

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan NW 2575 v. Booth*,
2018 BCSC 1605

Date: 20180919
Docket: S1711431 & S184435
Registry: Vancouver

Between:

The Owners, Strata Plan NW 2575

Petitioner

And

Verna Booth and George Booth

Respondents

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for the Petitioner:

L.N. Mackie

Respondents, Verna Booth and George
Booth:

No appearance at this hearing

Counsel for the Civil Resolution Tribunal:

T. Mason

Place and Dates of Hearing:

Vancouver, B.C.
August 27 and 28, 2018

Place and Date of Judgment:

Vancouver, B.C.
September 19, 2018

INTRODUCTION

[1] The Civil Resolution Tribunal (“CRT”) is an online tribunal with jurisdiction to mediate and, where necessary, adjudicate certain categories of civil disputes. As part of the CRT’s mandate to resolve disputes economically, flexibly and informally, the governing legislation requires parties to represent themselves in most cases. Participation by lawyers or other representatives must be approved by the CRT.

[2] The petitioner is a party to a proceeding before the CRT and has an insurance policy that includes coverage for legal defence costs. The CRT denied its application to be represented by counsel and the petitioner applies for judicial review of that decision.

[3] The petitioner is a 28-unit residential Strata Corporation commonly known as Tiffany Lane, located in Surrey, B.C. (the “Strata Corporation”). The Respondents, Verna Booth and George Booth (the “Booths”) are the owners of one unit in the building. The Strata Corporation and the Booths disagree about who is responsible for maintenance and repair of a limited common property deck that has been altered to include an enclosed sunroom.

[4] On June 27, 2017, the Booths filed a CRT dispute notice claiming that the Strata Corporation must complete repairs valued at \$700 and seeking \$25,000 in compensation for “loss of enjoyment of life, threats, abuse and stress.”

JURISDICTION OF THE CIVIL RESOLUTION TRIBUNAL

[5] The CRT’s jurisdiction in disputes concerning strata property is set out in s. 3.6(1) of the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25 [CRTA]:

3.6(1) Subject to subsections (2) and (3) and section 48.1 [orders available in strata property claims], the tribunal has jurisdiction over a claim concerning one or more of the following:

- (a) the interpretation or application of the *Strata Property Act* or a regulation, bylaw or rule under that Act;
- (b) the common property or common assets of the strata corporation;
- (c) the use or enjoyment of a strata lot;

- (d) money owing, including money owing as a fine, under the *Strata Property Act* or a regulation, bylaw or rule under that Act;
- (e) an action or threatened action by the strata corporation, including the council, in relation to an owner or tenant;
- (f) a decision of the strata corporation, including the council, in relation to an owner or tenant;
- (g) the exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

[6] Section 3.6(2) of *CTRA* lists a number of sections of the *Strata Property Act*, S.B.C. 1998, c. 43 over which the CRT does not have jurisdiction.

REPRESENTATION AT THE CIVIL RESOLUTION TRIBUNAL

[7] Section 20 of the *CRTA* provides that, unless otherwise provided under the *Act* or the CRT Rules, parties to a dispute must represent themselves in the tribunal process. The only specific exceptions are where the party is a child or a person with impaired capacity. However, the CRT also has a residual discretion to permit representation in any case where it is “in the interests of justice and fairness.”

[8] The CRT Rules provide that a party can apply at any time to be represented and set out matters the CRT may consider in exercising its discretion. CRT Rules 36 to 38 read:

- 36) In considering a request for permission to be represented, a tribunal employee or member may consider whether
 - a) any other party in the dispute is represented and if so, whether that representation is a lawyer or other person supervised by a lawyer,
 - b) every party in the dispute has agreed to representation,
 - c) the person proposed as the representative is appropriate, and
 - d) in the interests of justice and fairness, the party should be permitted to be represented.
- 37) A refusal of a request for permission to be represented must be made by a tribunal member or staff, as delegated by the Chair.
- 38) If a party is represented, the representative can be
 - a) a practicing lawyer or a person supervised by a lawyer in B.C.,
 - b) a spouse, a relative, or a friend who has agreed to act as a representative, or
 - c) another person proposed by the party and permitted by the tribunal.

[9] The involvement of insurers is dealt with in CRT Rules 41 to 42:

- 41) An insurer who is providing coverage to pay damages in a dispute can request to be added as a party to the dispute.
- 42) An insurer who is a party in a dispute must act through
 - a) a director or authorized employee of the insurer, or
 - b) another person permitted by a tribunal employee or member to represent the insurer.

[10] Thus, even insurers do not have an automatic right to be represented by counsel. In any case, CRT Rule 41 apparently does not apply in this case because counsel for the Strata Corporation says the insurance policy only provides defence costs, not indemnity for damages.

