

CANADA / JUDGMENT

Downing v. Strata Plan VR2356

2022 BCSC 590

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Supreme Court of British Columbia

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2022 BCSC 590 Downing v. Strata Plan VR2356

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Downing v. Strata Plan VR2356,

2022 BCSC 590

Date: 20220412

Docket: S214487

Registry: Vancouver

Between:

Charlotte Elizabeth Downing

Petitioner

And

Strata Plan VR2356

Civil Resolution Tribunal

Respondents

Before: The Honourable Madam Justice Warren

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

October 25, 2021, and March 3-4, 2022

Place and Date of Judgment:

Vancouver, B.C.

April 12, 2022

Table of Contents

Introduction. 3

Background. 4

Procedural History. 10

The Decision. 13

Standard of Review.. 17

Issues. 21

Analysis. 24

Was the Decision-Maker's conclusion that Ms. Downing had not established trespass patently unreasonable?. 24

Was the Decision-Maker's conclusion that Ms. Downing had not established negligence patently unreasonable?. 26

Was the CRT process procedurally unfair?. 30

Conclusion. 36

Introduction

- [1] The petitioner, Charlotte Elizabeth Downing, was the owner of unit 105 at 995 Roche Point Drive in North Vancouver, which is strata lot five (SL5) in the respondent strata corporation, The Owners, Strata Plan VR 2356 (the "Strata"). The Strata is a strata corporation existing under the Strata Property Act, SBC 1998, c. 43 (the "SPA").

- [2] Ms. Downing applies for judicial review of a decision of the Civil Resolution Tribunal (the "CRT") issued on March 22, 2021 (the "Decision"), dismissing her claims against the Strata for damages allegedly arising from the Strata's investigation of water ingress into SL5. She argues that substantive conclusions of the vice-chair of the CRT who made the Decision (the "Decision-Maker") are patently unreasonable, and that she was denied procedural fairness in the course of the proceeding before the CRT.
- [3] Ms. Downing seeks to have the Decision set aside. If her application is successful, she asks me to exercise my discretion to decide her claims on the merits, on the record that was before the Decision-Maker, and award her nonpecuniary damages of between \$30,000 and \$50,000, and pecuniary damages of about \$412,000. Alternatively, she seeks an order remitting the matter to the CRT for a new hearing before a different tribunal member, with particular procedural and evidentiary directions.
- [4] The Strata opposes the relief sought and asks that the petition be dismissed with costs.
- [5] The CRT appeared to address issues of jurisdiction and standard of review and to provide evidence about the CRT's process. I found it appropriate to exercise my discretion in favour of permitting it to do so in accordance with the principles set out by the Supreme Court of Canada in Ontario (Energy Board) v. Ontario Power Generation Inc., 2015 SCC 44 at para. 57; see also 18320 Holdings Inc. v. Thibeau, 2014 BCCA 494 at paras. 51 - 53.

Background

- [6] Few of the facts are in dispute. Some of the following summary is based on the facts as outlined in the Decision.
- [7] The Strata consists of 72 strata lots in an 11-story building above a large underground parking area.
- [8] SL5 is a ground floor strata lot located immediately above the underground parking area, facing a landscaped plaza. The underground parking area extends past the exterior wall of SL5, under the landscaping. Much of SL5 is located along the exterior wall of the building. A patio is located on the exterior of the building immediately next to SL5, which is limited common property designated for the exclusive use of SL5. The remaining exterior ground-level area surrounding the building is common property.
- [9] In 2009, the Strata retained an engineering firm to complete reviews of the building envelope. As part of the initial review, the engineering firm conducted a survey of the strata owners. Ms. Downing responded to the survey, but did not identify any areas of moisture or water ingress in SL5 other than moisture and mould in some interior window troughs. The engineering firm made one exploratory opening below the den window of SL5 at the location of a previous repair. The resulting report states the steel stud track at floor level was corroded and the batt insulation was moist, suggesting a number of possible water sources, including high interior humidity.

- [10] In 2010, the Strata retained JRS Engineering Ltd. ("JRS") to provide a second opinion on the 2009 engineering reports. JRS issued its report dated July 16, 2010, generally concurring with the findings of the first engineer. The JRS report was authored by Kurtis Topping, a professional engineer. Two of his recommendations relevant to this dispute were to replace the ground level waterproofing membrane and to reduce the humidity levels in four ground-level strata lots, including SL5. To reduce humidity, JRS recommended improvements to existing ground-level mechanical systems. It is unclear what, if any, of these recommendations were followed by the Strata.
- [11] In August 2012, the Strata received a report from Aqua-Coast Engineering Ltd. ("ACE") indicating the parkade membrane had failed. ACE recommended the Strata take steps to replace the entire parkade membrane or at least the areas around the perimeter building perimeter, which would include SL5.
- [12] At the Strata's annual general meeting on June 20, 2017 ("AGM"), a ¾ vote to retain an engineer to prepare specifications and tender the parking membrane replacement was approved. The June 2017 AGM minutes show a JRS representative was present to explain the process. By this time, it is clear the Strata was aware of leaks into the parkade but not into SL5.
- [13] The Strata then retained JRS to verify construction details for the parkade membrane replacement. JRS provided a report dated December 22, 2017 setting out options for the Strata to consider. There was no evidence of any known active leaks at this time, other than into the parkade. Mr. Topping, who also authored the December 2017 JRS report, provided evidence in the CRT proceeding to the effect that he was not aware of any leaks into ground-level strata lots at the time of his December 2017 inspection of the membrane.
- [14] The January 10, 2018 strata council meeting minutes report that JRS had submitted a design brief to the Strata for the parkade membrane replacement with two repair options. The minutes state the Strata was considering the less expensive option. Later, in early April 2018, JRS provided the Strata with design and specification documents for the parkade membrane replacement.
- [15] The Strata also retained JRS to complete a depreciation report under s. 94 of the SPA. The completed report dated March 13, 2018 recommended that the Strata consider, and start saving for, replacement of the parkade membrane, over the next three years.
- [16] Ms. Downing suffered a stroke in August 2017, when she 89 years old. She was living independently in SL5 at the time but, as a result of the stroke, she decided to move to an adjacent assisted living facility.

