure, and it is the denial of those procedural guarantees which justifies the courts in intervening. **The application of these rules should thus not depend on speculation as to what the decision on the merits would have been had the rights of the parties not been denied.** I concur in this regard with the view of Le Dain J., who stated in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 661:
>
> > … **the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision**. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.
>
> [Emphasis added][11]

[11] *Larocque* at **p. 493**.

14. The requirements of procedural fairness in an arbitration are mandatory. Section 19 of the *Act* provides that parties *shall* be treated equally and fairly. The degree of procedural fairness to which a party is entitled does not change based on the impact of a breach of procedural fairness on the outcome of the arbitration. By suggesting otherwise, the Respondents are, in effect, seeking to import the higher standards of a section 45 appellate review of the merits into an application to set aside an arbitral award under section 46(1) of the *Act*.

15. The Award should be set aside pursuant to section 46 of the *Act* and a new hearing should be ordered before a different arbitrator, or panel of arbitrators, on the same record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of March, 2023.

Matthew P. Gottlieb / Niklas Holmberg

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Matthew Gottlieb LSO #32268B
Tel: 416 644 5353
Email: mgottlieb@lolg.ca

Niklas Holmberg LSO #63696G
Tel: 416 645 3787
Email: nholmberg@lolg.ca

and

CASSELS BROCK & BLACKWELL LLP
Barristers & Solicitors
Scotia Plaza, Suite 2100
40 King St West
Toronto, ON M5H 3C2

Jane Dietrich
Tel: 416 860 5223
Email: jdietrich@cassels.com

Lawyers for Mattamy (Downsview) Limited

SCHEDULE "A"

LIST OF AUTHORITIES

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

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

3. *Inforica Inc. v. CGI Information Systems and Management Consultants Inc.*, 2009 ONCA 642

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.

MATTAMY (DOWNSVIEW) LIMITED
Applicant

-and-

KSV RESTRUCTURING INC. et al.
Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

REPLY FACTUM OF THE APPLICANT, MATTAMY (DOWNSVIEW) LIMITED

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Matthew P. Gottlieb LSO#: 32268B
mgottlieb@lolg.ca
Tel: 416 644 5353

Niklas Holmberg LSO#: 63696G
nholmberg@lolg.ca
Tel: 416 645 3787

CASSELS BROCK & BLACKWELL LLP
Scotia Plaza, Suite 2100, 40 King St West
Toronto, ON M5H 3C2

Jane Dietrich
Tel: 416 860 5223
Email: jdietrich@cassels.com

Lawyers for the Applicant,
Mattamy (Downsview) Limited