

CANADA / JUDGMENT

Guevara v. Louie

2020 BCSC 380

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Supreme Court of British Columbia

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2020 BCSC 380 Guevara v. Louie

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Guevara v. Louie,

2020 BCSC 380

Date: 20200316

Docket: S1910794

Registry: Vancouver

Between:

Ana Guevara

Petitioner

And

Josephine Louie

Respondent

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

Counsel for Petitioner:

A. Muter

Counsel for Respondent:

C. Anninos

Place and Date of Hearing:

Vancouver, B.C.

January 10, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 16, 2020

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Introduction

[1] The petitioner, Ana Guevara, applies pursuant to the Judicial Review Procedure Act, RSBC 1996 c. 241, for an order setting aside the following decisions of arbitrators appointed pursuant to the Residential Tenancy Act, SBC 2002 c. 78, [RTA]:

1. The decision of an Arbitrator made on September 4, 2019 (the "Decision"), granting the respondent landlord Josephine Louie an order for possession of a residential premises in Coquitlam, British Columbia (the "Premises"), that was occupied by Ms. Guevara pursuant to a residential tenancy agreement.
2. The decision of Arbitrator Vaughn (the "Review Arbitrator") dated September 12, 2019 (the "Review Consideration Decision"), dismissing Ms. Guevara's application to review the Decision.

[2] For the reasons that follow I find that the Decision should be set aside and an order made dismissing Ms. Louie's application for possession of the Premises.

Background

- [3] Ms. Guevara has been a tenant of the Premises since 2009. Ms. Guevara first moved into the Premises with her husband and family. Ms. Guevara's husband died in 2015 but she continued to occupy the Premises after his death.
- [4] The parties executed a number of residential tenancy agreements throughout Ms. Guevara's occupancy of the Premises. The most recent was executed on March 31, 2017, between Ms. Louie as landlord, and Ms. Guevara and Cole Hayman as tenants for a two-year term ending April 1, 2019. At the end of the term, the tenancy continued on a month-to-month basis.
- [5] Clause 3(a) of the tenancy agreement provided that the rent of \$1460 per month should be paid on the first day of each month of the tenancy.
- [6] Ms. Guevara had made monthly rent payments by cheque until sometime in 2015. Thereafter, by agreement with Ms. Louie, Ms. Guevara made the payments by e-transfers through her bank.
- [7] Once payment of rent by e-transfer was established, the practice was for Ms. Guevara to send an e-transfer of the rent to Ms. Louie using Ms. Louie's Hotmail email address, upon which Ms. Louie would accept the e-transfer and deposit it into her bank account. On a number of occasions, Ms. Louie either did not receive, or was unable to deposit, the e-transfers on the first day of the month. While this occurred a few times in 2017, Ms. Louie nonetheless accepted the payments, which appear to have been received by her on the second, third or fourth day of the month. Ms. Louie accepted the payments without complaint, although there is evidence of the occasional "friendly reminder." In October 2017, upon request of Ms. Guevara, whose income was being affected by a labour dispute, Ms. Louie accepted payment of rent on the fifth day of the month.
- [8] It appears that, up until the summer of 2018, there was a cordial and friendly relationship between Ms. Louie and Ms. Guevara.
- [9] The events that gave rise to this dispute appear to have begun in August 2018. For the purposes of this judicial review, it is necessary I provide an overview of the events and communications that transpired between the parties beginning in August 2018, and culminating in Ms. Louie's notice to end tenancy in June 26, 2019.
- [10] In August 2018, the Coquitlam fire Department inspected the Premises and informed Ms. Guevara of the obligation to install working smoke detectors. Ms. Guevara informed Ms. Louie of this obligation and Ms. Louie agreed to attend to installing the smoke detectors. At that time, Ms. Guevara also raised other concerns about the Premises, including the fact that the sundeck had fallen into disrepair.
- [11] On September 3, 2018, Ms. Louie sent an email to Ms. Guevara stating:
- Just a friendly reminder, can we have the e transfer by tomorrow?

Thanks

- [12] On the same day, Ms. Guevara responded with an email stating that she had sent the e-transfer on September 1, 2018, and said she would try to see what the issue was when she returned home that day. That evening, Ms. Guevara sent a further email saying that she had looked into the matter and her records indicated that the e-transfer had in fact been sent on September 1, 2018, but that she had just sent a second e-transfer to Ms. Louie. She asked Ms. Louie to deposit only one of the e-transfers if two appeared in her email inbox. In the same email, Ms. Guevara mentioned she had deducted from the e-transferred rent payment the cost of newly purchased smoke detectors and a replacement lock for a broken bathroom door on the Premises, for a total rent deduction of \$89.30. Ms. Guevara stated that she would provide Ms. Louie with the receipts for these purchases when the parties met on September 8, 2018.
- [13] In a reply email later that same evening of September 3, 2018, Ms. Louie thanked Ms. Guevara for the transfer and requested, in future, for Ms. Guevara to send the full amount of the rent and submit receipts to Ms. Louie for reimbursement. In response, the record shows that Ms. Guevara sent a further e-transfer to Ms. Louie for \$89.30 that evening.
- [14] Further, the record indicates that in October 2018, Ms. Louie received the rent payable on October 1, 2018, on October 2, 2018. The parties exchange emails concerning this rent payment.

