IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Liu v. Wang,*
2024 BCSC 982

Date: 20240607
Docket: S242564 and S242565
Registry: Vancouver

Between:

Feng Xia Liu and Lian Bin Feng

Petitioners

And

Shan Guang Wang and Hua Yun Zhang

Respondents

Before: The Honourable Justice K. Loo

On judicial review from: Decisions of Arbitrators of the Residential Tenancy Branch dated February 25, 2024 and April 8, 2024

Reasons for Judgment

Counsel for the Petitioners:	M. Morinaga
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Place and Date of Hearing:	Vancouver, B.C. May 28, 2024
Place and Date of Judgment:	Vancouver, B.C. June 7, 2024

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Introduction

[1] Before the Court are two petitions for judicial review in which the petitioners, Feng Xia Liu and Lian Bin Feng, seek to set aside two decisions made by arbitrators of the Residential Tenancy Branch ("RTB"). In petition S242565, the petitioners seek a judicial review of the decision of Arbitrator C. Nelson made February 25, 2024 (the "February Decision"). In petition S242564, the petitioners seek a judicial review of the decision of Arbitrator C. Amsdorf made April 8, 2024 (the "April Decision").

[2] As Arbitrator Amsdorf followed the February Decision in their April Decision on the basis of *res judicata,* the result of the first review will determine the result of the second.

[3] The petitioners are the tenants and the respondents are the landlords with respect to the RTB matters which form the subject of this judicial review.

Background

[4] The petitioners were the original owners of the subject property, a residence on West 36th Avenue in Vancouver.

[5] The respondents purchased the property from the petitioners for $3.9 million pursuant to a contract of purchase and sale dated April 30, 2023 (the "CPS").

[6] The sale closed on June 15, 2023, following which the petitioners rented the property from the respondents pursuant to a residential tenancy agreement dated May 1, 2023 (the "Tenancy Agreement"). The tenancy was stated to be for a fixed term ending September 30, 2023. The rent was $5,500 per month.

[7] The section entitled "Security Deposits" states in part:

> The tenant is required to ~~pay a security deposit of~~ have $100,000 holdback in the buyer's lawyer. [*sic*]

[8] Following this provision, the standard terms regarding security deposits appear. They are not crossed out.

[9] The $100,000 holdback is also dealt with in the CPS. The parties are agreed that the CPS and the Tenancy Agreement ought to be read together. The relevant clause in the CPS (the "CPS Clause") provides:

> Both of parties agree to have $100,000 holdback until Sep 20, 2023. The seller will rent back from the buyer at the agreed rent $5,500 per month from completion date. The seller must vacate the house before or on September 30, 2023. The seller is not required to pay a security deposit but agree to keep the property in the same condition as when viewed on April 9, 2023. Seller will be responsible to pay the following utilities: Heat, BC Hydro, Water, Phone and Cable, tenant insurance. The buyer will be responsible to pay property tax and home insurance.

[10] When the CPS completed and the Tenancy Agreement was entered into, the sum of $100,000 was held back by the respondents from the purchase price.

[11] Since September 30, 2023, when the fixed term under the Tenancy Agreement ended, the petitioners have taken the position that they are entitled to continue to live in the property on a month-to-month tenancy and that rent ought to be paid from the $100,000 holdback, from the end of September 2023 forward.

[12] On December 5, 2023, the petitioners applied for Dispute Resolution under the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [*RTA*], arguing that the $100,000 holdback was a security deposit. They sought an order for its return, plus interest, and a "statutory penalty for wrongful withholding of deposit".

[13] In the February Decision, Arbitrator Nelson held that the $100,000 holdback is not a security deposit.

[14] On March 1, 2024, the respondents delivered a ten-day notice to end tenancy for unpaid rent. Under s. 46(4) of the *RTA*:

> (4) Within 5 days after receiving a notice under this section, the tenant may
>
> (a) pay the overdue rent, in which case the notice has no effect, or
>
> (b) dispute the notice by making an application for dispute resolution.

[15] The petitioners filed a dispute notice but did not pay the rent. In the April Decision, Arbitrator Amsdorf held that the February Decision that the $100,000

holdback is not a security deposit was binding. The consequence of this ruling was that the petitioners were not entitled to require the respondents to take the monthly rent payments from the holdback. Therefore, the petitioners were in arrears of rent, and Arbitrator Amsdorf issued an order of possession in respect of the property.

