IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1028677 B.C. Ltd. v. The Owners, Strata Plan LMS 1083 ,* 2024 BCSC 578

Date: 20240416
Docket: S247384
Registry: New Westminster

Between:

1028677 B.C. Ltd.

Petitioner

And

The Owners, Strata Plan LMS 1083;
Civil Resolution Panel

Respondents

Before: The Honourable Justice Matthews

On judicial review from: An order of the Civil Resolution Tribunal, dated November 22, 2022 (*The Owners, Strata Plan LMS1083 v. 1028677 B.C. Ltd.*, 2022 BCCRT 1261, ST-2022-001350)

Reasons for Judgment

Counsel for the Petitioner:	B. Scheidegger
Counsel for the Respondent, LMS 1083:	A. Kokanova
Place and Date of Hearing:	New Westminster, B.C. October 5, 2023 January 30, 2024
Place and Date of Judgment:	New Westminster, B.C. April 16, 2024

2024 BCSC 578 (CanLII)

Table of Contents

2024 BCSC 578 (CanLII)

2024 BCSC 578 (CanLII)

Overview

[1] The petitioner, 1028677 B.C. Ltd., owns strata lot 6 of Strata Plan LMS 1083. In 2022, LMS 1083 commenced a proceeding in the Civil Resolution Tribunal seeking that 1028677 reverse alleged unauthorized alterations of strata lot 6 that were undertaken in 2015. 1028677 asserts that the alterations were authorized by a letter dated September 22, 2015 signed by then strata council president.

[2] In a decision indexed at 2022 BCCRT 1261, the tribunal member ordered 1028677 to reverse listed alterations to strata lot 6. In resisting that order, 1028677 relied on the September 22, 2015 letter LMS 1083 asserted that the letter was forged. The tribunal member found that the letter did not authorize the alterations to strata lot 6 based on evidence including statements of various individuals which could not be reconciled.

[3] The tribunal member ordered 1028677 to reverse the alterations by "restoring them to the condition that they were in before the alterations occurred in 2015" but did not make findings as to what condition they were in before the alterations occurred. The listed alterations include constructing a mezzanine floor in strata lot 6 and installing an HVAC unit.

[4] On this judicial review it is common ground that construction of a mezzanine floor was not an unauthorized alteration because it was present in strata lot 6 when 1028677 bought it. LMS 1083 concedes that the adjudicator's determination that 1028677 constructed the mezzanine was in error, but asserts that the error is not palpable and overriding because the order provides for strata lot 6 to be restored to its condition before the unauthorized alterations and so long as 1028667 does that, on the current understanding of that condition was, there is no problem with the order.

[5] With regard to the HVAC, 1028677 points to evidence that the HVAC in strata lot 6 had been recently improved prior to 1028677's purchase of strata lot 6 in March 2015 and so it cannot be an unauthorized alteration. LMS 1083 maintains that

1028677 installed an HVAC unit without authorization and asserts that the adjudicator did not err in making that finding.

[6] The issues are:

a) whether the decision was procedurally unfair because a central issue was whether the principal of 1028677, Matthew Dosen, forged the signature of the president of the strata council on the September 22, 2015 letter authorizing the renovations and the adjudicator did not require *viva voce* evidence to decide that issue; and

b) whether the decision was patently unreasonable in relation to the mezzanine and the HVAC because the tribunal member did not grapple with whether there were unauthorized alterations or make an order that can be complied because there is no statement about the status of strata lot 6 in relation to those matters before the 2015 renovations.

Procedural Fairness

[7] The parties agreed that the standard of review on this issue is correctness. This court must review the decision to determine whether, given all of the circumstances, the tribunal acted fairly.

Legal Principles

[8] A discussion of procedural fairness usually starts with *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699 where Justice L'Heureux-Dubé explained that the purpose of the duty is to ensure that the administrative decisions are made in a fair and open manner with a procedure that provides notice to those who will be affected to put forward their views and have them considered by the tribunal member.

[9] The scope of the duty varies with the circumstances in which the decision is made: *Baker* at paras. 22–23. It is typically determined with reference to a non-exhaustive list of factors identified in *Baker* at paras. 23–27 as:

2024 BCSC 578 (CanLII)

> (1) the nature of the decision being made and the process followed in making it;
>
> (2) the nature of the statutory scheme and the provisions of the legislation under which the decision-maker operates;
>
> (3) the importance of the decision to the individuals affected;
>
> (4) the legitimate expectations of the person challenging the decision; and
>
> (5) the choices of procedure made by the decision-maker "particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances".

[10] In *Downing v. Strata Plan V2356*, 2023 BCCA 100, the Court of Appeal held that because the function of the Civil Resolution Tribunal is to resolve civil disputes, the requisite procedural fairness is "closer to the trial mode": at para. 36.