- [15] On October 2, 2018, Ms. Louie emailed Ms. Guevara as follows:

Hi Ana.

How are you!

Time fly when you are having a good time.

Would appreciate it if you can do the e transfer today

Thanks so much!

- [16] That evening, Ms. Guevara replied as follows:

Hi Josie

Hope everything is well

The cibc Mobile online banking app has been having some issues for a few days now and it's down for me. Today it tells me that it will back online soon so as soon as it becomes available I will make the transfer to you hoping by tonight

- [17] Ms. Louie replied to that email a few minutes later, stating:

Thanks for the update

Have a wonderful evening

You are the best.

[18] Ms. Louie agrees that she received the November 2018 rent on the first of the month.

[19] Ms. Guevara admits that she did not pay the rent which was due on December 1, 2018, on the first of the month.

[20] On December 3, 2018, Ms. Louie emailed Ms. Guevara stating:

Hi Ana.

How are you?

I just want to follow up if you and your father interest to buy 1621 Como Lake?

Also it will be appreciate if you can transfer December rent at your earliest convenience.

[21] The next day, December 4, 2018, Ms. Guevara replied, explaining that she had been double charged for a washer and was therefore short of funds:

I will submit the rent money soon if you are ok with that when I tried to return the new washer they went take out the purchase price again instead of credit my account so I'm waiting for that to get settled

[22] Ms. Louie replied the same day stating:

Hi Ana

Sure. Do you when I can get the rent.

[23] On December 7, 2018, Ms. Guevara followed up stating that she had sent the money for the rent on December 5, 2018. According to Ms. Louie's documents, she received that payment on December 6, 2018. On December 7, 2018, Ms. Louie emailed Ms. Guevara stating:

Thank you for the E transfer. I accepted it last night.

[24] In the same December 7, 2018 email, Ms. Louie made reference to a notice she had sent by registered mail to Ms. Guevara and discussed reimbursing Ms. Guevara for repairs she had done to the fence on the Premises.

[25] The notice that Ms. Louie referred to was a notice terminating the rental agreement effective April 1, 2019, on the basis that the lease would expire on that date. Ms. Guevara made inquiries at the Residential Tenancy Branch and was informed that the notice was invalid. She communicated that position to Ms. Louie, who took no further steps to enforce the notice.

[26] Although Ms. Louie filed a statement with the Arbitrator alleging that the January 1, 2019 rent was late, the record before the Arbitrator contained no further emails respecting rent until May 2, 2019, when Ms. Louie sent an email to Ms. Guevara stating:

Hello Ana

Thanks for your May payment

For all future payments, please note the payment is 1st of each month

We sent you notices by registered mail for three months rent increase notice.

Effective August 1, 2019 your rent will be \$1496.50

[27] On June 3, 2019, the parties exchanged emails about the state of the Premises. Ms. Guevara sent an email at 4:37 PM concerning a blocked drain in a sink, problems with the refrigerator and responding to an earlier email from Ms. Louie providing notice of a rent increase. Ms. Louise responded to Ms. Guevara's June 3, 2019, email at 7:28 PM that evening, saying, amongst other things, that both herself and Ms. Guevara should obtain a quote to fix the sink and, on this basis, she would decide who should undertake the repairs. Ms. Louie concluded her email by stating:

Thanks we received the June payment. Please note that the rent is due on the 1st of the month. I will much appreciate it if all the future payments are made on the 1st of the month.

[28] Ms. Guevara responded to this email on June 4, 2019, stating that she had sent an e-transfer of the rent on June 1, 2019. Ms. Louie takes the position that the rent for June 1, 2019, was not paid until June 3, 2019. Ms. Guevara deposes that she sent an e-transfer for the rent on June 1, 2019. Page 74 of the record before the Arbitrator showed that Ms. Louie received the rent on June 2, 2019.

[29] Without further communicating with Ms. Guevara, Ms. Louie prepared and mailed a notice terminating the rental agreement for repeated late payment of rent on June 21, 2019, and posted the notice on the door of the Premises on June 26, 2019.

[30] On July 5, 2019, Ms. Guevara submitted an application for dispute resolution to the Residential Tenancy Branch (the "RTB"), disputing the termination notice and seeking an order that Ms. Louie carry out repairs to the Premises.

[31] A hearing was held by teleconference before the Arbitrator on September 3, 2019, at 9:30 AM to consider the application. Both Ms. Guevara and Ms. Louie called into the hearing.

