Court of Queen's Bench of Alberta

Citation: Condominium Corporation No. 042 5177 v Kuzio, 2019 ABQB 814

Date: 20191021
Docket: 1903 15696
Registry: Edmonton

Between:

Condominium Corporation No. 042 5177

Applicant

- and -

Drew Kuzio, James Knull, Jonah Porter, 2131497 Alberta Ltd, and Dr. Tan Lin

Respondents

Oral Judgment
of the
Honourable Mr. Justice W.N. Renke

I reserved the right to complete citations and quotations and to add a Table of Contents to this oral judgment for publication purposes.

[1] Condominium Corporation No 042 5177 (the Corporation) has applied for an interim injunction against Drew Kuzio, James Knull, Jonah Porter, 2131497 Alberta Ltd and Dr. Tan Lin (the Respondents) to restrain the Respondents from offering short-term accommodations in their units, pending the disposition by the presiding Justice of the matters set for a Special Chambers Hearing on February 21, 2020. The application came before me in Civil Chambers on September 16, 2019. The application was adjourned to October 17, 2019 for hearing.

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Background

[2] The Corporation was created by the registration of condominium plan 042 5177 with the North Alberta Land Titles Office, pursuant to the provisions of the *Condominium Property Act* (the Act). The units and common property described by the plan shall be referred to as the Condominium Property. The premises are located in downtown Edmonton.

[3] Each of the Respondents, except Dr. Lin, is a registered owner of a unit in the Condominium Property, as specified in paras 4-6 of the Originating Application. Dr. Lin is the sole director and shareholder of 2131497 Alberta Ltd, a unit owner.

[4] Bylaws respecting the Condominium Property have been duly passed by the Corporation and registered with the Land Titles Office (the Bylaws). Under s. 32(2) of the Act, "[t]he owners of the units and anyone in possession of a unit are bound by the bylaws," including, then, the Respondents.

[5] Section 2.01.1 of the Bylaws confirms that the Corporation, the Board of Directors elected under the bylaws (the Board), and Owners of units must observe and obey the Bylaws and Rules established by the Board.

[6] Two sections of the Bylaws are at the foundation of the Corporation's application, s. 6.01.1 and 6.01.2:

> 6.01.1 Each Unit shall only be occupied as a one-family residence by the Owner of the Unit, the Owner's family and guests, or a Tenant of the Owner, and the Tenant's family and guests, and for the purposes of these By-laws:
>
> > a. "guests" are to be construed as individuals visiting or residing with the Owner or the Tenant;
> >
> > b. "one family residence" means a residence occupied or intended to be occupied as residence (sic) by one family along (sic) and continuing one kitchen (sic) and in which no Roomer or Boarder is allowed;

> c. "Boarder" means a person to whom room and board is regularly supplied for consideration; and
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> d. "Roomer" is a person to whom a room is regularly supplied for consideration.
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> 6.01.2 No Unit shall be used in whole or in part for any commercial or professional purpose involving the attendance of the public at such Unit … except as otherwise authorized by the Board in writing, which approval may be arbitrarily withheld and if given, by withdrawn (sic) at any time on Thirty (30) days notice.

[7] Under the Bylaws, certain units may be used for commercial purposes: see definition of Unit, s. 1.02.2(r)(i). The Respondents' units are not designated for commercial use.

[8] The Corporation has alleged that the Respondents have listed their respective units on short-term accommodation websites such as AirBnB and HomeAway, and that they have permitted members of the public to occupy their respective units on a short-term basis for fees. The Respondents do not deny these claims.

[9] The Corporation claims that the Respondents' conduct violates the Bylaws, particularly ss. 6.01.1 and .2. The Respondents deny that their conduct violates these or any other provisions of the Bylaws. Further, if offering and permitting short-term accommodation in their units for fees does violate the Bylaws, particularly ss. 6.01.1 and .2, these bylaws are invalid under s. 32(5) of the Act. Subsection 32(5) provides that

> (5) No bylaw operates to prohibit or restrict the devolution of units or any transfer, lease, mortgage or other dealing with them or to destroy or modify any easement implied or created by this Act.

[10] The Respondents contend that the accommodations that they provide are a form of leasing of the units or a form of "other dealing" with the units contemplated by s. 32(5). Subsection 32(5) precludes bylaws from prohibiting or restricting unit leases or other dealings with units. The Corporation responds in turn that the type of accommodations provided by the Respondents do not amount to leases or rentals or other dealings within the meaning of s. 32(5).

[11] I am called on to decide whether, on the record before me, the Corporation is entitled to an interim injunction against the Respondents, pending the decision of the Justice hearing the Special Chambers application.

Test for an Interim Injunction

[12] The parties agree that the test governing the granting of the interim injunction is the "tripartite test" recently reviewed by Justice Topolniski in ***ANC Timber Ltd v Alberta (Minister of Agriculture and Forestry)***, 2019 ABQB 653 at para 38:

> [38] For the purposes of the injunction/stay, the evidence must relate to the three components of the test enunciated in *RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 334: a "serious issue" to be tried (for a prohibitive injunction) or "strong prima facie case" (for a mandatory injunction), irreparable harm, and weighing the balance of convenience.

See also ***Alberta Union of Provincial Employees v Alberta***, 2019 ABCA 320 at para 6; ***360Ads Inc v Okotoks (Town)***, 2018 ABCA 319 at para 5.

[13] An interim injunction is a tool of equity designed to prevent injustice. The overarching perspective of a court requested to grant an interim injunction must be, as Justice Veit observed in ***Enviro Trace Ltd v Sheichuk***, 2014 ABQB 381 at para 28, whether granting the injunction is "fair and equitable." Further, and again as Justice Veit observed in ***Enviro Trace*** at para 28, the tripartite test "is a useful particularization of the factors inherent in an assessment of whether it is fair and equitable to issue an interlocutory injunction in a particular set of circumstances."

[14] Similar comments are found in ***Henderson v Quinn***, 2019 NSSC 190, Arnold J at para 44:

> [44] The test ought not be applied mechanically. In *Saint Mary's University v. Atlantic University Sport*, 2017 NSSC 294, Associate Chief Justice Smith adopted the following passage from *Injunctions and Specific Performance* (Toronto: Thomson Reuters Canada Limited, Looseleaf, updated to 2018):
>
> > [48] In *Injunctions and Specific Performance* … Sharpe J. warns against taking too formalistic an approach when dealing with an injunction motion, stating at 2.600 to 2.630:
> >
> > > Although reference has been made throughout the discussion to the *American Cyanamid* formula, it now seems clear that neither it nor its adoption by the Supreme Court of Canada should be applied mechanically. As already noted, there has been a significant retreat from the assertion that consideration of the merits should never play an important role. The seeming rigidity of the remaining items in the formula is also regrettable, and the direction given by *Cyanamid* and *RJR-MacDonald* should be seen as guidelines rather than firm rules. The terms "irreparable harm", "status quo" and "balance of convenience" do not have a precise meaning. They are more properly seen as guides which take colour and definition in the circumstances of each case. More importantly, they ought not to be seen as separate, water-tight categories. These factors relate to each other, and strength on one part of the test ought to be permitted to compensate for weakness on another. The Manitoba Court of Appeal has quite properly held that "it is not necessary . . . to follow the consecutive steps set out in the *American Cyanamid* judgment in an inflexible way; nor it is necessary to treat the relative strength of each party's case only as a last step in the process". A similar view was expressed by the Saskatchewan Court of Appeal:

> . . . the strength of case, irreparable harm and balance of convenience considerations, although prescribed and necessary parts of the analysis mandated by the Supreme Court, are nonetheless not usefully seen as an inflexible straightjacket. Instead, they should be regarded as the framework in which a court will assess whether an injunction is warranted in any particular case. The ultimate focus of the court must always be on the justice and equity of the situation in issue. As will be seen, there are important and considerable interconnections between the three tests. They are not watertight compartments.
>
> Treating the checklist of factors as a "multi-requisite test" will often produce results which do not reflect the balance of risks and do not minimize the risk of non-compensable harm. As Lord Hoffman stated, a "box-ticking approach does not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction".
>
> The list of factors which the courts have developed – relative strength of the case, irreparable harm and balance of convenience – should not be employed as a series of independent hurdles. They should be seen in the nature of evidence relevant to the central issue of assessing the relative risks of harm to the parties from granting or withholding interlocutory relief. [Citations omitted]

[15] Nonetheless, I will focus on the tripartite factors in turn.

