

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Holly C. Beard
Madam Justice Jennifer A. Pfuetzner

BETWEEN:

5182353 MANITOBA LTD.)	L. B. Nasberg
)	<i>for the Appellants</i>
(Applicant) Respondent)	
- and -)	R. P. Sokalski and
)	B. A. Steidl
)	<i>for the Respondent</i>
BNB REAL ESTATES CO. LTD. and)	
BNKM HOMES INC.)	<i>Appeal heard:</i>
)	October 21, 2015
(Respondents) Appellants)	
)	<i>Judgment delivered:</i>
)	November 18, 2015

PFUETZNER JA

I. The Issues

[1] This is an appeal of an order under section 5(8) of *The Condominium Act*, RSM 1987 c C170 (the *Act*) repealed by SM 2011 c 30, which dispensed with the consent of the respondent (BNB) to the registration of a condominium declaration and plan regarding the property at 238 Portage Avenue, Winnipeg, Manitoba (the declaration).

[2] BNB appeals the order, arguing that the application judge erred, both in the test applied and in his apprehension of the facts. This is a discretionary decision and I see no error in the exercise of that discretion, as

explained in the reasons that follow.

II. The Background

[3] The applicant is the owner of the land and building at 238 Portage Avenue, which is subject to a caveat held by BNB. The applicant intends to convert the building into condominiums, but it requires the consent of the caveat holder in order to register the declaration on title. It has requested that BNB provide its consent but, to date, that consent has been withheld.

[4] The property at 238 Portage Avenue was previously part of a larger parcel of land that was recently subdivided. What is now 238 Portage Avenue contains an office tower, while the other parcels, now described as 240-246 Portage Avenue and 295 Garry Street, contain a parking structure (the parkade). Neither the applicant nor BNB owns the parkade. On the other side of the parkade is the land and building at 250 Portage Avenue, which is owned by BNB. Vehicle access to the parkade is via a ramp which is built on land owned by BNB and subject to a right-of-way.

[5] The caveat refers to an agreement made in 1962 between the then title holders under which the owner of 250 Portage Avenue was granted “the exclusive use of a loading zone and parking area for two automobiles within the building erected upon the lands hereinafter described”. The legal description in the caveat covers both the land that is now 238 Portage Avenue and the parkade lands. The parking rights referred to in the caveat resulted in the dedication of three parking spaces for the use of BNB in the parkade in an area adjacent to the back entrance of its building at 250 Portage Avenue. Title to 238 Portage Avenue and title to the parkade

lands both continue to be subject to the caveat.

[6] When BNB continued to withhold its consent to the registration of the declaration, the applicant brought an application under section 5(8) of the *Act* for an order dispensing with that consent. While a new statute came into force two days before the hearing of the application, the application was decided on the basis of the old legislation. This was not an issue on the appeal.

[7] Section 5(8) of the *Act* states:

Dispensing with consent

5(8) Where, upon application, a judge of the court finds

- (a) that a consent of any person required under clause (1)(f) is unreasonably withheld; or
- (b) that the encumbrance, interest or estate of any person whose consent is required under clause (1)(f) would not be diminished or adversely affected by the registration of the declaration and plan;

he may dispense with the requirement of the consent of the person and thereupon the consent of that person is not required for the registration of the declaration and plan.

[8] The order dispensing with BNB's consent was granted by the application judge. BNB appeals that order. The grounds of appeal are:

- (i) Are the reasons of the application judge so inadequate as to constitute an error of law?
- (ii) Did the application judge err by failing to apply the correct

test in making his decision?

- (iii) Did the application judge err in finding that BNB's rights under the caveat would not be diminished or adversely affected by the registration of the declaration and that BNB was acting unreasonably in withholding its consent?

