

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
PLACE LAURIER LIMITED) Fred Seller and Eric Dwyer, for the Applicant
)
Applicant)
)
- and -)
)
THE MANUFACTURERS LIFE) Lisa Constantine and Vladimira Ivanov, for
INSURANCE COMPANY) the Respondent
)
Respondent)
)
)
) **HEARD:** April 24, 2025

2025 ONSC 4172 (CanLII)

JENSEN J.

Introduction

[1] The Applicant, Place Laurier Limited (“PLL”), seeks leave to appeal an arbitration award of Arbitrator Sydney Troister, dated March 13, 2024 (“Award”) pursuant to section 45 of the *Arbitration Act*, 1991, S.O. 1991, c. 17.

[2] PLL is the tenant, pursuant to a ground lease (“Ground Lease”), for 170 Laurier Avenue West, Ottawa, Ontario (“Land”). The Respondent, The Manufacturers Life Assurance Company (“Manulife”), is the owner of the Land and lessor under the Ground Lease.

[3] The Ground Lease has a 70-year term that is divided into three rental periods. Upon the completion of the first and second rental periods, the ground rent payable by PLL for the third period is to be based upon the appraised value of the Land. Section 3 of the Ground Lease defines the appraised value as “the fair market value of the said lands exclusive of building or other improvements and as if free and unencumbered.”

[4] The Arbitrator was required to address the following two broad issues: (i) what is the correct interpretation of the Ground Lease, including the interpretation of the Appraisal Conditions

(“Contractual Interpretation Issue”); and (ii) what is the fair market value of the Land (“Appraisal Issue”)?

[5] On the first issue, the Arbitrator applied the principles of contractual interpretation and found that the fair market rent was to be determined as if the land was “vacant, unimproved by any buildings or other improvements and on the basis that the title was free and clear of all encumbrances” including the Ground Lease. PLL has not appealed the Arbitrator’s determination of the Contractual Interpretation Issue.

[6] On the second issue, the Arbitrator determined that the fair market value of the Land was \$12,500,000.00. It is the Arbitrator’s determination of the fair market value that PLL seeks leave to appeal.

[7] PLL asserts that the Arbitrator made the following two principal errors of law in his determination of the fair market value of the Land: (i) the Arbitrator failed to correctly determine the highest and best use of the Land prior to determining its fair market value; and (ii) the Arbitrator erred in law by determining the fair market value of the Land without regard to the evidence before him and without any explanation or justification.

[8] Manulife’s response is that the two issues raised on appeal are not questions of law; they are at best questions of mixed fact and law. Therefore, leave should not be granted to appeal the Award. If leave is granted, Manulife argues that the Arbitrator made no reviewable legal errors. The Award reflects the Arbitrator's exercise of the very broad discretion jointly conferred to him on all matters raised by PLL in its Application, regardless of whether these issues are errors of law, mixed fact and law, or fact.

[9] For the reasons that follow, I find that the test for leave to appeal has been met on some of the issues raised by the Applicant: the matter is of great importance to the parties and justifies an appeal; and there are extricable questions of law raised in the appeal that will significantly affect the rights of the parties.

[10] However, I find that the Arbitrator correctly answered the legal questions. He identified the appropriate approach to take in determining the highest and best use of the Land and arrived at a fair market value for the Land in a comprehensible manner based on the evidence before him.

Factual Background

[11] Manulife owns the Land and leases the Land to PLL. PLL holds the leasehold interest in the Land and operates a 14-storey office building on the Land that PLL constructed in 1972.

[12] The Land was zoned until 2008 for the office building and other uses of similar size. In 2008, the Land was rezoned permitting substantially higher density usage than the 14-storey office building.

[13] The rent was fixed for the first 30 years of the term and was to be reset after year 30 and again after year 50, based on the then fair market value of the Land.

[14] Section 3 of the Ground Lease provides the terms for the reset of the ground rent payable by PLL to Manulife for the final 20-year rental period, as follows:

AND PROVIDED FURTHER that during the fiftieth year of this Lease the said demised premises are to be again appraised by the parties and the rent hereunder payable for the next ensuing twenty (20) year period adjusted to an annual amount equal to nine and one-half (9 1/2%) per centum of the then appraised value, payable in monthly instalments on the first day of each month, but in no event is the rent to be less than the rent provided for the immediately preceding rental period.

PROVIDED that the said appraised value shall be the fair market value of the said lands exclusive of buildings or other improvements and as if free and unencumbered.

[15] The Ground Lease provides that failing agreement as to the appraised value of the Land, the issue must be arbitrated.

[16] The parties failed to reach an agreement on the appraised value of the Land and entered into an arbitration agreement on April 6, 2023 (“Arbitration Agreement”). The Arbitrator was appointed to determine the appraised value of the Land for the third and final rental period in the Ground Lease, which was April 30, 2022 (“Effective Date”) to April 30, 2024.

[17] The Arbitration Agreement provides that subject to appeal remedies and rights that apply to set aside the Arbitrator’s Award under sections 45 and 46 respectively of the *Arbitration Act*, and subject to the other applicable provisions of the *Arbitration Act*, all awards of the Arbitrator shall be binding upon the parties.

