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**Albert County Condominium Corp. No. 1 v. Matthews**

Between

Albert County Condominium Corporation No. 1, a body corporate,  
applicant, and  
Marilyn Matthews, respondent

[1996] N.B.J. No. 174

No. M/M/306/95

**New Brunswick Court of Queen's Bench  
Trial Division - Judicial District of Moncton  
P.S. Creaghan J.**

Heard: April 1, 1996.

Judgment: filed April 15, 1996.

(13 pp.)

*Real property — Condominiums — Corporations — Board of directors — Review of decision — Reasonableness.*

This was an application for an order requiring the respondent to remove a propane fireplace she had installed in her condominium unit, and to return the unit to its structural state prior to the installation. The condominium corporation Board had twice refused permission to the respondent to have the fireplace installed. This was despite of the fact that she had done extensive research and provided them with evidence that installation of a propane appliance would not affect their insurance rates. The respondent saw the Board's decision as contrary to the intent of the condominium declaration, and refused to accept it.

**HELD:** The application was granted. The evidence showed that the insurer would continue to cover the risk at the same premium should the propane fireplace be connected. However, the evidence also showed that the insurer's method of rating propane fireplaces might change in the future, and the Board's options for obtaining insurance might be restricted. The court was not satisfied that the Board had acted in a patently unreasonable manner. There was a factual basis for the Board to come to the decision it came to. The Board had acted within its mandate to manage the condominium within the limits of the Act, the declaration and the bylaws.

**Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982.

Condominium Act, R.S.N.B. 1973, c. C16, ss. 6(2), 12(1), 23(1), 23(2).

**Counsel:**

Sean R. Dempsey, for the applicant

J. Christopher Nagle, for the respondent.

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¶ 1 P.S. CREAGHAN J.:— The Applicant requests an order that the Respondent be required to remove a propane fireplace that she installed in her condominium and to return the unit to its structural state prior to the

installation.

¶ 2 The condominium development in question is located in Riverview, New Brunswick. The development is divided into blocks and the unit in question is one of eight side by side two floor units plus a basement level. The Respondent purchased her unit in 1983 and has occupied it continuously since then.

¶ 3 In August of 1995, the Respondent decided that she would like to install a propane fireplace to enhance her own enjoyment, to increase the unit's resale value, and as an alternative source of heat in the event of a power outage.

¶ 4 The Respondent, who was a past president of the condominium corporation, was familiar with its rules and regulations and took steps as she thought necessary to comply with these rules and regulations before she installed the fireplace.

¶ 5 First, she obtained the consent of six of the other seven owners of Block 'D', which was the section where her unit was located.

¶ 6 She contacted the agent who provided insurance coverage for the condominium and was advised that the fireplace should not cause a problem as to coverage or result in any increase in premiums.

¶ 7 She determined that installation of the fireplace required a vent of approximately 9 inches to be made in an outside wall to be covered by a stainless metal plate attached to the side of the unit. Further, an external propane tank was required which the Respondent was prepared to conceal by a lattice or shrubs.

¶ 8 The Respondent then wrote to the condominium corporation board on August 23, 1995, requesting its consent to install the fireplace.

¶ 9 On September 14, 1995, the board considered the Respondent's request and replied in writing refusing to grant its consent. It stated that its decision was based on its conclusion that an installation of this sort would create the possibility of a future increase in property insurance fees for the corporation.

¶ 10 The Respondent then went about getting further information with respect to the concerns of the board related to the effect of the installation of such a fireplace on the insurability of the condominium.

¶ 11 She ascertained that the fireplace was approved by the Canadian Standards Association and that the work would be done by a competent professional installer. She attained assurances from the fire chief that the technology of propane fireplaces was not considered a fire hazard. She contacted ten insurance agencies, including the agent for the condominium, and states that she was informed that the majority of the insurers represented do not charge additional premiums for propane fireplaces as an increased risk.

¶ 12 On October 10, 1995, the Respondent again wrote to the board advising it of the results of her research regarding its concerns and stated she felt they had been addressed and that she would be within her rights under the condominium declaration if she installed the fireplace.

¶ 13 The condominium board met again on October 18, 1995. The Respondent was present and again made her request. On October 20, 1995, the board gave the Respondent formal notification in writing that its position remained unchanged and again it refused to give consent. As the reason for its decision, the board referred to Section IV(1)(b) of the Declaration dealing with insurance availability and rules and regulations numbered 5 and 14 passed pursuant to the condominium Bylaws prohibiting any activity which will increase the risk of fire or the rate of fire insurance and which precludes the storage of any combustible material on the property, except sufficient wood to operate a wood stove or furnace.