III. Standard of Review

[9] The decision of the application judge was discretionary in nature. Appellate courts must show great deference to a discretionary decision such as this. The onus is on BNB to show that the application judge either misdirected himself or that the decision he arrived at was so clearly wrong as to amount to an injustice. See *Towers Ltd v Quinton's Cleaners Ltd et al*, 2009 MBCA 81, 245 ManR (2d) 70.

IV. Analysis

[10] The applicant raises the foundational issue of whether BNB has any interest in either 238 Portage Avenue or the parkade lands arising out of the caveat. This is because a copy of the 1962 agreement, which is protected by the caveat, cannot be located. Given my decision on the other issues in this appeal, I do not have to decide this issue. Even assuming that BNB's interest is as described in the caveat, I am not persuaded that the appeal should be granted.

[11] The first ground of appeal regarding the adequacy of the reasons can be dealt with briefly. Inadequate reasons are not a free-standing basis for appeal. See *FH v McDougall*, 2008 SCC 53 at para 99, [2008] 3 SCR

41. In any event, the reasons of the application judge, although brief, are adequate when read in the context of the entire record, including the submissions made at the hearing of the application. When read in this context, the reasons permit meaningful appellate review. See *R v REM*, 2008 SCC 51, [2008] 3 SCR 3.

[12] In the second ground of appeal, BNB argues that the application judge applied the wrong test. BNB argues that the application judge based his decision to grant the order solely on his finding that BNB was unreasonably withholding its consent to the registration of the declaration. BNB argues that the application judge relied only on the fact that the caveat would continue to be registered against the master title and the titles of all unit holders after the conversion of 238 Portage Avenue to a condominium as the reason for deciding that BNB was unreasonably withholding its consent. While the application judge noted that the caveat would continue to be registered against any new titles, I find that that was not the sole basis for his decision.

[13] The application judge's reasons show that he granted the order based on his finding that any rights of BNB under the caveat would not be diminished or adversely affected by the registration of the declaration. After finding that BNB's rights would not be diminished or adversely affected, the application judge went on to find that BNB was unreasonably withholding its consent to the registration of the declaration. While it was not necessary to do so given section 5(8) of the *Act*, based on the evidence and his finding that the declaration would not diminish or adversely affect BNB's rights under the caveat, it was open to the application judge to find that it was

unreasonable for BNB to withhold its consent. He committed no errors in so finding.

[14] The third ground of appeal raises the issue of whether the application judge misapprehended the facts.

[15] The application judge had to decide the matter based on the evidence that was before him. The application judge was satisfied that the applicant had met the onus on it to show that there would be no diminishment or adverse effect on any rights of BNB under the caveat by the registration of the declaration. This decision was open to him on the evidentiary record as explained below.

[16] BNB argues that the application judge erred in finding that the declaration would not diminish or adversely affect BNB's rights under the caveat. BNB raises three issues related to its parking rights: that people unauthorized by BNB use its parking spots; that it will be more difficult to deal with multiple title-holders to enforce its rights under the caveat; and that BNB's access to the parking lot will be adversely affected. These same arguments were made to the application judge.

[17] The first two issues are easily addressed. Any problems BNB is having with others using its parking spaces are pre-existing issues that should be taken up with the owner of the parkade. The registration of the declaration is completely unrelated to any such problems. On the second issue, there is no reason to conclude that the introduction of several condominium owners would diminish or adversely affect BNB's rights.

[18] The third issue is that BNB's physical access to the parkade and to its parking spaces could be affected by the conversion of 238 Portage Avenue to condominiums. However, the evidence is that BNB accesses the parkade via the ramp which is on property owned by BNB and which is not even adjacent to the property at 238 Portage Avenue. While BNB raised several scenarios related to access through other entrances to the parkade, there was no evidence to support those arguments which, in the end, were no more than speculation.

V. Decision

[19] For these reasons, I find that the application judge did not commit any errors in granting the order dispensing with BNB's consent. I would dismiss the appeal with costs to the applicant.

_____ JA

I agree: _____ JA

I agree: _____ JA