COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Momeni v. Percy,*
2024 BCCA 77

Date: 20240301
Docket: CA48992

Between:

Sasan Momeni and Ailin Arsham

Appellants
(Respondents)

And

Michale Percy and Kimberley Newman

Respondents
(Petitioners)

And

The Director of the Residential Tenancy Branch

Respondent

Before: The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Hunter
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated April 3, 2023 (*Percy v. Momeni*, 2023 BCSC 522, Nanaimo Docket L97042).

Counsel for the Appellants:	A. Ehteshami
The Respondents, appearing in person:	M. Percy K. Newman
Counsel for the Director of the Residential Tenancy Branch:	J.M. Patrick
Place and Date of Hearing:	Vancouver, British Columbia December 7, 2023
Place and Date of Judgment:	Vancouver, British Columbia March 1, 2024

Written Reasons by:
The Honourable Mr. Justice Hunter

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Voith

Summary:

The parties were formerly landlords and tenants in the appellants' rental suite. The appellants issued a Notice to End Tenancy for cause under the Residential Tenancy Act. The respondents disputed the notice and the matter was reviewed pursuant to the Act by an arbitrator who confirmed the notice on two distinct grounds. On judicial review, a chambers judge accepted the findings of the arbitrator on one of the grounds but sent the issue back for reconsideration on the other. The landlords appeal. Held: Appeal allowed. It was sufficient to confirm the notice on one of the grounds. The decision of the arbitrator was not patently unreasonable.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

[1] This appeal arises out of a dispute over the validity of a Notice to End Tenancy of a residential suite. The respondents, formerly tenants in the appellants' rental suite, have departed the premises, but assert that they were required to do so under an invalid notice. They do not seek reinstatement in the suite but wish to bring a claim for monetary compensation for their eviction.

[2] The Notice to End Tenancy was reviewed by an arbitrator under the *Residential Tenancy Act,* S.B.C. 2002, c. 78 ("*RTA*"). The arbitrator confirmed the validity of the notice on two grounds and issued an order of possession to the landlords. On judicial review, a chambers judge set aside the order of the arbitrator, and made certain directions for reconsideration. The landlords appeal.

[3] This appeal raises two issues. The substantive issue is whether the chambers judge correctly applied the standard of patent unreasonableness when she set aside the arbitrator's decision on the basis of her assessment of error in one of the grounds relied on by the arbitrator. A second potential issue is whether the judicial review proceeding should have been dismissed as moot on the basis that monetary compensation is not available for an eviction pursuant to an order of possession, even if the order of possession is subsequently determined to have been erroneously made.

[4] In my view, the first issue is dispositive. The chambers judge confirmed the factual basis for one ground for the Notice to End Tenancy but set aside the

arbitrator's decision based on the second ground. In my view, the chambers judge erred in two respects. Once one ground for the notice was established, the order of possession was mandatory. Furthermore, the conclusion by the judge on the second ground does not meet the strict standard of patent unreasonableness for judicial review.

[5] As the mootness question has not been fully argued and is not necessary to resolve for purposes of this appeal, I would express no opinion on it.

[6] For the reasons that follow, I would allow the appeal, set aside the order of the chambers judge and dismiss the application for judicial review.

Background

[7] The appellants, Sasan Momeni and Ailin Arsham, were landlords to the respondents, Michale Percy and Kimberley Newman. The parties entered into a tenancy agreement on December 18, 2017 concerning a rental suite in Maple Ridge, British Columbia (the "Suite"). For clarity, I will refer to the parties as Landlords and Tenants in this judgment.

[8] Between February 2022 and May 2022, the Landlords notified the Tenants on several occasions of their intention to enter the Suite and were denied access by the Tenants. A dispute arose between the parties concerning, among other things, whether the Landlords were reasonably exercising their right to enter the Suite in accordance with the *RTA*.

[9] On February 22, 2022, the Tenants filed a claim before the Residential Tenancy Branch ("RTB") seeking, *inter alia*, an order permitting the Tenants to change the locks on the Suite and restricting the Landlords' right to access the Suite.

