Court of Queen's Bench of Alberta

Citation: Owners: Condominium Plan No 762 1302 v Stebbing, 2015 ABQB 219

Date: 20150407
Docket: 1303 11384
Registry: Edmonton

Between:

The Owners: Condominium Plan No 762 1302

Appellant

- and -

Rhonda Stebbing

Respondent

Memorandum of Decision
of the
Honourable Mr. Justice L.R.A. Ackerl

Appeal from the Judgment by
W.S. Schlosser, Master in Chambers
Filed and dated on the 11th day of August, 2014

(2014 ABQB 487, Docket: 1303 11384)

I. Introduction

[1] In 2010 the respondent, Ms. Stebbing, purchased a condominium in a residential condominium block, "The Saskatchewan", located at 9737 112 St. in Edmonton. She owned two cats. In 2012 the Board of Condominium Plan No. 762 1302 [the "Board", or the "Appellant"] decided to eliminate cats from The Saskatchewan following complaints that the cats in The

Saskatchewan were health hazards to several occupants. The Board became aware that Ms. Stebbing had a cat (the second had died), and ordered it removed.

[2] Ms. Stebbing resisted, and on May 1, 2014 applied to this Court for a declaration that the Board had acted in an oppressive or unfairly prejudicial manner.

[3] On July 30, 2014 Master Schlosser heard Ms. Stebbing's application. Evidence was entered by affidavit. Master Schlosser issued a written judgment on Aug. 11, 2014 (reported as ***Condominium Plan No 762 1302 v Stebbing***, 2014 ABQB 487), and concluded at para 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.

Each party would bear its own court costs: para 27.

[4] The Board has appealed Master Schlosser's decision and argues that Master Schlosser did not accord the Board an appropriate degree of deference and:

> ... should not have substituted his views on whether Ms. Stebbing's pet should be allowed to remain in the Saskatchewan for the decision of the Board."

II. Standard of Review

[5] In its written brief the Appellant argued that the standard of review of a decision of a Master of the Court of Queen's Bench is that findings of fact should not be disturbed unless they disclose a palpable and overriding error, while issues of law are reviewed on a correctness standard. The Appellant, in support, cites ***Turner v DN Developments Ltd***, 2011 ABQB 554, 525 AR 370.

[6] This is not the correct standard of review. That judgment was subsequently overruled by ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166, 524 AR 382, where Côté JA at para 30 concluded that "...the standard of review on appeal from a Master to a judge, on all issues, is still correctness."

[7] The Respondent correctly cited ***Bahcheli v Yorkton Securities Inc*** for the relevant test but argued I may vary Master Schlosser's conclusion if he "... made any "palpable and overriding error on the standard of correctness" ...". I was unable to locate the quoted phrase in either ***Bahcheli v Yorkton Securities Inc*** or any other reported judgment.

[8] I conclude Master Schlosser's decision shall be reviewed in its entirety on a standard of correctness.

III. Facts

[9] This matter was advanced on affidavit evidence alone, which I summarize as follows:

1. Until 2012 The Saskatchewan permitted residents to keep pets.

2. Due to plumbing issues only penthouse condominiums had their own clothes washers and driers. Regular condominium owners used communal washers and driers.

3. The Saskatchewan's Bylaws include two provisions relating to pets:

> 46. Owner's Usage
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> An owner shall not:
>
> ...
>
> (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.
>
> ...
>
> 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.

4. In the period up to 2012 the Board provided written permission for a condominium owner to have one or two cats, or a bird. There were a number of cats in the building. Formal permission had been obtained from the Board for some cats. Others were present but their owners had not taken that step.

5. Ms. Stebbing in Aug. 28, 2010 offered to purchase unit 704 of the Saskatchewan. One of the conditions of that purchase offer was "Board approval for cats (2) by Sept. 7, 2010".

6. Ms. Stebbing's realtor informed her the Board approval condition had been met, and the condominium purchase closed. She moved into her condominium on Sept. 28, 2010.

7. During Ms. Stebbing's first week in The Saskatchewan she spoke to a Board member who knew she had cats and indicated she was required to have written permission from the Board.

8. Bruce Kirkland was the president of the Board at the time Ms. Stebbing moved in.

9. Complaints concerning cats began in 2012. Two condominium owners complained to the Board that they were allergic to cat hair and there was cat hair in the laundry facility. Another condominium owner with cat allergies complained that a neighbor had a cat who wandered in common areas and had entered his condominium.

