IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Galasso v. Chartwell Construction Ltd.,* 2023 BCSC 97

Date: 20230123
Docket: S229533
Registry: Vancouver

Between:

Robert Stephen Galasso and Janjira Saejan

Petitioners

And

Chartwell Construction Ltd., Sharon Pretty, Elaine Guile

Respondents

Before: The Honourable Justice Schultes

Reasons for Judgment

Appearing on behalf of the Petitioners:	R.S. Galasso
Counsel for the Respondents:	R. McGowan J. Cummings
Place and Date of Hearing:	Vancouver, B.C. December 14, 2022
Written Submissions of the Petitioners:	December 21, 2022
Written Submissions of the Respondents:	December 23, 2022
Place and Date of Judgment:	Vancouver, B.C. January 23, 2023

Introduction

[1] On November 30, 2022 Justice Veenstra granted the petitioners, Robert Galasso and Janjira Saejan, an interim stay of the order of possession of their rental unit that had been obtained from the Residential Tenancy Branch by the respondent Chartwell Construction Ltd. The stay was obtained following a without notice application by the petitioners. It was to remain in effect until December 16.

[2] The petitioners are now applying to extend the stay until their application for judicial review of the decision of the adjudicator that led to that order can be heard and decided. The respondents oppose any extension.

[3] Because some of the factual assertions that Mr. Galasso was relying on were not supported by his affidavit on behalf of the petitioners, I gave him the opportunity to file a supplementary affidavit that included them, with an opportunity for the respondents to reply if necessary. As it turned out, Mr. Galasso then filed a further affidavit addressing the respondents' reply affidavits. I have added the additional relevant evidence that the parties provided in that material to the narrative[1].

Background

[4] Many of the facts underlying the decision to be reviewed are not in dispute. There is a history of ill will between the parties that was extensively reviewed in the material. I will refer to it only to the very limited extent that it is relevant to the grounds for extending the stay.

[5] The petitioners rent a unit in a building in Vancouver that is owned by Chartwell. The respondent Sharon Pretty is the building manager and the respondent Eileen Guile is a "field agent" for Chartwell. Roland Pretty, whom I infer is Ms. Pretty's spouse, appears at various points in Mr. Galasso's description of the events as well.

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[1] Since the hearing, the Branch has also filed a Response to Petition, addressing only jurisdictional issues, as well as an affidavit from a policy analyst. The affidavit provides information about how the Branch maintains its records and attaches copies of material that was submitted by the parties in the applications that were before it.

[6] The petitioners' rent for a given month is due on the last day of the previous month. On August 31, 2022, the petitioners did not pay their rent for September to Chartwell. Instead, Mr. Galasso sent the rent cheque to Chartwell's legal counsel, in a letter containing allegations that previous rent payments had been misappropriated or fraudulently dealt with.

[7] On September 1, Chartwell served the petitioners with a notice of late rent. On September 2 Chartwell served the petitioners with a 10 Day Notice to End Tenancy pursuant to the *Residential Tenancy Act* on the basis of the unpaid rent. It served the Notice to End Tenancy by attaching it to the front door of the petitioners' unit.

[8] In his initial affidavit filed in support of the interim stay, Mr. Galasso deposed that:

> 9. On September 2, 2022, we were served with a 10 Day Notice to End Tenancy on the Basis of Unpaid Rent or Utilities (the "10 Day Notice) [.] I found the Notice on my door.

[9] Although he did not specifically indicate the date on which he found the Notice, once could infer from his reference to the date of service that he discovered it on the same day.

[10] Pursuant to s.90(c) of the *Act* a notice that has been attached to a door of the unit is deemed to have been received on the third day after it was attached, "unless earlier received". In this case, that deemed receipt date would have been September 5.

[11] Pursuant to s. 46(5) of the *Act*, if the tenant does not pay the rent or file an application for dispute resolution within five days of having received the Notice, they are deemed to have accepted the end of the tenancy.

[12] On September 10 the petitioners paid their rent by depositing it into Chartwell's bank account.

[13] On September 13, Chartwell applied to the Branch for an order of possession. The means for making that application is known as a Dispute Resolution – Direct Request. Because such a request proceeds on the basis that the tenant has been deemed to accept the end of the tenancy, the tenant is not permitted to make submissions or participate in the hearing, although they are entitled to notice of the application[2].