[11] In *Athwal v. Johnson*, 2023 BCCA 460, the Court of Appeal held that a "high level of procedural fairness" was required for self-represented parties in residential tenancy board proceedings. The Court of Appeal also addressed whether a self-represented litigant should be foreclosed from making a "procedural fairness claim … for the first time on judicial review". At para. 64, the Court of Appeal explained that "the principle that a party should raise all issues at first instance is not a hard and fast rule", citing *R.N.L. Investments Ltd. v. British Columbia (Agricultural Land Commission*), 2021 BCCA 67. The Court of Appeal held that "[t] he court may exercise its discretion to allow a party to raise a new issue on judicial review, especially if the party was practically precluded from raising the issue at first instance and there is no prejudice to the other party" (para. 64 of *Athwal)*.

[12] Deference is owed to the tribunal member on factual determinations that pertain to procedural fairness. The question is whether the process aligned with minimum fairness requirement, not whether it meets what the reviewing court considers to be the optimal procedure: *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 at para. 179.

[13] Where appropriate deference is given and a want of procedural fairness is nevertheless identified, even a substantively reasonable administrative decision will

2024 BCSC 578 (CanLII)

be set aside: *Mission Institution v. Khela*, 2014 SCC 24 at para. 79. That is because a decision that arises from a procedurally unfair process cannot stand: *Athwal* at para. 23.

Whether Proceeding on a Written Record was Procedurally Fair

[14] The petitioner's position is that the decision was not fair because a central issue was whether the LMS 1083 had authorized the renovations through a letter allegedly signed by the strata council president in September 2015. That factual issue was the subject of unsworn statements by the strata council president who denied that he signed it; and by Mr. Dosen, and Kelly Dosen, both of whom stated they saw the strata council president sign it.

Application of the Baker Factors

The Nature of the Decision Being Made

[15] As set out above, in *Downing*, the Court of Appeal held that generally speaking, because the Civil Resolution Tribunal is in the business of adjudicating civil disputes, a high degree of procedural fairness is required.

[16] In addition, I would observe that the issue of whether the September 22, 2015 letter provided authorization was a high stakes issue because LMS 1083 asserted that 1028667 forged it and provided it to the municipality to obtain a building permit. That is a very serious allegation to make affecting the integrity and reputation of the principle of 1028677.

[17] In addition, the outcome of this dispute involved high stakes because what was sought was the reversal of significant structural changes to strata lot 6 which had been in place for six to seven years by the time LMS 1083 commenced the Civil Resolution Tribunal Proceedings.

The Nature of the Statutory Scheme and the Precise Statutory Provisions

[18] The parties referred to several sections of the *Civil Resolution Tribunal Act,* S.B.C. 2012, c. 25 as follows:

2024 BCSC 578 (CanLII)

Civil Resolution Tribunal mandate and role

2 (1) The Civil Resolution Tribunal is established, consisting of the chair and other tribunal members appointed in accordance with this Act.

(2) The mandate of the tribunal is to provide dispute resolution services in relation to matters that are within its authority, in a manner that

(a) is accessible, speedy, economical, informal and flexible,

(b) applies principles of law and fairness, and recognizes any relationships between parties to a dispute that will likely continue after the tribunal proceeding is concluded,

(c) uses electronic communication tools to facilitate resolution of disputes brought to the tribunal, and

(d) accommodates, so far as the tribunal considers reasonably practicable, the diversity of circumstances of the persons using the services of the tribunal.

(3) In fulfilling its mandate, the role of the tribunal is

(a) to encourage the resolution of disputes by agreement between the parties, and

(b) if resolution by agreement is not reached, to resolve the dispute by deciding the claims brought to the tribunal by the parties.

(4) In addition to its responsibilities in relation to disputes brought to the tribunal for resolution, the tribunal may

(a) provide the public with information on dispute resolution processes generally, and

(b) make its online dispute resolution services available to the public generally.

…

General rule that parties to represent themselves

20 (1) Unless otherwise provided under this Act, the parties are to represent themselves in a tribunal proceeding.

(2) A party may be represented by a lawyer or another individual with authority to bind the party in relation to the dispute if

(a) the party is a child or a person with impaired capacity,

(b) the rules permit the party to be represented, or

(c) the tribunal, in the interests of justice and fairness, permits the party to be represented.

2024 BCSC 578 (CanLII)

(3) Without limiting the authority of the tribunal under subsection (2) (c), the tribunal may consider the following as circumstances supporting giving the permission:

(a) another party is represented in the proceeding;

(b) the other parties have agreed to the representation.

(4) A person representing a party in a tribunal proceeding must be a lawyer unless

(a) the rules otherwise permit, or

(b) the tribunal is satisfied that the person being proposed to represent the party is an appropriate person to do this.

(5) In the case of a party that is a corporation, partnership or other form of organization or office with capacity to be a party to a court proceeding, the person acting for the party in the tribunal proceeding must be

(a) a director, officer or partner of the party,

(b) an individual permitted under the rules, or

(c) an individual permitted by the tribunal.

…

General tribunal authority in conducting hearings

38 The procedure for a tribunal hearing in relation to a dispute is at the discretion of the tribunal, subject to this Act and the rules.

