

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**  
**Citation: CAPREIT v. Wagstaff, 2020 NSSM 27**

**BETWEEN:**

**CAPREIT**

**Appellant/Landlord**

- and -

**JOHN ADAM WAGSTAFF**

**Respondent/Tenant**

**Hearing Date:** November 10, 2020 (by teleconference)

**Appearances:**

**Appellant** – John Boyle, Barrister & Solicitor

**Respondent** – Meaghan Kells, Barrister & Solicitor

**ORDER and DECISION**

[1] This is an appeal of a Director’s Order dated May 18, 2020. In that Order the Director found that the Tenant had the right to sublet his residential premises for a reasonable term and to advertise in a manner which he saw fit. The Director ordered that both the Tenant and the Landlord must comply with Section 9B of the *Residential Tenancies Act*, R.S.N.S. 1989, C. 401 as it relates to subletting as well as comply with the Schedules to the Lease between them.

[2] The basic background of the matter is that the Tenant, who is a merchant seaman and often away for extended periods of times, wishes to make his unit available for rentals under the Airbnb system. The Landlord, whose consent is required for any subletting or parting of possession of premises, does not permit Airbnb/short term leasing and has denied the Tenant’s request to be permitted to do so.

[3] I will first summarize the evidence of the Tenant, John Wagstaff, and the Landlord representative, Jennifer Bateman-Hatch.

**John Wagstaff, the Tenant**

[4] Mr. Wagstaff reviewed the background of circumstances that brought the matter to a head. He stated that he is an able bodied seaman and works offshore on vessels for various shipping lines. He does not have regular shifts and sometimes would have as little as two days’ notice of a trip which could be six weeks at sea. He estimates that over the course of an average year, he would likely be away from Halifax upwards of six months. He would like the ability to sublet his premises through the Airbnb platform and thereby effectively recoup some of the money that he is expending for rent. He talked to several of the representatives for the Landlord and was told it was not

permitted. At a point he wrote to the general counsel for the Landlord but received no response. He states that he is not trying to run a business and this is not like the situation where people will buy a condominium for purposes to renting it out. He emphasized that he would still be living in the unit when he is not working – it is his home.

- [5] He was referred to the draft Sublease Agreement which had been prepared on behalf of the Landlord and which is at page 68 of Exhibit 2. He understood that if he wanted to Airbnb his apartment he was supposed to have this filled out. He stated that this document would not allow him to rent his unit through Airbnb as it had too much detail and would make it impossible for him to do what he was looking to do.
- [6] On cross-examination he was referred to Schedule B of the signed Lease - the Rules and Regulations and in particular those dealing with assignment of sublet (page 28, Exhibit 1). He understood that he was bound by those terms including the requirement that for an assignment or sublet he was to supply the Landlord with the new tenant's completed tenancy application form.
- [7] He was referred to the Airbnb Terms of Service document which is an approximately 40 page document apparently entered into by the "Members" of Airbnb, both "Hosts" and "Guests," and in particular, the section at page 57 of the exhibit which reads:
- 8.2.1 You understand that a confirmed booking of an Accommodation ("**Accommodation Booking**") is a limited license 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] When he was asked to confirm that this was a license, he did not agree but said subletting was the same thing.
- [9] He stated that he was never specifically told that he could not sublet but he was told he could not Airbnb. He stated that typically he was away for between a month and a month and a half. He stated that he would probably be looking to do a two night minimum. As to the rate he would charge, he would let Airbnb set the price but it would probably be something like \$60-\$80 per night. He recognized he would probably have to pay for a cleaner. As to how CAPREIT would be able to vet the subletters, he stated that Airbnb rates all of its Guests and those reviews are sent along to him. He would be prepared to forward those to CAPREIT but they would have to turn it around quickly. He agreed that if there was any specific insurance that would be required by the Landlord that it would be reasonable for that to be secured. He confirmed that he was looking to do the entire process through Airbnb not just advertisement. This means that the money goes through Airbnb from the renter/Guest and then in turn his portion is forwarded on to him by Airbnb. Mr. Wagstaff confirmed that the way the Airbnb system works, the Host has to approve the prospective Guest first but there apparently is no direct communication between the prospective Guest and the Host. He again confirmed that the proposed Sublease Agreement prepared on behalf of the Landlord is just too much. He stated that the Airbnb Agreement is already in place and it contains the terms of service.
- [10] As to the question of whether a very short consent form with the Tenant's name and the proposed term could be sent to the Landlord for their consent. Mr. Wagstaff said that he could conceivably see that working. But, given the 24 hour typical turnaround time for the Host to accept the Guest,

the Landlord would have to act quite promptly in this regard. It was also indicated that the Airbnb site can require the identification of the intended Guest which the Host would have access to.