[18] Section 45 of the *Arbitration Act* provides a right of appeal from arbitration awards, but only on questions of law that are of such importance to the arbitration that their appeal is justified and because the questions of law will significantly affect the rights of the parties. Section 46 of the *Arbitration Act* provides for the setting aside of an arbitral award in certain circumstances. Section 46 does not apply to the present case.

The Arbitration and the Award

(a) The Contractual Interpretation Issue

[19] The Contractual Interpretation Issue of the Ground Lease was of central importance in the arbitration. The issue was whether the Land’s fair market value was to be based on its current and historical use as a 14-storey office building, or as a property that could support a 27-storey

apartment building.¹ As the Arbitrator noted, the fair market value of the Land was significantly different depending on the determination of this issue.

[20] At the Arbitration, Manulife took the position that the strict language of the Ground Lease provided that the Land must be valued as if vacant and unencumbered and that it was only the value of the Land that was in issue. Given that in 2022, the year of the lease reset, the development of a 27-storey residential rental apartment was permitted by the zoning change, Manulife argued that the value of the Land should be based on that use.

[21] PLL presented evidence and argued that the parties made a 70-year deal for a 14-storey office building and therefore, the Land could not be valued for any purpose other than that specific use.

[22] The Arbitrator noted that the difference between the two parties' positions on the Contractual Interpretation Issue was crucial since the differential over the remaining 20-year term of the Ground Lease was \$21,853,800.00.

[23] The Arbitrator dedicated 17 pages of his 27-page decision to a careful analysis of the Contractual Interpretation Issue. He concluded that the fair market value was to be determined as if the land was vacant, unimproved by any buildings or other improvements, and on the basis that the title was free and clear of all encumbrances and, in particular, free and clear of the Ground Lease. This part of the Award had significant implications for the determination of the fair market value because it meant that the Land was not restricted to its current use as a 14-storey office building.

(b) The Appraisal Issue

[24] During the second stage of his analysis, the Arbitrator reviewed the evidence and arguments regarding the determination of the fair market value of the Land.

[25] Each party provided an appraisal supporting its position as well as a critique of the other's appraisal report. The Arbitrator noted that Canadian appraisers perform their appraisals pursuant to the Canadian Uniform Standards of Professional Appraisal Practice ("CUSPAP"). This ensures that the appraisals can be fairly compared.

[26] CUSPAP requires appraisers to determine "the highest and best use" of real property. This is a term of art that has a specific meaning within CUSPAP. The highest and best use is defined as

¹ Arbitration Award, at p. 2.

“the reasonably probable use of Real Property, that is physically possible, legally permissible, financially feasible, and maximally productive, and that results in the highest value.”²

[27] The Arbitrator noted that CUSPAP’s mandatory standards require that a stand-alone Market Rent Report conform to the following requirements:

9.5 Highest and Best Use [see 3.32, 8.2.6]

9.5.1 **The Report must contain an opinion as to the Highest and Best Use of the property**, unless an opinion as to Highest and Best Use is not relevant.

9.5.2 If the Purpose of the Assignment is to provide a Market Value, support and rationale for the opinion of Highest and Best Use is required in the Report.

9.5.3 **The analysis of the Highest and Best Use** (as if vacant and as improved) and reasoning in support of the opinion and conclusion **must be**:

9.5.3.i provided with the **depth and level of detail required** in relation to its significance to the Report; and

9.5.3.ii **based on the relevant legal, physical and economic factors**. [see 9.5.4]

9.5.4 Opinions on the Highest and Best Use of a property are required on both:

9.5.5.i the land, as if vacant; and

9.5.5.ii the property, as improved. [Emphasis added.]

[28] Manulife’s appraiser, Mr. Stephen Granleese from the Altus Group, valued the Land, as unencumbered with its highest and best use as a site for a 27-storey apartment building, at \$16,172,000.00.

[29] PLL’s appraiser, Mr. John Comba of Juteau Johnson Comba Inc., valued the Land, as a site for a 14-storey office building, at \$4,670,000.00.

[30] The Arbitrator noted that neither appraiser provided a separate appraisal valuing the property on the basis of the other’s deemed highest and best use. However, both appraisers provided critiques of each other’s appraisals.

² Arbitration Award, at p. 18.

[31] Manulife also submitted a report from Mr. Miguel Tremblay of Fotenn, an urban design and landscape architecture firm, on the relevant planning and regulatory issues (“Fotenn Planning Report”). Fotenn provided an estimate of the gross floor area (“GFA”) for a 27-storey rental building on the Land at 190,258 square feet. This number was used by Mr. Granleese in his assessment of the appraised value of the Land.

[32] Before analysing the evidence, the Arbitrator confirmed with the parties that he was not bound to accept either expert’s opinion of the highest and best use or fair market value of the Land, but that he had discretion to make these determinations as he considered appropriate.

[33] The Arbitrator rejected PLL’s appraisal because it was restricted to valuing the Land only for a 14-storey office building. He stated that PLL’s limitation on the scope of Mr. Comba’s appraisal made reliance on it “problematic” and inconsistent with his finding that the use of the Land for valuation purposes was not limited to a 14-storey office building. As a result, he found he could not rely on any of the comparables provided in Mr. Comba’s report.³ However, the Arbitrator found Mr. Comba’s critique of the Altus Group report helpful in revealing the deficiencies in their report.

