IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tang v. Goldmanis*,
2024 BCSC 351

Date: 20240228
Docket: S245919
Registry: New Westminster

Between:

Xian Yu Tang

Petitioner

And

Heide Goldmanis & Micka Devkota

Respondents

Before: The Honourable Madam Justice Girn

Reasons for Judgment

Counsel for the Petitioner:	J. Wang
Representative for Respondent, M. Devkota:	H. Goldmanis (January 20, 2023)
The Respondent, appeared on her own behalf:	H. Goldmanis
Place and Dates of Hearing:	New Westminster, B.C. January 20, 2023 August 18, 2023
Written Submission received from Respondent, H. Goldmanis:	August 31, 2023
Place and Date of Judgment:	New Westminster, B.C. February 28, 2024

Table of Contents

[1] The petitioner, Xian Yu Tang, seeks judicial review of a decision of a Provincial Court Judge in a small claims proceeding. The underlying dispute involves a claim against an absentee landlord regarding a nuisance caused by his tenants on the respondents.

[2] The petitioner seeks to set aside the following orders of Judge Smith of the Small Claims Court as unreasonable: (1) dismissing the petitioner's application to set aside the prior default orders of Judge Dorey; and (2) dismissing the petitioner's application to dismiss the underlying claim. The petitioner also asks that, after finding those orders to be unreasonable, the Court substitute its own decisions for those of Judge Smith.

[3] The petitioner is represented by counsel while the respondent Heide Goldmanis appeared for herself and on behalf of the other respondent, Micka Devkota.

[4] The respondents oppose the petition. They submit that Judge Smith's decision was reasonable and should not be set aside. They also submit that the petitioner's attempt to re-argue the case on its merits is not permitted on this judicial review.

Background

[5] The petitioner owns a property located at 1018 Dory Street, Coquitlam, B.C. The home on the property was rented to tenants sometime in the summer of 2020.

[6] The respondents reside at 1025 Dory Street, Coquitlam, B.C. Their house is two doors down from the property owned by the petitioner.

[7] The petitioner resided in China at the relevant times. The petitioner arranged for his friend, Lin Chum Shen, to pick up his mail from the property and forward it to the petitioner in China.

[8] At the relevant times, the petitioner's tenants owned two dogs, a Rottweiler and a German Shepherd. The petitioner's house has a front porch and the dogs moved freely in and out of the house through a sliding door on the porch.

[9] Shortly after the tenants moved in, their dogs began to cause a nuisance to the surrounding neighbors by incessantly barking at passing pedestrians, cyclists, other pets, postal workers and delivery drivers. The dogs would also bark to sounds of sirens and car horns.

[10] In regards to the respondent Ms. Goldmanis, the dogs regularly barked at her and her son and their dog as they entered and exited their home and while they were in their backyard.

[11] In addition to the dogs' barking, the tenants also played loud music throughout the day and night. This was particularly problematic given that Ms. Goldmanis worked from home and her young son was being home schooled during the early months of the COVID-19 pandemic.

[12] Ms. Goldmanis spoke to the tenants and asked them to control their dogs. The tenants refused and also refused to identify themselves.

[13] Thereafter, Ms. Goldmanis wrote a note to the landlord, the petitioner, addressed to the house in question. She gave the letter to the tenants and asked that they forward it to the landlord. The tenants told her that the petitioner lived in China and would not provide his mailing address.

[14] After not receiving any response from the petitioner, Ms. Goldmanis made several noise complaints to the City of Coquitlam. Unfortunately, this did little to deter the tenants.

[15] Through a land titles search, Ms. Goldmanis was able to identify the owner of the property as the petitioner. The petitioner's mailing address recorded in the land titles office was at the property in question: the 1018 Dory Street address.

[16] Ms. Goldmanis then decided to proceed with a Notice of Claim in Small Claims Court. However, prior to doing this, she sent a demand letter to the petitioner regarding the noise disturbances and affixed it to the front door of the petitioner's rented home. There was no response to her letter.

[17] The Notice of Claim was served by registered mail on the petitioner on July 21, 2021, to the mailing address at the property. Ms. Goldmanis filed a Certificate of Service with Small Claims Court.

Provincial Court Proceedings

[18] On September 20, 2021, Ms. Goldmanis appeared before Judge Dorey in civil chambers in the Provincial Court of British Columbia in Port Coquitlam. Judge Dorey granted default judgment in favour of the respondents, given the petitioner's failure to file a response or attend the hearing.