10. Mr. Kirkland in cross examination is explicit that the Board considered this development a "major complaint", and "started to move" on this issue by a review of "all cats, not just one cat, but all cats in the building." [April 29, 2014 transcript, pp 111-112, ll 26-4]. This was "a severe issue" [April 29, 2014 transcript, p 113, l 22] and now "... a priority of the board ..." [April 27, 2014 transcript, p 109, ll 13-15].

11. In response, the Board, in late 2012, decided to eliminate cats from The Saskatchewan. This policy objective would be met by refusing to permit residents introduce any new cats, and by ordering the removal of all cats whose owners had not obtained written permission from the Board. Cats which had received written Board permission were 'grandfathered' and permitted to stay in The Saskatchewan until they died.

12. The Board sent letters to cat owners who did not have written permission to keep cats. Several were voluntarily removed. In Aug. 30, 2013 the Board obtained a court order to remove another cat in a different condominium.

13. Ms. Stebbing's cats were identified on Dec. 17, 2012 when Mr. Kirkland responded to a plumbing issue reported by Ms. Stebbing. Mr. Kirkland told Ms. Stebbing she did not have permission to have cats. Ms. Stebbing disagreed.

14. The Board on Dec. 17 2012 and March 5, 2013 issued written notices for Ms. Stebbing to remove her cats.

15. Ms. Stebbing's cats had not led to specific complaints.

16. The Board investigated to determine whether Ms. Stebbing had written permission to have her cats, and concluded she did not. It ordered she remove the cats. Ms. Stebbing disagreed, noting the condition of her purchasing the condominium. Both parties retained legal counsel.

17. The Board filed an originating application on Aug. 12, 2013 for an order to remove Ms. Stebbing's cat. Ms. Stebbing on May 1, 2014 applied to this Court for a declaration that the Board had acted in a manner that was oppressive, unfairly prejudicial, or disregarded the interests of Ms. Stebbing.

[10] A second issue that I raised before counsel was whether or not the Board disputed the point at which it became aware Ms. Stebbing had cats, and that Ms. Stebbing had not obtained written permission for her pets. This potential fact in dispute arose from Mr. Kirkland's statement he was unaware that Ms. Stebbing's cats existed until he saw them on Dec. 17, 2012. However, an April 9, 2013 email between Board members indicates that, in 2010, an unidentified Board member told Ms. Stebbing she needed Board approval for her pets. Mr. Kirkland does not dispute this during cross-examination.

[11] Ms. Stebbing argued this affidavit evidence meant the Board was aware of the cats from the date she moved into The Saskatchewan. This would appear to be contrary to the position taken in the Board's reply brief at paras 4-6, which is why I raised this potential disputed fact at the hearing. Counsel for the Board stated the date on which the Board became aware of Ms. Stebbing's cats is irrelevant and did not take a position contrary to Ms. Stebbing.

[12] I therefore conclude the parties do not dispute the Board knew Ms. Stebbing had cats when she arrived at The Saskatchewan in Sept. 2000. In effect, the Board forgot about that fact until Mr. Kirkland 're-discovered' the cats on Dec. 17, 2012.

IV. The Parties Submissions

A. The Board

[13] The Board argues Master Schlosser did not provide the Board's decision with an appropriate degree of deference, but instead substituted his own decision for that of the Board. This is an error of law. In court, counsel for the Board stressed that Master Schlosser's reasons are a serious and anomalous divergent precedent requiring court response.

[14] A further error was the Master's conclusion that the methodology adopted by the Board was arbitrary in the way it distinguished between pets which had received written consent, and those that had not. The Board, like all condominium boards, has an obligation to enforce their Bylaws. That was the intent of the Board's order that Ms. Stebbing remove her cats, and it was a good faith decision. Courts have recognized a need for condominium boards to control the presence of animals in their facilities: ***934859 Alberta Inc v Condominium Corporation No 0312180***, [1990] OJ No 130 (QL) (Ont Dist Ct); ***Condominium Plan No 772 3097 v Marquis*** (1991), 84 Alta LR (2d) 192 (Alta QB).

[15] The Board also criticizes the Master for concluding that the lives of animals have significant worth, and that it is relevant that removal of a cat in these circumstances may lead to euthanization. This was an error of law, "... generated by Master Schlosser's moral or social consciousness rather than from the law." In any case, even if the Ms. Stebbing had received some form of permission in 2010 that was revoked by the Board's 2012 order that she remove her cats.

