IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wu v. Horvath,*
2024 BCSC 1484

Date: 20240814
Docket: S247547
Registry: New Westminster

Between:

Chi-Hang Wu

Petitioner

And

Michael Horvath, Nataliia Petryshyn and Director, Residential Tenancy Branch

Respondents

Before: The Honourable Justice Lamb

On judicial review from: An order of the Residential Tenancy Branch, dated November 4, 2022 (File No. 310068482)

Reasons for Judgment

Counsel for the Petitioner:	M. Menkes
Counsel for the Respondents, Michael Horvath & Nataliia Petryshyn:	F. Jiwa M. Badwal
Place and Date of Hearing:	New Westminster, B.C. May 8, 2024
Place and Date of Judgment:	New Westminster, B.C. August 14, 2024

Introduction

[1] On July 12, 2021, Chi-Hang Wu (the "Purchaser") agreed to purchase a residential property at 6158 Burns Street, Burnaby, BC (the "Property") that was then occupied in part by Michael Horvath and Natalia Petryshyn (the "Tenants"). The Tenants received a Notice to End Tenancy with an effective date of October 31, 2021 (the "Notice") on the basis that the Purchaser or his family member would be moving in. The Purchaser did some renovations before moving into the Property on July 25, 2022.

[2] The Tenants filed a monetary claim with the Residential Tenancy Branch ("RTB") against the Purchaser pursuant to the *Residential Tenancy Act*, S.B.C. 2002, c. 78 alleging the Purchaser had failed to accomplish the purpose for ending their tenancy as set out in the Notice within a reasonable period of time as required by s. 51(2) of the *Residential Tenancy Act*. On November 4, 2022, the RTB arbitrator (the "Arbitrator") issued a decision in favour of the Tenants, finding there was no evidence the rental unit was uninhabitable during the renovations and there was no evidence of extenuating circumstances (the "Decision"). The Arbitrator ordered the Purchaser to pay the Tenants $27,700 (the equivalent of 12 months' rent plus the $100 filing fee).

[3] The Purchaser filed a petition seeking to set aside the Decision or alternatively to remit the matter to the RTB for reconsideration.

[4] This judicial review proceeded on the basis of the record before the Arbitrator and the transcript of the RTB hearing. The petitioner did not seek to have new evidence admitted, and I have not considered any of the affidavit evidence that goes beyond the record before the Arbitrator.

Statutory Framework

[5] Section 49(5) of the *Residential Tenancy Act* provides as follows:

> (5) A landlord may end a tenancy in respect of a rental unit if
>
> > (a) the landlord enters into an agreement in good faith to sell the rental unit,

> (b) all the conditions on which the sale depends have been satisfied, and
>
> (c) the purchaser asks the landlord, in writing, to give notice to end the tenancy on one of the following grounds:
>
> > (i) the purchaser is an individual and the purchaser, or a close family member of the purchaser, intends in good faith to occupy the rental unit;
> >
> > (ii) the purchaser is a family corporation and a person owning voting shares in the corporation, or a close family member of that person, intends in good faith to occupy the rental unit.

[6] If a purchaser does not accomplish the stated purpose for ending the tenancy "within a reasonable period after the effective date of the notice", the purchaser must pay a tenant an amount 12 times the monthly rent, unless there are extenuating circumstances that prevent the purchaser or their family member from occupying the rental unit within a reasonable period: *Residential Tenancy Act*, s. 51(2) and (3).

[7] On November 3, 2022, the Tenants' application for dispute resolution with the RTB was heard by the Arbitrator. The hearing was conducted by way of a conference call in accordance with standard RTB procedure. The Purchaser represented himself and brought his sister as a witness. Mr. Horvath represented himself and appeared on behalf of Ms. Petryshyn. The Purchaser and the Tenants submitted various documents to the RTB in advance of the hearing and delivered those documents to each other.

[8] At the outset of the Decision, the Arbitrator noted that only the relevant oral and documentary evidence needed to resolve the issues in dispute and to explain the decision was reproduced in the decision.

