

In the Court of Appeal of Alberta

Citation: Porter v Condominium Corporation No 042 5177, 2025 ABCA 87

Date: 20250313
Docket: 2403-0038AC
Registry: Edmonton

Between:

Jonah Gordon Porter

Appellant

- and -

Condominium Corporation No. 042 5177

Respondent

The Court:

**The Honourable Justice Frans Slatter
The Honourable Justice April Grosse
The Honourable Justice Karan Shaner**

Reasons for Decision

Appeal from the Decisions by
The Honourable Justice R. Paul Belzil
Dated the 23rd day of January, 2024
Dated the 1st day of March, 2024
(2024 ABKB 41, 2024 ABKB 140, Docket: 2203 19890)

Reasons for Decision

The Court:

[1] This appeal is a part of a long-running dispute over whether the appellant was entitled to make the condominium unit he previously owned available to the general public through short-term accommodation websites such as the Airbnb portal.

[2] The appellant advertised his unit on Airbnb. The condominium Board concluded that this was contrary to the bylaws and a previously obtained injunction. It disabled all but one of the entrance fobs to the appellant's unit and levied a fine on him. The appellant commenced these proceedings alleging that he had not violated the bylaws, and that the Board's conduct had caused him damage. A chambers judge dismissed his application: *Porter v Condominium Corp No. 042 5177*, 2024 ABKB 41.

Background Facts

[3] The appellant previously owned a unit in the subject residential condominium building. The advertising of some of the units on Airbnb for short-term rentals became contentious. The Board took the view that this was contrary to the bylaws:

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 by one family along and continuing one kitchen and in which no Roomer or Boarder is allowed (sic);
- c. "Boarder" means a person to whom room and Board is regularly supplied for consideration; and
- d. "Roomer" is a person to whom a room is regularly supplied for consideration.

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 at any time on Thirty (30) days notice.

The reach of this bylaw is constrained by s. 32(5) of the *Condominium Property Act*, RSA 2000, c. C-22:

(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.

The ultimate question is whether, or under what circumstances, a unit owner could make the unit available on the Airbnb portal.

[4] The issue came before the Court of Queen’s Bench in 2019 when the Board applied for an interim injunction restraining a number of unit holders, including the appellant, from offering short-term accommodation in their units. An interim injunction was granted in reasons reported as *Condominium Corp No. 042 5177 v Kuzio*, 2019 ABQB 814, 8 RPR (6th) 214. The chambers judge concluded:

- (a) The Board had made out a strong case that short-term rentals were a “commercial purpose . . . involving the attendance of the public at such Unit” under bylaw 6.01.2. That use was not permitted unless authorized by the Board in writing: reasons at paras. 23-28.
- (b) Use of the units for short-term rentals also likely violated bylaw 6.01.1, which limited uses to “single-family use”, because short-term users were not “tenants”: reasons at paras. 34-45.
- (c) The phrase “other dealing” in s. 32(5) of the *Act* refers only to real property transactions, not contractual arrangements: reasons at para. 73.
- (d) Considering the risk of harm to each party, and the balance of convenience, an interim injunction was warranted: reasons at paras. 149, 160.

An interim injunction was granted restraining use of the units for short-term accommodation until the hearing of the matter: reasons at para. 161.

[5] The interim injunction was reviewed and made permanent in 2020: *Condominium Corp No 042 5177 v Kuzio*, 2020 ABQB 152, 11 Alta LR (7th) 203. The chambers judge concluded that Airbnb rentals were licences, not leases, and were prohibited by the bylaws: reasons at para. 26. A short-term occupant was the functional equivalent of a hotel guest, and not a “tenant”. This interpretation was supported by the terms of the Airbnb portal. Section 32 of the *Act* permitted bylaws which restricted the short-term occupancy of units where no lease was entered into: reasons at para. 52. Short-term rentals were a “commercial purpose” and were prohibited by the bylaws unless a lease was in place. Short-term rentals would change the fundamental structure and character of the condominium without the consent of the Board and the majority of the owners:

reasons at para. 73. The Court issued a declaration that the bylaws were *intra vires* and prohibited short-term Airbnb type rentals where no lease was entered into. The interim injunction was made permanent.

[6] The operative clauses of the permanent injunction read:

2. The interim injunction granted by Justice W.N. Renke on October 18, 2019, restraining the Respondents from using their units to provide short-term, commercial-style accommodation for the general public, and from advertising the units for same on websites such as AirBnB, is hereby made permanent, and shall continue in force so long as the Applicant's Bylaws continue to prohibit commercial use of the units and require single-family residential use only, and/or for so long as the Board of Directors of the Applicant has not exercised its discretion under the Bylaws to approve such uses of the Respondents' units. . . .

