IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan LMS 2602 v. Gebauer,* 2023 BCSC 2065

Date: 20231027
Docket: S229822
Registry: Vancouver

In the Matter Concerning the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

Between:

The Owners, Strata Plan LMS 2602

Petitioner

And:

Faye Marjorie Marlene Gebauer and The Civil Resolution Tribunal

Respondents

Before: The Honourable Mr. Justice D.M. Masuhara

On judicial review from: An order of the Civil Resolution Tribunal, dated November 4, 2022 (*The Owners, Strata Plan LMS 2602 v. Gebauer*, 2022 BCCRT 1211)

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	P. Dougan
Counsel for Respondent, Faye Gebauer:	L. Bau
Place and Date of Hearing:	Vancouver, B.C. October 18, 2023
Place and Date of Judgment:	Vancouver, B.C. October 27, 2023

[1] **THE COURT:** I will preface these reasons with my usual reservation to edit for clarity, spelling, punctuation, and insertions of citations and cases should a transcript be requested. The result here will remain unchanged.

[2] This ruling is a judicial review of a decision of the Civil Resolution Tribunal (the "CRT") in respect of a claim of a strata corporation (the "Strata"), seeking to charge remediation expenses due to a water leak as well as related legal services to Ms. Gebauer, the owner of the strata lot from which the Strata says the leak originated. The Vice Chair of the CRT dismissed the claim on the basis that the Strata had failed to establish that the leak originated in Ms. Gebauer's unit, unit 307. As a result, Ms. Gebauer was not held responsible for the remediation costs. A decision was issued on November 4, 2022, and is indexed as 2022 BCCRT 1211 (the "Decision"). The Strata seeks to have the Decision set aside on the basis that the Vice Chair's conclusion regarding the origin of the leak was substantively deficient and that the process adopted by the Vice Chair was procedurally unfair.

Background

[3] The origin of this dispute occurred on April 14, 2020, when the occupant of unit 207 discovered water dripping from the ceiling and wall in the bathroom of that unit. Similarly, unit 107, which is directly below, experienced the same. Ms. Gebauer is the owner of unit 307, and the bathroom in her unit is directly above the bathroom of unit 207.

[4] The record before the Vice Chair was provided in the petition record, and the following facts as recounted in the Decision are undisputed. It is paras. 17 to 21, which I will not repeat here. However, I will indicate that the total of the damage remediation work was $11,927.46. In addition, the Strata claimed legal fees from Ms. Gebauer. The total claim amounted to $24,599.44.

[5] The Vice Chair notes and accepts that On Side Restoration ("On Side") reported high levels of moisture on the tiles, vanity base, and underside of Ms. Gebauer's bathroom sub floor. As well, the Vice Chair noted that in the invoice

from DW Optimum HVAC Services Ltd. ("DW") for their attendance to unit 307, a visible leak in the bathroom ceiling of unit 307 was found, and that the source of the leak was not found.

[6] The Vice Chair also noted that the Strata conducted a further investigation about a year after the water leak into the source of the water leak on March 5, 2021. This investigation was conducted by a council member who attended at unit 307. The council member in an affidavit noted the conditions of the bathroom, which included missing caulking and cracked tiles, among other things, and then determined that the leak originated in unit 307. The Vice Chair noted that this investigation was a year after the subject leak. The Vice Chair preferred the note in the DW invoice over both the report from On Side and the affidavit sworn by the council member following the March 5, 2021 investigation.

[7] The Vice Chair rejected the assertion that Ms. Gebauer denied access to her unit during the original investigation of the leak by the Strata's trades or later. The Strata also argued that she denied access on the night when the tenant in unit 207 went to unit 307 to investigate and knocked on the door but received no answer. He found the evidence did not support the assertion. He also did not find that Ms. Gebauer's refusal to have a humidifier placed in her bathroom meant she denied access. As a result, the Vice Chair denied the Strata's claim, including the legal fees, and granted Ms. Gebauer's counterclaim seeking to have the Strata remove the $11,927.46 charge against her strata account.

