COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Downing v. Strata Plan VR2356,* 2023 BCCA 100

Date: 20230301
Docket: CA48277

Between:

Katherine Costello, Executrix of the Estate of Charlotte Elizabeth Downing, deceased

Appellant (Petitioner)

And

Strata Plan VR2356, and Civil Resolution Tribunal

Respondents (Respondents)

And

Attorney General of British Columbia

Respondent

Before: The Honourable Mr. Justice Willcock
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated April 12, 2022 (*Downing v. Strata Plan VR2356*, 2022 BCSC 590, Vancouver Docket S214487).

Counsel for the Appellant:	M. Nied
Counsel for the Respondent, Strata Plan VR2356:	A.J. Chang
Counsel for the Respondent, Civil Resolution Tribunal:	Z.N. Rahman J. Molnar, Articled Student
Counsel for the Respondent, Attorney General of British Columbia:	M. Bennett A. Choi
Place and Date of Hearing:	Vancouver, British Columbia December 7, 2022

Place and Date of Judgment: Vancouver, British Columbia
March 1, 2023

Written Reasons by:
The Honourable Mr. Justice Willcock

Concurred in by:
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Mr. Justice Voith

Summary:

The appellant brought a claim to the Civil Resolution Tribunal (CRT) against her strata for damages arising from the strata's investigation of water ingress into her unit. The CRT's dismissal of her claim was upheld on judicial review. The appellant challenges the dismissal of her petition for judicial review of the CRT's decision. Held: Appeal dismissed. The CRT did not breach the requirements of procedural fairness by declining to hold an oral hearing. It was open to the CRT to determine that credibility was not so central to this case as to require an oral hearing or cross-examination. The CRT's conclusion that the strata acted reasonably upon professional advice was founded upon evidence. There is no basis upon which we could find the CRT's analysis of the negligence claim was patently unreasonable.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] This is an appeal from the dismissal of the appellant's petition for judicial review of a decision of the Civil Resolution Tribunal (the "CRT") issued on March 22, 2021. The CRT dismissed the appellant's claims against The Owners, Strata Plan VR2356 (the "Strata") for damages arising from the Strata's investigation of water ingress into her unit. She argued before the reviewing judge that substantive conclusions of the vice-chair of the CRT who made the decision (the "Vice Chair") were patently unreasonable, and that she was denied procedural fairness in the course of the proceeding before the CRT.

[2] The questions on appeal are whether the reviewing judge described the correct standards of review in relation to the issues before her, and whether she applied those standards correctly. Essentially, we are to step into the shoes of the reviewing judge: *Crook v. British Columbia (Director of Child, Family and Community Service)*, 2020 BCCA 192 at para. 35.

[3] The reviewing judge summarized the factual context of this case at paras. 7–34 of her reasons for judgment, indexed at 2022 BCSC 590. I will not repeat the history, but rely upon the reviewing judge's summary. In short, the appellant alleged that the extensive work done to investigate the nature and extent of water ingress

into her unit, in April and May 2018, was undertaken by the Strata without her permission or consent. In the reviewing judge's words:

> [34] [H]er claim was based on "the wrongful act of dismantling [her] unit and the consequences flowing from that wrong". She argued that the Strata was not entitled to authorize [a contractor] to enter her suite for the purpose of dismantling it. She advanced a claim for damages based on the torts of nuisance, trespass and negligence, and also alleged "significant unfairness" by the Strata as contemplated by s. 164 of the SPA [*Strata Property Act*, S.B.C. 1998, c. 43]. In particular, she submitted that it was negligent for the Strata … to authorize the dismantling of SL5 [her unit] without a plan to promptly effect repairs, in circumstances where it was known that a large-scale membrane replacement was required, and it was known that Ms. Downing was attempting to sell her unit.

[4] The evidence of a leak was unfortunately discovered after the appellant, then 89 years old, had suffered a stroke and decided to move from her home into an assisted living facility. She had planned to sell her condominium unit, invest the proceeds and use the investment income to pay the monthly fees of the assisted living facility. Uncovering the extent of the leak, discovering its cause and fixing it was far more extensive than initially anticipated, and the delay in the sale resulted in significant hardship for the appellant and, she argued, a loss as a result of declining value of her property in the real estate market. When she filed the notice of appeal, Ms. Downing was 94 years old. She has since passed away. We are mindful of the fact that the events that led to this litigation cast a cloud over the last years of Ms. Downing's life.

Procedural History

The petition to the Supreme Court

[5] The appellant sought to have her dispute with the Strata determined in the Supreme Court. In response to her petition, the Strata sought a referral to the CRT under the provisions of the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25 [*CRT Act*].The Strata relied on s. 121 of the *CRT Act*, which affords the CRT broad authority to determine most forms of strata disputes in the following terms:

> 121 (1) Except as otherwise provided in section 113 *[restricted authority of tribunal]* or in this Division, the tribunal has jurisdiction over a claim,

> in respect of the *Strata Property Act*, concerning one or more of the following:
>
> (a) the interpretation or application of the *Strata Property Act* or a regulation, bylaw or rule under that *Act*;
>
> (b) the common property or common assets of a strata corporation;
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> (c) the use or enjoyment of a strata lot;
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> …
>
> (f) a decision of a strata corporation, including the council, in relation to an owner or tenant;…
>
> (g) the exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

[6] On an application heard in September 2019, Justice Crerar held, for reasons indexed at 2019 BCSC 1745 (the "2019 Decision"):

> [35] Counsel for the respondent strata corporation, with reference to s.121(1) of the Act, argues that all of the issues raised in the petition in some way deal with a combination of:
>
> A. The application of the SPA and the strata's bylaws;
>
> B. The decisions of the strata corporation and its council; and
>
> C. The actions of the strata corporation.
>
> [36] I agree. I further agree that this matter is appropriately stayed under s.16.1 of the Act and referred to the CRT under s.16.4 of the Act.

