

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Trinden Enterprises Ltd. v. Civil Resolution Tribunal and The Owners*,
2024 BCSC 2052

Date: 20241113
Docket: S235259
Registry: Vancouver

Between:

Trinden Enterprises Ltd.

Petitioner

And

Civil Resolution Tribunal and The Owners, Strata Plan NW2406

Respondents

Before: The Honourable Justice K. Loo

On judicial review from: An order of the Civil Resolution Tribunal, dated May 26, 2023 (*Trinden Enterprises Ltd. v. The Owners, Strata Plan NW 2406*, 2023 BCCRT 439, File: ST-2022-005047)

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.
October 18, 2024

Place and Date of Judgment:

Vancouver, B.C.
November 13, 2024

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Introduction

[1] This is a petition for judicial review in which the petitioner, Trinden Enterprises Ltd., seeks to quash a decision (the “CRT decision”) made by the Civil Resolution Tribunal (the “tribunal” or the “CRT”) on May 26, 2023.

[2] The CRT decision concerns the use and ownership of parking spaces in a residential strata development on Hastings Street in Burnaby.

[3] The development includes 96 residential apartment units, 30 townhouses, and two commercial units. The strata plan was approved and construction was completed in or around 1987. The development has 244 parking spaces.

[4] The developer Bosa Bros. Construction Ltd. sold the residential units and initially retained the commercial units. In May 1997, Bosa sold the two commercial units to LKK Enterprises Ltd. The sale purported to include 90 parking spaces allocated to the two commercial units.

[5] In 2005, Trinden purchased the commercial units, including the parking spaces, from LKK.

[6] From 2005 to April 2022, the 90 parking stalls thought to be allocated to the commercial units were managed or controlled by Trinden.

[7] In 2022, the strata reviewed the strata plan and determined that 24 of the 90 parking spaces previously thought to be limited common property for the use of the commercial units are, in fact, common property.

[8] (Common property is owned together by all of the strata lot owners and is managed by the strata corporation. While the common property within a strata development is owned by the collective, it is not necessarily available for collective use. Areas of common property designated as "limited common property" are designated for the exclusive use of one or more strata lots: see *Richter v. Stratton*, 2022 BCCA 337 at paras 2-3.)

[9] On the hearing of this petition, although at one point its counsel submitted that the “strata plan does not tell us anything” about where the disputed spaces are, he also acknowledged, on behalf of Trinden, that the 24 disputed stalls are designated on the strata plan as common property.

[10] In 2022, the strata took steps to attempt to enforce its rights under the plan. It issued notices to commercial tenants that their use of the 24 disputed parking spaces is contrary to the strata plan.

[11] Trinden filed a dispute notice with the CRT, seeking an order that the strata corporation be required to designate the disputed parking spaces as “limited common property for the exclusive use of the non-residential section.”

[12] The CRT issued the CRT Decision, dismissing Trinden’s dispute notice. It held, among other things, that the petitioners’ expectation to control the disputed parking spaces was not reasonable, that the strata’s actions were not significantly unfair to Trinden, and that Trinden had failed to make out the elements of promissory estoppel.

[13] On July 24, 2023, Trinden filed this petition seeking judicial review of the CRT Decision.

Issues

[14] Trinden submits that the following findings and decisions of the CRT Decision were patently unreasonable:

- a) the CRT’s finding that the petitioners’ expectation to control the disputed parking lots was not reasonable;
- b) the CRT’s finding that the strata’s actions were not significantly unfair; and
- c) the CRT’s decision that the petitioner failed to establish the elements of and could not rely on the doctrine of promissory estoppel.

[15] Further, Trinden submits that the CRT failed to act fairly in refusing to order the strata council to produce certain parking schedules as requested.

[16] These alleged errors will be addressed in turn below.

Standard of review

[17] The parties agree that the applicable standard with respect to the first three alleged reviewable errors is patent unreasonableness: s. 56.7(2)(a) of the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25 [CRTA].