I. Strength of the Corporation's Case

A. Serious Questions

[16] The parties agree that there are serious issues or questions to be tried respecting the interpretation and application of the pertinent bylaws, the interpretation of s. 32(5) of the Act, and the validity of the pertinent bylaws in light of s. 32(5) of the Act.

[17] The threshold for whether there is a "serious question" to be tried is low: ***Alberta Union of Provincial Employees v Alberta***, 2019 ABCA 320 at para 47; ***360Ads*** at para 7; ***Fawcett v College of Physicians and Surgeons of the Province of Alberta***, 2019 ABQB 788, Little J at para 8; ***Domo Gasoline Corporation Ltd v St. Albert Trail Properties Inc***, 2003 ABQB 649, Lee J at para 41.

[18] The Respondents submit that the Corporation's arguments meet this low threshold but only this low threshold. The Respondents deny that the Corporation has strong arguments, that it is likely to succeed in subsequent proceedings, or that it has established a *prima facie* case.

[19] I must consider the strength of the Corporation's case, leaving the decision about which party's arguments shall actually prevail to the Special Chambers Justice.

B. Statutory Interpretation

[20] The Act and the Bylaws must be interpreted. In ***Geophysical Service Incorporated v EnCana Corporation***, 2017 ABCA 125 the Court of Appeal provided a concise and helpful account of the correct approach to statutory interpretation at para 77:

> [77] A succinct template for the correct approach is provided by the Supreme Court of Canada in *Rizzo v Rizzo Shoes Ltd, (Re)*, [1998] 1 SCR 27 at para 21:
>
> > Although much has been written about the interpretation of legislation … Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
> >
> > > 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 ….

See also ***Orphan Well Association v Grant Thornton Limited***, 2017 ABCA 124 at para 192; ***Cuthbertson v Rasouli***, 2013 SCC 53 at para 32.

[21] The Driedger approach is consistent with the direction provided by s. 10 of the *Interpretation Act*:

> 10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

[22] I note that the Bylaws are a type of regulation, falling under s. 1(1)(c) of the *Interpretation Act*:

> (c) "regulation" means a regulation, order, rule, form, tariff of costs or fees, proclamation, bylaw or resolution enacted
>
> (i) in the execution of a power conferred by or under the authority of an Act[.]

Statutory interpretation principles apply to the interpretation of the Bylaws. See ***Condominium Corporation No 0312235 v Scott***, 2015 ABQB 171, Ackerl J at para 41.

C. Bylaws s. 6.01.2

[23] The Respondents' acknowledged conduct violates s. 6.01.2 of the Bylaws. I discern no viable argument to the contrary. Section 6.01.2 provides that

> No Unit shall be used in whole or in part for any commercial … purpose involving the attendance of the public at such Unit … except as otherwise authorized by the Board in writing ….

[24] The Respondents have offered their accommodations for profit. The Respondents' purpose is commercial. The "public," in the sense of individuals who are not unit owners and who otherwise would have no business being on the Condominium Property, are "involved" in the Respondents' commercial scheme. The Board has not authorized the Respondents' commercial use of their units.

[25] In her affidavit of July 30, 2019 (Hodgkinson Affidavit), Terry Hodgkinson, a member of the Board, Vice-President and Secretary, and Parking Enforcement Officer for the Corporation, referred at para 9 to the Respondents advertising on websites to general public; having reservation systems, availability calendars, deposit and cancellation policies; accepting credit card payments; and charging service and cleaning fees. I agree that these are all hallmarks of commercial enterprises. See ***Albrecht v Condominium Corporation No 0411156***, 2011 ABQB 53, Brooker J at para 69.

[26] I note that s. 1.1 of the AirBnB Terms of Service makes the commercial nature of the transactions it supports explicit:

> 1.1 The Airbnb Platform is an online marketplace that enables registered users ("Members") and certain third parties who offer services (… "Hosts" and … "Host Services") to publish such Host Services on the Airbnb Platform ("Listings") and to communicate and transact directly with Members that are seeking to book such Host Services (… "Guests") ….

[27] Hosts and Guests, in AirBnB terms, are interacting in a marketplace. A marketplace is a commercial environment.

[28] I therefore conclude that the Corporation has a very strong argument that the Respondents have violated s. 6.01.2 of the Bylaws.

D. Bylaws s. 6.01.1

[29] Section 6.01.1 provides that "[e]ach Unit shall only be occupied as a one-family residence by the Owner of the Unit, the Owner's family and guests, or a Tenant of the Owner, and the Tenant's family and guests …."

[30] In the following, I will refer to individuals who purchase short-term accommodations from the Respondents as Customers, as a neutral term.

1. Inapplicable Elements

[31] Section 6.01.1 has a definition of "guests," "individuals visiting or residing with the Owner or Tenant." Customers are not "guests" within the meaning of s. 6.01.1(a). Customers are not "visiting … with the Owner," or "residing with the Owner." The Owner is not in the unit with them during their occupation of the unit.

[32] Paragraph 6.01.1(b) forbids providing accommodations to Roomers or Boarders, as defined in paragraphs 6.01.1(c) and (d), but both definitions concern room or room and board (respectively) "regularly supplied for consideration." There is no evidence that Customers stay in the Respondents' units "regularly." Customers are not "Roomers" or "Boarders."

[33] The remaining important elements of s. 6.01.1 concern "[occupation] as a one-family residence," and whether Customers are "Tenants."

2. One-Family Residence

[34] Under s. 6.01.1(b), "'one-family residence' means a residence occupied or intended to be occupied as residence (*sic* – should be a residence) by one family along (*sic*)." I interpret the last word to be "alone."

[35] The Respondents do have an argument that Customers occupy units in the same manner as a family, that is, for "residential" purposes – even if that residence is for a brief period. See ***Metropolitan Toronto Condominium Corp No 1170 v Zeidan***, [2001] OJ No 2785, 43 RPR (3d) 78, 2001 CarswellOnt 2495, Molloy J at para 22. The definition of "Unit" in 1.02.2(r) of the Bylaws does refer to a unit being "intended to be occupied as a residential dwelling."

[36] The Corporation might point out that nothing in (e.g.) the listings by the Respondents confines occupancy to "families" as opposed to families or other aggregations of individuals. The number of "guests" is relevant only to the cost of the accommodations. That is, nothing in the arrangements with Customers entails that occupation by Customers would be occupation "by one family."

[37] Justice Beaudoin provides a useful discussion of the "family" issue in ***Ottawa-Carleton Standard Condominium Corporation No 961 v Menzies***, 2016 ONSC 7699 at paras 47 – 52:

> [47] Article 3.1 of OCSCC 961's Declaration provides that its residential units are to be occupied "only for the purpose of a single family dwelling which includes a home office […] and for no other purpose".
>
> [48] In the absence of a definition in the condominium documents of what constitutes a "single family", the courts have defined a "family" as a "social unit consisting of parent(s) and their children, whether natural or adopted, and includes other relatives if living with the primary group".
>
> [49] I accept the Applicant's argument that a "one family residence" is "a basic social unit which involves more than merely sharing short term temporary sleeping quarters and shared facilities on a rental basis" and that courts have ordered compliance and enforced single-family provisions.
>
> [50] Based on the evidence before me, there is no doubt that the Respondents, who have leased their unit, on a repeated short-term basis in a hotel-like operation, are in breach of the Declaration.
>
> [51] "Single family use" cannot be interpreted to include one's operation of a hotel-like business, with units being offered to complete strangers on the internet, on a repeated basis, for durations as short as a single night. Single family use is incompatible with the concepts of "check in" and "check out" times, "cancellation policies", "security deposits", "cleaning fees", instructions on what to do with dirty towels/sheets and it does not operate on credit card payments.
>
> [52] …. What has happened in this case is a commercial use of the unit. [footnotes omitted]

[38] In my opinion, the stronger argument is that the booking practices of the Respondents do not lead exclusively to occupation of units as one-family residences and the Respondents are on this ground in violation of Bylaw 6.01.1. I accept in particular para 51 of Justice Beaudoin's reasons.