[32] On September 4, 2019, the Arbitrator issued written reasons granting Ms. Louie an order requiring Ms. Guevara to vacate the Premises by September 30, 2019.

[33] In his Decision, the Arbitrator recited some of the evidence before him. In the analysis section of the Decision, he recognized that ending a tenancy is a significant request and stated that it could only be done in accordance with the RTA.

[34] The Arbitrator went on to state as follows:

I find, based on the testimony and evidence of the parties, and on a balance of probabilities that the Tenant has been repeatedly late paying rent as alleged in the Notice. The evidence before me confirms that the Tenant was late 12 times in total during the tenancy, and six times in the most recent year including September 2018, October 2018, December 2019, January 2019, May 2019 and June 2019.

The Landlord issued the Notice in June 21, 2019. As such, I find that she acted in a timely manner after the most recent late payment.

I further find that while the Landlord and Tenant may have had a friendly relationship in the past, and the Landlord may have been empathetic when the Tenant struggled to pay her rent on time, at no time did the Landlord waive her entitlement to receive rent on the 1st of the month when rent was due as set out in the tenancy agreement. This was evident in the communication between the parties wherein the Landlord was forced to follow up with the Tenant when rent was not paid on time.

During the hearing the Tenant stated that she has had difficulty paying rent on the 1st due to issues with her online banking app on her phone. She stated that recently she has begun paying rent early to ensure such banking issues do not interfere with her paying on time. She did not provide any corroborating documentary evidence to support her testimony that it was her banking app which caused her late payment. In any event, it is the Tenant's responsibility to pay rent on time, and it was incumbent on her to ensure the payment was received. In this respect I prefer the testimony of the Landlord that the Tenant's failure to pay rent was not due to circumstances beyond the Tenant's control.

- [35] The Arbitrator found that it was unnecessary to consider Ms. Guevara's claim for repairs and dismissed that claim without leave to reapply.
- [36] Ms. Guevara applied under the RTA for a review of the Decision. On September 12, 2019, the Review Arbitrator issued a Review Consideration Decision dismissing the application for a review.
- [37] Under the RTA there are only three grounds on which a party may request that a Decision be reviewed. The Review Arbitrator held that Ms. Guevara had not established any of these three grounds and denied her request for review on this basis. Specifically, the Review Arbitrator held that Ms. Guevara had not established that the Decision had been obtained by fraud, and that she had not provided an adequate explanation as to why some of the banking documents she relied on as new and relevant evidence in her review application had not been available before the Arbitrator. In dismissing Ms. Guevara's request for a review, the Review Arbitrator upheld the Decision.
- [38] Ms. Guevara applies to have both the Decision and the Review Consideration Decision set aside.

Issues on Application

[39] The following issues arise on this application:

1. Which decision is subject to judicial review?
2. What is the applicable standard of review?
3. Was the reviewable decision patently unreasonable?
4. If the applicable decision was patently unreasonable what remedy should be granted to Ms. Guevara?

1. Which Decision is Subject to Judicial Review?

[40] A party must exhaust all statutory administrative review procedures before bringing a judicial review application: *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 [Yellow Cab] at para. 39. As a general principle, it is the final decision reached by a tribunal that is subject to judicial review. However, where a tribunal has discretion as to whether it will undertake a review of an earlier decision, such as by requiring a party to seek leave for review, a tribunal's denial of leave is not treated as the final reviewable decision if it does not constitute a determination that the party's allegation of error lacks foundation: *Yellow Cab*, paras. 41, 44-45; *Martin v. Barnett*, 2015 BCSC 426 at para 24.

[41] In this case, the Review Consideration Decision did not consider the substance of Ms. Guevara's complaint against the Decision because not all of the issues she raised fell into the strict grounds for review available under s. 79(2) of the RTA. For example, Ms. Guevara took issue with the Arbitrator's failure to properly consider the email correspondence regarding a history of e-transfer banking errors between the parties as a reason for late payment. This complaint did not meet any of the grounds for review under s. 79(2) of the RTA, which provides that a decision may only be reviewed if a party was unable to attend the hearing for reasons beyond their control; there is new, relevant evidence that was unavailable at the time of the hearing; or there is evidence that the decision was obtained by fraud. As a result, the proper decision to be reviewed in this case is the Arbitrator's Decision, and not the Review Consideration Decision: *Quigley v. Columbus Charities Association*, 2016 BCSC 1557 at para. 15.

2. Standard of Review

[42] The standard of review applicable in this case is governed by the Administrative Tribunals Act, SBC 2004, c.45 [ATA].

[43] Section 58(1) of the ATA provides that if the statute under which an application for judicial review arises contains a privative clause, the tribunal in question must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction. Section 84.1 of the RTA contains such a privative clause:

Exclusive jurisdiction of director

84.1 (1) The director has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in a dispute resolution proceeding or in a review under Division 2 of this Part and to make any order permitted to be made.

