COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *The Owners, Strata Plan BCS 3407 v. Emmerton,* 2024 BCCA 354

Date: 20241018
Docket: CA49348

Between:

The Owners, Strata Plan BCS 3407

Appellant
(Petitioner)

And

John Emmerton and Van Ortega

Respondents
(Respondents)

Before: The Honourable Chief Justice Marchand
The Honourable Madam Justice Saunders
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated August 17, 2023 (*The Owners, Strata Plan BCS 3407 v. Emmerton*, 2023 BCSC 1571, Vancouver Docket S227866).

Counsel for the Appellant: K.A. McGoldrick
L.N. Mackie

No one appearing on behalf of the Respondents

Counsel for the Civil Resolution Tribunal: Z.N. Rahman
E. McCullum, Articled Student

Place and Date of Hearing: Vancouver, British Columbia
June 4, 2024

Place and Date of Judgment: Vancouver, British Columbia
October 18, 2024

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Chief Justice Marchand
The Honourable Madam Justice Fisher

Summary:

The Strata Corporation appeals the dismissal of a judicial review petition challenging a decision of the Civil Resolution Tribunal. The Tribunal had found a hot tub was "patio furniture" within the meaning of the Strata's bylaws. The reviewing judge found the Tribunal's decision was not patently unreasonable.

Held: Appeal allowed. The Tribunal took an overly narrow approach to the question of the hot tub as patio furniture by focusing singularly on whether the item was "readily moveable". This narrow view led the Tribunal away from looking at the plain and ordinary meaning of the bylaw at issue and resulted in a patently unreasonable decision. The finding also did not cohere with municipal regulatory scheme. The decision was patently unreasonable in accepting that the presence of the hot tub could lead to the effluxion of it through the surface water/storm sewer system, contrary to municipal regulations. The order dismissing the petition is set aside and the claim before the Tribunal is dismissed, with costs against the respondents in favour of the appellant.

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] This appeal is from an order of the Supreme Court of British Columbia dismissing the petition of the Owners, Strata Plan BCS 3407 for judicial review of a decision made by the Civil Resolution Tribunal on the interpretation of a Bylaw of the Strata Corporation. In its decision, the Tribunal held that an inflatable hot tub was allowed on the respondents' patio as patio furniture within the terms of Bylaw 53(4), contrary to the prior direction of the Strata Corporation. It awarded costs against the Strata Corporation. The issue before the reviewing judge was whether the Tribunal's decision was patently unreasonable. He found it was not.

[2] On appeal, the Strata Corporation contends that the Tribunal's decision was patently unreasonable and, the judge erred in applying the standard of review to it.

[3] The respondents, who were the owners of a strata unit, first wrote to the Strata Corporation enquiring about approval to place what they termed a "portable" hot tub on their patio. The Strata Corporation did not approve the request. Notwithstanding that response, the respondents placed an inflatable hot tub on their patio. The hot tub in question holds about 900 litres of waters and seats four to six adults.

[4] After learning the hot tub had been placed on the patio contrary to its direction, the Strata Corporation initiated bylaw enforcement processes. This caused the respondents to file a dispute notice with the Tribunal claiming that the Strata Corporation misinterpreted its bylaws by refusing to permit the hot tub.

[5] Bylaw 53(4) provides:

> A Resident shall not use Balconies or Patios for storage. Only plants with saucers, patio furniture, and propane or electric BBQ are allowed with the use of a fire extinguisher. Fire extinguisher must be registered with the Concierge.
>
> [Emphasis added.]

[6] The respondents' strata lot is on the 26th floor of a residential tower. It has a large open deck designated as common property for the exclusive use of the strata unit. As did the Tribunal, I shall refer to the deck as a patio.

[7] The Tribunal addressed the interpretation of Bylaw 53(4) by considering the singular question of whether the hot tub character was "readily moveable". It distinguished other cases addressing the character of a "hot tub" as furniture based on the moveability of the item. It found this hot tub's inflatability and drainability features brought the item within the term "patio furniture" because those features made this hot tub readily moveable, and held in its paras. 25–30 that the hot tub was permitted patio furniture under the basic rules of statutory interpretation.