[7] He considered but rejected five arguments advanced by the appellant in support of her position that the dispute should be allowed to proceed in the Supreme Court rather than the CRT:

a) the question of when a strata corporation may enter and physically alter a strata unit is of great importance not only to the petitioner, but to other strata owners (finding that question falls squarely within the CRT's statutorily recognized area of expertise);

b) trespass of a person's residence is such an assault on personal dignity and safety as to be analogous to a constitutional or human rights claim (finding that the question whether a strata corporation or another party is authorized

to enter a strata unit for repairs or otherwise, is an issue that arises frequently in residential strata disputes and given that no one was present or lived in the suite at the time of the alleged trespasses, the analogy was inapt);

c) the amount claimed, which could well exceed $100,000, and the potential complexity of evidence concerning lost sales opportunities and the falling real estate market made the dispute more complicated than the typical strata dispute heard by the CRT (noting that in *Yas v. Pope,* 2018 BCSC 282 at para. 14 the Court concluded: “the legislature … has mandated that the CRT should handle strata claims in any amount, large or small”);

d) the procedural limitations of the CRT — the presumptive mode of a written electronic hearing rather than oral testimony would not adequately resolve the credibility dispute as to whether the petitioner’s realtor authorized the Strata to enter and dismantle the unit (noting that the CRT “frequently adjudicates disputes where there are conflicts in the evidence”, and “ss. 39 to 42 of the [*CRT*] *Act* permit the CRT to question parties and witnesses, and to convene an in-person hearing with oral testimony if appropriate”); and

e) the appellant would be at a procedural disadvantage in prosecuting these important claims if she were required to continue in the CRT rather than the Supreme Court, because her rights of appeal would be drastically limited by the onerous, patently unreasonable standard of review (finding that this procedure represents a policy decision of efficiency and finality).

[8] While the chambers judge correctly observed that the CRT frequently adjudicates disputes where there are conflicts in the evidence and adjudicators may exercise a discretion to convene an in-person hearing with oral testimony, a chambers judge hearing a s. 121 application should, in my view, pay close attention to the fact that there are limited procedural safeguards at the CRT. In cases involving significant sums or other important issues, the potential limitation on a party’s procedural rights before the CRT may militate against the referral. The dismissal of a s. 121 application implies that, at least on the limited record at the

hearing of the application, the interests of justice do not demand that the case proceed in the trial court. In the case at bar, the s. 121 application judge was of the view that the CRT adjudicator would be able to afford procedural fairness to the parties. His decision was not appealed.

The CRT decision

[9] The Vice Chair (for reasons indexed at 2021 BCCRT 319) made the following findings.

CRT jurisdiction and procedure

[10] The CRT had discretion to decide the format of the hearing, and he was satisfied an oral hearing was not required as he could fairly decide the dispute based on the evidence and submissions provided.

[11] The appellant had accepted the Strata's right to conduct repairs under the guidance of professional advice, and did not challenge the Strata's actions in relation to its statutory obligations to repair and maintain common property and limited common property. The appellant's counsel acknowledged the claim was not about what the Strata did or did not do in terms of conducting repairs. Accordingly, he was only required to address the Strata's access to the appellant's unit for the initial water ingress investigation and the extent of that investigation.

Trespass

[12] The Vice Chair held the Strata did not trespass on the appellant's property. He accepted the evidence of the Strata's vice president (the "Strata VP") that the appellant's real estate agent, Mr. Panchyshyn, had authorized the Strata to investigate the water ingress and provided a key to the Strata VP for that purpose. Relying on evidence in an affidavit sworn on November 12, 2020 by Mr. Panchyshyn, the Vice Chair found the agent had authority to convey the appellant's wish that the Strata investigate.

[13] There was some, limited, conflict in the evidence of the Strata VP and Mr. Panchyshyn. The Vice Chair resolved that conflict in the Strata's favour, without

cross-examination, and gave reasons for doing so: the Strata VP's affidavit was sworn within months of the critical events, whereas Mr. Panchyshyn's affidavit was sworn about 1 ½ years after the events; and the Strata VP's description of events better aligned with the evidence, specifically:

a) the fact the Strata VP would have needed a key to arrange further investigation of water ingress;

b) the fact she obtained the key from Mr. Panchyshyn; and

c) Mr. Panchyshyn's evidence that he "understood the [Strata] was responsible for water damage" and, presumably, investigation.