[8] The Vice Chair also noted that had he found Ms. Gebauer responsible for the leak, he would nevertheless have denied the Strata's claim on the basis of the Strata's bylaws. He stated at para. 34:

> …under bylaws 1.9 and 7.8, the strata was ***not*** responsible to repair the strata lot damage in 207 and 107, as it is clearly the strata lot owner's responsibility, so the strata should not have repaired the damage. Also, the evidence indicates the strata charged Ms. Gebauer for some repair expenses, other than the Strata Pro invoice, without properly following the procedural fairness requirements of [*Strata Property Act*, S.B.C. 1998, c. 43] section 135. Since the strata alleged Ms. Gebauer breached its bylaws, and appears to have taken steps to remedy the breach under section 133, section

> 135 requires the strata to give her notice of the alleged breach and an opportunity to respond *before* charging the repair costs to her.
>
> [Emphasis in original.]

[9] The Strata did not challenge this basis in its petition for judicial review.

Application to Adduce Fresh Evidence

[10] The Strata in this application seeks to introduce as fresh evidence a report from the national quality assurance manager for On Side that was made on April 20, 2023. The affidavit of the Strata's representative states that opinion was sought to address issues regarding the accuracy of moisture readers used to take the readings when the leak was first investigated. This concern was raised by Ms. Gebauer.

[11] The affidavit also states that in reviewing the matter, On Side found that the supplemental report dated December 4, 2020 was "inaccurate and incomplete." This report stated that the leak "appeared to be coming from the toilet drain seal or possible overflow of toilet in unit 307", but stopped short of making a definitive finding about the source of the leak.

[12] The Strata relies upon the test for adducing fresh evidence set out in *Palmer v. The Queen* (1979), [1980] 1 S.C.R. 759, 1979 CanLII 8. The test requires an applicant to establish that:

a) the evidence was not discoverable by reasonable diligence before the end of the trial;

b) the evidence is credible;

c) the evidence is practically conclusive of an issue before the court; and

d) if believed the evidence could have affected the result of the trial.

[13] I also note the approach for adducing fresh evidence in a judicial review is described in *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016

BCCA 41, leave to appeal to SCC ref'd, 36917 (7 July 2016). In that case, the Court of Appeal stated in para. 52:

> …There is ample authority for the proposition that evidence that could or should have been before the tribunal, but which was not in fact before it, is generally not admitted in judicial review proceedings. The court is reviewing, and must show some deference for, the decision already taken, rather than decide the matter anew on different evidence.
>
> [Emphasis in original.]

[14] The report is put forth for the opinion that the source of the subject leak was from the toilet in the bathroom of unit 307.

[15] I will note first that counsel for the Strata advised that he was not pushing the application too hard and that its position could stand on the existing record. I appreciated that candour.

[16] The discretion to admit fresh evidence is to be exercised sparingly and only in exceptional circumstances. The Court's role in a judicial review proceeding as a general rule is to be based on the record before the tribunal. It does not retry matters. As stated in *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 at para. 40, "[c]ourts must be vigilant, however, not to accept affidavits that simply seek to shore up weaknesses in the record".

[17] I further note that the report is an opinion and does not conform to the requirements for such under the Court's rules. Also, the opinion is based upon information and moisture readings taken at or shortly after the subject leak in the four units that were in the same vertical column in the building, which were in the supplemental report that On Side reported to the Strata in December 2020. That report noted that "[t]he strata plumber tried to determine the cause of loss and should have a report advising on the matter." It further noted that On Side had "on three occasions after April 14 … tried to gain access to continue the emergency mitigation but were told [they] could not have access."

[18] It further stated that:

> . . . the cause appeared to be coming from the toilet drain, seal or possible overflow of toilet in unit 307. After we removed the ceiling in unit 207, we

> found water staining on the backside of the subfloor to unit 307 all around the toilet drain and the subfloor had high moisture readings.

[19] The report goes on to note that in unit 307, on April 14, 2020:

> We observed high moisture reading on the bathroom floor tile and base of vanity adjacent to the toilet. Owner asked us to leave the unit shortly after attending and would not allow any drying equipment to be installed. The owner denied access to our crews despite several attempts. No mitigation was performed in this unit as we were asked to leave the unit.