[8] The standard of review applicable in this case was as determined by s. 56.7 of the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25:

> 56.7 (1) The tribunal must be considered to be an expert tribunal relative to the courts in relation to a decision of the tribunal
>
> (a) concerning a claim within the exclusive jurisdiction of the tribunal, ...
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> ...
>
> (2) On an application for judicial review of a decision of the tribunal for which the tribunal must be considered to be an expert tribunal, the standard of review to be applied is as follows:
>
> (a) a finding of fact or law or an exercise of discretion by the tribunal must not be interfered with unless it is patently unreasonable;
>
> ...

[9] As s. 2(1)(c) of the *Act* provides that strata property claims are within the Tribunal's specialized expertise, the judge correctly observed that the *Act* required him to apply the standard of patent unreasonableness.

[10] There are many descriptions of "patent unreasonableness". In *Maung v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2023 BCCA 371 at para. 42, this Court described a patently unreasonable decision as one in which the decision "is so flawed that no amount of curial deference can justify letting it" stand:

citing *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 52. Patent unreasonableness has been described as the most deferential standard of review known to Canadian law: *The College of Physicians and Surgeons of British Columbia v. The Health Professionals Review Board*, 2022 BCCA 10 at para. 130, leave to appeal to SCC ref'd 40106 (24 November 2022).

[11] On appeal, the issue is whether the judge identified and applied the correct standard of review. Where, as here, the judge identified the correct standard, the question is whether he applied it correctly. This court effectively "steps into the shoes of the reviewing judge and conducts a *de novo* review of the tribunal's decision": *Macdonald v. The Owners, EPS 522*, 2024 BCCA 52 at para. 6, citing: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at para. 10; *British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd.*, 2023 BCCA 168 at para. 55. No deference then is owed to the reviewing judge.

[12] We were informed that the respondents no longer own the strata property in issue. The new owners participated in the hearing of the judicial review petition but did not appear at the hearing of this appeal. In these circumstances, I have considered the judge's description of the respondents' submissions before him as useful in understanding the issues presented on the appeal.

[13] We have had the benefit of submissions from the Tribunal. Although it properly did not address the merits of its decision directly, its factum and oral submissions on the standard of review, the strata property context, the scope of the Tribunal's considerations, and explanation of the record before the Tribunal were of assistance to the court.

The Grounds of Appeal

[14] As the judge selected the correct standard of review, our task is only to review the Tribunal's decision on the standard of patent unreasonableness.

[15] The appellant contends that the Tribunal failed to apply the rules of statutory interpretation, leading it to a patently unreasonable interpretation. This failure, it says, took the form of:

i) failing to consider the ordinary meaning of “patio furniture” and whether reasonable people would understand hot tubs fell within it;

ii) failing to consider the words “patio furniture” within the context of other items permitted by Bylaw 53(4) and other bylaws dealing with patios and balconies;

iii) failing to consider the purpose of Bylaw 53(4); and

iv) failing to find that the Tribunal’s conclusion that the hot tub was “patio furniture” was patently unreasonable.

Discussion

[16] Respectfully, I have come to the conclusion that the Tribunal’s decision was patently unreasonable. In my view, the Tribunal took an overly narrow approach by considering moveability as the sole determinant of whether this item was patio furniture. That is, it compared other hot tub cases that had been before the Tribunal and looked at this hot tub’s ability to be drained and deconstructed to a folded item that was readily moveable or “moved at will” as being the determinative factor. The preoccupation with moveability was to the exclusion of considering the very nature of a tub, the necessary implications of its liquid containing purpose, the words “plants with saucers” and “propane or electric BBQ ... with the use of a fire extinguisher” bracketing the words “patio furniture” in Bylaw 53(4), and the duty of the Strata Corporation to maintain a degree of consistency fair to the whole community of strata lot owners in the exercise of its responsibility to manage the common strata property within the parameters of the law.