- [17] In the spring of 2018, with the assistance of her friend, Ann Barclay, Ms. Downing formulated a plan to finance the cost of the assisted living facility (about \$5,000 per month). The plan included selling SL5, investing the sale proceeds, and applying the income earned thereon towards the monthly cost. She retained a realtor, Dana Panchyshyn, who conducted a comprehensive market analysis of SL5 and then listed it for sale on April 4, 2018 for \$879,000.
- [18] Ms. Downing moved into the assisted living facility on April 1, 2018. She arranged a \$15,000 line of credit to cover her living expenses pending the anticipated sale of SL5.
- [19] Ms. Downing gave Mr. Panchyshyn a key to SL5 so that he could show it to potential purchasers. While preparing for an open house, it came to Mr. Panchyshyn's attention that there was a stain on the carpet of the second bedroom, near the window. Mr. Panchyshyn noticed some moisture in the area. He discussed this with Ms. Downing and Ms. Barclay. There was speculation that the stain could have been caused by a leak. Mr. Panchyshyn understood that the Strata was responsible for water damage to the suite. Ms. Downing and Ms. Barclay agreed that Mr. Panchyshyn would bring the matter to the attention of the strata council.
- [20] Mr. Panchyshyn contacted Monique Talle, the vice president of the strata council, about the potential leak. There is some conflict in the evidence of Mr. Panchyshyn and Ms. Talle about the communication between them.
- [21] Mr. Panchyshyn deposed that he left the key to Ms. Downing's suite under Ms. Talle's door for the purpose of having her take a look at the area to see the damage for herself. He also deposed that he recalled "addressing" the water spot in the second bedroom with Ms. Talle at some point. According to Mr. Panchyshyn, the "sole purpose for leaving the key with Ms. Talle was to inspect the damage to the Suite and report back to Ms. Downing".
- [22] Ms. Talle deposed that on or about April 16, 2018, she received a voice message from Mr. Panchyshyn, who said he wanted to show her some moisture in the second bedroom of Ms. Downing's unit and that "he wanted the strata to remedy it". She deposed that on April 16, 2018, she sent an email to the Strata's manager, Mike Chess, to advise him of Mr. Panchyshyn's request. In that email, Ms. Talle wrote, among other things, that Ms. Downing's realtor "would like us to see it [some moisture in the second bedroom] and to remedy it asap"; that she would try to look at the problem the next day and report to Mr. Chess; if "we have to do some repair that will have to be payed [sic] by the Strata", and that she thought they "could use the contractor who did similar repair [in another unit] recently and it was well done". That contractor was Rudi Nosper of Woodcraft Contracting ("Woodcraft").

[23] Ms. Talle deposed that on or about April 17 or 18, 2018, Mr. Panchyshyn showed her a soft and wet patch of drywall in the den and some wet carpeting in the second bedroom, and then he left her a key to the suite. She deposed that it "continued to be [her] understanding that he wanted the strata to inspect the leak and remedy the situation". She deposed that she contacted Woodcraft to do that.

[24] Ms. Talle deposed that on or about April 18, 2018, Woodcraft inspected the moisture in Ms. Downing's unit. There is no dispute that Ms. Talle used the key she had been given by Mr. Panchyshyn to give Mr. Nosper access to the unit for this purpose. Ms. Talle deposed that Woodcraft cut into the drywall in the den and showed her water dripping inside the wall. She said Woodcraft then discovered and showed her water in the walls and floor of the second bedroom, living room, and kitchen. She said the water appeared to be coming through the building envelope. She said that on Woodcraft's advice, she instructed Woodcraft to dry the suite out to prevent any further damage or spreading of mould and that Woodcraft removed the baseboards and opened walls for this purpose. She said moisture was also found under the cabinetry and counters, and Woodcraft told her those would have to be removed if the suite was to be dried out.

[25] There is no dispute that Woodcraft dismantled substantial portions of SL5. Carpet was pulled out, lower drywall and baseboards were removed, kitchen cabinets were dismantled, and kitchen counters were removed. In a statement that formed part of the Strata's evidence in the CRT proceeding, Mr. Nosper characterized the leaks in Ms. Downing's unit as "very apparent by the signs of water staining in the carpet". He went on to say, in part:

I conducted a review of unit 105 glass solarium area and observed significant leaks from the exterior building envelope & confirmed this by use of moisture meter & infrared scanner. I told Ms. Talle what I had observed and that to prevent further water damage and mould, that the drywall should be removed immediately to investigate the source & degree of water damage. Once removed, we applied antimicrobial spray & set up drying equipment. With further investigation along the same exterior walls, we noted that the carpet was wet & the tack strips were rusted & black with mould & stained from perhaps several years of slow seeping water ingress. I recommended that further remediation was required which would include the removal of carpeting, baseboards, cabinets and other fixtures needed to be removed so that the unit could be dried ".

[26] The Strata retained JRS to further investigate the issue in SL5. Mr. Topping attended at Ms. Downing's unit on May 4, 2018 for this purpose. In a report dated June 1, 2018, he noted multiple sources of water ingress into SL5. He recommended that the plaza waterproofing assembly around Ms. Downing's unit be replaced and that this work be incorporated into the full-scale replacement of the entire plaza waterproofing assembly. In a statement that formed part of the Strata's evidence in the CRT proceeding, Mr. Topping said, in part:

In advance of my site visit, emergency remediation work by others had been done to remove fixtures, drywall, carpet and other finishes which had been damaged within the areas where leaks had been occurring. This is necessary to confirm the extent of damage within the depth of the wall assembly and to diagnose the source of the leaks. Fans and heaters had also been placed in the unit to dry out the interior. These interim measures are commonly done to mitigate the risk of further damage to the interiors while the source of the leak is being diagnosed and permanent repairs are being carried out.

- [27] Mr. Panchyshyn deposed that when he returned to Ms. Downing's suite shortly before the next showing, he discovered that it had been significantly dismantled. He said he was "completely shocked" and immediately contacted Ms. Downing and Ms. Barclay to determine whether they had authorized the demolition. He characterized Ms. Downing and Ms. Barclay as "completely unaware and equally shocked" by what had taken place.
- [28] Upon discovering the damage to SL5, Mr. Panchyshyn took the suite off the market. He deposed that to sell it in its deconstructed state he would have had to "severely decrease the listing price" and it "would have been a distress sale". He deposed that it was initially expected that the repairs would be completed quickly and the suite would then be put back on the market.
- [29] For reasons that are not relevant to this dispute, the repairs were delayed and not completed until 2020. JRS issued a certificate of substantial completion for the SL5 work on February 4, 2020.
- [30] Mr. Panchyshyn relisted SL5 for sale on May 16, 2020 which he said was "as soon as it was reasonably possible to do so". The list price was \$809,000. He said this was lower than the initial listing price "largely because the 2018 AGM minutes disclosed significant, costly membrane replacement scenarios and because the landscaping around [Ms. Downing's] unit had changed dramatically", with a number of trees, hedges and bushes having been removed.
- [31] After reducing the list price several times, SL5 finally sold on October 29, 2020 for \$625,000.
- [32] According to Mr. Panchyshyn, if Ms. Downing's suite had been left in the condition it was in when it was initially listed, he would have "proceeded to try to sell it" notwithstanding that a water ingress problem had been identified. He deposed that "if the purchaser was at all concerned about water leakage, [he] would have proposed to resolve the issue by incorporating a holdback in the offer to purchase, which would allow the purchaser to hold back a designated amount (possibly \$25,000) potentially for up to a year, in the event the strata corporation required a special levy to conduct capital repairs". He deposed that this is what happened with another unit that sold in the building on May 23, 2018. He deposed that he "believed" that with such a holdback provision he would have been able to sell SL5 within 4 to 5 weeks.

