Court of Queen's Bench of Alberta

Citation: Condominium Plan No. 762 1302 v Stebbing, 2014 ABQB 487

Date: 20140811
Docket: 1303 11384
Registry: Edmonton

Between:

The Owners: Condominium Plan No. 762 1302

Applicants

- and -

Rhonda Stebbing

Respondent

Reasons for Judgment
of
W.S. Schlosser, Master in Chambers

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[1] Rhonda Stebbing and her two cats moved into The Saskatchewan condominium complex in September, 2010. The Saskatchewan was a 'pet-friendly' building. The bylaws provided for Board consent to keep cats. The bylaws also provided for withdrawal of consent.

[2] Ms. Stebbing's cats were important to her, as pets are to many. Ms. Stebbing made Board approval for her two cats a condition of the purchase of her new home. Although the Board was not a party to her real estate contract, the realtor conveyed that approval had been obtained. Ms. Stebbing withdrew the condition and moved in.

[3] The evidence shows that the Board was aware of Ms. Stebbing's cats but written consent was never granted. Things went smoothly for over two years. Then the trouble began.

[4] There were many pets in the building. Some had written permission. Others did not. There appeared to be no criteria for obtaining written permission. It seems to have been a formality. An owner would make a request. The Board would convey formal consent with a letter or by reference to a motion made at a Board meeting. But not everyone made a formal request.

[5] The bylaws are silent about the approval process or the form of approval, other than to say that the consent is to be in writing and that it can be withdrawn if the pet is "deemed a nuisance or causing an annoyance to others". A later bylaw, specifically referring to animals, indicates that the Board may withhold approval arbitrarily and that it may withdraw approval 'at any time on 15 days' notice'.

[6] The bylaws specifically provided:

> 46. Owner's Usage
> An owner shall not:
> ...
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> (c) keep or harbour in the Building any animal, bird, domestic or household pet without written consent of the Board provided that the Board may at any time in writing revoke such consent or request the removal of any domestic or household pet, animal or bird, which is deemed a nuisance or causing an annoyance to others, whereupon such animal or pet shall be removed forthwith from the Building. No Owner shall feed pigeons, gulls or other birds from the windows of their unit, or anywhere in close proximity to the Building.
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> 58. Animals
> No animal, livestock, fowl or pet of any kind shall be kept in any unit unless approved by the Board, which approval the Board may arbitrarily withhold and may, if given, withdraw at any time on fifteen days' notice. Any and all approved animals which may bear a leash will be required to wear one when on the common property in any event.

[7] In other words, the bylaws tell us that approval is necessary and that approval may be withheld arbitrarily (bylaw 58). Consent is to be in writing (bylaw 46(c)). Approval may be withdrawn on 15 days' notice (bylaw 58). The Board may request removal of pets that are a nuisance or annoyance; in which case an owner must remove the animal forthwith (bylaw 46(c)).

[8] There were three recorded complaints about pets in the building. One complaint came from an owner on the fourth floor. He complained of cat hair in and around the washers and dryers in the common laundry area. He wished his concern to be communicated to cat owners in the building so that they would be more considerate of others when using the common facilities. An owner on the fifth floor made a similar complaint. Both said they had allergies. Finally, an owner on the eighth floor complained that he was extremely allergic to cats and that not only did his next door neighbour own a cat but that this cat had been wandering around in the common

hallways and it came into his unit on one occasion.[1] He said he was suffering extreme discomfort as a result.

[9] Ms. Stebbing's unit is on the seventh floor and there was never any specific complaint about her cats (though now there is only one). There is no evidence of the kind of cat Ms. Stebbing owns; whether it is an indoor, or an outdoor cat, whether Ms. Stebbing uses the common laundry facilities, or whether her cat has in any way been an annoyance to others.

[10] Although this is not strictly in evidence, there are apparently 80 units in The Saskatchewan. Eight of these are penthouse units. They have their own laundry facilities. Washers (and, presumably, dryers) are not permitted in the other units because of plumbing problems. One of the Board members in attendance at the hearing in court indicated that there was one common laundry area for these 72 units.

[11] The Board decided to enforce Bylaws 46 and 58 strictly. They knew that Ms. Stebbing had a cat and that it did not have written consent – at least there was no record of any written consent from the Board. They sent a 15-day notice.