[34] The Arbitrator accepted the evidence of Mr. Mark Shabinsky, a principal of PLL, that he was holding a property that he owned instead of developing it because of challenging economic conditions. Mr. Comba also provided evidence that the Land should be purchased as an investment to hold but not develop given the economic climate. On the basis of this evidence, the Arbitrator found it likely that a high-rise development would be bought and held as of the Effective Date.⁴

[35] The Arbitrator was very critical of Manulife’s appraisal, but did not reject it in its entirety. He found that Mr. Granleese minimized the difficult market conditions at the time, did not consider rising interest rates, and failed to conduct a feasibility study. The Arbitrator did note that neither expert conducted a feasibility study but acknowledged that this would seem unnecessary for a buy and hold for later development, as proposed by Mr. Comba.

[36] The Arbitrator did not accept Mr. Granleese’s evidence that the highest and best use of the Land was to commence construction within 10-12 months of closing following permit approval. Rather, he preferred the evidence of Mr. Mark Shabinsky and Mr. Comba that caution was required, given the state of economy, in the development of a high-rise residential building. The

³ Arbitration Award, at pages 21 and 25.

Comparables refer to recently sold properties that are similar to the property being assessed or valued. Comparable properties are used as a reference point to estimate the fair market value of a subject property. Essentially, they provide a benchmark for comparison: Will Kenton, “Comparables: What They Are, How They Work, Examples” (31 March 2024), online:

<<https://www.investopedia.com/terms/c/comparables.asp#:~:text=Even%20the%20best%20comparables%20can,station%20next%20to%20the%20house>>.

⁴ Arbitration Award, at p. 23.

Arbitrator found that this factor was also likely to affect the market value of the Land as of the Effective Date.

[37] The Arbitrator stated that Mr. Granleese's comparables also needed a careful review. He disagreed with Mr. Granleese's upward adjustments to the comparables prices. He reviewed each of the comparables provided by Mr. Granleese and indicated that a downward adjustment was more appropriate for most of them, given the market conditions. The Arbitrator noted that two of Mr. Granleese's comparables had planning approvals and that these would likely fetch the highest values.⁵

[38] In his conclusion, the Arbitrator reiterated his concerns with both appraiser's reports. He then stated:

I find that the fair market value of the Land as free and unencumbered on April 30, 2022 was \$12,500,000.00.

The Issues in the Appeal

[39] To make these reasons easier to follow, I have provided my analysis of the merits of the legal questions for which appeal is granted immediately after my reasons for granting leave. For that reason, I have addressed the standard of review before addressing leave to appeal.

[40] The following issues arise in the present case:

1. What is the standard of review?
2. Should PLL be granted leave to appeal the Award on questions of law?
3. Did the Arbitrator err in law in:
 - a. failing to correctly determine the highest and best use of the Land prior to determining its fair market value; and
 - b. determining the fair market value of the Land without any regard to the evidence before him and without any explanation or justification.
4. If PLL succeeds in its appeal, is it entitled to a declaration that the fair market value of the Land as of the Effective Date should be fixed in accordance with PLL's

⁵ Arbitration Award, at p. 26.

Appraisal (\$4,670,000.00) or, alternatively, that the matter be returned for a new arbitration with a new arbitrator appointed by the Court?

1. The Standard of Review

[41] A review of the case law on the standard of review on appeals from arbitration awards under s. 45(2) of the *Arbitration Act* reveals a growing consensus that the appellate standards of review apply to arbitral awards. In *Continental Casualty Company v. Chubb Insurance Company of Canada*, 2022 ONCA 188, 22 C.C.L.I (6th) 1 (“*Continental Casualty*”), the Court of Appeal for Ontario held that the appellate standards of review applied to the arbitration of a dispute between insurers, which was legislatively mandated by the *Disputes Between Insurers* regulation.⁶

[42] More recently, this court has held that the appellate standards of review apply to contractual appeals from an arbitration award under s. 45(2) of the *Arbitration Act*: *Burwell et al v. Wozniak*, 2024 ONSC 5851, 174 O.R. (3d) 544, at para. 39; *Ontario Minister of Transportation v. Link 427 General Partnership*, 2025 ONSC 2375, (“*Link 427*”) at para. 47; and *1750738 Ontario Inc. c. 6888631 Canada Inc. et al*, 2025 ONCS 3145 (“*1750738 Ontario Inc.*”), at para. 25.

[43] The present case arises from a contractual provision requiring the arbitration of disputes as opposed to a legislative requirement to proceed to arbitration, as was the case in *Continental Casualty*. I find therefore that I am bound by the principle of horizontal *stare decisis* to apply the reasoning of my colleague Rees J., who rendered the most recent case on this point in *1750738 Ontario Inc.*

[44] In *R. v. Sullivan*, the Supreme Court of Canada stated that trial courts should depart from binding decisions issued by a court of coordinate jurisdiction only if one or more of three narrow circumstances apply:

1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;
2. The earlier decision was reached per incuriam (“through carelessness” or “by inadvertence”); or
3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.⁷

⁶ *Continental Casualty*, at para. 46; *Disputes Between Insurers*, O. Reg. 283/95.

⁷ *R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460, at para. 75.