How tribunal hearings are conducted

39 (1) In resolving a dispute, the tribunal may conduct a hearing in writing, by telephone, videoconferencing or email, or through use of other electronic communication tools, or by any combination of those means.

(2) It is not necessary for the means of communication referred to in subsection (1) to allow all parties to the dispute to take part at the same time.

(3) The tribunal may hold an in-person hearing if the tribunal considers that the nature of the dispute or that extraordinary circumstances make an in-person hearing necessary in the interests of justice.

(4) Subject to an order under subsection (5), an in-person hearing must be open to the public.

(5) The tribunal may, by order,

(a) impose restrictions on a person's continued participation in or attendance at a tribunal hearing, and

2024 BCSC 578 (CanLII)

> (b) exclude a person from further participation in or attendance at a tribunal hearing until the tribunal orders otherwise.

[19] In *Djakovic v. British Columbia (Workers Compensation Appeal Tribunal)*, 2010 BCSC 1279, the governing statute granted the discretion to hold a hearing in writing, orally or by other means. The chambers judge held that the refusal to hold an oral hearing amounted to a failure to afford procedural fairness where the issue on which cross examination was sought was relevant and central. The chambers judge held that the procedural fairness error was the acceptance of the risk that not all of the information that could have affected its decision was before the court.

[20] In *Downing,* one of the grounds for judicial review was that the Civil Resolution Tribunal's Vice Chair did not hold an oral hearing despite credibility issues. The Court of Appeal reviewed the jurisprudence relating to procedural fairness and the failure to hold an oral hearing when credibility is a central issue, including *Djakovic*; *Weiss v. Workers' Compensation Appeal Tribunal*, 2021 BCSC 231; *Bhullar v. Workers' Compensation Appeal Tribunal*, 2019 BCSC 1673; and *Pion v. British Columbia (Workers Compensation Appeal Tribunal),* 2022 BCSC 1112. The Court of Appeal concluded that where the tribunal has discretion to hold an oral hearing and permit witnesses to be cross-examined, the tribunal must weigh the advantages of an oral hearing against the efficiency. This conclusion is supported by s. 2 and s. 39(3) of the *Civil Resolution Tribunal Act*.

[21] Below I will describe a submission that 1028677 made on credibility which did not gain any traction with the tribunal member for reasons the tribunal member did not explain. At this juncture, I refer to that submissions to address one of LMS 1083's submissions, which is that 1028667 did not request an oral hearing. In this regard, LMS 1083 refers to Rule 9.1(6). The whole of Rule 9.1 reads as follows:

> Rule 9.1 – Tribunal Hearings
>
> 1) The tribunal has discretion to decide whether a hearing will be held in writing, orally, or a combination of in writing and orally.
>
> 2) A tribunal hearing will generally be held in writing.

2024 BCSC 578 (CanLII)

> 3) A written hearing may be conducted by email, electronic submissions, or paper submissions.
>
> 4) An oral hearing may be conducted by telephone, by videoconference, or in extraordinary circumstances and where required by the interests of justice, in person.
>
> 5) [Repealed]
>
> 6) To request an oral hearing a party must inform the case manager of the request during the case management phase.
>
> 7) If the tribunal orders an oral hearing it will issue a Notice of Hearing containing
>
> a) the time and date of the hearing,
>
> b) how the hearing will be conducted,
>
> c) instructions for providing witness lists, and
>
> d) any other information the tribunal considers necessary.

[22] I do not regard Rule 9.1(6) as limiting the tribunal member's authority to order an oral hearing to circumstances where a party requests one. I regard *Downing* as authority for the proposition that where parties are self represented, and especially where the legislation requires self representation unless an exception is made, administrative decision maker must be actively engaged in considering whether the appropriate procedure is being utilized to ensure a fair hearing that allows the tribunal member to get to the truth. Because of the legislative scheme requiring parties to self represent in most cases and stipulating that hearings will generally be held in writing, the tribunal member needed to be acutely aware of and actively considering whether he had the evidence and procedure he needed to find facts where there was evidence on a key issue that was diametrically opposed.

[23] In short, the tribunal member had the discretion to employ procedures to make sure it had the capability of fairly deciding the issue before it.

[24] LMS 1083 assert that the tribunal member adequately considered whether further procedures were required at para. 8 of his reasons where he stated as follows:

> 8. CRTA section 39 says the CRT has discretion to decide the format of the hearing, including by writing, telephone,

2024 BCSC 578 (CanLII)

> videoconferencing, email, or a combination of these. *Some of the evidence in this dispute amounts to a "they said, they said" scenario. The credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence.* Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note that in *Yas v. Pope*, 2018 BCSC 282, at paragraphs 32 to 38, the British Columbia Supreme Court recognized the CRT's process and found that oral hearings are not necessarily required where credibility is an issue.
>
> [Italics and underlining added]

[25] 1028667 notes that para. 8 quoted above appears as part of the tribunal member's preliminary comments. 1028667 asserts that the italicized portion of para. 8 is the language that appears as part of the preliminary comments in 280 Civil Resolution Tribunal decisions and the underlined language appears in 220 decisions. The tribunal member did not refer to the specific conflicting evidence in this case or explain why he could resolve them using the tools that he employed other than having an oral hearing with cross examination. He did not explain whether doing so on unsworn statements, not subject to cross examination, provided efficiency gains that outweighed the advantages of what an oral hearing and cross examination can offer in fact-finding.