[20] The new report sought to be adduced in essence states the same opinion as the original supplemental report but more definitively, and it states at the outset that "On Side did not repair the source so cannot comment on the exact cause such as the flange or toilet seat, etc."

[21] The fresh-evidence application here is denied. I am not persuaded the evidence was not discoverable by reasonable diligence before the end of the CRT proceeding or even before the issuance of the Decision. Further, I am not persuaded that practically the evidence would be conclusive. Though the new report adds moisture readings from the bathroom floor and bathroom tiled wall of unit 407 that are said to have been in the standard dry zone, it cannot be said this addition to the other readings is conclusive as to the source of the leak. The expertise of the writer is not known. The method employed and the readings are not stated as being definitive nor as establishing the source or eliminating other alternative explanations. Neither the independence nor the qualifications of the writer are established. In any event, the fresh evidence the Strata seeks to adduce does not fit within the exceptional circumstances that would permit the admission of fresh evidence on judicial review. Rather, in my view it seeks only to shore up the record before the CRT.

Review of the Decision

[22] Adjudication of this petition requires consideration of the issues that the Strata raises to challenge the Decision. From the Strata's written and oral submissions, I distill the following issues:

1) Was the Vice Chair's conclusion that the Strata failed to establish that the leak originated in Ms. Gebauer's unit substantively deficient because:

    a) he applied the wrong standard of proof in assessing the Strata's claim;

    b) he gave too much weight to the DW invoice and ignored the possibility that the visible leak mentioned in the DW invoice could have been a stain from a different flood that occurred in 2015;

    c) he gave too little weight to the supplementary report from On Side;

    d) he gave too little weight to the affidavit of the council member, who was also a lawyer, concerning the Strata's investigation of the leak on March 5, 2021;

    e) he misapprehended the evidence regarding whether Ms. Gebauer denied access to her unit on the night of the leak; and

    f) he ignored the physical impossibilities of the theory of the source of the leak that Ms. Gebauer advanced before the CRT.

2) Was the CRT process procedurally unfair because there was no opportunity to cross-examine the witnesses?

[23] Before examining these issues, I will determine the applicable standard of review for each issue. Part 5.1 of the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25 [*CRTA*] governs the judicial review of CRT decisions. Section 56.7 sets out the applicable standard of review for CRT decisions concerning a claim in respect of which the tribunal has specialized expertise. Per s. 121, the CRT is considered to have specialized expertise in respect of strata property disputes concerning one or more of the matters listed in s. 121(a) to (g).

[24] The present dispute concerns a charge on the respondent's strata lot account, and as such it falls within the matters listed in ss. 121(a) to (g), and the

CRT is considered to have specialized expertise in respect of this dispute. The standards of review listed in s. 56.7 of the *CRTA* therefore apply.

[25] Section 56.7(2) sets out three different standards of review and specifies when each standard applies. The Court may only interfere with a finding of fact or law by the CRT or an exercise of discretion by the CRT unless it is "patently unreasonable", per s. 56.7(2)(a). With respect to questions about the application of common law rules and natural justice and procedural fairness, the Court must decide whether in all of the circumstances, the CRT acted fairly, per s. 56.7(2)(b). For all other questions, the Court must apply a standard of review of correctness, per s. 56.7(2)(c).

[26] The Strata argues that the Court must review the question of whether the Vice Chair applied the wrong burden of proof on a correctness standard because it concerns an error of law. While acknowledging that the Vice Chair cited the correct burden in the Decision, the Strata argues that when considering the totality of the evidence, it becomes clear that the Vice Chair implicitly applied a higher burden.

[27] On this point, the Strata relies on *Kunzler v. The Owners, Strata Plan EPS 1433*, 2021 BCCA 173 [*Kunzler*], a decision in which the Court of Appeal applied the appellate standards of review set out in *Housen v. Nikolaisen*, 2002 SCC 33. I disagree with the Strata on this point. In my view, this is a question of mixed fact and law. The Vice Chair cited the correct burden of proof, and I find insufficient support for the position that he implicitly applied a different burden throughout the Decision, such that the Decision discloses a readily extricable legal error in this regard.