[14] On September 29, 2022, Chartwell served the petitioners with a Notice of Dispute Resolution in relation to the application, by registered mail. Under the *Act* it was deemed to have been received by them on October 4.

[15] On November 3, the adjudicator ruled that the petitioners had not paid the rent or filed an application for dispute resolution in relation to the Notice to End Tenancy within five days of receiving the Notice, and that they were presumed to have accepted the end of the tenancy. The adjudicator therefore granted the order for possession to Chartwell, which was to be effective two days after service of it on the petitioners.

[16] In reaching that conclusion, the adjudicator proceeded under s. 90(c) and deemed the Notice to End Tenancy to have been received on September 5. The adjudicator's ruling does not contain any reference to the payment of rent by the petitioners on September 10, although the respondents' application was filed after that date.

[17] Chartwell served the petitioners with the order on November 4. There is a dispute about whether they also provided the actual decision at that time, which I will discuss.

[18] The petitioners filed a Request for Review Consideration of the adjudicator's decision on November 7. The material that they filed in support canvassed in detail

[2] I did not fully understand the nature of the application for Dispute Resolution – Direct Request based on the initial application material, so I asked Mr. Galasso to explain in his supplementary affidavit why the petitioners did not participate in the hearing with respect to it. In response, he provided the Notice that he received, which makes it clear that the tenant is not a participant.

the history of the disputes between the parties, and the petitioners' efforts to pay rent through counsel in August.

[19] The Branch sent them a copy of the adjudicator's decision on the same day, by regular mail. The petitioners received it on November 9 or 10.

[20] On November 14, a second adjudicator dismissed the petitioner's application for a review of the November 3 decision. The second adjudicator concluded that any failure by the respondents "to tell the truth" to the original adjudicator, or their practice of depositing rent cheques into different accounts, both of which had been alleged by the petitioners, had not been shown to amount to fraud, which was the applicable threshold for setting the decision aside.

[21] The second adjudicator also found the rent cheque from September 10 (the deposit into Chartwell's account) to be inconsistent with the petitioners' claims that they had provided a cheque on August 31.

[22] The petition was filed on November 30. In its current form, it seeks to set aside only the original November 3 order, not the order dismissing the application to review it.

Potential Grounds for Judicial Review

[23] The petitioners intend to challenge the order of the first adjudicator on the basis that they attempted to pay their rent on August 31, by means of the cheque to Chartwell's counsel. Mr. Galasso says that on the same date, he sent a text message to Ms. Pretty advising her of where he had sent the rent payment.

[24] The petitioners take the position that it is a fundamental principle, as expressed in the Branch's past jurisprudence, that a landlord should never refuse rent, which is what they say occurred here. According to the material they filed on the review application, a rent cheque from earlier in the tenancy relationship that had been sent through counsel ended up being cashed by Chartwell, so they believed that they were able to pay rent in that manner. They were not told after they did so

on August 31 that it was not acceptable, either by Ms. Pretty or anyone else on behalf of Chartwell.

[25] Their next argument is that they actually paid their rent within five days of the deemed service of the Notice to End Tenancy on September 10, so the first adjudicator should not have found that they had accepted the tenancy's end.

[26] Mr. Galasso explains that they made the deposit into Chartwell's account on September 10, after unsuccessful attempts to track down their attempted payment through its counsel, and receiving no response or assistance from Ms. Pretty. He says that he did so according to the time limits provided by the Branch documents "Respondent Instructions for Dispute Resolution" and the "Residential Tenancies Fact Sheet" that explains the dispute resolution process. These documents set out the various dates on which material is deemed to have been received, including the three days if it has been attached to a door, as well as the requirement to dispute a Notice to End Tenancy or pay the rent within five days of receiving it.

[27] The petitioners also emphasize that the nature of the Direct Request process, which precludes any participation by the tenants, prevented them from being able to inform the first adjudicator that they had paid rent within this required period.