[26] I do not regard para. 8 as containing reasoned analysis of the procedural issues in the case before the tribunal member, given the particular evidentiary issues that arose in this case. Para. 8 does not demonstrate that the tribunal member engaged in the requisite weighing of the mode of hearing required to engage in procedurally fair fact finding.

The Importance of the Decision to the Individuals Affected

[27] LMS 1083 submits that the decision around the September 22, 2015 letter is not important to the outcome since the letter only purported to approve the addition of a caretaker's suite to the second storey of strata lot 6, and not the full list of 6

2024 BCSC 578 (CanLII)

alterations that LMS 1083 asserts were unauthorized. LMS 1083 also asserts that at law, the alterations could not be authorized by a letter signed by the strata council president, and so the letter cannot be proof of authorization in any event.

[28] The tribunal member considered that whether the alterations had been approved was central because that would determine whether the alterations had been undertaken in breach of the bylaws as described by the tribunal member at paras. 38-41 of his reasons. The tribunal member considered the September 22, 2015 letter extensively in relation to the approval of the alterations as a whole.

[29] The president of the strata council provided a written statement in which he expressly denied signing the letter including pointing out that the letter had a last name which was different from his ("Openshaw" vs. "Owen-Jones). Even though his email address uses the name "Openshaw", the strata council president stated he would not sign a letter that did not contain his correct name.

[30] The tribunal member does not explain why he preferred the strata council president's evidence to that of Mr. Dosen and Kelly Dosen who made statements saying they saw the strata president sign the letter. The tribunal member considered the evidence of other people, who did not sign the letter and did not make any statement that they had knowledge of it one way or the other, but who made bare statements that the alterations were not approved. The tribunal member concluded those statements supported the strata council president's denial that he signed the letter.

[31] As I have said, none of this evidence was sworn. The tribunal member noted that 1028677 made submissions that the strata council president was not trustworthy but the tribunal member found them unpersuasive and did not find it unnecessary to set out what those allegations of untrustworthiness were. The tribunal member did not explain why he found those submissions unpersuasive.

[32] The tribunal member found that the president did not sign the September 22, 2015 letter. This amounted to an acceptance of the position of LMS 1083 that the

2024 BCSC 578 (CanLII)

principle of 1028677 forged the September 22, 2015 letter, which was then provided to the City of Surrey to obtain a building permit.

[33] Accordingly, the tribunal member made what he considered was a central finding of fact that was credibility-dependent without articulating how he resolved the evidence that directly conflicted. The tribunal member did so in the absence of sworn evidence, on an issue of credibility where the outcome was a finding of forgery.

[34] The record of the matter before the tribunal does not support LMS 1083's submission that the letter was not central. The record includes statements by Mr. Dosen and by other owners that the strata council did not meet regularly and did not have a quorum at all times in 2015. Mr. Dosen was the only strata council member for a period in July and August 2015. Mr. Dosen has asserted that in the absence of a functioning council, he had the strata council president provide him with the authorization he needed to obtain a building permit from the City of Surrey.

[35] The extent to which the letter could stand as an authorization for anything, and if so, whether it only authorized the caretaker's suite, is not factually or legally clear. It is not the role of this court, on judicial review, to sort it out. It does not appear that the tribunal member saw the letter as a red herring or incapable of legally providing the required authorization. The tribunal member did not undertake any of the analysis that LMS 1083 now says is critical to sideline the September 22, 2015 letter based on the requirements in the *Strata Property Act*. If an authentic letter was incapable of authorizing the alterations, that would have been a very straightforward path to the conclusion that the alterations were not authorized. The tribunal member did not take that path.

[36] Instead, the issue of whether the September 22, 2015 letter was signed by the strata council president, or was forged as claimed by LMS 1083, figures centrally in the tribunal member's reasons. The decision has 15 paragraphs on whether the renovations were authorized by LMS 1083, and of those, 9 are dedicated to the September 22, 2015 letter. At the conclusion of those 15 paragraphs, the tribunal member concluded that the strata council strata council president had not signed the

2024 BCSC 578 (CanLII)

letter and therefore, LMS 1083 had met its burden to prove that the petitioner had breached the bylaws. At no point did the tribunal member differentiate what the letter purported to authorize and the list of alleged unauthorized alterations.

[37] In addition, when considering remedy, the September 22, 2015 letter formed part of the analysis. At para. 65, the tribunal member considered that the letter was part of a pattern of behaviour of 1028677 misleading LMS 1083 about its renovations.

[38] The factual dispute on this issue was not minor. LMS 1083 had the burden of proof. It cannot be gainsaid that administrative tribunals decide contested matters on written records in many cases. However, the law also makes it clear that in some cases, evidence should be tested through cross examination.

