COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Hunt v. The Owners, Strata Plan LMS 2556,* 2018 BCCA 159

Date: 20180426
Docket: CA44490

Between:

Anthony Hunt and Brenda Hunt

Appellants
(Petitioners)

And

The Owners, Strata Plan LMS 2556

Respondent
(Respondent)

Before: The Honourable Mr. Justice Goepel
The Honourable Mr. Justice Fitch
The Honourable Madam Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated May 11, 2017 (*Hunt v. The Owners, Strata Plan LMS 2556*, 2017 BCSC 786, Vancouver Docket S166981).

Counsel for the Appellants:	A. D. Gay, Q.C. and V. J. Broughton
Counsel for the Respondent:	P. A. Williams
Place and Date of Hearing:	Vancouver, British Columbia March 20, 2018
Place and Date of Judgment:	Vancouver, British Columbia April 26, 2018

Written Reasons by:
The Honourable Madam Justice Griffin

Concurred in by:
The Honourable Mr. Justice Goepel
The Honourable Mr. Justice Fitch

Summary:

In an arbitration proceeding initiated by the appellants, owners of a strata unit, the lawyer for the respondent strata corporation had four ex parte communications with the arbitrators. The appellants were unsuccessful on a judicial review application, alleging procedural unfairness and reasonable apprehension of bias. They appealed the dismissal of their application, seeking an order allowing the petition and setting aside the arbitration and costs awards. Held: appeal allowed. The chambers judge erred in failing to find that the communications between one party to the arbitration and the arbitrators raised a reasonable apprehension of bias, entitling the appellants to an order quashing the arbitration hearing and resultant costs decision against them.

Reasons for Judgment of the Honourable Madam Justice Griffin:

Introduction

[1] This appeal concerns the issue of reasonable apprehension of bias when arbitrators have private communications with only one party to the arbitration.

[2] The arbitration was between two owners of a residential unit in a strata building, the Hunts, and the Strata Corporation (the "Strata") under the *Strata Property Act*, S.B.C. 1998, c. 43 (the "*Act*"). The Hunts initiated an arbitration with the Strata due to concerns about installation of a heating, ventilation and air conditioning unit ("HVAC system"), which the Hunts thought would disturb their enjoyment of their suite.

[3] Contrary to the Hunts' preference for a single arbitrator, a three-person arbitration panel was constituted. Ultimately the arbitrators ruled against the Hunts on the main issues, conceding one minor issue in their favour, and awarded special costs against them. An application for leave to appeal the special costs award was refused.

[4] In preparation for the special costs assessment, the Hunts reviewed the file of the Strata's lawyer, Mr. Patrick Williams (whose fees would be at issue), and discovered that the lawyer had four private communications with the arbitrators during the course of the arbitration proceeding. These *ex parte* communications had

never previously been disclosed to the Hunts, who were self-represented throughout the arbitration proceedings: not by Mr. Williams and not by the arbitrators.

[5] The Hunts brought a proceeding for judicial review to quash the entire arbitration proceeding on the basis of procedural unfairness, including a reasonable apprehension of bias on the part of the arbitrators due to the *ex parte* communications. The Hunts also argued that a reviewable error had been committed by the arbitrators' failure to discuss the possibility of a mediated settlement with the Hunts, contrary to the requirement that arbitrators do so pursuant to s. 181 of the *Act*.

[6] A key argument of the Strata in the court below, and indeed in the Strata's factum on this appeal, was that the Hunts were not prejudiced by the *ex parte* communications or by the failure to mention the possibility of mediation. The Strata's submissions framed the Hunts as unreasonable and the arbitration result as inevitable because "there was nothing to arbitrate" and "no dispute to mediate". The chambers judge accepted that argument, and dismissed the application for judicial review in reasons for judgment indexed at 2017 BCSC 786 (the "Chambers Reasons").

Factual Background

[7] The facts of the procedural history of the dispute between the parties, the arbitration proceeding, and the *ex parte* communications, were correctly summarized by the chambers judge, as agreed by the parties on this appeal for the most part.

[8] The Hunts are a married couple in their eighties, who, since 1999, have lived in strata lot 2 of Strata Plan LMS 2556, known as the Waterford.

[9] In 2013, Conrad Pinette purchased the unit above the Hunts, strata lot 3, and began renovating it.

[10] In January 2014, the Hunts received a letter from the property management company for the Strata, Bayside Properties Services Ltd. ("Bayside"), stating the

strata council had met and approved the installation of new cooling/heating equipment at floor 3. The Hunts were later told the letter was in error and that Mr. Pinette had no present application for approval to install an HVAC system.

[11] The Hunts opposed the installation of an HVAC system by their neighbour, based on their view that it would disturb their peace and enjoyment and that it was contrary to the bylaws.

Arbitration Initiated

[12] The Hunts initiated arbitration under the *Act* by sending Bayside a "Form L Notice Beginning Arbitration" on April 8, 2014. The notice stated that they were seeking an arbitration to deny the installation of the HVAC system on the strata lot 3 balcony.

[13] The Hunts nominated Elaine McCormack, a lawyer, to act as arbitrator.

[14] The Strata did not accept the Hunts' choice of arbitrator and nominated Frank Borowicz, Q.C., a lawyer, to act as arbitrator.