- [33] During the two years that it took for the repairs to SL5 to be completed, Ms. Downing had to liquidate investments and secure a mortgage to cover her living expenses. She suffered significant stress and anxiety as a result of this very unfortunate series of events.
- [34] In her submissions before the CRT, Ms. Downing did not challenge the Strata's actions in relation to its statutory obligation to maintain and repair. She did not take issue with what the Strata did or did not do in terms of conducting repairs after SL5 had been, in her words, "destroyed". Rather, her claim was based on "the wrongful act of dismantling [her] unit and the consequences flowing from that wrong". She argued that the Strata was not entitled to authorize Woodcraft to enter her suite for the purpose of dismantling it. She advanced a claim for damages based on the torts of nuisance, trespass and negligence, and also alleged "significant unfairness" by the Strata as contemplated by s. 164 of the SPA. In particular, she submitted that it was negligent for the Strata (Ms. Talle) to authorize the dismantling of SL5 without a plan to promptly effect repairs, in circumstances where it was known that a large-scale membrane replacement was required, and it was known that Ms. Downing was attempting to sell her unit.

Procedural History

- [35] Ms. Downing initially commenced a petition proceeding in this Court in June 2019, seeking orders under the SPA compelling the Strata to promptly repair her suite so she could sell it. The Strata challenged the court's jurisdiction to hear the petition. Ms. Downing then amended her initial petition to add a claim for damages for trespass and mental distress, and sought an order that the petition be converted to an action. On September 27, 2019, with reasons for judgment reported at 2019 BCSC 1745, Justice Crerar stayed the initial petition pursuant to s. 16.1 of the Civil Resolution Tribunal Act, SBC 2012, c. 25 (the "CRTA") and referred the matter to the CRT pursuant to s. 16.4 of the CRTA.
- [36] On February 28, 2020, Ms. Downing submitted an application for dispute resolution to the CRT. The CRT issued a dispute notice on March 3, 2020, which initiated the CRT proceeding.
- [37] On September 24, 2020, a CRT vice chair considered two preliminary matters. First, Ms. Downing requested the CRT refer the dispute back to this Court for adjudication. The Strata objected to that request. The vice chair determined that the CRT should continue hearing the dispute. She concluded that the claims in the dispute were the same as the claims advanced in the petition stayed by Justice Crerar, and his decision to refer the dispute to the CRT was binding. Second, the Strata argued the dispute was barred by s. 13.3 of the CRTA, because it was filed too late. The vice chair found it appropriate to use her discretion under that provision to allow the dispute to continue notwithstanding the dispute notice being issued passed the 28-day deadline set by s. 13.3.
- [38] In October 2020, the parties entered the final stage in the CRT process, referred to as the "Tribunal Decision Plan stage" during which an administrator prepares the dispute for the adjudicator by collecting the parties' evidence and arguments.

- [39] By email from the CRT dated October 28, 2020, the parties were advised that they would be given two weeks from the time of the CRT's request to upload their evidence; that they would be given seven days to submit written arguments, which would be limited in length to 20,000 characters; and the applicant would then have five days to submit a final reply argument, limited in length to 10,000 characters. On the same day, counsel for Ms. Downing wrote to the CRT, raising concerns about the process. In particular, she asserted that the two-week window for marshalling the evidence and the time limits for and length of submissions were inadequate. She also specifically requested an opportunity to cross-examine Ms. Talle. Counsel for the Strata then sent an email to the CRT emphasizing the Strata's desire to have the matter resolved expeditiously, and advising that the Strata did not consent to a cross-examination of Ms. Talle or an extension for arguments.
- [40] On October 29, 2020, the parties received another email from the CRT setting specific deadlines for the exchange of evidence and arguments. The deadline for evidence from both parties was November 13, 2020. In addition, the parties were advised of the process for requesting extensions to any of the deadlines. Specifically, the email advised that the parties could request additional one-week extensions, requests for an extension longer than one week would be escalated for a decision and the other party might be asked if they object to it, and extensions had to be requested before the deadline in question passed. In this email, the administrator noted Ms. Downing's extension request and observed that she did not specify how long of an extension she was requesting. The parties were advised to be sure to specify how long an extension they are requesting if they submit such a request. There was no mention in this email about Ms. Downing's request to cross-examine Ms. Talle, and that request was not pursued by Ms. Downing.
- [41] As of November 10, 2020, neither party had submitted any evidence. On that day, the CRT sent another email to the parties reminding them about the evidence deadline and advising that if they had to submit evidence after the deadline they should email it directly to the CRT and it would be at the tribunal member's discretion to consider it or not.
- [42] It appears that both parties submitted evidence by the deadline of November 13, 2020. For example, Mr. Topping's statement is dated November 10, 2020 and Mr. Nosper's statement is dated November 12, 2020.
- [43] Ms. Downing requested an extension for her written argument. An extension of about 10 days, to November 30, 2020, was granted.
- [44] Ms. Downing then requested a character increase for her written submission from 10,000 characters to 69,423 characters. The Strata consented to her character increase request so long as it received the same increase and also an extension of two weeks to respond. Ultimately, each party was granted an extra 30,000 characters for their submissions (less than had been requested and agreed to by the parties), and the Strata was granted a two-week extension to respond to Ms. Downing's written submission.

- [445] Ms. Downing's counsel also requested an extension to submit further evidence and amended arguments. Ultimately, the deadlines were amended as follows: December 11, 2020 for evidence; December 11, 2020 for Ms. Downing's written argument; January 8, 2020 for the Strata's written response argument; and January 25, 2020 for Ms. Downing's written reply argument. In addition, the CRT granted Ms. Downing's request for a character increase for her reply argument from 10,000 characters to 14,105 characters.
- [446] By email dated January 27, 2021, the CRT advised the parties that all evidence and arguments had been received and would be forwarded to a tribunal member for a decision.
- [447] On March 22, 2021, the Decision-Maker issued the Decision.

The Decision

- [448] Following a brief introduction, the Decision-Maker addressed the CRT's jurisdiction and procedure. Among other things:

- he noted the CRT's mandate "to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly" while acting "fairly and follow[ing] the law";
- he concluded that an oral hearing was not required as he could "fairly decide the dispute based on the evidence and submissions provided";
- he summarized Justice Crerar's decision staying Ms. Downing's initial petition proceeding;
- he summarized the two CRT preliminary decisions referred to above; and
- he noted a change in the focus of Ms. Downing's claim; specifically, she conceded the Strata acted reasonably in the repair process after it discovered, in April 2018, that water was entering SL5, and she only took issue with the Strata's access to SL5 for the initial water ingress investigation and the extent of that investigation.

- [449] The Decision-Maker identified the issues at para. 26 of the Decision:

- a. Did the strata trespass on SL5?
- b. Did the strata cause nuisance to Ms. Downing?
- c. Was the strata negligent?
- d. Did the strata treat Ms. Downing in a significantly unfair manner?
- e. What is an appropriate remedy, if any?

- [450] The Decision-Maker then summarized the evidence and analysed each of the issues.

- [451] The Decision-Maker characterized the issue of whether the Strata trespassed on SL5 as "the heart of this dispute". He noted that Ms. Downing said she did not "directly or indirectly authorize the strata to take the actions it did to permit Woodcraft to investigate SL5 for water ingress" (para. 45). He summarized the evidence Ms. Downing submitted on the question of the authority given to Mr. Panchyshyn (para. 48). Having done so, he found that Mr.

Panchyshyn had the authority to bring the potential water leak to the strata council's attention and inferred that the purpose of doing so was to request "the strata to investigate the water ingress" (para. 49).