[39] In this case, the circumstances were that either 1028667 was relying on forged evidence and the false statements of Mr. Dosen and Ms. Dosen, or the respondent's witness, Mr. Owen-Jones, made a false statement to the tribunal.

[40] Where such serious allegations are in play, the tribunal member was required to consider whether the process he employed was adequate to the task of determining the truth. Had he done so, deference would be required.

The Legitimate Expectations Of the Party Challenging the Decision

[41] LMS 1083 submits that because the petitioner did not request an oral hearing, there can be no suggestion that there was a lack of procedural fairness in not requiring cross examination. This relates to whether 1028677 had a legitimate expectation to explore the credibility issue through an oral hearing with cross examination.

[42] I do not accept this submission. The *Civil Resolution Tribunal Act* has set up a process by which the decision-maker is not solely a passive receiver of evidence and submissions who makes a decision based on that. The default is that the parties will be self-represented. The legislation empowers a Civil Resolution Tribunal member to find facts based on evidence that might not be admissible in a court and

2024 BCSC 578 (CanLII)

to make inquiries or ask questions of the parties. The parties make their submissions and submit their evidence through prescribed forms.

[43] Accordingly, the legislative scheme is such that the tribunal member cannot rely on self-represented persons to press for the procedural safeguards that may be appropriate in a given case. The legally trained and specialized tribunal members must be active guardians of fair procedure in such circumstances. Given the legislation, that is a heavier burden and requires more proactivity on a tribunal member than in tribunals where the parties are entitled to be represented by legal counsel.

[44] This conclusion is consistent with *Athwal*. However, the question still remains as whether 1028677 should be permitted to raise the issue on judicial review. In *Athwal* the Court of Appeal held that a judicial review court should consider whether the party was practically precluded from raising the issue in the first instance and whether the opposing party would be prejudiced when deciding whether to raise the issue.

[45] LMS 1083 asserts that 1028677 did not request an oral hearing and if it wanted one, was required to do so by Rule 9.1(6) of CRT Rules.

[46] The record demonstrates that while 1028677 did not expressly ask for an oral hearing, it did raise the issue of credibility, specifically, that the tribunal member should not believe the strata council president's denial that he signed the September 22, 2015 letter because of credibility issues. As I have related, the tribunal member gave this submission short shrift for unexplained reasons.

[47] Regardless of why the tribunal member dismissed this submission, 1028677 made a submission that should have, at the very least, put up a red flag to the tribunal member as to whether the tribunal member could decide the credibility issues in a procedure that did not provide for cross examination or for the tribunal member to make a considered assessment of credibility.

2024 BCSC 578 (CanLII)

[48] I do not regard Rule 9.1(6) as limiting the tribunal member's authority to order an oral hearing to circumstances where a party requests one. I regard *Downing* as authority for the proposition that where parties are self represented, and especially where the legislation requires self representation unless an exception is made, administrative decision maker must be actively engaged in considering whether the appropriate procedure is being utilized to ensure a fair hearing that allows the tribunal member to get to the truth. Because of the legislative scheme as I have described, the tribunal member needed to be acutely aware of and actively considering whether he had the evidence and procedure he needed to find facts where there was evidence on a key issue that was diametrically opposed.

[49] Accordingly, while there is no indication that 1028677 was actually precluded from requesting an oral hearing with cross examination, I conclude that 1028677 raised an issue that should have triggered the tribunal member to consider whether the procedure was adequate to the case. Having done so, and given that legislated self-representation unless the tribunal member decided otherwise, I conclude that 1028677 did the best that could be expected in the circumstances and so was practically precluded from understanding that what it needed to do was expressly request an oral hearing.

[50] With regard to prejudice, while LMS 1083 submitted that 1028677 should not be permitted to raise procedural fairness on this judicial review, it did not argue that it would be prejudiced if the Court considers procedural fairness on judicial review.

The Nature of the Deference Accorded to the Body

[51] It is clear that weight must be given to the procedures selected by the tribunal. However, in order to be correct in terms of procedural fairness, as explained in *Downing*, the tribunal member must engage in weigh the advantages of an oral hearing against efficiency. Where the tribunal member does not do so, there is limited analysis to which deference can be accorded.

[52] LMS 1083 assert that the tribunal member did the requisite weighing at para. 8 of his reasons set out above. I have explained why I do not consider para. 8

2024 BCSC 578 (CanLII)

of the tribunal member's reasons to be an adequate weighing of the procedural options to decide the factual issues that this proceeding raised.

[53] In *Yas v. Pope*, 2018 BCSC 282, Justice Baird, on judicial review of a decision of a Civil Resolution Tribunal member, held that conflicting evidence could be resolved on a written record. In this case, the tribunal member cited *Yas*.

[54] The holding in *Yas* is not a general or immutable rule, or if it was, it has been eclipsed by *Downing*. There is now clearly a requirement that the tribunal member to consider the appropriate procedure taking into account the specific issues in the case before the tribunal, including whether credibility is in issue, recognizing that credibility can be best tested at an oral hearing (*Weiss* at para. 49) and cross examination is a foundation of the adversarial system including before administrative tribunals (*Djakovic* at paras. 44, 46 and 51).