[19] On March 25, 2022, a hearing was conducted to prove the claim and damages. On March 30, 2022, Judge Dorey provided her reasons for judgment and concluded that the respondents had proven their case for the tort of nuisance against the petitioner and awarded damages in the amount of $7,500 to each respondent as well as $5,000 to Ms. Goldmanis for her pain, suffering and mental stress caused by the noise disturbances.

[20] On March 31, 2022, a Certificate of Judgment was sent to the petitioner at the 1018 Dory Street mailing address.

[21] On August 29, 2022, counsel for the petitioner, Mr. Wang, brought an application in Provincial Court to set aside the default order and to "dismiss the claim". It is notable that the Certificate of Judgment reached the petitioner but that previous communications sent or posted at the 1018 Dory Street address did not.

[22] The application was heard by Judge Smith. Counsel for the petitioner argued that the default judgment ought to be set aside because the test as set out in

Miracle Feeds v. D. & H. Enterprises Ltd. (1979), 10 B.C.L.R. 58, [1979] B.C.J. No. 1965 (Co. Ct.), had been met.

[23] In particular, counsel for the petitioner argued that the petitioner had a meritorious defence to the claim against him. Specifically, that a landlord cannot be held liable for actions of its tenants. Counsel for the petitioner submitted that there was no caselaw in Canada on point in respect of this issue. Instead he relied on a case from the Supreme Court of the United Kingdom: *Coventry v. Lawrence (No. 2)*, [2014] UKSC 46. He argued that *Coventry* was directly on point that a landlord, with some limited exceptions, cannot be responsible in nuisance for the actions of its tenants.

[24] Judge Smith dismissed the petitioner's application. Judge Smith's reasons were brief, which I will reproduce in full:

> [1] THE COURT: This application before the court is for setting aside a default judgment that was issued by Judge Dorey on two different dates; September was the default order, September 20th, 2021. The application before the court today also is for the claim against the defendant to be dismissed.
>
> [2] From my perspective, the ***Miracle Feeds v. D.N.H. Enterprises Ltd.***, [1979] B.C.J. 1965, test for setting aside a default judgment has not been made out by the materials filed and the submissions provided by counsel.
>
> [3] In my view, the defendant's failure to file a response to the civil claim was not wilful or deliberate. The defendant made the application to set aside as soon as reasonably possible after he became aware of the judgment and has a reasonable explanation for the delay.
>
> [4] However, I do not see the defendant having a meritorious defence or a defence worthy of investigation. There is no clear law in Canada, as I have heard from Mr. Wang, about owner's liability for the conduct of the landlord's tenants on the landlord's property, and this defendant is the landlord for tenants who caused disturbance to the claimant in this case.
>
> [5] In my view, with that *Miracle Feeds* test not having been made out, the default judgment issued by Judge Dorey with values set on March 30th, 2022 remains in effect. The defendant certainly has an opportunity now to sue the tenants for the debt owing by the defendant to the claimant.
>
> [Emphasis added.]

[25] The next day, counsel for the petitioner attended the Court Registry seeking to have Judge Smith reconsider his decision. Counsel says he was able to find a

case from this Court which stood for the same principle as the *Coventry* case on which he had relied at the application to set aside the default order. Having already issued his reasons, Judge Smith declined to accept the new case for reconsideration.

Supreme Court Judicial Review Proceedings

[26] On September 16, 2022, the petitioner filed a petition for judicial review in respect of the Judge Smith's refusal to set aside the default judgment and to dismiss the initial claim against the petitioner.

[27] The petitioner relies on *Shahgaidi v. Zhang*, 2018 BCSC 2082, the case on which basis he sought to have Judge Smith reconsider his decision. The petitioner argues that in the face of the law and evidence before him, Judge Smith's decision was not only unreasonable but also clearly wrong. He argues that the application record and transcript of the applications reflect a failure or refusal to recognize previously stated legal principles as a meritorious legal defence for the petitioner.

[28] The petitioner says that while, as the reviewing judge, I have the authority to remit the matter back to Judge Smith, I should instead substitute my own decision for that of Judge Smith and vacate the Certificate of Judgment.

[29] The respondents argue that the Court should dismiss the petition because the petitioner is attempting to relitigate the issue, which is not the purpose of judicial review. They say the petitioner told Judge Smith that no case on this point existed in Canada and instead relied on a case from the United Kingdom which Judge Smith was entitled not to follow. As such, they submit that Judge Smith's decision was not unreasonable and the petition should be dismissed.