[16] The Board's position is that the time at which a limitations period would come into play is when the Board had both knowledge that Ms. Stebbing had cats and that she was not going to seek written permission. That occurred when the cats were 're-discovered' in 2012, not 2010.

[17] The stay of enforcement should therefore be nullified, the Court should order Ms. Stebbing immediately remove her cat, and the Board should receive its costs.

B. Ms. Stebbing

[18] Ms. Stebbing argues that this court should dismiss the Board's application and award costs for all steps in this litigation.

[19] First, the Board was aware of Ms. Stebbing's cats and did nothing for two years and two months. It therefore acquiesced to the cats, and waived its right to enforce the Bylaws under the doctrine of laches. It was unfair after that period for the Board to strictly apply the Bylaws pet formal written permission requirement. This situation is analogous to that of the pet owner in ***Niagara North Condominium Corp No 46 v Chassie***, 173 DLR (4th) 524, 94 OTC 352 (Ont Ct

J (Gen Div)). In that case, a condominium board rule that excluded the pet was potentially reasonable, but the manner in which it was enforced unfairly affected the particular condominium owner. That Court noted the board had not enforced its policy for an extended time period.

[20] Second, the Board's different treatment of certain cat owners was unequal and unfair. The Board had permitted a Bylaw infraction to occur over extended time. This created a reasonable belief that the pet Bylaws would not be enforced. The Board is estopped from now withdrawing its tacit consent via a strict enforcement of Bylaws 46(c) and 58.

[21] Here, while the Board had a broad discretion, it acted in an unreasonable manner. The Bylaw 58 claim to have "arbitrary" authority does not extinguish court supervision via *CPA*, ss 66-67: ***Condominium Plan No 772 1806 v Gobeil***, 2011 ABQB 318 at para 11. Ms. Stebbing had not been provided a meaningful opportunity to seek written approval and Master Schlosser was correct to conclude her breach was technical, rather than substantial. It is unfair for the Board to cotton onto this defect after having acquiesced to her cats for over two years without action.

[22] Ms. Stebbing argues that principles of equity should apply, and cites Veit J in ***Condominium Plan No 822 2909 v 837023 Alberta Ltd***, 2010 ABQB 111, 497 AR 342 who concluded the doctrine of laches may apply to dated breaches of condominium bylaws. Justice Veit also found delay in enforcing a bylaw may constitute waiver where it is unfair on a balance of justice to enforce a bylaw given that delay. Here the breach was minor, it was also innocent as Ms. Stebbing had tried to conform to The Saskatchewan's Bylaws, and the Board had sat on its hands. That meant the Board had either acquiesced to, or given tacit approval to Ms. Stebbing housing her cats.

[23] Last, the Respondent argues ***Condominium Plan No 822 2909 v 837023 Alberta Ltd*** provides a second basis to test whether the Board has waited too long to act. It became aware of the cats and their lack of written permission in late Sept. or early Oct. 2010. It did not issue a written removal order until Dec. 17, 2012. Justice Veit in ***Condominium Plan No 822 2909 v 837023 Alberta Ltd*** observed at para 50 it is unfair for a condominium board to pursue bylaw enforcement outside the statutory limitation period. The same should be true for Ms. Stebbing.

[24] Ms. Stebbing also complains that the Board's actions in relation to her cats is symptomatic of a larger pattern of Board misconduct.

V. The Law

[25] *Condominium Property Act*, RSA 2000, c C-22, s 66 [the "*CPA*"] permits petition to the Alberta Court of Queen's Bench (*CPA*, s 1(1)(i)) for trial of an issue. Where "improper conduct" has taken place the Court has a broad discretion to order whatever remedy it sees fit (*CPA*, s 67(2)). "Improper conduct" is defined by *CPA*, s 67(1)(a):

> 67(1) In this section,
>
> (a) "improper conduct" means
>
> ...