[55] Having not done so, especially where such serious allegations are made including that one party or the other is lying to the tribunal on the central issue, the tribunal member's choice of procedure is not owed deference.

Conclusion on Procedural Fairness

[56] The circumstances of this case raised the issue of whether an oral hearing or some procedure more robust than an entirely digital hearing was sufficient to resolve the evidentiary issues, especially on the controversial key issue of whether 1028677's alterations were approved by the strata council in whole or in part through the September 22, 2015 letter.

[57] The tribunal member's reasons do not demonstrate that he considered that specific issue or that he engaged in the requisite weighing in determining what procedure to employ.

[58] I conclude that the manner of proceeding did not accord 1028677 the minimum procedural fairness that was appropriate.

2024 BCSC 578 (CanLII)

[59] In the result, the decision must be overturned and returned to the CRT for a new hearing.

Whether the Decision was Patently Unreasonable Because Some of the Renovations Had Already Been Done Before the Petitioner Bought the Lot

[60] Having decided that the decision was procedurally unfair, it is not necessary to consider whether the decision was patently unreasonable. However, since the issue was fully argued, and in case I am wrong on procedural fairness, I will address this issue.

[61] As I have already related, LMS 1083 issued its dispute notice alleging that 1028677 made seven alterations to strata lot 6 that were not authorized. 1028677 asserts that two of those alterations, the addition of the mezzanine and the installation of an HVAC unit, had been made by a previous owner. LMS 1083 agrees that the tribunal member proceeded on an erroneous misunderstanding of the facts in relation to the construction of the mezzanine level, but that the error is cured by the order to restore strata lot to its pre-alteration status.

[62] I do not agree with LMS 1083. I conclude that the terms of the order, when considered against its erroneous factual substratum, results in an order that cannot be complied with and may engender further litigation.

Legal Principles

[63] Patent unreasonableness is the most deferential standard of review. It is not a matter of whether the court is persuaded by the rationale for an administrative body's decision, but rather, the court must "merely ask whether, assessing the decision as a whole, there is any rationale or tenable line of analysis supporting the decision, such that the decision is not clearly irrational" or "is so flawed that no amount of curial deference can justify letting it stand": *Team Transport Services Ltd. v. Unifor, Local No. VCTA*, 2021 BCCA 211 at para. 28, citing *Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109 at para. 65, aff'd 2009 BCCA 229. The Supreme Court of Canada has described a patently unreasonable decision as one that "almost borders on the absurd": *The*

2024 BCSC 578 (CanLII)

College of Physicians and Surgeons of British Columbia v. The Health Professions Review Board, 2022 BCCA 10 at para. 131, citing *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para. 28.

Analysis

[64] The central issue on this question is that the list of renovations that LMS 1083 stated were unauthorized in its dispute notice contained important errors that the tribunal member did not address.

[65] The first pertains to the second floor mezzanine. In its dispute notice, LMS 1083 asserted that Civil Resolution Tribunal constructed a second floor mezzanine without authorization. In its oral submissions on this judicial review, LMS 1083 now agrees that was in error, and the real issue that it meant to dispute was that 1028677 expanded an already existing mezzanine without authorization. However in its petition response, and its initial written submissions, LMS 1083 stated that the unauthorized alterations included 1028667 "constructing a mezzanine level (second floor) inside the Strata Lot, which may have punctured the firewall between the Strata Lot and the neighbouring unit".

[66] The second pertains to HVAC. In its dispute notice, LMS 1083 alleged that 1028677 installed an HVAC unit on the roof above strata lot 6 without authorization. 1028677 asserts that the HVAC unit was installed prior to its purchase of the strata lot. LMS 1083 does not accept that is the case.

Whether 1028677 Is Impermissibly Raising These Issues for the First Time on Judicial Review

[67] The tribunal member stated that the parties agreed that, among other things, 1028677 "constructed a mezzanine level (second floor) inside SL6" and "installed a HVAC unit on the roof above SL6".

[68] LMS 1083 submits that 1028677 did not take issue with LMS 1083's description of the alterations before the Civil Resolution Tribunal and so cannot now argue that the Civil Resolution Tribunal erred by accepting LMS 1083's admittedly erroneous description of the alterations.

2024 BCSC 578 (CanLII)

[69] The basis for that submission is that in its dispute response at the Civil Resolution Tribunal, 1028677 did not specially take issue with the description of the unauthorized alterations. That is correct, however 1028677 did state, in response to Claim 1 which pertained to the alleged unauthorized alterations, that it disagreed with the claim description as inaccurate. Later in that section, it stated the unauthorized alterations were done but disagrees that they were unauthorized.

[70] 1028677 asserts that it did take issue with the alterations that LMS 1083 raised in its dispute notice. 1028677 points to evidence it submitted to the Civil Resolution Tribunal and made reference to demonstrating that the mezzanine level was already constructed when it purchased strata lot 6 and that strata lot 6 was marketed to prospective buyers such as 1028677 as having an upgraded air conditioning system.