[15] Ms. McCormack and Mr. Borowicz were then required under s. 179(6) of the *Act* to either name a third person as the sole arbitrator, or name a third arbitrator to act with them and to chair the panel.

[16] The Hunts had written twice to the Strata, on May 8 and 16, 2014, expressing a preference for a single arbitrator, stating that this would minimize costs "for all concerned" and that the issues were within the capacity of a single arbitrator.

[17] On May 26, 2014, Mr. Williams wrote a letter to Ms. McCormack (with copies to the Hunts and to Mr. Borowicz) reminding them of s. 179 and that it was appropriate for Ms. McCormack and Mr. Borowicz to either "name a third person as the sole arbitrator or name a third arbitrator to act with them and chair the panel". The letter disclosed no preference on the part of the Strata.

First *Ex Parte* Communication

[18] The first *ex parte* communication then occurred two days later. On May 28, 2014, Mr. Williams sent Mr. Borowicz an email on the issue of whether there should be a single arbitrator or panel of three. The email was not copied to the Hunts or Ms. McCormack.

[19] The May 28, 2014 email attached the May 26, 2014 letter to Ms. McCormack and attempted to explain that the Strata did not in fact hold the neutral position expressed in the letter on whether there be one arbitrator or three. The email, addressed to "Frank", set out that "Council is very firm in its desire that there be a three person arbitration panel." The email contained statements directly received from strata corporation representatives, one of which read that Mr. Williams should "stress with our nominee that we want the depth and insight of a panel of three Arbitrators for this serious Arbitration and this should be strongly conveyed to our nominee".

[20] Mr. Borowicz did not disclose the May 28, 2014 email to the Hunts, who did not know that the Strata was making submissions directly to one of the arbitrators.

[21] It is not known whether Mr. Borowicz shared the May 28, 2014 email, or its sentiments, with Ms. McCormack.

[22] Mr. Borowicz, in receipt of this undisclosed communication from Mr. Williams, and Ms. McCormack then made the decision to name a third arbitrator to chair a panel of three, rather than refer the matter to a single arbitrator. They selected Mr. John Sanderson, Q.C., a lawyer, as the third arbitrator and chair. No reasons for this decision were given (nor is there any complaint about the lack of reasons).

August 19, 2014 Case Management Conference

[23] The arbitration panel held a case management conference ("CMC") on August 19, 2014, for the purpose of addressing procedural issues. The Hunts attended, as did Mr. Williams.

[24] On the same day, after the CMC, Mr. Williams wrote a lengthy reporting email to his client, the Strata. He reported that, while he had expected the CMC would take only one hour, it took four hours.

[25] In Mr. Williams' email, he reported that he had mentioned mediation at the CMC and that he had a proposal, but he was cut off in addressing this by Mr. Borowicz, who said it could be dealt with after discussion of procedural issues.

[26] He also reported that they had discussed the estimated length of the arbitration at the CMC. The Hunts had stated an estimate that it would only take the arbitration panel an hour to read through their brief; Mr. Williams said that he had estimated "3-4 days, to an intake of breath from [the] Hunts, who immediately commented this is too expensive". Mr. Williams went on to speculate in his reporting email that he thought the reason Mr. Borowicz wanted to postpone the mediation discussion was to have the Hunts realize "what they had bitten off".

[27] The speculation by Mr. Williams in his reporting email illustrates that Mr. Williams knew that the notion of pursuing mediation, and the costs of the arbitration with a three-person panel, were not trivial matters. Rather, he recognized they were matters that had potential strategic and material import in the context of the ongoing arbitration proceeding.

Second *Ex Parte* Communication

[28] Mr. Williams' August 19 email to the Strata also revealed the second *ex parte* communication between Mr. Williams and an arbitrator.

[29] The email stated that, after the case management conference, Mr. Williams had a private discussion with the panel chair, Mr. Sanderson, referred to as JS. They discussed the Strata's position on settlement, and Mr. Williams reported that he told Mr. Sanderson that he could relay the Strata's views to the other arbitrators:

> As I headed into the lobby, JS took me aside and wanted to talk to me on a private basis. He said that due to be side tracked on mediation, what was the proposal of the Strata, if I was prepared to say it. I said that we would accept a ruling of the Panel that Floor 3 not be considered for permission to install

> the HVAC machinery unless some other owner was granted permission. JS said he thought it might be something like that. I told him he was free to tell other arbitrators. JS is a mediator foremost, he is aware of costs and I think will give it serious thought.

[30] In the same email, Mr. Williams further noted that the Hunts had complained about the cost of the arbitration during the CMC, and were unhappy about having to write a cheque for $15,000 as their share of the fees. He noted that he had stated that the Hunts caused the arbitration and that there was "no dispute to arbitrate". Mr. Williams speculated in his email that:

> I think that is why JS asked me what he did in the lobby and I let slip that the levy to fund the defence of the Strata was unanimous.

[31] The message that Mr. Williams "let slip" suggested that other owners of units in the building supported the Strata as against the Hunts, to the extent of being willing to fund the costs of the arbitration.

[32] Neither Mr. Sanderson nor Mr. Williams gave evidence in the judicial review proceeding relating to this communication.