[28] As I will discuss, the respondents argue that because the deemed date of receipt of a document under s. 90(c) applies "unless [it has been] earlier received" and there is evidence here that Mr. Galasso actually received it on September 2, the petitioners' five days to file dispute or pay rent ran from September 2, and ended on September 7. Mr. Galasso responds that such a position on actual service is not found anywhere in the Branch material that he reviewed. He also deposes that a Branch information officer told him during a phone call that "it does not matter" whether the document has actually been received – that is, the deeming provision applies once the document has been attached to the door.

[29] A further proposed basis for challenging the first adjudicator's decision is that the petitioners were not provided with all of the notices of rent increase that were

served on them during the tenancy, as the Branch's procedure for invoking the Dispute Resolution Proceeding – Direct Request requires. Instead, they allege that the notice of rent increase submitted by the respondents was fraudulent, and they have attached a copy of what they say was the genuine notice that should have been provided.

[30] Although it applies to the decision of the second adjudicator dismissing their application for a review of the original decision, which is not currently addressed in the petition, the petitioners raised the additional argument that the deadline for filing their application for a review was November 7, but the original adjudicator's decision was only mailed to the petitioners on that day. Consequently, they had to make their submissions in support of a review without knowing the basis of the original decision.

[31] Along the same lines, they say that the second adjudicator incorrectly asserted that they had "received the November 3, 2022 decision and/or order on November 4, 2022", when they had actually received only the order by that date.

[32] There is an incongruous note in the petitioners' material on this point. In their submission for review of the initial order, they referred to the posting of the Notice on September 2 by Ms. Pretty, and added that the positing was "witnessed" by Mr. Pretty. Their submissions indicated that this witnessed positing was "unbeknownst to us at the time", and that they did not find out about it until they received the Notice of Dispute Resolution – Direct Request on October 3. They also wrote that this posting "surreptitiously" had the effect of making their deadline for filing a request for dispute resolution September 7. I was unable to grasp what the significance of the posting having been witnessed by Mr. Pretty was, but the point is that this scenario is potentially at odds with the petitioners' current position that they always understood that they had a deadline of September 10, at least in relation to filing a dispute.

[33] As further potential support for this state of belief on the petitioner's part, the Notice itself, after setting out the actual and deemed receipt timelines, concludes with the following warning, in boldface:

> Note: the date a person receives documents is what is used to calculate the time to respond; the deeming provisions do not give you extra time to respond.

The Respondents' Position

[34] The respondents oppose extending the stay on two bases.

[35] First, Veenstra J.'s order should be discharged because in the course of obtaining it without notice, the petitioners did not make full and frank disclosure of all relevant facts, which is an essential requirement of all such applications.

[36] In particular, they failed to disclose their long-standing contentious relationship with Ms. Pretty; the serious allegations that they made against Chartwell, its legal counsel and Ms. Pretty in their letter to legal counsel; and the fact that they had not paid their rent "in full and on time" in August and September.

[37] Mr. Galasso is also said to have misleadingly deposed that the petitioners did not know why they had received a "Notice of Late Rent" on September 1, when the reason that the respondents would have taken that position was well known to them.

[38] In short, the petitioners are alleged to have omitted the essential context that Veenstra J. needed in order to have an accurate understanding of the situation.

[39] Second, the respondents submit that the stay should not be extended because the judicial review is "bound to fail" on the merits. Specifically, there is nothing "patently unreasonable" about either the original decision or the review, as the standard of review requires.

[40] Their position is that Chartwell's counsel were not its agents for the purposes of rent collection, and that nothing was done by any of the respondents that would have led the petitioners to reasonably believe that counsel were acting in such a capacity, or that it was otherwise permissible to pay their rent in that way.

[41] In support of that position, Ms. Pretty deposes that there is no procedure in place under which Chartwell's tenants are permitted to pay their rent to its counsel, and no permission was ever granted to the petitioners to do so. She also deposes that in February 2021, Mr. Galasso was advised by letter that both the *Act* and his tenancy agreement require the petitioners to pay rent by post-dated cheques, and requested him to do so. The letter was in response to his previous attempt to pay his rent by handing her an envelope of cash.

[42] Ms. Pretty further explains that cheques are to be deposited into a mailbox located in the building lobby, a procedure that all tenants are informed of at the outset of their tenancy. I infer that she meant by this explanation that sets of postdated cheques are to be deposited there. (Mr. Galasso replies that the requirement of post-dated cheques has not been uniformly enforced in the building. As recently as November, Ms. Guile sent him an email asking him to "deposit [his]rent in the mail box for the office as all other residents in the building do"[3].)

