COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Allard v. The Owners, Strata Plan VIS 962,* 2019 BCCA 45

Date: 20190205
Docket: CA45323

Between:

James Allard

Respondent
(Petitioner)

And

The Owners, Strata Plan VIS 962

Appellant
(Respondent)

And

Civil Resolution Tribunal

Respondent
(Respondent)

Before: The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated May 4, 2018 (*Allard v. The Owners, Strata Plan VIS 962*, 2018 BCSC 1066, Vancouver Docket No. S-1711290).

Counsel for the Appellant:	C.D. Wilson
Counsel for the Respondent, James Allard:	C.L. Vickers
Counsel for the Respondent, Civil Resolution Tribunal:	T. Mason
Place and Date of Hearing:	Vancouver, British Columbia December 14, 2018
Place and Date of Judgment:	Vancouver, British Columbia February 5, 2019

Written Reasons by:
The Honourable Madam Justice Kirkpatrick

Concurred in by:
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Hunter

Summary:

Appeal from an order of the Supreme Court granting leave to appeal from a decision of the Civil Resolution Tribunal. The chambers judge had granted leave to appeal under s. 56.5 of the Civil Resolution Tribunal Act on the basis that (1) the proposed appeal engaged a question of law and (2) granting leave would be in the interests of justice and fairness. Held: Appeal allowed. The order under appeal does not identify questions of law, but rather questions of mixed fact and law. Even if the issues sought to be raised by the respondent could be reframed as questions of law, leave to appeal would not be in the interests of justice and fairness. The proposed appeal was inextricably tied to the unique facts of the dispute and was of limited importance to the parties as a whole. It would also run afoul the principle of proportionality as it pertains to alternative forms of dispute resolution.

Reasons for Judgment of the Honourable Madam Justice Kirkpatrick:

[1] By an order made May 4, 2018, the Supreme Court of British Columbia granted leave to the respondent, James Allard, to appeal from a decision of the recently established Civil Resolution Tribunal. The appellant strata corporation appeals from that order.

[2] The central issue on appeal is the application of the test for leave under s. 56.5 of the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25. Section 56.5 provides for appeals to the Supreme Court on questions of law relating to final decisions in strata property claims, either by consent of the parties or where the Supreme Court determines it to be in the interests of justice and fairness to grant leave.

[3] For the reasons that follow, I conclude that:

(i) the order under appeal does not identify questions of law, the statutory precondition for the grant of leave to appeal, and

(ii) even if the issues sought to be raised by the respondent could be framed as questions of law, the chambers judge erred in concluding that it is in the interests of justice and fairness to grant leave in this case.

Accordingly, I would set aside the order granting leave to appeal.

[4] I should note at the outset that the current appeal process is slated to be altered in favour of judicial review: Bill 22, *Civil Resolution Tribunal Amendment Act*, 3rd Sess., 41st Leg., British Columbia, 2018. The precedential value of this case is thus significantly attenuated.

Background

[5] In 2000, Mr. Allard purchased a unit in a 54-unit condominium building. The unit contained a solarium built by the previous owner, which the strata had approved on the condition that future repair, maintenance and insurance costs would be borne by the owner of the unit to which it was attached. There is nothing to suggest that Mr. Allard, at the purchase time or anytime thereafter, assumed this condition through an agreement with the strata.

[6] Between 2015 and 2016, the strata commenced a renewal project for the building's doors and windows, but refused to include two solaria additions—one being Mr. Allard's—in the project. The strata justified the exclusion on the grounds that it had no responsibility to repair and maintain owner-constructed improvements on exterior balconies or decks. The project cost over $4.5 million and was funded by special assessments from the strata owners, including Mr. Allard. It was completed in December 2016.

A. The Tribunal Decision

[7] Mr. Allard disputed the exclusion of the solarium from the renewal project. On September 29, 2016, he brought a claim against the strata under s. 3.6 of the *Civil Resolution Tribunal Act*, which gives the Tribunal jurisdiction over certain strata property claims. He contended that the exclusion of the solarium from the renewal project amounted to significant unfairness under s. 48.1(2) of the *CRTA*:

> **Orders available in strata property claims**
>
> **48.1** …
>
> (2) In resolving a strata property claim brought to the tribunal under section 3.6 (1) (e) to (g) *[strata property claims within jurisdiction of tribunal]*, the tribunal may make an order directed at the strata corporation, the council or a person who holds 50% or more of the votes, if the order is

> necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights.