Third *Ex Parte* Communication

[33] The third communication occurred on August 21, 2014, two days after the CMC and the private conversation about mediation with Mr. Sanderson.

[34] The communication was described in an email dated August 22, from Mr. Williams to his client. Mr. Williams described being in a meeting about a different matter with another person and Ms. McCormack, and then afterwards having a private discussion with Ms. McCormack. He wrote as follows:

> At the lobby of the building afterward, Elaine took me aside and commented how a one hour meeting had turned into a four hour meeting. She also at least implied that this arbitration should not go much further based upon my mediation comments made to John Sanderson. That concerns me only to the extent that Mark and others had commented that perhaps it is best that the arbitration takes its course. Once the Arb. Panel takes the matter further re mediation (and I expect they will) I will touch base with you, Mark, Terry and others. More particularly we might be able to stop arbitration and still leave open the ability to install an A/C system, on basis of others making an application.
>
> [Emphasis added.]

[35] Ms. McCormack did not provide any evidence regarding this alleged communication, nor did Mr. Williams.

Fourth *Ex Parte* Communication

[36] The fourth *ex parte* communication before the arbitration hearing took place in the form of a telephone call between Mr. Williams and Mr. Borowicz on September 15, 2014.

[37] The only evidence or record of this call is Mr. Williams' handwritten notes. Neither Mr. Williams nor Mr. Borowicz have given evidence about the telephone call.

[38] The topics discussed can be gathered by inference from Mr. Williams' notes, which are headed "Issues discussed – will get letter from John Sanderson". The notes have as item (4): "EM → s. 182 — mediation? premature to do that."

[39] It is common ground that EM was Mr. Williams' shorthand reference to Ms. McCormack. It is also uncontested that the reference to s. 182 was a mistake, and the reference was meant to be to s. 181 of the *Act*, as found in the Chambers Reasons at para. 26.

[40] Section 181 of the *Act* provides that: "Before holding a hearing, the arbitrator must advise the parties of the possibility of a mediated settlement."

[41] The arbitrators did not raise the possibility of mediation with the Hunts: Chambers Reasons at para. 27.

Communications Between Arbitrators and the Hunts

[42] In response to the Hunts' complaints about the Strata's *ex parte* communications with the arbitrators, the Strata submits that the Hunts also had private communications with their nominee. However, the only evidence of any such private communication is a letter dated June 23, 2014, from Ms. McCormack to the Hunts regarding the arbitration process, copied to the other two arbitrators. The letter informed the Hunts of the appointment of Mr. Sanderson, Q.C. to chair the panel of arbitrators, the rates the arbitrators would charge, namely $400 an hour or $3,000 a day each, and logistical information for a teleconference call Mr. Sanderson was arranging.

[43] The letter from Ms. McCormack to the Hunts is qualitatively different than the four *ex parte* communications the Hunts complain about. Her letter was simply notice of non-controversial administrative matters.

[44] The four *ex parte* communications between Mr. Williams and the arbitrators were opportunities for the Strata's counsel to advocate privately for the Strata and to share the Strata's point of view on such things as mediation. There is no evidence that the Hunts had private conversations with Ms. McCormack or other arbitrators in which they tried to advocate privately for their point of view. Even if they did, this would not act as a "set-off" of the Strata's private conversations with the arbitrators and mean that a fair hearing took place.

Arbitration Hearing

[45] The arbitration hearing took place over four days in October 2014.

[46] The panel issued its award on January 21, 2015. With one minor exception, all orders sought by the Hunts were refused.

[47] The panel issued its costs award on July 6, 2015, ordering the Hunts to pay the special costs of the Strata. The arbitrators' fees, including taxes, totalled $106,008.

[48] Both the reasons for the panel's main decision and the costs award emphasized that the Hunts had proceeded with arbitration despite knowing that there was no present application for installation of the HVAC unit, and that the strata council had made this clear to the Hunts. The arbitration panel stated in its main ruling that it would be inappropriate for the panel to "predetermine" any future application to install an HVAC system. The panel found that the Hunts showed an attitude of resentment toward the members of their strata community, and disrespect for the authority of the strata council.

Leave to Appeal Special Costs

[49] The Hunts sought leave to appeal the special costs award, pursuant to s. 188(1)(b) of the *Act*. Madam Justice Maisonville dismissed the leave application on December 18, 2015: 2015 BCSC 2412.

[50] The Strata next delivered its Bill of Costs to the Hunts, seeking full indemnity for all time spent by the Strata's counsel on the arbitration proceeding plus disbursements, including the Strata's share of the arbitrators' fees.

[51] In the course of preparing for the assessment of special costs, the Hunts obtained the file of Mr. Williams and became aware of his four *ex parte* communications with the arbitrators.

Chambers Reasons

[52] Following the discovery of the four *ex parte* communications, the Hunts brought a petition, pursuant to s. 187 of the *Act*, to set aside the January 21, 2015 arbitration award and the July 6, 2015 costs award.

[53] The petition was heard on March 17, 2017, and was dismissed on May 11, 2017.

[54] The chambers judge set out the background facts, including the four *ex parte* communications at paras. 23–26, 32 of the Chambers Reasons.