[45] None of the above-noted circumstances apply in the present case and therefore, I find that the appellate standards of review apply to the issues raised in this appeal. As a result, the standard of correctness applies to questions of law.⁸

2. Leave to Appeal is Granted

[46] Section 45(1) of the *Arbitration Act* provides a statutory right of appeal as follows:

45(1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,

(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and

(b) determination of the question of law at issue will significantly affect the rights of the parties.

a. The Appeal Raises Issues of Significant Importance to the Parties

[47] There is no question that the present appeal raises a very important issue for the parties. As the Arbitrator himself recognized, the difference between the appraised values is \$11,502,000, which results in an annual rent differential of \$1,092,690. Over the remaining 20-year term, the amount in dispute is \$21,853,800. PLL points out that the annual rent increase resulting from Manulife's appraisal would constitute a near 600 percent increase from the previous rent PLL had been paying. Therefore, this step of the test for leave to appeal has been met.

b. Only Some Issues Raised Are Properly Questions of Law

[48] I must next determine whether PLL has raised questions of law, bearing in mind that a court must grant leave only when questions of law can be clearly perceived and delineated.⁹ Finding that the questions on appeal are not questions of law wholly disposes of this court's jurisdiction to review them.¹⁰

[49] PLL has broken the two presumed questions of law into sub-questions, which they assert are also questions of law:

⁸ *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8.

⁹ *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688 ("*Teal Cedar*"), at para. 45; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 ("*Sattva*"), at para. 54.

¹⁰ *Teal Cedar*, at para. 42.

1. The Arbitrator erred in not determining the highest and best use because:
 - (a) He failed to apply the correct legal test for determining the highest and best use;
 - (b) He erred in relying on any of Manulife's appraisal;
 - (c) He failed to consider financial feasibility and maximum return; and
 - (d) He erred in relying on the Manulife appraisal which was not CUSPAP compliant and not reliable.
2. The Arbitrator failed to correctly determine fair market value because:
 - (a) He had an insufficient factual basis for his Decision; and
 - (b) There was a lack of discussion or analysis on how he determined fair market value.

[50] PLL argues that in a very similar case, *D. Lands Inc. v. K.S. Victoria and King Inc.*, 2022 ONSC 1029 ("*D. Lands Inc.*"), this court granted leave to appeal an arbitral award on questions of law. As in the present case, Dietrich J. found that if the appeal was granted, the valuation in question could change significantly, making the issue critically important to the parties.

[51] In *D. Lands Inc.*, the Applicant disputed the interpretation of the term "unencumbered" by the majority of the arbitration panel. The Applicant argued that the majority failed to interpret the lease in accordance with the governing principles of contractual interpretation and failed to apply binding authority regarding the interpretation of similarly phrased ground rent renewal clauses.

[52] In contrast, in the present case, PLL does not take issue with the Arbitrator's contractual interpretation of the term "unencumbered" as it is used in the Ground Lease. Rather, PLL argues that the Arbitrator failed to correctly determine the highest and best use of the Land prior to determining its fair market value and incorrectly determined the fair market value of the Land without regard to the evidence before him and without any explanation or justification. Therefore, I find that *D Lands Inc.*, is not applicable on this point.

[53] It has long been recognized that where an appeal is limited to questions of law, it will be rare that the court can extricate a purely legal question, especially in contractual interpretation cases: *Sattva*, at para. 55.

[54] In *Link 427*, Kimmel J. stated the following important principle relating to judicial restraint in appeals from arbitral decisions, at para. 18:

This admonition not to strain to find extricable questions of law on an appeal is equally, if not more, applicable in the appeal of arbitration decisions, where the deference to be afforded to the factual findings of the parties' chosen decision-maker is heightened. Judicial intervention in commercial arbitrations is the exception, not the rule: see *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, 475 DLR (4th) 1, at para. 50. This is also consistent with the principles of finality in commercial arbitration and deference to factual findings: see *Teal Cedar*, at para. 45; *Tall Ships Development Inc. v. Brockville (City)*, 2022 ONCA 861, 476 DLR (4th) 500, at paras. 3 and 16; and *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 SCR 23, at para. 113.

[55] On the challenge of identifying an extricable question of law, Kimmel J. provided the following helpful summary, at para. 19:

Extricable errors of law are about the decision-maker applying the wrong principle, not applying the right principle inappropriately. A legal question is only extricable if it can be considered without regard to the facts: see *Teal Cedar*, at paras. 59-61; *Christie Building Holding Company, Limited v. Shelter Canadian Properties Limited*, 2022 MBKB 239, at paras. 35-36. Once the decision-maker engages in the application of the correct principle, that becomes a question of mixed fact and law, from which there is no right of appeal: see *Sattva*, at paras. 64-67.

[56] Manulife argues that PLL has “dressed up” the Arbitrator’s factual determinations in legal clothing so that they can have another run at the Arbitrator’s decision on the facts. I think this is partly true, but not entirely. While I recognize the importance of judicial restraint in determining whether there are extricable questions of law in a commercial arbitration, it is nevertheless important to consider whether there are issues that may be determined without regard for the facts.