[9] From August 2020 to October 31, 2021, the Tenants occupied the upper suite in the Property. As of July 2021, they paid $2300 per month in rent. They received the Notice on July 31, 2021, which terminated their tenancy as of October 31, 2021. The Tenants moved out of the Property at the end of October 2021.

[10] The Purchaser made an offer to purchase the Property on July 13, 2021 after a brief two-day window to inspect the Property. The Purchaser's offer required vacant possession because they were not interested in purchasing the Property as an investment property.

[11] The Purchaser obtained possession of the Property on November 2, 2021 and began preparations to have renovations done to the Property. The Purchaser did not fully or "properly" assess the Property until sometime in November. It was difficult to find contractors to come to provide a quote or evaluate the Property during the COVID-19 pandemic. The Purchaser argued they could not have had retained a contractor to provide a quote until they obtained possession in November.

[12] The Purchaser's witness (his sister, mistakenly identified as his daughter in the Decision) said they found additional issues such as a leaking washroom. They determined at some point that various rental units in the Property were unauthorized suites. The Purchaser's sister continued to look for a contractor and found one in February 2022. Renovations took a few months to finish.

[13] The Arbitrator wrote, "the purchaser's daughter's brother moved into the rental unit at the end of July 2022". In fact, the Purchaser, his spouse, his children and his father moved into the Property on July 25, 2022.

[14] The Purchaser testified renovations needed to be done for a number of reasons, including a gas leak found after they obtained possession. The Purchaser said it would not have been suitable for the Tenants to remain in their unit considering the scope of renovations.

[15] The Arbitrator said the onus was on the Tenants to prove their case, and the standard of proof was on a balance of probabilities, which meant that it was more likely than not that the facts occurred as alleged.

[16] The Arbitrator found that the Purchaser had failed to establish that the stated purpose for ending the tenancy—so that he or a close family member could move

into the Property—was accomplished within a reasonable period after October 31, 2021.

[17] The Arbitrator noted that although the Purchaser provided evidence about the difficulty of finding contractors to undertake renovation work throughout the Property, the Purchaser did not establish "the rental unit was in fact uninhabitable". The Arbitrator expanded upon this finding as follows:

> Indeed, they briefly referred to the rental unit (the "upstairs suite") as being "okay". And though the rental unit may have required renovations and some repairs, including the issue with a leaking bathroom, there is no evidence before me to find that the purchaser or a close family member of the purchaser could not have occupied the rental unit within weeks, if not days, of the tenants' departure. Rather, the property basically sat unoccupied for a period of almost nine months. There is, to reiterate, no evidence to persuade me to find that the purchaser could not have occupied the rental unit in a vastly shorter, more reasonable period of time. Nine months was not, I find, a reasonable period after the effective date of the Notice in which to accomplish the stated purpose for ending the tenancy.

[18] The Arbitrator then went on to consider s. 51(3) of the *Residential Tenancy Act*:

> There is, quite frankly, no evidence before me to find that any extenuating circumstance prevented the purchaser from accomplishing the stated purpose for ending the tenancy within a reasonable period after the effective date of the Notice.
>
> While the purchaser experienced difficulty in obtaining the services of contractors to carry out renovations or repairs, as I have noted previously, those renovations and repairs did not and ought not to have been a barrier to occupancy. It was the purchaser's decision to carry out renovation work, and the delays and so forth in hiring tradespersons is not by any stretch something that is unforeseen or unknown to the purchaser.

Standard of Review

[19] The standard of review to apply to a decision of the RTB is patent unreasonableness: *Administrative Tribunals Act*, S.B.C. 2004, c. 45, s. 58(2)(a); *Residential Tenancy Act*, ss. 5.1, 84.1. As a result, findings of fact and law made within an RTB's exclusive jurisdiction can only be set aside if they are patently unreasonable.

[20] Our Court of Appeal recently confirmed that a patently unreasonable RTB decision is one that is "clearly irrational" or "evidently not in accordance with reason" or "so flawed that no amount of curial def[er]ence can justify letting it stand": *Metro Vancouver (Regional District) v. Belcarra South Preservation Society*, 2021 BCCA 121 at para. 32.