Legal Framework

Proper Procedure: Petition for Judicial Review, not an Appeal

[30] This matter was properly brought as a petition for judicial review. Under s. 5(1) of the *Small Claims Act*, R.S.B.C. 1996, c. 430 [*SCA*], a litigant has the right to appeal an order only if it was made after a trial:

> 5 (1) Any party to a proceeding under this Act may appeal to the Supreme Court an order to allow or dismiss a claim if that order was made by a Provincial Court judge after a trial.

[31] Otherwise, there is no right of appeal from any other order: *SCA*, s. 5(2). While an appeal to this Court is not permitted, a litigant can bring an application for judicial review: *Hart v. Laird Cruickshank Personal Corporation*, 2022 BCSC 569 at para. 19; *Andrews v. Clay*, 2018 BCCA 50 at para. 25. As set out in the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 2, a judicial review application must be brought as a petition.

[32] For instance, In *Hart*, Chief Justice Hinkson noted that a petition for judicial review was the correct procedure for a party to seek review of a judge's decision to refuse to set aside a default judgment in a small claims proceeding:

> [20] In this case, the petitioners seek judicial review of Judge Dhillon's refusal to set aside default judgment. Section 5 of the *SCA* provides no right of appeal from a decision to refuse to set aside a default judgment: *Andrews v. Clay*, 2018 BCCA 50 [*Andrews*]. The respondents concede that the petitioners were entitled to proceed with their application for judicial review, subject the Court's discretion.

Standard of Review

[33] Orders in a small claims proceeding are subject to judicial review on a standard of reasonableness: *Hart* at para. 32; *Andrews* at para. 26. In other words, to set aside the order dismissing the petitioner's application to set aside default judgment, the petitioner must demonstrate that the order was unreasonable.

[34] While *Andrews* was decided before the Supreme Court of Canada's landmark decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, *Vavilov* did not disturb the reasonableness standard: *Kawakami v. Brayer*, 2021 BCSC 267 at para. 41. Justice Riley recently summarized the *Vavilov* approach to the reasonableness standard in *Marples v. Biddlecome*, 2023 BCSC 1690:

> [13] Reasonableness is a deferential standard. The reviewing court is not allowed to simply substitute its view for the view of the original decision maker. Nor is the reviewing court permitted to conduct a new analysis in an effort to determine its view of the correct outcome: *Vavilov* at para. 83. The reviewing court can only intervene where satisfied that the decision, in light of

> both the rationale and the outcome, was unreasonable: *Vavilov* at para. 87. The decision must be transparent, intelligible, and justified: *Vavilov* at para. 15. Thus, the reasonableness standard of review involves a consideration of both the outcome and the reasoning process that led to that outcome: *Vavilov* at para. 83. The reviewing court should adopt a "reasons first" approach: *Vavilov* at para. 84.

[35] I note that in *Shahgaidi*, decided before *Vavilov* and *Hart*, the small claims decision was judicially reviewed on a standard of correctness: at para. 17.

[36] In *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras. 58–64 and 68, the Supreme Court of Canada highlighted the importance of conducting a reasonableness review with a “reasons first” approach, rather than a “disguised correctness review” which begins with the court’s own perception of the merits. See also *Patry v. Capital One*, 2023 BCSC 1836 at para. 43.

[37] Where formal reasons are not provided, the court “must look to the record as a whole”: *Vavilov* at para. 137. Where “neither the record nor the larger context sheds light on the basis for the decision”, the court must still consider “the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable”: *Vavilov* at para. 138.

[38] The Court’s analysis is not a “line-by-line” hunt for error: *Vavilov* at para. 102. In assessing reasonableness, it is relevant if the decision maker, “where a relationship is governed by the private law … ignore[d] the law in adjudicating parties’ rights within that relationship”, if “the decision maker fundamentally misapprehended or failed to account for the evidence”, or if the decision maker failed “to meaningfully grapple with key issues or central arguments”: *Vavilov* at paras. 111, 126, 128.

Remitting to Decision Maker or Substituting Decision

[39] In *Vavilov*, the Supreme Court of Canada noted that where a decision reviewed under the reasonableness standard is found to be unreasonable, it is most often appropriate to remit the matter to the decision maker:

> [141] Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome…

[40] That said, there are rare occasions where the court may instead choose to substitute its own decision. The court will rarely do so, and it is only appropriate where it is clear "that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose": *Vavilov* at para. 142.

[41] Factors which may influence a court's decision whether to remit a matter or substitute a decision include "concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources": *Vavilov* at para. 142. One such instance where it would be appropriate to substitute a decision is where the interaction between "text, context and purpose leaves room for a single reasonable interpretation" of a disputed statutory provision: *Vavilov* at para 124.