[18] The patent unreasonableness test requires a high degree of deference. That test in the context of the CRT was discussed in *Williams v. BC CRT*, 2023 BCSC 239, in which this Court adopted with approval the following passage from *Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109:

[65] When reviewing for patent unreasonableness, the court is not to ask itself whether it is persuaded by the tribunal's rationale for its decision; it is to merely ask whether, assessing the decision as a whole, there is any rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational or, expressed in the *Ryan* [Law Society of New Brunswick v. Ryan, 2003 SCC 20] formulation, whether the decision is so flawed that no amount of curial deference can justify letting it stand. If the decision is not clearly irrational or otherwise flawed to the extreme degree described in *Ryan*, it cannot be said to be patently unreasonable. This is so regardless of whether the court agrees with the tribunal's conclusion or finds the analysis persuasive. Even if there are aspects of the reasoning which the court considers flawed or unreasonable, so long as they do not affect the reasonableness of the decision taken as a whole, the decision is not patently unreasonable.

[19] Similarly, in *Macdonald v. EPS 522*, 2024 BCCA 52 at para 9, the Court held:

The standard of review of patent unreasonableness is highly deferential. A patently unreasonable decision is one that is "openly, clearly, evidently unreasonable" and "almost borders on the absurd": *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para. 28. To be considered patently unreasonable, the decision must be so flawed that no amount of curial deference can justify letting it stand: *Maung v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2023 BCCA 371 at para. 42.

[20] With regard to the fourth reviewable error, which concerns an alleged failure by the tribunal to order documents to be produced or to consider an additional

document delivered by the petitioner, the issue is procedural fairness. In that context, the question is whether in all of the circumstances, the tribunal acted fairly: *CRTA*, s. 56.7(2)(b).

Discussion

Was tribunal's finding that the petitioners' expectation to control the disputed parking lots was not reasonable, patently unreasonable?

Was the tribunal's finding that the strata's actions were not significantly unfair, patently unreasonable?

[21] The first two errors alleged by Trinden will be dealt with together as they relate to different aspects of the same legal test.

[22] The petitioner's original complaint was made under s. 123 of the *CRTA*, which provides that the CRT may order a strata corporation to do something or to refrain from doing something if the order is necessary to prevent or remedy a significantly unfair action or decision.

[23] In *Dollan v. Strata Plan BCS 1589*, 2012 BCCA 44 at para 30, the Court articulated a two-part test to be employed under a section that was a predecessor to s. 123:

- a) Examined objectively, does the evidence support the asserted reasonable expectations of the petitioner?
- b) Does the evidence establish that the reasonable expectations of the petitioner were violated by action that was significantly unfair?

[24] The Court of Appeal has held that "significantly unfair" encompasses, at the very least, oppressive and unfairly prejudicial conduct, and that oppressive conduct is conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith. Unfairly prejudicial conduct had been defined as conduct that is unjust or inequitable: see *Kunzler v. Strata Plan EPS 1433*, 2021 BCCA 173 at para 82.

The petitioner's reasonable expectations

[25] The strata corporation does not contest that the disputed spaces have been used and controlled by the owners of the commercial units or their tenants since the building's construction.

[26] It also appears to be uncontroverted that the strata assisted in managing these spaces on the assumption that the spaces were intended, at least in part, for commercial use. I say "in part" because there is evidence that there are signs adjacent to at least some of the 90 spaces that state "visitor and commercial parking." Further, the "as built" drawings relied upon by the petitioner designate the disputed spaces as "visitor / commercial parking."

[27] At para 39 of the CRT Decision, the tribunal accepted that the petitioner expected that it had control over 90 stalls. The question that had to be dealt with by the tribunal and that must be assessed on this judicial review is whether the petitioner's expectation was reasonable. The tribunal held that it was not.

[28] The petitioner advanced much evidence about the way in which the disputed spaces were dealt since the building's construction, in support of its argument that its expectations regarding the disputed parking spaces were reasonable. In particular:

- a) the tribunal accepted the petitioner's evidence that Bosa confirmed to LKK that 90 parking spaces were allocated to the commercial lots, and that Trinden expected control over those spaces when it purchased the commercial units from LKK: CRT Decision, paras 38 and 39;
- b) the 90 parking spaces thought to be allocated to the commercial units, including the 24 disputed parking spaces, are on the "public" side of a security gate and are therefore accessible from the outside. The residential parking spaces, not including the 24 disputed spaces, are protected from outside access by the security gate;

- c) as-built construction drawings show the 90 parking spaces on the public side of the security gate to be visitor or commercial parking;
- d) the strata plan does not reflect what was built: the separation between the common property historically used by residents and the disputed parking spaces is not evident on the strata plan;
- e) signage was placed in the disputed area by property managers of the strata in at least 2011 and 2019, advising residents that they were not allowed to park their vehicles in the commercial parking stalls.

