2013 ONSC 503
Ontario Superior Court of Justice (Divisional Court)

York Region Condominium Corp. No. 639 v. Lee

2013 CarswellOnt 1520, 2013 ONSC 503, 225 A.C.W.S. (3d) 1133, 28 R.P.R. (5th) 208, 303 O.A.C. 279

York Region Condominium Corporation No. 639, Applicant/ Appellant and Norbert Lee and Frances Lee, Respondents/ Respondents in Appeal and Landlord and Tenant Board, Intervenor

Matlow, Kiteley, Lederer JJ.

Heard: September 20, 2012
Judgment: January 25, 2013
Docket: Oshawa DC-12-00414-00

Counsel: Carol A. Dirks, for Applicant / Appellant
Norbert Lee, Respondent / Respondent in Appeal, for himself
Brian A. Blumenthal, for Intervenor, Landlord and Tenant Board

Subject: Property

Headnote

Real property --- Landlord and tenant — Residential tenancies — Termination of tenancy — By landlord for own occupation
Respondent tenants rented unit in building owned by applicant corporate landlord — Landlord decided to again employ on-site superintendent who would live in subject unit — Landlord gave tenants notice of termination at end of term on ground that it required possession for purpose of its own residential occupancy — Landlord and Tenant Board dismissed landlord's application to terminate tenancy on ground that non-closely held corporation could not seek to use rental unit for its own use — Board dismissed landlord's request to review previous order — Landlord appealed — Appeal allowed — Board erred in deciding that landlord could not qualify as "landlord" for purpose of application pursuant to s. 48(1) of Residential Tenancies Act, 2006 — Corporation was able to occupy rental unit for purpose of residential occupation incidental to its status as landlord and was capable of reclaiming unit for its own use — Board failed to carry out required analysis of issues and reached wrong result, as it was incorrect in law and did not fall within scope of reasonable options — Landlord was granted vacant possession without referring matter back to Board — Referring matter back to Board would have provoked unnecessary delay and costs when outcome was inevitable.

The respondent tenants rented a unit in a building owned by the applicant corporate landlord. The landlord decided to again employ an on-site superintendent who would live in the subject unit. The landlord gave the tenants a notice of termination at the end of the term on the ground that it required possession for the purpose of its own residential occupancy.

The Landlord and Tenant Board dismissed the landlord's application to terminate the tenancy on the ground that a non-closely held corporation could not seek to use a rental unit for its own use and could not require care services. The Board dismissed the landlord's request to review the previous order.

The landlord appealed both decisions.

Held: The appeal was allowed.

Per Kiteley and Lederer JJ.: The decision of the Board was replaced with an order granting the application and giving the landlord vacant possession. The Divisional Court had the power to replace the decision of the Board, pursuant to s. 210(4) of the Residential Tenancies Act, 2006. It was unnecessary to return the matter to the Board because to do so would provoke delay and costs. The outcome before the Board was inevitable. The tenants were not prejudiced by the substitution of the decision.

Per Matlow J. (dissenting in part): The orders of the Board were set aside and the matter would be remitted to the Board.

The Board erred in deciding that the landlord could not qualify as a "landlord" for the purpose of an application pursuant to s. 48(1) of the Act. The landlord, even though it was a body created pursuant to statute, was capable of acquiring possession of the

rental unit for the purpose of residential occupation by itself. A corporation was able to occupy a rental unit for the purpose of residential occupation incidental to its status as a landlord. A corporation was also capable of reclaiming a unit for its own use. The Board failed to carry out the required analysis of the issues and reached the wrong result, as it was incorrect in law and did not fall within the scope of any reasonable options.

APPEAL by applicant landlord from decisions of Landlord and Tenant Board, dismissing landlord's application for termination of tenancy and dismissing landlord's request to review order.

Matlow J. **(Dissenting in part):**

This appeal

1 The applicant appeals two orders of the Landlord and Tenant Board ("Board"). The first is an order dated March 22, 2012 made by Member Karol Wronecki dismissing an application made by the applicant, as landlord, pursuant to section 48 (1) of the *Residential Tenancies Act*, 2006 S.O. c. 17 ("the Act"). The application was for an order terminating the tenancy of the respondents at the end of the term of their tenancy on the ground that the applicant required possession of the respondents' unit for the purpose of its own residential occupancy. The second is an order dated April 20, 2012 made by Member Vincent Ching pursuant to Rule 29 of the Board's Rules of Practice declining the applicant's request to review the previous order, confirming it and declaring that it "remains unchanged". Although the notice of appeal states that the appeal is from only the second order, the applicant's factum states that it is from both orders and no objection limiting the scope of this appeal was made.