[8] The Tribunal rendered its decision on November 8, 2017. It held that, while the strata had an obligation to repair and maintain the solarium under the operative 2015 bylaws, the exclusion of the solarium from the renewal project was not significantly unfair.

[9] In reaching its conclusions, the Tribunal adverted to a 2017 expert report by an architect named Grant Laing, who had opined that "the solarium currently fulfills its original function without the need for any repair or renewal work." The Tribunal also noted that the appearance of the solarium continued to blend in with the new windows and frames.

[10] On the issue of significant unfairness, the Tribunal applied the test set forth in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44 at para. 30. The *Dollan* test addresses s. 164 of the *Strata Property Act*, S.B.C. 1998, c. 43, and asks the following two questions:

> 1. Examined objectively, does the evidence support the asserted reasonable expectations of the petitioner?
> 2. Does the evidence establish that the reasonable expectation of the petitioner was violated by action that was significantly unfair?

[11] The Tribunal concluded that, despite the strata's obligation to repair and maintain the solarium, Mr. Allard lacked any reasonable expectation that the solarium would be included in the renewal plan. The exclusion, for this reason, was found to be not significantly unfair.

[12] The Tribunal went on to order that each party bear their own costs and that Mr. Allard pay for a portion of the Laing expert report.

B. The Order and Reasons of the Chambers Judge

[13] Mr. Allard sought leave to appeal the Tribunal's decision pursuant to s. 56.5 of the *CRTA*, which provides for an appeal to the Supreme Court with consent of the parties or else with leave of the court:

> **Appeal to Supreme Court**
>
> **56.5** (1) Subject to this section, a party that is given notice of a final decision in a strata property claim may appeal to the Supreme Court on a question of law arising out of the decision.
>
> (2) A party may appeal to the Supreme Court only if
>
> (a) all parties consent, or
>
> (b) the court grants leave to appeal.
>
> …
>
> (4) The court may grant leave to appeal under subsection (2) (b) if it determines that it is in the interests of justice and fairness to do so.
>
> (5) When deciding whether it is in the interests of justice and fairness to grant leave, the court may consider the following:
>
> (a) whether an issue raised by the claim or dispute that is the subject of the appeal is of such importance that it would benefit from being resolved by the Supreme Court to establish a precedent;
>
> (b) whether an issue raised by the claim or dispute relates to the constitution or the *Human Rights Code*;
>
> (c) the importance of the issue to the parties, or to a class of persons of which one of the parties is a member;
>
> (d) the principle of proportionality. …

[14] For leave to be granted under s. 56.5, two requirements must be satisfied. First, the proposed appeal must engage a question of law. Second, it must be in the interests of justice and fairness to grant leave. Section 56.5(5), reproduced above, provides a list of factors that "may" be considered on the second branch of the test.

[15] On May 4, 2018, the chambers judge granted Mr. Allard leave to appeal from the Tribunal's decision on the basis of four questions of law—two relating to substantive issues and the other two relating to costs. The entered order under appeal formulates the two substantive questions of law as follows:

> i) The Tribunal acted without evidence or took an unreasonable view of the evidence and thereby erred in law when, despite finding that the

> Strata was responsible for repair and maintenance of the Solarium under the Strata Bylaws and despite finding that the Owner was not bound by the conditions of the Solarium installation, the Tribunal found:
>
> a) that the Owner did not have a reasonable expectation that the Strata would include the Solarium in the renewal project;
>
> b) the Strata's decision to exclude replacement of the Solarium in the renewal project does not amount to significant unfairness;
>
> c) on the basis of the Laing report obtained after the renewal project was complete, that the Strata acted reasonably with the assistance of professionals in determining the Solarium should not be included in the renewal project.
>
> ii) The tribunal erred in law by misapplying the test set out in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44 for a significantly unfair action or decision of the Strata Corporation in finding that although the Strata was responsible for the repair and maintenance of the Solarium under the Strata Bylaws and that the Owner was not bound by the conditions agreed with the previous owner for installation of the Solarium, the Owner did not have a reasonable expectation that the Strata would include the Solarium in the renewal project and the Strata's decision to exclude the Solarium from the renewal project was not a significantly unfair action.