> (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,
>
> ...
>
> (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;

[26] Chrumka J in ***934859 Alberta Inc v Condominium Corporation No 0312180***, 2007 ABQB 640 at paras 93-95, 434 AR 41 defines these three categories:

> 93 Oppression or oppressive conduct has been defined ... to be conduct that is burdensome, harsh or wrongful or which lacks probity or fair dealing.
>
> 94 The term "unfairly prejudicial" has been defined to mean acts that are unjustly or inequitably detrimental.
>
> 95 The term "unfairly disregards" may be defined as unjust and inequitable. Unfairly itself has been defined as "in an unfair manner, inequitably, unjustly". Fair has been defined as "just, equitable, free of bias or prejudice, impartial". Prejudice means " injury, detriment or damage caused to a person by judgment or action in which the person's rights are disregarded: hence injury, detriment or damage to a person or a thing likely to be the consequence of some action". Prejudicial means "causing prejudice; detrimental damaging "to rights, interests, etc."

[27] Section 67(1)(b) defines an “interested party” as “an owner, a corporation, a member of the board, a registered mortgagee or any other person who has a registered interest in a unit”: *CPA*, s 67(1)(b).

[28] Here, Ms. Stebbing argues that she, as an interested party, has been the subject of exercise of the Board’s power that is oppressive, unfairly prejudicial, or that unfairly disregards her interest.

[29] The nature of this review has been the subject of significant judicial commentary, which consistently emphasizes that the decisions of a condominium board are due considerable deference. This is true for both when a board enacts a rule (***York Condominium Corp No 382 v Dvorchik*** (1997), 12 RPR (3d) 148, 69 ACWS (3d) 195 (Ont CA)) and the manner in which a condominium board exercises its discretion (***Maverick Equities Inc v Owners: Condominium Plan 942 2336***, 2008 ABCA 221 at para 13, 16 ACWS (3d) 852).

[30] Veit J in ***Maverick Equities Inc v Condominium Plan No 942 2336***, 2010 ABQB 179 at paras 48-50, 34 Alta LR (5th) 147 draws a parallel between the approach a court should take in a *CPA*, ss 66-67 review and the principles applied in judicial review to test reasonableness of a board’s decision. She concludes (para 50):

> A condo board is not a traditional administrative tribunal; yet, its decisions should be treated with an analogous deference. As between individual owners and the condo board itself, it must be emphasized that a condo board embodies, in

> addition to the notions of a tribunal, the notions appropriate to an elected body. Therefore, the decisions of a condo board are entitled to respect.

[31] The Board cites ***Devlin v Owners: Condominium Plan No 9612647***, 2002 ABQB 358, 318 AR 386 to illustrate that a condominium board's decisions are due deference. That decision at paras 2-3 also offers a second principle: the board has an obligation to enforce its bylaws:

> 2 Condominium corporations are created to manage the assets of a condominium which is owned collectively by its unit holders. The condominium corporation incorporates a system whereby the majority rules and the unit holders may decide how they want their condominium to run subject to any restrictions contained in the condominium bylaws which are not contrary to the Condominium Property Act. It is trite law to say that once the rules have been established a unit owner is expected to abide by them and the condominium corporation is obliged to enforce them.
>
> 3 Bylaws are in place for a good reason and should be enforced, and a message will be sent by the Court that where the Board acts reasonably in carrying out its duty to enforce the bylaws and restrictive covenants, the Board will be supported by the Court, however when the bylaw and restrictive covenant are clearly prohibited under the Condominium Property Act then the Court will intervene.
>
> [Emphasis added.]

[32] I agree with Ms. Stebbing that the Bylaw 58 invocation of "arbitrary" decision making jurisdiction cannot immunize the Board from scrutiny by this Court: ***Condominium Plan No 772 1806 v Gobeil***, at para 11.

VI. Analysis

A. The Board's Decision to Eliminate Cats

[33] A useful first step is to evaluate the Board's response to a growing controversy in The Saskatchewan over the presence of cats in that condominium. The agreed evidence is that in 2012 a concern arose in The Saskatchewan on the health implications of cats for certain residents in that property. In response the Board made three related decisions:

1. that the health issues associated with the cats were of a kind that meant the Board should change its policy of permitting pets and eliminate cats from the building;
2. that removing cats would be a two-stage process:
    a) cats which did not have written permission to remain would be purged immediately by strict enforcement of The Saskatchewan's Bylaws, and
    b) cats which had received written permission to live in The Saskatchewan would be permitted to remain until they died; and
3. no new cats would be permitted in The Saskatchewan.

[34] Counsel for the Board stressed that these decisions are due a high degree of deference, and that the Court should only rarely interfere where a condominium board makes what is essentially a policy decision.