[71] LMS 1083 asserts that before the Civil Resolution the references to the evidence were made by 1028677 in the “comments” section of the forms that parties use to digitally upload their evidence. According to LMS 1083, such comments are not part of the parties’ submissions and 1028667 cannot rely on them to support its position that it argued these factual issues before the Civil Resolution Tribunal.

[72] I disagree. The form used has a column for the parties to bring to the tribunal’s attention any issues they wish the tribunal member to take into account when reviewing the evidence. That column is entitled “Description, How it supports the claim/response” for each piece of evidence submitted. This column is obviously for submissions about the evidence.

[73] It is clear that in its submissions, 1028677 raised the factual issue that two of the alleged unauthorized alterations pre-existed 1028677’s ownership of strata lot 6.

[74] In addition, in its “argument”, which LMS 1083 asserts is where the parties put their positions before the tribunal member, 1028677 took the position that LMS 1083 was seeking an order that it return strata lot 6 to its “original condition” while failing to specify what the original condition was. 1028677 submitted that an order requiring it

2024 BCSC 578 (CanLII)

to "reverse the unauthorized alterations" was vague and would likely result in further litigation.

[75] 1028677 led evidence to show that these two alleged unauthorized alterations pre-existed its purchase of strata lot 6 including:

a) drawings of the strata lot submitted to the City of Surrey in July 2015 showing the mezzanine level prior to September 2015 and describing an area described as "Level 2 – Existing";

b) a real estate listing for strata lot 6 prior to 1028677's purchase describing a "1063 sq. ft. mezzanine fully finished" and "Brand New air-conditioning unit";

c) a letter from an architect regarding the alterations describing that Mr. Dosen had applied for a building permit to "add floor area on the second level" and to "convert the rear portion of the second floor to a caretaker's suite".

[76] In addition, in relation to other evidence, 1028677 stated in the "Description, How it supports the claim/response" column that the evidence "proves that at the time of purchase in 2015, SL 6 had an existing second floor".

[77] 1028677 stated in the same column that the real estate listing shows that Mr. Dosen "did not install the air conditioner". In addition, in relation to other evidence, 1028677 stated in the same column that in relation to the evidence "SLR was purchased in 2015 with an existing rooftop AC unit".

[78] I accept that 1028677's dispute response may have initially led the tribunal member to the view that 1028677 agreed that it undertook the alterations that were alleged to be unauthorized. But the tribunal member asserted that he read everything. After reading everything, the tribunal member could not have continued with the view that 1028677 agree that it altered the strata lot by constructing the second floor mezzanine and putting an HVAC unit on the roof. In such

2024 BCSC 578 (CanLII)

circumstances, the Civil Resolution Tribunal legislation and the structure of the hearing that the tribunal member proceeded with should have prompted him to make inquiries to get to the bottom of the discrepancy especially since the parties were not represented.

2024 BCSC 578 (CanLII)

[79] In any event, LMS 1083's submission that 1028677 is raising these matters in this court for the first time is incorrect.

The Mezzanine

[80] On this review, LMS 1083 agrees that the evidence clearly shows that there was a pre-existing mezzanine level, however I note that this concession is very late in coming. In its response to petition and initial written submissions it took the same position as it took before the Civil Resolution Tribunal, i.e. that 1028677 constructed a second floor mezzanine in strata lot 6 without authorization.

[81] LMS now asserts that the unauthorized renovation was to add 694 square feet to it and construct a caretaker's suite in it. LMS 1083 is not able to say whether the caretaker's suite was constructed in the pre-existing mezzanine, in the addition, or in both.

[82] LMS 1083 asserts that the tribunal member's order makes it clear that he was differentiating between the pre-existing mezzanine and the addition.

[83] I do not agree. The tribunal member never acknowledged the pre-existing mezzanine and his reasons are only consistent with him not understanding that there was one. At para. 27 of the decision, the tribunal member described alterations made in August or September 2015 including that the petitioner "constructed a mezzanine level (second floor) inside SL6" and "constructed a caretaker suite inside SL6". In setting out the remedy, the tribunal member ordered the petitioner to "reverse the following alterations by restoring them to the condition they were in before the alterations occurred in 2015" including the mezzanine level. The decision cannot be read except to conclude that the tribunal member held that one of the unauthorized renovations was the entire second floor mezzanine.

[84] The tribunal member was partly led into this incorrect apprehension by both parties. LMS 1083 asserted that 1028677 had constructed an unauthorized mezzanine level. As I have already stated, 1028677 stated that it did not dispute the alterations complained of by LMS 1083 in its dispute notice, but also disputed the description of the claim and made submissions on evidence that the mezzanine level and the HVAC unit existed when it bought strata lot 6 and so could not be unauthorized alterations.

[85] As I have related, the tribunal member stated that he read all of the evidence. The evidence clearly shows that the mezzanine level existed before 1028677 commenced the renovations that were the subject of LMS 1083's dispute notice.