3. The Alleged Errors of Law

Alleged Error #1: Failure to Determine the Highest and Best Use of the Land

[57] In the present case, PLL states that the Arbitrator identified the correct legal principle, but then misapplied it by omitting the analysis of the last two parts of the four-part legal test. PLL characterizes the definition of “highest and best use” set out in section 3.32 of CUSPAP as a legal test. For ease of reference, that definition is the reasonably probable use of Real Property that is (1) physically possible, (2) legally permissible, (3) financially feasible, and (4) maximally productive, and that results in the highest value.

[58] PLL contends that in *Musqueam Indian Band v. Glass*, 2000 SCC 52, [2000] 2 S.C.R. 633 (“*Musqueam Indian Band*”), the Supreme Court of Canada established that the four factors, which are reflected in section 3.32 of CUSPAP, constitute a legal test that must be applied by arbitrators in determining the fair market value. They further contend that in *The Rosseau Group Inc. v. 2528061 Ontario Inc.*, 2023 ONCA 814, 169 O.R. (3d) 192 (“*Rosseau Group*”), the Court of

Appeal for Ontario “echoed this approach”, relying on its previous decision in *Re Farlinger Developments Ltd. and Borough of East York* (1975), 9 O.R. (2d) 553 (C.A.), leave to appeal refused, (1975) 9 L.C.R. 10, to hold that determining the highest and best use of a property requires the appraiser to demonstrate the use to which the property could reasonably and probably be put in the future to maximize its economic return, including by redevelopment.

[59] Manulife argues that neither the Supreme Court of Canada nor the Court of Appeal for Ontario have established that arbitrators are subject to the same requirements as appraisers and that the CUSPAP definition of “highest and best use” is a legal test that applies to arbitrators.

[60] I find however, that the question of *whether* there is a legal test for the highest and best use with which the Arbitrator was required to comply is an extricable question of law that warrants granting leave to appeal. In addition, if there is a legal test, one must ask whether the Arbitrator properly applied the legal test.

[61] Generally speaking, the application of a legal test to the facts is a question of mixed fact and law on which leave would not be granted. However, the failure to properly apply the correct legal test may constitute an error of law where, in the course of applying a legal test, the arbitrator fails to consider a required element of that test, and in effect, deletes that element from the test and thus alters the test.¹¹

[62] PLL alleges that the Arbitrator effectively altered the test by failing to explicitly deal with the third and fourth step of the purported legal test. Those steps require an analysis of financial feasibility and maximum return.¹²

[63] Manulife argues that if there is a legal test, the Arbitrator fulfilled the requirements of the test by analyzing all four components of the test, but this is a factual determination that is not subject to appeal.

[64] I find that the question of whether the Arbitrator implicitly modified the legal test by omitting the last two components of the CUSPAP factors is sufficiently connected to the question of whether there is a legal test, qualifying the matter as an extricable legal issue. Leave is therefore granted on the issue of whether there is a legal test for highest and best use analysis which the Arbitrator was required to apply and whether he implicitly modified the purported legal test for highest and best use by neglecting to consider the last two parts of the test.

[65] Leave is therefore granted to appeal the issues of whether there is the legal test for highest and best use analysis and whether the Arbitrator implicitly modified that test.

¹¹ *Teal Cedar*, at para. 44.

¹² This is the second of PLL’s sub-questions within the overall issue of the requirement to find a highest and best use.

[66] However, I find that sub-issues (b) and (d), which ask whether the Arbitrator erred in relying on parts of Manulife’s appraisal in his determination of the highest and best use, are not questions of law and therefore, leave is not granted on those issues. These issues, which are really one and the same, relate to the Arbitrator’s evaluation of the evidence and the conclusions he drew from that evidence. At best, they are questions of mixed fact and law since they involve the application of the criteria for highest and best use to the evidence.

(i) *Analysis of Whether There is a Legal Test for Highest and Best Use*

[67] PLL argues that the Supreme Court of Canada’s decision in *Musqueam Indian Band* established that a determination of the fair market value of land requires that an assessment of the highest and best use of the land be conducted based on the following four factors: what is (1) legally permissible, (2) physically possible, (3) financially feasible, and (4) maximally productive.¹³ PLL asserts that this is a legal test that the Arbitrator failed to apply.

[68] In *Musqueam Indian Band*, the Supreme Court of Canada heard an appeal on the determination of the “current land value” of reserve lands for purposes of a rent reset. The Supreme Court rendered three different opinions. McLachlin C.J. wrote the dissent for herself and three others. Gonthier J. also wrote for himself and three others. Bastarache J. wrote only for himself, but concurred in the result with Gonthier J., making the latter’s opinion the plurality opinion.

[69] At paragraph 47, Gonthier J. stated that in determining fair market value, appraisers consider the highest and best use of the land that is “legally permissible, physically possible, financially feasible, and maximally productive”, in accordance with professional appraisal practice in Canada. McLachlin C.J. quoted Gonthier J., stating that calculating fair market value requires determining the highest and best use for the land that is “legally permissible, disregarding any restrictions imposed by the lease itself”, at p. 638.

[70] Then, in *Victoria University (Board of Regents) v. G.E. Canada Real*, 2016 ONCA 646, at para. 38, leave to appeal refused, [2016] S.C.C.A. No. 462, the Court of Appeal for Ontario observed that although Gonthier J. and McLachlin C.J. disagreed on the result in *Musqueam Indian Band*, one issue upon which they both agreed was that calculating “fair market value” requires determining the highest and best use for the land that is legally permissible.