[42] In *Patry*, the petitioners sought to set aside an order of a Provincial Court Judge refusing to set aside default orders in a small claims action. Applying the reasonableness standard of review, Justice Brongers found the decision was unreasonable, but declined to substitute a decision as it was not a case "where the outcome is inevitable": at para. 71. Instead, he remitted the decision to the Provincial Court to be re-determined in light of his reasons.

[43] Likewise, in *Marples*, Riley J. declined to substitute a decision and instead remitted the matter to the Provincial Court for three reasons: (1) to show "proper respect for the institutional role of the Provincial Court as set out by the legislature under the [*SCA*]"; (2) as the proceedings in that case did not suggest that an "'endless merry-go-round' of judicial reviews" was likely; and (3) that "the outcome of the disqualification application [was] far from certain": at paras. 34–37.

Setting Aside Default Orders

[44] Under Rule 17(2) of the *Small Claims Rules*, B.C. Reg. 261/93, a Provincial Court Judge in a small claims proceeding may cancel a default order if:

> (a) the order was made
>
> (i) in the absence of a party,
>
> (ii) for failing to file a reply, or
>
> (iii) for failing to make a deposit under section 56.3 of the *Civil Resolution Tribunal Act*, and
>
> (b) the party applies (see Rule 16 (7)) and attaches to the application an affidavit containing
>
> (i) the reason the party did not file a reply, attend the settlement conference, trial conference or trial or make a deposit under section 56.3 of the *Civil Resolution Tribunal Act*,
>
> (ii) the reason for any delay if there has been delay in filing the application, and
>
> (iii) the facts that support the claim or the defence.

[45] Rule 17(2) reflects the oft-cited factors from *Miracle Feeds* which guide a court's discretion in setting aside a default judgment. As summarized in *Lee v. Zhou*, 2022 BCSC 172 at para. 43, the *Miracle Feeds* factors are whether:

> (1) the defendant wilfully or deliberately failed to respond to the claim;
>
> (2) the defendant applied to set aside the default judgment as soon as reasonably possible after learning of it;
>
> (3) the defendant has a meritorious defence to the claim (or at least one worthy of investigation); and,
>
> (4) the above have been satisfactorily established by evidence.

[46] In *Andrews*, the Court of Appeal described these considerations as inexhaustive, and as not necessarily mandatory:

> [29] I have described these as factors rather than tests, as they are not intended to be either mandatory or exhaustive of the considerations that are relevant, though in most cases they will be the appropriate indicators of whether it is in the interests of justice to set aside the default judgment.

[47] The Court of Appeal also cautioned that the factors should not be applied inflexibly at para. 31.

Dismissing the Respondent's Underlying Claim

[48] While there are no express summary judgment provisions of the *Small Claims Rules* or *SCA*, the power to dismiss a claim in Small Claims Court is found in s. 2 of the *SCA* and Rule 16(6)(o) of the *Small Claims Rules*. Section 2(2) of the *SCA* provides broad powers to a judge to "make any order or give any direction it thinks necessary to achieve the purpose of this Act and the rules". Rule 16(6)(o) of the *Small Claims Rules* permits a judge to make, after a hearing, "any other order that a judge has the power to make and notice of which is served on another party". See e.g., *Schiller v. Northern Health Authority*, 2019 BCPC 60.

[49] Judge Smith dismissed the petitioner's application to dismiss the underlying claim on finding that the petitioner's application to set aside the default orders ought to be dismissed. The record shows that Judge Smith did not hear submissions on whether the claim should be outright dismissed, instead focusing on "the test for setting aside" and noting that Small Claims Court "rarely [engages] in a summary hearing for [an] application to dismiss". Presumably, having found in his reasons at para. 5 "that *Miracle Feeds* not having been made out" and that the default judgment accordingly "remains in effect", Judge Smith did not then analyze "the application for the claim against the defendant to be dismissed". In other words, as the default judgment was not set aside, there was no reason to consider whether to dismiss the underlying claim.

Discussion

[50] The petitioner argues that the decision to not set aside the default order on the basis that he lacked any meritorious defence was unreasonable because it failed to account for the *Shahgaidi* case. I reiterate that in his oral reasons, Judge Smith stated that, on the issue, there was "no clear law in Canada, as [he] heard from [the petitioner's counsel]".