[10] On May 18, 2022, before the Tenants' claim could be heard, the Landlords' solicitor wrote to the Tenants objecting to the denials of access and stating as follows:

> We have further been advised that you have changed the locks to the Property contrary to clause 12 in your tenancy agreement and section 31(2) of the *Residential Tenancy Act*, without seeking our client's permissions first. This represents a breach of a material term of your tenancy agreement, which is why our clients demand that the locks be changed back to the previous locks on or before our clients' scheduled access to the Property on May 20.

[11] The Landlords' letter went on to state that "if our clients are again subjected to verbal insults at the upcoming inspection, or their access to the Property is denied, or you have not changed the locks back", the Landlords would be issuing a One-Month Notice to End Tenancy for breach of a material term of the tenancy agreement.

[12] The Tenants responded by way of a letter sent to the Landlords the next day, in which the Tenants denied that they had changed the locks to the Suite, but stated that they had applied to the RTB for an order to do so.

[13] On May 25, 2022, the Landlords served the Tenants with three Notices to End Tenancy: a 10-Day Notice, a One-Month Notice, and a Two-Month Notice. The Tenants applied for dispute resolution.

[14] The Tenants' February claim was heard on June 2, 2022 by RTB arbitrator Wietzel, who dismissed the Tenants' claim for permission to change the locks to the Suite, but made certain orders governing entry to the Suite by one of the Landlords.

[15] On October 3, 2022, a hearing was held on the Notices to End Tenancy before RTB Arbitrator Selbee. On October 5, 2022, Arbirator Selbee confirmed the validity of the One-Month Notice and issued an order of possession to the Landlords ("Arbitrator Selbee's Decision"). It is Arbitrator Selbee's Decision that is at issue in this proceeding.

Arbitrator Selbee's Decision

[16] At the hearing, the Landlords withdrew the Two-Month Notice to End Tenancy and Arbitrator Selbee dismissed the Landlords' 10-Day Notice. The remaining issue before Arbitrator Selbee was the One-Month Notice to End Tenancy.

[17] The One-Month Notice specified two grounds under s. 47 of the *RTA*. The chambers judge summarized these grounds in this way:

> [33] The two main grounds for the one-month notice to vacate the premises are that:
>
> a) the tenants illegally changed the locks to the unit without first seeking the landlords' permission (Issue 1), and
>
> b) the tenants unlawfully denied the landlords entry to the unit on several occasions despite being properly notified of the requested access, (Issue 2).

[18] The Landlords submitted that the Tenants denied them entry to the Suite on February 16, February 21, March 22, and May 20, 2022, despite being served proper notice of the Landlords' intention to enter the Suite. With regard to the March 22 request, the Landlords submitted that they had entered the Suite on that date, but left when the Tenants became confrontational. The Landlords also submitted that the Tenants had changed the locks to the Suite and had refused to change them back. They relied on oral testimony, video evidence, their solicitor's letter and the Tenants' response.

[19] The Tenants denied changing the locks, and argued that they had not unjustifiably denied access to the Landlords. The Tenants provided their own video evidence, testimony and written submissions. There has been no suggestion that the prohibition against changing the locks without the consent of the Landlords was not a material term of the tenancy agreement between the parties, as was the case in *Belmont Properties v. Swan*, 2021 BCCA 265.

[20] At the hearing, the question whether the Tenants had in fact changed the locks to the Suite was a contested issue. Arbitrator Selbee concluded that they had:

> In relation to the Tenants changing the locks to the rental unit, I find it more likely than not that the Tenants did change the locks. The most compelling evidence in relation to this issue are the videos submitted by the parties. I find the Landlords' video does show that the Landlords cannot unlock the front door with their key because Landlord S.M. tries their key in the door and it does not unlock the door. The Tenants' videos simply show that the Tenants have keys to get into the rental unit, they do not show that the Landlords' key opens the locks to the rental unit. Further, the Tenants attempted to argue that the key must be forcefully turned and this is why the Landlords' key did

> not open the door; however, the Tenants' video shows the key does not need to be forcefully turned to open the door.