### **Jennifer Bateman-Hatch, the Landlord Representative**

- [11] Jennifer Bateman-Hatch is an Associate Director and Manager for the entire Halifax operations of the Landlord. This comprises approximately 3,200 suites. She refers to these as “multi-family residences.” The complex occupied by the Tenant is part of the Brunswick Street complex which has three towers comprising some 480 suites in total.
- [12] She was not initially involved in Mr. Wagstaff’s request but later was. She understood that he had requested permission to rent his apartment through Airbnb although no specific information was provided. Their response was that they do not allow short term rentals through Airbnb. Her reasons for this position were:
- they do not operate hotels;
  - a concern for the greater community interest;
  - security issues;
  - increased wear and tear;
  - increased noise;
  - access to the premises by strangers;
  - an overall concern during the COVID-19 pandemic.
- [13] The time requirement to process applications would be significant. Further, she emphasized that they rent “homes”; they are not in the hotel business.
- [14] With what is being proposed they would not be able to check landlord references which would be typical for subtenants. The concern is that there would be no direct control over subtenants. She stated that the \$75 maximum administration fee does not cover the actual cost of processing an application. She stated that they would not be able to process such applications in 24 hours. She further stated that an Airbnb review would have no information regarding a “tenancy” and no information regarding day-to-day occupancy. She would be concerned about hundreds of people coming and going as this raises major concerns and extra effort for cleaning and disinfecting for COVID. This hinders the Landlord’s resources. She is concerned about security and if there is an adequate opportunity to vet potential subtenants. The existing tenants that live in the buildings would have concerns and there could be disruptions for their day-to-day living.
- [15] On cross-examination she did confirm that they do allow other tenants to sublet. She stated that they outline what is required on the Sublease document.
- [16] She stated that for subtenant requests they always call previous landlord references. If there are none they may go to a guarantor or an employer. They are very mindful of the demonstrated respectfulness of tenants.
- [17] She further stated that the units in the three buildings in question are a mix of one, two and three bedroom apartments. The Landlord views this as a community unto itself.

[18] In response to a question from the Court, Ms. Bateman-Hatch stated that she would consider a sublet for one month or even two weeks. With respect to a sublet for one week she stated “probably no.”

### Submissions

[19] The Appellant/Landlord argues that it was reasonable to refuse a hypothetical sublet. It was asserted that what Mr. Wagstaff is seeking is *carte blanc* to use Airbnb and what is created in such a transaction is a license and not a sublease.

[20] CAPREIT was not acting unreasonably or arbitrarily in denying the Tenant’s request. CAPREIT must have sufficient information. The case of *Formac Investments Limited v. Peck* 2009 NSSM 48, was referred to and in particular paragraphs 10-12 and 16 which related to the issue of the consent of the landlord not being unreasonably or arbitrarily withheld. CAPREIT was acting reasonably and had the following reasonable concerns:

- Expense of application;
- Security Concerns;
- Strangers to the building;
- No proper opportunity to vet;
- No opportunity to speak to references for the Landlord;
- COVID

[21] In no way was this denial based on an arbitrary decision or the personal whim of the Landlord. It is their choice and it is their property that is to be respected.

[22] For the Tenant, Ms. Kells referred to the language in Section 9B which refers to “*otherwise part[ing] with the possession of the residential premises.*” She stated that whatever it is called, the principal, or head lease agreement, remains in place and the Landlord retains, at all times, the full benefits and remedies it has under the lease between it and the head Tenant. Whether or not it is a sublet or a license does not matter because it does not ultimately affect the basic Landlord-Tenant relationship.

[23] She further stated that there was no evidence from any other tenants of distress or that they were taking issue with what was being proposed. The flat blanket denial of CAPREIT is a contravention of Section 9B of the *Act*. With respect to the draft Sublease Agreement, she noted that this was proposed after and apparently in response to Mr. Wagstaff’s request. She stated that this was an unreasonable withholding of consent.