(2) A decision or order of the director on a matter in respect of which the director has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

[44] Section 58(2)(a) of the ATA continues that in a judicial review proceeding relating to expert tribunals:

a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,

[45] Pursuant to these provisions, the standard of review that I must apply to the Decision is that of patent unreasonableness.

[46] The concept of patent unreasonableness has been explained in a number of court decisions. In *Mcknight v. Workers Compensation Appeal Tribunal*, 2012 BCSC 1820, Justice Saunders summarized the authorities as follows:

45 The principles which govern application of the common law standard of patent unreasonableness were summarized by Josephson J., and endorsed by the B.C. Court of Appeal in *Speckling v. British Columbia (Workers' Compensation Board)* 2003 BCSC 1487, aff'd 2005 BCCA

80. As stated by Levine J.A.:

[33] Having confirmed the correctness of the patently unreasonable standard of review, I agree with the chambers judge's summary of the approach to be taken in applying that standard. He noted the following principles (at para. 8):

1. The standard of review is that of patent unreasonableness: *Canada (Attorney General) v. P.S.A.C.* (1993), 101 D.L.R. (4th) 673 (S.C.C.).
2. "Patently unreasonable" means openly, clearly, evidently unreasonable: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.
3. The review test must be applied to the result not to the reasons leading to the result: *Kovach v. British Columbia (Workers' Compensation Board)* (2000), 184 D.L.R. (4th) 415 (S.C.C.).
4. The privative clause set out in s. 96(1) of the Act requires the highest level of curial deference: *Canada Safeway v. B.C. (Workers' Compensation Board)* (1998), 59 B.C.L.R. (3d) 317 (C.A.)
5. A decision may only be set aside where the board commits jurisdiction error.

6. A decision based on no evidence is patently unreasonable, but a decision based on insufficient evidence is not: *Douglas Aircraft Co. of Canada Ltd. v. McConnell*, [1980] 1 S.C.R. 245, and *Board of Education for the City of Toronto v. Ontario Secondary School Teachers' Federation et al* (1997), 144 D.L.R. (4th) 385 (S.C.C.).

46 Levine J.A. further elaborated on the substance of the patent unreasonableness test at para. 37:

- [37] As the chambers judge noted, a decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review, or for this Court on appeal, to second guess the conclusions drawn from the evidence considered by the Appeal Division and substitute different findings of fact or inferences drawn from those facts. A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable. That is not the case here.
- [47] It follows from the above authorities that the function of a reviewing court is not to substitute its decision for that of the tribunal. The amount of deference owed to the Arbitrator is at the highest end of the range. However, this does not mean that the Decision must not be subject to careful scrutiny.
- [48] In *Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 65 [Vavilov], the Court emphasized that it is the duty of a reviewing court to determine whether the decision maker's reasons meaningfully account for the central issue and concerns raised by the parties. While these comments were made in the context of a review on a reasonableness standard, it is my view that they also apply to a review of reasons on the standard of patent unreasonableness. What constitutes a patently unreasonable decision may be "understood in the context of the common law jurisprudence" regarding judicial review generally "and will necessarily continue to be calibrated according to general principles of administrative law:" *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (S.C.C.) at para 19.

3. Was the Decision Patently Unreasonable?

- [49] The central issue between the parties before the Arbitrator was whether Ms. Guevara had been "repeatedly late" in paying her rent, as that phrase is used in s. 47(1)(b) of the RTA:

47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

- (b) the tenant is repeatedly late paying rent;

- [50] While the Arbitrator made reference to Ms. Guevara's "repeatedly late" rent payment as a statutory ground for terminating a tenancy, I am unable to find any coherent analysis in the Decision of the meaning of "repeatedly late" and how this applies to Ms. Guevara.

[51] In Vavilov, the majority judgment recognized that tribunals must demonstrate an understanding of the proper approach to statutory interpretation:

118 This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law -- whether courts or administrative decision makers -- will do so in a manner consistent with this principle of interpretation.

119 Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. As discussed above, formal reasons for a decision will not always be necessary and may, where required, take different forms. And even where the interpretive exercise conducted by the administrative decision maker is set out in written reasons, it may look quite different from that of a court. The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.

120 But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

121 The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior -- albeit plausible -- merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.

122 It can happen that an administrative decision maker, in interpreting a statutory provision, fails entirely to consider a pertinent aspect of its text, context or purpose. Where such an omission is a minor aspect of the interpretive context, it is not likely to undermine the decision as a whole. It is well established that decision makers are not required "to explicitly address all possible shades of meaning" of a given provision: *Construction Labour Relations v. Driver Iron*

Inc., 2012 SCC 65, [2012] 3 S.C.R. 405, at para. 3. Just like judges, administrative decision makers may find it unnecessary to dwell on each and every signal of statutory intent in their reasons. In many cases, it may be necessary to touch upon only the most salient aspects of the text, context or purpose. If, however, it is clear that the administrative decision maker may well, had it considered a key element of a statutory provision's text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances. Like other aspects of reasonableness review, omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker.

