IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Yas v. Pope,*
2018 BCSC 282

Date: 20180227
Docket: S172776
Registry: Victoria

In the matter of an application to the British Columbia Supreme Court
under Section 12.3 of the *Civil Resolution Tribunal Act*

Arlene Marion Yas, Jacqueline Yas and Ninele Jackson

Petitioners

Before: The Honourable Mr. Justice Baird

Reasons for Judgment

Counsel for the Petitioners:	M. Brunton
Counsel for the Respondents, Bhavananda Pope and Derek Pope:	C. Wilson
Counsel for the Respondent, Civil Resolution Tribunal:	V. Ryan
Counsel for the Respondent, The Owners, Strata Plan VIS30	T. Wedge
Place and Dates of Hearing:	Victoria, B.C. December 13 & 14, 2017 January 12, 2018
Place and Date of Judgment:	Victoria, B.C. February 27, 2018

INTRODUCTION

[1] The petitioners seek an order pursuant to s. 12.3 of the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25 (the "*Act*") preventing the Civil Resolution Tribunal (the "CRT") from resolving two competing strata property claims presently before it. There is no doubt that the CRT has jurisdiction over the claims, but the petitioners argue, relying on s. 12.3(1)(b) of the *Act*, that it is not in the interests of justice and fairness for the CRT to resolve them.

[2] Section 12.3(1)(b) reads:

> (1) The Supreme Court may order that the tribunal not resolve a claim that is or purports to be a strata property claim if
>
> …
>
> (b) it is not in the interest of justice and fairness for the tribunal to resolve the claim.

[3] Section 12.3(2) of the *Act* stipulates the following list of factors to be considered when an application is made under s. 12.3(1)(b):

> (2) When deciding whether it is in the interests of justice and fairness for the tribunal to resolve a claim or dispute, the Supreme Court may consider the following:
>
> (a) whether the use of electronic tools in the process of the tribunal would be unfair to one or more parties in a way that cannot be accommodated by the tribunal;
>
> (b) whether an issue raised by the claim or dispute is of such importance that the claim or dispute would benefit from being resolved by the Supreme Court to establish a precedent;
>
> (c) whether an issue raised by the claim or dispute relates to the constitution or the *Human Rights Code*;
>
> (d) whether an issue raised by the claim or dispute is sufficiently complex to benefit from being resolved by the Supreme Court;
>
> (e) whether all of the parties to the claim or dispute agree that the claim or dispute should be resolved by the Supreme Court;
>
> (f) whether the claim or dispute should be heard together with a claim or dispute currently before the Supreme Court.

[4] There was some discussion during the present hearing about whether this list is exhaustive. I will express no opinion on the subject as all the petitioners' arguments fit comfortably into factors (a), (b) and (d).

[5] The petitioners concede that they bear the burden of establishing that they are entitled to the remedy they seek. As they have not, in my estimation, managed this task on the balance of probabilities, I decline to say whether, in a more compelling case, a higher, more onerous burden of proof might have to be discharged by a party seeking relief under s. 12.3(1)(b).

BACKGROUND

[6] For some reason the style of cause in this proceeding identifies the petitioners alone, of whom there are now only two. Ms. Jacqueline Yas recently passed away at the age of 100. The remaining petitioners, Ms. Arlene Marion Yas and Ms. Ninele Jackson, are her daughters. They are the joint owners of unit 602-670 Dallas Road, a condominium unit in a 9-storey building in Victoria.

[7] The first respondents are Bhavananda and Raku Pope ("the Popes"), who are the owners of unit 502-670 Dallas Road, the condominium directly below the one owned by Ms. Yas and Ms. Jackson. The second respondents are the property owners as represented by their strata council, Strata Plan VIS30 ("the Strata"). The third respondent is the CRT itself.

[8] The Popes and the Strata oppose the order sought by the petitioners. The CRT took no position on outcome, but argued that the claims under consideration are well within the competence of the CRT to adjudicate justly and fairly. The CRT also submitted that the petitioners' concerns about the CRT's processes and capabilities are unfounded. Finally, the CRT argued that the petition is premature and that the petitioners should exhaust the remedies provided by the *Act* before seeking access to this court by appeal.

[9] The claims before the CRT have to do, mostly, with a noise complaint advanced by the Popes. They allege that over the last five or so years the petitioners

have intermittently created unreasonable amounts of noise from within unit 602 in breach of the Strata's bylaws forbidding such things. The Popes claim that this has caused an ongoing and unwarrantable interference with their use and enjoyment of unit 502.