3. Tenant

[39] Section 6.01.1 goes on to provide that the occupation as a "one-family residence" must be by the Owner, the Owner's family or guests, or a Tenant of the Owner, and the Tenant's family and guests.

[40] A Customer is not the Owner. Neither is a Customer (necessarily) a member of the Owner's family. As indicated, a Customer is not a "guest" within the meaning of s. 6.01.1.

[41] Even if Customers' occupation of a unit qualifies as occupation "as a one-family residence," is this occupation by a "Tenant of the Owner"?

[42] In my opinion, the Corporation has a strong argument that Customers are not Tenants within the meaning of the Bylaws. Under s. 32(7) of the Act, the Act prevails over the Bylaws and therefore must be read with the Bylaws. The Act contains elaborate provisions respecting the rental of units (s. 53) and corporation remedies respecting tenants (ss. 54 -56). Because of the fleeting duration of Customers' stays, the remedial provisions of the Act could not practically apply respecting Customers' occupancy. Moreover, the evidence did not disclose that the Respondents complied with s. 53(1) (notice to the Corporation).

[43] Further, s. 5.08.2 of the Bylaws provides that

> Every owner shall require his tenant, as a condition of the tenancy, to place and maintain a policy of insurance in either the Tenants Basic Form or the Tenants Comprehensive Form, together with Personal Liability coverage.

There was no evidence that this provision of the Bylaws was complied with.

[44] The Corporation has rental policies set out in Exhibit F of the Affidavit of Donald McLaughlin, President of the Board of the Corporation. These policies require (*inter alia)* completion and submission of tenant forms and pet registration forms and payment of a security deposit. None of this is feasible for short-term occupants of units.

[45] I therefore find that the Corporation has a very strong argument that Customers are not Tenants within the meaning of s. 6.01.1 and that, on this ground as well, the Respondents have violated s. 6.01.1.

4. Deference to the Board's Interpretation of the Bylaws

[46] There is some authority to the effect that Board decisions should be treated with deference, as would a tribunal's decision in judicial review. See, e.g., ***Owners: Condominium Plan No 762 1302 v Stebbing***, 2015 ABQB 219, Ackerl J at para 30; ***Maverick Equities Inc v Condominium Plan No 942 2336***, 2010 ABQB 179, Veit J at paras 48-50; ***Condominium Plan No. 772 1806 v Gobeil***, 2011 ABQB 318, Smart M at para 10.

[47] In judicial review, deference is (generally) owed to tribunal in the interpretation of the tribunal's home statute: see, e.g., ***Dunsmuir v New Brunswick***, 2008 SCC 9 at paras 53, 54; ***McLean v British Columbia (Securities Commission)***, 2013 SCC 67, Moldaver J at para 40 ("Judicial deference in such instances is itself a principle of modern statutory interpretation"); ***Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd***, 2016 SCC 47 at para 22. If the judicial review analogy were pressed in the present circumstances, it might be argued that a court should extend deference to a condominium board's interpretation of its bylaws, if not the

Act. I did not receive argument on this point and I have not considered this point in my approach to the Bylaws.

E. Subsection 32(5)

[48] Even if the Corporation has strong, even overwhelming arguments that the arrangements between the Respondents and Customers violate the Bylaws, the Corporation could be found to have a strong case only if those Bylaw provisions were valid. The Corporation's case is only as strong as its case that the Bylaw provisions do not violate s. 32(5). As Justice Ackerl wrote in ***Scott*** at para 17, "[c]ondominium corporations cannot create mechanisms or schemes that run contrary to the Act and if they do so, such actions will be invalid as they are *ultra vires* to the condominium's authority …." What is the strength of the Corporation's case on the issue of whether the pertinent bylaw provisions are *ultra vires* the Corporation, being precluded by s. 32(5)?

[49] I shall bear in mind Justice Ackerl's reminder at para 27 of ***Scott***:

> [27] In looking at what the legislature intended, it is imperative to remember that "[t]he legislature is presumed not to intend to abolish, limit, or otherwise interfere with the established common law or statutory rights, including property rights, in the absence of explicit statutory language that it intends to do so": *Hamilton (City) v Equitable Trust Co*, 2013 ONCA 143 at para 34, 114 O.R. (3d) 602. Moreover, in order for a court to conclude that a citizen's rights have been truncated or reduced, the legislature must do so expressly using express language in the statute: *Morguard Properties Ltd v Winnipeg (City)*, [1983] 2 SCR 493 (SCC), at p 509.

[50] Subsection 32(5) reads as follows:

> (5) No bylaw operates to prohibit or restrict the devolution of units or any transfer, lease, mortgage or other dealing with them or to destroy or modify any easement implied or created by this Act.

If the Bylaws had the effect of prohibiting or restricting "leases" or "dealings" with units as contemplated by s. 32(5), those bylaws would be ineffective.

1. Inapplicable Terms

[51] Whatever may be the legal nature of the Respondents' arrangements with Customers, those arrangements do not involve the "devolution" of units. "Devolution" in the s. 32(5) context concerns "[t]he passing of property from one owner to another, which may occur on death or sale, as a gift, by operation of law, or in any other way:" *A Dictionary of Law*, 9th ed, Jonathan Law (ed) (Oxford University Press, 2018). The arrangements with Customers do not involve the passing or transmission of units to them.

[52] Neither do the arrangements involve the "transfer" of any property rights in or to units or the "mortgage" of units.

[53] The final clause relating to easements has no bearing on this litigation.

2. Lease

[54] Are the arrangements with Customers at least arguably a form of short-term lease? Are the Customers short-term renters or (legally) short-term tenants, regardless of what the Bylaws

might contemplate as constituting tenancy? What else could the arrangements between the Respondents and Customers be, but short-term tenancies?

[55] The legal characterization of the arrangements alternative to tenancy is that the arrangements are a contractual licence. That is, Customers, by contract, are entitled to use the premises for a defined period but they do not acquire exclusive possessory rights to those premises, even for a that defined period. Customers have rights against the Respondents but otherwise do not have "*in rem*" rights against any and all other persons. In ***Design Services Ltd. v Canada***, 2008 SCC 22 at para 39, Justice Rothstein quoted S. J. Hepburn, *Principles of Property Law* (2nd ed. 2001), at p. 21:

> In order to establish a proprietary interest it must be proven that the holder has an enforceable, *in rem* right to exclude the rest of the world; it is this right alone which distinguishes *in rem* rights from other enforceable legal rights. Contractual rights are not enforceable against the rest of the world; they are only enforceable against the parties to the contract and are therefore *in personam* in nature. Contracts which deal with land or personal property may confer similar rights of use and enjoyment; however, without the right to exclude, such rights will only be *in personam*.

(A classic discussion of the *in rem*/*in personam* distinction is found in W. N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning," 26 *Yale LJ* 710 commencing (1916-1917) commencing at 712.)

[56] In ***Klewchuk v Switzer***, 2003 ABCA 187 at para 41 the Court of Appeal wrote that

> [41] The hallmark of a lease is the granting of exclusive possession: *Street v. Mountford*, [1985] 2 All E.R. 289 (H.L.). A licence, on the other hand, does not create an interest in the property to which it relates. Rather, it conveys a privilege to use the property: *Baker and Baker v. Gee*, [1945] 3 W.W.R. 555 (Alta. S.C.A.D.).