[16] Since the April Decision was made, the order of possession has been stayed pending this judicial review.

Standard of Review

[17] Pursuant to ss. 5.1 and 84.1 of the *RTA*, certain provisions of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*], including s. 58, apply to adjudicators governed by the *RTA*. Specifically, s. 58(2) of the *ATA* sets out the standard of review applicable to decisions of the RTB:

> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
> >
> > (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and ...

[18] A comprehensive summary of the jurisprudence and legal principles relating to the patent unreasonableness standard can be found in *Hollyburn Properties Limited v. Staehli*, 2022 BCSC 28 [“*Hollyburn*”] at para. 25:

> [25] As the *ATA* does not define patent unreasonableness as it applies to a tribunal's factual or legal findings, however, guidance regarding its meaning must be sought from the case law. In *Kong* at paras. 58-65, Madam Justice MacDonald set out a number of jurisprudential holdings which provide content to the notion of patent unreasonableness, including:
>
> > [a] as expert tribunals are entitled to significant deference, the standard is an onerous one and their decisions can only be quashed if there is no rational or tenable line of analysis supporting them (*Victoria Times Colonist v. Communications, Energy and Paperworkers,* 2008 BCSC 109 at para. 65; aff'd 2009 BCCA 229);
> >
> > [b] a decision is patently unreasonable if it is openly, evidently, and clearly irrational, or unreasonable on its face, unsupported by

> evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures (*Gichuru v. Palmar Properties Inc.,* 2001 BCSC 827 at para. 34, citing *Lavender Co-Operative Housing Association v. Ford,* 2011 BCCA 114);
>
> [c] a patently unreasonable decision is one that almost borders on the absurd (*Voice Construction Ltd. v. Construction & General Workers' Union, Local 92,* 2004 SCC 23 at para. 18 and *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal),* 2018 SCC 22 at para. 28);
>
> [d] it is a possible that a great deal of reading and thinking will be required before the problem in a patently unreasonable decision is apparent, but once its defect is identified, it can be explained simply and easily, leaving no real possibility of doubting that the decision is defective (*Yee v. Montie,* 2016 BCCA 256 at para. 22);
>
> [e] the standard of patent unreasonableness also applies to the consideration of adequacy of reasons, which involves an assessment of the justification, transparency and intelligibility of the decision-making process (*Vavilov*); and
>
> [f] under the *RTA* regime, the overriding test for adequacy of reasons is whether a reviewing court is able to understand how and why the decision was made (*Ganitano v. Yeung,* 2016 BCSC 2227 at para. 24).

[19] Similarly, in *PHS Community Services Society v. Swait*, 2018 BCSC 824 at paras. 45-46, this Court held:

> [45] The approach to reviewing decisions must not be a "line-by-line treasure hunt for error": *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at para. 54. Furthermore, defects in reasoning may not render a decision patently unreasonable if there is a rational basis for it. The test is applied to the result not to the reasons: *Asquini v. Workers' Compensation Appeal Tribunal*, 2009 BCSC 62 at para. 85. However, that does not detract from the requirement that reasons be adequate in the sense of allowing a court to understand how and why the decision is made. Notably, this Court has recognized that "in the context of residential tenancy disputes the standard of adequacy is lowered because the governing legal regime is relatively straightforward": *Ganitano v. Yeung*, 2016 BCSC 2227 at para. 24.
>
> [46] Equally important to knowing what constitutes a patently unreasonable decision, is to identify what does not. A decision based on insufficient evidence is not patently unreasonable. It is only if there is no evidence can that standard be met: *Speckling* at paras. 33 and 37, and *Dualeh v. British Columbia Housing Management Corp.*, 2006 BCCA 196 at para. 4. Nor is it necessary for a decision maker to make reference to each item of evidence: *Buttar v. British Columbia (Workers' Compensation Appeal Tribunal),* 2009 BCSC 1228 at para. 70. Moreover, a decision inconsistent

with a prior decision of the same tribunal does not render it patently unreasonable: *Sager v. Boudreau*, 2017 BCSC 837 at paras. 41-42.