[28] In any event, the Court of Appeal in *Kunzler* applied the appellate standards of review, which are different from the standards of review that I must apply in this judicial review. As a result, I find the entirety of the first issue raised by the Strata, which concerns the Vice Chair's findings of fact and law regarding the origin of the leak, requires the patent unreasonableness standard of review.

[29] The second issue raised by the Strata concerns procedural fairness, and I must decide this issue having regard to whether in all of the circumstances, the tribunal acted fairly.

Patent Unreasonableness

[30] Before moving on, I will first describe the patent unreasonableness standard.

[31] Patent unreasonableness is the most deferential standard of review. Pursuant to s. 56.9 of the *CRTA*, a discretionary decision is patently unreasonable if the discretion:

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.

[32] In *Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109, aff'd 2009 BCCA 229, states:

> [65] When reviewing for patent unreasonableness, the court is not to ask itself whether it is persuaded by the tribunal's rationale for its decision; it is to merely ask whether, assessing the decision as a whole, there is any rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational or, expressed in the *Ryan* formulation, whether the decision is so flawed that no amount of curial deference can justify letting it stand. If the decision is not clearly irrational or otherwise flawed to the extreme degree described in *Ryan*, it cannot be said to be patently unreasonable. This is so regardless of whether the court agrees with the tribunal's conclusion or finds the analysis persuasive. Even if there are aspects of the reasoning which the court considers flawed or unreasonable, so long as they do not affect the reasonableness of the decision taken as a whole, the decision is not patently unreasonable.

[33] From these authorities, I find that if there is a rational or tenable line of analysis supporting a decision such that the decision is not clearly irrational, the decision is not patently unreasonable even if there are aspects of the reasoning that I consider flawed or unreasonable.

Issue 1: Was the Vice Chair's conclusion on the origin of the leak patently unreasonable?

[34] As I have noted, the Vice Chair concluded that the Strata failed to prove its claim on a balance of probabilities that the leak originated in unit 307. The Strata argues that this finding was patently unreasonable. The respondent disagrees.

[35] For the following reasons, I find that the Strata has failed to prove that the Vice Chair's conclusion was patently unreasonable. The Strata claims that the Vice Chair gave too much weight to the DW invoice dated May 21, 2020, which stated there was a visible leak in the ceiling above unit 307 and that the source of leak was not found. DW provided the invoice following its visits to the building on April 14, 16, and 21, 2020. The invoice contained the following comments:

> Apr 14 – Arrived on site and found water damage in bathroom 107, 207, & 307. Unit 407 water was shut off by others the night when leak started; others indicated after water isolated stopped. Cut open drywall ceiling above tub in 307; visible leak discovered
>
> Apr 16 – no cause of leak was found on original call
>
> April 21 – [for unit 307] Tested all bathroom fixtures 307. While toilet is aged, no leakage present at this time. Toilet isolation valve is leaking from packing, basin faucet is running on as well as drainage plugged. Owner requested technician leave unit due to COVID concerns. Cleaned up in all units accessed 107, 207, 307, & 407.

[36] The Vice Chair preferred this evidence over the On Side supplementary report dated December 4, 2020, prepared following its visits to the building on April 14 and 21, 2020. The supplemental report contained the following comments:

> Cause of loss – the Strata plumber tried to determine the cause of loss and should have a report advising on the matter. Based on the limited access to unit 307 and the damage we discovered in units 207 and 107, the cause appeared to be coming from the toilet drain, seal or possible overflow of toilet in unit 307. After we removed the ceiling in unit 207, we found water staining on the backside of the subfloor to unit 307 all around the toilet drain and the subfloor had high moisture readings.

