IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dowling v. Heitner,*
2024 BCSC 2139

Date: 20241125
Docket: S238217
Registry: Vancouver

Between:

Laura Dowling

Petitioner

And

Tamara Heitner

Respondent

Before: The Honourable Justice A. Ross

On judicial review from: An arbitrator's decision of the Residential Tenancy Branch, dated October 5, 2023, and a subsequent review decision, dated October 20, 2024.

Reasons for Judgment

Counsel for the Petitioner:	P.J. Goodwin
The Respondent, appearing in person:	T. Heitner
Place and Date of Trial/Hearing:	Vancouver, B.C. October 29, 2024
Place and Date of Judgment:	Vancouver, B.C. November 25, 2024

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Introduction

[1] This is a petition brought by a “landlord”, Ms. Dowling, seeking to set aside an order of an arbitrator of the Residential Tenancy Branch (“RTB”) dated October 5, 2023 (the “Merits Decision”), and a subsequent review decision dated October 20, 2024 (the “Review Decision”).

[2] The respondent in this petition, Ms. Heitner, is the former tenant of the premises.

[3] In the underlying Merits Decision, the arbitrator granted a monetary order to Ms. Heitner pursuant to ss. 49, 51 of the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [*RTA*]. The monetary award to Ms. Heitner was $17,700, representing 12 times the monthly rent that she had paid for the rental unit.

[4] The petitioner submits that the Merits Decision was patently unreasonable. In the alternative, she says that the procedure followed at the RTB was procedurally unfair.

[5] The respondent opposes the relief sought. She argues that the two RTB decisions were reasonable and correct. Further, she says the procedure was fair.

[6] For the reasons set out below, I find that:

a) the Merits Decision was patently unreasonable. As a result, the Review Decision, which upheld the Merits Decision, is also patently unreasonable; and

b) the underlying hearing was procedurally fair.

Issues

[7] There are two issues of substance:

a) Were the Merits Decision and the Review Decision patently unreasonable in finding that the landlord should not be excused from paying monetary order pursuant to s. 51(3)?

b) Was there procedural unfairness resulting in an incorrect decision?

[8] In addressing these issues, I accept that the RTB arbitrator is an expert in the area of the *RTA*.

[9] Before addressing the facts and the decisions, I pause to note that there are two legal questions that are not in dispute:

a) the correct decision to be reviewed; and

b) the standard of review.

[10] On the first non-issue, I note that it is clear from the petition as a whole that the petitioner seeks to set aside the Merits Decision. In law, it is the Review Decision that is under review. In my reasons below, I have considered whether the Review Decision was patently unreasonable; however, the context for that analysis is the underlying Merits Decision.

[11] The second non-issue relates to the standard of review:

a) The first standard of review for me to consider is whether the arbitrator's decision was patently unreasonable: In that respect I am applying s. 5.1 of the *RTA* and s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

b) The second standard of review applies on the issue of procedural fairness, I note that many cases have considered what level of procedural fairness is to be applied in RTB hearings. The consensus is that such hearings require the adjudicator to observe a high degree of procedural fairness.

[12] I apply those standards below.

Factual Background

[13] The factual background is largely undisputed:

a) Ms. Heitner moved into unit 404 - 2216 W. 3rd Ave. Vancouver on March 1, 2015 (the "Unit"). The tenancy agreement was between Ms. Heitner and the landlord, Mr. Dale Flexman.

b) On February 3, 2021, a contract of purchase and sale was entered into between Mr. Flexman and Ms. Laura Dowling for the purchase of the Unit. The completion date was scheduled for May 3, 2021.

c) On February 10, 2021, Mr. Flexman served a Two Month Notice to End Tenancy for Landlord's Use of Property. The effective date of the notice was April 30, 2021. The stated purpose was as follows:

> All of the conditions for the sale of the rental unit have been satisfied and the purchaser has asked the landlord, in writing, to give this Notice because the purchaser or a close family member intends, in good faith, to occupy the rental unit.

d) The respondent filed an application for dispute resolution on February 11, 2021. She sought an order setting aside the notice to end tenancy. That application was heard on April 29, 2021, via conference call. The decision was released on May 7, 2021, dismissing the respondent's application.

e) Due to an innocent error, Mr. Flexman as landlord, did not receive a copy of that decision. He was not aware of it until May 31, 2021.

f) Ms. Heitner, dissatisfied with the May 7, 2021 decision, sought a review. That review was heard without submissions from Mr. Flexman. Ms. Heitner's review application was dismissed on May 30, 2021.