- [52] The Decision-Maker preferred Ms. Talle's evidence over that of Mr. Panchyshyn to the extent it conflicted, reasoning that (1) her affidavit was sworn closer to the event, (2) her description was most reasonable in the circumstances and better aligned with the overall evidence, and (3) granting the Strata access to SL5 without authorizing an investigation of the water ingress was unreasonable (paras. 51 - 55). In particular, he found that Ms. Talle inspected the moisture in SL5 with Mr. Panchyshyn; Mr. Panchyshyn then gave her the key to the suite so she could arrange for a further investigation in his absence; and then she asked Woodcraft to investigate. At paras. 56 -57, the Decision-Maker reasoned that "it follows that Mr. Panchyshyn was aware of and authorized access to SL5 by both the strata and Westcoast [sic, Woodcraft] for the purpose of investigating water ingress into SL5". On this basis, he concluded that the Strata did not commit trespass.
- [53] The Decision-Maker also dismissed the nuisance claim. He referred to *Allison v. Radtke*, 2014 BCSC 1832 at para. 19, for the proposition that to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both substantial and unreasonable, and *Dodsworth v. Madill*, 2019 BCSC 898 at para. 57, for the proposition that nuisance is distinct from trespass, with trespass involving direct entry onto another's land and nuisance being concerned with unreasonable interference with the enjoyment of land resulting from another's conduct elsewhere. He concluded that because the alleged interference resulted from the direct actions of the Strata in SL5 and not from the Strata's conduct elsewhere, the tort of nuisance did not apply. Further, and in any event, he found that although the Strata's investigation of SL5 resulted in a substantial interference with SL5, the steps the Strata took to investigate the water ingress were reasonable.
- [54] The Decision-Maker also dismissed the negligence claim. He correctly identified the elements of negligence: that the strata owed Ms. Downing a duty of care, that it breached the standard of care, and that Ms. Downing sustained damage as a result (para. 65). He noted that the parties agreed that the applicable standard of care is reasonableness (para. 66), and he ultimately concluded that the Strata acted reasonably.
- [55] In his analysis of the negligence claim, the Decision-Maker cited *Kayne v. LMS* 2374, 2013 BCSC 51, *John Campbell Law Corp. v. Strata Plan 1350*, 2001 BCSC 1342, and *Wright v. Strata Plan #205*, 1996 CanLii 2460 (BCSC), *aff'd* 1998 BCCA 5823, for the proposition that "if the strata corporation's contractor or consultant fails to carry out work effectively, the strata corporation should not be found negligent if it acted reasonably in the circumstances". He accepted Mr. Nosper's statement that it was at his direction that Ms. Talle approved the extent of the investigation, noting this was not challenged by Ms. Downing. He also relied on Mr. Topping's evidence, which the Decision-Maker said "confirmed the extent of investigation in SL5 was required to determine the exterior water leaks". He found Mr. Topping's statement met "the qualifications of expert evidence under CRT rule 8.3", and he

noted Mr. Topping's witness statement was not challenged by Ms. Downing. On the basis of this evidence he found that the Strata "relied on Woodcraft and JRS when it approved the extent of the investigation" to determine the cause of the water ingress. He found the Strata was not negligent because it acted on advice it received from professionals during the investigation of SL5 (para. 73), and its actions in attending to the investigation were reasonable and initiated by Ms. Downing's request (para. 70).

[56] As an aside, the Decision-Maker also found the Strata had a duty to mitigate any potential insurance claim that might have been triggered under its insurance policy, including a duty to investigate the possibility of water ingress from a common property source (para. 74).

[57] In conclusion on the negligence claim, the Decision-Maker stated, at para. 78:

[The Strata] could not ignore the water ingress and pretend it did not happen. I find the strata had to complete its investigation in order to determine the source of the water leak. Taking no action would not be reasonable and may have been negligent.

[58] Next, the Decision-Maker addressed Ms. Downing's claim that she had been treated in a significantly unfair manner by the Strata. In her submissions on the judicial review application, Ms. Downing explained that "the concept of significant unfairness comes from section 164 of the SPA" which provides, in material part, that this Court "may make any interim or final order it considers necessary to prevent or remedy a significantly unfair action or threatened action by, or decision of, the strata corporation".

[59] The Decision-Maker dismissed the claim for significant unfairness on the merits. At para. 81, he cited *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126, *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, and *Kunzler v. The Owners, Strata Plan EPS 1433*, 2020 BCSC 576, for the proposition that to ground a significant unfairness claim the Strata must have acted in a way that was "burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust or inequitable". He said he understood Ms. Downing's argument to be that it was significantly unfair for the Strata to investigate SL5 for water ingress and not investigate other strata lots. He noted, again, that the Strata responded to Ms. Downing's request and followed the advice of its professionals, completed the investigation, and determined the source of the water ingress. He found that the Strata did not single out SL5 or Ms. Downing, noting there was no evidence of any leaking in any other ground level strata lot.

[60] Although it was not necessary to do so given his dismissal of each of Ms. Downing's claims, the Decision-Maker also found that Ms. Downing did not prove that she would have had to discount the price of her suite in order to sell it during the repair period or that any alleged discounted price was solely related to the Strata's investigation of SL5 and not other repairs, such as the entire parkade membrane repair (para. 87). He stated that there was no evidence "Ms. Downing attempted to sell her strata lot during the repair period and no evidence on the sale potential during the repair period".

Standard of Review

- [61] Before October 28, 2021, the standard of review for strata property decisions of the CRT was correctness: *The Owners, Strata Plan BCS 435 v. Wong*, 2020 BCSC 1972 at paras. 51 and 61; *West v. The Owners, Strata Plan BCS 2637*, 2021 BCSC 824 at para. 34.
- [62] After the first day of the hearing of this petition (October 25, 2021) but before the continuation of the hearing (March 3 - 4, 2022), the standard of review was amended by statute, with retrospective effect: *Miscellaneous Statutes Amendment Act (No. 2)*, 2021, S.B.C. c. 27, ss. 1 and 23. Pursuant to s. 56.7 of the CRTA, with an exception not relevant here, the patently unreasonable standard of review now applies to findings of fact or law or an exercise of discretion by the CRT for claims in respect of which the CRT "is considered to have specialized expertise", while questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all the circumstances, the CRT acted fairly. Sections 116 and 121(2) of the CRTA stipulate that the CRT has specialized expertise in strata claims.
- [63] There is no dispute between the parties as to the applicable standards of review; however, they departed somewhat in their submissions concerning the interpretation of the patently unreasonable standard.
- [64] Ms. Downing urges an interpretation of the patently unreasonable standard that is informed by the more context-driven common law standard of reasonableness as discussed in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. While acknowledging that the patently unreasonable standard is the most deferential standard of review, she argues that the degree of deference to be accorded to an administrative decision-maker depends on the context. She submits that the degree of deference to be accorded to the Decision-Maker in this case is attenuated by the fact that the claims were based on common law torts and not an interpretation of the SPA, and the fact that the Decision-Maker is not a lawyer.
- [65] Citing the recent decision of a five-judge division of our Court of Appeal in *The College of Physicians and Surgeons of British Columbia v. The Health Professions Review Board*, 2022 BCCA 10 at paras. 129-131 [College of Physicians], the CRT and the Strata submit that the patently unreasonable standard of review has "remained stable" and has not been altered by developments in the common law reasonableness standard.
- [66] I agree with the CRT and the Strata on this point. In my view, *College of Physicians* at paras. 129 - 131, and the cases referred to therein, provides a clear explanation of the patently unreasonable standard that must be applied in this case:
- [129] While there have occasionally been calls for judicial reinterpretation of the patent unreasonable standard (see, for example, Paul Daly, "Patent Unreasonableness After *Vavilov*", 2021 CanLIIDocs 654), this Court has not reinterpreted the standard. In *Team Transport Services Ltd. v. Unifor, Local No. VCTA*, 2021 BCCA 211, Saunders J.A., speaking for the Court said:

- [27] [A] court may only interfere with a decision of the Board when the court is satisfied that the Board's decision is patently unreasonable. That standard continues to apply notwithstanding developments of the common law standards of review, and it continues to mean what it meant when the Administrative Tribunals Act came into force: *Red Chris [Red Chris Development Company Ltd. v. United Steelworkers, Local 1-1937, 2021 BCCA 152]* at para. 29.
- [28] Patent unreasonableness is the standard that is most highly deferential to the decision maker. There are many descriptions of the standard. The explanation found in *Victoria Times Colonist v. Communications, Energy and Paperworkers, 2008 BCSC 109* (aff'd *Victoria Times Colonist, a Division of Canwest Mediaworks Publications Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 25-G, 2009 BCCA 229*) is useful:
- [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.
- [29] In other words, the standard is at the most deferential end of the reasonableness standard .
- [130] The patently unreasonable standard remains the most deferential standard of review known to Canadian law. Because it lies at the constitutional limit of deference to a tribunal, its definition has remained stable. This is in contrast to the definition of the "reasonableness" standard, which has gradually been refined.
- [131] In *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, the Supreme Court of Canada described the standard as follows:
- [28] A legal determination like the interpretation of a statute will be patently unreasonable where it "almost border[s] on the absurd": *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92, 2004 SCC 23, [2004] 1 S.C.R. 609*, at para. 18. In the workers' compensation context in British Columbia, a patently unreasonable decision is one that is "openly, clearly, evidently unreasonable": *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80, 46 B.C.L.R. (4th) 77, at para. 33; *Vandale v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2013 BCCA 391, 342 B.C.A.C. 112, at para. 42 (emphasis deleted).

[67] In summary, questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all the circumstances, the CRT acted fairly, while the patently unreasonable standard of review now applies to findings of fact or law or an exercise of discretion by the CRT. In applying the patently unreasonable standard of review, the operative principles are:

- a legal determination will be patently unreasonable where it almost borders on the absurd; and
- if there is a "rational or tenable line of analysis supporting [a] decision" such that the decision is not "clearly irrational", the decision is not patently unreasonable even if there are aspects of the reasoning that I consider flawed or unreasonable, I am not persuaded by the analysis, or I disagree with the conclusion.

Issues

[68] The focus of Ms. Downing's submissions changed somewhat, but not entirely, between the first day of the hearing on October 25, 2021 and the continuation of the hearing on March 3 and 4, 2022, because of the change in the standard of review applicable to findings of fact or law or an exercise of discretion by the CRT. From her original submissions and her supplemental submissions, the issues she ultimately raised may be distilled as follows:

1. Was the Decision-Maker's conclusion that Ms. Downing had not established trespass patently unreasonable because:
 - (a) the Decision-Maker failed to account for, and give reasonable consideration to, Ms. Downing's evidence to the effect that she did not authorize anyone to enter her unit for the purpose of "taking anything apart or otherwise remov[ing] anything";
 - (b) he failed to address the scope of Ms. Downing's consent to the Strata entering her unit;
 - (c) he failed to address whether Mr. Panchyshyn, as Ms. Downing's real estate agent, had the authority to provide consent to an investigation that resulted in such a substantial interference with Ms. Downing's unit; and
 - (d) there is an obvious inconsistency between his finding that Ms. Downing consented and his acceptance that the extent of the Strata's investigation was not what she was expecting?
2. Was the Decision-Maker's conclusion that Ms. Downing had not established negligence patently unreasonable because:
 - (a) the Decision-Maker "invented and substituted a remote and inchoate 'duty to mitigate' [a potential insurance claim] to justify the Strata's 'destructive actions'";
 - (b) in addressing the reasonableness of the Strata's conduct, he ignored the fact that the Strata knew Ms. Downing was intending to sell her unit and that its conduct would "foreseeably prevent her from effecting a sale";

- (c) he found the Strata relied on both Woodcraft and JRS when it approved the extent of the investigation but, in fact, the damage was done before JRS conducted any investigation;
 - (d) he imported consent into the analysis of the reasonableness of the Strata's conduct which "requires an analysis of informed consent and engages all of the conflicting evidence" about the scope of Ms. Downing's consent;
 - (e) he found the Strata was justified in relying on the advice of Woodcraft, a carpenter, instead of an engineer; and
 - (f) his reasoning was based on a false dilemma; specifically, that the only alternative to the Strata immediately investigating by dismantling Ms. Downing's unit was for the Strata to do nothing?
3. Was the Decision-Maker's conclusion that Ms. Downing had not established damage patently unreasonable because he ignored Mr. Panchyshyn's evidence of the impact the dismantling of the unit had on its marketability and value?
4. Was the CRT process procedurally unfair because:
- (a) the Decision-Maker arbitrarily and unequally accepted some of the evidence as expert evidence;
 - (b) there was an arbitrary limit on the number of characters for written submissions;
 - (c) Ms. Downing did not have the opportunity to cross-examine Ms. Talle; and
 - (d) the parties were required to simultaneously submit their evidence within a short time frame and then the Decision-Maker relied on the fact that some of the Strata's evidence was not challenged or responded to by Ms. Downing in giving weight to that evidence?
5. If the Decision was patently unreasonable or unfair, should I substitute my own decision on the merits for that of the CRT or, instead, should the matter be remitted back to the CRT?
- [69] For the reasons expressed below, I have concluded that the Decision was neither patently unreasonable nor procedurally unfair. In the circumstances, it is not necessary for me to address issues numbered 3 and 5.

Analysis

Was the Decision-Maker's conclusion that Ms. Downing had not established trespass patently unreasonable?

- [70] The dispositive finding on the trespass claim was that Mr. Panchyshyn, on Ms. Downing's behalf, authorized the Strata to enter SL5 for the purpose of investigating the water ingress (paras. 46 and 56).