[55] The chambers judge identified the two arguments of the Hunts, namely, that there was a reasonable apprehension of bias and that the arbitrators had failed to meet their duty imposed by s. 181 of the *Act* to advise the Hunts of the possibility of mediation.

[56] In the discussion portion of his reasons, the chambers judge found that, in respect of the Hunts' objectives on the arbitration relating to the HVAC equipment, there was no dispute to arbitrate because Mr. Pinette had not sought permission to install the HVAC system: at para. 55.

[57] The chambers judge reviewed the arbitrators' decisions on each of the issues before them, and concluded that they were "correct": at paras. 56, 60.

[58] On the question of s. 181 of the *Act*, the chambers judge concluded that there was no prejudice to the Hunts arising from the failure of the arbitration panel to advise of mediation as a possibility, because the chambers judge found as a fact that the Hunts were not open to compromise and were aware of mediation as a possible alternative: at paras. 54, 66. Further, the chambers judge found that there was no dispute to mediate: at para. 66.

[59] Although the chambers judge identified the Hunts' argument based on reasonable apprehension of bias earlier in his reasons, he did not specifically address the merits of that submission. The chambers judge made no finding on the question of whether the four *ex parte* communications gave rise to a reasonable apprehension of bias.

[60] Lastly, the chambers judge seemed to imply, without making a finding or discussing the issue in any significant way, that the Hunts' application for judicial review could violate the rule against collateral attack. He said, at para. 67, "This judicial review application cannot be a collateral means to appeal [the costs award]."

Positions of the Parties

[61] The Hunts' position is that the chambers judge erred in failing to set aside the arbitration award on the basis that the four *ex parte* communications gave rise to a reasonable apprehension of bias.

[62] The Strata submits that the chambers judge considered the argument and rejected it. The Strata further submits that the *ex parte* communications were procedural and did not give rise to a reasonable apprehension of bias, and did not affect the outcome, since there was nothing to arbitrate.

[63] The Hunts are no longer pursuing the argument that the arbitrators' failure to comply with s. 181 of the *Act* was an error that could lead to overturning the results of the arbitration. There is therefore no appeal from the chambers judge's dismissal of this ground of their petition.

Standard of Review

[64] The standard of review for reviewing a decision of a lower court on a judicial review of a tribunal's decision is dealt with in *Henthorne v. British Columbia Ferry Services Inc.,* 2011 BCCA 476. There, this Court held that no deference is owed to the court below on whether the correct standard of review was applied by the court below or whether the tribunal being reviewed met that standard; both issues are questions of law: *Henthorne* at paras. 74–79 (per Groberman J.A.).

[65] In *Henthorne*, it was held that, on appeals from judicial review decisions, the appellate court will be for practical purposes in the same position as it would be if it were reviewing the decision of the tribunal directly, except in limited situations where the chambers judge was called upon to make an original finding of fact or to exercise discretion: at para. 79.

[66] The courts have the final say on issues of procedural fairness; the question on review is whether the tribunal or court below correctly afforded procedural fairness: *Macdonald v. Institute of Chartered Accountants of British Columbia,* 2010

BCCA 492 at paras. 43–45; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 at para. 74.

[67] It follows that if this Court determines the arbitration panel did not afford procedural fairness to the Hunts, then the chambers judge committed a reviewable error for which this Court can substitute its view.

Issues

[68] I will address the issues in this order:

1) Whether the judicial review proceeding constitutes a collateral attack; and,

2) Whether a reasonable apprehension of bias arose in the arbitration proceeding, including consideration of the following:

   i. the applicability of the law on procedural fairness to arbitration proceedings;

   ii. the concept of reasonable apprehension of bias;

   iii. analysis of the four *ex parte* communications.

[69] Discussion and analysis of the four *ex parte* communications will include consideration of the following three sub-issues: characterization of the communications as procedural; treatment of an arbitrator as nominee; and content of the *ex parte* communications about mediation.

Discussion

Collateral Attack

[70] The rule against collateral attack was summarized in the following way by Mr. Justice McIntyre in *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at 599:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is

> set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally—and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence.
>
> [Emphasis added.]

[71] The rule against collateral attack can be properly viewed as a particular application of the broader doctrine against abuse of process. The doctrine of abuse of process dictates generally that "relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole": *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 22, 52.

[72] I find that these judicial review proceedings do not constitute a collateral attack – against either the arbitrators' costs award, or the subsequent judicial proceeding denying leave to appeal that award – for the following reasons:

a) The *Act* expressly provides for both an application for judicial review and an appeal to the Supreme Court, if all of the parties consent or leave is granted: ss. 187 and 188. There has been no prior judicial review application. Judicial review is a form of direct attack, not collateral attack, against the order which is subject to judicial review.

b) The grounds raised on judicial review are different than the grounds raised before the arbitrators and on the application for leave to appeal.

c) The evidence on which the application for judicial review is based consists of the private communications between the Strata's counsel and the arbitrators. This evidence was not disclosed and could not have

been discovered by the Hunts until after the dismissal of the application for leave to appeal the costs award.

Reasonable Apprehension of Bias

i. Arbitrations and Procedural Fairness

[73] I turn now to consider the basis of the judicial review proceeding, the denial of procedural fairness.

