2005 CarswellOnt 10528
Ontario Superior Court of Justice (Divisional Court)

MacNeil v. 976445 Ontario Ltd.

2005 CarswellOnt 10528, [2005] O.J. No. 6362

Mel MacNeil and Sherry MacNeil and Mary Lundrigan and Wallace Lundrigan and Annette Walton and Trevor Walton and Annette Walton and Brian Draper and Lorne Whetham and Patti Wieoeman and David Rouse and Kim Howe and Veronika Leck and Jerry Higgins and Alan King and 976445 Ontario Ltd.

Borkovich J., Bryant J., Somers J.

Judgment: May 5, 2005
Docket: Stratford 04-1164, London 04-1465

Counsel: Gerald K. Culliton, for Appellants
Joseph J. Hoffer, for Respondent

Subject: Property

Headnote

Real property --- Landlord and tenant — Residential tenancies — Termination of tenancy — By landlord for miscellaneous purposes

Landlord owned complex that included 11 occupied mobile home site, gas station and two-acre field — Sewage infrastructure serving tenants' mobile home was declared unsafe for use and city issued municipal unsafe order — Landlord served one-year termination notice on tenants — During notice period, landlord pumped tenant's sewage twice weekly at cost of $428 — Long standing tensions existed between landlord and one tenant — Rental housing tribunal ("tribunal")found that issuance of notice of termination was bona fide and that landlord made good faith decision to close community after exploring alternatives to closure — Tenancies were ordered terminated — Tenants appealed decision — Appeal dismissed — Test was whether or not decision to evict was made in good faith — Landlord made business decision rather than personal decision to close park — Eviction of entire mobile home was not to retaliate for dysfunctional relationship with one tenant — Termination may have been partially vindictive with respect to one tenant but was not substantive reason when viewed overall — Landlord was not in serious breach obligations pursuant to Landlord and Tenant Act — Tribunal member correctly decided issues of fact and law.

Real property --- Landlord and tenant — Residential tenancies — Judicial review of decisions

Landlord owned complex that included 11 occupied mobile home site, gas station and two-acre field — Sewage infrastructure serving tenants' mobile home was declared unsafe for use and city issued municipal unsafe order — Landlord served one-year termination notice on tenants — During notice period, landlord pumped tenant's sewage twice weekly at cost of $428 — Long standing tensions existed between landlord and one tenant — Rental housing tribunal ("tribunal")found that issuance of notice of termination was bona fide and that landlord made good faith decision to close community after exploring alternatives to closure — Tenancies were ordered terminated — Tenants appealed decision — Appeal dismissed — Standard of review of issues under appeal was correctness — Test was whether or not decision to evict was made in good faith — Landlord made business decision rather than personal decision to close park — Eviction of entire mobile home was not to retaliate for dysfunctional relationship with one tenant — Termination may have been partially vindictive with respect to one tenant but was not substantive reason when viewed overall — Landlord was not in serious breach obligations pursuant to Landlord and Tenant Act — Tribunal member correctly decided issues of fact and law.

APPEAL by tenants of mobile home park of tribunal board member's decision to terminate tenancy agreements.

Per curiam:

Background

1 This is an appeal of the July 26, 2004 Order of the Ontario Rental Housing Tribunal ("ORHT") wherein Board member, Dennis McKaig, ordered the termination of the tenancy agreements between 976445 Ontario Ltd. and the applicants tenants.

2 976445 Ontario Ltd. the Landlord, was the owner of the complex that included 11 occupied mobile home sites, a gas station and a two-acre field.

3 The appellants are the tenants who leased lands upon which they placed mobile homes.

4 In March 2003, the sewage infrastructure serving the tenants' mobile homes was declared unsafe for use and made subject to a municipal unsafe order issued by the City of Stratford.

5 On April 25, 2 003 the landlord served a one-year notice on the tenants in accordance with S. 113 of the *Tenant Protection Act* to obtain vacant possession and close the rental operation.

6 By April of 2004, when it appeared that the tenants would refuse to vacate, that landlord brought an Application to terminate the tenancies and obtain an Order for vacant possession.

7 During the notice period, extensions of time for compliance with the terms of Stratford's unsafe order were obtained provided the landlord pumped the tenants' sewage twice weekly. The cost to the landlord for doing so was $428.00 per week.