[16] The reasons for judgment address the issue of whether it would be in the interests of fairness and justice to grant leave to appeal. As to the first substantive question, the judge said the following:

> [66] This is an issue that would be beneficial to address by means of a Supreme Court precedent. It is a significant one for Mr. Allard and there would be no disproportionality in having it heard on appeal, in light of the significant value of the renewal project and his contribution. Leave will be granted on this question.

[17] The judge then went on to address the second substantive question:

> [67] The second substantive ground is closely related. While the member stated the test for significant unfairness accurately, it is again at least arguable that he misapplied it, by considering Mr. Allard's reasonable expectations only in light of his awareness of the conditions of approval of the solarium for the original owner (even although it was also found by the member that those conditions did not apply to him), rather than as those expectations might have been modified by the bylaw that was in effect at the time the renewal was initiated, which the member found made the Strata responsible.

On Appeal

[18] The strata alleges that the chambers judge erred in two respects:

(1) by concluding that the appeal proposed by Mr. Allard engages a question of law; and

(2) by holding that granting leave would be in the interests of justice and fairness.

[19] Mr. Allard says that the judge did not so err. He submits, however, that he will not pursue the questions relating to costs unless he is entitled to appeal on the first two substantive issues identified by the judge.

A. Questions of Law

[20] Section 56.5(1) of the *CRTA* only permits appeals from "a question of law." The character of a question of law, as opposed to a question of fact or mixed fact and law, was explained by the Supreme Court of Canada in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 35:

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

The Court in that case went on to caution that "the distinction between law on the one hand and mixed law and fact on the other is difficult."

[21] I first observe that the alleged questions of law identified in the order under appeal are quintessentially questions of mixed-fact-and-law. At the very least, the order frames the pertinent legal questions from the standpoint of a particular factual matrix. The definition of a question of mixed fact and law invokes the application of the relevant legal standard to a particular set of facts: see *Housen v. Nikolaisen*, 2002 SCC 33 at para. 26.

[22] In addressing this first issue, the jurisprudence on appeals under the *Arbitration Act*, R.S.B.C. 1996, c. 55—the appeal mechanism which likewise

requires the identification of a question of law—provides general guidance. Notably, in *Elk Valley Coal Partnership v. Westshore Terminals Ltd.*, 2008 BCCA 154 at para. 17, this Court reasoned that "a court considering an application for leave to appeal must be careful to grant leave only where questions of law can be clearly perceived and delineated." This caution is clearly apposite in the present case.

[23] Even assuming, and without deciding, that the questions sought to be raised by the respondent could be reframed as questions of law, I would nonetheless find that it would not be in the interests of justice and fairness to grant leave to appeal under s. 56.5. This is the issue to which I now turn.

B. The Interests of Justice and Fairness

[24] Section 56.5(4) of the *CRTA* provides that the Supreme Court "may grant leave to appeal … if it determines that it is in the interests of justice and fairness to do so." The judge's determination of this question amounts to an exercise of judicial discretion. While the standard of review for discretionary decisions is a stringent one, an appellate court may legitimately interfere with such a decision "where the lower court gives no or insufficient weight to relevant considerations": *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19 at para. 27.

[25] In my respectful opinion, the judge erred by failing to advert to three considerations that militate against the granting of leave in this case. First, the questions raised by the respondent remain inextricably bound up with the unique facts of the dispute. Second, although the matter is undoubtedly of importance to Mr. Allard, it is of less importance to the strata corporation and the other strata owners. Finally, the granting of leave in this case undermines the Tribunal's mandate to provide, among other things, accessible and speedy dispute resolution.

1. Precedential Value

[26] Given the concerns expressed above, it seems to me that the issues raised by the respondent would not benefit from the establishment of Supreme Court precedent. The two substantive questions articulated in the order are thoroughly

infected by the particular facts of the dispute at issue. Accordingly, I am unable to see how an answer to either question, even if they could be reframed as questions of law, could serve as a guide to strata disputes beyond those party to the immediate proceedings.

2. Importance to the Parties

[27] The proposed appeal is of significance to Mr. Allard personally. In my view, however, the judge erred in principle in failing to consider its overall significance to the strata corporation and the other strata owners.