[57] Finally, Justice Martin, as she then was, wrote as follows in ***Orphan Well Association*** (dissenting) at para 131:

> [131] …. A licence, at its most basic, is the right to do that which would otherwise be illegal, or would amount to a trespass absent the licence. The common law recognizes three types of licences: (1) a "mere" or "bare" licence, which is unsupported by consideration and revocable; (2) a contractual licence, subject to contractual terms; and (3) a licence coupled with a grant of legal interest, such as a *profit à prendre*: Bruce Ziff, *Principles of Property Law*, 6th ed. at 318-321; see also Anne Warner La Forest, *Anger & Honsberger, Law of Real Property*, 3rd ed. at §16:40 ….

See also ***Lauder Industries Inc v Reid***, 2018 ABQB 568, Graesser J at para 50.

[58] What factors distinguish the creation of a lease as opposed to the creation of a licence to occupy? The question is one of law rather than of the labels the parties use. The decisive consideration is the intention of the parties as determined from the parties' agreement, whether that agreement is reduced to writing or inferred from circumstances: ***The Owners Strata Plan VR2213 v Duncan & Owen***, 2010 BCPC 123, Yule PCJ at para 37.

[59] The AirBnB Terms of Service are very clear that only a contractual relationship exists between a Host and a Guest. The following provisions are relevant:

> 1.2 …. When Members make or accept a booking, they are entering into a *contract* directly with each other.
>
> 8.1.2 Upon receipt of a booking confirmation from Airbnb, a *legally binding agreement* is formed between you and your Host …. [emphasis added]

[60] The Terms of Service explicitly contemplate the establishment of a licence between the parties:

> 8.2.1 You understand that a confirmed booking of an Accommodation ("Accommodation Booking") is *a limited licence* granted to you by the Host *to enter, occupy, and use the Accommodation for the duration of your stay*, during which time *the Host (only where and to the extent permitted by applicable law) retains the right to re-enter the Accommodation*, in accordance with your agreement with the Host.
>
> 8.2.2 …. If you stay past the agreed upon checkout time without the Host's consent ("Overstay"), you no longer have a *licence* to stay in the Accommodation …. [emphasis added]

[61] The nature of the occupancy of units by Customers, in my view, strongly supports the characterization of the arrangement with the Respondents as being a licence only. Customers occupy the premises only briefly. They do not take on the trappings of tenants under the Act or Bylaws. Their occupation is like that of a person who stays in a hotel room. Rather than understanding the relationship as being a very short lease, the relationship is better understood as being a very short stay in the functional equivalent of a very small hotel.

[62] I find that the Corporation has a strong argument that the Respondents' arrangements with Customers result in licences, not leases.

3. Other Dealing

[63] Subsection 32(5) precludes a bylaw from prohibiting or restricting not only devolution, transfer, lease, or mortgage of units, but also "other dealing" with units. Do short-term licences fall within "other dealing" in s. 32(5)?

[64] The Respondents do have an argument that a licence relating to a unit is a "dealing" relating to a unit, and so is protected from bylaw interference under s. 32(5). The term "other dealing" is very broad. If that term were found alone in s. 32(5), its extension to the licencing of units would be difficult to resist.

[65] However, the words "other dealing" do not exist alone in s. 32(5). These words follow a list of terms – devolution, transfer, lease, mortgage. As a matter of statutory interpretation, the broad words "other dealing" must be understood in light of the words that precede it. This is an example of the "limited class" or *ejusdem generis* maxim of interpretation.

(a) Limited Class Rule

[66] Professor Ruth Sullivan writes as follows in *Sullivan on the Construction of Statutes*, 6th Ed at §8.64:

§8.64 The limited class rule (*ejusdem generis*). In *National Bank of Greece (Canada) v. Katsikonouris*, [[1990] 2 SCR 1029 at 1040] La Forest J. explained the limited class rule as follows:

> Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it.

The reasoning underlying this rule is explored in *Consumers' Association of Canada v. Canada (Postmaster General),* [[1975] FCJ No 23 (CA)]. In that case the Consumers' Association sought to register its magazines as second-class mail. The issue was whether it was precluded from doing so by s. 11(1)(d)(i) of the *Post Office Act* which excluded publications of "a fraternal, trade, professional *or other association* or a trade union, credit union, cooperative, or local church organization … " author's emphasis]. In concluding that the Consumers' Association was not an "association" within the meaning of the provision, the court reasoned as follows:

> The rule of construction generally known as the "*ejusdem generis*" rule was cited by counsel for the Applicant as applicable to if not decisive in this case. This rule is designed to assist in ascertaining the true intention of Parliament and is often a thoroughly sound guide. Looking at all the terms in the paragraph which describe specific kinds of organization, all of which have meanings quite limited in scope, and particularly at the words "fraternal, trade, professional", we cannot think that Parliament meant, by simply adding the words "or other association", to bring every conceivable kind of association of human beings within the provisions of the paragraph. If that had been the intention of Parliament there would have been no need to spell out several specific kinds of associations. Words like "any kind of association whatever" would have been sufficient. Or, if it was thought desirable to name some specific associations, the addition of words like "or any other association, whether '*ejudsem generis*' with the foregoing or not" would have sufficed to make the intention clear.

As the Court clearly indicates, the inferences involved in applying the limited class rule are based on the assumption that legislatures do not use superfluous words; they express themselves as concisely as possible; and every word is there for a reason and has some work to do. [footnotes omitted]

[67] Professor Sullivan identifies the "conditions precedent" for a limited class argument to be available, at §8.66:

> **§8.66 Conditions precedent for limited class argument.** For a limited class inference to arise several conditions must be present. First, there must be an identifiable class to which each item in the list of specific items belongs. Second, the class inferred from the list of specific items must be narrower in scope than the general words that follow the list. Finally, the class inferred from the list of

> specific items must have something, apart from those items, to apply to. Otherwise the general words would add nothing to the provision, contrary to the presumption against tautology. [footnote omitted]

[68] I do bear in mind that the limited class rule is a guideline for interpretation, but not a legally-obligatory rule of interpretation. Professor Sullivan writes as follows at §8.82:

> **§8.82 Rebuttal.** The courts often caution that the limited class rule is not a rule of law. It is merely an application of the contextual principle, which may serve as a starting point for analysis but should not be considered conclusive.

(b) Identifiable Class

[69] The first prerequisite for a limited class inference is that there be an identifiable class to which each item in the specific list belongs. In s. 32(5), the identifiable class to which each item in the list of specific transactions belongs is the class of dispositions of real property rights – the devolution of property, the transfer of property, the lease of property, the mortgage of property; and the last clause concerns property, the incorporeal hereditament that is an easement.

[70] I note that s. 5(3) of the Act supports this real property-based interpretation:

> 5(3) After a certificate of title to a unit is issued pursuant to subsection (1), the unit comprised in it may devolve or be transferred, leased, mortgaged or otherwise dealt with in the same manner and form as land held under the *Land Titles Act* and the provisions of that Act apply to those dealings insofar as they do not conflict with this Act or the regulations.

(c) Class Narrower than the General Words

[71] The second prerequisite for a limited class inference is that the class inferred from the specific list of items must be narrower than the general words that follow. In s. 32(5), the class of property transactions inferred from the general words is narrower than the words "other dealing."

(d) No Tautology

[72] The third prerequisite for a limited class inference is that the list of transactions forming the limited class cannot be exhaustive. There must be some additional transactions that the words "other dealing" could refer to. In s. 32(5), the property transactions mentioned do not exhaust potential transactions involving *in rem* rights. Joint tenancy or tenancy in common might be created respecting a unit. A unit may be held in trust on behalf of beneficiaries. A charge or security interest other than a "mortgage" (e.g. a hypothecation or a builder's lien) might be imposed on the unit.

(e) Conclusion

[73] In my opinion, the Corporation has a strong argument that the limited class rule applies and "other dealing" must be interpreted to refer to a real property transaction, not contractual arrangements that may have a bearing on the use of property. Hence, licencing arrangements are not included in "other dealing."

[74] And hence, the Corporation has a strong argument that s. 32(5) does not invalidate the pertinent bylaws.