- [52] As noted in the quotation from Vavilov above, failure to apply the proper approach to statutory interpretation is not a stand alone ground of review where such a failure is only in respect of a minor aspect of the interpretive context and does not undermine the decision as a whole. However, if it is clear that the administrative decision maker--had they given proper consideration to a key element of a statutory provision's text, context or purpose-- would have rendered a different decision, this failure would be "indefensible," and thus in my view, patently unreasonable.
- [53] The Arbitrator recognized that ending a tenancy is a significant request that must only be done in accordance with the RTA. However, his analysis went no further than to refer to Guideline 38 of the Residential Tenancy Branch Policy Guidelines which states that the minimum number of late payments required to justify a notice for termination under the RTA provisions is three. Therefore, Guideline 38 gives little real guidance on the manner in which the provision should be applied to the circumstances of this case.
- [54] In my view, the Arbitrator failed completely to consider or apply the modern principle of statutory interpretation to his consideration of s. 47(1)(b) of the RTA and its application to the circumstances of Ms. Guevara. At a minimum, the Arbitrator was required to consider the context and purpose of s. 47 and adopt an interpretation consistent with those factors.
- [55] Section 47 sets out a number of grounds on which a landlord may rely upon to terminate a tenancy. A review of all of the grounds on which a tenancy may be terminated under s. 47 makes it apparent that the tenant must have engaged in serious misconduct that seriously affected the landlord or the other tenants of the building in which the premises are located, failed to comply with a condition precedent to the rental agreement coming into effect (s. 47(1)(a)) or have taken an unreasonable amount of time to comply with a material term of the tenancy agreement.
- [56] In addition, the Arbitrator appeared to give no consideration to the circumstances relating to the defaults he found to have occurred. Beyond noting that three late payments of rent were the minimum number to engage s. 47(1)(b), he did not address the frequency of the defaults in the context of the length of the tenancy, the length of the default, or the expectations of the parties. He did not give full consideration to the content of the communications between the parties in respect of any of the defaults--such as Ms. Louie

indicating that she was okay with receiving late rental payments on several occasions and several discussions of banking errors arising from the e-transfer format--aside from concluding that Ms. Louie was forced to follow up with Ms. Guevara when rent was not paid on time. In my view, that approach fell so far short of the required standard of statutory interpretation as to render the decision patently unreasonable.

- [57] My view in this regard is reinforced by the fact that Ms. Guevara was in default, even on the Arbitrator's view of the facts, for a total of 10 days in the year leading up to the notice of termination being given. Section 46 of the RTA provides that a landlord may not give notice of termination for non payment of rent on the due date until 10 days have elapsed after that date. Under s. 46(2) the tenant would then have five days to pay the rent, resulting in the notice being of no effect. These permissive timelines should inform the interpretation of what circumstances constitute "repeatedly late" rental payments, giving rise to a right to terminate a tenancy under s. 47(1)(b) of the RTA.
- [58] Moreover, it is also unclear why, if the Arbitrator was intending to rely upon Guideline 38 to direct his determination, he did not give due scrutiny to other relevant factors contained within Guideline 38, such as the direction that "where an unforeseeable bank error has caused the late payment, the reason for the lateness may be considered by an arbitrator in determining whether a tenant has been repeatedly late paying rent." While the Arbitrator stated that Ms. Guevara "did not provide any corroborating documentary evidence to support her testimony that it was her banking app which caused her late payment," he did not acknowledge, or provide reasons as to why he did not accept, the email correspondence between the parties in which Ms. Guevara noted online banking problems on several occasions.
- [59] On this basis, an additional ground on which I find the Decision to be patently unreasonable, is that the reasons do not adequately explain why the Arbitrator rejected Ms. Guevara's evidence that there was a history of errors with the e-transfer process.
- [60] As discussed in the context of a review of an Arbitrator's decision in *Laverdure v. First United Church Social Housing Society*, 2014 BCSC 2232:
- [31]
- 3) The standard of patent unreasonableness applies to the consideration of the adequacy of reasons as an inquiry into an assessment of the "justification, transparency and intelligibility" in the decision making process. See: *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2010 NLCA 13 (N.L. C.A.) (appeal dismissed 2011 SCC 62 (S.C.C.)); and *Ashurwin Holdings Ltd. v. Morrison*, 2012 BCSC 1408 (B.C. S.C.), at paras 18-21.
- [36] That need for the reasons given to be understandable is the key to determining their adequacy.