2 The respondents were not represented in this appeal by counsel. The respondent, Norbert Lee, appeared in person and made brief oral submissions. His spouse, the respondent, Frances Lee, did not appear. The Board has intervened in this appeal pursuant to section 210 (3) of the Act and, as a result, we have had the benefit of the able assistance of its counsel, who confined his submissions to the issue of what the applicable standard of review ought to be.

3 This appeal involves the interpretation of section 48 (1) of the Act which reads as follows:

> 48 (1) A landlord may, by notice, terminate a tenancy if the landlord in good faith requires possession of the rental unit for the purpose of residential occupation by,
>
> (a) the landlord;
>
> (b) the landlord's spouse;
>
> (c) a child or parent of the landlord or the landlord's spouse; or
>
> (d) a person who provides or will provide care services to the landlord, the landlord's spouse, or a child or parent of the landlord or the landlord's spouse, if the person receiving the care services resides or will reside in the building, related group of buildings, mobile home park or land lease community in which the rental unit is located.

The disposition of this appeal

4 This appeal is allowed and the order of Member Wronecki is set aside. It follows that the order of Member Ching must also be set aside. No claims for costs were made.

5 It is my view that the application that was before Member Wronecki should be referred back to the Board for a new hearing before another Member in accordance with these Reasons. Although the majority agree that the appeal be allowed and the orders of both Members be set aside, they prefer to bring the application to a conclusion now for their separate Reasons on this issue set out below.

6 As shown in paragraph 16 of the Board's order, set out in paragraph 8 below, the Board dismissed the application on what was a preliminary issue of law without addressing the merits of the application or giving the parties an opportunity to do

so by presenting further evidence and submissions. Therefore, despite the lengthy delay that has resulted from this appeal and the desirability of bringing the application to a final conclusion without further delay, the parties should now be afforded that opportunity. If the application were to be referred back to the Board for this purpose, I would urge the Board, in the interests of justice, to give the new hearing appropriate priority so that the further delay can be kept to a minimum.

The orders in Appeal

7 The determination of this appeal requires that we address primarily the Wronecki order. That order, which includes the undisputed factual background of this appeal, reads, in part, as follows:

> **Evidence, determinations and reasons:**
>
> ***Background***
>
> 1. York Region Condominium Corporation #639 (CC) has owned a building in Markham, Ontario, since 1986. All units (approximately 150) but one are owned by individual members. Unit 118 is owned by CC as a common element and until 2007 it was occupied by a resident superintendent.
>
> 2. From April 2007 the owners decided to rent unit 118 to the present Tenants. The building is being serviced by an off-site superintendent. After work hours owners have acted as on-call residents for emergency purposes.
>
> 3. In 2012 the corporation decided to again employ an on-site superintendent who will reside in the building. They wish to return to the pre-2007 status of unit 118 and gave the Tenants, who have lived there since 2007, a notice of termination (so-called Form N12). There actually have been two notices, the applicant relies on the amended one dated January 30, 2012. It states that CC needs the unit for "a person who provides or will provide care services to...the Corporation". The date of termination in the notice is April 10, 2012.
>
> 4. At the outset of the hearing, I considered preliminary issues regarding the validity of Form N12. I accepted the parties' oral and written submissions and the hearing was adjourned until the questions are answered.
>
> 5. There are three issues which this notice raises:
>
> > (i) Does section 48 of the **Residential Tenancies Act, 2006**, (the **Act**) allow a corporate entity of 150-owners to claim own use of a rental unit they coown?
> >
> > (ii) If the answer to the above is "yes", the related question is can a corporation claim to require "care services" in the meaning of paragraph 48(1)(d)?
> >
> > (iii) If the answer to question 2 is "yes", the last problem with this Form N12 is what should be the date of termination under subsection 48(2)?

8 After its review of the applicable law, the order continues as follows:

> 13. In my mind none of the three cases raised helps to answer the question whether a large corporate entity of some 150 shareholders can style itself to be a landlord for the purpose of [its] own occupation for residential use.
>
> 14. Under the current legislation this matter has been resolved in 2010 in a Court of Appeal decision known as *Slapsys (1406393 Ontario Inc.) v Abrams.* Mr. Slapsys was the sole shareholder of a corporation that owned a rental unit. After considering the real substance of the transaction based on section 202 of the **Act,** the Court agreed he was entitled to occupy the unit for his own use. In this the Court of Appeal upheld the earlier conclusions of the Board and of the Divisional Court.
>
> 15. This leading case makes it clear that, as a rule, a corporation cannot seek to use a rental unit for its own use. The exception (paragraph 8 of *Slapsys*) exists when there is only one shareholder and a "directing mind" of the corporate owner. In other words, there has to be a very close relationship between the person and the company so that ownership is not

diluted amongst many. In this way *Slapsys* follows the reasoning in two cases under the **LTA (**paragraphs 8 and 9 of the order above) quoted by the Landlord.