[43] Ms. Pretty deposes that Mr. Galasso also did not ask her for permission to pay the petitioners' September rent by direct deposit, and that she did not grant him any such permission. The first she knew of that deposit was when Chartwell informed her of it on September 12.

[44] Crucially from the respondents' perspective, Ms. Pretty also deposes that the respondents disclosed the rent payment that had been received from the petitioners on September 12 in their application for an order of possession by means of the Dispute Resolution – Direct Request procedure.

[45] Oddly, in light of that claim, in the "Direct Request Worksheet" that the petitioner submitted to the Branch, the space for "Amount paid since the 10 Day notice to End Tenancy was issued" has been left blank.

[3] The tenancy agreement, a copy of which was submitted by the respondents as part of the Dispute Resolution-Direct Request, does not assist. It simply provides that "[t]he rent must be paid by a series of post-dated personalized cheques dated the last day of each month…"

[46] The respondents' second argument is that Mr. Galasso's admission in his affidavit that he received actual notice of the Notice to End Tenancy on the day that it was posted on his door, means that they do not need to rely on the provision deeming that notice has been received three days after the posting. They stress that s. 90(c) draws an important distinction between actual and deemed receipt.

[47] On this point, they rely on *Mohawk Oil Co. v. Kingsgate Auto (1974) Ltd.,* (1997) 34 B.C.L.R. (3d) 230 (S.C.). That decision confirmed, in the context of giving notice of the termination of a contract, that where deemed notice following a period after delivery is permitted, evidence that the recipient actually received it at a certain time is obviously sufficient, and notice runs from that actual date. Therefore, the petitioners' five days in which to pay their rent, after having actually received the Notice, ended on September 7, and they did not pay it by then.

[48] With respect to the review decision, the respondents submit that the adjudicator's finding that any incorrect information that may have been presented on the initial application did not amount to fraud is clearly correct. Even if some fault can be found with the information that was provided by the respondents on the initial application, the conclusion that it was not fraudulent cannot be said to be patently unreasonable.

[49] On the petitioners' concern that they had to apply for a review of the first decision before having received that adjudicator's reasons, both Ms. Pretty and Ms. Guile depose that they delivered the actual decision, by posting it on the petitioner's door, on November 4. They say that Mr. Galasso opened the door, removed the decision and began reading while they were still there. (In his reply affidavit, Mr. Galasso has provided a copy of the order, which he maintains is all that was provided at that time.)

Applicable Principles

[50] There is no dispute that the standard of review when considering findings of fact or exercises of discretion by a Branch adjudicator is patent unreasonableness. Section 5.1 of the *Act* applies that standard, as it is expressed in s.58 of the

Administrative Tribunals Act, to decisions made on behalf of the director of the Branch in dispute resolution proceedings (that is, those made by adjudicators), as though the Director were a tribunal.

[51] “Patently unreasonable" means openly, clearly, evidently unreasonable: *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748. In *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23 at para. 18, [2004] 1 S.C.R. 609, Justice Major explained that, " [t]he result must almost border on the absurd." In *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 52, [2003] 1 S.C.R. 247, Justice Iacobucci described it as, "[a] decision that is…so flawed that no amount of curial deference can justify letting it stand." This standard is also met when there is no evidence to support the findings: *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80 at para.37.

[52] In addition to this general standard, section 58(3) of the *ATA* provides specifically that a discretionary decision by a tribunal is patently unreasonable when it:

a) is exercised arbitrarily or in bad faith,
b) is exercised for an improper purpose,
c) is based entirely or predominantly on irrelevant factors, or
d) fails to take statutory requirements into account.

[53] Some of the issues raised by the petitioners go beyond the reasonableness of the decisions themselves. They raise questions about what information was provided to the first adjudicator, and whether the petitioners were given a fair opportunity to address the adjudicator’s decision on their review application. It is therefore also worth noting that s. 58(2)(b) provides that:

> questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly[.]