### Analysis

[24] The issues presented by this case are novel and, to my knowledge at least, have not yet been addressed in a decision in Nova Scotia.

[25] The Airbnb platform has had a significant impact in Canada, United States and indeed around the world. However, it does not fit neatly into the framework of the Nova Scotia *Residential Tenancies Act*. Indeed, as stated at the hearing, what is being attempted here is, in common parlance, an attempt to fix a square peg into a round hole.

[26] According to Wikipedia, Airbnb is:

*...an American vacation rental online marketplace company based in San Francisco, California, United States. Airbnb maintains and hosts a marketplace, accessible to consumers on its website or via an app. Through the service, users can arrange lodging, primarily homestays, and tourism experiences or list their properties for rental. Airbnb does not own any of the listed property; instead, it profits by receiving commission from each booking.*

[27] I also refer to Mr. Wagstaff's evidence with respect to how the process would work and, we also have in evidence the 40 plus page Terms of Service that Members, both Hosts and Guests enter into and presumably are bound by.

[28] Section 9B of the *Residential Tenancies Act* is front and center in this case. In full, it reads:

**9B (1)** *A tenant may assign, sublet or otherwise part with possession of the residential premises, subject to the consent of a landlord.*

**(2)** *A landlord may not arbitrarily or unreasonably withhold consent or charge for consent sought under subsection (1) unless the landlord has actually incurred expense in respect of the grant of consent.*

**(3)** *Where a tenant has assigned residential premises to another individual,*

*(a) the lease continues to apply on the same terms and conditions to the new tenant;*

*(b) the new tenant is liable to the landlord for any breach of the original tenant's obligations under the lease or the Act if the breach relates to the period after the assignment, whether or not the breach began before the assignment;*

*(c) the new tenant is entitled to enforce against the landlord any obligation of the landlord under the lease or the Act if the obligation relates to the period after the assignment, whether or not the obligation began before the assignment;*

*(d) the former tenant is liable to the landlord for any breach of the tenant's obligations under the lease or the Act if the breach relates to the period before the assignment; and*

*(e) the former tenant is entitled to enforce against the landlord any of the landlord's obligations under the lease or the Act if the obligation relates to the period before the assignment.*

**(4)** *Where a tenant sublets residential premises to another individual,*

*(a) the tenant gives the right to occupy the premises to another individual for a period of time ending on a specified date;*

*(b) the tenant remains entitled to the rights of a tenant and is also liable to the landlord for any breaches under the lease or the Act during the sublet;*

*(c) the subtenant is entitled to the rights of a tenant and is liable to the tenant for any breaches of the subtenant's obligations under the sublet agreement, the lease or the Act during the sublet; and*

*(d) the subtenant shall vacate the residential premises at the end of the term of the sublet.*

(5) A sublet agreement must specify the date on which the tenancy under the sublet agreement ends.

- [29] Before reviewing the question of whether the Landlord here acted arbitrarily or unreasonably, there is the issue of whether or not an Airbnb transaction constitutes, in law, a sublet or a license or, whether the distinction matters. Counsel for the Landlord argues that it is a license and is not a sublet. Tenant's counsel on the other hand states that it basically does not matter and refers to the wording in 9B of "...otherwise part with possession of the residential premises."
- [30] In the case of **Condominium Corporation No. 0425177 v. Kuzio**, 2020 ABQB 152, a decision of the Alberta Court of Queen's Bench, Justice Belzil had this to say:

***What is the Legal Status of a Short Term Airbnb Renter Where No Lease Is Entered Into?***

[16] One of the key issues to be determined in this application, is the legal status of someone who temporarily occupies a condominium unit pursuant to a contractual arrangement facilitated by a web based platform like Airbnb.

[17] The Applicant submits, that this type of arrangement amounts to nothing more than a license, which is not a lease.

[18] Counsel for the Respondent Porter submits, that anyone entering into such an arrangement becomes a tenant under the Bylaws of the Corporation, even if the term of possession is one night. He also submits that the only difference between a lease and license is the length of possession.

[19] It is well established that a lease creates an enforceable interest in real property.

[20] As noted in **Lauder Industries Inc v Reid**, 2018 ABQB 568 at para 50, a license is a contractual right to use land but does not create an interest in land.