[29] The petitioner argues that the ways in which the disputed spaces were dealt with historically, as described above, as well as the contractual arrangements among Bosa, LKK, and Trinden, resulted in the petitioner having a reasonable expectation that the disputed spaces were intended for its use.

[30] However, in relation to the arrangements among Bosa, LKK, and Trinden, the tribunal held that the strata plan is the “sole and independent source of the owner’s title” and that LKK was unable, simply by making a promise in a contract, to pass along exclusive use rights to common property.

[31] In relation to the historical use of the spaces, the tribunal held that a reasonable person in Trinden’s position would have examined the strata plan, or relied upon professionals to do so. It found that “upon examination [of the strata plan], it would have been apparent that not all of the 90 parking stalls were located on [limited common property].”

[32] In support of the tribunal’s conclusions on these issues, the strata corporation cites the Court of Appeal’s decision in *Richter* with respect to the binding nature of a registered strata plan. At para 135 of that decision, the Court held:

Unless it is demonstrated that an error has been made on the deposited strata plan, the plan must be taken to be conclusive as to intentions with respect to rights to the strata property. It governs unless and until it is amended, or a proper strata bylaw is passed to change its effect.

[33] As stated by the tribunal at para 44 of the CRT Decision, owners cannot reasonably expect permanent permission to use common property.

[34] In my view, in finding that the petitioner's expectation that it would permanently have control over and was entitled to control the disputed spaces was unreasonable, the CRT's decision was not patently unreasonable, for the reasons above. Indeed, in my view, the CRT's decision on this issue was correct.

Significant unfairness

[35] As I have held that the tribunal's conclusion regarding the reasonableness of the petitioner's expectations was not patently unreasonable, it is unnecessary to address whether the petitioner's expectations were violated by action that was significantly unfair.

[36] But in any event, the arguments in relation to significant unfairness are similar to those regarding the reasonableness of the petitioner's expectations, and are unpersuasive for the same reasons.

[37] At the petition hearing, the petitioner's argument in relation to significant unfairness focussed on the difference between the strata plan and what was built. The petitioner submits that the configuration of the parking areas resulted in a use of the disputed spaces for many years contrary to the strata plan. It submits that it would be significantly unfair to change the parties' entitlements to parking now.

[38] On the other hand, the respondent argues that the strata's actions were not significantly unfair because it was not reasonable for the petitioner to continue to assert control over 90 stalls when only 66 are designated as limited common property for the petitioner's benefit.

[39] As noted by the tribunal (at para 48 of the CRT Decision), the best interests of a strata corporation may conflict with the interests of individual owners. Decisions may negatively affect a particular strata lot owner without being significantly unfair.

[40] In my view, given the conclusive nature of a registered strata plan described in *Richter*, it was not significantly unfair for the strata to assert its rights under the plan.

[41] The petitioner has not established that the tribunal's decision on the issue of significant unfairness was patently unreasonable.

Is the strata precluded by the doctrine of promissory estoppel from relying on the strata plan?

[42] In *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47 [*"Trial Lawyers"*] at para. 15, the Supreme Court of Canada cited with approval the following passage from *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, 1991 CanLII 58 at 57, setting out the law in respect of promissory estoppel:

The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the [promisee] must establish that, in reliance on the [promise], he acted on it or in some way changed his position.

[43] The Court in *Trial Lawyers* went on to summarize the elements of promissory estoppel as follows:

[15] ... The equitable defence therefore requires that (1) the parties be in a legal relationship at the time of the promise or assurance; (2) the promise or assurance be intended to affect that relationship and to be acted on; and (3) the other party in fact relied on the promise or assurance. It is, as we will explain, implicit that such reliance be to the promisee's detriment.