[35] Decisions of this kind are obviously subject to review under *CPA*, ss 66-67. Returning to the approach taken by Justice Veit in ***Maverick Equities Inc v Condominium Plan No 942 2336***, I conclude the Board's decisions are reasonable where "...the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law ...": at para 49, citing ***Dunsmuir v New Brunswick***, 2008 SCC 9 at para 47, [2008] 1 SCR 190.

[36] Viewed in this manner, several of the Board's decisions are reasonable. Some condominium owners had apparently significant health consequences or potential consequences which flowed from the cats owned by other residents in The Saskatchewan. One possible method to address this conflict of interests was to eliminate cats from the condominium building. The Bylaws clearly made this a potential step; pets only may reside in The Saskatchewan with the Board's permission. I therefore conclude several of the decisions are reasonable:

1. the strategic policy choice to make The Saskatchewan a 'cat free' zone,
2 the decision to not permit any new cats in The Saskatchewan, and
3. the decision to permit condominium owners who already had permission to keep those cats.

[37] These three decisions exhibit a balancing of competing interests, and are responsive to them.

[38] The last decision, however, is different. There is a logic to treating condominium owners who had not followed the formal requirements of the Bylaws in a different manner. However, the presence of cats already in The Saskatchewan in 2012 when the Board started strict enforcement of its bylaws was a consequence of the Board not meeting its obligation to enforce condominium Bylaws upon becoming aware of a breach. It did not do that. That changes the factors in play.

B. Did the Board's Actions Constitute Improper Conduct?

1. The Board Permitted Ms. Stebbing's Cats

[39] Ms. Stebbing and the real estate agent involved in the purchase of her condominium believed the Board had granted written permission for Ms. Stebbing to keep her cats in The Saskatchewan. The real estate records indicate that. The Board says no permission was granted, that it has searched its records and found nothing concerning Ms. Stebbing's cats.

[40] I infer from the undisputed evidence that the probable explanation for this scenario is the Board approved Ms. Stebbing having her cats in writing but subsequently either forgot that occurred or lost any associated documentation. This is clearly not the only possible explanation for the apparent disconnect between what Ms. Stebbing believed had occurred and the Board's records. For example, the Board's counsel speculated it is possible that the person who sold the condominium to Ms. Stebbing lied about obtaining Board permission in writing and provided a forged supporting document. No supporting admissible evidence exists.

[41] However, multiple grounds exist to conclude the Board did authorize Ms. Stebbing to have cats in the Saskatchewan.

[42] First, it is implausible that a real estate professional would not have taken necessary steps to ensure Board approval for Ms. Stebbing's cats had been obtained. It is clear that Ms. Stebbing and her real estate agent were very well aware of that specific bylaw requirement. Ms. Stebbing intended to comply with it. It was one of two buyer's conditions for the purchase, and the last one to be removed. I conclude the real estate agent involved received communication from the Board (or Board member) prior to removing that condition.

[43] Second, there is very strong evidence that in 2010 the Board was not operating carefully in relation to pets. On one hand the Board's emails indicates a Board member was aware of Ms. Stebbing's cats in 2010. However, no record or memory identifies that person. Mr. Kirkland offered no specifics but assumes the entire Board was told about the unauthorized animals. One possible explanation is that in 2010, an identified Bylaw breach was not important enough to document. By Dec. 12, 2012 Mr. Kirkland was apparently entirely unaware Ms. Stebbing's cats existed until he saw them while visiting Ms. Stebbing's condominium.

[44] There is an alternative and I believe more likely explanation for the Board's apparent disinterest in its own rules. The reason no follow-up occurred in 2010 is because the Board had already granted permission. This possibility is supported by a third factor. The Board's documentary record of pet permissions display clear regression. The early documents are formal letters including quoted passages from Board minutes, reproduce relevant bylaws. They provide explicit limitations for permissions granted on a per-pet basis, and cite instructions on proper disposal of kitty litter and laundry facility use. However, as time moved, documentation became increasingly casual. In 2003, the only written documentation of a Board approval is an annotation on the bottom of an extremely brief letter by a resident asking permission to keep a cat. That annotation reads: "Nov 20 "passed" Pierre to respond." A 2007 approval letter states only "The Board would like to welcome the newest addition to the Saskatchewan and wishes you much happiness with your new kittie."