[54] Finally, an order of a tribunal may be set aside on judicial review if it was obtained by reliance on knowingly false or misleading evidence: *St. John's*

Transportation Commission v. Amalgamated Transit Union, Local 1462, [1998] N.J. No. 35 (S.C.T.D.) at paras. 36-39. Specifically, “a finding of fraud will vitiate an award of an administrative tribunal, on the same principles that apply to a court decision”: *Ndachena v. Nguyen*, 2018 BCSC 1468 at para. 42. Proof that a party knowingly adduced false or misleading evidence is one of the exceptions to the usual rule that the review proceeds only on the record that was before the tribunal: *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263 at para. 25.

[55] The test for upholding the stay here is also not in dispute. The applicant must establish that (1) there is some merit to the judicial review application, (2) that the applicant will suffer irreparable harm if the stay is not granted, and (3) the balance of conveniences favours granting the stay: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311. In the present case, the application of the test comes down to whether there is “some merit” to the judicial review application. There is no issue that the other requirements for granting a stay favour the petitioners – the immediate loss of their residence is not something that can readily be compensated for by damages, and as between the parties the respondents are in a better position to endure the stay application being decided against them.

[56] The threshold for finding “some merit” is a low one. Once the judge is satisfied that the application is neither frivolous nor vexatious (in other words, that there is “a serious question to be tried”) they should proceed to the other parts of the test. This is true even if the judge’s opinion is that the applicant is unlikely to succeed at the hearing on the merits. Further, only a preliminary assessment of the merits of the case should be carried out – a prolonged examination of the merits is neither necessary nor desirable: paras 335, 337-338.

[57] A stay that has been obtained without notice is subject to being set aside if there has not been full and fair disclosure: *LLS America LLC (Trustee of) v. Dill*, 2018 BCCA 86, at para. 39, citing *Gulf Islands Navigation Ltd. v. Seafarers International Union of North American (Canadian District)*, (1959) 18 D.L.R. (2d) 216 (B.C.S.C.), aff'd (1960) 28 W.W.R. 517.

[58] As I have previously summarized, s. 46 of the *Act* provides the relevant timelines following receipt of a Notice to End Tenancy and a deeming provision in the absence of a response:

> Landlord's notice: non-payment of rent
>
> 46 (1)A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.
>
> …
>
> (4) Within 5 days after receiving a notice under this section, the tenant may
>
> (a) pay the overdue rent, in which case the notice has no effect, or
>
> (b) dispute the notice by making an application for dispute resolution.
>
> (5)If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant
>
> (a)is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and
>
> (b)must vacate the rental unit to which the notice relates by that date.

[59] The provision that governed the petitioners' deadline for seeking the review of the original order is also relevant:

> Time limit to apply for review
>
> 80 A party must make an application for review of a decision or order of the director within whichever of the following periods applies:
>
> (a)within 2 days after a copy of the decision or order is received by the party, if the decision or order relates to:
>
> ...
>
> (ii)a notice to end tenancy under section 46 [landlord's notice: non-payment of rent]...

[60] Finally, dealing with deemed receipt of notices, the full applicable text of s. 96(c) of the *Act* provides:

> When documents are considered to have been received
>
> 90 A document given or served in accordance with section 88 [how to give or serve documents generally]… unless earlier received, is deemed to be received as follows:
>
> …

> (c)if given or served by attaching a copy of the document to a door or other place, on the third day after it is attached

Discussion

[61] With respect to the alleged departures from full and frank disclosure, I first of all do not agree with the respondents that the contentious history between the parties, the fact that Mr. Galasso has been involved in previous residential tenancy disputes, and the allegations of misconduct against the respondents and their counsel that were made in his letter to counsel, would have assisted Veenstra J. in applying the test for granting a stay. Such evidence would more likely have served as a distraction from his consideration of the relevant issues, and it was actually beneficial to omit it.

[62] However, the omission of any reference to the petitioners' attempt to pay rent through counsel, when coupled with Mr. Galasso's assertion that he did not know why they had been served with the Notice to End tenancy, were somewhat misleading. Mr. Galasso must have known that his efforts to pay rent through someone other than the building manager were not in accordance with the required procedure, and could well have been refused by Chartwell.