Nuisance

[14] The Vice Chair noted that nuisance is distinct from trespass; the former is concerned with unreasonable interference with the enjoyment of land resulting from another's conduct elsewhere, whereas the latter is direct entry onto another's land. He held there was no basis for a claim in nuisance in this case.

Negligence

[15] The Vice Chair found the Strata's actions in attending to the water investigation to be reasonable, and to have been initiated at the appellant's request.

[16] The Strata relied on the professional advice of Rudi Nosper, the president of a contracting firm, Woodcraft, himself a carpenter, and Kurtis Topping, a professional engineer employed by JRS Engineering Ltd. ("JRS"), when it approved the work that needed to be done to determine the cause of the water ingress. He found the Strata was not negligent because it acted on that professional advice.

[17] He held that Mr. Topping was qualified under R. 8.3 of the *Civil Resolution Tribunal Rules* [*CRT Rules*] to provide expert opinion evidence with respect to the necessity of the repairs undertaken. The Vice Chair noted that the appellant did not challenge Mr. Topping's witness statement, nor did she adduce contrary expert evidence.

[18] The Vice Chair held that in the event the Strata did not have a duty to repair all of the damage discovered on inspection, it nevertheless had a duty to mitigate any potential insurance claim by investigating the extent of water ingress from common property and preventing further damage.

Significant unfairness

[19] The Vice Chair held the appellant had not established that by aggressively investigating her unit for water ingress, the Strata acted in a way that was "burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust or inequitable", the basis for a significant unfairness claim described in *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126; *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44; and *Kunzler v. The Owners, Strata Plan EPS 1433*, 2020 BCSC 576.

Remedy

[20] Finally, the Vice Chair held that a case for a remedy had not been made out:

> [87] Ms. Downing's claims for damages were entirely based on the strata causing the delay in her selling SL5 [her condominium unit]. She says she could not sell her strata lot while the repairs were in progress, which the strata says is not true. There is no evidence Ms. Downing attempted to sell her strata lot during the repair period and no evidence on the sale potential during the repair period, so I agree with the strata. Ms. Downing has not proven she would have had to discount the price of SL5 to sell it during the repair period. Nor has she proven any alleged discounted price was solely related to the strata's investigation of SL5 and not other repairs, such as the entire parkade membrane repair.

Judicial review

[21] On judicial review the appellant argued:

a) the Vice Chair's conclusion that Ms. Downing had not established trespass was patently unreasonable because he failed to account for, or give reasonable consideration to, Ms. Downing's evidence; and he failed to address the scope of Mr. Panchyshyn's authority to authorize investigation into the water ingress;

b) the Vice Chair's conclusion that Ms. Downing had not established negligence was patently unreasonable because he erred in concluding the Strata had a duty to mitigate a potential insurance claim; he failed to give adequate consideration to the fact Ms. Downing was intending to sell her unit; and he erred in finding the Strata relied on JRS when it approved the extent of the investigation, or that it was reasonable to rely on the advice of the contractor;

c) the Vice Chair's conclusion that Ms. Downing had not established damages was patently unreasonable because he ignored evidence of the impact the dismantling of the unit had on its marketability and value; and

d) the Vice Chair arbitrarily and unequally accepted some of the evidence as expert evidence; limited written submissions; imposed a short schedule for submissions; and made no allowance for cross-examination.

[22] The reviewing judge held that the claim in trespass was answered by the finding that Mr. Panchyshyn, on Ms. Downing's behalf, authorized the Strata to enter her unit for the purpose of investigating the water ingress. The Vice Chair did not fail to account for or reasonably consider her evidence about the scope of the authority given to the Strata, or whether Mr. Panchyshyn was authorized to instruct the Strata on her behalf. There was evidence before the Vice Chair that the extent of the investigation conducted was not only reasonable but was "required to determine the exterior water leaks". The Vice Chair was satisfied that the investigation did not exceed what was reasonable in the circumstances.

[23] The nuisance claim was effectively answered by the Vice Chair's implicit finding that the authorization to investigate extended to doing whatever was reasonably required to properly investigate the water ingress.

[24] The reviewing judge found the decision to dismiss the negligence claim was not patently unreasonable. The investigation conducted by the Strata did not exceed what was reasonably required to determine the extent of the water ingress problem, and the Strata followed advice it received from professionals. The duty to mitigate

was only addressed in the alternative, and the error alleged by the appellant did not affect the soundness of the Vice Chair's primary conclusion that the Strata acted reasonably.

[25] The reviewing judge noted that, in his consideration of the reasonableness of the Strata's conduct, the Vice Chair did not expressly address the fact the appellant was intending to sell her unit, but that did not render his conclusion clearly irrational. To the contrary, it could be argued that once a water leak was suspected, an intention to sell would justify a more extensive investigation than might otherwise be justified because of the potential impact of a latent defect on an unsuspecting purchaser.

[26] The reviewing judge concluded the appellant was correct that the damage to her unit was done in the course of the contractor's investigation, before Mr. Topping arrived at the site, and the scope of the investigation could not have been determined by his advice. However, even if the Vice Chair erred in saying that the Strata relied on JRS based on a mistake about the timing of JRS's involvement, it is undisputed that the Strata relied on Woodcraft. The Strata's reliance on Woodcraft alone provided a rational line of analysis supporting the conclusion that the Strata acted reasonably. The Vice Chair expressly noted that it was at the direction of Woodcraft's president that the Strata approved the extent of the investigation.