[21] Accordingly, a lease of real property and a license to use it, are not the same legal concept. A lessee has more legal rights than a licensee. Indeed, but for the license, the occupier would be a trespasser.

[22] There is no evidence that the Respondents entered into leases with any Airbnb renters or ever contemplated doing so.

[23] While by no means dispositive of the issue, Airbnb documents presented in argument describe renters as licensees and nowhere does the documentation refer to renters as tenants or lessees.

[24] The Applicant submits that Airbnb renters are the functional equivalent of hotel guests who are mere licensees, and who acquire no interest in property.

[25] In his Interim Injunction decision, Renke J, at para 61 describes the Airbnb rental arrangement as the functional equivalent of a hotel. I agree with his analysis.

[26] In the result, I conclude that Airbnb rentals are licenses, not leases.

. . .

**[71] Reduced to its essence, short term occupancy through platforms like Airbnb, where no lease is entered into, results in the functional equivalent of a hotel stay.**

**[72] In the result, Airbnb renters are not tenants of the owner, but occupy as licensees for consideration.**

[Emphasis added]

- [31] In my view, ultimately, it does not matter for the purposes of this decision whether or not an Airbnb transaction is considered a sublet or is seen to fall under the language, “*otherwise part with the possession of the residential premises*,” since in either case it is still subject to the consent of the Landlord which consent may not be arbitrarily or unreasonably withheld. If it were necessary to determine, I would adopt the reasoning in the **Kuzio** case that an Airbnb occupancy is the functional equivalent of a hotel stay and, as such, constitutes a licence arrangement between the Host and the Guest.
- [32] I would also add that that that conclusion is wholly consistent with what the Airbnb Terms of Service state in Article 1.2, 8.1.2, and 8.2.1.
- [33] I return to the central issue here of whether or not the Landlord acted arbitrarily or unreasonably in withholding its consent generally to what was being proposed by the Tenant.
- [34] As will be seen, my view is that the Landlord did not act unreasonably or arbitrarily.
- [35] I refer to the evidence of Ms. Bateman-Hatch.
- [36] The concerns she raised are, it would appear, largely legitimate. For convenience, I repeat them:
- they do not operate hotels;
  - inability to adequately vet the prospective guest
  - the concern for the greater community interest;
  - security issues;
  - increased wear and tear;
  - increased noise;
  - access to the premises by strangers;
  - an overall concern during the COVID-19 pandemic.
- [37] While it may be suggested that some of these are speculative and would appear to be based more on third party, generalized information, overall they are compelling.
- [38] For example, and this is based on Mr. Wagstaff’s evidence of a two two-day minimum, if such was allowed to proceed over a period of upwards of six weeks or more, and assuming a fair volume of Airbnb traffic, it would indeed result in the unit being converted into “the functional equivalent of a hotel”, to use Justice Belzil’s words.
- [39] It is a fair inference that this would not go unnoticed by the other tenants and, such would not be consistent with the other tenants’ expectations that they would be not living in a building with an element of transient, non-resident, occupants, or to put it succinctly, living in a hotel.

- [40] Of further concern here is the ability of the Landlord to vet the proposed Guests. While it might be argued that the draft Sublease Agreement and Sublease application are unduly onerous, it is still entirely appropriate and reasonable for a landlord to have the practical ability to vet the applicants for sublease or, those entering into a licence agreement with the tenant. On the evidence, this is done in every other case of subletting by this Landlord and I fail to see how it could be considered unreasonable for the Landlord to be able to do the same thing with a proposed Airbnb occupancy.
- [41] I note Mr. Wagstaff's evidence that the guest ratings information could be forwarded to the Landlord for their review. What information that would comprise was not made clear and no examples were provided, for example, by way of an exhibit. The inference was that it would be significantly less than what the Landlord would typically receive when going to previous landlords or in some cases employers or guarantor.
- [42] The response to the preceding is that ultimately the "Head" Tenant, in this instance Mr. Wagstaff, is still entirely responsible to the Landlord for any issues that may arise during the occupancy by the Airbnb Guest. While on one level that is certainly true, from a practical perspective, it is of little comfort to the Landlord who cannot reach Mr. Wagstaff who could be in the middle of the ocean somewhere and unreachable and an issue arises with the guest occupant that needs to be dealt with on an immediate basis.
- [43] Earlier, reference was made to the decision of Adjudicator Slone in *Formac Investments Limited v. Peck*, 2009 NSSM 48 . I refer to the following paragraphs:

[10] The concept of consent not being unreasonably or arbitrarily withheld occurs in two contexts in the Act. The other is subletting.....