[10] On three occasions the Strata has received and accepted noise complaints from the Popes and has levied fines in the total amount of $350 against the petitioners. The petitioners have refused to pay, on the basis that the complaints weren't properly investigated and that they have been denied – to use their lawyer's expression – "due process." Their cross claim filed with the CRT is that the Popes have waged a scurrilous, sustained and unfounded campaign against them that has caused them needless expense, stress and unhappiness.

[11] Meanwhile, on grounds not much discussed during the hearing, the Popes have filed a complaint against the Strata under the *Human Rights Code*, R.S.B.C 1996 c. 210 alleging, I gather, that it has failed to take sufficiently assertive steps to protect their right to quiet enjoyment of their property. I was told that the adjudication of this complaint was stayed pending the resolution of the CRT claims.

THE ROLE OF THE CRT

[12] The CRT advertises itself as Canada's first "online" tribunal. Section 2 of the *Act* provides as follows:

> **Civil Resolution Tribunal mandate and role**
>
> 2 (1) The Civil Resolution Tribunal is established, consisting of the chair and other tribunal members appointed in accordance with this Act.
>
> (2) The mandate of the tribunal is to provide dispute resolution services in relation to matters that are within its authority, in a manner that
>
> a) is accessible, speedy, economical, informal and flexible,
>
> b) applies principles of law and fairness, and recognizes any relationships between parties to a dispute that will likely continue after the tribunal proceeding is concluded,
>
> c) uses electronic communication tools to facilitate resolution of disputes brought to the tribunal, and

> d) accommodates, so far as the tribunal considers reasonably practicable, the diversity of circumstances of the persons using the services of the tribunal.
>
> (3) In fulfilling its mandate, the role of the tribunal is
>
> a) to encourage the resolution of disputes by agreement between the parties, and
>
> b) if resolution by agreement is not reached, to resolve the dispute by deciding the claims brought to the tribunal by the parties.
>
> (4) In addition to its responsibilities in relation to disputes brought to the tribunal for resolution, the tribunal may
>
> a) provide the public with information on dispute resolution processes generally, and
>
> b) make its online dispute resolution services available to the public generally.

[13] According to Mr. Richard Rogers, the Executive Director and Registrar of the CRT, the tribunal's role is two-fold. First, it encourages the resolution of disputes by agreement, and, second, it adjudicates disputes that cannot be resolved consensually by conducting adversarial hearings, online for the most part, and issuing rulings and decisions. Appeals to this court from final CRT decisions may be taken with leave: *Act* s. 56.5.

[14] The CRT is limited in most matters over which it has jurisdiction to claims not exceeding the small claims monetary jurisdiction of the Provincial Court. However, for strata property claims the *Act* contains no such limit. The *Act* makes a point, in other words, of differentiating strata property claims from all others rendered justiciable by the CRT. The legislature by necessary inference has mandated that the CRT should handle strata claims in any amount, large or small.

[15] The *Act* was designed to deal quickly, efficiently and inexpensively with strata matters and to remove a wide swathe of strata disputes from the dockets of our over-burdened ordinary courts: see *Act* s. 3.6. Counsel have informed me, and my own research has confirmed, that the members of the CRT have been carefully selected for their specialised expertise, competence and experience within the areas of jurisdiction reserved to it.

THE PARTIES' CLAIMS BEFORE THE CRT

[16] The Popes filed the first of the two claims before the CRT on November 23, 2016; the petitioners filed the second one, which has the flavour of a counterclaim, on January 18, 2017.

[17] In their claim, the Popes allege "ongoing unreasonable intermittent noise from unit 602 above due to a flooring change from carpet to hard surfaced flooring and the lifestyle of the occupants". The petitioners' cross-claim alleges that they have "for more than [three] years, been subjected to harmful, baseless attacks" from the Popes, and that the Strata has rushed to judgment and fined them in denial of principles of natural justice.

[18] In the first claim, the Popes seek damages of $185,395, comprised mostly of the estimated cost of sound-proofing their own unit against noise allegedly emanating from the petitioners' unit. In the second complaint, the petitioners seek an even $200,000, a figure chosen for no obvious reason other than, possibly, because it is slightly higher than the amount sought by the Popes. They also seek an order setting aside the Strata fines imposed on them.

[19] The petition was heard over three court days. I heard submissions from four lawyers, two of whom attended court with juniors. In my respectful view, extraordinarily heavy weather has been made out of a common residential noise complaint. The CRT is well suited to the task of dealing with it. For the following reasons the petition is dismissed.