[21] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 84, the Supreme Court of Canada guided courts conducting judicial reviews to focus on the reasons given by the administrative decision maker. Considering the adequacy of reasons involves an assessment of the justification, transparency and intelligibility of the decision: *Vavilov* at para. 15. However, a tribunal's reasons are not required to meet a standard of perfection, and the judicial review process is not a treasure hunt for error: *Vavilov* at paras. 91, 102.

[22] In terms of procedural fairness, the question is whether the tribunal acted fairly in all of the circumstances, including the statutory, institutional and social context for the decision: *Athwal v. Johnson*, 2023 BCCA 460 at para. 23. Courts have recognized that parties are entitled to a high level of procedural fairness from the RTB: *Ndachena v. Nguyen*, 2018 BCSC 1468 at paras. 56–61, cited with approval by the court in *Athwal* at para. 24.

Analysis

[23] As submitted by the Director of the RTB in its response to petition, what constitutes a reasonable amount of time for a purchaser or purchaser's family member to occupy the rental unit "will depend on the circumstances of each case".

[24] In this case, the Arbitrator seemingly ignored relevant circumstances related to the Purchaser's father and evidence about why he did not move in sooner. This evidence is relevant both to the question of whether the time for the Purchaser or his family member to move in was reasonable and whether there were extenuating circumstances if the time was not reasonable. The Arbitrator does not mention the Purchaser's father and his circumstances in his analysis of either of these issues.

[25] The Arbitrator found "there is *no evidence* before me to find that the purchaser *or a close family member* of the purchaser could not have occupied the rental unit within weeks, if not days, of the tenants' departure" (emphasis added). However, the Arbitrator's conclusion that there was "no evidence" was patently unreasonable based on the record before him. In particular, the Arbitrator seemingly ignored the Purchaser's written evidence that the original plan was to have the Purchaser's father move into the rental unit and the reason why that did not happen:

> My dad has glaucoma, he has very limited vision and is declared blind legally by his eye doctor. After he visited the house after possession, my dad evaluated and decided that it was unsafe for him to move in even on the second floor temporarily because of the illegal suites. Also, some renovation was required to make the house safer for him to live in, i.e. the bathroom.

[26] As part of the assessment of whether the Purchaser or his family member moved into the unit within a reasonable period of time, one of the circumstances the Arbitrator was required to consider was the Purchaser's father's post-Notice decision not to occupy the rental unit because he felt it was unsafe for him to do so. The Arbitrator erred by failing to consider the father's decision not to move in or alternatively by failing to mention this key evidence when describing the relevant circumstances in this case. A failure to consider a relevant factor may vitiate a decision: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para. 41. The reasons are inadequate as they do not refer to this key factor in the circumstances of this case. By concluding there was "no evidence" when there was *some evidence* as to why the father could not occupy the rental unit, which is not addressed in the Decision, I am satisfied the Decision is patently unreasonable.

[27] This is not a case like *Mawani v. Dobbs*, 2022 BCSC 1285, where the purchaser of a property changed their mind about moving in after seeing the property after the purchase completed and did not ever move in. The case at bar is more factually similar to *Maasanen v. Furtado*, 2023 BCCA 193 where the purchaser eventually moved into the property after renovations took longer than anticipated and the only question was whether the purchaser moved into the rental unit within a reasonable period of time or there were extenuating circumstances for not doing so.

At para. 24 of *Maasanen*, the Court of Appeal confirmed that evidence of extenuating circumstances needed to be considered when determining whether a purchaser was prevented from accomplishing the stated purpose for ending a tenancy within a reasonable period from the effective date of notice. At para. 29 of *Maasanen*, the Court of Appeal confirmed that the construction delays in that case amounted to extenuating circumstances for the purposes of s. 51(3) of the *Residential Tenancy Act*.

