CITATION: Sapershteyn et al v. 1821317 Ontario Limited et al, 2023 ONSC 5977
DIVISIONAL COURT FILE NO.: 23-016-00
DATE: 20231031

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Sutherland, Leiper and Centa JJ.

BETWEEN:	
SLAVA SAPERSHTEYN, STEVEN AIKENHEAD, SCOTT EVERINGHAM, RICHARD KENNEDY, KATHERINE GRANT, NADA RAFAJ, ALBERT KWON, TREVOR WHEATLEY and AARON WYNIA Applicants (Tenants/Respondents in Appeal)	*Slava Sapershteyn, Richard Kennedy, Katherine Grant, Nada Rafaj, Albert Kwon and Trevor Wheatley*, self represented Tenants
– and –	
1821317 ONTARIO LIMITED AND GROUP D INVESTMENTS INC. Respondents (Landlords/Appellants in Appeal)	*Joe Hoffer and Kevin Kok*, Counsel for Respondents/Landlords *Katia Snukal*, Counsel for the Landlord and Tenant Board
	HEARD in Toronto: October 18, 2023 (by videoconference**)**

REASONS FOR DECISION

Sutherland J.

Overview

[1] 1821317 Ontario Limited and Group D Investments Inc. (hereinafter the landlord or appellants) appeal a decision of Vice Chair E. Patrick Shea of the Landlord and Tenant Board (the Board) dated November 2, 2022 (the final Order). The respondents obtained a final Order that section 135.1 of the *Residential Tenancies Act, 2006*[1] (RTA) did not apply to the unlawful rent increases of the landlord and consequently, the landlord was obligated to pay to the respondents the unlawful rent increases it received.

[2] The appellants contend that the decision of the Board that s. 135.1 of the RTA does not apply in the circumstances is an error in law. The appellants contend that the section does apply which means that the respondents are prohibited from receiving any repayment of the unlawful rent increases received by the appellants.

[3] For the reasons that follow, the appeal is dismissed.

Brief History

[4] The appellants own a residential "live-work" complex located at 87 Wade Avenue, Toronto (the Property). The nine respondents reside in units at the Property. The landlord operated as if the rental units were commercial, such that the RTA did not apply to them. For example, he charged HST to the tenants (which he remitted to CRA) and did not comply with the RTA when increasing the rent charged to the tenants. The respondents applied to the Board seeking a determination that the RTA applied to their units. The Board concluded the fact that the RTA applied to the rental units was resolved by an order made January 2, 2020. [2]

[5] With that declaration in hand, the respondents then applied to the Board alleging that the landlord had collected rent that was not permitted by the RTA and collected HST and seeking orders pursuant to s. 135 of the RTA that the landlord return these amounts. This application was brought prior to July 21, 2020.

[6] In its final Order, the Board ordered that "[t]o the extent it has not already done so the Landlord shall pay specified amounts to the Tenants, ranging in amounts up to $25,000.00." The tenants waived recovery of any amounts over $25,000.00.[3]

[7] The landlord did not dispute that it charged 'illegal' rent and improperly collected HST from the tenants. The landlord's position before the Board, however, was that the coming into force of s. 135.1 of the RTA prevented the Board from making an Order to direct to return illegally charged rent to the tenants.

[8] There is also no dispute that the tenants paid the illegal rent charged by the landlord for 12 consecutive months. The parties agreed before the Board that were it not for s. 135.1 of the RTA, the landlord would have to return the illegal rent that it collected from the tenants. The parties were also in agreement as to the amounts that would have to be returned to the tenants.

Decision of the Board

[9] As Vice-Chair, E. Patrick Shea wrote: "These applications were all commenced before section 135.1 came into force. I must determine whether the validity of the rent increases in issue was 'finally determined' when the section came into force on July 21, 2020. For the reasons set out below, I find that section 135.1 of the Act does not apply to these applications."[4]

[10] Beginning with the presumption that legislation does not have retrospective application, the Board found it "ambiguous" as to what the legislation means by "finally determined by the Board".[5] To avoid an absurd interpretation, and in accordance with the Board's obligation to adopt the most expeditious method of determining questions arising in a proceeding, the Board held that it could not have been the intention of the Legislature in an application pending before the Board: to deprive the tenant of recovery of what the parties agreed was illegal rent collected by the landlord based on the fact that the Board had not made the order directing the landlord to repay the 'illegal' rent it collected from the tenant - the only order that the Board would be expected to make in the circumstances - before s. 135.1 came into force on July 21, 2020.