CRT HANDLING OF THE CLAIMS

[20] Absent some minor delays in the early going, which I think might fairly be put down to growing pains for this newly created tribunal, the parties' claims were dealt with efficiently and simultaneously through the CRT's dispute resolution processes. Both claims were assigned to the same facilitator who was in the midst of engaging with the parties to obtain relevant information when the present petition was filed.

[21] The facilitator conducted a detailed correspondence with both sides indicating a desire to move things along smartly and to find the underlying cause of this irksome and long-standing dispute as soon as possible. I enthusiastically endorse her brisk, no-nonsense attitude. In my view this is precisely what the case requires. I am convinced that the dispute between the parties is amenable to a speedy, logical and practical solution, and the facilitator appears to me to have been in the midst of politely but persistently shepherding the parties in that direction.

[22] Having engaged with the parties, as I was saying, in preliminary fact-finding correspondence and negotiation, the facilitator recommended that "acoustical testing" should be performed in both units 602 and 502. The idea was to determine the source, if any, of the noises alleged in the Popes' complaints. I consider this proposal to have been eminently practical and sensible. I doubt anyone looking into the matter would have failed to suggest it.

[23] I would note, in passing, that the Popes have already commissioned a report from an acoustical engineer indicating that the noise-absorption or reduction rating for hardwood flooring such as that put down in the petitioners' unit is below what would be acceptable in the building in question. The engineer recommended that a "tap test" of the petitioners' flooring would get to the root of the matter. The Popes say that this could be done in short order for a small amount of money.

[24] The petitioners, however, have consistently opposed access to their unit for such testing. They have never given any particularly plausible reason for this refusal. In May 2015, furthermore, the petitioners agreed to participate in a mediation organised by the Strata with a specialised, independent mediator, but later they pulled out. They also rejected the Strata's offer to install and pay for carpeting in their suite to deaden the noise if necessary.

[25] I will leave it to the CRT to determine whether the parties have conducted themselves reasonably. For present purposes, I will only say that an objective and independent forensic investigation into the noise issue would not only settle the main dispute between the parties, eliminating all credibility issues along the way, but

would produce the happy concomitant of confirming or negating the Strata's grounds for levying fines on the petitioners. The CRT most assuredly has the authority to reverse penalties wrongly imposed on an owner by a strata corporation: see, generally, ss. 3.6 and 48.1 of the *Act* and the recent decision of this court in *The Owners, Strata Plan BCS 1721 v. Watson*, 2018 BCSC 164.

[26] I do not accept the petitioners' argument that the facilitator was addressing only the Popes' claim while ignoring theirs. The suggestion is wrong and unfair, in my view, that the facilitator developed tunnel vision and was interested in acoustical testing to the exclusions of other issues. To the contrary, the facilitator correctly identified and was honing in on the only matter of real importance: whether or not there is unreasonable noise emanating from unit 602. If the facilitator's opinion was that resolution of this issue will settle all aspects of the case then I agree with her completely.

[27] It seems to me that the facilitator was performing her functions in accordance with her mandate under the *Act* and in compliance with her duty of fairness. I reject the argument that by encouraging the parties' to agree to acoustical testing the facilitator exhibited bias against the petitioners. Her assertion that an adjudicator would likely order such testing if the matter went to a contested hearing did not amount to pre-judgment of the case. It was merely a clear-eyed prediction of the sort of information that a CRT panel, at the tribunal hearing phase, would likely requisition under s. 42(1)(c) of the *Act* in order to resolve the dispute quickly and inexpensively. I would note here that s. 27(1)(b) of the *Act* explicitly allows a case manager to provide his or her "views on how the court or tribunal would likely resolve the dispute if it proceeded to a court or tribunal hearing".

[28] In fact, it appeared that the facilitation phase of these competing claims was moving ahead promisingly. The parties exchanged proposals concerning the manner in which acoustical testing might finally be done, a positive development, I should have thought, in light of the petitioners' long-standing refusal to permit it. However, just when things looked to be taking off on this sensible trajectory, the petitioners

sought to withdraw from the process by bringing this petition to remove the claims from the CRT. The petition was filed on July 21, 2017 after which the CRT processes came to a halt pending the outcome.