[74] All administrative bodies owe a duty of procedural fairness to the persons before them, but the extent of that duty can vary depending upon the nature and function of the tribunal: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at 636–637; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[75] The closer the function of the board is to the judicial function of adjudicating a dispute, the more decision-makers will be expected to comply closely with the standards expected of judges, including conducting themselves to avoid a reasonable apprehension of bias: *Nfld. Telephone* at 636–637, 638; *Szilard v. Szasz*, [1955] S.C.R. 3.

[76] Arbitration is a form of judicial proceeding and, as such, the arbitrators must be impartial, independent decision-makers, free from "reasoned suspicion of biased appraisal and judgment": *Szilard* at 4, 6.

[77] And further, as held in *Szilard* at 7:

> Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.

[78] Arbitration decisions made under the *Act* can affect the quality, value and enjoyment of a strata owner's residence and major asset. These are therefore important decisions to the persons affected by them. Correspondingly, the process which precedes arbitration decisions is also very important.

[79] The arbitration proceeding provided for under the *Act* anticipates procedures similar to a judicial proceeding, including such procedures as a hearing open to the affected parties and the opportunity for each party to present and rebut evidence: ss. 183, 184 of the *Act*.

[80] It can be concluded from the context that arbitrators under the *Act* are expected to play a role similar to that of a judge, by considering the evidence and issues independently and free from actual or apprehended bias.

ii. Concept of Reasonable Apprehension of Bias

[81] The requirement for impartiality on behalf of those who adjudicate in law is a fundamental tenet of our legal system, and is a necessary requirement for public confidence in the judicial or administrative proceeding: *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at paras. 23–24.

[82] This principle is related to and goes hand-in-glove with the ancient adage that justice must not only be done, it must be seen to be done: *Strata Plan VR 2733 v. Jensen*, 2000 BCSC 1489 at para. 19, citing *The King v. Sussex Justices*, [1924] 1 K.B. 256 at 259.

[83] The test for considering whether there is a reasonable apprehension of bias is: what would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude? Would the person think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly? This test was set out in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394, per de Grandpré J., dissenting, and is often cited, including in *Yukon Francophone* at para 20.

[84] A finding of a reasonable apprehension of bias on the part of a decision-maker invalidates the proceeding, and results in setting aside the decision as void. This is because it leads to the conclusion that there was not a fair hearing. This defect cannot be remedied. It is unnecessary to prove actual bias, and the question

of whether the decision would have been different is irrelevant: *Nfld. Telephone* at 645.

iii. Analysis of the Four Ex Parte Communications

[85] What would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude about the impartiality of the arbitrators, in light of the *ex parte* communications? Would one think it is more likely than not that the decision-maker or decision-makers, whether consciously or unconsciously, would not decide fairly?

[86] It is well-accepted in the context of judicial proceedings that a judge ought not to discuss any part of an ongoing case with only one party to the dispute, or a witness. If a judge were to discuss a case with only one party, even in good faith, this could be sufficient to create a reasonable apprehension of bias.

[87] As explained by Dickson J. in *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 at 1113–1114:

> It is a cardinal principle of our law that, unless expressly or by necessary implication, empowered to act *ex parte*, an appellate authority must not hold private interviews with witnesses … or, *a fortiori*, hear evidence in the absence of a party whose conduct is impugned and under scrutiny. Such party must… ". . . know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. . . . Whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other."…
>
> [Emphasis added; citations omitted.]

[88] A number of cases have considered the problem of a decision-maker communicating privately with only one party to the dispute.

[89] In *R. v. Jones* (1996), 29 O.R. (3d) 294 (Gen. Div.), a preliminary inquiry judge initiated a private conversation with a Crown attorney about a case in front of that judge. One part of the conversation had to do with scheduling; another part of the discussion touched on a contentious issue having to do with the shackling of the prisoner. The judge repeated a view he had stated in court, that he did not want

evidence adduced on the behaviour of the accused outside of the courtroom, and the Crown stated what its position on the issue would be. Soon after the conversation, the Crown disclosed the contents of the conversation by letter to the defence.

[90] The court in *Jones* praised the integrity of Crown counsel in disclosing the *ex parte* communication with the judge, but found this did not "cure the impropriety": at para. 53. Mr. Justice Then noted that he did not find actual bias on the part of the judge, but held that the conversations raised a reasonable apprehension of bias.

[91] In reaching this conclusion in *Jones*, the court succinctly summarized the law at para. 44:

> To my understanding the prohibition against a judge speaking to one counsel about any case in the absence of other counsel is virtually absolute, permitting very few exceptions. In order to maintain public confidence in the administration of justice the prohibition must be strictly enforced.

Characterization of the Communications as Procedural

[92] The Strata submits that the content of the conversations at issue in the present proceeding were purely procedural, did not involve the taking of evidence, and that such conversations do not raise a reasonable apprehension of bias. The Strata cites *Gerstel v. Kelman*, 2017 ONSC 214, as support.

[93] In *Gerstel*, the parties to a business dispute had agreed to refer a matter to arbitration by a rabbinical court made up of three rabbis. One of the parties had private meetings or discussions with the rabbis before the hearing.