16. Based on the above I find that CC, not being a closely held corporation, cannot assume the position of landlord in the meaning of section 48 of the **Act**. The amended notice of January 30, 2012 on which this application is based is void and the application fails.

Can a corporation require "care services"?

17. I will answer this question as it is closely related to the previous one. Even if my conclusion above was in the affirmative, I am of the opinion — and I agree here with the Tenant — that in the **Act** the terms "care services" as well as "care homes" refer to health and related services which only an individual may received (sic) but not a corporation.

It is ordered that:

1. The Landlord's application is dismissed.

The applicable standard of review

9 I am persuaded that the jurisprudence establishes that the applicable standard of review in this appeal must be "reasonableness".

10 At paragraphs 82 and 83 of his concurring Reasons in *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 (S.C.C.), Binnie, J. commented on the implications of applying this standard of review as follows:

[82] It may be recalled that the willingness of the courts to defer to administrative tribunals on questions of the interpretation of their "home statutes" originated in the context of elaborate statutory schemes such as labour relations legislation. In such cases, the tribunal members were not only better versed in the practicalities of how the scheme could and did operate, but in many cases, the legislature tried to curb the enthusiasm of the courts to intervene by inserting explicit privative clauses. Over the years, acceptance of judicial deference grew even on questions of law (see e.g. *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R 557) but never to the point of presuming, as Rothstein J. does, that whenever the tribunal is interpreting its "home statute" or statutes, it is entitled to deference. It is not enough, it seems to me, to say that the tribunal has selected one from a number of interpretations of a particular provision that the provisions can reasonably bear, no matter how fundamentally the tribunal's legal opinion affects the rights of the parties who appear before it. In issues of procedural fairness or natural justice, for example, the courts should not defer to a tribunal's view of the extent to which its "home statute" permits it to proceed in what the courts conclude is an unfair manner.

[83] The middle ground between Cromwell J. and Rothstein J., it seems to me, lies more in the more nuanced approach adopted by the Court in *Canada (Canada Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 ("CHRC"), where it was said that "if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and The Tribunal will be entitled to deference" (para. 24 (emphasis added)). Rothstein, J. puts aside the limiting qualifications in this passage when he comes to formulating his presumption, which is triggered entirely by the location of the controversy in the "home statute".

Analysis

11 It is clear from Member Wronecki's Reasons that he approached the application before him by concluding that the Court of Appeal in *Slapsys v. Abrams* [2010 CarswellOnt 7831 (Ont. C.A.)] had effectively decided that "a large corporate entity of some 150 shareholders "could not style itself to be a landlord for the purpose of own occupation for residential use" (see Reasons, para. 13) and "that, as a rule, a corporation cannot assume the position of landlord in the meaning of section 48 of the *Act*". That consideration alone was sufficient for him not only to dismiss the application but to hold that the notice of application was "void".

12 In my view, by interpreting and applying *Slapsys* as he did, the Member fell into error. In *Slapsys*, the Court of Appeal upheld the right of the sole shareholder and officer of a corporation that owned a rental property to invoke section 48 (1) to successfully obtain possession for the purpose of his own personal occupation. This appeal, in contrast, involves the right of the corporation that owns a rental property to obtain possession for its own occupation. The question of whether a corporation can ever "possess" a rental unit for "the personal use of the landlord", the issue in this appeal, was not addressed by the Court of Appeal.

13 Moreover, in paragraphs 7 and 8 of its Reasons, the Court of Appeal addressed the definition of "landlord" in the Act as follows:

> [7] The definition of "landlord" in the Act, however, is not restricted to the owner of a rental unit and it clearly contemplates that there may be more than one "landlord". Section 2 of the Act provides in part:
>
> "landlord" includes,
>
> > (a) the owner of a rental unit or any other person who permits occupancy of a rental unit, other than a tenant who occupies a rental unit in a residential complex and who permits another person to also occupy the unit or any part of the unit...[emphasis added]
>
> [8] Where the premises are owned by a corporation, the issue is whether the sole shareholder and officer of that corporation may also come within the definition of "landlord" as a "person who permits occupancy of a rental unit". In this case, the sole shareholder and officer is clearly the directing mind of the corporate owner and is therefore a "landlord" within the definition of the Act as the person who permits occupancy of the unit. Whether another individual is "a person who permits occupancy of a rental unit" will depend upon the facts, including particularly whether the person has the ultimate authority to permit occupancy.