[44] In this case, the doctrine of promissory estoppel would operate to preclude the strata from relying on the strata plan if it had, by words or conduct, made a promise or assurance to Trinden which was intended to affect their legal relationship and which led Trinden to believe that it would not rely on the strict terms of the plan, and if Trinden had changed its position in reliance on that promise or assurance.

[45] Regarding whether the strata by its conduct made a promise or assurance to Trinden, the tribunal held at para 44:

There is no evidentiary basis to support a finding that the strata promised to allow LKK or Trinden to permanently exercise control over the disputed parking stalls. The more logical inference is that successive strata councils over the years failed to closely examine the strata plan to determine the status of those parking stalls.

[46] The petitioner submits that this finding is patently unreasonable, citing the evidence described above that led the petitioner to expect that it had control over the disputed spaces. However, the key word in the tribunal's finding on this point is "permanently." It may well be that the strata's conduct before April 2022 constituted an assurance, on a day-to-day basis, that the petitioner could use the disputed spaces. However, as submitted by the strata, there is no evidentiary basis for finding that the strata promised to allow LKK or Trinden to *permanently* exercise control.

[47] In my view, the tribunal's conclusion in the passage set out above was not patently unreasonable.

[48] Although it is unnecessary in this case because of my conclusion with regard to the promise or assurance alleged made by the strata, the second step in the analysis under the promissory estoppel doctrine is to consider whether Trinden had changed its position in reliance on the alleged promise or assurance to its detriment.

[49] Trinden argues that it relied on the assurances of the strata by providing parking spaces to its commercial tenants. There is a suggestion that it entered into lease arrangements with tenants in which parking stalls were promised, although no lease documents were provided to the Court in this regard.

[50] However, the tribunal considered these arguments and noted that Trinden did not say that it was unable to meet its contractual obligations to provide tenants with parking stalls. The tribunal found that there was no evidence before it of a present or future parking shortage: para 47.

[51] As a result, detrimental reliance on the part of Trinden in respect of any promise or assurance made by the strata was not established.

[52] As a result of the foregoing, I have concluded that the conclusions reached by the CRT regarding the doctrine of promissory estoppel are not patently unreasonable.

The petitioner's request for additional documents and its request to place a further schedule before the tribunal

[53] The fourth reviewable error alleged by the petitioner has two aspects.

[54] First, in its dispute notice, Trinden sought an order requiring the strata to produce all documents "relating to the Parking Agreement including all correspondence about the common property parking stalls," and also submitted that the strata refused to supply "parking lot assignments."

[55] However, Trinden conceded before the tribunal that there was no "parking agreement." Further, the tribunal cited s. 35 of the *Strata Property Act*, S.B.C. 1998, c. 43, which contains a list of the documents and records that a strata corporation must retain and produce to strata owners. The tribunal concluded, correctly in my view, that the strata provided a current parking list to Trinden and was not required to keep or produce out-of-date lists.

[56] Second, the petitioner alleges that the tribunal failed to consider a "parking schedule" which was offered to the tribunal in May 2023, five months after the close of submissions in January 2023.

[57] It appears that the tribunal did receive and consider the parking schedule but the schedule did not cause it to change its conclusions: see CRT Decision, para 13.

[58] Further, in my view, the tribunal's assessment of the parking schedule – that it did not cause the tribunal to change its conclusions - was reasonable. The petitioner's principal stated in an email that the schedule would "demonstrate which parking stalls are designated as Commercial and which are Residential" and "what

has been accepted by both the residential and commercial sections (for the past 36 years).” As stated above, it was not contested by the strata that the disputed spaces were used and controlled by the owners of the commercial units or their tenants since the building’s construction. It is therefore clear, in my view, that the parking schedule did not add anything new to the tribunal’s analysis.

Style of cause

[59] Counsel have pointed out an error in the style of cause: the second respondent should be “The Owners, Strata Plan NW2406.” I order that the style of cause be amended accordingly and that these reasons shall bear the correct style of cause.

Conclusion

[60] For the reasons stated above, the CRT Decision was not patently unreasonable and Trinden was not denied procedural fairness. Accordingly, Trinden’s petition for judicial review of the CRT Decision is dismissed.

[61] Costs shall be payable by Trinden to the strata owners at scale B.

“The Honourable Justice Loo”