[11] Counsel has been retained to defend the Strata Corporation under a Directors and Officers Liability Policy that included legal defence coverage and the Strata Corporation applied to the CRT for appointment of counsel as its representative.

[12] That request was rejected in a preliminary decision by CRT Chair Salter dated August 18, 2017. The Chair said she was giving particular weight to the following factors:

- 14. In reaching this conclusion, I have put significant weight on the following:
 - (a) The owners do not agree to the representation. This is a factor set out in both the Act and the tribunal's rules. The owners' view is that allowing the strata to be represented by a lawyer would "tip the scales of justice against [them]. There is no fairness in that."
 - (b) The owners are not represented. This is also a factor in both the Act and the tribunal's rules. In this regard, I have also considered the owners' undisputed submission that they cannot afford legal representation.
 - (c) There is nothing exceptionally unusual or complex about the subject-matter of the dispute. It is a common dispute type within the tribunal's strata jurisdiction, conferred under the Act.

[13] The Chair also noted that although the Strata Corporation could not be directly represented by counsel before the CRT, it was not completely deprived of assistance:

8. In the tribunal process, a “representative” is someone who speaks on behalf of a party and is authorized to bind that party. While section 20 of the Act creates a general rule that parties must represent themselves, a party is entitled to use a “helper” throughout the tribunal process. There is nothing in the Act or the tribunal’s rules restricting a party’s ability to get legal advice, or help completing documents, preparing submissions, and organizing evidence, among other assistance.

JUDICIAL REVIEW OF THE PETITIONS

[14] The petition seeking judicial review of the Chair’s decision (the “Representation Petition”) was filed on December 11, 2017. The petitioner then applied to the CRT for a stay of the dispute pending the outcome of judicial review. The CRT denied the stay request on January 18, 2018 and the Strata Corporation filed a second petition (the “Stay Petition”) seeking judicial review of that decision.

[15] On April 26, 2018, Justice DeWitt-Van Oosten granted a temporary stay pending the hearing of the Representation Petition and ordered that the two petitions be heard at the same time. The Representation Petition has now been heard and is the subject of these reasons. The Stay Petition has therefore become moot and I will say no more about it.

[16] The CRTA allows appeals to this court, but only with leave and on questions of law arising out of a final decision: s. 56.5 of the *CRTA*. This petition involves an interim decision and is, therefore, brought pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

[17] In *The Owners, Strata Plan BCS 1721 v. Watson*, 2018 BCSC 164, Justice Pearlman held at para. 54 that decisions of the CRT are reviewable on the reasonableness standard. That was an appeal, rather than a judicial review, but the petitioner agrees that the same standard of review applies.

[18] The CRT relies on what is commonly referred to as the “prematurity doctrine” to argue that its preliminary decision should not be subject to judicial review. The general rule is that in the absence of special or extraordinary circumstances, interlocutory rulings by administrative tribunals should not be challenged until the

tribunal has rendered its final decision: *Secord v. Saint John Board of Police Commissioners*, 2006 NBQB 65 at para. 26, citing *Air Canada v. Lorenz*, [2000] 1 F.C. 494 (Fed T.D.) at para. 37; *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61 at paras. 30–31.

[19] As the petitioner points out, the prematurity doctrine is not invariable. It is a discretionary bar and there are many situations in which demands of justice and efficiency favour early intervention by the courts: *ICBC v. Yuan*, 2009 BCCA 279 at para. 24; *British Columbia (Workers' Compensation Appeal Tribunal) v. Hill*, 2011 BCCA 49 at para. 35.

[20] In this case, I find that it is appropriate to consider the petitioner's application because the Chair's interim decision is central to how further tribunal proceedings will be conducted. It would be obviously inefficient for the parties to go through the entire process before the CRT, only to be told later by this court that the petitioner had a right to representation.

APPLYING THE STANDARD OF REVIEW: REASONABLENESS

[21] The reasonableness standard of review has been defined by the Supreme Court of Canada and the Court of Appeal on many occasions. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Court said at para. 47:

[47] ... In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[22] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 17, the Court said:

[17] ... Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be "fateful."

[23] In *Kenyon v. British Columbia (Superintendent of Motor Vehicles)*, 2015 BCCA 485, the Court of Appeal said at para. 55 that judicial review judges should not parse or dissect a tribunal's reasoning. In order for a decision to be set aside on the basis of any flaw in the reasoning, that flaw should be obvious and central to the decision maker's reasoning.

[24] The petitioner points to a number of passages in the Chair's decision where it alleges that she considered irrelevant matters, ignored relevant ones or referred to matters that the parties had not addressed in their submissions. I do not intend to go through those submissions individually because they generally amount to the kind of parsing or dissection that the Court of Appeal has warned against.

[25] The point that was most fundamental to the decision was that the governing legislation establishes self-representation as the norm. Although the CRT has discretion to allow representation in an individual case, it is entirely reasonable to limit the exercise of that discretion to exceptional circumstances. To do otherwise would defeat one of the central provisions of the statute.