[94] In analyzing the issue of whether there had been an apprehension of bias, the court in *Gerstel* noted the special terms of the arbitration agreement which were based on religious and community traditions, and distinguished this from the more formal rules employed by lawyers and courts: at paras. 13, 42, 48, 52, 70, 72. The court also distinguished the phase of the communications as taking place during an introductory and investigatory stage and dealing with procedure, not the substance or merits: at paras. 48, 56.

[95] The *Gerstel* case is distinguishable because the arbitration proceeding was intended to be faith-based and was expressly distinguished from formal adjudicative proceedings in the judicial tradition.

[96] In contrast to *Gerstel*, the present arbitration proceeding was modelled on a judicial proceeding; the arbitrators were lawyers presumed to be well-versed in the legal tradition of the neutrality of decision-makers; and the arbitration was conducted under the statutory guidance of the *Act*. It seems unlikely that the Legislature could have intended arbitrations under the *Act* to be conducted in ways that did not respect procedural fairness.

[97] Further, the tenor of the *Gerstel* decision is that the communications at issue had to do with matters that were considered inconsequential. The same cannot be said to be true here.

[98] In the present case, the first of the *ex parte* conversations had to do with the decision to be made by two of the arbitrators as to the number of arbitrators – whether it would be three or one. This was a material decision which had significant costs consequences. Mr. Williams recognized that the costs of the arbitration might be of some strategic importance.

[99] Private conversations between an arbitrator and one party to the dispute do not necessarily have to deal with the merits of the dispute or evidence in order to be disqualifying.

[100] The case of *Setlur v. Canada (Attorney General)* (2000), 194 D.L.R. (4th) 465 (F.C.A.), concerned judicial review of a decision of the appeal board of the Public Service Commission on an appeal by an employee as to a hiring decision. The chairperson of the appeal board made efforts to separately contact the employee's counsel and the human resources person representing the employer to schedule hearing dates. The human resources person missed the call, but then returned it and had a private conversation with the chairperson. On that call, the human resources person complained about various matters, including the tone of the

hearing and the manner in which the employee's allegations were being presented. The chairperson suggested it was inappropriate for those concerns to be expressed off the record and further suggested she contact senior human resources personnel for guidance. A month later, another person working for the employer also contacted the chairperson and left a voice mail message seeking some accommodation for a witness's attendance.

[101] In *Setlur*, the employee was unhappy with a decision by the chairperson that allowed an adjournment of the hearing and release of hearing tapes to new counsel for the employer, after earlier refusing to release the tapes to the employee. The employee requested that the chairperson recuse herself, and she refused.

[102] On judicial review in *Setlur*, the judge dismissed concerns about the private communications. On appeal, the Federal Court of Appeal held that the trial judge had erred in part because he focused on the degree of actual prejudice caused to the petitioner, noting that the appellant did not need to prove actual bias, and that the appellant's apprehension of bias was reasonably held: at paras. 26, 29. The court further noted that the appeal board would be well advised to "revisit its procedure of communicating with the parties on procedural matters": at para. 30.

[103] In other words, *Setlur* confirms that *ex parte* communications that touch on procedural matters are not exempt from the principles of procedural fairness that require the maintenance of the appearance of absolute impartiality on the part of the decision-maker.

[104] There is no question that procedural matters can have strategic importance in a dispute. Some procedural matters are on the purely administrative end of the spectrum, such as the start time of a hearing; others will be more significant, such as the right to and scope of discovery.

[105] In addition to the important issue of the number of arbitrators, Mr. Williams' private communications with the arbitrators discussed the prospects of mediation, including what the Strata's mediation proposal would be, and the implication that the

rest of the owners supported the costs of arbitration. As I will touch on shortly, these were not trivial matters.

Treatment of Arbitrator as Nominee

[106] It is relevant that the Strata viewed Mr. Borowicz as its nominee at the time of the first *ex parte* communication, and not as an independent, neutral arbitrator. The Strata submits in its factum herein:

> 56. At the time, Mr. Borowicz was the Strata Corporation's nominee and there was nothing inappropriate about the Strata Corporation contacting its nominee particularly on a strictly procedural issue and only to communicate the Strata Corporation's position that it had not had the chance to previously set out.
>
> [Emphasis added.]

[107] I pause to note that the submission that the Strata had not had a prior chance to set out its position is untenable. Mr. Williams had written to the arbitrators and the Hunts two days previous, and took a neutral position on whether the Strata preferred a panel of three or a single arbitrator. The Strata had a chance in that letter, or in a second letter copied to all, to set out a different position if it wanted to do so.

[108] But what is most telling is the Strata's concession in its factum that Mr. Borowicz was viewed as its nominee. This choice of words is possessory. It implies an expectation that, as its nominee, Mr. Borowicz would show some loyalty to the Strata and be more receptive to its viewpoint.

[109] Mr. Borowicz stood to gain professional fees as a result of the Strata's nomination. The first *ex parte* communication was a signal to him that the party who nominated him wanted him to be part of a three-person arbitration panel and was not deterred by the increased costs this would bring.

[110] The Strata's expectation that Mr. Borowicz was simply the Strata's nominee, entitled to favour the Strata's position, is at odds with the language of the *Act*.