¶ 14 The Respondent saw the decision of the board as contrary to the intent of the condominium declaration

and refused to accept it. On October 26, 1995, she had the propane fireplace installed and made the necessary structural changes to vent the installation on the outside wall of her unit.

¶ 15 The board then advised its insurance agent that the fireplace had been installed. The agent in turn contacted the insurer and the board was advised on December 1, 1995, that because the unit was not CSA approved the insurer was not prepared to continue to underwrite the risk. The agent advised the board that unless the fireplace was removed within thirty days coverage on the condominium would be cancelled.

¶ 16 The same day the board wrote the Respondent requesting her to immediately disconnect and remove the fireplace. The board also informed her that it had referred the matter to its solicitor.

¶ 17 The solicitor wrote a further demand to the Respondent on December 7, 1995, and as a result the Respondent had the fireplace disconnected by her installer.

¶ 18 The Respondent then made further inquiries of the insurance agent and had confirmed that upon being informed that the fireplace was indeed CSA approved and installed by a competent professional installer, the insurer was prepared to continue to insure at the same premium even if the fireplace was installed.

¶ 19 The evidence before me is that the insurer will continue to cover the risk at the same premium should the fireplace be reconnected.

¶ 20 However, the evidence also is that it is the opinion of the insurance agent that insurer's methods of rating propane fireplaces might change in the future and that such units could conceivably limit the markets available to write the risk as well as the rate at which it would be accepted. The agent states that in her opinion, as a result of the installation of the Respondent's propane fireplace, "there would be a further limitation placed on the Board in relation to the available markets to obtain insurance".

¶ 21 The condominium board brings this matter before me by application pursuant to the Condominium Property Act, R.S.N.B. 1973, c. C16.

¶ 22 Section 23 of the Act provides as follows:

(1) Where a duty imposed by this Act, the declaration or the bylaws is not performed, the corporation, an owner, or a person having an encumbrance against a unit and common interest may apply to The Court of Queen's Bench of New Brunswick for an order directing the performance of the duty.

(2) The Court may by order direct performance of the duty, and may include in the order any provisions that the Court considers appropriate in the circumstances."

¶ 23 Section 12(1) of the Act states that

"Each owner is bound by and shall comply with this Act, the declaration and the bylaws."

¶ 24 Section 6(2) of the Act provides:

"Subject to this Act, the declaration and the bylaws, each owner is entitled to exclusive ownership and use of [her] unit."

¶ 25 The Act also provides that the condominium is to be managed by a condominium corporation through a

board of directors and that the corporation has a duty to effect compliance by the owners with the Act, the declaration and the bylaws.

¶ 26 In this case, the condominium declaration states:

"I. UNITS

(1) Occupation:

The occupation and use of the units shall be in accordance with the following restrictions and stipulations:

- (a) ...
- (b) No unit shall be occupied or used by anyone in such a manner as to result in the cancellation, or threat of cancellation, of any policy of insurance referred to in this Declaration or which would in any way increase the rate of fire insurance on the property or any part thereof, or on chattels kept within any unit.
- (c) ...
- (d) No owner shall make any structural change or alteration in or to his unit or make any change to an installation upon the common elements, or maintain, decorate, alter or repair any part of the common elements, without the consent of the Board.
- (e) Prior to making any alterations or repair to his unit, the owner shall submit his plans to the Board of Directors of the Corporation in accordance with the Bylaws for approval; and the Board shall approve the plans unless the proposed alterations or repairs or the manner of carrying them out is likely to damage or impair the value of any other unit or the common elements.
- (f) ...
- (g) No unit owner shall paint or otherwise change the outside appearance of his unit without the written consent of 2/3 of the remaining unit owners in the particular building in which that owner's unit is located.
- (h) ..."

¶ 27 The bylaws of this condominium provide for rules and regulations and two of these are relevant to this application as follows:

- "5. No owner shall do, or permit anything to be done in his unit or bring or keep anything therein which will in any way increase the risk of fire or the rate of fire insurance on any building, or on property kept therein, or obstruct or interfere with the rights of other owners, or in any way injure or annoy them or conflict with the laws relating to fire or

with the regulations of the Fire Department or with any insurance policy carried by the Corporation or any owner or conflict with any of the rules and ordinances of the Board of Health or with any statute or municipal bylaw.

14. No stores of coal or any combustible materials except for sufficient wood to operate a wood stove or furnace, if any, or offensive goods, provisions or materials, shall be kept in the units or on the property."