[11] The Board found that the validity of the illegal rent charges had been finally resolved by July 21, 2020. At paragraph 40, the Board stated:

There was an interim order made in these applications by a Hearing Officer on May 26, 2020 in which a Hearing Officer directed, in part, that

*On or before July 5, 2020, the Landlords shall give the Tenant and the Landlord and Tenant Board a statement confirming whether the figures and calculations regarding the illegal rent and the illegal charge provided by the Tenant are correct or not, and if not correct, then what are the discrepancies.**[6]***

[12] The landlord did not comply with that direction, nor did it explain its failure to comply. The Board found that, in the circumstances, the directive from the Hearing Officer on May 26, 2020, constituted "a final determination as to the validity of the rent increases in issue on these applications." [7]

[13] The Board took notice of the fact that in-person hearings before the Board were postponed in March 2020, and that it was impossible for the tenants to have obtained an order "closing out these applications before July 21, 2020. That does not, however, change the fact that the validity of the rent increases charged by the Landlord was not an issue as of July 21, 2020, such that s. 135.1 does not apply to these applications."[8]

[14] The Board also noted, without making a finding on the matter, that "it certainly seems that the Landlord was waiting for section 135.1 to come into force based on the assumption that, once it did, the Tenants would be 'out of luck' in terms of recovering the 'illegal' rent."[9]

Legislative Scheme

[15] Section 135.1 of the RTA, which came into force on the day it received Royal Assent (July 21, 2020),[10] reads as follows:

Rent increase deemed not void

135.1 (1) An increase in rent that would otherwise be void under subsection 116 (4) is deemed not to be void if the tenant has paid the increased rent in respect of each rental period for at least 12 consecutive months. 2020, c. 16, Sched. 4, s. 24.

Non-application

(2) Subsection (1) does not apply with respect to an increase in rent if the tenant has, within one year after the date the increase was first charged, made an application in which the validity of the rent increase is in issue. 2020, c. 16, Sched. 4, s. 24.

Deemed compliance with s. 116

(3) For greater certainty, if subsection (1) applies with respect to an increase in rent, section 116 is deemed to have been complied with. 2020, c. 16, Sched. 4, s. 24.

Application of s. 136

(4) For greater certainty, nothing in this section limits the application of section 136. 2020, c. 16, Sched. 4, s. 24.

Transition

(5) This section applies with respect to an increase in rent even if it was first charged before the day the *Protecting Tenants and Strengthening Community Housing Act, 2020* receives Royal Assent, provided the validity of the rent increase was not finally determined by the Board before that day. 2020, c. 16, Sched. 4, s. 24.[11] (emphasis added)

[16] Accordingly, the legislature changed the legislative scheme allowing for illegal increases in rent if the tenant pays the illegal increase in rent in respect of each rental period for at least 12 months and if any illegal increase in rent before July 21, 2020, is not "finally determined by the Board" before July 21, 2020. It is not disputed that this change in this legislation was a response to the Ontario Court of Appeal decision in *Price v. Turnbull's Grove Inc.*[12]

Issues

[17] The issues in this appeal deal with these questions:

(a) Did the Board err in its interpretation of s. 135.1 of the RTA?

(b) Did the Board err in its application of s. 135.1 of the RTA by ordering the landlord to repay to the tenants the increase in rent paid?

(a) Did the Board err in its interpretation of section 135.1 of the RTA?

Jurisdiction and Standard of Review

[18] This Court has jurisdiction to hear an appeal of an order of the Board.[13]

[19] The parties have a right of appeal on questions of law only.1F[14] There is no right of appeal from findings of fact, or findings of mixed fact and law that do not give rise to an extricable question of law.2F[15] The standard of review on questions of law is correctness.

Analysis

[20] It is not contested that in interpreting legislation the modern approach governs. The Board correctly utilized the modern approach as was laid in *Bell ExpressVu Ltd. Partnership v. Rex*[16]. In *Bell ExpressVu*, the Supreme Court of Canada adopted Elmer Driedger's formulation of the approach: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[17]

[21] I do note that after the decision of the Board, the Supreme Court of Canada reviewed the law of statutory interpretation in *La Presse inc. v. Quebec*[18] *in particular the* confusion on what is meant by the formulation of the approach of Driedger. The Court stated:

[22] It is well established that, under the modern approach to statutory interpretation, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object 2023 SCC 22 (CanLII) of the Act, and the intention of Parliament" (E. A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87). Confusion as to what this might entail in practice endures, despite the apparent simplicity of Driedger's influential words. For the sake of clarity, I will restate two principles that seem to be at the heart of this confusion.

[23] First, the plain meaning of the text is not in itself determinative and must be tested against the other indicators of legislative meaning — context, purpose, and relevant legal norms (*R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967, at para. 31). The apparent clarity of the words taken separately does not suffice because they "may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation" (*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 10).

[24] Second, a provision is only "ambiguous" in the sense contemplated in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, if its words can reasonably be interpreted in more than one way *after* (emphasis in original) due consideration of the context in which they appear and of the purpose of the provision (paras. 29-30). This is to say that there is a "real" ambiguity — one that calls for the use of external interpretive aids like the principle of strict construction of penal laws or the presumption of conformity with the *Canadian Charter of Rights and Freedoms* — only if differing readings of the same provision cannot be decisively resolved through the contextual and purposive approach set out by Driedger (ibid.).