[27] The reviewing judge rejected the appellant's argument that it was patently unreasonable for the Vice Chair to find that the Strata was justified in relying on the advice of Mr. Nosper, a carpenter, instead of an engineer.

[28] The reviewing judge noted that the standard of review for questions of procedural fairness is prescribed by s. 56.7(2)(b) of the *CRT Act*: 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.

[29] She considered the five factors relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances, identified by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699 (S.C.C.).

[30] She held that the process, function, and nature of the decision-making body, and the determinations it makes, suggested that a relatively high level of procedural fairness was required. The statutory scheme, however, identifies the CRT's mandate as resolving disputes in a manner that is "accessible, speedy, economical, informal and flexible", and s. 18 requires that a proceeding "be conducted with as little formality and technicality and with as much speed as permitted by … a proper consideration of the issues in dispute". She noted that in *Allard v. The Owners, Strata Plan VIS 962*, 2019 BCCA 45 at paras. 30–33, this Court recognized that the CRT "enjoys a significant degree of procedural flexibility [which] further accords with the proportionality principle". She concluded, at para. 96:

> All of this indicates a need for a level of procedural fairness that is attenuated by the reality that for many disputes fairness requires a process that is accessible, timely, and affordable.

[31] She found the Vice Chair had, perhaps unfairly, discounted the opinion evidence of the realtor, Mr. Panchyshyn, but considered that to be immaterial, given that his opinion evidence related only to damages, not the merits of the claim that was dismissed. She considered there to be no unfairness in the manner in which the tribunal admitted and weighed the evidence of the engineer, Mr. Topping.

[32] She rejected the complaint that the tribunal had unfairly limited the length of submissions, noting that a limit on the length of written submissions is common and the mere fact that there was a limit does not give rise to unfairness. Further, the limit did not prevent the appellant from advancing any argument that she otherwise would have advanced. Similarly, she held that the mere inability to cross-examine a witness does not give rise to unfairness, and the Vice Chair expressly provided a reasoned basis for preferring the Strata's evidence over the appellant's evidence.

Nor did the imposition of a schedule for submissions constitute procedural unfairness.

Grounds of Appeal

[33] The appellant submits:

a) the tribunal breached the requirements of procedural fairness by refusing to provide for an oral hearing and allow cross-examination on the central issue of consent;

b) the tribunal misconstrued the law of consent by ignoring that consent must be informed in order to be a valid defence to trespass;

c) the tribunal erred by admitting evidence as expert evidence in disregard of the tribunal's own rules concerning the admission of expert evidence and, alternatively, by relying on it without attempting to reconcile it with conflicting evidence; and

d) the tribunal erred by misapplying the law applicable to the negligence claim, and dismissing that claim based on a finding which was not supported by the evidence.

Procedural unfairness

Applicable law

[34] In *Baker*, Justice L'Heureux-Dubé described procedural fairness as follows:

> [21] The existence of a duty of fairness… does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (SCC), [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (SCC), [1990] 3 S.C.R. 1170, *per* Sopinka J.
>
> [22] Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what

> procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker. [Emphasis added.]

[35] On the substantive requirements of procedural fairness, L'Heureux-Dubé J. stated:

> [23] Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In Knight, supra, at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. …

[36] Here, the function of the decision-making body, the CRT, is to resolve civil disputes. Given that the tribunal's determinations resemble judicial decision making, procedural protections closer to the trial model will be required by the duty of fairness: *Baker* at para. 23, citing *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City),* 1990 CanLII 31 (SCC), [1990] 3 S.C.R. 1170 at 1191; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.), at 118; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission*), [1989] 2 S.C.R. 879 at 896. The reviewing judge recognized that fact when she concluded that a relatively high level of procedural fairness was required.

[37] On judicial review, the appellant argued that the CRT process was procedurally unfair in many respects. On appeal, she submitted that the process was fundamentally flawed because the central issue turned on credibility, and she had not been able to test the credibility of the Strata's principal witness, Ms. Talle, the Strata VP.

[38] Similar allegations, that inability to cross-examine witnesses in disputes before administrative tribunals is procedurally unfair, have been carefully considered in a number of decisions of the trial court on appeals from the Workers' Compensation Appeals Tribunal (WCAT).

[39] In *Djakovic v. British Columbia (Workers' Compensation Appeal Tribunal),* 2010 BCSC 1279, the appellant took issue with WCAT's decision to refuse a request for an oral hearing. The trial judge found the refusal, in the circumstances of that case, to amount to a failure to afford the appellant procedural fairness. His conclusion turned on consideration of the *Baker* factors. Like the CRT, WCAT's role bore some of the hallmarks of judicial process. The issue the appellant had sought to raise in cross-examination was not only relevant, but was also central to the case. Significant rights were at stake. Questions of credibility were in issue, and the apparent burden of allowing the cross-examination was a modest increase in the hearing's length.