[11] In a case before the Saskatchewan Court of Queen's Bench, *Windsor Apothecary Ltd. v. Wolfe Group Holdings Ltd.* 1996 CarswellSask 116, the judge summarized what has become the accepted law in this area:

3 At one time, to be considered reasonable, the withholding of consent by a landlord had to be connected to the personality of the intended sublessee or with his probable user of the property: *Houlder Bros. & Co. v. Gibbs*, [1925] Ch. 575 (C.A.) This view of the law has fallen into disfavour, and the modern approach is for a court to put itself into the position of the landlord and, having regard to the surrounding circumstances, the commercial realities of the marketplace and the economic impact of the sublease on the landlord, determine whether a reasonable landlord would consent to the sublease: *Sundance Investment Corporation Ltd.*, supra; *F.B.D.B. v. Starr* (1986), 1986 CanLII 2534 (ON SC), 41 R.P.R. 151 (Ont. S.C.); *Lehndorff Can. Pension Properties Ltd. v. Davis Mgmt. Ltd.*, 1989 CanLII 2762 (BC CA), [1989] 5 W.W.R. 481 (B.C.C.A.).

[12] I believe the same considerations as apply to subletting would apply to the changing of the term of the lease. Based on this, the task for me is to ask whether or not, "having regard to the surrounding circumstances, the commercial realities of the marketplace and the economic impact of the [conversion] on the landlord, a "reasonable Landlord" would withhold consent to the conversion of a year to year to a month to month tenancy.



[16] An arbitrary decision would be one that is random or based on purely personal whim. An unreasonable one would have no credible rationale behind it. I am unwilling to say that this Landlord was being arbitrary or unreasonable in refusing consent. It is, after all, his building and the financial consequences of a long vacancy will be borne by him. He is entitled to make a reasonable business decision and not be second guessed by tenants, Residential Tenancy Officers or Adjudicators simply because they do not agree with the Landlord.

- [44] Based on these comments which flow from the Saskatchewan Court of Queen's Bench decision in *Windsor Apothecary Limited v. Wolfe Group Holdings Limited*, 1996, CarswellSask 116, Saskatchewan QB, I cannot conclude that the Landlord's position here in denying short term Airbnb rentals was unreasonable. To the contrary, there is a credible rationale behind that position. Practically and functionally, the Tenant's request here would, if acceded to, have the effect of converting his unit and perhaps others by result, into hotel units for periods of four to six weeks or longer while he was at sea. That is a significant change and one that is inconsistent with the Landlord's reasonable concerns and, by extension, to the reasonable concerns of other tenants in the building.
- [45] Based on the preceding, I would allow the appeal as I find that the Landlord has not been unreasonable or arbitrary in its position. Clearly the Landlord is required to comply with Section 9B of the *Residential Tenancies Act*. However, based on the evidence, I find that there has not been a failure to abide by Section 9B.
- [46] Two closing comments. First, I do not want it thought that I am suggesting that renting out a unit through Airbnb cannot be conducted in any apartment building. I would think it is entirely conceivable that some landlord with a multi-unit building may make the decision to allow Airbnb letting/licensing of its units by the tenants. That would be the landlord's decision.
- [47] Secondly, I take note that Airbnb does advertise for monthly sublets on its website. While there were no details about that in the evidence before me, I merely make the observation that the fact that it is Airbnb is not the defining factor here. What is of most critical significance is that it is for multiple short-term occupancies (the functional equivalent of a hotel), with very rapid requirement to process and approve proposed Guests, and with inadequate ability of the Landlord to vet the Guest. Those factors are the major ones which, in my view, support the Landlord's reasonable and unarbitrary withholding of consent.

## **ORDER**

- [48] The appeal is allowed and the original complaint of the Tenant is dismissed.
- [49] There will be no costs to any party.

**DATED** at Halifax, Nova Scotia, this 14<sup>th</sup> day of December, 2020.

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**MICHAEL O'HARA**

**ADJUDICATOR**