IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kassam v. Castro,*
2024 BCSC 921

Date: 20240529
Docket: S232926
Registry: Vancouver

Between:

Altaf Kassam

Petitioner

And

Wayne Castro and William Graham Sullivan
Also known as Graham Sullivan

Respondents

Before: The Honourable Justice Bantourakis

Reasons for Judgment

Counsel for the Petitioner:	I. Macdonald
Counsel for the Respondent, W. Sullivan:	M. Scherr R. Rogers
Place and Date of Hearing:	Vancouver, B.C. April 29, 2024
Place and Date of Judgment:	Vancouver, B.C. May 29,2024

INTRODUCTION

[1] The parties entered into two short fixed-term tenancy agreements for one rental unit but had a falling out over the non-payment of rent. The landlord seeks damages for breach of the tenancy agreements, both of which are subject to the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [*RTA*]. Mr. Sullivan is the only one of the two tenants to have been served and responded in these proceedings as Mr. Castro's whereabouts, I am told, are unknown.

[2] The parties agree that in the ordinary course the Director of the Residential Tenancy Branch ("RTB") would have exclusive jurisdiction to hear and determine the landlord's claim, pursuant to ss. 58(3) and 62(1)(b) of the *RTA*. However, they disagree on whether s. 58(2)(a) of the *RTA* ousts the Director's jurisdiction because of the amount the landlord is claiming in damages. That is, the parties agree that the Director has subject-matter jurisdiction, but disagree on whether he has monetary jurisdiction: *Janus v. The Central Park Citizen Society*, 2019 BCCA 173 at para. 10.

[3] The disagreement turns on whether this case involves "a dispute" in which the amount claimed for debt or damages is more than the monetary limit for claims under the *Small Claims Act,* RSBC 1996, c. 430 (i.e. $35,000); in such cases the Director "must not" determine the dispute unless ordered to by this Court: *RTA*, ss. 58(2)(a), 58(4)(a).

[4] The parties also disagree on what should be done if I conclude that the Director's monetary jurisdiction is exceeded, with the landlord contending that this Court should hear and determine the dispute pursuant to s. 58(4)(b) of the *RTA*, and the tenant arguing that the Court should order that the Director hear and determine the dispute pursuant to s. 58(4)(a) of the *RTA* or, if it does not, that the matter should be referred to the trial list or a hybrid procedure adopted that will better allow for determination of contested issues of fact: *Cepuran v. Carlton*, 2022 BCCA 76 at paras. 158–160.

[5] Finally, assuming that the Director's monetary jurisdiction is exceeded and that this Court chooses to hear and decide the matter, the parties disagree on whether damages are payable and, if so, the amount.

BACKGROUND

[6] The parties entered into two successive fixed-term residential tenancy agreements for the sublease of a furnished luxury property located at 2101-111 Alberni Street in Vancouver, B.C. The first was to run from February 1, 2023 and end May 31, 2023. Towards the end of the first month of that tenancy, they entered into the second agreement, which was to run from June 1, 2023 to August 31, 2023.

[7] The first and second agreements were identical save the amount of rent payable and, of course, the dates during which the tenancies were to run. Both were made subject to the *RTA*. The rent payable under the first tenancy agreement was $13,800 per month. The rent payable under the second tenancy agreement was $14,900 per month. Both agreements included liquated damages clauses setting the landlord's liquidated damages entitlement at a half month's rent in the event of tenant repudiation or breach.

[8] The tenants did not pay the rent due on April 1, 2023 and, shortly thereafter, told the landlord they had vacated the unit. On April 3, 2023, the landlord posted a 10-day notice to end tenancy and emailed copies to the tenants. The next day, one of them confirmed receipt. Under s. 46(4) of the *RTA*, the tenants had five days from the date they received the notice to either pay the overdue rent, or dispute the notice by making an application for dispute resolution to the RTB. That deadline was not met.

[9] Pursuant to s. 46(5) of the *RTA*, a tenant who has received notice under that section who does not, within the time provided, either pay the overdue rent or seek dispute resolution before the RTB is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice.

[10] The effective date of the notice in this case was April 14, 2023. The same day, the landlord commenced this proceeding by way of petition. He served the petition on Mr. Sullivan on April 22, 2023, before what had been scheduled as an end of tenancy condition inspection: *RTA*, s. 35. The parties have filed conflicting affidavits about what happened that day and the reasons a condition inspection was not completed.