[45] There is also evidence of at least one other missing Board cat approval document. The Aug. 1997 record where the Board approved two cats owned by Ms. Shekhter indicates these cats were returning and had previously been approved in 1994. The Shekhter letter and a written annotation of a Board member, "Jay", indicate a previous 1994 Board approval with specific and apparently previously documented conditions. Although the Board produced records concerning cat residence approvals from 1994 those do not include any relating to Ms. Shekhter's cats. The logical inference is these records were lost.

[46] I therefore infer, on a balance of probabilities, that a member of the Board communicated in writing that Ms. Stebbing's cats had been approved. This led to Ms. Stebbing ultimately residing in The Saskatchewan with the honest belief that she had received formal approval to live there with her cats. At the time the Board did not consider permission to keep cats as a serious topical issue, and the Board either never documented that fact or lost the record.

[47] This is a first independent basis on which I conclude the Board's decision to not 'grandfather' Ms. Stebbing's cat was oppressive and unfair and must be overturned. The Board's own negligence or poor internal communications are responsible. Ms. Stebbing made all reasonable efforts to conform to The Saskatchewan's bylaws. It is entirely unfair to her that she and her cat have been penalized by the Board's error(s).

[48] In the event I am incorrect and the Board never granted Ms. Stebbing permission to keep her cats, I will continue my analysis to evaluate whether the Board's conduct warrants *CPA*, ss 66-67 intervention.

2. The Board Did Not Permit Ms. Stebbing's Cats

[49] Several key facts relating to the change in policy from minimal to strict bylaw enforcement backdrop my alternative analysis:

1. the Board was aware of Ms. Stebbing's cats in 2010 and the cats did not have written permission to reside in The Saskatchewan;
2. the Board chose not to take steps to either have those cats removed or notify Ms. Stebbing of her breach of the Bylaws;
3. Ms. Stebbing reasonably believed she had the Board's permission to have her cats stay with her; and
4. Ms. Stebbing would not have chosen to live in The Saskatchewan without her cats.

[50] I also find as fact that, over time, pets were generally permitted in The Saskatchewan. Written Board permission devolved into little more than a formality. Master Schlosser also came to that conclusion. The record supports this conclusion. I also note the Board has not challenged the Master's finding of fact.

[51] I therefore conclude that if Ms. Stebbing had been informed in 2010 by the Board that it was aware she had not received permission to have her cats, Ms. Stebbing and the Board would have investigated who misled Ms. Stebbing and her real estate agent. Ms. Stebbing clearly wanted to conform to The Saskatchewan's Bylaws and respected the Board's authority. She would have immediately requested written permission, since her cats were very important to her. Board permission would have followed as the health-related allergy concerns had not yet emerged. As Mr. Kirkland acknowledged, cats were a non-issue at that time.

[52] Master Schlosser considered whether pets are associated with a special personal interest and value. Chrumka J in ***934859 Alberta Inc v Condominium Corporation No 0312180***, at paras 88-90 cites British Columbia jurisprudence that a court may intervene where a condominium board's actions have an effect on a condominium owner that is "… more than mere prejudice or trifling unfairness ...". Removing a pet from its owner, especially in these circumstances, easily meets that threshold.

a. The Doctrine of Laches

[53] In this alternative analysis I presume Ms. Stebbing did not obtain written permission for her cats, and the Board knew about the cats in 2010 but did nothing until 2012. Ms. Stebbing argues the Board acted unfairly when it then ordered her to remove her remaining cat. The doctrine of laches should apply; the Board through inaction waived the requirement that Ms. Stebbing have written permission to keep her cats. I agree.

[54] The doctrine of laches responds to unjust enforcement of a right arising from delay. The Supreme Court of Canada in ***(K) v M(H)***, [1992] 3 SCR 6 at para 97, 96 DLR (4th) 289 adopted a definition of this principle from the UK case of ***Lindsay Petroleum Co v Hurd*** (1874), LR 5 PC 221 at 239-240:

> ... it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

[55] In this case, the following relevant factors are engaged:

1. there was a substantial delay (if not disinterest) by the Board in enforcing the condominium Bylaws to formally document Board permission to have cats;
2. Ms. Stebbing had a valid basis to believe she not only would be permitted to keep her cats, but had already conformed to The Saskatchewan's Bylaws;
3. if the Board had not failed to enforce its Bylaws then Ms. Stebbing would have applied for and received written permission in 2010 to keep her pets;
4. Ms. Stebbing's cats had not caused any complaints; and
5. the Board's 2012 conclusion was that health issues did not require an absolute and immediate purge of all cats. Instead, a gradual phased approach would eventually make The Saskatchewan cat-free.