[28] The Purchaser urged me to find that the time taken by the Purchaser was reasonable or that there were extenuating circumstances rather than remitting the matter to the RTB. Unfortunately, unlike in *Maasanen*, I am not satisfied that there is "no reasonable argument" in this case that the circumstances "were anything other than extenuating". I am not able to conclude a reconsideration by the RTB "could lead to only one result", in part because the evidentiary record is incomplete. At the hearing, the Arbitrator erroneously ruled that a question about the Purchaser's father's housing needs was not relevant (confirming that the Arbitrator failed to consider a relevant circumstance when assessing reasonable time). During the oral hearing, the Tenant tried to ask the Purchaser's sister about the features of a residence that would be good for the Purchaser's father, i.e. asking indirectly about the Purchaser's father's needs. The Arbitrator cut off that line of questioning by saying,

> I think we're …straying a little bit further from the issues that are --- that I'll be looking at. I appreciate where you're going but I'll have you know right now that I won't be delving into those comparative aspects.

[29] However, in my view, the Purchaser's father's needs and perhaps more importantly his limitations and safety concerns were relevant to the question of whether or not it was reasonable that he did not move in until the unauthorized suites were removed and the rental unit renovated to make it safer for him. The Arbitrator erred by cutting off this relevant inquiry, which left the record incomplete.

[30] Even assuming the Purchaser's father's limited vision was a factor, it is possible that an arbitrator would conclude the Purchaser has failed to discharge his

onus to show that the time to move in was reasonable. The Purchaser led only limited evidence about the scope of the renovations actually carried out, which makes it difficult to assess whether it was reasonable for the father (even with limited vision) to decline to move in until those renovations were complete. There was no evidence about the time the actual work took or whether there were permits required or any delay related to permits. There were photos of the interior of what appears to be the unauthorized suites, but there was no evidence about the quote provided or the invoice issued by the contractor who did the renovations. In her evidence at the hearing, the Purchaser's sister said she was trying to ready the Property for the Purchaser's arrival in July 2022. It would be open to arbitrator to find in all the circumstances that the time taken to initiate and carry out the renovations was not reasonable, even if the Purchaser's father was not able to live in the rental unit from the outset.

[31] The Purchaser has identified other errors in Decision. The Decision says the onus was on the Tenants to prove their case, but in fact, the onus was on the Purchaser to prove on a balance of probabilities that he or a family member moved in within a reasonable period of time. It is not clear that this error affected the outcome, but it does undermine confidence in the Decision.

[32] The Purchaser has identified other minor flaws in the Decision. As noted, the Arbitrator misidentified the Purchaser's sister as his daughter and wrote that the "purchaser's daughter's brother" (i.e. the purchaser's son) moved into the rental unit, when in fact the Purchaser, his wife, children and father moved into the Property. The decision says that after November 1, 2021, "they found additional issues with the property such as a leaking washroom in the rental unit", and they "also determined (at some point) that the various rental units in the house were "illegal" or unauthorized". However, the evidence is clear the Purchaser became aware that the two downstairs suites were unauthorized when he received the seller's disclosure statement in July 2021 before agreeing to buy the Property. These flaws do not individually or collectively rise to the level of patently unreasonable errors as the Decision does not turn on them.

[33] In the end, I am satisfied the Decision is patently unreasonable for failing to consider or address evidence related to the Purchaser's father's delay in moving into the rental unit, both in assessing whether the time was reasonable and whether there were extenuating circumstances. As a result, I am setting aside the Decision and remitting the matter back to the RTB for reconsideration before a different arbitrator. This outcome is regrettable given the amount in issue and the time that has passed, but this is not one of those rare cases where it would be appropriate for me to substitute my decision for that of the Arbitrator. As indicated, the record is inadequate, even if I was inclined to do so.

[34] The Purchaser urged me to give direction or guidance to the arbitrator on a rehearing with respect to the assessment of reasonableness and the definition of "extenuating circumstances". I decline to do so, as such direction or guidance would not be appropriate in this case given my decision to remit the matter.

[35] Although I have found a procedural irregularity in that the Arbitrator did not allow the parties to present relevant evidence, this procedural irregularity does not justify a departure from the usual rule that no costs are payable by the decision maker to the applicant who is successful on judicial review: *Ball v. Beacham*, 2024 BCSC 21 at paras. 92–95. The parties shall bear their own costs of this judicial review.

"Lamb J."