[21] Arbitrator Selbee also found that the Tenants had unreasonably denied the Landlords access to the Suite on February 21, 2022 and May 20, 2022, and that one of the Tenants had behaved in an uncooperative and belligerent manner when the landlords attempted to enter the Suite on May 20, 2022.

[22] Arbitrator Selbee concluded:

> Given the above, I am satisfied the Tenants have significantly interfered with the Landlords and seriously jeopardized the lawful right of the Landlords by changing the locks to the rental unit, denying entry when the Landlords had a right to enter and being uncooperative and belligerent in their dealings with the Landlords despite the Landlords having the right to be at the rental unit and entering the rental unit. I am satisfied the Landlords had grounds to issue the One Month Notice.

[23] The Landlords were issued an order of possession pursuant to s. 55(1) of the *RTA*. The Landlords served the order of possession on the Tenants on October 6, 2022. The Tenants subsequently left the Suite.

Judicial Review Decision

[24] On December 2, 2022, the Tenants filed a petition for judicial review of Arbitrator Selbee's Decision. The Tenants requested that Arbitrator Selbee's Decision and the writ of possession be quashed. They also requested monetary compensation.

[25] The judicial review hearing was held on March 6, 2023. The reasons, indexed at 2023 BCSC 522 [*RFJ*], were delivered on April 3, 2023.

[26] At the outset of her reasons, the chambers judge considered whether the application for judicial review was moot given that the Tenants were not seeking to regain possession of the Suite. The chambers judge concluded that it was not, because "[i]f the tenants succeed in this judicial review and the matter is remitted back to the RTB, the tenants could bring a monetary claim to the RTB…on that basis…the judicial review should proceed.": *RFJ* at para. 14.

[27] The chambers judge structured her analysis concerning the One-Month Notice to End Tenancy under the two factual issues underlying the Landlords' grounds to end tenancy: the changing of the locks, and the denials of access.

[28] With respect to the changing of the locks issue, the chambers judge found no error in Arbitrator Selbee's conclusion that the Tenants had changed the locks to the Suite:

> [81] Arbitrator Selbee considered the evidence before her and found that it was more likely than not the tenants had changed the locks on the premises. She reviewed the videotapes submitted by both parties.
>
> [82] She accepted the landlords' evidence that their key did not work in the lock. The landlords provided videotape evidence to demonstrate this. She did not accept the tenants' evidence that the locks had not been changed. She rejected the tenants' argument that the key needed to be turned forcibly to open the lock because she observed that was not the case in the tenants' video.
>
> [83] I find that Arbitrator Selbee did not reverse the onus of proof. She found that the landlords proved the fact and the tenants' evidence did not rebut that proof.
>
> [84] There is no error. I will not interfere with Arbitrator Selbee's finding of fact which was based on her assessment of the evidence before her.

[29] The chambers judge then went on to consider whether the Tenants wrongly denied the Landlords access to the Suite. The judge concluded that Arbitrator Selbee's failure to consider the orders of Arbitrator Weitzel and the Tenants' request for a brief postponement of one of the Landlords' access requests was patently unreasonable.

[30] The judge ordered that the RTB reconsider its decision on the denial of entry and also directed the RTB to conduct the inquiry mandated by s. 47(1)(h)(ii). The judge found it was unnecessary to consider whether the writ of possession should be quashed given that the Tenants had not applied for a stay of execution pending the judicial review and did not seek to regain possession of the Suite.

[31] The formal order of the Court contained a term that "in the event that the Petitioners are successful in a rehearing, the Petitioners can request a monetary award."

Legal Framework

Standard of Review

[32] The role of this Court in reviewing the decision of a chambers judge on a judicial review application is to determine whether the chambers judge identified the correct standard of review and applied it correctly. For that purpose, the appellate court is to "step into the shoes of the lower court" such that the "appellate court's focus is, in effect, on the administrative decision": *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45–46, quoting *Merck v. Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 247.