[37] The Vice Chair explained that he preferred the DW invoice over the supplemental report from On Side because it clearly states that DW discovered a visible leak in the ceiling of the bathroom of unit 307, and that no cause of the leak was found in that room. I find this preference is entirely reasonable, as only the DW

invoice contained firsthand observations of the bathroom of unit 307, whereas the supplemental report from On Side only included speculation about the conditions of that room.

[38] It was also reasonable for the Vice Chair to conclude that the fact that On Side reported that it found water on the subfloor of the bathroom of unit 307 does not necessarily mean the leak originated in that room. It is entirely possible that the water came to rest there after flowing from a leak in a different location. Finally, it is reasonable for the delay between the date of On Side's investigation and the date of its supplemental report to raise reliability concerns in respect of the report's contents.

[39] While the Vice Chair did not expressly consider whether the "visible leak" mentioned in the DW invoice could have been leftover dried staining from a different flood that occurred in 2015, I do not find this makes his conclusion patently unreasonable. This comment is not invalidated on the basis that there could be alternative explanations for what the DW representative may have observed. This is especially true given that DW is a plumbing firm and as such, it would be reasonable to conclude that the author of the comments would be able to discern between an active leak and dried staining from an old leak. The Vice Chair's apparent conclusion that the words "visible leak" refer to an active leak as opposed to staining from an old leak is also reasonable. I also note the Vice Chair quoted from the report the evidence that when the water was shut off to unit 407, the leak stopped.

[40] The Strata further argues that the Vice Chair gave too little weight to an affidavit sworn by a council member, who was also a lawyer, containing their observations from the Strata's own investigation into the cause of the leak on March 5, 2021, nearly a year after the original leak. The Vice Chair stated that he preferred the DW invoice over this affidavit because:

1) there was no evidence that the council member had expertise in plumbing, whereas DW was a plumbing firm, and it was therefore more likely than not that the author of the comments in the DW invoice was a plumber; and

2) DW attended the building, including unit 307, within mere hours and days of the leak occurring and witnessed the leak firsthand.

[41] These are both considerations that would reasonably support the Vice Chair's preference of the DW invoice over the council member's affidavit. I reject the Strata's argument that the fact that the council member was also a lawyer made their affidavit deserving of more weight. While lawyers may generally have a greater appreciation of the consequences of knowingly giving false affidavit evidence, this does not make their evidence weightier in terms of the opinion it advanced on the source of the leak. Whether or not the evidence was sworn was just one factor that the Vice Chair was free to consider in weighing the evidence. The Vice Chair's preference of the DW invoice was reasonable in light of the circumstances.

[42] The Strata further argues that the Vice Chair misapprehended the evidence regarding whether Ms. Gebauer denied access to unit 307 at the time of the leak. According to the Strata, Ms. Gebauer's alleged denial of access supported a negative inference with respect to her credibility and a positive inference that the leak was, in fact, originating in unit 307. The Vice Chair concluded the evidence did not support a finding that Ms. Gebauer denied access to her unit at the time the leak was noticed.

[43] As the Vice Chair notes, the DW invoice states that the water damage was observed in the bathroom of unit 307 on April 14, 2020, the day of the leak. I also note that the supplemental report from On Side includes photos that were purportedly taken in unit 307 during their "initial site visit" on April 14, 2020.

[44] The Strata points to evidence stating that the owner of unit 207 knocked on Ms. Gebauer's door in the early morning of April 14, 2020, but there was no answer. Even if this evidence is accepted, it does not make the Vice Chair's conclusion on this issue unreasonable. It still appears that Ms. Gebauer facilitated access for tradespeople from both DW and On Side later that day. Further, there are legitimate reasons to decline to answer a knock on one's door late at night or in the early hours of the morning, and doing so would not itself support a negative inference with

respect to Ms. Gebauer's credibility. Moreover, such action would not constitute an actual refusal of entry to the Strata. I also note that counsel for the Strata acknowledged that even based on his understanding of the leak, the circumstances did not constitute an emergency as defined under the Strata's bylaws which would have warranted entry.