[75] In my opinion, the Corporation's case for the Respondents being in violation of valid bylaws is strong. The Corporation is likely to prevail in subsequent proceedings.

II. Irreparable Harm

[76] The Corporation has established a strong case showing that the Respondents have violated valid bylaws. The Respondents are likely to have violated a "negative covenant," prohibitions set out in the Bylaws. Some authority, stretching back to the 1878 decision in *Doherty v Allman*, supports the view that in such circumstances, the other two tripartite factors, irreparable harm and balance of convenience, concerning the effect on the Corporation were an injunction not granted and the effect on the Respondents if an injunction were granted, are of lesser significance: ***Domo Gasoline*** at paras 45, 51.

[77] I shall not rely on this authority. The Corporation is seeking the extraordinary remedy of an interim injunction, coming before even a Special Chambers application (let alone trial), so all the equities should be considered to determine whether this remedy is appropriate. Justice Sharpe has suggested that the *Doherty v Allman* principle "does not apply with the same force" to interlocutory injunctions. Pre-trial determinations are made without the advantage of full review of the facts and law: ***Domo Gasoline*** at paras 52, 54.

[78] In any event, the failure to provide due consideration to the issues of harm and the balance of convenience would be an error: ***364661 Alberta Ltd v 735608 Alberta Ltd***, 2010 ABCA 6 at para 8; ***101280222 Saskatchewan Ltd v Silver Star Salvage (1998) Ltd***, 2019 SKCA 59 at para 36.

[79] At this juncture, I will consider the risk of harm to the Corporation if the injunction were not granted. I will then consider the risk of harm to the Respondents if the injunction were granted and the balance of convenience.

A. Nature of Irreparable Harm

[80] The Court of Appeal clarified the nature of irreparable harm in ***May v 1986855 Alberta Ltd***, 2018 ABCA 94 at paras 12-14:

> [12] .... The appellant submits that a plaintiff must prove only that the possible harm is "of such a nature that no fair and reasonable redress would be available after trial": *Lubicon Lake Band v Norcen Energy Resources Ltd.*, 1985 ABCA 12 at paras 31-32; [1985] 3 WWR 193; *Noise Solutions v Commercial Insulation Contracting*, 1998 ABCA 257 at para 6.
>
> [13] In his reasons, the chambers judge concluded that ... any harm that flowed from the construction of a multi-family dwelling would at most result in a diminution in the value of her property that was capable of being remedied by an award of money damages.
>
> [14] That conclusion does not consider whether a monetary award would amount to fair and reasonable compensation. This court has said that irreparable harm does not mean that the injury must be beyond the possibility of repair by money compensation. Rather, the test is whether "no fair and reasonable redress can be had in a court of law unless the injunction is granted and that its refusal would be a denial of justice": *Noise Solutions*, *supra*, at para 6. The question is

adequacy of damages as compensation, not complete impossibility: *Maverick Equities Inc v The Owners: Condominium Plan no 942 2336*, 2008 ABCA 190 at para 10.

B. Harm Caused by Customers' Bad Conduct

[81] Through the evidence of Ms. Hodgkinson, the Corporation introduced evidence of property damage, nuisance, and expense attributable to Customers. This included evidence concerning loud parties continuing into the early morning, persons parking in the wrong parking spots, increased garbage in common areas, and non-residents being permitted to enter into condominium areas. Ms. Hodgkinson deposed that the presence of Customers has resulted in increased wear and tear of Condominium Property, additional expenses for a more sophisticated security system, and increased insurance premiums.

[82] Nonetheless, the Respondents contend that the Corporation has failed to establish irreparable harm. The Respondents advance four main arguments. First, Mr. Porter has provided evidence that he has been duly diligent in managing bookings of his unit, thereby reducing the risk of harm by his Customers. Second, if any harm is associated with Customers, the level of harm is no greater than the level of harm associated with unit owners and tenants. Third, there is circumstantial evidence of lack of harm. Fourth, the evidence of Ms. Hodgkinson fails to prove harm.

1. Due Diligence

[83] In para 9 of his affidavit of September 13, 2019 (Porter Affidavit), Mr. Porter outlined ways in which he accepts bookings from prospective Customers. He requires a photograph, government-issued identification, a recommendation from "other short-term rental unit owners," information respecting the prospective use of the unit, contact information, a security deposit, and an agreement to abide by his "House Rules" for the unit. See also Exhibit A to his affidavit, an AirBnB listing.

[84] There was also evidence that Mr. Porter has installed a decibel meter that provides him with notification if sound in the unit gets too loud. He has offered to install water usage monitoring equipment and power monitoring equipment, both for the purpose of reducing risks of flooding: Porter Affidavit at para 10.

[85] Mr. Porter has, on the evidence, taken his responsibilities seriously, as he confirmed at para 10 of his affidavit. He has made an effort to reduce the risks that his Customers will cause any harm while occupying his unit.

[86] I will set aside the issues of

- whether the agreement respecting the House Rules meets the Bylaw requirement in s. 2.03.1(h) that

  2.03.1 An Owner shall …

  h. comply with, and cause all Tenants, family, visitors and other occupants of the Unit, to comply with the By-laws, the Act, and regulations in force ….;

- the non-compliance with the insurance requirement under s. 5.08.2, and
- the inconsistency between the Rule respecting Water use and the House Rules about using the dishwasher on check out.

[87] Mr. Porter has imposed some rules, but he is not – not being approved for short-term rentals – following the rental rules provided to him by the property manager for the Corporation and attached as Exhibit D to Mr. Porter's affidavit. Mr. Porter is following rules and managing risk but he is following his own rules.

[88] Further, there is no evidence respecting the Customer-management practices of any Respondents besides Mr. Porter, save for the online listings exhibited to Mr. McLaughlin's affidavit.

[89] In my opinion, Mr. Porter, alone of the Respondents, does have a reasonable argument that he has put measures in place to reduce the risks that Customers will cause some harm, although his rules run contrary to the Corporation's rules respecting (e.g.) water use. There is no argument, though, that Mr. Porter's measures put him in compliance with the Bylaws.

2. No Harm Beyond Baseline

[90] The Corporation did not provide information about what the baseline number and nature of complaints had been, prior to the Respondents booking their units through online platforms. The evidence did not permit a conclusion about the extent, if any, by which conduct violative of condominium rules increased after online booking commenced. I keep in mind that any increase would be an association only and it would still be necessary to attribute conduct to online-booked units.

[91] Ms. Hodgkinson deposed that two Respondent units were not made available for fire inspections. However, some 17 units, including units that were not (to anyone's knowledge) available for online booking, were not made available for fire inspections: Questioning on Affidavit of Ms. Hodgkinson (THQ) at 31.24-32.8; 32.15-22. Further, Mr. Porter deposed that 18 units were not made available for a mandatory plumbing inspection: Porter Affidavit at para 31.

[92] In response to an undertaking from her Questioning on Affidavit, Ms. Hodgkinson produced some 98 pages of notes respecting parking infractions. My notes of submissions indicate that 198 infractions were recorded. Of this total number of infractions, 6 (only 6) were linked to the Respondents.

[93] The Respondents pointed out that an affidavit could have been provided by the Corporation's property manager, who would be best placed to provide context about the nature and scope of various rule-infractions on the condominium premises. No such affidavit was provided.

[94] I find that Customers were not causing more harm, harm at a higher rate, or more severe types of harm than any other occupants of the condominium.

3. Evidence of Lack of Harm

[95] The Respondents pointed to evidence circumstantially supporting the inference that short-term accommodation online bookings did not cause harm to the Corporation or occupants of the condominium.

[96] Mr. Porter deposed that he started booking his unit through AirBnB in July 2017. The Corporation did not approach him about his booking activities until over a year later, in September 2018. His bookings, then, do not appear to have raised any concerns with anyone during their first year.