[86] The finding of the tribunal member that the petitioner constructed a mezzanine level without approval is patently unreasonable on the undisputed facts.

[87] LMS 1083 submits that nevertheless, the decision is not patently unreasonable because the tribunal member's order only requires reversal of the unauthorized alterations. In essence, LMS 1083 argues that if the order is interpreted with the correct facts, different facts from those found by the tribunal member, it can be applied so as to be not patently unreasonable. There are several problems with that argument.

[88] First, there is no sound basis to interpret an order using different facts from those found by the tribunal member. It is not reasonable to require 1028667 to rely on LMS 1083's late breaking and incomplete acknowledgment of the actual facts regarding the mezzanine to comply with the order when those facts are different from those on which the order is based. Again, I refer to the fact that in this court, in its petition response and in its initial written submissions, LMS 1083 continued to assert that 1028667 altered strata lot 6 in 2015 by constructing a second floor mezzanine. It was only in oral submissions and in its revised written submissions that it clarified that the 2015 unauthorized alteration was expansion of the pre-existing mezzanine. The status of the caretaker suite is still unclear as LMS 1083

2024 BCSC 578 (CanLII)

was not able to say whether it was constructed within the pre-existing mezzanine or the expansion.

[89] Second, it is patently unreasonable to require 1028677 to comply with an order based on a facts that are inconsistent with the reasons and the wording of the order and in a manner inconsistent with the wording of the order. The order requires 1028677 to reverse construction of the mezzanine level (second floor). The fact that LMS 1083 seems to suggest now that all is required is removing the expansion of the mezzanine is cold comfort to 1028677 which is faced with an order that cannot be read that way. Put another way, the order cannot be complied with given the disconnect between the facts on which it is based and what it says compared to the real facts.

[90] Third, this same problem is compounded by the fact that the tribunal member ordered that the reversal of the unauthorized renovations be inspected by a home inspector. That home inspector will presumably be inspecting for reversals that comply with the order made by the tribunal member, not a different order that is inconsistent with the order made by the tribunal member. LMS 1083 argues that the incorrect factual foundation does not render the decision patently unreasonable because the tribunal member ordered that 1028667 reverse the alterations by restoring them to the condition they were in before the alterations occurred in 2015. LMS 1083 argues that 10128667 therefore only need to reverse what LMS 1083 now acknowledges were the post-2015 alterations.

[91] Given that the both parties agree that the mezzanine as a whole was not an unauthorized alteration, the order is patently unreasonable because the order is based on an incorrect factual substratum and requires 1028667 to reverse an unauthorized alteration that is not an unauthorized alteration. The fact that the parties contributed to the confusion cannot cure the patent unreasonableness of the decision.

2024 BCSC 578 (CanLII)

The HVAC Unit

[92] The problem with the HVAC unit is different because LMS 1083 does not acknowledge that it pre-existed 1028677's purchase of strata lot 6.

[93] Unfortunately, the tribunal member did not specifically address the evidence as to whether that alleged alteration was undertaken by 1028677. Again, the tribunal member proceeded on the basis that 1028677 agreed that it did so. This was a problem partly created by 1028677's statement in its response to dispute notice contrasted with its submissions on the evidence. It was not clear.

[94] I am of the view that the tribunal member erred in not recognizing that contradictory state of affairs when the submissions on the evidence makes the contradiction plain and the structure of the hearing requires the tribunal member to identify such problems without the assistance of oral submissions and counsel assisting the party and the tribunal. The tribunal member did not identify the conflict, and resolve it through seeking further submissions and/or analyzing the evidence. The burden was on LMS 1083 to prove its allegation. It was not put to that burden. There was not finding of fact about the HVAC.

[95] The order requires restoration of strata lot 6 to it state prior to the unauthorized alterations. The tribunal member did not make findings about what that state is vis à vis the HVAC. The parties cannot know what the order practically requires 1028677 to do and so the order cannot be complied with. The combination of failing to require LMS 1083 to prove its allegation with regard to the HVAC and making an order that cannot be complied with amounts to a patently unreasonable decision.

[96] I conclude that the decision was patently unreasonable and must be remitted to the Civil Resolution Tribunal to be reconsidered.

Disposition

[97] I conclude that the manner in which the hearing below proceeded was procedurally unfair for failing to provide an adequate process to address the

2024 BCSC 578 (CanLII)

credibility issue on the central fact of whether the September 22, 2015 letter was forged. I remit the dispute to the Civil Resolution Tribunal for rehearing.

[98] I conclude that the decision was patently unreasonable for making an order that is in part inconsistent with undisputed facts about the second floor mezzanine. In addition, by not requiring LMS 1083 to prove that the HVAC was an alteration and by ordering its reversal to a pre-alteration state but not making findings of fact as to what that state was, the tribunal member granted relief that cannot be complied with and may lead to further litigation. It is patently unreasonable for that reason also. I remit the dispute to the Civil Resolution Tribunal for reconsideration.

"Matthews J."

2024 BCSC 578 (CanLII)