¶ 28 The matter before me comes down to the issue that the board maintains the Respondent has not complied with the relevant provisions of the Declaration and the Bylaws and it has a duty to effect compliance, while the Respondent maintains she is in compliance with the Declaration and the Bylaws and that within that parameter she is entitled to use her unit as she sees fit.

¶ 29 Two questions arise.

¶ 30 First, does the installation of the propane fireplace constitute a use of the unit that gives rise to a threat of cancellation of fire insurance or would in any way increase insurance rates? This restriction in the Declaration should be read in the context of the regulation passed under the Bylaws which says that no owner shall do anything in [her] unit that will in any way increase the rate of fire insurance and that no stores of combustible materials shall be kept on the property.

¶ 31 The answer to that question is not apparent with any certitude. The installation of the propane fireplace will not result in any immediate cancellation of insurance or increase in rates. It is arguable as to whether the propane tank, properly installed and maintained, amounts to storage of combustible material on the property.

¶ 32 By the same token, the propane fireplace does raise the risk that the market for insurance on the condominium might be adversely affected in the future and the storage of propane on the property could be seen as an objectionable storage of combustible material if not properly maintained.

¶ 33 The second question is whether the Respondent had made a structural alteration to her unit without the consent of the board. Clearly, the Respondent has obtained the consent required of the remaining owners and, clearly, the venting of the fireplace and the location of the propane tank is structural in the sense that it changes, at least to some extent, the outside appearance of the unit. The board maintains that these changes impair the value of other units while the Respondent maintains it does not.

¶ 34 The overriding issue in this case is the role of the court upon an application under section 23(1) of the Act. What test should be applied judicially to determine whether the Respondent has not performed her duty to comply with the Declaration and Bylaws?

¶ 35 The question is made more difficult because I have not been referred to any decision in this jurisdiction that goes to the question.

¶ 36 I do not think it should be the function of the court to usurp the function of the board and become ultimately responsible for the management of the corporation.

¶ 37 If the board acts within its jurisdiction or authority conferred by the legislation, its decision should be respected unless it can be shown to be in violation of a Charter right, contrary to fundamental justice or patently unreasonable.

¶ 38 Here, there is no argument that the board, in refusing the Respondent's request, was acting outside the mandate given it by the Act to enforce the Declaration and Bylaws. Clearly, the board has this function and duty.

¶ 39 There is no argument made here based on constitutional grounds.

¶ 40 There is no argument based on a failure to apply principles of fundamental justice. The board did not act arbitrarily. It gave careful consideration to the Respondent's request. It gave the Respondent an opportunity to be heard. It acted in a timely manner.

¶ 41 The only real issue here is whether the board's decision was reasonable in the context of the Declaration and Bylaws which it had a duty to apply.

¶ 42 The Applicant has referred me to a decision of the Ontario County Court in York Condominium Corp. No. 216 v. Borsodi et al. (1983), 42 O.R.(2d) 99 where, relying on American authorities, the court rejects reasonableness as the appropriate test to determine when a court should interfere with a decision of a condominium board. The court cites a Florida District Court of Appeal decision in Hidden Harbour Estates, Inc. v. Basso et al. (1981), 393 So. 2d 637 at p. 640 as follows:

"...the restrictions are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right."

¶ 43 I agree with this position as it should apply to the law of New Brunswick with respect to applications to the court to enforce nonperformance of duties determined by a condominium board as being required by the Act, its Declaration or Bylaws.

¶ 44 I am not satisfied that on the facts before me the board acted in a patently unreasonable manner in rejecting the Respondent's request to install a propane fireplace. Had it done so, then public policy would require a court to find the board had acted outside its authority. Here, there was a factual basis for the board to come to the decision it came to. Another board, or indeed a court, might not have come to the same decision. Obviously, the Respondent would not have.

¶ 45 Acting within the limits of the Act, the Declaration and the Bylaws, the management of the condominium is given to the board of directors. Even though I might not have come to the same decision, I do not find the board acted outside that mandate.

¶ 46 Accordingly, the relief requested is granted.

¶ 47 IT IS ORDERED that the Respondent be required within 90 days to remove, at her cost and expense, the propane fireplace (inclusive of all piping, storage tanks, etc.) installed within Unit 21, 45 Trites Road in Riverview, New Brunswick; and

¶ 48 IT IS FURTHER ORDERED that the Respondent perform, within 90 days and to the satisfaction of the Applicant, all repairs necessary to return Unit 21 to its original structural state prior to the installation of the propane fireplace.

¶ 49 In the circumstances, I have decided that there should be no order as to costs.

P.S. CREAGHAN J.

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