14 It follows that, in deciding in the case at bar that the applicant could not qualify as a "landlord" for the purpose of an application pursuant to section 48 (1) of the Act, the Member was in error.

15 In the circumstances of this case the Member was required to engage in a much more complex analysis which included taking into account the unique implications related to the status of the applicant as a condominium corporation. I will demonstrate that starting with some of the relevant statutory provisions.

16 The interpretation of section 48 (1) of the Act must reflect the requirements of section 64 of the *Legislation Act*, 2006 S.O. 2006, c. 21, Schedule F, which reads as follows:

> 64 (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

17 Section 1 of the Act sets out its purposes as follows:

> 1. The purposes of this Act are to provide protection for residential tenants from unlawful rent increases and unlawful evictions, to establish a framework for the regulation of residential rents, to balance the rights and responsibilities of residential landlords and tenants and to provide for the adjudication of disputes and for other processes to informally resolve disputes.

18 The Court of Appeal described the specific purpose of section 48 (1) of the Act in paragraph 12 of its Reasons in *Slapsy*s as follows:

> [12] Section 48 is clearly an exception to the regime that protects against no fault eviction. While the legislation has a tenant protection focus, s. 48 is designed to strike a balance between the protection of tenants and the rights of landlords.

19 Section 5 (1) of the *Condominium Act, 1998*, S.O. 1998, c. 19 describes condominium corporations as follows:

> 5 (1) A corporation created or continued under this Act is a corporation without share capital whose members are the owners.

20 Section 17 of the same Act describes the objects and duties of a condominium corporation as follows:

> 17 (1) The objects of the corporation are to manage the property and the assets, if any, of the corporation on behalf of the owners.
>
> 17 (2) The corporation has a duty to control, manage and administer the common elements and the assets of the corporation.

21 These provisions and the declaration governing the subject condominium complex provide the underlying authority for the applicant's duty to provide services for the orderly control, management and administration of the common elements on behalf of all of the owners.

22 On the evidence tendered on behalf of the applicant through the affidavit of Heather Reading, a unit owner and the president of the applicant, the applicant proposes to carry out that duty, in part, by restoring the use of unit 118 to its original purpose and use as the residence of an on-site superintendent. Her evidence is set out as follows:

> YCC 639 was registered in 1988. It is comprised of a single highrise building, and is municipally known as 2 Raymerville Drive, in Markham.
>
> At the time of registration, the developer had a designated dwelling unit for the purpose of having a full-time live-in superintendent which dwelling unit forms part of the common elements of YRCC 639 being Suite 118. Suite 118 was occupied by YCC 639 for the period from 1998 to 2007. When the resident superintendent left, it was determined by the then Board of Directors that the current needs of YRCC 639 were such that a resident superintendent was not required so long as the condominium building was able to provide the necessary emergency support from volunteer residents.
>
> Accordingly, in early 2007, the then Board of Directors approved, and the owners subsequently passed, a By-law which authorized YRCC 639 to be able to lease the common element area, being Suite 118, to a tenant as may be determined by the Board. Suite 118 was leased to the current tenants, Norbert and Frances Lee, beginning on April 11, 2007.
>
> Since 2007, the superintendent for the building has lived off-site. Three owners have acted as on-call residents to provide emergency coverage when the nonresident superintendent is not on duty. During 2011, one on-call resident was vacationing out the country several times. She recently decided to sell her unit and no longer wishes to be an on-call resident. Another on-call resident was seriously ill during 2011 and was in the hospital and in respite care for a lengthy period. The third on-call resident was the only person available for emergency coverage each night between 4:00 p.m. and 7:30 a.m. as well as on Saturdays and Sundays. She informed the Property Manager that she felt too much stress at being the only person available for emergency coverage; however, no person is willing to take on this responsibility.
>
> The condominium building is predominantly occupied by residents who are 65 years of age and older. Many of these residents have health issues, and have mobility restrictions. Since 2007, the needs of the building have changed, such that the YRCC 639 now requires it to have a full-time live-in superintendent. Pursuant to the Condominium Act, 1998, the Board of Directors has a legal duty to ensure the safety and security of the condominium building and its residents. This legal duty cannot be complied with if there is no weekend and after hours coverage. In accordance with this legal duty, the Board of Directors has determined that only available option is for YRCC 639 to once again have a fulltime live-in superintendent.
>
> Based on the foregoing, the Landlord is requesting an Order to evict the tenants, Norbert and Frances Lee from Suite 118 at 2 Raymerville Drive, Markham, Ontario, L3P 7N7 so that the Corporation can use the suite to house a live-in superintendent.

