

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mochizuki v. Whitworth Holdings
Ltd.*,
2008 BCSC 802

Date: 20080625
Docket: S082113
Registry: Vancouver

**In The Matter Of The *Judicial Review Procedure Act*,
R.S.B.C. 1996, c. 241**

Between:

**Ken Mochizuki, Josip Juracic, Martin Merk, Amanda Cherbo,
and Garth Thompson, Tenants**

Petitioners

And

**Whitworth Holdings Ltd., Landlord,
and D. Anderson, in the capacity of a
Dispute Resolution Officer under the *Residential Tenancy Act***

Respondents

Before: The Honourable Mr. Justice Williamson

Reasons for Judgment

Counsel for the Petitioners

Jessie K. Hadley

Counsel for the Respondents
Whitworth Holdings Ltd.

Shannon Salter

Counsel for the Respondent D.
Anderson, Dispute Resolution
Officer

Neena Sharma

Date and Place of Hearing:

June 6, 2008
Vancouver, B.C.

[1] The petitioners apply pursuant to the **Judicial Review Procedure Act** R.S.B.C. 1996, c. 241 for an order setting aside the decision issued January 26, 2008 by a Dispute Resolution Officer ("DRO") in a landlord tenant matter.

[2] At the opening of the hearing I was told that two of the petitioners, Anita Rempel and Ciril Harshenin, were no longer tenants and had withdrawn as petitioners. I was asked to amend the style of cause accordingly, and I so ordered.

Background

[3] The petitioners rent apartments at 1221 Lawrence Avenue in Kelowna. The respondent, Whitworth Holdings Ltd., owns the apartment building, Arlington House.

[4] The landlord sought an order approving a rent increase which amounted to 29% for ten of the units and just under 21% for one unit.

[5] The **Residential Tenancy Act**, S.B.C. 2002, c. 78, sets out in s. 43 the rent increases that are permitted according to regulations. The current regulation permits annual increases of 3.7%. However, s. 23(1) of the regulation permits a landlord to apply to a DRO for a greater increase if:

The rent for the rental unit is significantly lower than the rent payable for other rental units that

are similar to, and in the same geographic area as, the rental unit.

Standard of Review

[6] Counsel made a number of submissions with respect to the appropriate standard of review. These submissions concerned whether the recent decision of *Dunsmuir v. New Brunswick*, 2008 SCC 9, a decision handed down March 7, 2008, has any impact upon s. 58 of the *Administration Tribunals Act*, S.B.C. 2004, c. 45, the section which determines the standard of review in a number of circumstances on a judicial review. The provincial statute discusses patently unreasonable, as well as fairness and correctness.

[7] It is the submission of the petitioners that as a result of the ruling in *Dunsmuir*, which in effect says that there is no significant difference between "unreasonable" and "patently unreasonable", the standard of review in circumstances set by the provincial *Administrative Tribunals Act* to have a standard of patently unreasonable must now be treated as reasonableness. The respondents, on the other hand, point to the statement in para. 30 of *Dunsmuir* that:

In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.

[8] I need not resolve this issue, because I conclude that the decision of the DRO cannot stand for other reasons.

Analysis

[9] Section 77 of the *Residential Tenancy Act* states as follows:

- (1) A decision of the director must
 - (a) be in writing,
 - (b) be signed and dated by the director,
 - (c) include the reasons for the decision, and
 - (d) be given promptly and in any event within 30 days after the proceedings conclude.

[10] I add that pursuant to s. 43 of the *Residential Tenancy Act*, it is the Director who determines questions of rent increases and the *Act* permits him to delegate authority to Dispute Resolution Officers. It is for this reason that the DRO in this case is bound by the requirements of s. 77 set out above.

[11] I conclude that on a critical question the DRO failed to comply with s. 77. He noted that the grounds for the landlord's application were that the rent for the units concerned is significantly lower than the rent payable for other rental units that are similar to, and in the same geographic area as the rental unit.

[12] In dealing with this matter, in paragraph 5 of his decision, the DRO set out the submissions of the landlord, and the submissions of the tenants. He went on to say that one of the tenants provided a detailed submission concerning the location of the relevant units. Having set out those two positions, he stated:

After hearing the evidence of the parties, I find that the comparables of the landlord are within the same geographic area for the purposes of the **Act**.

[13] I conclude that that statement of fact without any indication for the reason why, or of the analysis supporting, his decision to prefer the landlord's submissions over the tenant's submissions violates the s. 77 requirement that he "include the reasons for the decision".

[14] In this regard, I have considered the decision of Bauman J., as he then was, in ***Harley v. British Columbia (Employment and Assistance Appeal Tribunal)***, 2006 BCSC 1420, 54 Admin. L.R. (4th) 309. In that case, the petitioner sought a judicial review of a decision concerning her made by the Employment and Assistance Appeal Tribunal. Ms. Harley submitted that the Tribunal had failed to provide reasons that explained its decision on a central point. Bauman J. agreed. He found that there was no analysis at all indicating a weighing of the evidence.

[15] Bauman J. relied upon a decision of the Federal Court of Appeal in ***Via Rail Canada Inc. v. Canada (National Transportation Agency)*** (2000), [2001] 2 F.C. 25, 193 D.L.R. (4th) 357. That Court said, in para. 22:

The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out and must reflect consideration of the main relevant factors.

[16] It is significant that the statutory duty to give reasons in the ***Via Rail*** case was similar to s. 77 of the ***Residential Tenancy Act*** quoted above in this case. The direction in the ***Via Rail*** matter was that the Tribunal was to "give orally or in writing the reasons for its decision".

[17] Here, on a critical point, there is a failure on the part of the DRO to give any reason for his decision to prefer the submissions of the landlord over that of the tenants.

[18] The Court of Appeal has recently confirmed this necessity in ***Gibson v. Insurance Corporation of British Columbia***, 2008 BCCA 217. In ***Gibson***, the Court, which included Bauman J.A. (the trial judge in ***Harley***, *supra*), noted that the learned trial judge set out "nothing of the reasoning process in which

the trial judge engaged" in arriving at principal facts. Further, concerning contentious issues, the Court found at para. 25:

We have the benefit of the trial judge's conclusory findings on each of these issues, but we do not enjoy an indication of the reasoning process, the evidentiary analysis, or a discussion of the acceptance and rejection of the evidence of the numerous experts, in which the trial judge had to engage in arriving at these conclusions.

[19] In the case at bar, there is the same omission of any indication of the reasoning process or the analysis of the competing submissions.

Order

[20] The matter should be remitted to a different DRO for rehearing.

Costs

[21] I am not aware of any reason why the petitioners should not have their costs. However, counsel made no submissions on costs, but rather reserved the right to do so. Counsel will have liberty to file a written submission on costs.

If nothing is received within 21 days of the date of these reasons, the petitioners will have one set of costs.

"Williamson J."