- [71] Contrary, to Ms. Downing's submissions, the Decision-Maker did not fail to account for or reasonably consider her evidence about the scope of the authority given to the Strata, or whether Mr. Panchyshyn was authorized to instruct the Strata on her behalf.
- [72] Although Ms. Downing deposed that she did not "instruct anyone to enter [her] Suite for the purpose of taking anything apart or otherwise remov[ing] anything", she relied on other evidence (that of Ms. Barclay, Mr. Panchyshyn, and her son, Mr. Downing) about the nature of the authority she did provide. That evidence was expressly considered by the Decision-Maker at paras. 48 and 49 of the Decision. He observed that this evidence established that Ms. Barclay and Mr. Downing suspected a water leak and Mr. Panchyshyn noted that moisture was present. He noted Mr. Panchyshyn's evidence that after consultation with Ms. Barclay and Ms. Downing, there was agreement that he bring the likely water leak to the attention of the strata council. From this he concluded that Ms. Downing did authorize Mr. Panchyshyn to "report [her] wishes to the strata on her behalf" (para. 48). He then drew the inference that this was to "request the strata to investigate the water ingress" (para. 49). That is a reasonable inference in the circumstances; certainly, it is not clearly irrational.
- [73] In addition, the Decision-Maker preferred the evidence of Ms. Talle over that of Mr. Panchyshyn where it conflicted. At paras. 53-55, he gave reasons for doing so: Ms. Talle's evidence was given closer in time to the event, it was more reasonable, and it better aligned with the overall evidence. This is not clearly irrational.
- [74] In her submissions on the judicial review application, Ms. Downing complained that the Decision-Maker failed to specifically address the scope of her consent, drawing a distinction between consenting to an inspection and minor repair, on the one hand, and consenting to changes that rendered the suite inhabitable and unsaleable, on the other. She relied on an excerpt from Fleming's the Law of Torts (Caroline Sappideen, Prue Vines, Fleming's The Law of Torts, 10th ed. (Australia: Thompson Reuters, 2011) concerning the defence of consent to an intentional tort. At para. 5.40, the author states:

Consent is no defence, unless it is given to the conduct in question, or at least to acts of a substantially similar nature. One who challenges another to a fist fight does not sanction an attack with a knife; boxers and wrestlers agree to violent bodily contact typical of the sport, but not to deliberate foul play. Nor is a surgeon, charged with the particular operation, justified to depart from instructions and perform a different one; the only occasion which would justify proceeding without prior authority is when it is "necessary to save the life or preserve the health of the patient". In other words, here the balance between preservation of life and self-determination is found in authorizing medical procedure only when it would be unreasonable, not just inconvenient, to postpone until consent could be sought. Justification for this is found not in fictitiously imputing to the patient consent, obviously not given, but in the humanitarian duty of the medical profession.

[75] The Decision-Maker did not expressly consider the distinction between consenting to an inspection and minor repair, on the one hand, and consenting to changes that rendered the suite inhabitable and unsaleable, on the other. However, he did not find that Ms. Downing merely consented to an inspection and minor repair. He found that she consented to an investigation of the water ingress. There was evidence before him, that he accepted, to the effect that the extent of the investigation conducted by Woodcraft was not only reasonable but "required to determine the exterior water leaks" (para. 72). In other words, he was satisfied that the investigation, which was authorized, did not exceed what was reasonable in the circumstances.

[76] In his analysis of Ms. Downing's nuisance claim at para. 62, the Decision Maker said:

I would find the strata took reasonable steps to investigate at the request of Ms. Downing, following the advice of its professionals. I accept the extent of the strata's investigation was not what Ms. Downing was expecting, but that does not mean the strata's actions were a nuisance.

Ms. Downing submitted that there is an obvious inconsistency between the finding that she consented and his acceptance that the extent of the Strata's investigation was not what she was expecting.

[77] I do not agree. Again, the Decision-Maker found that the Strata was authorized to investigate and that the investigation did not exceed what was reasonable in the circumstances. He did not expressly state that the authorization to investigate extended to doing whatever was reasonably required to properly investigate, but that is reasonably, if not necessarily, implied from the Decision as a whole. In other words, the implication that an authorization to investigate extends to doing whatever is required to investigate properly cannot be characterized as irrational. That Ms. Downing was surprised by the extent of the investigation that was reasonably required to determine the cause and extent of the water ingress does not mean she did not consent to an investigation for that purpose.

[78] For these reasons, I am not persuaded that the Decision-Maker's conclusion that that Ms. Downing did not establish trespass was patently unreasonable.

Was the Decision-Maker's conclusion that Ms. Downing had not established negligence patently unreasonable?

[79] As discussed, the Decision-Maker correctly identified the elements of negligence and noted that the parties agreed that the applicable standard of care is reasonableness. He found that the extent of the investigation conducted by Woodcraft did not exceed what was reasonably required to determine the extent of the water ingress problem. He concluded that the Strata was not negligent (in other words, that the Strata acted reasonably) because, in responding to Mr. Panchyshyn's request that it investigate, it reasonably followed advice it received from professionals.

- [80] Ms. Downing submits that the Decision-Maker "invented and substituted a remote and inchoate 'duty to mitigate' [a potential insurance claim] to justify the Strata's destructive actions". Again, in addition to finding that the Strata acted reasonably in response to Ms. Downing's request (relayed through Mr. Panchyshyn), the Decision-Maker also found the Strata had a duty to mitigate any potential insurance claim that might have been triggered under its insurance policy, including a duty to investigate the potential water ingress from a common property source. This finding was clearly stated as an alternative to the conclusion that, irrespective of any such duty to mitigate an insurance claim, the Strata acted reasonably in response to Ms. Downing's request that it investigate. Leaving aside whether it is correct to characterize the Decision-Maker's alternative finding as the invention and substitution of a remote and inchoate duty, it does not affect the soundness of his primary conclusion that the Strata acted reasonably; in other words, it does not render his dismissal of the negligence claim patently unreasonable.
- [81] Ms. Downing says that, in addressing the reasonableness of the Strata's conduct, the Decision-Maker ignored the fact that she was intending to sell her unit.
- [82] The Decision-Maker was aware that Ms. Downing was intending to sell and that she claimed to be unable to sell as a result of the Strata's conduct. This is mentioned expressly in the Decision at para. 4. It is true that in his analysis of the negligence claim, the Decision-Maker did not address the fact that Ms. Downing was intending to sell. However, that does not render his conclusion that the Strata acted reasonably in response to the request that it investigate clearly irrational. To the contrary, it could be argued that once a water leak was suspected an intention to sell would justify a more extensive investigation than might otherwise be justified because of the potential impact of a latent defect on an unsuspecting purchaser.
- [83] Ms. Downing submits that the Decision-Maker incorrectly found the Strata relied on both Woodcraft and JRS when it approved the extent of the investigation but the damage was done by Woodcraft before Mr. Topping of JRS conducted his investigation.
- [84] It is true that the damage to Ms. Downing's unit was done in the course of Woodcraft's investigation, before Mr. Topping arrived at the site. The Decision-Maker was aware of this sequence. At paras. 39 and 40 of the Decision, he summarized Woodcraft's involvement commencing April 18, 2018 and the extent of the investigation Woodcraft conducted, and then, at para. 41, he noted that Mr. Topping attended the suite on May 4, 2018.
- [85] It is also correct that in his analysis of the negligence claim, the Decision-Maker stated that the Strata "relied on Woodcraft and JRS when it approved the extent of the investigation" (para. 73). However, this does not render his dismissal of the negligence claim patently unreasonable. First, it is not clear that this statement evidences an error on the part of the Decision-Maker about the timing of JRS's involvement. As noted, he was clearly aware of the timing of Woodcraft's and JRS's involvement, and he found that "the initial inspection of SL5, remediation, and subsequent repairs are 'all inextricably linked'" (para. 22). It may be

that his statement that the Strata relied on both Woodcraft and JRS was intended to apply to this broader, inextricably linked process. Second and in any event, even if the Decision-Maker's statement that the Strata relied on both Woodcraft and JRS reflected a mistake on his part about the timing of JRS's involvement (and thus a flaw in his reasoning), the undisputed fact that the Strata relied on Woodcraft provides a rational line of analysis supporting the conclusion that the Strata acted reasonably. Again, the Decision-Maker expressly noted that it was at the direction of Woodcraft's president (Mr. Nosper) that Ms. Talle approved the extent of the investigation and that Mr. Topping later confirmed that the extent of the investigation was as required (para. 72).