[12] Ms. Stebbing refused and retained counsel. The Board did too. The Board's position became entrenched. Instead of considering whether Ms. Stebbing's pet ownership could be regularized by written consent, they dug in their heels. Their lawyer said:

> The Board of Directors has ascertained that there is no evidence of any kind of approval of your client's 2 cats. There are a number of people in the building who are allergic to cats and the failure to obtain approval under the circumstances is of serious concern to both the Board and other owners.
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> As you know from the Bylaws and the Board's approval or non-approval is a discretionary matter and even where approval is given the Board is entitled to withdraw that approval. Your client has been notified to remove the cats and whether that is treated as a demand in circumstances of initial non-approval or in circumstances of withdrawal of an approval previously given should not make any difference. Your client should remove the 2 cats from her residence and this letter is to advise you that if that has not happened within the next 10 days we expect to be instructed to bring an application to court to require removal of the 2 cats and costs and damages may be claimed.

So the matter ended up in court.

[13] Section 67(1)(a) of the *Condominium Property Act*, RSA 2000 c-22, provides:

> 67(1)(a) In this section, "improper conduct" means
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> > (i) non-compliance with this Act, the regulations or the by laws by a developer, a corporation, an employee of a corporation, a member of a board or an owner,

[1] This type of problem is not new: See, for example, ***Mitten v Faudrye,*** 1625, Popham 161 at 162 per Dodderidge J.

> (ii) The conduct of the business affairs of a corporation in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party,
>
> (iii) The exercise of the powers of the board in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party
>
> (iv) the conduct of the business affairs of a developer in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit, or
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> (v) the exercise of the powers of the board by a developer in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit.

Section 67(2) provides a wide range of remedies.

[14] The law relating to Section 67 can be summarized as follows (from ***Leeson v Condo Plan No. 9925923***, 2014 ABQB 20):

> [15] Subsections 67(1)(a)(ii) - (v) use the words 'oppressive or unfairly prejudicial [conduct]'. An oppression remedy is well established in a company law setting, though it goes without saying that the remedy in that context protects a narrower range of interests than those that might be found in a condominium setting.
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> [16] The learned authors of the *Condominium Law and Administration*, Carswell, vol. 2, (Looseleaf) Ch. 23 (T. Rotenberg), identify British Columbia as the pioneering jurisdiction for an oppression remedy in the condominium context. Mr. Rotenberg notes five general principles that apply in this setting:
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> > (a) It is a broad remedy, broadly applied; attempts to narrow its impact and effectiveness should therefore be resisted.
> >
> > (b) The purpose of the oppression remedy is to protect the objectively reasonable expectation that caused the relationship to begin or continue.
> >
> > (c) Either the cumulative results of the conduct complained of or a specific egregious act ultimately determines whether there is an actionable wrong.
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> > (d) The court must balance the competing interests of the minority, who are to be treated fairly, with the rights of majority to govern. Only if the minority's interest is unfairly treated will the courts intervene.
> >
> > (e) The selection of a remedy must be sufficient to achieve the desired result. Remedies should not be narrowly limited, and may be granted against individuals in appropriate cases.

> (17) The source of the remedy is the recognition that there are different, sometimes competing, interests within any group. Not every interest can prevail, so the law requires due consideration and fair treatment of the various stakeholders.

[15] In this case the Board drew an arbitrary line between pets with written consent and pets without it. They were cracking down on Ms. Stebbing's cat, not because it had caused any trouble, or had been the subject of any particular complaint, but because her pet lacked written consent. It is not a case of an owner flaunting an absolute prohibition. Lack of written consent appears to have arisen from a misunderstanding on her part.

[16] Other pets had been allowed to stay in the building. There is no evidence of any consideration of whether written approval could be granted to Ms. Stebbing's cat to regularize this technical breach of the bylaws, only a firm and arbitrary line. In Ms. Stebbing's case the situation had been allowed to exist for over two years, and, for others, possibly longer.

[17] This case may not be about murder or millions (though a cat's life may hang in the balance) but it does have wide importance. Withdrawal of informal consent, or withdrawal of tacit approval of pet ownership in a 'pet-friendly' building is subject to Section 67 of the Act, partly because the Board allowed the situation to exist for a period of time and then decided to change their position. (Note: ***Niagra North Condominium Corp No. 46 v Chassie***, 1999 CanLII 15035 (ONSC).) It is surprising how often this situation comes up.

[18] Pets are not simply chattels.[2] Compliance with Section 67 of the Act in this case requires balancing the inconvenience and discomfort suffered by other residents with depriving another of the comfort and companionship a pet affords its owner. It is not simply a case of the Board always siding with an owner with allergies.

[19] In my view, this imparts a duty to act fairly in making a decision that affects the 'rights, privileges or interests' of an owner. A page (or a chapter) might be taken from the book of administrative law. The jurisprudence in this area is well established (see *The Principles of Administrative Law*, Jones and de Villars, Carswell, 5th edition, Chapter 8). The learned authors of that text sum up, saying (at p 238):

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[2] at least not ordinary chattels.