Relevant Provisions of the *RTA*

[20] Section 1 of the *RTA* includes the following definition:

> "security deposit" means money paid, or value or a right given, by or on behalf of a tenant to a landlord that is to be held as security for any liability or obligation of the tenant respecting the residential property, but does not include any of the following:
>
> (a) post dated cheques for rent;
>
> (b) a pet damage deposit;
>
> (c) a fee prescribed under section 97(2)9(k).

[21] Section 19 of the *RTA* provides:

> 19 (1) A landlord must not require or accept either a security deposit or a pet damage deposit that is greater than the equivalent of 1/2 of one month's rent payable under the tenancy agreement.
>
> (2) If a landlord accepts a security deposit or a pet damage deposit that is greater than the amount permitted under subsection (1), the tenant may deduct the overpayment from rent or otherwise recover the overpayment.

Issues

[22] The petitioners relied before the RTB and rely in this Court on s. 19(2) of the *RTA* which states that if a landlord accepts a security deposit that is greater than ½ of one month's rent, the tenant may deduct the overpayment from rent. As discussed, Arbitrator Nelson, in the February decision, determined that the $100,000 holdback is not a security deposit. The primary issue before this Court is whether that decision was patently unreasonable.

[23] The petitioners also raise procedural fairness issues. The second issue before this Court is therefore whether, in all of the circumstances, the arbitrators acted fairly in making the February and April Decisions.

Analysis

Was the February Decision patently unreasonable?

[24] In the February Decision, the arbitrator referred to the definition of "security deposit" in s. 1 of the *RTA*, cited above, and to ss. 5, 17 and 19 of the *RTA*.

[25] Following these references to the statutory provisions, the entirety of the arbitrator's reasoning regarding whether the $100,000 holdback constituted a security deposit is as follows:

> However, the relevant paragraph of the sales contract states the $100,000 will be held until September 30, 2023; it does not state the return of the $100,000 is related to, or dependent on, the condition of the rental unit.
>
> Further, the same paragraph states, "the seller is not required to pay a security deposit".
>
> Therefore, although the security deposit section of the tenancy agreement refers back to the $100,000 holdback mentioned in the sales contract, I find the $100,000 holdback is not a security deposit as defined by the Act and the Act has not been avoided.

[26] The third of these paragraphs sets out the arbitrator's conclusion and does not contain any reasons. Therefore, this review will focus on the first two paragraphs in this passage.

[27] In my respectful view, Arbitrator Nelson's conclusion in the February Decision that the $100,000 holdback is not a security deposit because the sales contract "does not state the return of the $100,000 is related to, or dependent on, the condition of the rental unit" is defective for at least two reasons.

[28] First, there is no requirement in the legislation or the case law that a security deposit must be related to or dependent on the condition of the unit. The definition in s. 1 of the *RTA* provides that a security deposit is "money paid, or value or a right given, by or on behalf of a tenant to a landlord that is to be held as security *for any liability or obligation of the tenant respecting the residential property*" [emphasis added].

[29] Second, and in any event, it appears clear from the CPS Clause that the return of the $100,000 *was* related to the condition of the unit. The CPS Clause provides:

> Both of parties agree to have $100,000 holdback until Sep 20, 2023. … The seller is not required to pay a security deposit but agree to keep the property in the same condition as when viewed on April 9, 2023.

[30] The CPS Clause also requires the seller to pay certain utilities and to vacate the house by September 30, 2023. In my view, it is plain on the face of the CPS Clause that the $100,000 holdback was intended to secure the obligations set out in the CPS Clause, all of which are "liabilities or obligations of the tenant respecting the residential property" within the meaning of the definition in s. 1.

[31] One might ask, what possible purpose could the holdback have other than to secure those obligations? The respondents submitted that the holdback might be a form of vendor financing. Alternatively, they submitted that it was intended to incentivize the petitioners to move out on the agreed-upon date.

[32] The first of these submissions, in my respectful view, makes no sense in view of how vendor financing works. Vendor financing is money lent by the vendor to the purchaser to assist the purchaser in making the purchase. In this case, the purchase funds were required to be paid by the respondents (purchasers) to the petitioners (vendors) but $100,000 of these purchase funds were required to be held back in the trust account of the purchasers' solicitor. Therefore, the purchasers were out of pocket for the entire purchase price despite the holdback. The vendors' receipt of the $100,000 holdback has been delayed, but the $100,000 holdback has not assisted the purchasers in financing the purchase.