- [86] Ms. Downing submits that the Decision-Maker imported consent into the analysis of the reasonableness of the Strata's conduct which "requires an analysis of informed consent and engages all of the conflicting evidence" about scope of Ms. Downing's consent. As I have noted, the Decision-Maker's conclusion on the negligence claim was based on his finding that the Strata acted reasonably in response to Ms. Downing's request. For the reasons expressed above in discussing the trespass claim, after expressly considering Ms. Downing's evidence about the nature and scope of her consent, the Decision-Maker reasonably concluded that Ms. Downing authorized Mr. Panchyshyn to ask the Strata to investigate the water ingress. Accordingly, the consent analysis does not render his decision that the Strata acted reasonably in response to Mr. Panchyshyn's request clearly irrational.
- [87] Ms. Downing submits that it was patently unreasonable for the Decision-Maker to find that the Strata was justified in relying on the advice of Woodcraft, a carpenter, instead of an engineer. She argues that the Decision-Maker "referred to no jurisprudence on the issue of whether a carpenter had the necessary expertise and qualifications to advise the Strata regarding its legal obligations to maintain and repair common property under the Strata Property Act". This submission is simply incorrect. The Decision-Maker referred to *Wright v. Strata Plan #205*, a decision of this Court finding that a strata corporation was not negligent in reasonably relying on a contractor to repair water leakage.
- [88] In any event, I am not persuaded that it was clearly irrational for the Decision-maker to conclude that it was reasonable for Ms. Talle to follow Mr. Nosper's advice. There was evidence that Mr. Nosper had worked on another unit in the Strata and done a good job; that Mr. Nosper is a red seal journeyman carpenter with many years experience with flood restoration projects; and that when Woodcraft first cut into the drywall in the den of Ms. Downing's unit Ms. Talle saw "water dripping inside the wall", and Woodcraft subsequently showed her "water in the walls and floor of the second bedroom, living room, and kitchen". In the circumstances, I have no difficulty concluding that the Strata's reliance on Woodcraft's advice concerning the extent of the investigation provides a rational line of analysis supporting the Decision-Maker's conclusion on the negligence claim.
- [89] Ms. Downing submits that the Decision-Maker's conclusion on the negligence claim was patently unreasonable because it was based on a false dilemma; specifically, the assumption that the only alternative to the Strata immediately investigating by dismantling Ms.

Downing's unit was for the Strata to do nothing. She argues that no owner would tear apart their own home without first developing a plan and securing funding to fix the problem. As I understand it, she argues that, having been alerted to a water ingress problem in SL5, the Strata should not have taken steps to determine the extent of the problem or to prevent further water damage but rather should have left the unit as it was, and developed a plan to further investigate and repair the problems as part of the anticipated large-scale parkade membrane replacement.

[90] In my view, this submission does not reflect the extent of the Decision-Maker's reasoning or the evidence that a significant leakage problem was uncovered in the initial phase of Woodcraft's investigation. Although a large-scale parkade membrane replacement was anticipated, the Strata did not know that water was actively leaking into SL5 until Ms. Talle was alerted to the problem by Mr. Panchyshyn. As I have explained, the Decision-Maker concluded that the Strata was asked by Ms. Downing (through Mr. Panchyshyn) to investigate water ingress into SL5, that the Strata relied on the advice of Woodcraft in approving the extent of the investigation required, that the correctness of Woodcraft's advice was corroborated by Mr. Topping, and that, in the circumstances, the Strata's conduct was reasonable. Ms. Downing did not point to evidence of an alternative course of action that would render this conclusion clearly irrational. To the contrary, it is challenging to imagine an alternative, reasonable course of action given that, upon entering Ms. Downing's unit, Mr. Nosper observed wet carpet and rusted and mouldy tack strips and confirmed significant leaks through the use of a moisture meter and infrared scanner, and that Ms. Talle personally observed water dripping inside the wall when the drywall in the den was opened.

[91] For these reasons, I am not persuaded that the Decision-Maker's conclusion that that Ms. Downing did not establish negligence was patently unreasonable.

Was the CRT process procedurally unfair?

[92] As discussed, the standard of review for questions of procedural fairness is prescribed by s. 56.7(2)(b) of the CRTA: such questions must be decided having regard to whether, in all the circumstances, the CRT acted fairly.

[93] Administrative decision makers are bound by the rules of natural justice and procedural fairness, the nature and extent of which is variable, flexible, and context-specific: Vavilov at para. 77. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 21-28, the Supreme Court of Canada identified five non-exhaustive factors that influence the procedural rights afforded to participants in administrative decision-making processes and may be used to determine the level of procedural fairness required in a given context:

1. the nature of the decision and the process followed in making it;

2. the nature of the statutory scheme, including whether or not there is a right of appeal when the decision is a final decision;
3. the importance of the decision to the person affected;
4. the legitimate expectations of the person challenging the decision; and
5. the choices of procedure made by the agency itself, giving weight to its institutional constraints.

[94] With respect to the first of these factors, the Supreme Court of Canada said, in *Baker* at para. 23, that the more the process, function, and nature of the decision-making body, and the determinations it makes, resemble judicial decision-making, the more likely it is that procedural protections closer to the court model will be required. Although the CRT has a statutorily mandated role to assist in the resolution of disputes (CRTA, s. 23) and the CRT Rules provide for negotiation and facilitation processes during the case management phase (Rules, Part 5), if an agreement is not reached and the dispute proceeds to the decision phase, the process is similar to a judicial process. Among other things, the Rules provide for the framing of the issues in a dispute notice and dispute response, the service of documents, a process for adding parties to the dispute, the consequences of failing to respond to a dispute notice, a process for withdrawing claims, disclosure procedures, procedures for obtaining evidence from third parties, the permissibility of expert evidence, the production of witness lists, and the hearing process. Although there is procedural flexibility, parties generally represent themselves, and the tribunal is not bound by the rules of evidence (CRTA, s. 42), the process itself is nevertheless court-like. Similarly, the decisions made by the CRT, such as small claims disputes, vehicle accident disputes, and strata property disputes, are in the nature of decisions made by courts. All of this suggests that a relatively high level of procedural fairness is required.

[95] In addition, the third *Baker* factor (the importance of the decision to the person affected) suggests that, for at least some disputes resolved by the CRT, a relatively high level of procedural fairness is required. This case, which arose from events that had a significantly negative impact on Ms. Downing's enjoyment of life and gave rise to a claim for damages of almost \$500,000, provides a compelling example of the importance of some CRT decisions.