[111] Section 179(6) of the *Act* provides:

> (6) If an arbitrator, choice of arbitrators or method of appointing an arbitrator is rejected in the Notice Responding to Reply, each party has one week after that notice is given to appoint his or her own arbitrator, and the 2 arbitrators must either
>
> (a) name a third person as the sole arbitrator, or
>
> (b) name a third arbitrator to act with them and to chair the panel.

[112] The language of the *Act* refers to the appointed persons as "arbitrators", not as nominees, when faced with the decision of whether to appoint a third person as sole arbitrator or as chair. As such, the two arbitrators must be expected to make the decision independently and impartially.

[113] The Strata's assumption that Mr. Borowicz, as the Strata's nominee, could engage in private communications with Mr. Williams is contrary to the expected impartiality of arbitrators.

[114] The following passage from *Szilard* at p. 4 is oft-cited, including in *Refrigeration Workers Union, Local 516 v. Labour Relations Board of British Columbia* (1986), 27 D.L.R. (4th) 676 (B.C.C.A.) at 680:

> From its inception arbitration has been held to be of the nature of judicial determination and to entail incidents appropriate to that fact. The arbitrators are to exercise their function not as the advocates of the parties nominating them, and *a fortiori* of one party when they are agreed upon by all, but with as free, independent and impartial minds as the circumstances permit. In particular they must be untrammelled by such influences as to a fair minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled to.

[115] The case of *Refrigeration Workers Union* was decided in the labour context of labour and management having separately appointed members to the arbitration panel. The Court rejected the notion that independence and impartiality was watered down in such a context. Rather, the Court affirmed the principle enunciated in *Szilard* that the duty of arbitrators, once appointed, is not to act as advocates but as "free, independent and impartial minds": *Refrigeration Workers Union* at 681.

[116] I find that the first *ex parte* communication could have no purpose other than attempting to influence Mr. Borowicz as the Strata's nominee. An informed person, viewing the matter realistically and practically and in context, would think it more likely than not that Mr. Borowicz would be influenced, consciously or unconsciously, and would decide the matter in a way that would favour the party who nominated him.

[117] The Strata's private lobbying and expectation that Mr. Borowicz as nominee would be influenced by the Strata's desired outcome unfortunately destroyed any appearance of adjudicative neutrality. That neither Mr. Williams nor Mr. Borowicz disclosed the communication, and that Mr. Borowicz did not respond by stating to Mr. Williams that it was inappropriate, made the problem worse.

[118] When, later on, Mr. Borowicz initiated his own private communication with Mr. Williams in the September 15, 2016 telephone discussion, this further compounded the problem that had been initiated by Mr. William's first *ex parte* communication to him. It indicates their off-the-record relationship was ongoing, which suggests that there continued to be something special about Mr. Borowicz being the Strata's nominee. The notes of that telephone conversation suggest that the discussion between Mr. Borowicz and Mr. Williams touched on the prospect of mediation, including at least one other arbitrator's views, those of Ms. McCormack, and that one of them had suggested that mediation was "premature". The Hunts were left out of this important discussion.

[119] That takes me to the topic of mediation.

Ex Parte Communications About Mediation

[120] The Strata submits that the private discussions about mediation were irrelevant to the substance of the dispute that was being arbitrated and therefore of such little import they could not raise a reasonable apprehension of bias.

[121] There were the following express or implicit messages arising from the *ex parte* communications between Mr. Williams and the arbitrators about mediation:

a) The Strata was reasonable and willing to consider mediation and even to make a reasonable mediation proposal. Logically, without hearing from the Hunts, this could communicate the inference that the only reason the matter had not settled was because the Hunts were unreasonable.

b) All other owners supported the Strata's position in the arbitration and were willing to fund the three-person arbitration. Again, this could communicate the inference that the Hunts were the unreasonable parties.

c) The arbitrators were comfortable discussing the concept of mediation with counsel for the Strata, and discussing the Strata's opinion about a mediation proposal, but at the same time, the arbitrators had decided not to raise the notion of mediation with the Hunts despite the mandatory requirement to do so in s. 181 of the *Act*.

[122] As already mentioned, the Strata understood that the comparative costs as between mediation and arbitration were of strategic importance and could be used as a tool to put pressure on the Hunts.

[123] Mr. Williams conceded during the course of the hearing of this appeal that one aspect of what happened in this arbitration was akin to a judge meeting outside of the courtroom with only one party to discuss the prospect of settlement or mediation. I have little difficulty concluding in the context of a court proceeding that this would be considered inappropriate and could raise a reasonable apprehension of bias. Likewise, I have no difficulty reaching the same conclusion in the context of an arbitration under the *Act*.

Whether there was anything to arbitrate

[124] As for the repeated submission by the Strata that there was nothing to arbitrate or mediate, this was raised by the Strata below, and accepted by the chambers judge, as a reason for dismissing the application for judicial review. However that submission and finding is irrelevant to the question of whether there was a reasonable apprehension of bias. This assertion is simply one rung of the

irrelevant argument that there was no actual prejudice to the Hunts arising from the four *ex parte* communications even if they did give rise to a reasonable apprehension of bias.