[40] In support of his conclusion, the judge in that case cited passages from *Re County of Strathcona No. 20 et el. & Maclab Enterprises Ltd.* (1971), 20 D.L.R. (3d) 200 (Alta. C.A.) and *Armstrong v. Royal Canadian Mounted Police Commissioner*, [1994] 2 F.C. 356, 24 Admin. L.R. (2d) 1 (T.D.).

[41] He noted:

> [55] … The question was not whether the Tribunal had the information required to arrive at a decision. Rather the question was whether [the appellant] was given the opportunity to "fully and fairly" present his case: *Baker* at para. 28.
>
> [56] In denying him this opportunity I find that WCAT took the "unacceptable risk that not all information that could have affected its decision was placed before it": *Baker v. Workers' Compensation Appeal Tribunal*, 2007 BCSC 1517 at para. 73. It thereby denied Mr. Djakovic the degree of procedural fairness to which he was otherwise entitled.

[42] In *Weiss v. Worker's Compensation Appeal Tribunal*, 2021 BCSC 231, the trial judge noted that the governing statute, like the *CRT Act*, granted the WCAT discretion to conduct an appeal in writing, orally, or by other means. In terms similar

to those that appear in the *CRT Act*, the governing legislation also granted the WCAT broad powers to establish its own procedures. He considered five decisions that examined the content of WCAT's duty of procedural fairness: *Djakovic; Squires v. British Columbia (Workers' Compensation Appeal Tribunal),* 2011 BCSC 556; *Encinger v. Workers' Compensation Appeal Tribunal*, 2017 BCSC 1483; *Cannon v. WCAT* (26 November 2010), Vancouver S092291 (B.C.S.C.); and *Bhullar v. Workers' Compensation Appeal Tribunal*, 2019 BCSC 1673.

[43] In *Squires*, *Encinger* and *Cannon*, the reviewing courts found the appellants had not been afforded procedural fairness because an oral hearing was denied, and credibility was "at the heart of" the litigation or a "key and central issue".

[44] The court in *Weiss* noted that in *Bhullar*, the judgments in *Squires*, *Cannon* and *Encinger* had been distinguished on the ground that in those cases, credibility was a central issue, and WCAT had refused the petitioners' express requests for an oral hearing. In *Bhullar*, the petitioner had agreed to a written hearing.

[45] *Bhullar* has been followed in cases where the credibility issues are not central, or the appellant had not pressed for an oral hearing before the tribunal. In *Pion v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2022 BCSC 1112, Justice Hughes noted (at para. 53) that even where the statutory scheme supports a high level of procedural fairness, the court must give weight to the choice of procedures selected by a tribunal with discretion to design its procedures. She concluded:

> [89] An oral hearing is not invariably required to ensure a fair hearing and fair consideration of the issues, even where issues of credibility arise. There is no requirement that a decision-maker hold an oral hearing in every case where credibility is in issue or where a party's case might conceivably benefit from an oral hearing: *Bhullar* at para. 76.

[46] In the case at bar, the reviewing judge was referred to and relied upon our decision in *Allard*, in support of the proposition that the CRT enjoys "a significant degree of procedural flexibility". *Allard* was an appeal from an order granting leave to appeal a CRT decision. The question was whether the appeal engaged a question of

law. The appellant had obtained leave to address two substantive questions of law on appeal, including a question whether the tribunal acted without evidence or took an unreasonable view of the evidence. Justice Kirkpatrick, writing for the Court, concluded it was not in the interests of fairness and justice to grant leave, given the CRT's broad discretion to determine what evidence is admissible and what rules of evidence are applicable. The appeal did not address the CRT's discretion to hold oral hearings or allow cross-examination.

[47] The jurisprudence supports the view that where a tribunal has discretion to hold an oral hearing and permit witnesses to be cross-examined, the judicial exercise of that discretion requires the tribunal to weigh the advantages of an oral hearing and cross-examination against efficiency. Here, the advantages of an oral hearing must be balanced against the CRT's statutory mandate to resolve disputes in an "accessible, speedy, economical, informal and flexible" manner. That balancing exercise requires the tribunal to consider, in particular, the extent to which the dispute before it hinges upon the centrality of the questions that turn on credibility, and the extent to which cross-examination may assist in resolving those issues.

Discussion and analysis

[48] A central question in this case is whether Ms. Downing's agent authorized the Strata to investigate the cause and locate the source of water entering her unit.

[49] Mr. Panchyshyn deposed in an affidavit filed on behalf of the appellant that:

a) after listing Ms. Downing's property for sale, he learned about a small stain in the second bedroom carpet from Ann Barclay, the appellant's friend and the holder of a power of attorney for the appellant;

b) after inspecting it, he spoke with Ms. Downing, and she asked him to bring the moisture to the Strata's attention;

c) he then left a key to the unit at the door of the Strata VP, Monique Talle, "for the purpose having her take a look at the area to see the damage for herself";

d) the sole purpose for leaving the key with Ms. Talle was to inspect the damage to the suite and to report back to Ms. Downing;

e) he recalled discussing the water spot with Ms. Talle (but does not describe that discussion in his sworn evidence; in particular, he does not say that he advised Ms. Talle of his expectation that she would discuss repairs with Ms. Downing);

f) he understood the Strata was responsible for repairing water damage to the unit;

g) when he next returned to the unit, he was "shocked" to see large portions of her unit had been torn apart;

h) he would never authorize demolition to a client's property, and did not do so in this case; and

i) no one at the Strata ever contacted him seeking permission to do the extensive work done to find and repair the water leak.