[51] Counsel for the petitioner's oral submissions in the hearing before Judge Smith relied only on a non-binding case from the United Kingdom on occupier's liability. His submissions on this issue were as follows:

> THE COURT: -- this and, Mr. Wang, I don't -- I don't think I understand your position about occupier's liability.
>
> CNSL J. WANG: Oh, no, no, no, that's -- that's the -- it's not -- that's just there because there's a -- it's a vacuum in our Canadian jurisprudence. There isn't a case right very close related. That case -- those two Canadian cases cited it's just to -- to -- to argue by analogous – by analogy. It is very closely similar to what we're dealing with. This is not really -- it's similar to occupier's liability cases. It's the UK Supreme Court case that's right on point. And that case is a seminal case of the whole country, UK. In Canada we don't have one like that yet.

[52] I have included this excerpt from the proceeding to better understand the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable: *Vavilov* para. 99.

[53] Further, the transcript of the proceedings shows that in an exchange with counsel immediately after giving his reasons, Judge Smith said that "The Supreme Court of the United Kingdom is not binding upon courts in Canada".

[54] To be clear, at no point did counsel for the petitioner bring the *Shahgaidi* case to Judge Smith's attention during the hearing, and in fact stated that no Canadian case stood for the argued principle. It was only the day after Judge Smith's reasons that counsel for the petitioner attempted to bring *Shahgaidi* to Judge Smith's attention, at which point Judge Smith declined reconsideration.

[55] The petitioner now argues that judges are "presumed to know the law". He submits that Judge Smith ought to have been aware of the *Shahghaidi* case and should have considered it during the application to set aside the default judgment.

[56] I am unable to agree with the petitioner on the point that "judges are presumed to know the law" and therefore that Judge Smith ought to have been aware of the *Shahgaidi* case in these circumstances. As I understand it, this principle tends to be referenced by courts to the benefit of a lower court judge in cases where a judge may not have fully explained the reasons for coming to a decision, but is presumed to have done so based on the law in a particular area.

[57] Recently in *White v. Schultz*, 2023 BCCA 266, the appellant in a family law case had argued that the judge failed to apply *Gordon v. Goertz* principles or the principles in s. 16 of the *Divorce Act*. The Court of Appeal found that despite not mentioning the exact principles, the trial judge had not failed to apply them. The Court stated the following at para. 27:

> However, a judge is presumed to know the law. A failure to refer to a statutory provision or a relevant authority is of no consequence, provided there is nothing in the judge's reasons demonstrating a lack of knowledge: *E.R.H. v. B.W.H.*, 2009 BCCA 573 at para. 38. Here, the judge correctly noted that "the only consideration for a court in making a parenting order is the best interests of the child": at para. 13. It is evident from a review of the judge's reasons that she considered the case law to which she was referred and specifically considered the factors relevant to a determination of the best interests of the child.
>
> [Emphasis added.]

[58] The difficulty with the petitioner's argument in this regard lies with his own submissions in which his counsel stated without reservation that there were no Canadian cases—let alone British Columbia cases—dealing with the liability of a landlord for a tenant's nuisance. Counsel for the petitioner informed Judge Smith that the only case on point was from the United Kingdom. If I were to accept the petitioner's submissions, it would require me to conclude that Judge Smith should have rejected the petitioner's argument that there were in fact no cases in Canada on this point. It simply cannot be. It was not unreasonable for Judge Smith to have relied on counsel's unreserved submission as being fully researched on the area. In my view, Judge Smith's reasons cannot be seen as being unreasonable in this issue.

[59] I will now discuss whether I ought to consider the *Shahgaidi* case in light of the fact that it was not before Judge Smith. The petitioner submits that I can review the case and substitute my own decision.

[60] The general rule on a court's discretion to entertain a new issue on judicial review was set out by the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 22–

29. The Supreme Court held that where a party seeks to raise a new issue on judicial review, a court has discretion to permit them to do so. However, that discretion will generally not be exercised "where the issue could have been but was not raised before the tribunal": at para. 23.