[17] Bylaws are the internal vehicles for the governance of strata developments, and in that spirit it is accepted that the basic rules of statutory interpretation apply to

the interpretation of bylaws: *Semmler v. The Owners, Strata Plan NE3039*, 2018 BCSC 2064 at para. 18. Principal among these rules is the proposition that bylaws are to be given their plain and ordinary meaning: *The Owners Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2016 BCSC 32 at para. 179; *Harvey and Genge v. The Owners, Strata Plan N.W. 2489*, 2003 BCSC 1316 at para. 18. Another is that words should be interpreted considering their purpose: Ruth Sullivan, *The Construction of Statutes,* 7th ed. (Toronto: LexisNexis Canada, 2022), *Wang v. British Columbia (Securities Commission),* 2023 BCCA 101 at paras. 40–41. In *Strata Plan VIS4663 v. Little*, 2001 BCCA 337 at para. 21, this court observed that "[r]espect for collected governance of a community requires that bylaws be interpreted purposively so that they accomplish the community's goals". The context of the words in issue must be considered.

[18] In this case, I conclude that the Tribunal's overly narrow approach deprived the decision of balance and perspective, leading far away from the plain and ordinary meaning of Bylaw 53(4) and leading to a patently unreasonable result.

[19] It is true that dictionary definitions of the word "furniture" include the description of movable items, chairs, tables, desks, couches and bookshelves being items commonly listed, for the use of home, office or the like. Significantly, however, these items are not remarkable for their content, and moveability is immediate. A tub, in contrast, is commonly defined in dictionaries as a wide, deep, flat-bottomed container used for holding liquids. The difference suggests that items, the purpose of which is to contain liquid, are not in the first rank of items thought of as furniture.

[20] The rule of thumb is that one litre of water weighs one kilogram, that is, 900 litres weighs 900 kilograms (with some adjustment for the temperature of the water). In other words, the water alone in the hot tub would weigh about one ton. When filled the hot tub is not moveable. Its moveability, as found by the Tribunal, depended on reducing the tub to a folded item. The Tribunal found that the hot tub could be inflated and deflated in five minutes, and found, without evidence of the drainage time, that it could be drained relatively quickly. On this basis, the Tribunal

found that the hot tub was readily movable and came within the term “patio furniture” used in Bylaw 54(3).

[21] Even if the hot tub is properly considered moveable because it can be deconstructed into a moveable item in a relatively short period of time, and recognizing that the standard for interfering with the Tribunal’s decision is high, we still must consider the purpose and context of the Bylaw. Since a tub is defined in terms of its liquid holding function, not its reclining capacity, the question before the Tribunal demanded this contextual consideration. In my view, reading Bylaw 53(4) in its entirety, and in the context of a regulatory prohibition on draining the hot tub into the surface water (storm sewer) system, necessarily produces a different result.

[22] Bylaw 53(4) limits items that may be stored on the patio to three categories, plants with saucers, patio furniture, and barbeques provided they are accompanied by a fire extinguisher. It may reasonably be argued that the requirements that plants have saucers and that barbeques must be accompanied by fire extinguishers demonstrate that a primary intention of limiting the items that may be stored on the patio is the physical safety of the common property. In this spirit, an interpretation of “patio furniture” as not allowing for a large but contained volume of water is consistent with the purpose of the other two limitations on permissible items in Bylaw 53(4).

[23] Concern about the liquid contained in the hot tub was addressed before the Tribunal. Evidence was adduced that the respondents had increased their insurance limits to protect against escaped water. Further, the respondents’ original scheme of draining the tub into the surface water (storm sewer) drain was found to be contrary to municipal regulations which required hot tubs to be drained into the sanitary sewer system. There is no sanitary sewer drain from the deck and when the respondents learned they were not allowed to drain the hot tub’s water into the storm sewer system, they addressed the prohibition by running a hose from the hot tub to a drain within the strata unit, which then drained into the sanitary sewer.