g) Although the arbitrator in the Merits Decision found that the respondent vacated the unit on May 22, 2021, both sides agree that this was not the case. The respondent hired movers who moved her furniture on May 22, 2021. However, she did not depart the Unit until May 31, 2021. It is not

disputed that on May 31, 2021, she provided the keys to the purchaser, Ms. Dowling.

h) By agreement between Mr. Flexman and Ms. Dowling, certain renovations were planned for the Unit. For context, as noted, Mr. Flexman did not know the outcome of the RTB decision on the eviction notice until May 31, 2021. He could not begin any renovations until he had that knowledge plus possession of the Unit.

i) On June 2, and again on June 7, 2021, Mr. Flexman met with a contractor to obtain an estimate on the planned renovations to the premises. The contractor was retained, and the renovations were undertaken.

j) Ms. Dowling moved into the Unit (which she then owned) on August 1, 2021.

k) Ms. Heitner filed an application under ss. 49, 51 of the *RTA* claiming that the landlord did not use the premises for the stated purpose within a reasonable period of time following the tenant's departure.

l) At the hearing leading to the Merits Decision, Mr. Flexman appeared on behalf of Ms. Dowling and submitted a number of documents including:

   i. A Telus bill dated June 28, 2021, showing Mr. Dowling's address at the premises.

   ii. A BC Hydro invoice for the Unit dated August 9, 2021, indicating that Ms. Dowling had taken over the Hydro account on June 30, 2021.

   iii. A renovation invoice, from MayneStream Solutions Inc. ("MayneStream") which I describe below.

   iv. A series of emails between Ms. Dowling, Mr. Flexman, and the contractor hired to conduct the renovations.

[14] The invoice from MayneStream is dated July 29, 2021. It was issued to Mr. Flexman (the vendor) and describes the scope of work as follows:

> Condo refresh,- demo carpet, baseboards, floor, toilet, hot water tank. Debris removal, rebuild new microwave/fan combo, update stove new luxury vinyl flooring new one piece toilet MDF shelving in closet, new cove molding (sic), LED pot lights on dimmers, Paint throughout, one coat primer, two coat colour…

[15] Of particular note, the invoice indicates that the total cost of the work performed was $30,775.47. A $25,000 deposit had been paid. The remaining balance, as of July 29, 2021, was $5,775.47.

[16] The chain of emails with the contractor commences on July 14, 2021. In almost every email, the contractor indicates that he has been dealing with delays and there is a high demand for his sub-trades. The responses from Ms. Dowling indicate that she is hoping to move in as soon as possible upon completion of the renovation. She noted that she wanted to get the premises cleaned before moving in. On August 1, 2021, Ms. Dowling wrote, in part, “I’ll have fully moved in tomorrow (Monday), so please have your guys call before they come just to make sure I’m available.”

[17] I note that the respondent in this petition argued that Ms. Dowling did not, in fact, move into the Unit on August 1. I note that the Merits Decision found as a fact that she did. I see no admissible evidence to the contrary.

The RTB Hearing and the Merits Decision

[18] As noted, Ms. Heitner filed an application for monetary compensation under ss. 49, 51 of the *RTA.* She sought an award equivalent to 12 months’ rent, or $17,800, plus the $100 filing fee.

[19] The hearing was conducted over the phone on September 11, 2023. A transcript of the hearing was introduced into evidence before me. Ms. Heitner was represented by *pro bono* counsel. As noted, Mr. Flexman appeared as Ms. Dowling’s agent.

The *Residential Tenancy Act* Provisions

[20] Some explanation of the *RTA* provisions is required. The applicable sections are ss. 49, 51. Section 49 allows the termination of the tenancy. Section 51 provides for penalties if certain conditions are not met.

[21] Section 49 of the *RTA* allows the landlord to provide notice to the tenant that the tenancy will be terminated. In this instance, the notice was for landlord's use.

> 49(2) Subject to section 51 [tenant's compensation: section 49 notice] and any prescribed conditions, restrictions or prohibitions, a landlord may end a tenancy for a purpose referred to in subsection (3), (4), (5) or (6) of this section by giving notice to end the tenancy effective on a date that must be
>
> (a) not earlier than, as applicable,
>
> (i) if a period is not prescribed under subparagraph (ii), 4 months after the date the tenant receives the notice, or
>
> (ii) a prescribed period after the date the tenant receives the notice, which prescribed period must not be earlier than 2 months after the date the tenant receives the notice,
>
> (b) the day before the day in the month, or in any other period on which the tenancy is based, that rent is payable under the tenancy agreement, and
>
> (c) if the tenancy agreement is a fixed term tenancy agreement, not earlier than the date specified as the end of the tenancy.
>
> (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.