[22] With these principles in mind, while I disagree with the Board's characterization of the purpose of the section, the Board did not err in its interpretation of the meaning of the provision.

[23] In my view, there is no ambiguity in the meaning of s. 135.1. The purpose of the section is clear, it is a response to *Price* and to limit the availability to tenants to seek and obtain payment of illegal rent charged. The legislature, in its wisdom, determined that tenants cannot seek retroactive payment of illegal rent charged after one year and in the cases of an application brought before the legislative change, up to the date the change came into affect, July 21, 2020.

[24] It could be taken that the legislature was well aware that a fixed date will make it difficult if not impossible for some tenants to have their application finally determined by July 21, 2020. With the indication of a fixed date, it can be taken that the legislature intended that fixed date with no exceptions.

[25] Consequently, in my view, the Board's characterization of the legislative purpose is not supported by the clear wording and grammar of the section. It is my view that the legislature exactly intended to deprive tenants of their right to recovery of illegal rents charged if there is no final determination by July 21, 2020.

[26] However, that does not mean the Board committed an error of law in its interpretation of the meaning of the provision. I do agree with the Board's interpretation of "final determination," that is, all issues arising from the application must be finally determined by July 21, 2020. This does not mean, as is the practice of the Board, that issues may be finally determined at different times during the application process. But as the Board found in this matter, all issues must be finally determined by July 21, 2020. Accordingly, I do not find that the Board erred in its interpretation of "finally determined by the Board."

(b) Did the Board err in its application by ordering the landlord to repay to the tenants the increase in rent paid?

[27] The crux of the appeal is the issue of the Board's application of s. 135.1 to the circumstances presented. This raises the question of whether the issue raised by the appellant is a question of law or a question of mixed fact and law.

[28] The appellant framed the issue as whether the Board erred on the facts in deciding that the May 26, 2020 endorsement was a final determination per s. 135.1.

[29] To determine that issue, this Court would have to delve into the facts and determine whether the Board's application of s. 135.1 to the facts was an error. I am of the view that such a determination is a question of mixed fact and law.[19] The appellant is asking this Court to substitute its decision of the application of the facts to s. 135.1 to that of the Board.

[30] It is undisputed that the Board has special knowledge and expertise as it concerns residential tenancies and its processes for addressing disputes. Deference must be given to the Board's assessment of the factual matrix of issues and the application of the facts to the law. It is a clear intention of the legislature per s. 210 of the RTA that this Court is only to interfere with a Board's decision on questions of law.

[31] Whether this Court would have come to the same conclusions as the Board on its application of the facts in this matter is not the issue. The Board has the legal opportunity to be wrong in its application of the facts to the law. As long as the Board utilized the right test, which the Board did in this circumstance, of whether there was a final determination of the issue of the validity of the rent increases before July 21, 2020, this Court has must not interfere with the Board's assessment.

[32] I find that the Board was cognizant that the issue was whether there was a final determination made before July 21, 2020. The Board decided there was. This decision is not a question of law.

Disposition

[33] The appeal of the landlord on the Board's interpretation of s. 135.1 of the RTA is allowed, but the appeal as to the Board's determination that the landlord is obligated to pay to the tenants the illegal rent collected is dismissed.

[34] No one is seeking costs. There will be no order for costs.

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Sutherland J.

I agree

_____
Leiper J.

I agree

_____
Centa J.

Date: October 31, 2023

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Respondents/Tenants

– and –

1821317 ONTARIO LIMITED AND GROUP D INVESTMENTS INC.

Appellants/Landlords

REASONS FOR DECISION

Released: October 31, 2023

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[1] S.O. 2006, c. 17
[2] *TST-96600-18 (Re)*, 2020 CanLII 31438 (ON LTB).
[3] final Order, at para. 54 and separately numbered Order section, para. 2.
[4] final Order, at para. 31.
[5] final Order, at paras. 33-34.
[6] final Order, at para. 40.
[7] Final Order, at para. 44.
[8] final Order, at para. 49.
[9]final Order, at para.31.
[10] *Protecting Tenants and Strengthening Community Housing Act*, 2020, S.O. 2020, c. 16, Sched. 4, s. 41(1).
[11] *supra*, note 1.
[12] 2007 ONCA 408 (CanLII)
[13] s. 210(1) of the RTA.

[14] Section 210(1)-(3) of the RTA.
[15] *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.
[16] 2002 SCC 42, [2002] 2 S.C.R. 559, see also *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 117.
[17] *Ibid*, at para. 26.
[18] 2023 SCC 22.

[19] *Housen*, note 13 at paras. 26, 27 and 28.