[71] It is not clear whether the Court of Appeal meant that not only are appraisers required, pursuant to their professional obligations under CUSPAP, to first determine the highest and best use for the land on the basis of the four factors set out in s. 3.32 of CUSPAP, but that arbitrators and other decision-makers are also required to base their determinations of the highest and best use of the land on the same four factors. It seems clear that the highest and best use must be determined before fair market value can be assessed, but the question is whether the Arbitrator

¹³ *Musqueam Indian Band*, at para. 47.

must do so on the basis of the four CUSPAP factors and on the basis of the appraisal evidence, or if he can rely on other evidence and his own assessment of the use to which the property could reasonably and probably be put in the future to maximize its economic return.

[72] PLL suggests that in *Rosseau Group*, the Court of Appeal for Ontario made it clear that determining market value requires expert appraisal evidence of the highest and best use of the property. However, *Rosseau Group* involved the assessment of market value for the purpose of damages for breach of a purchase agreement for the sale of land, which the court stated, “generally requires appraisal evidence”.¹⁴

[73] The situation in *Rosseau Group* is different from the present case where the parties explicitly agreed that the Arbitrator was not bound to accept either expert’s evidence of the highest and best use or value but that he had discretion to determine the fair market value as he considered appropriate. Although this joint conferral of discretion does not absolve the Arbitrator from the requirement to base his conclusions on the evidence, it does establish that he was not required to base his decision regarding the highest and best use of the Land on the appraiser’s assessment of the highest and best use.

[74] I find that the Arbitrator correctly decided that he was required to make a determination about the highest and best use of the Land before determining fair market value. However, I do not agree with PLL’s assertion that the four components of the CUSPAP definition of “highest and best use” constitute a legal requirement that arbitrators must apply in determining highest and best use.

[75] Nonetheless, as discussed below, the Arbitrator did make findings on all four components of the definition of highest and best use, based on the evidence that was presented to him. Although he found he could not rely upon either expert’s assessment of the highest and best use, there was evidence that permitted him to address the last two components of the definition. Therefore, even if it could be said that the definition of “highest and best use” is a legal test, the Arbitrator correctly concluded that he was required to analyze all four components of the test before he determined the fair market value of the Land.

(ii) Analysis of Whether the Arbitrator Modified the Test for Highest and Best Use

[76] PLL argued that because Mr. Granleese’s appraisal failed to include the required analysis of whether the highest and best use it proposed, either a 27-storey residential building or a commercial office building, was financially feasible and would provide the maximum return, the Arbitrator made findings in the absence of evidence and altered the test for highest and best use.

¹⁴ *Rosseau Group*, at para. 74.

[77] I disagree for the following reasons.

[78] Firstly, although the Arbitrator found the evidence of both Mr. Granleese and Mr. Comba to be deficient with respect to the highest and best use of the Land¹⁵, the rejection of their evidence did not result in an absence of evidence upon which to base a finding on that issue.¹⁶

[79] Manulife's expert planner, Fotenn, provided evidence that the current zoning of the Land based on the 2008 rezoning permitted a 27-storey apartment building or a 23-storey office tower.

[80] Mr. Comba gave evidence that the highest and best use of the Land would be to buy and hold it for later development. This was confirmed by Mr. Mark Shabinsky. The Arbitrator found that this option would likely be the case for both office and residential use, although he noted that both appraisers agreed that the market for office building sites was limited, especially since the work-from-home practice arising from COVID-19.¹⁷ Therefore, the highest and best use would be to buy and hold the Land for future development as a high-rise residential building.

[81] The Arbitrator found that a feasibility study was not needed for a buy and hold option.¹⁸ However, it is also apparent from the Arbitrator's Award that the evidence of market activity provided by Mr. Granleese's comparables and Mr. Shabinsky's evidence of holding his property for future development gave the Arbitrator the evidence of financial feasibility and maximum return that was needed to determine the highest and best use. I agree with Manulife's submission that as an expert in the real estate market, the Arbitrator was entitled to rely on his knowledge that purchasers do not spend money on developments that are not financially feasible.

[82] The issue of the maximum return was addressed in the Arbitrator's analysis of the evidence of comparable properties and his adjustments to the values provided by Mr. Granleese. His assessment of the weight and reliability of this evidence is a question of fact and is not subject to review by this court.

[83] While the Arbitrator may not have clearly articulated his findings on each element of the highest and best use analysis, his findings are readily apparent in his reasons and are based on the evidentiary record. There is no indication that the Arbitrator failed to consider each of the criteria for the highest and best use of the land.

¹⁵ At page 22 of the Award, the Arbitrator held that Mr. Comba's appraisal provided no analysis of highest and best use other than for a 14-storey office building and ignored the potential value as vacant and unimproved with the existing zoning. At page 24 of the Award, the Arbitrator held that Mr. Granleese's appraisal did not have the depth and level of detail required for an analysis of highest and best use.

¹⁶ Arbitration Award, at p. 22.

¹⁷ Arbitration Award, at p. 19, 23.

¹⁸ Arbitration Award, at p. 24.

Alleged Error #2: Determination of the Fair Market Value

[84] PLL argues that the Arbitrator’s determination of fair market value was an error of law because he had an insufficient factual basis for his decision and because there was a lack of discussion or analysis on how he determined the fair market value.