[56] Last, I note an issue identified by Veit J in ***Condominium Plan No 822 2909 v 837023 Alberta Ltd*** at para 78. The passage of time inhibits the condominium owner's ability to respond to complaints. That is certainly the case here. Mr. Kirkland now cannot explain what exactly happened in 2010 when a Board member saw Ms. Stebbing's cats. He can only assume what transpired. The same is true for the unidentified party who misled Ms. Stebbing and her real estate agent into falsely believing the Board had provided written permission for Ms. Stebbing to have cats. Neither party to this dispute has suggested what actually happened because, presumably, at this late date they cannot find out.

[57] This is a second independent basis on which I conclude the Board engaged in improper conduct when it ordered Ms. Stebbing remove her cats.

b. The Limitations Act

[58] Ms. Stebbing also argues the Board is statute barred from ordering removal of her cats. In particular, the Board did not act for over two years and two months after first discovering the cats. That is outside the two year limitations period set by the *Limitations Act*, RSA 2000 c L-12.

[59] I reject the Board's argument that the threshold knowledge triggering the limitations period is their knowledge Ms. Stebbing had cats and refused to seek written permission for those pets. A Board member knew about Ms. Stebbing's cats in 2010 when she moved in. At that time, the Board, according to its then president, had a protocol to evaluate a request to keep a pet.

While Mr. Kirkland did not remember whether this situation of a pet without permission was brought to the Board's attention, he assumed that had occurred.

[60] The Board had a duty to enforce The Saskatchewan's Bylaws. It was aware of Ms. Stebbing's failure to obtain written permission, but did nothing. To argue their formal refusal would be the only knowledge point for awareness of her breach is an artificial distinction, particularly in light of the Board's duties.

[61] Justice Veit in ***Condominium Plan No 822 2909 v 837023 Alberta Ltd*** at para 78 observed:

> ... it will be recalled that if a person who is involved in a motor vehicle accident doesn't file a statement of claim within 2 years of the accident, that person loses their cause of action. It would be inconceivable that such a different rule would apply to alleged breaches of condominium by-laws. ...

[62] I do not interpret that passage to mean the *Limitations Act* literally applies to non-litigation steps taken by a condominium board. Rather, Justice Veit is indicating the two year limitation period is a marker for when inaction on a minor breach of bylaws should be presumptively viewed as "improper conduct" under the *CPA*.

[63] I think this is a reasonable approach. Taking into account the factors identified in the laches analysis, I conclude this represents a third independent basis to find the Board's actions are unfair, oppressive, and prejudicial, and require Court response.

c. Mistake of Fact

[64] A fourth basis on which I conclude the Board's actions were oppressive and unfairly prejudicial is that Ms. Stebbing had a mistake of fact defence for her actions.

[65] The nature of this defence was explained by Thomas J in ***R v Gauchier; R v Legrande***, 2013 ABQB 30 at para 6, 549 AR 354, affirmed 2014 ABCA 192, 575 AR 355, leave denied [2014] SCCA No 367:

> A person who is aware of the factual limits of a legal prohibition and *factually* exceeds those limits has potentially made a mistake of fact. [Emphasis in original.]

[66] Ms. Stebbing says that she knew exactly what the Bylaw requirements were, and to the best of her knowledge had complied with them. That is a mistake of fact. As the Supreme Court of Canada observed in ***R v Sault Ste Marie (City)***, [1978] 2 SCR 1299, at p 1326, the mistake of fact defence

> ... will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent. ... [Emphasis added.]

[67] The Aug. 28, 2010 purchase offer clearly indicates that Ms. Stebbing and her real estate agent had reviewed The Saskatchewan's Bylaws and were aware of clause 46(c) and its general prohibition against pets. She knew the rules. It is also obvious from the real estate documentation that Ms. Stebbing intended to follow those rules. If she could not live with her cats then she would not move into The Saskatchewan.

[68] The remaining question is whether Ms. Stebbing had a reasonable belief that she had adhered to those rules. I conclude she did. She received notification from her real estate agent

that the condition had been satisfied. Ms. Stebbing had no reason to doubt that information. When she moved into her condominium a Board member noted her cats and mentioned she needed written permission. Ms. Stebbing had a reasonable basis to conclude that requirement had been satisfied because:

1. she had been already informed that Board permission had been obtained, and
2. the Board took no further steps in relation to the cats.