8 The hearing of the landlord's eviction applications was held by the member on May 20, June 25 and July 15, 2004.

9 The member ultimately found that the landlord's issuance of the Notices of Termination was "*bona fide*" and that the landlord made a good faith business decision to close the community after reasonably exploring alternatives to closure. The member ordered that the tenancies be terminated; that the tenants be required to vacate their homes by July 31, 2004 and that the homes be removed by October 1, 2004.

10 As a result of the said decision of the member McKaig, and the orders granted, the tenants have appealed to this Court.

Other Proceedings

11 At the time of the hearing of this appeal the Panel was advised as to other proceedings having taken place. For the purposes of this appeal there is no need to recite the litany of court proceedings. Suffice it to say that, Mr. Justice Desotti, by Order dated March 3, 2005, ordered that the tenants appeal in this proceeding be perfected on or before March 31, 2005 and, further ordered that the hearing of the appeal and the motion to review Mr. Justice McGarry's Order, be heard at the April 19, 2005 sittings of the Court. The Panel's decision in this appeal, whether in favour of the appellant or the respondent, will make the issues concerning the Order of McGarry J. moot. Therefore it is not the intention of this Panel to deal either with the Ruling made by Board Member Sardo on November 19, 2002 or the Order of McGarry J.

12 The appellants filed several grounds of appeal. It is only necessary to consider two grounds of appeal on the following question:

> 1) Did the Tribunal err in its interpretation of s. 84(2) (a) of the *Tenant Protection Act* which requires the Tribunal to refuse the application for eviction when the landlord is in serious breach of its obligations?
>
> 2) Whether the OHRT erred in its interpretation of s. 121(3)(b) and s. 121(3)(c) as to the landlord's reasons for the Notice of Eviction?

Standard of Review

Pragmatic and Functional Approach

13 A reviewing court must: first determine the standard of review before assessing the decision-making reasons of the Tribunal. The pragmatic and functional approach requires the reviewing court to weigh a series of factors to determine whether the applicable standard is correctness, reasonableness *simpliciter* or patent unreasonableness. The four contextual factors are: (1) the presence or absence of a privative clause or a statutory right of appeal; (2) the nature of the question - law, fact, or mixed fact and law; (3) the expertise of the tribunal relative to the reviewing court on the issue in question; and, (4) the purpose of the legislation and the provision in particular (*Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] S.C.J. No. 18 (S.C.C.) at para, 22, 26). This approach requires the reviewing court to apply the appropriate standard of review after reviewing these factors.

14 The court conducts a balancing exercise of the factors since no one factor is determinative. The patent unreasonableness standard will apply where the four factors suggest considerable deference. At the other end of the spectrum, where little or no deference is called for, the correctness standard will apply. The reasonableness *simpliciter* standard applies where the balancing suggests some deference. (*Q.*, *supra*, para 35)

Application of the Pragmatic and Functional Test Privative Clause

15 Section 195 of the *Tenant Protection Act* is a privative clause that an order of the Tribunal is final and binding and not subject to review except where the *Act* provides otherwise. Section 196(1) of the *Act* provides a statutory right of appeal. It states:

> Any person affected by an order of the Tribunal may appeal the order to the Divisional Court within 30 days after being given the order, but only on a question of law.

16 Section 196(4) of the *Tenant Protection Act* provides that on an appeal from an order to the Divisional Court, the Court (a) may affirm, rescind, amend or replace the decision or order; or (b) may remit the matter to the Tribunal with the opinion of the Divisional Court. Thus, the *Tenant Protection Act* grants to the Divisional Court broad powers in relation to an error on a question of law.

The Nature of the Question

17 The Tribunal interpreted and applied s. 84(2) of the *Act* which provides as follows:

> Without restricting the generality of subsection (1), the Tribunal shall refuse to grant the application where satisfied that,
>
> > (a) the landlord is in serious breach of the landlord's responsibilities under this Act or of any material covenant in the tenancy agreement; ...

The section is mandatory and requires the OHRT to refuse to order the termination of a tenancy if there is a serious breach of the landlord's responsibilities.

18 Iacobucci J., in Canada *Canada (Director of Investigation & Research) v. Southam Inc.* (1997), [1996] S.C.J. No. 116 (S.C.C.), at para. 35, 36, held:

> questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed fact and law are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact.

Mr. Justice Iacobucci further held, where the words in question are contained in a statutory provision, "*questions of statutory interpretation are generally questions of law.*" (supra, at para. 36).