6. The Applicant shall rescind the non-monetary sanctions levied against the Respondents, including the deactivation of access fobs, intercom access and withholding of parking passes, provided the Respondents continue complying with the terms of the permanent injunction set out herein, which compliance is noted as of the date of this Order. (Emphasis added)

This judgment was not appealed.

The Present Proceedings

[7] The record discloses that after the injunction was granted, the appellant continued to advertise his unit on sites such as Airbnb: 2024 ABKB 41 at para. 23.

[8] After connecting on Airbnb, the appellant and Halal El Sherbini entered into a document entitled "Alberta Residential Lease Agreement" with Ms. El Sherbini described as the "Tenant". This document, which is in the form of a conventional residential lease, granted her possession, for residential purposes, as follows:

Term

8. The month to month periodic Term of the Lease to commence at 4pm on August 4, 2021.

9. Notwithstanding that the term of this Lease commences on the [sic] Tenant is entitled to possession of the Premises until 30 days notice is given. . . .

Renewal of Lease

23. Upon giving written notice no later than 5 days before the expiration of the month's periodic Lease, the Tenant may renew the Lease on a monthly basis each month. All terms of the renewed lease will be the same except for this renewal clause and the amount of rent. If the Landlord and the Tenant cannot agree as to the amount of the Rent, the amount of rent will be determined by mediation.

The lease document, apparently, was for a one month term, renewable at the option of the Tenant, apparently for a further single one month term, and terminable by the landlord on 30 days notice. This document included that the Tenant would have quiet enjoyment of the premises. Ms. El Sherbini remained in the premises for about one month.

[9] The Board took the position that the appellant was in violation of the injunction and the bylaws. It disabled all but one access fob to the building until Ms. El Sherbini moved out and the appellant removed the listing from Airbnb. The Board imposed a weekly monetary penalty.

[10] The appellant commenced these proceedings against the Board, seeking:

- (a) a declaration that he was entitled to lease his unit "irrespective of the source and origin from where he finds the tenant".
- (b) A declaration that the agreement with Ms. El Sherbini was a valid lease, in consonance with s. 35(2) of the *Act*.
- (c) A ruling that the Board had engaged in "improper conduct" in violation of s. 67(1) of the *Act*.

The appellant requested remedial orders restraining the Board from interfering with his month-to-month leases, appointing an investigator, awarding compensation for loss of revenue, reversal of fines levied against him by the Board, and compensation for the "distressed sale of the property" and psychological stress.

[11] The chambers judge concluded that the terms of the rental document indicated that it was a licence, not a lease. He reasoned:

21 These provisions are indicia of a license, not a lease.

22 I do not accept that there was a *bona fide* intention to lease on the part of the Applicant or the tenants. I do not accept that there ever was an intention to have these tenants become domiciled in the unit.

23 It is noteworthy that prior to entering into the agreement with Ms. El Sherbini, the Applicant advertised on Airbnb that his unit was available for short term rentals.

24 In argument before me the Applicant conceded that labelling the agreement a “Lease” is not dispositive of whether legally the agreement is a lease or something else.

25 I have concluded that in substance the agreement is not a lease but rather is a license intended for short term occupancy.

The chambers judge concluded that labelling the document a “Lease” was a colourable attempt to disguise its real nature.

[12] The chambers judge also confirmed that the Board had not engaged in “improper conduct”. It had warned the appellant that short-term rentals were prohibited and had obtained an injunction to that effect. The Board was legally entitled to use reasonable measures to thwart the appellant’s attempt to circumvent the injunction. Since the appellant had sold his unit, he had no standing to seek injunctive relief. The chambers judge did not agree that the appellant was entitled to recover the damages he claimed. Given the unfounded allegations of misconduct that were made, the Board was awarded costs on triple Column 2 of Schedule C: *Porter v Condominium Corp No. 042 5177*, 2024 ABKB 140.

Issues and Standard of Review

[13] In this appeal the appellant raises the following issues:

- (a) Was the appellant’s agreement with Ms. El Sherbini a licence or a lease?
- (b) Did the Board engage in “improper conduct” because of the way it limited Ms. El Sherbini’s access to the unit?
- (c) Is the appellant entitled to a remedy on this record?

[14] Questions of fact, including inferences drawn from the facts, and mixed questions of fact and law are reviewed for palpable and overriding error. Questions of law are reviewed for correctness.

[15] The characterization of the rental document in question as a licence or a lease is a mixed question of fact and law on which deference is extended on appeal. Whether the Board engaged in “improper conduct” is also a question of mixed fact and law.

Lease or Licence

[16] As the appellant notes, the bylaws and the injunction preclude licences for short-term rentals, but leases are permitted under s. 32(5) of the *Act*.