[22] Section 51 provides for monetary compensation:

> **Tenant's compensation: section 49 notice**
>
> 51(2) Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to

> the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement unless the landlord or purchaser, as applicable, establishes that both of the following conditions are met:
>
> > (a) the stated purpose for ending the tenancy was accomplished within a reasonable period after the effective date of the notice;
> >
> > (b) the rental unit, except in respect of the purpose specified in section 49 (6) (a), has been used for that stated purpose, beginning within a reasonable period after the effective date of the notice, for at least the following period of time, as applicable:
> >
> > > (i) if a period is not prescribed under subparagraph (ii), 12 months;
> > >
> > > (ii) a prescribed period, which prescribed period must be at least 6 months.
>
> (3) The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as applicable, from
>
> > (a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, and
> >
> > (b) using the rental unit, except in respect of the purpose specified in section 49 (6) (a), for that stated purpose, beginning within a reasonable period after the effective date of the notice, for at least the following period of time, as applicable:
> >
> > > (i) if a period is not prescribed under subparagraph (ii), 12 months;
> > >
> > > (ii) a prescribed period, which prescribed period must be at least 6 months.
>
> [Emphasis added.]

[23] The issues on this petition require consideration of the terms “reasonable period” (s. 51(2)(a)) and “extenuating circumstances” (s. 51(3)).

The Merits Decision

[24] The Merits Decision is dated October 5, 2023. It is six pages in length. After an introduction, it reviews the background and evidence, first from Ms. Heitner’s perspective and then from Mr. Flexman’s. It then proceeds with the analysis.

[25] The arbitrator states the issue as follows: “Is the Tenant entitled to a Monetary Order for compensation for the Landlord failing to accomplish the stated purpose on a notice to end tenancy?”

[26] On page 4/5 the arbitrator wrote (referring to the parties by their initials):

> DF testified that the condo refresh was completed over the months of June and July, 2021, and LD occupied the rental unit as of August 1, 2023 (sic). The Landlords filed an invoice dated July 29, 2021 as documentary evidence, outlining renovation details and associated costs in the total amount of $5,775.47. The Landlords submitted a BC Hydro Bill (the Bill) for the period of June 30, 2021 to August 5, 2021 as documentary evidence. The Bill is in the name of LD.

[27] I will pause here to note the factual errors in that paragraph:

a) “occupied the rental unit as of August 1, 2023”: The occupancy date was, of course, August 1, 2021. That date is stated correctly in other places in the decision. I place no weight on that error.

b) “renovation details and associated costs in the total amount of $5,775.47”: The actual cost of the work was, as noted, $30,775.47. The amount outstanding on the invoice was $5,775.47. As discussed below, I find this to be a patent error on the face of the decision. It is material to the ultimate finding on the Merits Decision.

[28] In assessing the factual background, the Merits Decision states:

> The Landlords filed email communication between LD, BF (sic) and the contractor, which discusses completion of renovations and a move in date in late July or early August. LD sent an email on August 1, 2021, stating they noticed incomplete work at the rental unit, however, will be moving in the next day.

[29] The Merits Decision also referenced Residential Tenancy Policy Guideline 50, which states:

> Reasonable Period A reasonable period to accomplish the stated purpose for ending a tenancy will vary depending on the circumstances. For instance, given that a landlord must have the necessary permits in place prior to issuing a notice to end tenancy, the reasonable period to accomplish the

> demolition of a rental unit is likely to be relatively short. The reasonable period for accomplishing repairs and renovations will typically be based on the estimate provided to the landlord. This, however, can fluctuate somewhat as it was only an estimate and unexpected circumstances can arise whenever substantive renovations and repairs are undertaken.
>
> A reasonable period for the landlord to begin using the property for the stated purpose for ending the tenancy is the amount of time that is fairly required. It will usually be a short amount of time. For example, if a landlord ends a tenancy on the 31st of the month because the landlord's close family member intends to move in, a reasonable period to start using the rental unit may be about 15 days. A somewhat longer period may be reasonable depending on the circumstances. For instance, if all of the carpeting was being replaced it may be reasonable to temporarily delay the move in while that work was completed since it could be finished faster if the unit was empty.
>
> [Emphasis added.]

