

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Doughty v. Whitworth Holdings
Ltd.*,
2008 BCSC 801

Date: 20080625
Docket: S081071
Registry: Vancouver

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

Between:

**Suzanne Doughty, Janet Smith, Doug Kozachenko,
and Gilles Houle, Tenants**

Petitioners

And

Whitworth Holdings Ltd., Landlord

Respondent

Before: The Honourable Mr. Justice Williamson

Reasons for Judgment

Counsel for the Petitioners

David Mossop, Q.C.

Counsel for the Respondent
Whitworth Holdings Ltd.

Shannon Salter

Counsel for the Respondent K.
Miller, Dispute Resolution
Officer

Neena Sharma

Date and Place of Hearing:

June 6, 2008
Vancouver, B.C.

[1] This is an application, pursuant to the **Judicial Review Procedure Act**, R.S.B.C. 1996, c. 241, for an order setting aside the decision of a Dispute Resolution Officer ("DRO") in a landlord tenant dispute. The petitioners ask that the matter be remitted to a new DRO for a rehearing.

Background

[2] The petitioners rent apartments in a building located at 1251 Lawrence Avenue in Kelowna. The respondent, Whitworth Holdings Ltd., owns the building, Carlton House. It was built in the early 1960s. The units are described as modest and the rents paid by the petitioners were \$664 to \$665 for two bedroom apartments.

[3] Rent increases are regulated in British Columbia. The **Residential Tenancy Regulation**, B.C. Reg. 477/2003 (the "**Regulation**") set this amount for the year 2008 at 3.7%. However, the **Residential Tenancy Act**, S.B.C. 2002, c. 78, permits the landlord to apply to be excused from this limitation. In this case, the landlord applied to impose a 28% increase on the tenants.

[4] Section 23(1)(a) of the **Regulation** allows a landlord to apply for a rent increase above the 3.7% if the rent being paid for the unit is:

...significantly lower than the rent payable for other rental units that are similar to, and in the same geographic area as, the rental unit.

[5] In his decision issued December 28, 2007, the DRO concluded that the landlord had not proven:

That the rent in the subject building is significantly lower than that of the one building which I found to be roughly comparable and accordingly deny the landlord's application to increase the rent for one bedroom apartments.

[6] However, the DRO went on to consider two bedroom units and decided that with respect to those the landlord could raise the rent to \$750 per month. This amounted to a rental increase in the 12.87% - 13% range.

[7] The relevant portion of the **Regulation** at s. 23(1) reads as follows:

(1) A landlord may apply under section 43(3) of the Act if one or more of the following apply:

(a) after the rent increase allowed under section 22, the rent for the rental unit is significantly lower than the rent payable for other rental units that are similar to, and in the same geographic area as, the rental unit;

...

(3) The director must consider the following in deciding whether to approve an application for a rent increase under subsection (1):

(a) the rent payable for similar rental units in the residential property immediately before the proposed increase is intended to come into effect;

...

(4) In considering an application under subsection (1), the director may:

(a) grant the application, in full or in part.

[8] The petitioners raise a number of arguments. First, however, one must determine the standard of review.

Standard of Review

[9] The applicable standards of review are set out in s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45. The relevant portion of that *Act* states:

58(2) In a judicial review proceeding relating to expert tribunals under subsection (1)

(a) 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,

(b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and

(c) for all matters other than those identified in paragraphs (a) and (b) the standard of review to be applied to the tribunal's decision is correctness.

(3) For the purposes of subsection (2)(a), a discretionary decision is patently unreasonable if the discretion

...

(c) is based entirely or predominantly on irrelevant factors or (d) fails to take statutory requirements into account.

[10] The petitioners say that because of the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, the standard of review "patently unreasonable" must now be treated as the same standard as reasonableness. The respondent, however, says that that decision has no bearing upon a judicial review in British Columbia where, as in this case, the standard of review is set out in s. 58 of the *Administrative Tribunals Act* as noted above.

[11] Without determining that issue, I am content for purposes of these reasons to presume that the standard of review in the *Administrative Tribunals Act* still applies. Section 58(3) of that *Act* sets out among other things that a "patently unreasonable" decision is one that:

(c) is based entirely or predominantly on irrelevant factors or (d) fails to take statutory requirements into account.

Analysis

[12] In this case, I am satisfied that the DRO erred in failing to take into account the statutory requirement set out in s. 23(1) of the **Regulation** mandating that he find that the rent for the rental unit is significantly lower than the rent payable for other rental units that are similar to, and in the same geographic area as, the rental unit.

[13] The DRO noted that the landlord had submitted that there were no buildings in the area, built in the same time period, which had the same character including private entrances and no common area lobby. He also noted that the landlord had testified that the subject building was further from Okanagan Lake and the city park than other buildings which were put forward as possible comparators.

[14] Nevertheless, the DRO did rely on two other buildings, the Riviera Villas and Fraser Manor. In his reasons, he stated in paragraph 7 that these were both located "in a location which can attract higher rents". He went on, to say that taking into account "the difference in location, as well as other differences between the subject building and the comparables, he concluded that the rent for the two bedroom units in the subject building should be raised".

[15] I conclude that given the wording of s. 23(1)(a) of the **Regulation** the omission of the DRO to find that the rental units were similar to and in the same geographic area as the comparables, is fatal to this decision. Indeed, his finding was that the two comparables "are both located in a location which can attract higher rents".

[16] In these circumstances, the DRO failed to take a statutory requirement into account. Pursuant to s. 58(3)(d) of the **Administrative Tribunals Act**, this failure amounts to a "patently unreasonable" exercise of discretion.

Order

[17] In the result, the matter will be remitted to a new DRO for a rehearing.

Costs

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

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

"Williamson J."