[33] By the combined effect of ss. 5.1 and 84.1 of the *RTA* and s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 ("*ATA*"), the standard of review for a judge conducting judicial review of the decision of an RTB arbitrator is patent unreasonableness.

[34] The patent unreasonableness standard of review is a highly deferential one. In *Campbell v. The Bloom Group*, 2023 BCCA 84, a judgment arising from the dismissal of a challenge to a Notice to End Tenancy by an RTB arbitrator, Voith J.A. described the standard in this way:

> [13] A patently unreasonable decision has been described as "clearly irrational", "evidently not in accordance with reason", or "so flawed that no amount of curial deference can justify letting it stand": *Beach Place Ventures Ltd. v. Employment Standards Tribunal*, 2022 BCCA 147 at para.17, quoting from *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 52.

[35] Even more recently, in another challenge to a decision of an RTB arbitrator, Fenlon J.A. stated that such a decision can be interfered with only if it "almost borders on the absurd", citing *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para. 28: see *McNeil v. Elizabeth Fry Society of Greater Vancouver*, 2024 BCCA 2 at para. 5.

[36] For discretionary decisions, s. 58(3) of the *ATA* defines the patent unreasonableness standard in this way:

> For the purposes of subsection (2)(a), a discretionary decision is patently unreasonable if the discretion
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> (a) is exercised arbitrarily or in bad faith,
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> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.

[37] The chambers judge correctly identified the standard of review of patent unreasonableness. The question on appeal is whether she correctly applied it.

Statutory Framework under the *RTA*

[38] Section 47 of the *RTA* sets out a landlord's ability to issue a notice to end tenancy for cause. Subsections 47(d)(i) and (ii), and (h)(i) and (ii) are relevant to this proceeding:

> **47** (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:
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> ...
>
> (d) the tenant or a person permitted on the residential property by the tenant has
>
> (i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,
>
> (ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or
>
> ...
>
> ...
>
> (h) the tenant
>
> (i) has failed to comply with a material term, and
>
> (ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;

[39] Where a tenant applies for dispute resolution to challenge a Notice to End Tenancy, s. 55(1) of the *RTA* applies:

> **55** (1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if

> (a) the landlord's notice to end tenancy complies with section 52 *[form and content of notice to end tenancy]*, and
>
> (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.
>
> [Emphasis added.]

Discussion

[40] The Landlords submit that the following analysis demonstrates error on the part of the chambers judge:

> [100] I cannot determine whether a writ of possession would have been issued if the tenants had been successful in defending this second issue but not the first. Would the arbitrator have issued a writ of possession solely on the basis of a finding that the tenants had changed the locks or would it be more likely that the arbitrator would have ordered the tenants to change the locks back? Section 47(1)(h) mandates an independent inquiry and assessment of whether the tenant corrected the situation within a reasonable time after the landlord gave notice …

[41] The Landlords submit that the judge asked herself the wrong question by linking two independent bases for a valid notice to end tenancy. It was not necessary that both grounds be established. Once Arbitrator Selbee had concluded that the tenants had changed the locks, contrary to a material term of the tenancy, and had upheld the notice on that basis, as she did, the order of possession was required to be issued pursuant to s. 55(1) of the *RTA*.

[42] I agree with the chambers judge that there was no basis on which Arbitrator Selbee's decision that the Tenants had wrongly changed the locks on the Suite could be set aside. It was a decision based on the arbitrator's assessment of the evidence.

[43] The only remaining issue might be whether the Tenants had been given a reasonable time to correct the situation after receiving written notice to do so. Here, it was undisputed that the Landlords had provided the requisite written notice and rather than correcting the situation, the Tenants denied that they had changed the locks. On this record there was no need for an independent inquiry, as the Tenants' denial set out their position with clarity.