[30] The crux of the Merits Decision is found on page 5/6:

> I find that a two-month period is unreasonable for a condo refresh consisting of new paint and flooring in the rental unit, and replacement of a single toilet. This work was being completed by the building contractor, for the rental unit and other units in the building. I find the condo refresh did not consist of substantive repairs. Further, the Landlord did not file any documentary evidence regarding unexpected circumstances that delayed the condo refresh.

[31] In that paragraph, the following findings were made:

a) a two-month period for this condo refresh was unreasonable; and

b) the Landlord did not file any documentary evidence regarding unexpected circumstances that caused delay.

[32] The petitioner submits that these findings were based upon a material misapprehension of the evidence. Hence, she submits, the decision is, on its face, unreasonable. In response, the respondent submits that the finding was properly grounded in the evidence.

Analysis

[33] Having considered the record that was before the arbitrator, I find that the arbitrator's finding was based upon a material misapprehension of the facts. The actual facts were established by the evidence tendered by Mr. Flexman.

[34] In particular, the arbitrator incorrectly found that:

a) the work on the refresh constituted $5,775.47 worth of work.

i. In fact, the work performed cost $30,775.47.

ii. It stands to reason that, the higher the cost of the renovation, the longer it would take to complete.

iii. In this case, the actual cost of the renovation was more than five-times the amount (incorrectly) found by the arbitrator.

b) the work consisted of “new paint and flooring in the rental unit, and replacement of a single toilet”:

i. In fact, the work was described in the Invoice (from which the arbitrator mistakenly took the $5,775.47 figure) consisted of “demo carpet, baseboards, floor, toilet, hot water tank. Debris removal, rebuild new microwave/fan combo, update stove new luxury vinyl flooring new one piece toilet MDF shelving in closet, new cove molding (sic), LED pot lights on dimmers, Paint throughout, one coat primer, two coat colour”.

c) the landlord did not file any documentary evidence regarding unexpected circumstances that delayed the condo refresh.

i. In fact, as outlined above, the landlord filed a thread of email exchanges between Ms. Dowling and the contractor. The emails from the contractor state:

(1) July 14, 2021: “We’ve been dealing with delays. High demand for my sub-trades, people booking time off. We need to push back until next weekend.”

(2) July 19, 2021: “We’ve scheduled appliance delivery for Saturday”.

(3) July 26, 2021:

> Painter was suppose (sic) to conclude ceilings on Friday … He will be concluding paint today. Lukas called in sick this morning so microwave/hood fan will be installed Tuesday, front closet shelving on Wednesday. Please reschedule for Thursday, the joys of managing busy trades.

ii. Throughout this thread of emails, Ms. Dowling is writing to the contractor trying to figure out when she can move into the Unit.

[35] On that basis, I find that the arbitrator clearly misapprehended the facts on three separate fronts. Those misapprehensions were material to the Merits Decision. In particular, I find as facts:

a) Two months is a reasonable period of time to undertake renovation work on an apartment, when the scope of that work is in the range of $30,000.

b) Even if that span of time was not “reasonable”, there was clear evidence of extenuating circumstances. The landlord filed the chain of emails explaining that there were unexpected delays. It is clear from the email exchanges that the contractor was delayed by having busy trades. All of those delays were outside of the control of Ms. Dowling. I find that they constitute “extenuating circumstances”.

[36] On these two points, I accept that the provisions of the *RTA* are designed to protect tenants from landlords acting improperly. However, in my opinion, Mr. Flexman and Ms. Dowling did nothing improper. Ms. Dowling purchased the Unit and wanted some renovations undertaken before she moved in. She came to an agreement with Mr. Flexman about that work. That work was completed, but it took two months, which was somewhat longer than expected. Either way, Ms. Dowling took possession of the Unit on May 31 and moved into the Unit on August 1, 2021.

[37] My point being, Ms. Dowling did nothing wrong.

a) Her goal was to move into the Unit.

b) As a result, upon her purchase of the Unit, she caused Mr. Flexman to deliver the Notice to End Tenancy.

c) On the completion date, Ms. Dowling, with the assistance of Mr. Flexman, undertook some renovations.

d) Those renovations took two months.

e) Then she moved into the Unit.

[38] Based upon these facts, there was nothing that the two landlords did that improperly removed Ms. Heinten from the Unit. The did not deceive her. They did not act in bad faith.