[29] In their pleadings, the petitioners say that a just determination of the issues in dispute may only be achieved by a trial in this court. During the hearing, however, in response to the Popes' counter-argument that Supreme Court proceedings will be needlessly protracted, cumbersome, disproportionate, and expensive, the petitioners submitted that their aim might not be to pursue "traditional" litigation after all. Counsel referred, without much specificity, to the possibility of pursuing other means of dispute resolution. I found this inconsistency in approach to be rather surprising, and the Popes suspect, perhaps justifiably, that the petitioners' true strategy might be to prevent resolution of the claims altogether.

OUSTING CRT JURISDICTION FOR REASONS OF JUSTICE AND FAIRNESS

[30] The parties have agreed that only the grounds for ousting the CRT's jurisdiction set out in subsections 12.3(2)(a), (b) and (d) need be considered on this petition. While the Popes have a *Human Rights Code* complaint in the works against the Strata, it is separate and distinct from the complaints before the CRT, and it does not involve the petitioners, so subsection 12.3(2)(c) is not engaged. It is clear that subsections 12.3(2)(e) and (f), which refer, respectively, to where all parties agree that a claim should be resolved in Supreme Court, or where a claim should be joined with another matter already before the Supreme Court, have no application here.

[31] I will now address with the petitioners' arguments under each applicable subsection.

Unfairness of electronic tools: *Act* s. 12.3(2)(a)

[32] As I said earlier, the CRT does most of its business online, or by other electronic means, during both the facilitation and tribunal hearing phases. This is what is meant by "electronic tools": complaints, responses, evidence, submissions and decisions are all filed and distributed electronically.

[33] In the run of CRT cases, there will not be any live testimony or cross-examination. However, s. 39(3) of the *Act* gives the CRT the discretion to tailor its procedures to suit a given case, including an in-person hearing if the nature of the dispute requires it. Section 42 of the *Act*, furthermore, permits the CRT to ask questions of the parties and any relevant witnesses, and to inform itself in any other way it considers appropriate.

[34] The petitioners argue, essentially, that an electronic hearing will be inadequate in their case. Without the procedural guarantees and safeguards of a traditional trial in the Supreme Court, they say, and in the absence of the ability to cross-examine witnesses, it will be impossible to adequately test the evidence and resolve the credibility issues that they claim are at the heart of this dispute. Furthermore, the CRT's somewhat relaxed and informal approach to the reception of evidence causes apprehension and uneasiness in the petitioners.

[35] Leaving aside, as previously stated, the petitioners' position taken during the hearing that, in fact, it might best if there were no substantive hearing at all, either before the CRT or this court, in my view the expressed concerns about CRT processes, evidence-taking and adjudication are illusory. Issues of credibility are routinely addressed on written records, not only by the CRT, but by a host of other administrative boards, tribunals and commissions across multiple disciplines and areas of legal authority in British Columbia and elsewhere.

[36] In any event, as just mentioned, provision is made in the *Act* for a *vive voce* hearing if justice requires it, and an appeal lies to this court in case of an error of law, including a denial of natural justice: see *Act* s. 56.5. The petitioners sought to abandon the CRT system at such an early stage that they never even asked for an in-person hearing. I agree with the overall argument of counsel for the CRT that this petition has been pursued prematurely, without the exhaustion of CRT remedies specifically designed by the legislature to deal with precisely this sort of dispute, and without any proper foundation or cause.

[37] The petitioners' evidence and arguments provided me with no reason to think that the CRT's rules of evidence or procedure might produce an injustice in their case. The CRT's evidentiary standards, it seems to me, are similar to those of other administrative tribunals, and its procedures are sufficiently flexible that they may be adapted in whatever manner might be considered necessary to address the petitioners' concerns related to a just and fair evaluation of the parties' credibility.

[38] I agree with the Popes, for that matter, that the CRT's even-handed management of on-site acoustical testing will settle all questions of credibility in the present case. Once the source of the noise, assuming there is one, has been objectively and independently identified, the parties' divergent theories, opinions and arguments on the subject will fall away and the practical business of solving the problem, if any, can begin.

Issue raised of importance/precedential value: *Act* s. 12.3(2)(b)

[39] As I have already mentioned, the Popes allege that the hardwood floors in unit 602 are the source of the noise that has caused them such consternation. They hired an acoustical engineer who has formed the preliminary view that these floors, unlike carpeted floors, have inadequate sound absorption qualities.