[97] Although it initially raised its concerns in September, 2018, the Corporation did not seek an interim injunction until September 2019. The Respondents contended that had their activities threatened harm, this matter would have made its way to court faster. However, the Corporation pointed out that it proceeded "incrementally" with the Respondents, as dictated by cases such as ***Condominium Plan No. 822 2909 v 837023 Alberta Ltd***, 2010 ABQB 111, Veit J at para 68. The Board was seeking to resolve the dispute without the expense to all parties of litigation. In my view, the Corporation's forbearance and incremental approach to the dispute with the Respondents should not result in an adverse inference against it.

[98] However, Mr. Porter's first-year short-term accommodation activities did not cause harm to the Corporation or to other unit owners or tenants.

4. Absence of Proved Harm

(a) Lack of Quantification

[99] Ms. Hodgkinson deposed that the online-booking occupants resulted in additional expenses for the Corporation, including wear and tear and increased insurance premiums. Those claims were not substantiated by reference to supporting evidence. See THQ at 34.6-8.

[100] Ms. Hodgkinson stated that the Board has installed a new security system that cost $30,000. That was not exclusively "to address your concerns with respect to AirBnB," but "that is part of our concern:" THQ 34.12-19. Ms. Hodgkinson explained that "We're inner city …. Lots of homeless, lots of drug addicts, lots of aimless intoxicated individuals …:" THQ at 34.22-25.

[101] Ms. Hodgkinson deposed that she was "concerned about the negative impact that these short-term commercial accommodations will have on my property value:" Hodgkinson Affidavit at para 25. She had not, though, made any inquiries respecting unit valuation with a realtor: THQ at 33.22-34.2.

[102] I find that the Corporation has not quantified any claim related to Customers concerning wear and tear, increased insurance premiums, or reduction of property values; and that there was no basis for attributing any specific amount of the $30,000 new security system cost to Customer-related issues.

(b) Rule 13.18 and Hearsay

[103] Paragraph 16 of Ms. Hodgkinson's affidavit refers to incidents linked to the Respondents' units. She repeats information received from other unit owners, concerning parking infractions and loud, large, and late-running parties. The units involved appear to be owned by the Respondents Kuzio and Knull.

[104] The Respondents argued that the information reported by Ms. Hodgkinson should have no or little weight. The complainants did not provide affidavits. The complainants were not subject to cross-examination on their affidavits. The requirement to swear an affidavit and the prospect of having one's evidence tested may enhance the care taken to describe events and so enhance the reliability of what is reported.

[105] Affidavits could have been provided by the complainants, or at least two of them since one has since moved to an unknown location: THQ at 25.15-17. In any event, this last complainant, after having spoken to Ms. Hodgkinson respecting the complaint, declined to be involved in any proceedings.

[106] It is true that in an interim proceeding, one not resulting in a "final" order, an applicant is not precluded from relying on hearsay, that is information received from or recorded by third parties that would not be admissible through an exception to the hearsay inadmissibility rules. In my opinion, none of the information reported in paragraph 16 of Ms. Hodgkinson's affidavit was admissible through an exception to the hearsay rule, in particular, through the "principled exception" to the hearsay rule. See ***R v Bradshaw***, 2017 SCC 35, Karakatsanis J at paras 19-32.

[107] Rule 13.18 provides that

> 13.18(1) An affidavit may be sworn
>
> > (a) on the basis of personal knowledge, or
> >
> > (b) on the basis of information known to the person swearing the affidavit and that person's belief.
>
> (2) If an affidavit is sworn on the basis of information and belief, the source of the information must be disclosed in the affidavit.
>
> (3) If an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the basis of the personal knowledge of the person swearing the affidavit.

[108] In ***ANC Timber***, Justice Topolniski commented as follows at para 21:

> [21] Typically, affidavits must be sworn on the basis of personal information. However, the Rules of Court allow hearsay evidence on a motion for interim relief if it is accompanied by a statement providing the source of the evidence and the deponent's belief in its truth: Rule 13.18(1)(b) and 13.18(2). Notwithstanding this, the Court is not mandated to accept such evidence: *Silver Recovery Systems of Canada Ltd v WMJ Metals Ltd* (1989), 103 AR 252 (Master); ***Schaffhauser Kantonalbank v Chmiel***, 1988 ABCA 149.

In ***Kantonalbank***, Justice Kerans wrote at para 6 that "As to the adequacy of the affidavit, it is true that an affidavit based on information and belief in an interlocutory proceeding is admissible but it is also true that, when it is based on hearsay, the Court may refuse to rely upon it."

[109] A claim in an affidavit does not necessarily have any or any significant probative value, just because it is found in an affidavit. Claims in an affidavit do not necessarily establish a fact-in-issue to the requisite standard, in civil matters the balance of probabilities: see ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at paras 28 and 29. There must be reasons, though, for discounting the weight of sworn evidence provided in accordance with the Rules of Court.

[110] I will address the most significant evidence, concerning the loud, large, late parties.

[111] This was hearsay evidence and so has less probative value than affidavit evidence from a person who observed the events reported. The complainants did not provide the information on oath and were not subject to cross-examination. This lowers but does not nullify the probative value of the information. I note that procedural assurances of reliability, substitutes for contemporaneous testing of report, are not necessary conditions for the admissibility of hearsay: R v Khelawon, 2006 SCC 57, Charron J at paras 63, 66. Inherent reliability is a second route to the admissibility of hearsay. I bear in mind that the present focus is on probative value rather

than admissibility. The admissibility rules, though, point to factors relevant to the assessment of probative value.

[112] The evidence about the parties was not contradicted by other affidavit evidence.

[113] Two of the complainants (paras 16(d) and (f)) approached Ms. Hodgkinson with their information. The 16(f) complainant did contact Ms. Hodgkinson "after the fact," but in relation to an unrelated issue; conversation led to the disclosure. Both complainants resided on the third floor of the condominium. Mr. Kuzio's unit was implicated in both reports. See THQ at 13.12-14; 17.6-17.

[114] There was no suggestion that any of the complainants had any reason to fabricate or misstate their observations or that the "third floor" complainants were not reliable reporters.

[115] The complainant who reported five or six parties over four months in 2018 involving Mr. Knull's eighth floor unit was approached by Ms. Hodgkinson when she was making investigations concerning short-term accommodation issues: THQ at 12.17-20. This complainant contacted Ms. Hodgkinson after their conversation and stated that she did not want her information used and she did not want to get involved: THQ at 24.12-14. She had a text conversation with Mr. Porter. She said "I will send you and her a statement saying everything I said to Terry on the phone was incorrect and I won't stand behind any of it:" Porter Affidavit at Exhibit B. A recanting witness's prior statement is sometimes admissible for the truth of its contents: see R v KGB, [1993] 1 SCR 740. On this record, though, particularly given the comments to Mr. Porter, it is safe to conclude that the probative value of this complainant's evidence is nullified.

[116] Ms. Hodgkinson was a Vice-President of the Board and was making investigations respecting the online booking units. On the one hand, it was natural that she would engage in investigations with unit owners and tenants, and it would be natural for unit owners and tenants to talk to her about relevant concerns. On the other hand, it would be fair to conclude that Ms. Hodgkinson was not an independent and impartial investigator. She and the Board were opposed in interest to the Respondents. This reality is relevant to the assessment of her evidence. Ms. Hodgkinson, though, was cross-examined and there was no suggestion that she reported the complainants' comments inaccurately.

[117] Based on the foregoing, I find that Ms. Hodgkinson's evidence respecting the third-floor parties had sufficient weight to permit me to find, and I do find, that the reported parties occurred in 2018.

[118] Again, evidence concerning the incidence of noisy parties hosted by unit owners or tenants was not available.

5. Conclusion concerning Bad Conduct by Customers

[119] For the most part, the Corporation has not established on a balance of probabilities any significant bad conduct by Customers, to any degree exceeding the conduct of unit owners and tenants, in the nature of loud parties continuing into the early morning and persons parking in the wrong parking spots. Neither has it established that the Customers' use of the premises has resulted in increased wear and tear of Condominium Property or increased insurance premiums or other expenses.