[37] In short, for reasons to be adequate, they need not necessarily address every issue raised by the parties nor all of the evidence adduced, but on the central issue or issues that underlie the conclusion reached there must be sufficient clarity of fact finding and application of those facts to the test to be met to allow the parties and a court to know why the decision was reached and whether it was within a range of acceptable outcomes.

[45]

- 4) Although the Dispute Resolution Officer did make the b[o]ld statement "I prefer the evidence of the Landlord over that of the Tenant," it is entirely unclear what evidence was preferred or for what reason.
- 5) Statements such as those used by Dispute Resolution Officer Lam in determining issues of credibility, without reference to why the evidence of one party was "preferred" over that of the other, wholly fail the test of adequacy.
- 6) Such conclusory statements do not allow a party against whom adverse credibility findings are made to understand why his or her evidence was not accepted, and afford no basis for meaningful review.

[61] As in Laverdure, I find that the Decision did not provide clear and intelligible reasons to explain why the Arbitrator preferred Ms. Louie's evidence that Ms. Guevara's "failure to pay rent was not due to circumstances beyond [her] control" and why he rejected Ms. Guevara's submissions regarding banking issues.

[62] Another fundamental problem with the Arbitrator's reasons is his failure to understand the vital distinction between waiver and estoppel in his analysis of the parties' rights and obligations. This resulted in the Arbitrator taking an unreasonably narrow view of all of the circumstances relevant to the decision he had to make. The Arbitrator decided that Ms. Louie had not "waived" her right to receive the rent on the first of the month as a term of the tenancy agreement. However, the real issue before him was whether Ms Louie was estopped from enforcing a provision of the tenancy agreement by her past conduct. That issue required a determination of whether Ms. Louie's conduct led Ms. Guevara to conclude that e-transferring the rent within a day or two after the first of the month was acceptable to her. Therefore, the proper question was whether Ms. Louie could rely on past instances of rent not being paid on the first of the month to terminate the tenancy agreement when for years she had acquiesced in the manner that rent was paid. Specifically, had Ms. Louie represented through her conduct and communications that she did not require strict compliance with the term of the tenancy agreement stating that rent must be paid on the first day of the month.

[63] While the legal test of waiver requires a "clear intention" to "forgo" the exercise of a contractual right, the equitable principle of estoppel applies where a person with a formal right "represents that those rights will be compromised or varied:" *Tymchuk v. D.L.B. Properties*, 2000 SKQB 155 at paras. 11-17. Unlike waiver, the principle of estoppel does not

require a reliance on unequivocal conduct, but rather "whether the conduct, when viewed through the eyes of the party raising the doctrine, was such as would reasonably lead that person to rely upon it:" *Bowen v. O'Brien Financial Corp.*, [1991] B.C.J. No. 3690 (C.A.). Thus, the relevant legal concept before the Arbitrator was not waiver of a contractual right, but rather whether Ms. Louie's prior conduct estopped her from relying on past rental payments made a day or two after the first of each month to evict Ms. Guevara on the grounds of "repeatedly late" payment under s. 47(1)(b) of the RTA.

[64] In this case, on the record that was before the Arbitrator, there had been a period of years in which Ms. Louie had acquiesced to an occasional payment being made shortly after the first of the month. Earlier in these reasons I reviewed some of that history. I note that in May 2019, Ms. Louie gave Ms. Guevara notice of an increase in rent-- clearly suggesting a continuation of the parties' landlord-tenancy relationship. In my view, no reasonable person in Ms. Guevara's position would have concluded that Ms. Louie was contemplating terminating the lease for late payment until she physically received the notice to terminate.

[65] The following broad concept of estoppel, as described by Lord Denning in *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.* (1981), [1982] Q.B. 84 (Eng. C.A.), at p. 122, was adopted by the Supreme Court of Canada in *Ryan v. Moore*, 2005 SCC 38 at para. 51:

When the parties to a transaction proceed on the basis of an underlying assumption -- either of fact or of law -- whether due to misrepresentation or mistake makes no difference -- on which they have conducted the dealings between them -- neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[66] The concept of estoppel was also described by the British Columbia Court of Appeal in *Litwin Construction (1973) Ltd. v. Pan* [1998] 29 B.C.L.R. (2d) 88 (C.A.), 52 D.L.R. (4th) 459, more recently cited with approval in *Desbiens v. Smith*, 2010 BCCA 394:

it would be unreasonable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment ..." [emphasis added]. That statement was affirmed by the English Court of Appeal in *Habib Bank and*, as we read the decision, accepted by that Court in *Peyman v. Lanjani*, [1984], 3 All E.R. 703 at pp. 721 and 725 (Stephenson L.J.), p. 731 (May L.J.) and p. 735 (Slade L.J.).