One needn't go back to the time of Pharoahs, as some have done, to find first principles (eg. ***Bizon v Bizon***, 2014 ABCA 174 at para 37 per Wakeling JA). Animals were first treated as a species of property by the common law, which, in the western tradition is probably biblical, (eg. Genesis 1:26). Then there was the modification of the common law by 'enacted law'; a process evident in what Holdsworth describes as the 'Age of Reform (1835-1875)' in England, (A History of English Law, Sir William Holdsworth vol. XV) and which continued after confederation in Canada.

An overview of the transition is thoughtfully set out in the dissenting judgment of Fraser CJ in ***Reese v Edmonton (City)***, 2011 ABCA 238.

Animals might not yet have rights in the conventional sense, or standing to intervene, but the very least that can be said is that their status is evolving. And given the dissent of no less a voice than the Chief Justice of Alberta, their status remains, as some have said, a gray area, and a large one at that.

> The factors which determine whether the procedure was fair include (but are not limited to):
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> > (i) the nature of the decision and the process following in making it;
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> > (ii) the nature of the statutory scheme;
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> > (iii) the importance of the decision to the individual affected (or, in other words, the effect of the decision on the individual's rights);
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> > (iv) the legitimate expectations of the person challenging the decision; and
> >
> > (v) the choices of procedure made by the tribunal itself.
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> Because different judges may answer the question of whether a certain procedure was fair differently, it will often be difficult to advise either clients or administrators on whether a procedure used was fair. However, this approach is totally consistent with the policy underlying the historical judicial power to review procedures for breaches of natural justice – to ensure that justice is not only done, but manifestly and undoubtedly perceived to be done. The courts' recognition of the duty to be fair has been welcomed by everyone concerned with administrative law.

[20] I appreciate this applies in the present context only by analogy because Condominium Boards are not governed by administrative law. An appeal to the court of a decision of a Condominium Board is not by way of judicial review. But the administrative law resource is a deep well to draw upon.

[21] The 15-day provision in the bylaw should be reserved for extreme cases. It may be difficult to place a pet. If a new home cannot be found, this would, at the very least, impose a burden on the Edmonton Humane Society. I take notice of the fact that all too often it amounts to a death sentence, as pets who are not placed by the Edmonton Human Society are euthanized.

[22] The impact on the pet owner is significant. In Ms. Stebbing's case it was important enough to her to be made a condition of her purchase of this condominium unit. I expect that her position has not changed and that if she is not allowed to have this pet, she may wish to move.

[23] There is another, more general point. Some condominium corporations assert a right to make fines and penalties for non-compliance an interest in land, giving themselves the power to do so in their bylaws. There is conflicting authority about whether this is *ultra vires* the corporation and the issue has not been resolved by a higher court. (See, for example, ***Condominium Plan No. 8210034 v King***, 2012 ABQB 127 per Prowse, M, and the cases cited there.) This can have significant consequences. It could lead to foreclosure proceedings for something as trivial as an unpaid bill or an unpaid fine (See, most recently: ***Bank of Montreal v Rajakaruna***, 2014 ABQB 415, per Dario J.) Claiming this power puts a particular emphasis on a Board's duty to act properly and with a kind of due process. It is no answer to say that the Board members are volunteers and that, implicitly, they should be held to a lower standard.

[24] After both sides had 'lawyered up', there were several applications in regular chambers, including a direction that this matter be heard as a Special, lengthy materials and cross-

examinations on affidavits. This court is not to act as a substitute for the failure of a Board to perform what, in many circumstances, is close to a quasi-judicial function.

[25] Finally, once the parties retain counsel, the economic consequences are significant, not just from their own lawyers' bills but because in many circumstances the Board will claim their lawyers' costs pursuant to the bylaws. I note in this case that the Board is claiming only party-party costs on Column 1, Schedule C, but double costs for the application because there was apparently a formal offer.

[26] Sometimes cases that appear straightforward turn out not to be. The strict and narrow outcome would be to dismiss the Board's application based on a breach of Section 67 of the Act. However, the practical result, in an attempt to avoid having this matter returned (barring appeals), would be to issue a declaration that Ms. Stebbing's cat is in breach of bylaw 46(c) for lack of written consent but to stay its enforcement until the cat either dies of natural causes or is relocated.

[27] Each side will bear its own costs.

Heard on the 30th day of July, 2014.
Dated at the City of Edmonton, Alberta, this 11th day of August, 2014.

W.S. Schlosser
M.C.C.Q.B.A.

Appearances:

Maya C. Gordon
Reynolds, Mirth, Richards & Farmer LLP
for the Applicants

Brian E. Thompson
Chomicki Baril Mah LLP
for the Respondent