[45] The Strata further argues that the Vice Chair ignored the physical impossibilities of the theory of the source of the leak that Ms. Gebauer advanced before the CRT—that is, that the leak originated from a location in the building other than her unit. The Strata notes that there was video evidence that depicted water dripping very fast into unit 207, in addition to photos taken by On Side of the ceiling of 307 on the same day, which according to On Side's supplemental report showed "no signs of water damage to ceiling or wall."

[46] While I am inclined to agree that this evidence raises some questions about the plausibility of the leak coming from a location other than 307, I do not find that it makes the Vice Chair's conclusion patently unreasonable.

[47] In light of the evidence taken as a whole, it was not patently unreasonable for the Vice Chair to conclude that the strata failed to prove on a balance of probabilities that the leak originated in unit 307.

[48] The Vice Chair sufficiently explained how he dealt with the conflicting evidence and gave his reasons for preferring certain pieces of evidence over others. There is a rational and tenable line of analysis supporting this conclusion.

Issue 2: Was the CRT process procedurally unfair?

[49] I now turn to procedural unfairness. In its petition and written submissions, the Strata suggests that the Vice Chair would have weighed certain pieces of evidence differently had there been an opportunity cross-examine the witnesses—namely, the author of the comments in the DW invoice finding a visible leak in the ceiling of unit 307, the council member who swore an affidavit containing the results of the Strata's own investigation of the leak, and Ms. Gebauer.

[50] The inability to cross-examine witnesses at an oral hearing is an issue of procedural fairness, and I must decide whether in all the circumstances the tribunal acted fairly. The Court of Appeal in *Downing v. Strata Plan VR2356*, 2023 BCCA 100 recently confirmed that procedural fairness does not require an oral hearing or the ability cross-examine witnesses in all matters before the CRT. At paras. 67 and 68, it stated:

> [67] ... It is not necessary to permit cross-examination in all cases where there are conflicts in the evidence in order to afford the parties procedural fairness.
>
> [68] Fairness is a concept fundamentally concerned with appropriate procedures. The key question for a reviewing court is "whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly": *Baker* at para. 30.

[51] Neither party argued before me that it sought to examine witnesses in the CRT process, and I did not locate any such requests in the record in my review of the materials.

[52] Section 2(2)(a) of the *CRTA* identifies the CRT's mandate as resolving disputes in a manner that is "accessible, speedy, economical, informal and flexible", and s. 18 requires that a proceeding "be conducted with as little formality and technicality and with as much speed as permitted by … a proper consideration of the issues in the dispute." I note that the record shows a structured procedure which included a lengthy online exchange of documents and competing written arguments. I am not persuaded that in the context of the nature of this dispute, the amount in issue, and the mandate of the CRT to resolve disputes as described that the process adopted was unfair. The Strata had a meaningful opportunity to present their case fully and fairly via the online written procedure.

Conclusion

[53] The dispute between the Strata and Ms. Gebauer reflects what the Strata says is a common issue in which a strata as a whole must bear remedial costs for an event that it believes to be the responsibility of an individual member. The Strata notes the publicized difficulties strata corporations face today in obtaining insurance

coverage at a reasonable cost or even procuring coverage at all and the concern that individual members may be able to avoid responsibility by delaying and denying access to their units. The Strata argues that if the Decision is not reversed, it will set an unfair precedent for strata corporations.

[54] I can understand this problem. It appears in other areas of society where the collective raises its concerns of having to bear the costs of those it considers solely responsible for those costs. This is described as the cross-subsidization problem. However, the policy arguments of the Strata are beyond the reach of this type of proceeding. Judicial review requires as a starting point adherence to the principles of judicial restraint and a respect for the distinct role of administrative decision makers, which was recently reiterated in *Canada (Minister of Citizenship and Immigration) v*. *Vavilov*, 2019 SCC 65.

[55] I have found that the Decision was not patently unreasonable. I am similarly not persuaded that the CRT process was procedurally unfair. Accordingly, the Strata's petition is dismissed.

[56] As is appropriate in this case, the CRT does not seek costs. As the successful party, Ms. Gebauer is entitled to costs against the Strata.

[57] That concludes my ruling.

"The Honourable Mr. Justice Masuhara"