[50] Ms. Barclay deposed that she understood that Mr. Panchyshyn would bring the moisture observed in the unit to the attention of the Strata so they could "have a look at it".

[51] Monique Talle, the Strata VP at the time of the leak and repair, deposed that:

a) on or about April 16, 2018, Mr. Panchyshyn left her a voice message saying that he wanted to show her some moisture in the second bedroom, and that he wanted the Strata to remedy it;

b) she so informed the strata manager in an April 16, 2018 email that read, in part:

> The realtor selling #105 left me a message saying that he tried to contact Doug Cox by knocking on his door! There is some moisture in the 2nd bedroom and he would like us to see it and to remedy it asap.

c) on or about April 17 or 18, 2018, Mr. Panchyshyn showed her a soft and wet patch of drywall in the den, and some wet carpeting in the second bedroom;

d) he then left her a key;

e) it continued to be her understanding that he wanted the Strata to inspect the leak and remedy the situation; and

f) work then began on the inspection and repair.

[Emphasis added.]

[52] On October 28, 2020, the appellant's counsel advised the CRT of the nature of the claim for damages that the appellant would be advancing (the quantum of which was said to amount to "several hundred thousand dollars"). She sought an oral hearing for the following reason:

> The claimant specifically requests an opportunity to cross-examine Ms. Talle (a member of the strata council) regarding the circumstances in which she arranged for the destruction of the claimant's suite …

[53] In the record before us, there is no indication the CRT responded to that request before the decision. For ease of reference, I repeat here what the Vice Chair wrote in the decision (at para. 11):

> The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.

[54] While, as I have noted above, the Vice Chair gave reasons for preferring the evidence of the Strata VP to the evidence of Mr. Panchyshyn where the evidence conflicted, there was, in fact, little significant conflict. That fact must be borne in mind in describing the content of procedural fairness in the specific context of the case. In determining what procedure is appropriate, the decision maker can weigh the extent to which a central question turns on credibility.

[55] Here, the Vice Chair concluded there was "sufficient proof that Mr. Panchyshyn had authority to report Ms. Downing's wishes to the strata on her behalf". There appears to be no doubt that was the case.

[56] He found that Ms. Downing, through Mr. Panchyshyn, requested the Strata to investigate the water ingress, that Mr. Panchyshyn gave Ms. Talle the key for that purpose and, given that he understood the Strata was responsible for water damage to the unit, he must have expected the Strata would investigate.

[57] There was no question that Mr. Panchyshyn, on Ms. Downing's behalf, asked the Strata to investigate the cause of the water ingress. The factual dispute was whether it was understood or agreed that the investigation might be very extensive and could require the removal of drywall and cabinetry. On this question, there was no direct conflict in the evidence. Mr. Panchyshyn says he expected the Strata to report back to Ms. Downing after conducting an inspection, but does not say he asked Ms. Talle to do so, nor does he say that he understood what an inspection would entail.

[58] Mr. Panchyshyn understood the Strata was responsible for repairing water damage to the unit, but does not say whether he asked the Strata to repair the leak. He deposes that he has never authorized demolition of a client's property, but does not expressly dispute Ms. Talle's evidence (and the record in her contemporaneous email) that the Strata was asked, on April 16, 2018, to inspect and repair the water leak "asap". While, in part, the failure to respond to this evidence may be a result of the CRT's "simultaneous submission" process, the appellant clearly appreciated that her agent's discussions with the Strata were critical to her case, and Mr. Panchyshyn's evidence is vague with respect to the authority he gave to Ms. Talle.

[59] The reviewing judge dismissed the argument that the denial of an oral hearing gave rise to procedural unfairness for two reasons.

[60] First:

> [105] The mere inability to cross-examine a witness does not give rise to unfairness. Issues of credibility are routinely addressed on written records by many tribunals and also by courts. In this case, as already discussed, the Decision-Maker expressly provided a reasoned, and reasonable, basis for preferring Ms. Talle's evidence over that of Mr. Panchyshyn.

[61] And second:

> [107] Ms. Downing's request to cross-examine Ms. Talle was made in an email to a CRT administrator fairly early on in the process and, when no response was received, she did not renew her request, which suggests that she did not consider a cross-examination of Ms. Talle to be important. ...

[62] I would not have placed any weight upon the appellant's failure to reiterate her request for an oral hearing. There was a clear request for a hearing, and the tribunal recognized that the request was outstanding when the necessity of cross-examination was addressed, although briefly, in the decision.

[63] In my view, however, it was open to the Vice Chair to determine that credibility was not so central to this case as to require an oral hearing or cross-examination. There was no real dispute with respect to what the Vice Chair considered to be the key questions: whether Mr. Panchyshyn had authority to ask the Strata to investigate the cause of water ingress on Ms. Downing's behalf, and whether he did so.