[11] On May 25, 2023, the tenant filed a jurisdictional response to the petition. Subsequently he filed a response in which he maintained his jurisdictional objection but also answered the petition substantively. He only did that almost a year later on April 25, 2024, just a few days before the hearing of the petition and thus well beyond the time contemplated in Rule 16-1.

[12] On June 21, 2023, the Director of the RTB, who had been served as an interested party and in accordance with *Gates v. Sahota*, 2018 BCCA 375, at para. 43, leave to appeal to SCC ref'd, 38438 (2 May 2019), also filed a response. He took no position but responded to explain the legal framework and recent amendments to s. 58 of the *RTA*. The Director did not attend or make submissions at the hearing of the petition.

[13] The tenant did ultimately make good on the amount owing for the April rent, but nothing more than that. The landlord deposes that he attempted to find another tenant for the unit but those efforts were initially unsuccessful, until a new tenant was found for a tenancy commencing June 15, 2023, but at the much lower rate of $8,200 per month.

[14] The landlord therefore says he is owed additional amounts for the months of May through August, and liquated damages. The total amount claimed in damages

pursuant to both the first and second tenancy agreements is $44,900, broken down as follows:

First Tenancy Agreement:	May rent	$13,800
Second Tenancy Agreement:	June shortfall	$10,800
	July shortfall	$6,700
	August shortfall	$6,700
Liquidated damages:		$6,900 (First Tenancy Agreement amount)

[15] The tenant, for his part, disputes the amounts owing and says that he is entitled to return of the $7,000 damage deposit the landlord required of him (this deposit appears to exceed the statutory maximum in s. 19 of the *RTA*). He has very recently filed a dispute before the RTB regarding the damage deposit, which is set for hearing on July 22, 2024. However, if this Court decides the landlord is entitled to damages, he says the $7,000 deposit should be set off against any damage award. He also makes other allegations against the landlord, including that the rent increase as between the two tenancy agreements runs afoul of Part 3 of the *RTA*.

ANALYSIS

Is this a dispute that exceeds the monetary limit in s. 58(2)(a) of the *RTA*?

[16] According to s. 58(2)(a) of the *RTA*, except as provided in subsection 58(4)(a), the Director must not determine "a dispute" if the amount claimed for debt or damages is more than the monetary limit for claims under the *Small Claims Act* (subject to certain exceptions that do not apply here). In that instance, this Court may exercise jurisdiction to hear and determine the dispute, or order the Director to: *RTA*, s. 58(4)(a)-(b).

[17] The landlord says that this case involves just such a dispute, as he is claiming more than $35,000 in damages. The tenant, however, objects on the basis that this Court's jurisdiction has not been properly invoked: *Gates* at para. 44. He says that

this case actually involves *two* disputes: one under the first tenancy agreement and one under the second, each of which falls below the monetary limit. He says the landlord has improperly bundled two disputes into one to bypass the Director's exclusive jurisdiction.

[18] "Dispute" is not a defined term in the *RTA*. In *Janus*, taking up the language of s. 2 of the *RTA*, the Court of Appeal held that that the disputes contemplated by the *RTA* were those "arising out of the tenancy agreement, the Act and the regulations": *Janus* at para. 23. That language is also employed in s. 58(1) of the *RTA*, which provides that "a dispute" may be initiated regarding (a) rights, obligations and prohibitions under the *RTA*; and (b) rights and obligations under the terms of "a tenancy agreement". *Janus*, which involved a tenant's personal injury claim against a landlord, does not address whether a single dispute can arise from more than one tenancy agreement where the parties and rental property are the same.

[19] The jurisprudence does not appear to address this issue directly. In *Gates*, the Court of Appeal held that the Director's "jurisdiction cannot be avoided merely by joining multiple claims, each of which falls within the Director's exclusive jurisdiction" or, put otherwise, that the small claims limit "cannot be avoided by aggregating separate claims": *Gates* at paras. 72-73. The issue in that case, however, was a tenant's attempt to certify his landlord/tenant dispute as a class action, or pursue it as a representative proceeding. It did not involve one landlord and tenant pairing, nor a single rental unit.

[20] A single landlord and tenant pairing involving the same property can give rise to more than one dispute at the same time. That was the case in *Gil v. Lloyd*, 2019 BCSC 1455, where one landlord-tenant pairing (and a single tenancy agreement) gave rise to two disputes, one regarding rent and one regarding peaceful enjoyment, each of which was separately assessed by this Court in view of determining whether it fell above or below the monetary limit in s. 58(2)(a). However, in that case, the two "disputes" dealt with different aspects of a single tenancy with one dispute initiated by the landlord, and the other by the tenant.