19 The issue raised in this appeal is the correct legal test to determine the term "serious" breach found in s. 84(2) of the *Tenant Protection Act.* The statutory interpretation of the legal standard is a question of law.

Relative Expertise of the Tribunal

20 There are three sub-factors in relation to the relative expertise of the Tribunal. The Court must: (1) characterize the expertise of the tribunal; (2) consider its own expertise relative to that of the tribunal; and, (3) identify the nature of the specific issue before the administrative decision-maker relative to their expertise (*Q.*, *supra*, para 28).

21 The OHRT is a specialized tribunal concerning landlord tenant matters. The subject matter of the appeal is a question of law.

Purpose of the Legislation

22 The *Tenant Protection Act* sets out the rights and responsibilities of landlords and tenants and provides a mechanism for the resolution of disputes. The purpose of s. 84(2) is straightforward and precludes an order for eviction if the landlord is in serious breach of her or his duties under the *Tenant Protection Act.* The section limits the ability of landlords to evict tenants if they are in serious breach of their obligations under the Act or the lease.

The Applicable Standard of Review

23 After considering the four factors and for the reasons stated above, I find that the standard of review on the issues under appeal is correctness.

Tribunal Findings

24 Board McKaig stated the landlord gave good faith notice to all tenants to vacate the rental unit. In determining good faith I must look at the intent of the landlord at the time the notices were given. I find that the landlord made a business decision, rather than a personal decision, to close the mobile home park. I am satisfied that Ms. Becker explored the alternatives to a reasonable degree and made her decision based on those reasons. The test is not whether hex' business decision was good, bad or indifferent, but whether or not it was made in good faith.

25 While it is evident, based on the evidence, that there have been long-standing tensions between the landlord and the Waltone, I find it unreasonable that there was motive to evict the entire mobile home park to retaliate for a dysfunctional relationship with one tenant. Only one case precedent is on point with the current applications. In consideration of Mr. Culliton's submission of *Kingsway Villa Ltd. v. Ethier* [1993 CarswellOnt 3084 (Ont. Gen. Div.)], the case draws a very similar chronology and relies on the previous *Landlord Tenant Act*. Mr. Cappa correctly argued that in that case, the landlord proceeded to evict complainants only, and as such should be distinguished from the application before me where there seemed to be only one complainant and all others were being evicted as well. I agree with the argument of Mr. Cappa, and additionally find this case distinguishable based on the wording of the successor *Tenant Protection Act, 1997*. I rely on paragraph 74 of the decision that includes the wording of the previous legislation.

> s. 121(3) (b) a reason for the application being brought is that the tenant has complained to any governmental authority of the landlord's violation of any statute...or by-law;
>
> s. 121(3) (c) a reason for the application being brought is that the tenant has attempted to enforce his or her legal rights.

26 The new legislation has replaced "*a reason*" with the narrower "*the reason*". This indicates that the landlord's sole or primary reason for the termination of the tenancy is retaliatory. While the termination of may be partially vindictive in the eviction of Mr. Walton, I do not find it to be the substantive reason when viewed with the overall impact of evicting the "*innocent*". Mr. Culliton's request to deny the termination of the tenancies based on section 84(2)(b) and (c) is therefore denied.

27 The landlord is not in serious breach of her obligations under section 110 of the *Act.* While the tenants may have their own claims against the landlord for failing to adequately maintain the roads and snow removal. I heard no evidence to suggest that they were in such poor shape as to be considered a "*serious breach*". With respect to s. 110(1) (c), I find that although problems exist with the sewage system, the landlord has issue by taking remedial action and a septic system is currently in place and remains so except as directed by the municipality. Mr. Culliton's request to deny the termination based on section 84(2) (a) is therefore denied.

Questions of Law

28 I find that the appeal raises two questions of law:

1) Whether the OHRT erred in its interpretation of the word "*serious*" within the meaning of s. 84(2) of the *Tenant Protection Act*?

2) Whether the OHRT erred in its interpretation of s. 121(3)(b) and a. 121(3)(c) as to the landlord's reasons for the Notice of Eviction?

Decision of This Court

29 I find that Tribunal member McKaig correctly decided the issues of fact and law raised herein. The tenants' appeal is, therefore, dismissed.

30 The respondent shall have 15 days from the receipt of this decision to make submissions on costs. The appellants shall have 15 days from the receipt of the respondent's costs submissions, to reply.

Appeal dismissed.