[120] I find that loud, large, late parties were held in Mr. Kuzio's unit on two occasions in November 2018. I infer that the individuals involved were short-term occupants of this unit.

[121] If the only basis for a finding of irreparable harm were substantiated acts of nuisance or property damage, the evidence would not support a finding of irreparable harm to the Corporation or, for that matter, irreparable harm to unit owners or tenants.

[122] However, there are two additional bases for a finding of irreparable harm.

C. Risk of Harm

[123] The determination of whether an interim injunction is warranted involves a balancing of risks to the applicant and the respondent. Risk is a relevant consideration in the interim injunction analysis.

[124] It is true that short-term occupants of units have no property interest in the units. They are occupying someone else's property. Typically, people take better care of their own property than others' property. That observation, though, has greater implications for those who list their units online than for the Corporation or other unit holders.

[125] But further, it is true that short-term occupants of units will not have to co-exist with other unit occupants for any prolonged period. Short-term occupants and unit owners and tenants will be and remain strangers. Simple civility should moderate conduct. Unfortunately, as anyone who stays in hotels frequently could attest, simple civility is not evenly distributed. Regardless, short-term occupants will not conduct themselves as neighbours. They would have no connection to the condominium as a community, as a place and as a place filled with people they know or are at least acquainted with. Customers' conduct would not be moderated by social influences of neighborhood. I saw nothing in the evidence showing that the Corporation had any effective means of deterring occupants' bad conduct directly (although listing unit holders could face (e.g.) fines).

[126] Fortunately, on the evidence, the short-term occupants of this condominium have, to this point and for the most part, behaved well. Others may not even have known they were there, as with (it appears) Mr. Porter's customers in his first AirBnB year.

[127] Nonetheless, I find that there is a real risk that short-term occupants, without connection to others or the place, will pay less regard to others in terms of, e.g., noise and dumping garbage; and will have less regard for security for the premises, letting in people who should not be let in: what's it to them?

[128] Of course, there are bad neighbours. There was reference in Ms. Hodgkinson's cross-examination to a SWAT team attendance at the condominium for a regular unit owner or tenant.

[129] But again, allowing short-term occupation of units entails an ongoing risk, arising with each booking, in addition to the risks arising from regular occupation. I emphasize that risk is real. We insure against it. We take steps to manage it.

D. Violation of the Social Contract

[130] The most important harm suffered by the Corporation was evoked by Ms. Hodgkinson in para 26 of her affidavit:

> When I bought my unit in this building, the concept of short-term commercial accommodation outside of a hotel setting did not exist. I could not have contemplated a situation such as this. I did not agree to live in a hotel.

[131] At para 27 she stated

> The units in this building are defined as "one-family residences" in the Bylaws. I bought my unit on that basis, and relied on this restriction. I expect to live in a building occupied by other single-family occupants, not a parade of itinerant travellers. I covenanted with the other owners in the building that I too will occupy my unit only as a "one-family residence."

[132] The analysis of this type of harm has four elements.

1. Democratic Constraint

[133] First, the distinctive nature of the constitution of social life in condominium communities must be recognized. An owner of a unit in a condominium is not an isolated freeholder. She, he, or it is part of democratically organized community, bound by statute, regulation, and contract. Different condominium communities establish different social environments for their members. If a person joins such a community, the rules constituting that community are accepted, until those rules are changed through democratic process or until the person sells the interest and leaves the community.

[134] Thus, the BC Court of Appeal wrote as follows in ***The Owners Strata Plan LMS 2768 v Jordison***, 2013 BCCA 484 at para 25:

> [25] …. The competing private property interest which supports strict interpretation must, in my opinion, yield to the rights and duties of the collective as embodied in the bylaws and enforceable by court order. The old adage "a man's home is his castle" is subordinated by the exigencies of modern living in a condominium setting. In *Principles of Property Law*, 5th ed. (Toronto: Carswell, 2010) at 366, the learned author, Bruce Ziff, writes:
>
> > Participation in condominium projects necessarily involves a surrender of some degree of proprietary independence. An owner is at the mercy of the rules enacted through the internal decision-making process. That is only logical. … Likewise, uses that directly and adversely affect the physical enjoyment of neighbouring properties need to be regulated. These are problems that occur in all communities, and one of the attractions of the condominium lifestyle is that there can be a measure of control over the petty annoyances that often occur in urban habitats.

To similar effect, see ***Condominium Corporation No 0723447 v Anders***, 2016 ABQB 656, Schultz M at para 27.

2. Harm from Non-Conforming Use

[135] The second element of the harm analysis is that this particular condominium community was a community of "one-family residences" with only a very few units specifically dedicated to commercial uses. Commercial short-term occupation arrangements, mediated through online platforms, are antithetical to the one family residence commitment. Ms. Hodgkinson identified

the foundation of this condominium community and the inconsistency of the Respondents' commercial practices with that foundation.

[136] At this point, the strength of the Corporation's case re-emerges. I have found that the Corporation's argument that the Respondents violated valid Bylaws was strong. In my opinion, it was clear that the views expressed by Ms. Hodgkinson and other members of the Board, including Mr. McLaughlin in communications with the Respondents, were correct. This is not an instance of rules supporting two or more competing but more-or-less equally reasonable interpretations.

[137] What follows?

[138] The reaction of Ms. Hodgkinson was justified. As she put it, she did not agree to live in a hotel. Her injury was her and other unit owners and tenants' exposure to commercial dealings, to the parade of travellers winding through the community. That injury is hard to quantify. It is an injury to quality of life; the injury is a disappointment of legitimate expectations. In my opinion, this is a type of injury falling within the Court of Appeal's ***May*** doctrine: the test is whether "no fair and reasonable redress can be had in a court of law unless the injunction is granted and that its refusal would be a denial of justice." In my opinion, no redress is adequate to address the Respondents' conduct other than an injunction.

[139] Further harm was caused by the Respondents' continued violation of the clear rules of this condominium community. The Respondents, like other unit owners, were bound by the bylaws: Act, s. 32(2). Under s. 32(6),

> (6) The bylaws bind the corporation and the owners to the same extent as if the bylaws had been signed and sealed by the corporation and by each owner and contained covenants on the part of each owner with every other owner and with the corporation to observe and perform all the provisions of the bylaws.

[140] The Respondents' conduct was contrary to the local democracy of the condominium. Democracy does not mean doing what one pleases, just because it may not physically harm others. (See, in this regard, ***R v Malmo-Levine***, 2003 SCC 74, Gonthier and Binnie JJ at paras 102-129, particularly paras 115-126.)

[141] The Respondents were, through their disobedience, undermining respect for the rule of the special law that governed this community. This harm to the community is likewise not easily transmuted into a dollar value.

[142] The harm suffered by the Corporation and unit owners and tenants and caused by the Respondents occurred even if there was no additional injury to Ms. Hodgkinson and other unit owners or tenants. Justice Lissaman wrote as follows at para 21 of ***Metropolitan Toronto Condominium Corp No 850 v Oikle***, [1994] OJ No 3055, 44 RPR (2d) 55, 1994 CarswellOnt 763:

> 21 *York Condominium Corp. No. 216 v. Borsodi* (1983), 42 O.R. (2d) 99 (Co. Ct.) is a particularly helpful case. It states the proposition that just because unit holders do not complain, does not mean that the Declaration and By-laws should not be upheld by the Court. The case involved a building which had an "adults only" tower where no children under the age of 14 were permitted to live. Two other towers were designated as family towers. The other unit holders had not

complained but the condominium corporation wished to enforce the rules. A relevant passage of the judgment of Allen J. at p. 106:

> In my view, the defendants' objection to the plaintiff's action is not strengthened by the absence of testimony to suggest that the defendants' child has in any way, by reason of conduct or behaviour, interfered with the rights of others. The child's very presence as a permanent resident in the defendants' unit places the defendants in a position of breach of the Declaration. And if the plaintiff did not seek to enforce the Declaration it too would be in breach of the Act.