[64] Finding that was the case, the Vice Chair turned to the expert evidence with respect to the extent of the investigation required to find the cause of the water ingress. When he accepted that the work undertaken to find the cause of water ingress was appropriate, the dispute was decided in the Strata's favour.

[65] What might initially strike an observer to be procedural unfairness in this case is the inevitable result of legislation that diverts disputes—some of which are large in terms of money and of vital concern to residents of condominiums—into a tribunal that is not required to afford the litigants a traditional hearing, even where there are credibility questions. The impression that the process is unfair is reinforced by the statutory limitation on the scope of appellate review of the tribunal decisions. But the

decision to move disputes involving strata corporations into this dispute resolution process is a policy decision of the legislature, and reflects the legislature's balancing of the competing claims of efficiency and fairness.

[66] The appellant's attempt to avoid the summary determination of this claim without the benefit of a proper hearing and the limitation of her rights of appeal failed, in part, because the chambers judge in the 2019 Decision placed some weight upon the fact that the enabling legislation "permit[s] the CRT to question parties and witnesses, and to convene an in-person hearing with oral testimony if appropriate".

[67] However, the conflicts in the evidence in this case were limited and addressed in a reasoned manner by the Vice Chair. It is not necessary to permit cross-examination in all cases where there are conflicts in the evidence in order to afford the parties procedural fairness.

[68] Fairness is a concept fundamentally concerned with appropriate procedures. The key question for a reviewing court is "whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly": *Baker* at para. 30. While the procedural safeguards afforded parties will normally increase as the dollar value or significance of a dispute becomes more meaningful, I see no error in principle in the manner in which the Vice Chair addressed the limited conflicts in the record before him in this case.

Consent as a defence to a trespass claim

[69] The appellant says the tribunal erred in finding that she consented to the trespass upon her property, citing jurisprudence to the effect that consent to trespass must be informed consent to the particulars of what is proposed to be done to the property.

[70] She argues:

> The chambers judge fell into the same error as the vice chair. In particular, she reasoned that the vice chair had impliedly determined that "an authorization to investigate extends to doing whatever is required to investigate properly" and that the fact that Ms. Downing was surprised by the extent of the investigation "does not mean she did not consent to an investigation for that purpose." This reasoning cannot be reconciled with the legal principle that consent is not a defence to trespass unless the person providing it is informed of the nature and degree of the proposed intrusion.

[71] This argument is, in effect, an argument that it was not open to the Vice Chair to find that the appellant consented to doing that which was necessary in order to find and repair the cause of the water ingress. In my opinion, the finding was open to the Vice Chair, and is not inconsistent with the law of consent. The Vice Chair was not addressing a question of law of central importance to our legal system but, rather, a factual question that must arise frequently in strata properties, and one that lies within the exclusive jurisdiction of the CRT: what permission did the strata unit owner give to the Strata to enter her property and do work in the unit?

[72] The appellant contends the statutory standard set out in s. 56.7(2)(a) of the *CRT Act* does not apply to an action in trespass, because such actions are not claims "in respect of the *Strata Property Act*." That provision reads, in part, as follows:

> (2) On an application for judicial review of a decision of the tribunal for which the tribunal must be considered to be an expert tribunal, the standard of review to be applied is as follows:
>
> (a) a finding of fact or law or an exercise of discretion by the tribunal must not be interfered with unless it is patently unreasonable;
>
> ...
>
> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

[73] She says questions of law of central importance to our legal system are "matters other than those identified in paragraphs (a) and (b)", and that s. 56.7(2)(c) of the *CRT Act* imposes a standard of review of correctness for such questions. I would not accede to the argument that the question of consent in this case attracts

that standard of review. As I have noted, I regard the Vice Chair's conclusion that the appellant consented to the entry upon her property and to the initial investigation as a finding of fact in relation to strata property.

[74] As the respondent points out, correctly in my view, the finding of consent was informed by the Strata's duties under the *Strata Property Act*, including the Strata's duty to repair (s. 72), and duty to act in the best interest of all owners (s. 3). The conduct of the parties and their agents was informed by their understanding of the Strata's duties under the *Strata Property Act* to investigate and repair the leaks.

[75] To paraphrase the judgment of Justice Low in *Jestadt v. Performing Arts Lodge Vancouver,* 2013 BCCA 183, when addressing the jurisdiction of a different administrative tribunal but the same principle: the privative clause in the [*CRT*] *Act* confers a broad exclusive jurisdiction on the tribunal, which includes the common law principles under consideration, including trespass.

[76] Further, although framed as an argument with respect to the standard of review, this argument hinges upon the appellant's submission that the principal question before the tribunal was outside its jurisdiction. In my view, it is a submission that is inconsistent with, and an impermissible collateral attack upon, the 2019 Decision, in which Crerar J. determined the appellant's claim should be referred to the CRT, addressing substantially the proposition the appellant now advances, as follows:

> [39] The petitioner starts by noting that s.16.1 only requires the court to dismiss the Supreme Court proceedings in favour of resolution by the CRT if the court determines that "all matters" are within the jurisdiction of the CRT. She argues that the trespass and mental distress claims, and the extremity of the facts, move this dispute outside the typical jurisdiction of the CRT, and that fairness and justice demand that they remain in this court.
>
> [40] The petition in its original form entirely concerned the application of the SPA. The amended additions do not change the complexion of the dispute. Although trespass and mental distress have been added, they of course, arise from the allegation that unauthorized entry and destruction of a strata unit constituted trespass and caused distress. I agree that at its core, this dispute concerns the strata corporation's powers and duties to enter, inspect, maintain, and repair strata property. This falls firmly within the

> specialized expertise and jurisdiction granted to the CRT under s.121(1), and specifically under paragraphs (a), (e), and (f).