[21] In *Abboud v. Jung*, 2020 BCSC 736, like here, there were two successive tenancy agreements though they were much longer. However, the issue there was whether the tenant petitioner had advanced inflated monetary claims that had no basis. That is, the question was whether the claims were frivolous and vexatious. Based on the respondent's failure to pursue the proper procedural avenue to challenge the claims on that basis, the Court conducted its jurisdictional assessment in view of the amounts sought on the face of the claim, which far exceeded the monetary limit.

[22] Applying the modern approach to statutory interpretation, the question is whether read in its entire context, in its grammatical and ordinary sense harmoniously with the scheme of the *RTA*, its object and the legislature's intention, "a dispute" for the purposes of assessing whether the monetary limit is exceeded necessarily arises from a single tenancy agreement, or instead may relate to two or more tenancy agreements, for example involving the same parties and property: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at paras. 26–27; see also *Gates* at paras. 35–37.

[23] The parties' submissions on the jurisdictional issue did not meaningfully address the term "a dispute" in its context, in the broader scheme of the *Act* or in view of legislative intent. The petitioner submitted that even if he had initiated two separate disputes before the RTB, the Director likely would have consolidated them and dealt with them together. On the submissions I have received, it is not apparent how the procedural mechanism of consolidation advances the jurisdictional analysis. The respondent, for his part, argued that the Court could take from the use of the singular "a tenancy agreement" in s. 58(1)(b) of the *RTA* that a dispute must arise from a single agreement. Divorced from a contextual assessment it is, again, unclear how this should factor into the analysis. The term "dispute" is employed in several of the *RTA*'s provisions and the parties did not address the broader import, if any, of the interpretations they were advancing.

[24] The Court did not receive any submissions from the Director on the statutory interpretation question. The Director's response describing the statutory scheme generally was filed after the tenant had filed a bare jurisdictional response, but before the objection was fleshed out. He did not appear at the hearing of the petition proper. In each of *Gates*, *Gil*, and *Price v. Kehal*, 2021 BCSC 2118, the Court had the benefit of submissions from the Director on questions going to the core of his jurisdiction. And, of course, because the case was brought before this Court at first instance, there has been no consideration of this issue at the RTB level.

[25] In any event, because of the conclusion I have reached under s. 58(4) of the *RTA*, the answer to the threshold jurisdictional question would have no practical impact in this case. It is common ground that if the Director's monetary jurisdiction is not exceeded, the matter must be dealt with before the RTB and it is also common ground that I may order the Director to hear and determine the matter even if the monetary limit in s. 58(2) is exceeded. In light of that, and the considerations I have outlined below, I choose to leave for another case the question of whether "a dispute" in s. 58(2) of the *RTA* necessarily arises from a single tenancy agreement.

Who should hear and determine the landlord's claim?

[26] If the monetary limit in s. 58(2)(a) is surpassed, this Court may either hear and determine the matter (s. 58(4)(b)), or order the Director to hear and determine it (s. 58(4)(a)). At this stage, the question is which is the more appropriate venue for determining the issues: *Price* at para. 34.

[27] The statutory scheme recognizes that there are some claims that benefit from the structures, processes, and evidentiary rules that are available through the courts that are not available through the RTB: *Price* at para. 36 However, it is equally true that the discretion conferred in s. 58(4) imports a recognition that not all cases exceeding the monetary limit will necessarily benefit in that way and, in fact, may better be dealt with by way of RTB processes.

[28] In his response to the petition, the Director advises that if he is ordered to resolve this matter, it would be set down for a one-hour hearing by telephone

conference. If additional time is needed, the matter would be adjourned and set down for another one-hour hearing. The exchange of evidence and the conduct of the hearing would be governed by the RTB's rules of procedure enacted pursuant to s. 9(3) of the *RTA*. The laws of evidence do not apply in a dispute resolution proceeding before the RTB: *RTA*, s. 75. There is no right of appeal from an RTB decision, but the parties may seek internal review consideration on the grounds set out in s. 79 of the *RTA* or may seek judicial review.