[44] In my respectful view, the chambers judge erred in failing to consider the changing of the locks as an independent basis for the Landlords' notice, and the judgment on judicial review must be set aside.

[45] The Landlords also challenged the chambers judge's conclusion that Arbitrator Selbee had exercised her discretion in an arbitrary way in giving effect to the Landlords' ground relating to denial of access. The basis for the judge's conclusion was that Arbitrator Selbee had not considered the fact that Arbitrator Weitzel had found the Landlords' behaviour relating to access to the Suite to be unreasonable in the past, and also had not considered what the chambers judge regarded as the Landlords' refusal to grant brief postponements of access in the past.

[46] I can see nothing in Arbitrator Selbee's decision relating to the denials of entry by the Tenants that could meet the stringent standard for review of patent unreasonableness. The significance of the Landlords' refusals to grant postponements of access in the past was a matter squarely within the jurisdiction of Arbitrator Selbee; deference is owed to her weighing of that evidence. Furthermore, Arbitrator Selbee was required to make a decision based on the merits as disclosed by the evidence before her and was not bound to follow other decisions made under the RTB dispute resolution process, including that of Arbitrator Weitzel: *RTA*, s. 64(2); *Shevchenko v. Gentile*, 2022 BCSC 1272 at para. 24.

[47] In my view, the decision of Arbitrator Selbee, whether focussed on the significance of the changing of the locks alone or the overall analysis of the grounds advanced to support the Notice to End Tenancy, is not patently unreasonable and accordingly judicial intervention is not warranted.

Mootness

[48] At the judicial review hearing, the Landlords took the position that the validity of the Notice to End Tenancy was moot because the Tenants had been evicted pursuant to a writ of possession issued by the B.C. Supreme Court and were not seeking to regain possession of the rental unit. The Tenants argued that the validity

of the notice was relevant to a potential claim for compensation that the Tenants wished to bring, and the hearing proceeded on that basis.

[49] The availability of such compensation was not a matter at issue before the chambers judge, who ordered that if the Tenants were successful in the rehearing she was ordering, the tenants could request a monetary award.

[50] There is no clear basis under the *RTA* for compensation for eviction under what is subsequently determined to be an invalid Notice to End Tenancy.

[51] The Director of the RTB participated in this appeal to provide submissions on the statutory framework. The Director did not seek a resolution of the question of availability of compensation unless necessary for the resolution of the appeal, but submitted that the availability of such compensation was a matter requiring further analysis.

[52] As I have concluded that the appeal must be allowed and the order of the chambers judge set aside, it is unnecessary for this Court to undertake this analysis, and undesirable to do so at first instance. If a similar claim arises in the future, it will be preferable that the issue be addressed initially by the Director, so that a court conducting judicial review will have the benefit of the Director's expertise in considering this jurisdictional question.

Costs

[53] At the hearing of this appeal, the Landlords handed up a 600-page Appellants' Appeal Book which had not been filed prior to the hearing in accordance with the *Court of Appeal Rules*, B.C. Reg. 120/122, nor had an extension of time to file the appeal book been sought or ordered. No explanation was provided for the failure to comply with the requirements for prosecuting an appeal.

[54] The division accepted the appeal book as there appeared to be no undue prejudice to the Tenants by the fact that appeal books were produced so late, but I would reflect the Court's dissatisfaction with this procedure in our costs award.

[55] As the Landlords have been successful in this appeal, in the normal course they would be entitled to their costs. However, in light of their failure to file their appeal book until producing them the day of the appeal, I would order that each party bear their own costs.

[56] In order to regularize the record for this appeal, I would extend the time for filing appeal books to the day of the appeal, and accept the appellants' appeal book as part of the record in this appeal.

Disposition

[57] For the foregoing reasons, I would order:

(i) the appeal is allowed, the order under appeal is set aside and the judicial review proceeding is dismissed;

(ii) the time for the appellants to file their appeal book is extended to December 7, 2023; and

(iii) each party will bear their own costs of the appeal.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Voith"