3. Duty of the Corporation

[143] The third element of the harm analysis is that, in light of the Respondents' violations of the Bylaws, the Corporation was obligated to respond. The Corporation is statutorily required to enforce the Bylaws: Act, s. 37(1).

4. Role of the Courts

[144] The fourth element of the harm analysis is that, given the strength of the Corporation's interpretation of the Bylaws and the Act, the Court should assist the Corporation in enforcing the Bylaws.

[145] In ***Oikle***, Justice Lissaman wrote as follows at para 23:

> 23 The applicant also, in particular, relies on Mr. Justice Herold's decision in *Metropolitan Toronto Condominium Corp. No. 776 v. Gifford* (1989), 6 R.P.R. (2d) 217 (Ont. Dist. Ct.). This case supports the proposition that the Courts as part of policy should support the enforcement of the rules of a condominium. It is useful to quote Justice Herold's statement in the *Gifford* case which is as follows:
>
> > The major advantage of requiring compliance, on the other hand, appears to me to be that a message will be sent out by the board to the unit owners that the declaration and by-laws are in place for a good reason and they will be enforced, and a message will also be sent by the Court that where the board acts reasonably in carrying out its duty to enforce the by-laws and declaration the board will be supported by the Court ….
> >
> > A longer-term result of this position surely will be that people will only move into the building if they are prepared to live by the rules of the community which they are joining - if they are not they are perfectly free to join another community whose rules and regulations may be more in keeping with their particular individual needs, wishes or preferences ….

[146] In ***Stebbing***, 2015 ABQB 219, Justice Ackerl wrote as follows at para 31:

> [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 by Ackerl J]

5. Section 67 and Harm

[147] Finally on the issue of harm, I consider s. 67 to support the position that proof of harm beyond the violation of Bylaws is not required to support a judicial remedy, including an interim injunction under s. 67(3).

[148] The relevant provisions of s. 67 read as follows:

> 67(1) In this section,
>
> (a) "improper conduct" means
>
> (i) *non‑compliance with this Act*, the regulations or the bylaws by a developer, a corporation, an employee of a corporation, a member of a board or an *owner*, ….
>
> (b) "interested party" means an owner, *a corporation*, a member of the board, a registered mortgagee or any other person who has a registered interest in a unit. [emphasis added]
>
> (2) Where on an application by an interested party the Court is satisfied that improper conduct has taken place, the Court may do one or more of the following:
>
> …
>
> (b) direct that the person carrying on the improper conduct cease carrying on the improper conduct;
>
> (c) give directions as to how matters are to be carried out so that the improper conduct will not reoccur or continue;
>
> (f) give any other directions or make any other order that the Court considers appropriate in the circumstances.
>
> (3) The Court may grant interim relief under subsection (2) pending the final determination of the matter by the Court.

Note that "improper conduct" alone is the predicate to judicial relief under ss. (2) and (3).

E. Conclusion

[149] I conclude that the Corporation has suffered irreparable harm because of the Respondents' violation of the Bylaws. Added to this harm is the harm occasioned by the additional risk posed by short-term occupants to the community, and the evidence of two instances of loud, large, late parties at an online-listed unit owned by one of the Respondents.

III. Balance of Convenience

A. Impact on the Respondents

[150] An important aspect of the balance of convenience analysis is the assessment of the impact of an injunction on the Respondents. Would the Respondents suffer irreparable harm if an injunction were imposed?

[151] Mr. Porter deposed as follows in his affidavit:

> 11. The short-term rentals through AirBnB and other similar websites in respect of the Unit have helped me cover the expenses associated with the Unit. I have been unable to find anyone to agree to a long-term rental of the Unit …. Without the ability to provide short-term rentals with the Unit, I will not be able to cover the expenses associated with it.
>
> 12. …. I currently have renters booked for my Unit up to November 7, 2019.
>
> 14. If I am forced to cancel any of my current bookings on AirBnB, I will be subject to fines from AirBnB. Further, if I have to cancel three or more of my current bookings my AirBnB account may be deactivated. If this occurs, this would not only prevent me from listing the Unit on AirBnB but it would also harm my host status at the other properties that I list on AirBnB and affect those listings as well.

AirBnB's cancellation policies are attached as Exhibit C to Mr. Porter's affidavit. I note that while the policies indicate that AirBnB "may" deactivate his account and "may" generally entails some discretion, the policies state that "[u]nless there are extenuating circumstances, there will be no exceptions to our updated cancellation policy."

[152] Mr. Porter has known that he did not have Board approval for his commercial arrangements since late September 2018.

[153] Mr. Porter persisted, though, deposing as follows at para 24 of his affidavit:

> 24. I believed that this decision by the Board was not in accordance with the bylaws. There is nothing in the bylaws which prohibits rentals of units. As such, I continued to list the Unit on AirBnB and other websites as a short-term rental.

[154] In March 2019 he received a letter from the Board requesting him to undertake to cease to provide short-term rentals. He did not so undertake.

[155] In late March the Board began to levy a fine of $200 per month because of his non-compliance.

[156] Mr. Porter would face pecuniary loss were an injunction granted. He can be compensated in damages, should another Court find that an injunction preventing him from deriving revenue from his unit through short-term licencing arrangements is not warranted.

[157] The injunction application did not come as a surprise to Mr. Porter. The conflict between Mr. Porter and the Board respecting his dealings with his unit have been escalating for over a year. He learned in late September 2018 that the Board would not consent to Mr. Porter's arrangements respecting his unit. He did not receive approval for his "short-term rentals."

[158] As indicated above, in its dealings with the Respondents, the Board has employed an "incremental" method, and has sought to resolve issues without litigation: ***Condominium Plan No 822 2909*** at para 68.

[159] By implication, the other Respondents would face pecuniary loss were an injunction granted, not irreparable harm. Like Mr. Porter, they had ample notice that they were violating the Bylaws and that they would have to stop listing their units for short-term accommodations.

B. Other Aspects of the Balance of Convenience

[160] The Corporation's case is strong. Irreparable harm is being caused by the Respondents to the condominium community. The Corporation is obligated to enforce the Bylaws violated by the Respondents. The Corporation gave Mr. Porter and the other Respondents ample notice that they were in violation of the Bylaws and ample opportunity to correct their course. The Respondents will not suffer irreparable harm if the injunction is found not to have been warranted. They have been conducting commercial activities and their losses should be quantifiable.

IV. Conclusion

[161] I therefore grant an interim injunction against the Respondents, restraining them from using or offering short-term accommodations in their respective Units, until the disposition by the presiding Justice of the matters set for the Special Chambers Hearing on February 21, 2020.

V. Undertaking as to Damages

[162] The Corporation has indicated that it will provide an undertaking in damages. This is appropriate. I refer to ***Silver Star Salvage*** at para 21, quoting Justice Sharpe:

> As Justice Robert Sharpe explains in *Injunctions and Specific Performance*, loose-leaf (Rel 27, Nov 2018) (Toronto: Thomson Reuters, 2017) at para 2.470, "[i]t is well established that, as a condition of obtaining an interlocutory injunction, the plaintiff must give an undertaking to pay to the defendant any damages that the defendant sustains by reason of the injunction, should the plaintiff fail in the ultimate result".

[163] The Corporation shall provide an undertaking to compensate the Respondents in damages should an injunction not be continued by the Justice upon determination of the matters set for the Special Chambers application. The undertaking shall provide, subject to any further judicial directions, that the Corporation shall abide by any Order this Honourable Court may make as to damages if this Court shall hereafter be of the opinion that the Respondents have sustained any damages by reason of the injunction which ought to be paid by the Corporation.

VI. Costs

[164] Costs shall be in the cause.

Heard on the 16th day of September and the 17th day of October, 2019.
Delivered at the City of Edmonton, Alberta this 18th day of October, 2019.
Signed at the City of Edmonton, Alberta this 21st day of October, 2019.

W.N. Renke
J.C.Q.B.A.

Appearances:

Erin M. Berney
Field Law
for the Applicant

Keltie L. Lambert
Witten LLP
for the Respondents