23 On the authority of *Slapsys*, it is clear that the applicant could, on the evidence, reasonably qualify as a "landlord" within the definition set out in the Act. The only remaining question is whether the applicant, a body created pursuant to statute, is capable of acquiring possession of the rental unit for the purpose of residential occupation by itself. In my view, it is.

24 There is a legal presumption that rights conferred by statute are available to natural persons and corporations unless the statute states otherwise and there is no provision anywhere in the Act that limits its application only to natural persons. The Act refers to persons governed by the Act throughout in generic-neutral terms such as "landlord" and "tenant". Even if the Act had been worded to refer to them in "gender-specific" terms such as "he" or "she", section 68 of the *Legislation Act* would apply to provide that "Gender-specific terms include both sexes and **include corporations** (emphasis added)". *A priori*, if generic-specific terms include corporations, generic-neutral terms must include corporations as well.

25 The apparent reason why it is sometimes considered that section 48 (1) cannot apply to corporations is because corporations, being entities created pursuant to statute without any physical mass, do not have the capacity to occupy a rental unit in the same manner as a natural person. However, it is not necessary that a corporation have the same characteristics as a natural person in order to rely on section 48 (1). Rather, a corporation can occupy a rental unit in the same way that it does everything, namely, through the actions of its officers, directors, employees and other agents. If a corporation can occupy a rental unit for the purpose of maintaining or operating an office, store, factory, warehouse and other kinds of realty, it must surely also be able to occupy a rental unit for the purpose of residential occupation incidental to its status as a landlord.

26 In the context of this appeal, it is my view that when a corporation that is the landlord of a building occupies a rental unit for the purpose of engaging and requiring one or more natural persons to reside in the unit because on-site residency is reasonably incidental to their functions on behalf of the corporation, the residential occupation of those natural persons is also that of the corporation. In such circumstances it is open to the landlord to invoke section 48 (1) to attempt to regain possession of the unit for that purpose.

27 It matters not that a corporation cannot have a spouse, child or parent and clearly cannot meet the requirements of section 48 (1) (b) or (c) of the Act. This, however, does not disqualify a corporation from relying solely on section 48 (1) (a) of the Act as the applicant does.

Did the order in appeal satisfy the standard of review?

28 I turn, finally, to the ultimate question, the answer to which, has determined the disposition of this appeal. I am persuaded that the Member failed to carry out the required analysis of the issues before him and ultimately reached the wrong result. I use "wrong" because, in my view, it is both incorrect in law and does not fall within the scope of any of the reasonable options which were available to him.

29 In order to uphold the order in appeal, I would have to give deference to it on the basis that the issues decided fall within the home statute of the Board and the Member is presumed to have specialized expertise in this area of the law. "Deference" can mean giving blind approval to an order made by someone to whom deference is owed. It can also mean giving weight to the authority of the maker of the order and giving careful consideration to it while reserving the ultimate power of decision to one's self.

30 This appeal raises issues of statutory interpretation that really do not engage the specialized expertise that a Member of the Board might be expected to have had. Rather, the issues fall well within the scope of what judges are regularly called upon to determine in the ordinary course of their judicial duties.

31 The powers conferred on this Court by the Act are extremely broad. Accordingly, in the circumstances of this appeal, I respectfully cannot uphold the orders in appeal. The applicant is entitled to have its application determined on its merits in accordance with the evidence and in accordance with the applicable law.

***Kiteley, Lederer JJ.*:**

32 We agree with the foregoing except that we would substitute a decision rather than send the matter back to the Board as indicated in paragraph 5, above.

33 Pursuant to section 210 (4) of the Act, the Divisional Court may replace the decision of the Board. The decision of the Board was made on jurisdictional grounds. The Member did not consider the facts as indicated in paragraph 22, above. The evidence tendered on behalf of the applicant explains in detail the history of the unit and the reasons for needing vacant possession. That evidence was not challenged before the Board or before us on the appeal.

34 We consider it unnecessary to return the matter to the Board because to do so will provoke delay and costs. The outcome before the Board is inevitable. The respondents are not prejudiced by the Divisional Court substituting the correct decision so long as the respondents are given a reasonable period of time to vacate.

35 Order to go:

a) allowing the appeal and setting aside the orders made March 22, 2012 and April 20, 2012;

b) granting the application and giving the applicant vacant possession;

c) the respondents shall provide possession of the unit to the applicant no later than February 28, 2013;

d) no costs.

Appeal allowed.

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