[63] In the absence of any reference to those efforts, Veenstra J. could have been left with the impression that the Notice had come out to the petitioners of the blue, and that the respondent's conduct was completely arbitrary, when the most that could actually be said against them on this point is that they had declined to accept rent that had not been paid directly to them.

[64] I appreciate that the affidavit was likely drafted under some time pressure in relation to the application for a stay, and that Mr. Galasso is self-represented, but the petitioners' previous effort to pay the rent is a fundamental pillar of their argument, and there seems no real justification for failing to mention it.

[65] Despite this concern, I would not exercise my discretion to set the stay aside on the basis of non-disclosure alone. I reach that conclusion because there was other evidence in the present application, which was in essence a hearing *de novo*

on the appropriateness of a stay, that is potentially capable of sustaining the application, even after the misleading effect of the affidavit has been corrected.

[66] The question is then whether there is "some merit" to any of the proposed grounds of the judicial review. Care must be taken not to decide those grounds, and thereby the judicial review itself, in the course of answering that question. The current task is only to assess their merits on a preliminary basis. (I should also make clear, for the petitioners' benefit, that such preliminary assessments will not be binding on the judge who hears the actual judicial review.)

[67] Dealing with the more straightforward matters first, the difference between the notice of rent increase that was apparently submitted to the first adjudicator and the one that the petitioners have produced in this application is troubling on its face. But even assuming that the document that the respondents submitted was not the correct one, or even that it is not genuine, there is no indication that the issue of past rent increases played any part in the adjudicator's decision, which was a fairly mechanical application of s. 46(5)(a) of the *Act*, and so it would not be capable of leading to a remedy on judicial review. In fact, because the notice of rent increase that the respondents did provide was not signed by the landlord, the first adjudicator denied them their additional request for a monetary order for the unpaid rent.

[68] With respect to issues arising from the review decision, section 80 of the *Act* imposes the two-day deadline upon receipt by the tenant of the "decision or order", so any delay in serving the decision itself, which is hotly disputed on the current material, would not have entitled the petitioners to additional time to prepare their submissions (which were very thorough as it was) in any event. The second adjudicator's finding that the "decision and/or order" was received on November 4 was in keeping with this statutory framework, and correct.

[69] It is also important to remember that in their submissions on the review application, the petitioners took the position, inconsistent with their current one, that the witnessing of the posting of the notice by Mr. Pretty had left them with a filing deadline of September 7, so it is difficult to see how having had the actual decision,

which proceeded on the basis of the deemed receipt provision and a deadline of September 10, could have assisted them at that stage.

[70] The argument that the September rent was paid through the respondent's counsel is less straightforward.

[71] I agree with the respondents that there is no evidence of representations by any of the respondents that Chartwell's counsel were acting as its agents for the purposes of rent collection, or evidence that their counsel were under any duty to receive and remit payments. I appreciate that there was evidence submitted for the review application that a previous cheque that had been sent to Chartwell through counsel had been cashed, but in his letter to counsel on August 31 enclosing the cheque, Mr. Galasso pointed out that the one that had been sent through counsel in July had inexplicably gone missing. He suggested that this was a deliberate tactic by Chartwell's "rental agent and resident managers", and that it "demand[ed] complicity" on the part of counsel. This tends to undermine a reasonable belief by him that such a payment would be effective.

[72] On the other hand, despite the inflammatory contents of Mr. Galasso's letter, it did enclose the rent for September, and he deposes that he also informed the respondents of what he had done. As a result, the petitioners are in a position to argue that the respondents, having been contemporaneously informed of the manner in which the rent had been paid, and knowing that the payment was readily accessible to them, deliberately refused to access it and then mis-represented to the Branch that it had not been paid at all, to secure the end of the petitioners' tenancy on a purely technical ground. The petitioners' reasons for seeking to place the rent payment beyond the reach of the on-site respondents in the first place would also form a part of this argument.

[73] I do not suggest that this is an extremely strong basis for review, but I cannot say that it does not have at least some merit. How accurate it was for the respondents to represent to the Branch that the rent had not been "paid", and what inferences can be drawn about their intention when they made that representation,

are properly matters for the reviewing judge. To screen the argument out at this stage would require weighing it against the respondents' position, which is not the correct approach. It is certainly not frivolous or vexatious.