[96] On the other hand, the second *Baker* factor (the nature of the statutory scheme) highlights the need for balance between procedure, on the one hand, and timeliness and accessibility, on the other. For example, s. 2(2) of the CRTA identifies the CRT's mandate as resolving disputes in a manner that is "accessible, speedy, economical, informal and flexible"; while s. 18 requires that a proceeding "be conducted with as little formality and technicality and with as much speed as permitted by a proper consideration of the issues in dispute". In *Allard v. The Owners, Strata Plan VIS 962*, 2019 BCCA 45 at paras. 30-33, the Court of Appeal recognized that the proportionality principle for adjudicating disputes (which recognizes that a fair process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts in a manner that is proportionate, timely

and affordable) is consistent with the mandate of the CRT as expressed in the CRTA, and that the CRT "enjoys a significant degree of procedural flexibility [which] further accords with the proportionality principle". All of this indicates a need for a level of procedural fairness that is attenuated by the reality that for many disputes fairness requires a process that is accessible, timely, and affordable.

- [97] In summary then, a consideration of the relevant Baker factors indicates that a fairly high level of procedural fairness is required of the CRT, but also that the proportionality principle must be emphasized in assessing the fairness of its processes.
- [98] As mentioned, Ms. Downing raises procedural concerns relating to the Decision-Maker's treatment of expert evidence, the limit imposed on the length of written submissions, the lack of cross-examination of Ms. Talle, and the requirement that the parties simultaneously submit their evidence. I will deal with each in turn.
- [99] Ms. Downing submits that the Decision-Maker arbitrarily and unequally accepted Mr. Topping's evidence as expert evidence but ignored Mr. Panchyshyn's evidence. There is merit to this complaint.
- [100] As already discussed, in dismissing the negligence claim the Decision-Maker relied on Mr. Topping's opinion that the extent of the investigation conducted by Woodcraft was required. The Decision-Maker found that this opinion met the requirements of expert evidence under CRT Rule 8.3. In contrast, in finding that Ms. Downing did not prove that she would have had to discount the price of her unit in order to sell it during the repair period, the Decision-Maker stated that there was "no evidence on the sale potential during the repair" when, in fact, there was such evidence. Mr. Panchyshyn, a realtor with extensive experience selling real estate in North Vancouver, deposed that to sell Ms. Downing's unit in the state it was in after Woodcraft's investigation he "would have had to severely decrease the listing price" and "[i]t would have been a distress sale". However, because Ms. Downing's claims were dismissed on the merits, this error on the part of the Decision-Maker did not prejudice Ms. Downing. In other words, that the Decision-Maker overlooked an aspect of Mr. Panchyshyn's evidence had no impact on the result.
- [101] Ms. Downing also submits that it was unfair for the Decision-Maker to accept Mr. Topping's evidence as expert evidence because some of the requirements of CRT Rule 8.3 were not met. Specifically, CRT Rule 8.3(1)(a) provides that a party may not rely on expert opinion unless the party provides the expert's evidence to all other parties within 21 days of the case manager notifying the parties that facilitation has ended, and CRT Rule 8.3(4) provides that a party providing expert opinion evidence must provide a copy of the expert's invoice and any correspondence with that expert relating to the requested opinion to every party unless the tribunal directs otherwise.
- [102] There is some merit to this complaint but, in my view, it did not have any material impact on the fairness of the CRT process. Mr. Topping's witness statement was submitted on or about November 10, 2020, the evidence deadline was extended to December 11, 2020, and

the record was not provided to the Decision-Maker until late January 2021. Ms. Downing had sufficient notice of the Strata's intention to rely on Mr. Topping's evidence, which clearly expressed an opinion about the necessity of Woodcraft dismantling Ms. Downing's suite to the extent it did, and she did not object to it. Further, there was no suggestion in the submissions made on Ms. Downing's behalf on the judicial review application to the effect that Mr. Topping was not qualified to express the opinion he expressed or that he was not independent. Rather, her complaint focused on the fact that Mr. Panchyshyn's evidence was ignored. This suggests that Ms. Downing did not consider herself to have been prejudiced by any failure to meet the strict requirements of CRT Rule 8.3.

- [103] Ms. Downing asserts that the limit imposed on the length of written submissions was arbitrary and therefore unfair. I do not agree. Ms. Downing was granted leave to file written submissions that exceeded the length initially imposed by the CRT, although to a lesser extent than she had requested. Her initial written submission was about 19, single-spaced pages in length. A limit on the length of written submissions is common in many courts, including our Court of Appeal. Accordingly, the mere fact that there was a limit does not give not give rise to unfairness, and there was no suggestion in the submissions made on Ms. Downing's behalf on the judicial review application to the effect that she was prejudiced by the limit in the sense that it prevented her from advancing an argument that she otherwise would have advanced.
- [104] Ms. Downing submits that the CRT process was unfair because she did not have the opportunity to cross-examine Ms. Talle. Her counsel submitted a request to cross-examine Ms. Talle and did not receive a response. Instead, the Decision-Maker pronounced at para. 11 of the Decision that he was satisfied an oral hearing was not required because he could "fairly decide the dispute based on the evidence and submissions provided".
- [105] The mere inability to cross-examine a witness does not give rise to unfairness. Issues of credibility are routinely addressed on written records by many tribunals and also by courts. In this case, as already discussed, the Decision-Maker expressly provided a reasoned, and reasonable, basis for preferring Ms. Talle's evidence over that of Mr. Panchyshyn.
- [106] Ms. Downing's complaint about being unable to cross-examine Ms. Talle is similar in nature to her complaint that the CRT's simultaneous submission process for evidence was unfair because it prevented her from challenging the evidence of Mr. Nosper and Mr. Topping.
- [107] Ms. Downing's request to cross-examine Ms. Talle was made in an email to a CRT administrator fairly early on in the process and, when no response was received, she did not renew her request, which suggests that she did not consider a cross-examination of Ms. Talle to be important. Similarly, Ms. Downing received the evidence of Mr. Nosper and Mr. Topping by about mid November 2020 and the deadline for the submission of evidence was ultimately extended to December 11, 2020. She could have challenged their evidence if she thought it was important to do so. Further, Ms. Downing asks me to decide the merits of her claims on the same evidentiary record that was before the Decision-Maker which is a clear

indication that she does not consider it necessary to cross-examine Ms. Talle or challenge the evidence of Mr. Nosper and Mr. Topping. In the circumstances, I am not persuaded that Ms. Downing was prejudiced by an inability to cross-examine Ms. Talle or a failure to respond to the evidence of Mr. Nosper and Mr. Topping.

[108] For these reasons, I am not persuaded that the CRT process was procedurally unfair.

Conclusion

[109] The Decision-Maker's conclusion that Ms. Downing did not establish a claim in trespass was not patently unreasonable. The Decision-Maker's conclusion that Ms. Downing did not establish a claim in negligence was not patently unreasonable. I am not persuaded that CRT process was procedurally unfair. Ms. Downing's petition is dismissed.

[110] As is appropriate in this case, the CRT does not seek costs. As the successful party, the Strata is entitled to its costs against Ms. Downing.

"Warren J."

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