[17] The appellant submits that the primary distinction between a licence and a lease is that the latter gives the occupant “exclusive possession” of the premises: *Wal-Mac Amusements Ltd. v Jimmy’s Dining & Sports Lounge (Receivers of)*, 1997 ABCA 183 at paras. 15-17, 51 Alta LR (3d) 52. A lease is proprietary in nature, whereas a licence is contractual. The appellant argues that his arrangement with Ms. El Sherbini gave her exclusive possession and quiet enjoyment and is therefore a lease.

[18] The nature and interpretation of a contract depends on the words of the written contract, considered in light of the factual matrix: *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at para. 21, [2016] 2 SCR 23. The label put on the document is not conclusive: *Wal-Mac Amusements* at para. 18. In this case, the factual matrix includes the long-running dispute between the Board and the appellant about short-term rentals. The permanent injunction ruled that the appellant was not permitted to provide occupancy of his unit on a short-term basis. That conclusion is *res judicata*. The injunction also prevented the appellant from advertising his unit on Airbnb for short-term rentals.

[19] The reasons reported as 2019 ABQB 814 quote at para. 60 from the Airbnb Terms of Service:

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]

These Terms of Service explicitly contemplate the establishment of a licence between the parties. This is also part of the overall context over the dispute between the appellant and the Board about the use of his unit.

[20] The chambers judge was required to determine the nature of the arrangement between the appellant and Ms. El Sherbini, based on the wording of the document and the surrounding factual matrix. The short initial term and the single renewal for a further month were both relevant considerations. On this record, it was open to the chambers judge to conclude that the “Lease” was actually a licence, and the document was a colourable attempt to finesse the terms of the bylaw and the injunction. The appellant has been unable to show any reviewable error in this conclusion.

Improper Conduct

[21] The appellant argues that the Board engaged in improper conduct by evicting Ms. El Sherbini by disabling her access fob. However, there is no evidence of what prompted her to vacate the unit. The chambers judge concluded that the Board was entitled to act in a reasonable way in response to what it saw as a deliberate breach of the injunction.

[22] The appellant argues that the Board blocked Ms. El Sherbini's access without first discussing the matter with him. However, in light of the lengthy dispute about short-term rentals, including several court appearances and the appellant's persistent attempts to rent his unit on a short-term basis, the Board had no further obligation to discuss with the appellant what the Board perceived as being a deliberate breach of the injunction. The appellant admittedly removed the "no Airbnb" sign the Board had posted. The chamber judge's description of his conduct as a flagrant attempt to circumvent the injunction does not disclose reviewable error. Reviewing a copy of the "Lease" which the Board viewed as being colourable would not have changed anything in light of the overall record. The appellant well knew the Board's attitude to short-term rentals, and by his conduct he had decided to proceed in the face of that objection.

[23] The permanent injunction specifically dealt with the deactivation of access fobs. It provided that the respondent must rescind such deactivation, providing that the appellant complied "with the terms of the permanent injunction". The appellant does not deny that he listed the property on Airbnb despite the prohibition in the injunction. The Board's subsequent deactivation of some of the appellant's fobs was consistent with this unappealed court ruling. In any event, there is no evidence that Ms. El Sherbini's occupancy was disturbed, as the appellant still had one active fob.

[24] The appellant argues that the Board should have followed the procedure in s. 54(1)(b) of the *Act*. It provides that the Board may require a tenant to give up possession if the tenant "contravenes a bylaw", in which case the Board must give the tenant notice. This issue was not pleaded in the Originating Application and it was not raised before the chambers judge. New issues are generally not considered on appeal, and the appellant concedes it only applies if the disputed document was a "lease".

[25] In any event, the Board's complaint was not against Ms. El Sherbini; there is no clear evidence that she even knew about the prohibition on short-term rentals. The Board's complaint was that it was the appellant who was breaching the bylaws. The step it took, of disabling some of the appellant's fobs, was directed at him. On this record, this was an understandable response, although it is problematic that no notice was given to Ms. El Sherbini.

[26] The chambers judge dismissed the appellant's arguments about other oppressive conduct, and did not agree that he had proved the damages he claimed. Those findings were all available on this record, and do not disclose palpable and overriding error.

Conclusion

[27] In conclusion, the appellant has failed to show any reviewable error, and the appeal is dismissed. While the chambers judge found the Board's conduct to be within its rights, it was unreasonable for it to disable Ms. El Sherbini's job without any notice to her. As a result costs of the appeal will be limited to single Column 2.

Appeal heard on March 6, 2025

Memorandum filed at Edmonton, Alberta
this 13th day of March, 2025

Slatter J.A.

Authorized to sign for: Grosse J.A.

Authorized to sign for: Shaner J.A.

Appearances:

K.D. Marlowe, KC
for the Appellant

E.M. Berney
S.G. Denholm
for the Respondent