[67] The distinction between waiver and estoppel is vital in this case because Ms. Louie relies on alleged defaults that occurred before she gave any indication that she required strict compliance with the requirement to pay rent on the first of the month. It is not until email reminders dated May 2 and June 3, 2019, that Ms. Louie states that she would require "all future payments" to be made on the 1st of the month. Such a notice would have had to be clear. As reviewed, previous correspondence regarding rental payments made after the 1st of the month involved language to the effect of 'please transfer rent at your earliest convenience' and 'do you know when I can get the rent?' (December 2018 correspondence).

In light of Ms. Louie's history of acquiescence, I find that Ms. Louie could not rely on instances where Ms. Guevara paid rent after the 1st of the month, where these payments occurred prior to Ms. Louie's notice that she would require Ms. Guevara's strict compliance with the tenancy agreement's rental payment due date. I find Ms. Louie was required to give Ms. Guevara reasonable notice that strict compliance would be enforced, before taking steps to terminate the residency for late payment. Such notice was not provided.

- [68] Estoppel has been a fundamental principle of the law for a long time: see *Hughes v. Metropolitan Railway Co.* (1877), 2 App. Cas. 439. However, the Arbitrator failed to address this fundamental principle in his reasons. By so doing he deprived Ms. Guevara of the right to show that in the circumstances of the application before him it would have been unjust to permit Ms. Louie to terminate the tenancy agreement given the long course of conduct in which she acquiesced.
- [69] This leads me to the final ground on which I find the Decision to be patently unreasonable. The Arbitrator misapprehended Ms. Guevara's evidence concerning the number of instances on which she submitted late rent payments that she had, with two exceptions, always sent the rent funds out of her account via an e-transfer on the first day of the month. A decision that is based on a clear misapprehension of the evidence is patently unreasonable: *Campbell v. McInnis*, 2017 BCSC 1134.
- [70] In his reasons the Arbitrator referred to Ms. Guevara struggling to pay her rent. However, there was only two occasions that Ms. Guevara maintained that she failed to pay the rent on time in the absence of prior approval, and on both occasions Ms. Louie acquiesced to the late payment in a friendly manner. On one of those occasions the difficulty was caused by Ms. Guevara being double charged for a washer she had purchased (December, 2018). On the other occasion the record before Arbitrator showed that Ms. Guevara had explained to Ms. Louie that there had been a problem with the e-transfer mobile application (October, 2018). On that occasion Ms. Louie replied thanking Ms. Guevara for the update and stating "you are the best."
- [71] While the Arbitrator stated in the Decision that Ms. Guevara also admitted that she had been late paying rent on January 1, 2019, May 1, 2019, and June 1, 2019, Ms. Guevara's affidavit filed in support of her petition provide a different version of her submissions. In her affidavit, Ms. Guevara states that she told the Arbitrator that she always submitted payment by e-transfer on the first of the month. Instead, her submission to the Arbitrator was that the email records Ms. Louie provided to the Arbitrator only established that Ms. Louie processed or received the rent payments after the first day of the months in which she indicated she had received late payment. Ms. Guevara maintained throughout that those emails were sent on the first of the month.

- [72] I am not entitled to consider evidence that was not before the Arbitrator to reach a different conclusion from the one which he reached. I am however of the view that I can consider evidence to determine whether he misapprehended the evidence before him. This is particularly so when the Arbitrator relies on what he considered to be an admission made by Ms. Guevara.
- [73] Contrary to what the Arbitrator stated in his reasons, there was no documentary evidence clearly establishing that Ms. Guevara was late in sending her e-transfers of the rent on any other occasion besides October and December 2018, for which months the Arbitrator had email correspondence before him in which Ms. Guevara acknowledges late payment and Ms. Louie accepted her explanation for that late payment. The documentary evidence produced by Ms. Louie purporting to establish late rent payments for other months showed only the date on which she had received the e-transfer at her Hotmail email account.
- [74] The Arbitrator was of the view that the tenancy agreement required Ms. Guevara to ensure that the e-transfer was received on the first of the month. However, that view was contrary to the evidence of Ms. Guevara, which was not denied by Ms. Louie, that the parties agreed that Ms. Guevara was responsible for sending an e-transfer of the rent to Ms. Louie on the first day of the month.
- [75] Before me, Ms. Louie did not dispute Ms. Guevara's evidence that she had told the Arbitrator, with the two exceptions noted, that she always sent the e-transfer on the first of the month. In addition, in her review consideration application, Ms. Guevara provided bank records to the Review Arbitrator confirming that Ms. Guevara had in fact sent her e-transfer payments on May 1, 2019 and June 1, 2019. While this evidence was not before the Arbitrator, it does confirm Ms. Guevara's evidence that the Arbitrator misapprehended the evidence she had given to him.
- [76] I consider that it would be unjust to ignore the bank records when considering whether the Arbitrator did misunderstand what Ms. Guevara said about the date on which she e-transferred the rent on these months.
- [77] In addition, the Arbitrator failed to explain how he reconciled his conclusions with the documentary evidence that showed that the parties did have some difficulties in completing e-transfers at times. For example, in September 2018, Ms. Guevara sent Ms. Louie an email confirming that she had e-transferred the rent on the first of the month.
- [78] In summary the reasons of the Arbitrator contain the following deficiencies:
1. He failed to apply the modern rule of statutory interpretation to s. 47(1)(b) of the RTA in a manner that materially impacted the outcome of the Decision.
 2. He did not adequately explain why he rejected Ms. Guevara's evidence regarding a history of errors with the e-transfer process.