[125] The Strata's position amounts to an argument that there was no need for an arbitration, and therefore no need for the arbitrators – once appointed and acting as arbitrators – to act fairly. The reverse is true: there was an arbitration; there were arbitrators appointed; and therefore they did have duties of impartiality and procedural fairness.

[126] Furthermore, the submission by the Strata that there was nothing to arbitrate or mediate is inconsistent with the following:

a) By the time the matter came to arbitration, there were additional issues to be addressed beyond the HVAC system, as noted in the Chambers Reasons at paras. 59–64.

b) Section 177(3)(e) of the *Act* specifically provides that a dispute may be referred to arbitration where there is a threatened action by the strata corporation in relation to an owner. There was evidence indicating that there was a threat of future HVAC units being approved: plumbing and electrical had been installed to provide for it in strata lot 3; and bylaws had been amended to potentially simplify the process for approval. The Hunts' submissions to the arbitrators referred to the "threat" they faced and so they may have been relying on this provision of the *Act*.

c) The Strata also sought rulings from the arbitrators on the right of the strata corporation to deal with future applications for installation of HVAC systems, seeking a ruling on the scope of authority based on interpretation of amended bylaws. The Strata set out in its written submissions to the arbitrators that it wished the arbitrators to "direct that, with the proper approvals in place, HVAC units can be installed by any owner in the future", and that the arbitrators had authority to make such a ruling pursuant to ss. 177(3)(b) and (c) and 185(1)(a) of the *Act*.

d) The Strata had an initial proposal that it was considering raising at mediation, related to future approval of HVAC systems, according to the records of Mr. William's *ex parte* conversation with Mr. Sanderson. Why the Strata withdrew from pursuing mediation and such a proposal is not known, but it does not lead to the conclusion that there was nothing to mediate, or that there was no long-term plan relating to installation of HVAC systems.

The Hunts' knowledge of mediation

[127] This leads to the contested finding of fact by the chambers judge that the Hunts knew during the arbitration process that mediation was a possible alternative: para. 66. The Hunts submit that this was an erroneous inference in the face of their affidavit evidence to the contrary.

[128] It is unnecessary to decide on this appeal whether the chambers judge erred in drawing the inference that the Hunts knew about mediation. First, as already stated, it is not necessary to show what would have happened had there been no steps taken by the arbitrators which created a reasonable apprehension of bias. Actual prejudice is not necessary to give rise to an unfair process.

[129] Second, the chambers judge found as a fact that none of the arbitrators mentioned mediation to the Hunts: at para. 27. Why the arbitrators failed to do so is unknown, but of course the several *ex parte* communications raise questions about this, given that the topic of mediation was discussed by each of the arbitrators privately with Mr. Williams.

[130] Further, one wonders how one could determine the hypothetical that, if the arbitration panel raised the possibility of mediation with the Hunts, it would have made no difference. Simply characterizing the Hunts as stubborn does not resolve the issue.

[131] Mediation is a chance to explore any misconceptions that the party initiating arbitration might have, to educate that party about the risks and costs implications,

and, in a non-adversarial setting, to come up with solutions to alleviate the concerns that might be motivating the arbitration.

[132] Where the possibility of mediation is raised by an arbitrator, the arbitrator's stature and authority can assist an unrepresented litigant in understanding that the arbitration process may have some considerable risk to them, and that mediation may be of some practical use.

[133] Lastly, I note that the distinction between arbitration and mediation, which is obvious to trained legal persons, is not necessarily apparent to laypersons.

Conclusion

[134] The chambers judge erred in failing to find that the four *ex parte* communications between the Strata's lawyer, Mr. Williams, and the arbitrators, viewed practically and reflected upon, would lead an informed person to conclude that the arbitrators would likely not decide the matter fairly. These communications created a reasonable apprehension of bias.

[135] Having said this, I have no reason to believe that the arbitrators were in fact biased and deliberately favoured the Strata over the Hunts. Suffice it to say, once there is a reasonable appearance of bias, it is unnecessary to embark on the impossible task of determining the actual state of mind of the decision-maker.

[136] By allowing *ex parte* communications about the arbitration proceeding to take place with Mr. Williams, the arbitrators placed themselves in an impossible position and undermined their appearance of neutrality.

[137] It has to be understood that many strata disputes are initiated or defended by self-represented condominium owners. The lawyers acting on the opposite side or as arbitrators in such disputes are usually earning significant professional fees for their roles. It would not be unheard of for them to refer work to one another and to maintain collegial professional relationships. In such a context, the legal

professionals involved must be especially vigilant to maintain appropriate professional distance in order to properly perform their roles.

[138] I would allow the appeal. On the basis that there was a reasonable apprehension of bias, I would grant the petition for judicial review, and set aside the arbitrators' decisions, including their costs award.

[139] The Hunts seek costs of the judicial review hearing in the court below, costs of this appeal, and costs of the arbitration proceeding. I agree that the Hunts are entitled to costs of the judicial review proceeding in the court below and costs of this appeal. I would make no order in regard to the costs of the arbitration.

"The Honourable Madam Justice Griffin"

I agree:

"The Honourable Mr. Justice Goepel"

I agree:

"The Honourable Mr. Justice Fitch"