(a) The Sufficiency of the Factual Basis for the Fair Market Value is not an Extrinsic Error of Law

[85] Manulife asserts that the question of whether there was a sufficient factual basis for the Arbitrator’s conclusion with respect to fair market value is clearly a question of fact, not law. The Arbitrator used the evidence of comparables for a high-rise residential building provided by Mr. Granleese, made his own adjustments to Mr. Granleese’s evidence, as he was entitled to do on the basis of the joint conferral of discretion, and arrived at his own conclusion with respect to the value of the Land. This exercise involved the assessment of the evidence and findings of fact, which is beyond this court’s jurisdiction on appeal.

[86] In response, PLL argues that the Court of Appeal for Ontario’s decision in *Municipal Property Assessment Corporation v. Claireville Holdings Limited*, 2024 ONCA 598 (“*Claireville*”), establishes that it is a legal error to accept an appraisal without a feasibility analysis and to use sales evidence of purportedly comparable properties to demonstrate financial feasibility.

[87] I agree with Manulife that *Claireville* does not stand for the proposition that PLL states and is distinguishable on the facts. In that case, the Court of Appeal for Ontario upheld the Divisional Court’s decision in a judicial review application of the Assessment Review Board (“Board”) in an expropriation case under the *Assessment Act*, R.S.O. c. A.31. The Board did not have the same discretion as the Arbitrator in the present case to come up with its own current value.

[88] In *Claireville*, the Board did not accept the evidence of the Municipal Property Assessment Corporation (“MPAC”) because it was methodologically flawed. Unlike the present case, where both parties were required to provide an appraisal of the value of the Land, under the *Assessment Act*, MPAC had the onus of proving its highest and best use on the evidentiary record before the Board. During cross-examination, an MPAC witness conceded that if MPAC’s evidence was not accepted, *Claireville*’s proposed valuation was appropriate. Therefore, the Board accepted *Claireville*’s evidence regarding current use. The Court of Appeal for Ontario noted that MPAC’s alternative submission to use evidence of comparable properties was never made to the Board. Therefore, in the absence of submissions on that issue and a properly developed evidentiary record, the Court of Appeal held that there was no basis for finding that the Board made a legal error by failing to use comparative sales as the basis for arriving at the current value.¹⁹

¹⁹ *Claireville*, at paras. 40-41.

[89] In the present case, the Arbitrator had the jurisdiction to accept all, some or none of the evidence on fair market value presented to him. Section 4.1 of the Arbitration Agreement stipulated that the Arbitrator was not required to adhere to strict compliance with the rules of evidence and was permitted to receive and consider any and all evidence he considered trustworthy and credible. He was permitted to come up with his own assessment of the value of the Land.

[90] I see no extricable error of law in the Arbitrator's assessment of the evidence. He found Mr. Granleese's evidence with respect to the highest and best use to be deficient, but he found that with the appropriate adjustments to the evidence of comparables, he could arrive at his own conclusion with respect to the value of the Land.

[91] PLL may not agree with this approach, but their assertion that it was a legal error for the Arbitrator not to accept Mr. Comba's evidence once he rejected Mr. Granleese's evidence of highest and best use is incorrect. The Arbitrator made a factual finding that Mr. Comba's evidence of comparables could not be used because they were based on the use of the Land for a 14-storey office building only. The Arbitrator was acting well within the scope of his role as fact-finder in doing so; there is no extricable question of law for appeal on this point. Leave to appeal on the evidentiary basis for the Arbitrator's determination of fair market value is therefore denied.

(b) The Sufficiency of Reasons May Constitute an Error of Law

[92] With respect to the sufficiency of reasons, I agree with PLL that the failure to provide sufficient reasons may amount to an error of law. Section 38 of the *Arbitration Act* requires that arbitrators provide reasons for their award. As the court noted at paragraph 39 of *Peters v. D'Antonio*, 2016 ONSC 7141, the failure to provide sufficient reasons also offends common law requirements. Therefore, leave to appeal is granted on the issue of whether the Arbitrator provided sufficient reasons for his conclusion regarding the fair market value of the Land.

(i) Analysis of Whether the Arbitrator Made an Error in Law by Providing Insufficient Reasons

[93] It is trite law that the sufficiency of reasons is not a stand-alone basis for setting aside a decision.²⁰ Reasons need not be comprehensive.²¹ Even brief reasons will be adequate, provided that when read in the context of the evidence and submissions before the Tribunal, the reasons demonstrate that the Tribunal seized and disposed of the substance of the proceeding.²²

²⁰ *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, ("*Labrador Nurses' Union*") at para. 14.

²¹ *Labrador Nurses' Union*, at paras. 16, 18.

²² See *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at paras. 35, 43-44, 51 and 55-56.

[94] In *Zurich Insurance Company v. Personal Insurance Company* (2009), 73 C.C.L.I. (4th) 301 (Ont. S.C.), this court stated at para. 51:

An Arbitrator is not required to refer in his reasons to every piece of evidence put before, or considered, by him. The law requires an arbitrator to provide transparent reasons which enable a reviewing court to understand the reasoning he employed and the material evidence upon which he relied in support of his award.