[39] In this regard, I am guided by the decision of the Court of Appeal in *Maasanen v. Furtado*, 2023 BCCA 193:

> [24] In any event, the evidence about this issue does not address the basis on which the judge allowed the petition; rather, the decision turns on the judge's conclusion that the arbitrator failed to consider evidence of extenuating circumstances that the statute mandates as relevant to whether the order the tenants sought should be made. The statute expressly permits the director to excuse the landlord if there are extenuating circumstances that prevent the landlord from accomplishing the stated purpose for ending the tenancy within a reasonable period after the effective date of the Notice: *RTA*, s. 51(3).
>
> [25] It cannot be disputed that evidence of extenuating circumstances was before the arbitrator, as set out above in para. 33 of the reasons for judgment. It is clear that the arbitrator ignored that evidence, and did not consider it in deciding whether a remedy was available to the tenants. It was also evident that the tenants did not make submissions to the arbitrator about that evidence, and why it would not be effective to deny them a remedy.
>
> [26] I can see no error in the judge's conclusion that the arbitrator's decision is patently unreasonable. The obligation to consider the evidence is obvious; failing which the decision is plainly unsupportable in law. The arbitrator plainly failed to apply the law. I would not give effect to this ground of appeal.

[40] On that basis, I find the Merits Decision to be patently unreasonable.

The Review Decision

[41] The Review Decision is dated October 20, 2023. At the hearing, Mr. Flexman provided written submissions as well as a written statement from the contractor. He also submitted an updated invoice dated September 30, 2021.

[42] In the Review Decision, the adjudicator found as follows:

> It is up to a party to prepare for a dispute resolution hearing as fully as possible. Parties should collect and supply all relevant evidence at the dispute resolution hearing. New evidence does not include evidence that could have been obtained before the hearing took place.
>
> I find that the invoice dated September 30, 2021 is not considered new evidence as it could have been provided to the Arbitrator for consideration well before the hearing. I also find that the Landlord could have obtained a witness statement from their contractor in advance of the hearing to support their arguments.

[43] On that basis, the review application was dismissed.

[44] However, the Review Decision fails to recognize the patent factual errors on the face of the Merits Decision. That failure, in my opinion, renders the Review Decision patently unreasonable.

Procedural Unfairness

[45] Having found that the Merits Decision and the Review Decision are both patently unreasonable, I need not consider the petitioner's alternate argument that the hearing was procedurally unfair.

Remedy

[46] The petitioner has been successful on this petition. The next issue is the appropriate remedy.

[47] The general proposition is that, by allowing a petition for judicial review and setting aside a decision, the usual order is to remit the matter back to the RTB for reconsideration. However, this Court has discretion regarding remedy. That discretion must be exercised on a principled and judicial basis (*Maasanen* at para. 28).

[48] The petitioner submits that, if I should find in her favour, I should not refer the matter back to the RTB. She relies, again, on the decision in *Maasanen.* In that case the Court of Appeal upheld the reviewing judge's decision not to remit the matter back to the RTB. Justice Stromberg-Stein wrote:

> [29] Here, although the judge gave only cursory reasons to explain her exercise of discretion, I find that decision is supportable. The circumstances leading to the delay in occupation were incontrovertible. There is no reasonable argument that they were anything other than extenuating. This is precisely the kind of exceptional case identified in *Vavilov* that justifies a departure from the ordinary remedy of remitting the question for redetermination. The legislation cannot possibly have intended to capture this landlord on these facts. In my view, a reconsideration of the issue by an arbitrator could lead to only one result. Given the amounts in issue, the costs of the process, the risks of further judicial review proceedings in the light of the apparent bad blood between the parties, and the efficient use of public resources, the judge's decision not to remit the matter, but to make the decision, was a principled exercise of discretion, and not one calling for appellate intervention.

[49] I consider the same factors in this case. I find:

a) There is no reasonable argument that the two-month period was not a "reasonable" amount of time for the renovation. If someone was successful on that point, then there were clearly "extenuating circumstances" which were described in the emails with the contractor.

b) The *RTA* cannot possibly have intended to capture this landlord on these facts.

c) The amount in issue in this case is less than the amount in *Maasenan*.

[50] Given those considerations, I exercise my discretion not to remit the matter back to the RTB for reconsideration. Accordingly, I order that the Merits Decision, the Review Decision, the monetary order, and the costs order all be set aside.

[51] I understand that Ms. Heitner has registered the monetary order with the Provincial Court. After the expiry of the appeal period relating to this decision, assuming no appeal is filed, that registration should be removed.

[52] I heard no submissions on costs. In the ordinary course, the successful party would be entitled to their costs. I am not aware of any settlement offers. Assuming no offers were made, I order that each side bear their own costs. I make that order because, in my opinion, it was the error of the RTB that caused the parties to be in this Court. However, if the petitioner made an offer, I will hear submissions on the costs consequences of that offer.

"A. Ross J."