[28] When viewed from the vantage point of the total class of strata owners and the renewal project at large, the importance of the questions to the parties is significantly diminished. The class of owners includes the owners of the building's other 53 units. Only one solarium besides Mr. Allard's was excluded from the project (and that owner did not seek to challenge the strata's decision). The renewal project cost over $4.5 million and was meant to address the building's original windows and doors. Given the scope of the project and the inconsequentiality of the solaria issue to the majority of the other owners, I cannot find that the proposed appeal would be of importance to the parties taken as a whole or to the class of persons of which Mr. Allard is a member.

[29] That is not to say, however, that it will never be in the interests of justice and fairness to hear an appeal that is of significance to only one of the parties. But the overall significance of the dispute ought to be a relevant, even if non-determinative, factor.

3. Proportionality

[30] In *Hryniak v. Mauldin,* 2014 SCC 7, the Supreme Court of Canada addressed the importance of the "proportionality principle" as it pertains to alternative forms of dispute resolution:

> 27 There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and

> needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
>
> 28 This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.
>
> [Emphasis added.]

[31] The Court in *Hryniak* was directly concerned with the summary judgment process. However, the proportionality principle for adjudicating disputes is consistent with the mandate of the Civil Resolution Tribunal, as set forth under s. 2(2) of the *CRTA*:

> **Civil Resolution Tribunal mandate and role**
>
> **2** …
>
> (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.

[32] The *Civil Resolution Tribunal Rules* expand upon this mandate. In particular, Rule 2 provides that the Tribunal must apply its rules in a way that

> a) takes reasonable steps to recognize and address the needs of tribunal participants,
>
> b) is appropriate in the circumstances of each dispute, including consideration of fairness and proportionality,
>
> c) recognizes any relationships between parties to a dispute that will likely continue after the tribunal proceeding is concluded,

> d) facilitates speedy, accessible, inexpensive, informal and flexible processes,
>
> e) encourages early and collaborative dispute resolution,
>
> f) makes reasonable accommodations for the diverse circumstances of persons using the tribunal,
>
> g) recognizes the value of certainty and finality in the resolution of disputes and compliance with outcomes, and
>
> h) promotes understanding of the dispute resolution processes for the tribunal's participants and for the public in general.

[33] That the Tribunal enjoys a significant degree of procedural flexibility further accords with the proportionality principle. Pursuant to s. 42 of the *CRTA*, for example, the Tribunal "is not bound by the rules of evidence," but may "receive, and accept as evidence, information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law."

[34] The general purpose of the Tribunal was recently summarized by the Supreme Court of British Columbia in *The Owners, Strata Plan BCS 1721 v. Watson*, 2018 BCSC 164:

> [49] The purpose of the CRT is to provide an accessible, flexible and speedy dispute resolution process to parties involved in strata claims falling within s. 3.6(1) of the *CRTA*. The CRT's online processes and emphasis on facilitated dispute resolution are intended to provide the parties with a quick and less expensive form of decision making than adjudication in the Supreme Court. …

[35] In my view, the chambers judge failed to appreciate the proportionality principle in light of this purpose. The issues raised by Mr. Allard, as discussed above, are primarily driven by the particular facts of the dispute. They are of limited significance to the parties when taken as a whole. An appeal in the Supreme Court, while affording a more painstaking procedure, would unduly lengthen resolution of the dispute and thereby negate the many benefits of the Tribunal proceedings. Given the Tribunal's express mandate to provide "accessible, speedy, economical, informal and flexible" dispute resolution, the aforementioned considerations militate strongly against the granting of leave in this case.

Conclusion

[36] The chambers judge, in granting Mr. Allard's leave application, failed to consider the limited precedential value of the proposed appeal, the relative lack of significance to the parties and the Civil Resolution Tribunal's special mandate as it pertains to the proportionality principle. On that basis, I would find the judge erred in principle in holding that it would be in the interests of justice and fairness to grant leave to appeal under s. 56.5 of the *CRTA*.

[37] As indicated at paragraph 19 of these reasons, Mr. Allard does not seek to proceed with the costs issues decided in the Supreme Court if he cannot proceed with his appeal. In light of that position, I would allow the appeal and set aside the Supreme Court order in its entirety.

"The Honourable Madam Justice Kirkpatrick"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Hunter"