It was entirely logical for Ms. Stebbing to conclude the Board member who noted her cats had subsequently checked to confirm written approval had been obtained. Instead, the Board was silent until Dec. 17, 2012 when she unexpectedly learned the Board believed she had not obtained permission for her pets.

[69] I have previously indicated the Board's decision to eliminate cats from The Saskatchewan or its methodology for treating 'grandfathered' cats is not "improper conduct" as defined by the *CPA*. However, its decision to treat Ms. Stebbing's cats differently from the other 'grandfathered' pets was not "fair dealing" and instead was unjust and inequitable. Ms. Stebbing had a legally valid defence to breaches of any regulation or legislation, including strict liability offences. That same defence is relevant to the Board's actions. The Board chose a fault-based methodology to determine which cats stayed, and which cats were purged. It then chose to demand Ms. Stebbing remove her cats even though her actions were innocent. That is improper conduct.

C. Exercise of Board Authority to Revoke or Arbitrarily Refuse Permission for Ms. Stebbing to Keep Her Cat

[70] Counsel for the Board argues that ultimately it does not matter what the Board may or may not have done prior to ordering Ms. Stebbing remove her cats in 2012. The Board is authorized under Bylaw 46(c) to revoke consent for a pet to be resident, or under Bylaw 58 to "arbitrarily withhold ... or withdraw" permission to have a pet in The Saskatchewan. It has done so on a valid basis, and that ends the matter.

[71] I disagree. The Board cannot engage in misconduct and then wallpaper over its errors with a new and perhaps technically correct step. Past misconduct taints subsequent Board action. Judicial determination of improper conduct requires review of the totality of circumstances. Here the Board has unfairly treated Ms. Stebbing, especially by disregarding the fact that she attempted to conform with the Bylaws of The Saskatchewan. It was unacceptable and unfair that the Board treated, and continues to treat, Ms. Stebbing differently from other residents of The Saskatchewan who also attempted to follow the Bylaws for their cats.

[72] I therefore reject this additional argument of the Board.

VII. Conclusion

[73] I order that Ms. Stebbing's cat is permitted to continue to reside at The Saskatchewan as a 'grandfathered' pet, in the same manner as those cats granted formal written approval by the Board.

[74] It is obvious that the Board's choice to eliminate cats from The Saskatchewan and this litigation has caused ongoing conflict in that community. It may be helpful to explicitly state my reasons have a quite limited scope. This judgment has no effect on the 2012 policy decisions of

the Board. This decision does not mean pets may reside in The Saskatchewan without Board approval, but only that Ms. Stebbing may continue to keep her cat through the remainder of its life. She may not acquire another cat or a replacement cat, unless the Board changes its policies towards pets.

[75] Ms. Stebbing was entirely successful at this hearing and is therefore presumptively entitled to costs on a party-and-party basis: *Alberta Rules of Court*, Alta Reg 124/2010, Rule 10.29(1).

[76] Ms. Stebbing clearly has taken exception to the manner in which the Board has managed this matter, and as my reasons indicate she had a strong basis to do so. She was not treated fairly.

[77] I further note that the Board's conduct to Ms. Stebbing has been problematic in relation to alleged damage to common areas in The Saskatchewan. The Board disregarded Mr. Kirkland's agreement that future communications with Ms. Stebbing be conducted through her lawyer. The Saskatchewan's management company improperly threatened to file a property interest against Ms. Stebbing's condominium and communicated that to her mortgage lender. To its credit the Board subsequently acknowledged and corrected this misconduct. However, the Board's actions as a whole reveal systematic improper conduct.

[78] The additional Board misconduct that I have identified occurred during the litigation process and per ***Polar Ice Express Inc v Arctic Glacier Inc***, 2009 ABCA 20 at para 21, 446 AR 295 is therefore a potential basis for an elevated cost award.

[79] Under all the circumstances, I order double party-and-party costs. The parties may return within 30 days if they require assistance in calculating that amount.

Heard on the 16th day of January, 2015.
Dated at the City of Edmonton, Alberta this 7th day of April, 2015.

L.R.A. Ackerl
J.C.Q.B.A.

Appearances:

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