3. He did not adequately set out the legal test to be applied to determine whether Ms. Louie could rely upon the term of the tenancy agreement requiring payment of rent on the first of the month in light of her history of acquiescence.
 4. He fundamentally misapprehended the evidence of Ms. Guevara with respect to the dates on which she e-transferred rent payments to Ms. Louie.
 5. He failed to give adequate consideration to the evidence of Ms. Guevara that the parties had agreed that the rent could be paid by e-transfer and that that method of payment provided Ms. Louie with access to the rent more quickly than payment by cheque.
- [79] In assessing whether a decision is patently unreasonable I am required to consider whether the outcome was reasonable even though the reasons were not; *Kovach v. British Columbia (Workers' Compensation Board)*, [1998] B.C.J. No. 1245, dissenting reasons of Justice Donald adopted by the Supreme Court of Canada; [2000] 1 S.C.R. 55.
- [80] In my view, the outcome of the decision was openly and clearly, patently unreasonable. The parties to this dispute had agreed on a method of paying the rent whereby the tenant e-transferred the rent to the landlord. This method had advantages for both parties. It made it more convenient for the tenant, and it meant that the landlord had the rent money in her bank account more quickly than she would have had if Ms. Guevara had given her a cheque on the first of the month, which would have taken up to three days to clear from the date she deposited it. The e-transfers made the funds available to Ms. Louis immediately upon her acceptance of them. Given these circumstances and the other factors I have outlined, the evidence before the Arbitrator did not justify his conclusion that the tenant was repeatedly late in paying the rent, as that term is used in s. 47(1)(b) of the RTA.
- [81] The cumulative effect of these defects in the reasons, coupled with the draconian remedy granted by the Arbitrator, have led me to conclude that the Decision was patently unreasonable.

Review Decision

- [82] Given my finding that the Decision was patently unreasonable it is not necessary to address the Review Decision.

Remedy

- [83] The usual remedy granted when a decision of a tribunal is set aside is to refer the matter back to the tribunal for reconsideration.
- [84] However, in *Vavilov*, the Supreme Court suggested that reviewing courts should consider whether the interests of timely and effective resolution of the dispute would be better served by the court resolving the matter. This situation will arise when the reviewing court concludes that a particular outcome is inevitable;

- [142] However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended. An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed.
- [85] I have concluded this is such a case. In my view, the record before me clearly demonstrates that the parties agreed that rent payments would be made by e-transfer. It also clearly demonstrates that the course of dealings between the parties would have led a reasonable person in Ms. Guevara's position to conclude that Ms. Louie was not insisting on strict performance of the requirement that rent be paid on the first of the month, at least up to May 1, 2019.
- [86] The record also demonstrates that there is no basis for concluding that Ms. Guevara was repeatedly late in sending e-transfers of rent to Ms. Louie. The tenancy agreement between the parties provides that Ms. Guevara is responsible for paying rent on the first of each month. There is no term in the tenancy agreement providing that, where e-transfer is the method agreed to by the parties, Ms. Guevara would be responsible for ensuring that e-transfers were always properly received and processed on the first of each month-- this would require Ms. Guevara to be responsible for events entirely outside of her control and would be an unreasonable interpretation of the agreement.
- [87] In addition, Ms. Louie's notice of termination relied on 6 late payments of rent; September 3, October 2, December 6, 2018 and January 2, May 2 and June 2, 2019. Of these payments Ms. Louie expressly agreed that the December 2018 payment could be made late and the documentary evidence that was before the Reviewing Arbitrator included bank records demonstrating that the January, May and June 2019 payments were e-transferred in the first of the month. This evidence would be before an arbitrator conducting a rehearing of Ms. Louie's application to terminate the rental agreement. The Residential Tenancy Act Policy Guidelines provide that three late payments are the minimum number that are sufficient to justify a termination of a rental agreement under s. 47(1)(b) of the RTA. I, therefore, can see no basis in which an arbitrator could conclude that s. 47(1)(b) of the RTA applies in these circumstances.

[88] I am therefore of the view that the proper order to make is to dismiss the landlord's application to terminate the rental agreement and refer the tenant's application for repairs back to the RTB for determination.

[89] Ms. Guevara is entitled to her costs against Ms. Louie on Scale B.

"Sewell J"

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