[61] In *Vandale v. Workers' Compensation Appeal Tribunal*, 2013 BCCA 391, the Court of Appeal overturned the chambers judge's finding that a WCAT Appeal Division decision was patently unreasonable. The Court of Appeal declined to remit the matter to the WCAT to allow the petitioner to advance an Appeal Division decision in support of his claim. The Court of Appeal commented on the petitioner's failure to do so at first instance:

> [54] Although there was no evidence as to why Mr. Vandale did not advance the Appeal Division decision as binding in his submissions to the WCAT, the chambers judge opined that he simply overlooked it. Even accepting this point was overlooked, the fact remains that Mr. Vandale could have raised it not only before the original panel but also before the reconsideration panels. In my view, this militates strongly against his now being given the opportunity to re-argue his claim on that basis. To allow a party a new hearing before an administrative tribunal because it overlooked raising an issue or making an argument at the original hearing would unduly interfere with the role entrusted to such tribunals: *Alberta Teachers' Association* at para. 24. In effect, the tribunal's decision would be set aside not because it failed to pass scrutiny under the applicable standard of review, but because it did not address a point it was not asked to address.
>
> [55] In my view, having regard to all the circumstances, a further hearing before the WCAT is not warranted.
>
> [Emphasis added.]

[62] More recently, in *The Owners, Strata Plan VR 1120 v. Civil Resolution Tribunal*, 2022 BCCA 189, the Court of Appeal provided further guidance on attempts to raise new issues on judicial review:

> [49] *Alberta Teachers* recognizes that in limited circumstances, the reviewing court may permit a new issue to be raised on judicial review, but remit the issue to the tribunal to provide reasons in the first instance. However, a judge must be cautious in adopting such a process as it may undermine expedient and cost-efficient decision making, which are objectives of many administrative schemes. Parties should not receive a second hearing simply because they failed to raise at the first hearing all pertinent issues: *Alberta Teachers* at para. 55; *Vandale v. Workers' Compensation Appeal Tribunal*, 2013 BCCA 391 at para. 54.

> [50] Without suggesting that it would never be open to a judge on judicial review to remit a matter to a tribunal for reasons on a new issue that a petitioner could have, but did not, raise earlier, in my view, there would have to be exceptional circumstances to warrant such an order.
>
> [Emphasis added.]

[63] Finally, in *Zhang v. First Service Residential BC Ltd.*, 2023 BCSC 361, a similar argument was raised before Justice Chan wherein the petitioner sought to set aside the decision of a Residential Tenancy Branch arbitrator dismissing her application for the return of her security deposit. In *Zhang*, the petitioner submitted that the arbitrator failed to consider extending the limitation period, and relied on an additional case on that point. She did not, however, "make any of these arguments to the arbitrator". While Chan J. found that the case was distinguishable in any event, she also stated the following:

> [38] In my view, it cannot be patently unreasonable for the arbitrator not to have considered an argument that was not made to her. Further, Ms. Zhang ought not be provided a further opportunity to re-argue her claim in these circumstances, when she could have raised it. The following comments of Frankel J.A. from *Vandale* at para. 54 apply…
>
> [Emphasis added.]

[64] This is precisely what this petitioner has asked me to do. He did not bring the *Shahgaidi* case before Judge Smith. As I have noted above, his counsel specifically argued that no caselaw existed in Canada, despite the fact that this case was published well before the hearing before Judge Smith and the petitioner's counsel was able to find it the next day.

[65] In my respectful view, the failure of the petitioner's counsel to adequately research the issue prior to bringing his application before Judge Smith should not now permit the petitioner a further opportunity to re-argue his claim. He ought to have raised this case before Judge Smith in the first instance. The respondents are entitled to finality on the underlying issue of nuisance that occurred almost four years ago.

[66] The petitioner's submissions on the judicial review focussed exclusively on the key issue in the underlying claim of a landlord's liability for a tenant's nuisance.

In my view, on this judicial review, the petitioner attempted to argue this central issue on a *de novo* basis, which is not permitted.

[67] In arriving at this conclusion, I am guided by the Supreme Court's comments in *Vavilov*. In assessing reasonableness, I cannot say that Judge Smith ignored the law in adjudicating the parties' rights, nor am I able to say that Judge Smith fundamentally misapprehended, failed to account for the evidence, or failed to meaningfully grapple with key issues or central arguments.

[68] I fail to see how it can be said that Judge Smith erred in his decision when the petitioner never raised the case he now seeks to have me consider.

[69] While there may be exceptional circumstances where a reviewing court can on judicial review remit a matter to a tribunal for reasons on a new issue that a petitioner could have, but did not, raise earlier, this is not one of them. Accordingly, as I have found that Judge Smith's decision was not unreasonable, I decline to remit the matter back to Judge Smith.

Conclusion

[70] For the above reasons, I find that the decision of Judge Smith was not unreasonable. As the decision was not unreasonable, and the default judgment remains in effect, there is no reason for me to consider whether to dismiss the underlying claim. The petition is thereby dismissed.

[71] The respondents are entitled to their costs.

"Girn J."