[24] Evidence also was adduced of the patio's ability to accommodate the tub's volume of water should there be a rupture or other failure to contain the tub's contents. On this, the Tribunal said:

> 34. The evidence shows that after the applicants started this dispute, the strata requested information from the applicants about the hot tub's specifications, including how and where they drained the water. The strata says it has concerns about draining the hot tub into the patio drains because they may be plugged, which likely causes water to build up under the patio tiles. The strata also provided evidence of a municipal bulletin that says hot tubs should be drained into the sanitary sewer system, as the municipal bylaws prohibit draining hot tubs into storm drains.
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> 35. While the applicants say they were initially draining the hot tub directly into a patio drain, I find there is insufficient evidence that this represented a hazard to any strata lot or the common property. A text message exchange between Mr. Ortega and the occupant of the strata lot directly below the applicants shows the below neighbour had not observed any excess water coming out of the overflow drain from the SL197 patio since the applicants got their hot tub. Further, the strata's own evidence from Pacific West Mechanical Ltd. (PWM), which inspected the patio drains, suggests that water build-up likely would only occur if the applicants drained the hot tub onto the patio surface, rather then putting a hose directly down the drain, as the applicants say they did. In any event, I accept the applicants' submission they now use a pump and hose to drain the hot tub into the sanitary sewer system in their strata lot, which is shown in their video evidence.
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> 36. Further, the applicants provided an April 4, 2022 report prepared by Leon Prinsloo, a principal engineer at SG Arch Engineering Ltd. (Arch Engineers). This report states that based on review of the hot tub's owner's manual, photos of the patio, and the BC Building Code, in the event of a catastrophic failure (meaning the hot tub ruptures), the patio deck is large enough and the drainage and wastewater systems are sufficient to drain all the hot tub water. It also states the free chlorine concentration levels in the water are so low that draining all the water would not damage the drainage or wastewater pipes or systems.
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> [Emphasis added.]

[25] In my respectful view, it was not open to the Tribunal to assume for the Strata Corporation, the risk of hot tub water draining through the surface drains on the patio associated with the storm sewer. While it may be that the chlorinated water would not damage pipes or systems as the Tribunal hypothesized, on the evidence before the Tribunal, draining hot tub water from the deck though the deck's drains is not allowed by municipal bylaws. Accordingly, the Tribunal, in finding that the hot tub is

permissible patio furniture, has reached a result that does not cohere with the municipal regulatory scheme. This consideration, along with the limitations on the other items allowed to be placed on the patio, persuades me that the allowed items set out in Bylaw 53(4) does not extend to hot tubs.

[26] In my view, the decision of the Tribunal was patently unreasonable in accepting that the presence of the hot tub could lead to the effluxion of treated water through the surface water/storm sewer system, contrary to law. Further, the decision of the Tribunal was patently unreasonable in holding that the hot tub was patio furniture within the meaning of the Bylaw.

[27] I would allow the appeal and set aside the order dismissing the petition for judicial review.

Remedy

[28] In the event we allow the appeal, the Tribunal reminds us that we may make the order the Supreme Court could have made, there being no respondent appearing in the proceedings.

[29] In my view we should resolve the issue (under s. 24(1)(a) of the *Court of Appeal Act*, S.B.C. 2021, c. 6) rather than remitting it to the Tribunal for a fresh decision. The issue of the drainage of the deck in the event of catastrophic failure, alone, persuades me that the Strata Corporation must succeed on its petition.

[30] Accordingly, I would dismiss the claim before the Civil Resolution Tribunal.

[31] There is an outstanding issue of costs. The appellant does not seek costs against the Tribunal. I consider this appropriate, as its participation in the courts has not strayed outside of its proper lane. However, the appellant has been successful, and was obliged to pursue a court remedy to correct the error. I would order costs in the Supreme Court of British Columbia, and in this court pursuant to s. 44, in favour of the appellant, against the respondents.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Madam Justice Fisher"