[74] The questions of what deadline applied to the September 10 rent payment, and the effect of the respondents' representations concerning it at the first hearing, are also not straightforward.

[75] I think the respondents' interpretation of s. 90 of the *Act* accords with its plain meaning - that the time limits in the deeming provisions can be displaced by evidence that a notice was actually received at an earlier time. There is no other reason for the words "unless earlier received" to have been included. If Mr. Galasso received contrary advice from a representative of the Branch, as he claims, that would be unfortunate, but it cannot displace the meaning that arises from the provision itself, in its overall context.

[76] That does not end the inquiry however. The adjudicator and the respondents conducted the hearing, and the adjudicator ruled, on the basis of the deemed receipt date of September 5. The respondents did not apply for an order for possession until after the September 10 deadline. There is thus a strong inference available that they were operating under the belief, and sought the order on the basis, that the deadline had expired on that date. In fact, at that point the respondents did not know when the petitioners had actually received the Notice, so there would have been no reason for them to rely on a deadline for payment before September 10.

[77] I am not convinced that the respondents would be allowed on the judicial review to retroactively substitute an earlier date to support the reasonableness of the adjudicator's order, based on a fact that was not known to them or the adjudicator at the time that the hearing was held, or the decision was rendered. There is a tenable argument that the date of receipt of notice, whether deemed or actual, is based on the record before the decision-maker.

[78] More significantly, Ms. Pretty deposes that the respondents sought the Direct Request hearing knowing that the rent had been paid by then, and informed the Branch of that fact in their submission. Under the legislation, that payment rendered the Notice to End Tenancy of no effect. As I have described, for some reason that disclosure is not found in the documents that the Branch received.

[79] The adjudicator did not refer to the subsequent payment at all in their decision, and also did not refer to whatever document may have described that payment in their summary of evidentiary material that had been submitted by the respondents. Instead, the adjudicator explicitly found that the petitioners had "failed to pay the rent in full within the five days granted under section 46(4)".

[80] It is therefore at least arguable that the adjudicator failed to consider evidence placed before them - evidence that was fundamental to the making of the order that resulted. Such a core neglect of that evidence seems abundantly capable of being found patently unreasonable.

[81] It is also at least arguable that such patent unreasonableness is not retroactively curable by fresh evidence that the earlier date of actual notice would have rendered the payment on September 10 moot.

[82] Thus, I find that there is at least some merit to this ground for judicial review as well.

[83] To succeed, both grounds will require the admission of fresh evidence. In the case of the payment through counsel, the purpose will be to show that the order for possession was obtained by a misrepresentation by the respondents to the Branch that the rent had not been paid. In the case of the subsequent payment into Chartwell's account, it will be to show that the adjudicator failed to consider evidence of payment within the deadline that the respondents say they submitted, and which would have nullified their Notice.

[84] I have therefore concluded that the stay of the order for possession should be extended, on the following terms:

- It will remain in place until a decision on the petitioners' judicial review application has been rendered;

- If the petitioners have not already done so, they must set the application for hearing in ordinary chambers on the earliest date on which the respondents' counsel are available, subject to the additional time periods set out below. (I think that with an appropriate focus on the actual issues, the hearing can likely be completed in two hours, but that will be for the reviewing judge to decide, once they have seen all of the material. If it has to go on the long chambers list, directions to expedite its progress can be considered);

- The petitioners will have seven days from the release of these reasons to file and serve any additional affidavits on which they intend to rely in the application and, if they wish, to amend the petition to add the decision of the adjudicator on the review application as the subject of judicial review, in addition to the original adjudicator's decision that is currently referred to;

- The respondents will have seven days following that to file and serve any additional affidavits on which they intend to rely on the application; and

- The petitioners will have three days following that to file affidavits in response.

[85] I express no opinion on the desirability of amending the petition as indicated above. I simply want the petitioners to be aware that failing to do so may preclude them from raising arguments about the review decision. I have not found any merit in their arguments about that decision, but the judge on the judicial review may see matters differently.

[86] Similarly, I am not suggesting that any supplementary affidavits are necessary. The point of establishing timelines for them to be submitted is only to

ensure that anything else that may be submitted does not prevent the application from proceeding on the scheduled hearing date.

"Schultes J."