[95] In this case, I find that the Arbitrator's reasons are not limited to his conclusion that "the fair market value of the Land as free and unencumbered on April 30, 2022 was \$12,500,000.00."²³

[96] When the Arbitrator's reasons are considered as a whole, in the context of the submissions that were made to him, it is apparent that he took Mr. Granleese's unit rate per square foot of GFA for a 27-storey residential building and replaced it with his own unit rate, based on his assessment of the likely value of the comparables.

[97] The Arbitrator quoted Mr. Granleese as follows:

Based on our analysis of the transaction activity and developer/broker discussions, we have concluded that a unit rate of \$85 per square foot of GFA (**190,258 square feet (GFA)**) / \$1,185 per square foot of Site Area (13,649 square feet), is reasonable and appropriate. It is assumed that market conditions will remain unchanged to the effective date. Further to the analysis of the subject property and of the market data outlined in this report, the "prospective" market value of the fee simple interest in the Subject Property located at 170 Laurier Avenue W, Ottawa, ON as at April 30, 2022, subject to the Ordinary Assumptions and Limiting Conditions in Appendix A and the Extraordinary Assumptions in Section 1.4 and the Hypothetical Conditions in Section 1.5 of this report, is:

Market Value Conclusion: \$16,172,000 Sixteen Million One Hundred & Seventy-Two Thousand Dollars

I estimate that an exposure time of 3 to 6 months would have been required prior to the effective date to sell the subject property at its market value estimate. [Emphasis added.]

[98] After "a careful review" of Mr. Granleese's comparables,²⁴ the Arbitrator determined that several of the unit rates had to be adjusted downward to account for Mr. Granleese's overly optimistic view of the market for the development of a high-rise residential on the Effective Date.

²³ Arbitration Award, at p. 27.

²⁴ Arbitration Award, at p. 24.

He noted that two of Mr. Granleese's comparables had planning approvals in place and fetched the highest values, and the two with no site plan approval in place had values per square foot GFA of \$54 and \$77.

[99] The Arbitrator observed that Mr. Granleese did not test the market value or the state of the economy for purchases of land with no planning approvals in place with his contacts in the market. He also noted that Mr. Granleese had no comparables as of the date of his appraisal and the comparable closest to the Land indicated a substantially lower value than that which he applied in his appraisal.

[100] Yet, despite the noted weaknesses in Mr. Granleese's evidence, it is apparent from his reasons that the Arbitrator decided that he had enough evidence and experience to make the appropriate adjustments to the unit rate. In their legal submissions to the Arbitrator, dated February 6, 2024, Manulife stated at paragraph 341 as follows: "[u]sing Fotenn's conservative estimate of GFA at 190,258 ft.², Mr. Granleese concluded that the price per square foot buildable was \$85, resulting in an appraised value of \$16,172,000."

[101] Although the Arbitrator did not show his calculations, one can readily see that he replaced Mr. Granleese's unit rate of \$85 with \$65.70 per square foot of GFA to arrive at an appraised value of \$12,500,000.²⁵

[102] PLL argues that Mr. Granleese's evidence was that the Land had several potential uses, including a wide range of office, commercial, and residential uses, and yet the Arbitrator provided no reasons for finding that the highest and best use of the Land would be to buy and hold it for later development as a 27-storey residential apartment building. However, the bulk of the evidence provided by the experts was for a 14-storey office building or a 27-storey residential apartment building. The only evidence of another use was found in a statement made by Mr. Granleese in a supplementary report. In that report, he opined that if there was a market for office towers, the value would be much higher than that provided by Mr. Comba. Given that the market for office towers at the time was weak, Mr. Granleese could not make use of comparables to value the Land for that use, but instead used the residual method. It is apparent that the Arbitrator chose not to consider that evidence, but as noted above, the Arbitrator was not required to provide his reasons for not considering every piece of evidence provided.

[103] In the context of the parties' submissions and the evidence that was provided, I find that the Arbitrator provided sufficient reasons to justify his conclusion that the value of the Land was \$12,500,000.00.

²⁵ \$12,500,000 divided by 190,258 square feet equals \$65.70 per square foot buildable.

4. The Appropriate Remedy

[104] Given my conclusion that the Arbitrator did not err in law, it is unnecessary for me to address the appropriate remedial approach. However, as is apparent from my reasons, even if I had found an error of law, I would not have accepted PLL's proposal to replace the Arbitrator's conclusion regarding the value of the Land with the value proposed by PLL's appraiser. That evidence was fundamentally flawed because it assumed the highest and best use of the Land was the development of a 14-storey office building. The most practical remedy if an error was found would be to send the matter back to the Arbitrator with directions.

5. Conclusion

[105] The Appeal is dismissed with costs to Manulife. I understand that the Parties have reached an agreement on costs. The order for costs may be included in the draft order to be provided for my review and signature.

Justice K.A. Jensen

Released: July 15, 2025

CITATION: Place Laurier Ltd. v. The Manufacturers life Insurance Company, 2025 ONSC 4172
COURT FILE NO.: CV-24-95349
DATE: 2025/07/15

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

PLACE LAURIER LIMITED

Applicant

-and-

THE MANUFACTURERS LIFE INSURANCE
COMPANY

Respondent

REASONS FOR JUDGMENT

Justice K.A. Jensen

Released: July 15, 2025