Consideration of expert evidence

[77] The Vice Chair discussed the expert opinion evidence of Mr. Topping briefly, as follows:

> [72] According to the affidavit of Woodcraft's president, who attend the April 2018 investigation of SL5, it was at his direction that the VP approved the extent of the investigation required to determine active water ingress was occurring from the building exterior and possibly exterior windows to SL5. This was not challenged by Ms. Downing. In a witness statement, Mr. Topping also confirmed the extent of investigation in SL5 was required to determine the exterior water leaks. I find Mr. Topping's statement meets the qualifications of expert evidence under CRT rule 8.3, in effect at the time of this dispute, given his Professional Engineer qualifications were provided in JRS reports and he confirmed his evidence was to assist the CRT. I note Mr. Topping's witness statement was not challenged by Ms. Downing, nor did she provide contrary expert evidence.
>
> [73] Therefore, I find the strata relied on Woodcraft and JRS when it approved the extent of the investigation necessary in SL5 to determine the cause of the water ingress. Based on the case law above, I find the strata was not negligent because it acted on advice it received from professional during the investigation of SL5.
>
> [Emphasis added.]

[78] Rule 8.3 of the *CRT Rules* sets out mandatory requirements for the admission of expert opinion evidence, in particular, a requirement that the expert's evidence be provided to all other parties by the deadline set by the case manager or Vice Chair. The appellant says that requirement was not met in this case. She contends that while the *CRT Rules* in place at the time of the hearing provide that "[i]n exceptional circumstances, the tribunal can waive the application of a rule or timeline to facilitate the fair, affordable, and efficient resolution of disputes", the Vice Chair did not decide to waive the requirements of R. 8.3 or identify any "exceptional circumstances" which justified doing so, and she contends the Vice Chair simply proceeded as though the mandatory rules were not there.

[79] However, as is evident in the passage cited above, the finding that the Strata relied upon professional advice in determining what investigation was necessary

was founded upon acceptance of the evidence of the president of Woodcraft. Thus, the additional evidence from Mr. Topping was confirmatory, not necessary. Even assuming that there was an objection to the admissibility of Mr. Topping's evidence (which is unclear), and assuming the Vice Chair did not consider whether there were exceptional circumstances justifying its admission, I am of the view that its admission was not critical to the outcome. I would not accede to this ground of appeal.

Reliance on an expert as a defence to a negligence claim

[80] Finally, the appellant argues that the Vice Chair erroneously described the evidence when he concluded that it was at the direction of Woodcraft's president that the Strata VP approved the extent of the investigation required to determine active water ingress was occurring from the building exterior and possibly exterior windows. She contends Woodcraft's president suggested that the unit should be dismantled not in order to investigate the water ingress, but to remediate the unit, to which the appellant never consented.

[81] The affidavit in question, sworn by Mr. Nosper, refers to work done on or about April 18, 2018, by Woodcraft, to investigate the source and degree of water damage, and to further remediation, including the removal of carpeting, baseboards, cabinets and other fixtures that needed to be removed so that the unit could be dried (the "Emergency Remediation").

[82] The appellant contends the Vice Chair did not properly analyze whether the Strata's reliance on the carpenter's suggestion was reasonable, which is a requirement of the law. She says the Vice Chair did not consider the potential harm of the invasive action to the appellant, or whether potential harm could be avoided with less invasive actions.

[83] There was evidence the work undertaken at the recommendation of Mr. Nosper was necessary to prevent further water damage and mould. The appellant contends that the Vice Chair effectively assumed that the Strata's decision to take the impugned action was reasonable because the carpenter suggested it. In

doing so, the appellant contends, the Vice Chair "fundamentally misapplied the law and engaged in the wrong analysis"; however, the appellant, in my opinion, identifies no fundamental error in the analysis. As the respondents note, the Vice Chair cited a number of cases, including *Wright v. The Owners, Strata Plan No. 205*, 1996 CanLII 2460, 20 B.C.L.R. (3d) 343 (S.C.), aff'd (1998), 103 B.C.A.C. 249, 43 B.C.L.R. (3d) 1, and *Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74, for the proposition that where the Strata acts reasonably in its investigations of building deficiencies, including by reasonably relying on the advice of a trusted tradesperson, then it has met its duty to repair and cannot be found negligent.

[84] The appellant's claim in negligence required her to establish a breach of the standard of care. The Vice Chair held that the Strata acted reasonably upon professional advice. That conclusion was founded upon evidence. In my view, there is no basis upon which we could find the Vice Chair's analysis of the negligence claim was patently unreasonable.

[85] I would dismiss the appeal.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice DeWitt-Van Oosten"

I agree:

"The Honourable Mr. Justice Voith"