[33] The second of these submissions does not support the respondents' position. They may well be correct that one of the purposes of the $100,000 holdback was to incentivize the petitioners to move out of the property by September 30, 2023, but that purpose would still bring the parties within the definition of "security deposit" in

s. 1. Moving out by the agreed-upon date was clearly an obligation of the tenant "respecting the residential property".

[34] It is my view that the $100,000 holdback was clearly a security deposit as that term is defined in the *RTA*. As stated, it is clear that the holdback was intended, on the face of the documents, to secure obligations of the tenant with respect to the property. The respondents have not been able to identify any other viable reason for its imposition.

[35] As against these conclusions, Arbitrator Nelson observed that the CPS Clause states that "the seller is not required to pay a security deposit" and that the words "pay a security deposit of" are struck out in the Tenancy Agreement.

[36] These insertions and deletions obviously favour the respondents' position that the holdback is not a security deposit and, indeed, the respondents argue that the arbitrator's reasoning based on these insertions and deletions is sufficient in itself to preclude a finding that the February Decision is patently unreasonable. However, in my view, the fact that the parties chose not to call the holdback a security deposit could not have, by itself, reasonably led the arbitrator to conclude that the holdback was not a security deposit given that the holdback clearly fell within the definition of a security deposit in s. 1.

[37] On this issue, the petitioners cite Residential Tenancy Guideline 29 which states expressly that the determination of whether a payment is a security deposit ought to be made "irrespective of any agreement between a landlord and a tenant".

[38] Residential Tenancy Guidelines are not binding but, in my view, the particular principle stated in Guideline 29 – that labels which parties place on their legal relationships or instruments are not determinative - is one of general application. In other contexts, that principle has repeatedly been stated: for example, see *Lycar v. Lonnie W. Orcutt Farms Ltd.*, 2002 ABQB 903 at para. 13; *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 at para. 49; *Royal Bank of Canada v. Swartout*, 2011 ABCA 362 at para 45.

[39] As submitted by the respondents, the standard of review in RTB matters is highly deferential and the approach must not be a "line-by-line treasure hunt for error". However, in my view, this onerous threshold for review is met in the circumstances of this case. For the reasons stated above, I have concluded that the arbitrator's finding that the holdback was not a security deposit because the relevant provision did "not state the return of the $100,000 is related to, or dependent on, the condition of the rental unit" was "openly, evidently, and clearly irrational, or unreasonable on its face" within the meaning of *Hollyburn.* Further, the insertions and deletions in the CPS and Tenancy Agreement cannot by themselves, as a matter of law, justify a finding that the holdback is not a security deposit when the holdback clearly falls within the statutory definition. I have concluded that there is no rational or tenable line of analysis supporting the result of the February Decision.

[40] In my view, the February Decision is defective in the same way as the arbitrator's decision in *Schwartzman v. Leah*, 2017 BCSC 264 at para. 40, wherein Justice McEwan held that the finding in that case was "contrary to the terms of the lease, fact, and common sense and most importantly … to the provisions of the enabling statute." In that case, the Court concluded:

> It is a decision based predominantly on irrelevant factors and it fails to take statutory requirements into account. The decision, insofar as the arbitrator held that the utility payment was a security deposit, is therefore patently unreasonable and is quashed.

Did the arbitrators act fairly in making the February and April Decisions?

[41] Given my conclusion above that the February Decision was patently unreasonable, it is not necessary for the Court to address the procedural fairness issues in this case and I decline to do so.

Conclusions, Remedy and Costs

[42] As indicated above, the April Decision followed on the February Decision. It was evident at the outset of this hearing that the two decisions would stand or fall together on this review.

[43] In light of my conclusion that the February Decision is patently unreasonable, the petitions are allowed and both decisions are quashed. The order of possession is set aside.

[44] The disputes giving rise to the February Decision and the April Decision are to be reconsidered by the Director of the RTB or a delegate in accordance with these reasons.

[45] The petitioners are entitled to costs payable by the respondents at scale B.

"The Honourable Justice K. Loo"