[40] The previous owners of unit 602 installed the hardwood floors. This was subject to the terms and conditions of an alteration agreement with the Strata signed on November 23, 2010. The agreement included the following:

> It is understood and agreed by the owners of the unit that approval to install alternative floor covering has been granted subject to the following three terms and conditions:
>
> a) Installation will be completed in accordance with the manufacturer's specifications and by a trade approved by the manufacturer,
>
> b) If there are complaints that are validated by the strata counsel and determined by a majority of the council members to be as a result of the change in floor covering, you will within 30 days of being so advised in writing by council or there designate install carpet over the flooring, remove the flooring, or take such steps so as to alleviate the problem,

> c) Prior to the issuance of a form "F" pertaining to the sale of your unit, you will submit an agreement to the strata council (signed by the purchaser) to the effect that he/she is aware of and agrees to be bound by section (b) of this agreement.

[41] The Popes and the Strata argue that the petitioners are bound by terms of this alteration agreement, which was appended to a Form B "Information Certificate" that was made by the previous owners of unit 602. However, the evidence before me does not disclose whether the previous owners took the necessary steps to bind the petitioners to its terms, pursuant to the *Strata Property Act*, S.B.C. 1998, c. 43 and Form B of the *Strata Property Regulation*, B.C. Reg. 43/2000 as modified by B.C. Reg. 238/2011.

[42] The petitioners say that this issue is of general importance and must be decided in Supreme Court as a precedent for future CRT claims. The question, they say, is whether the *Strata Property Act* or the Strata's bylaws inhere limitations upon common law conceptions of contractual privity.

[43] I reject this argument. The Strata's bylaws forbid all owners from using their property in a manner that causes unreasonable noise, a prohibition that applies to the petitioners, along with all other residents of the building, whether or not they are bound by the alteration agreement signed by the previous owners. In my view, as well, leaving aside any agreement, s. 48 of the *Act* authorises the CRT to order the petitioners to alter their flooring if the evidence establishes that it is the cause of the noise.

[44] In any event, in the absence of any plausible reason not to, I am prepared to accept the Strata's argument that the "transferability" of the agreement reached with the previous owners of unit 602 to the petitioners is a common enough question which the CRT, as a specialised tribunal, is well equipped to answer. An appeal to this court may be sought in the event of an error of law.

Complexity of the Issues: *Act* s. 12.3(2)(b)

[45] The petitioners say that the claims under consideration involve complex and interrelated issues making the CRT an unsuitable venue for their resolution. In addition to the noise complaint, the petitioners note that the dispute between the parties involves large amounts of money, interwoven with allegations of lack of procedural fairness against the Strata, over-layered with claims of bias on the part of the CRT facilitator, topped off with the "privity of contract" issue just discussed.

[46] I reject these arguments. The noise issue is not complex and the large awards sought by both parties – whether or not they are sustainable or realistic – do not make it so. In any event, the CRT's monetary jurisdiction in strata disputes is unlimited. It has the express authority to deal with and, if necessary, to impose sanctions upon strata councils that fail in their duty of fairness towards owners. I have already said that the allegations of bias against the facilitator are groundless, and whether the alteration agreement binds the petitioners is something well within the competence of the CRT to decide subject to this court's review jurisdiction on appeal.

[47] The petitioners say that the stated objectives of the CRT to resolve claims quickly, cheaply, and collaboratively, without the need for counsel, are now impossible to meet given the prolonged and intensely adversarial nature of this dispute, the involvement of lawyers on all sides, and the delay experienced since the claims were filed.

[48] Such complaints are not relevant to an examination of justice and fairness under s. 12.3(2) in this case. The CRT itself has done nothing at all to compromise the objectives of the *Act.* Most of the delay, expense and legal maneuvering took place before the CRT claims were filed, and the CRT has no control, outside of its own processes, over whether disputants drag their feet, behave unreasonably, or consult with lawyers. If, as alleged, the parties will never be able to reach a collaborative resolution of their problems, the matter will go to a tribunal hearing where a resolution will be imposed.

[49] The petitioners also allege that it would be unfair for the matter to continue before the CRT because lawyers represent the Popes and the Strata, but I note that the petitioners have long had experienced legal counsel representing them, too. While the *Act* purports to create a system in which counsel are not required, there is nothing to prevent disputants from seeking legal assistance, and indeed such assistance may be vital in more complicated or valuable claims.

CONCLUSION

[50] The petitioners have failed to persuade me that it is not in the interest of justice and fairness for the CRT to resolve the claims under consideration. The petition is dismissed. The claims are hereby remitted to the CRT for determination in the ordinary course of its rules and procedures.

[51] The respondents will have their ordinary costs.

"Baird J."