[29] The parties have already been put to time and expense in advancing their positions before this Court. If the Director is ordered to hear and resolve the matter, they will need to do so again in a different venue. There are, however, features to this claim that lead me to conclude that the RTB is the more appropriate venue for determining the issues, even if the monetary limit is surpassed.

[30] Unlike *Price*, for example, the landlord's claims here only engage issues that fall squarely within the RTB's subject matter jurisdiction. Further, and unlike *Abboud*, even if the Director's monetary jurisdiction is exceeded, it is by a relatively slim margin. The landlord's basic claims for unpaid rent and the parties' disagreement on how much the landlord is entitled to considering the rent increase between the First and Second Tenancy Agreements meet these descriptions: see e.g. *Shuster v. Prompton Real Estate Services Inc*., 2023 BCSC 1605 at paras. 30 – 41.

[31] The landlord also advances a claim for $6,900 in liquidated damages. During the hearing of the petition, counsel for the landlord acknowledged the liquidated damages amount might seem high but encouraged the Court to accept that amount as an accurate reflection of how much it costs to identify a renter and enter into a rental agreement for a property of this nature. The tenant maintains the amount is in the nature of a penalty and bears the onus in that regard.

[32] While this Court may certainly deal with the enforceability of liquidated damages clauses generally, the RTB routinely deals with such clauses in the specific context of residential tenancy agreements. It has a Policy Guideline on that topic and, given its mandate, is well-situated to assess at first instance what is a

genuine pre-estimate of loss in relation to residential tenancies in particular: see e.g. *652732 B.C. Ltd. v. Nazareth*, 2010 BCSC 1754 at para 33. To the extent that additional information is required, the informal processes of the RTB are also better suited to the task.

[33] Another factor is the related dispute pending before the RTB, which is scheduled for hearing on July 22, 2024. That is the tenant's dispute regarding the damage deposit. The landlord encourages this Court to decide the petition without regard for the concurrent RTB proceeding. He says that dispute can be dealt with separately by the RTB in July. He also says that the tenant's claim for setoff as against the damages sought in this Court ought not to be considered because it was advanced late. Alternatively, he says this Court can decide the damage deposit question because it is substantially connected to this petition (*RTA*, s. 58(2)(d)). In that event, he says he should be allowed to retain the damage deposit by operation of s. 39 of the *RTA* because the tenant did not provide his forwarding address in writing within one year after the end of the tenancy. For this reason, he says, any factual disputes relating to return of the deposit need not be decided.

[34] In my view, this Court is not in a position to decide the landlord's entitlement to the damage deposit, and determination of the landlord's financial entitlements should not be split between two different venues considering the particular features of this case.

[35] Conflicting affidavits have been filed on this petition regarding the damage deposit issue. Even the landlord's claim that he should be allowed to retain the damage deposit by operation of s. 39 of the *RTA* involves some measure of factual disagreement, as it is based on his assertion that the tenant did not provide his forwarding address within one year after the end of the tenancy. However, the parties do not agree on when the forwarding address was provided. Considering the amount in issue, it would be disproportionate to resort to a hybrid procedure to resolve any factual disputes. That is, any conflicts in the evidence are better dealt with by way of the RTB's informal procedures.

[36] The parties' conflicting accounts of the ill-fated end of tenancy condition inspection that had been planned for April 22, 2023 are also notable. These could become relevant depending on the outcome of the analysis under s. 39 of the *RTA*. The landlord indicated during the hearing of the petition that he would be willing to forfeit his claim to the deposit if this Court concludes he is not entitled to retain it by operation of s. 39. In so doing, he hopes to avoid the need to engage with the conflicting accounts of what happened on April 22, 2023. However, as noted above, whether s. 39 operates as the landlord contends itself engages a factual assessment better addressed through RTB procedures.

[37] I am concerned that the tenant's damage deposit dispute was only filed on the eve of the hearing of this petition as was his claim for set-off. However, on the particular facts of this case, that concern does not outweigh the factors outlined above. Considering the nature of the claims advanced and apparent conflicts in the evidence which it would be disproportionate to resolve by way of this Court's procedures, the RTB is a more appropriate forum: see *Price* at para. 39. Accordingly, I exercise the discretion afforded to me by s. 58(4)(a) of the *RTA* and order the Director of the RTB to hear and determine the matter.

[38] Though the landlord was not successful in obtaining a damage award on this petition, it cannot be said that the tenant was successful from a substantive point of view either. The substance of the claim remains very much to be determined. In the circumstances, each party will bear its own costs.

"Bantourakis J."