[26] Whether or not the circumstances of an individual case are exceptional must be determined in the context of CRT's general caseload and the defining features of what constitutes an ordinary or routine case. That is a determination the CRT is clearly better positioned than the court to make.

[27] Due to the nature of the CRT's jurisdiction, the tribunal will often preside over disputes between strata corporations and individual unit owners. Those strata corporations may frequently have the kind of insurance present in this case. If the existence of an insurance policy was in itself a sufficient reason to permit representation, the presence of counsel would quickly become the rule rather than the exception and individual strata members would regularly be at a disadvantage.

[28] The petitioner argued that the denial of counsel deprives it of the benefit of the insurance contract that it paid for. The Chair dealt with that argument by saying:

27. An implication from the strata's argument is that legislative provisions should conform to the terms of contracts between private entities, and not, conversely, that private entities should ensure the terms of their contracts are consistent with applicable legislation. I do not accept the strata's argument in this regard. I also find that it would be inappropriate for the tribunal to use the residual discretion in section 20(2)(c) to assist a party to contract out of a legislative provision with which it disagrees.

[29] With respect, there are many reasons why a party in the position of a strata corporation might wish to purchase insurance and a normal insurance policy cannot be fairly characterized as an attempt to contract out of the statute. However, I do not find that comment to be in any way fundamental to the Chair's decision.

[30] The Chair decided that there was nothing particularly difficult or complex about this dispute that justified a departure from the general practice. It is arguable that, in characterizing the dispute as she did, the Chair overlooked the fact that this is not simply a dispute about who is responsible for paying certain costs. The vast majority of the amount claimed by the Booths relates to damages for alleged threats, abuse and loss of enjoyment of life. In their response to the representation request, the Booth's allege dishonesty, fraud and bad faith. They also allege that they were physically attacked, threatened with bodily harm by a named member of the strata council.

[31] It is particularly important for the petitioners to have the assistance of counsel in defending that sort of claim. That need arises not only from the amount sought but from the potential impact of such allegations on the reputation of the individuals involved. There may also be an issue of whether or to what extent such a claim falls within the CRT's jurisdiction and, if there is such an issue, the petitioner may have a greater need for the assistance of counsel in putting forward a pure question of law. At the same time, the Chair was undoubtedly correct that participation of counsel on one side could put the other at a significant disadvantage.

[32] The fact that the petitioner may need assistance of counsel does not necessarily translate into a need for counsel's direct participation. I agree with the Chair that the nature of the CRT proceedings will still allow the petitioner to obtain

assistance of counsel and most of the benefits of its insurance coverage even if it is not formally represented.

[33] The *CRTA* provides for a two-stage procedure for its tribunal proceedings in s. 17:

17 (1) A tribunal proceeding has two phases,

- (a) the case management phase, and
- (b) the tribunal hearing phase.

(2) In the case management phase, resolution by agreement between the parties is facilitated and preparations are made for the tribunal hearing should one be required.

(3) In the tribunal hearing phase, the dispute is heard and the tribunal gives a final decision to resolve the dispute if it is not resolved in the case management phase.

[34] Section 19 provides for the use of electronic communication tools in all or part of a tribunal proceeding.

[35] In reference to the tribunal hearing phase, s. 39 says:

39 (1) In resolving a dispute, the tribunal may conduct a hearing in writing, by telephone, videoconferencing or email, or through use of other electronic communication tools, or by any combination of those means.

(2) It is not necessary for the means of communication referred to in subsection (1) to allow all parties to the dispute to take part at the same time.

(3) The tribunal may hold an in-person hearing if the tribunal considers that the nature of the dispute or that extraordinary circumstances make an in-person hearing necessary in the interests of justice.

[36] That section sets the CRT apart from many tribunals whose proceedings at some point involve a hearing with examination and cross-examination of witnesses and oral submissions. That is the setting where active participation of counsel may be essential, but the legislation makes clear that is to be an exceptional CRT proceeding.

[37] As the Chair pointed out, there is nothing to stop the Strata Corporation from relying on counsel to prepare the submissions and other materials that it submits to

the CRT. Even if the CRT did not recognize a party's right to such assistance, there is probably nothing it could do to prevent it.

[38] I am, therefore, not persuaded that the interim CRT decision will deprive the Strata Corporation of counsel's assistance or the benefits of its insurance policy in any significant way. The situation may become different if the CRT decides this is one of the exceptional cases where an oral hearing, including cross-examination of witnesses, is required. That is not the situation now before the court.

[39] I find the Chair appropriately considered the relevant matters within the context of the governing legislation, arrived at a conclusion within "the range of possible, acceptable outcomes" and provided clear reasons for her decision. The decision cannot be said to be unreasonable and the petition must be dismissed.

"N. Smith J."