

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ONTARIO SOCIETY FOR THE
PREVENTION OF CRUELTY TO
ANIMALS

Plaintiff

- and -

STEVE STRAUB AND JOHN STRAUB

Defendants

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) Paula J. Thomas for the Plaintiff
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) Philip J. Squire for the Defendants
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) **HEARD:** March 30 & 31, 2009 at St.
Thomas, Ontario

W. A. JENKINS J.:

[1] The plaintiff, Ontario Society For The Prevention Of Cruelty To Animals, sues the defendants for the cost of removing and caring for birds and animals owned by the defendant, Steve Straub and kept on property owned by the defendant, John Straub in Vienna, Ontario. The plaintiff's account is alleged to total \$168,746.86.

The Facts

[2] The defendant, John Straub, owns the property located at 4 Queen Street in Vienna, Ontario where his son, Steve Straub, kept his birds and animals. Those birds and animals

included cockatiels, budgies, finches, quail, pheasants, doves, ferrets, rabbits, ponies and donkeys. The plaintiff alleges that Steve Straub owned the birds and animals and John Straub was a custodian of the birds and animals and that they were both responsible for their care and upkeep.

[3] In response to a complaint, the plaintiff's agents attended at the defendant John Straub's premises on August 28, 2006. Since they were unable to obtain the defendants' cooperation they obtained a search warrant and returned to the defendants' property on August 31, 2006 with a veterinarian and a member of the Ontario Provincial Police.

[4] On inspecting the defendants' property, the plaintiff's agents found that the birds and animals were, in many cases, being kept in unsuitable surroundings which were not properly cleaned or maintained. In addition, many of the birds and animals had insufficient food and water and a lot of them were in poor condition.

[5] As a result, the plaintiff's agents issued two compliance orders requiring the defendants to remove all fecal matter, supply clean bedding and provide potable water and appropriate food. Treatment of some animals by a veterinarian was also ordered.

[6] The plaintiff's agents concluded that the defendants had no intention of complying with their recommendations concerning the care of the birds and animals. As a result, they issued veterinarian's certificates and notices of removal under the *Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990 c. 0.36 and they removed 17 ponies, 8 donkeys, 25 ferrets, 16 quail, 4 cockatiels, 12 budgies, 2 doves, 2 finches and 1 pheasant from the defendants' property. The birds and animals were removed pursuant to s. 14(1)(a) of the *Act* as they were deemed to be in distress.

[7] In all, 87 birds and animals were removed. Some went to foster homes and others to various SPCA branches for care and attention.

[8] The defendants appealed the actions of the plaintiff's agents and a hearing of the Animal Review Board was convened on September 19, 2006 to hear the appeal. At the

conclusion of the hearing, the Board agreed with the actions of the plaintiff with some minor exceptions. It ordered that the 87 birds and animals removed from the defendants' property be returned to the defendant, Steve Straub, on certain conditions. The Board also found that the plaintiff should not have to bear any of the cost of removal of the birds and animals.

[9] The plaintiff's bill for the removal and care of the birds and animals as of September 19, 2006, totalled \$31,198.00. A copy of that bill was provided to the defendant, Steve Straub. The bill included a cost of \$1,305.00 a day or \$15 a day for each bird or animal.

[10] On October 12, 2006, the cost of maintaining the birds and animals had risen to \$61,133.00. At that time, the plaintiff advised the defendant, Steve Straub, that he could have his birds and animals back if he fulfilled a number of conditions or he could choose to surrender the birds and animals to the plaintiff and avoid paying any further costs.

[11] The plaintiff's agents returned to the defendants' property on November 1, 2006 and found that the defendants had not complied with the orders of the Animal Review Board and they had no intention of paying the plaintiff's costs or surrendering the birds and animals.

[12] As a result, on November 10, 2006, the plaintiff advised the defendants that the 87 birds and animals would be put up for adoption in an effort to recover some of the plaintiff's costs. The defendants were also advised that the plaintiff's costs of removal and care as of that date totalled \$97,673.00.

[13] The amount recovered by the plaintiff on disposal of the birds and animals was \$1,763.40. The plaintiff's account, less the amount recovered, now totals \$168,746.86 which the plaintiff is attempting to recover from the defendants.

The Plaintiff's Position

[14] The plaintiff alleges that the defendant Steve Straub's birds and animals were in distress and that they were entitled under the *Act* to seize the birds and animals. Further, they allege that the defendant John Straub was a custodian of the birds and animals and, consequently, both he and his son, Steve Straub, are jointly and severally responsible for the plaintiff's account.

[15] The plaintiff further alleges that the Animal Review Board found that the actions of the plaintiff were reasonable and that the plaintiff is not responsible for any of the removal or care costs. The defendant, Steve Straub, was entitled to appeal the decision of the Animal Review Board and he did not. As a result, the plaintiff contends that he is required to pay its account.

The Defendants' Position

[16] The defendants deny that John Straub was a custodian of the birds and animals. They deny that the plaintiff was justified in seizing the birds and animals and they contend that the charges for the removal and care of the birds and animals are unreasonable. Further, the defendants allege that the plaintiff has failed to prove the amount of its account.

Analysis

[17] The defendant John Straub was sued by the plaintiff because he owned the property on which the birds and animals were kept. Rebecca Tanti, the Regional Inspector for the plaintiff, testified that Steve Straub told her that he owned all of the birds and animals. She said, however, that she saw John Straub at the farm on at least two occasions. She recalled that Steve Straub said at the Animal Review Board Hearing that John Straub and his wife helped look after the animals.

[18] The issue is whether John Straub was a custodian of the animals. There is no definition of custodian in the *Act* and Rebecca Tanti admitted that she is not sure of the extent of his involvement in the care of the birds and animals.

[19] The Concise Oxford English Dictionary defines custody as the protection, care or guardianship of someone or something. The Canadian English Dictionary defines a custodian as a keeper or caretaker. Both definitions require a degree of care and control that is lacking in this case.

[20] At the trial, Steve Straub testified that his father and mother are in their sixties. He said that when he was at work his parents, sisters, nieces and nephews would occasionally help him

with the animals. There is no evidence that he paid them to do that or that they had any formal duties to perform on a regular basis.

[21] In this case there is simply not enough evidence on which to base a finding that John Straub was a custodian of the animals. There is no evidence that he had any specific responsibility for the care and maintenance of the animals, other than occasionally feeding and watering them when Steve Straub was at work. He was not paid for his work and there was no formal arrangement between he and his son. Those facts are not sufficient to attract liability under the *Act*.

[22] In view of the foregoing, I find that John Straub was an unpaid volunteer who assisted his son, on occasion, with the care of the birds and animals. He was not, in my view, a custodian within the meaning of s. 13(1) of the *Act*. As a result, John Straub is not liable under s. 15(1) for the cost of removal and care of the birds and animals.

[23] The plaintiff's agent, Rebecca Tanti, testified at length about the conditions she found on the Straub property. She said she found a lack of bedding, food and water. She said there was the stench of urine and fecal matter resulting from overcrowding and lack of ventilation. She said that some of the ponies and donkeys suffered from extensive hoof growth, and some of them were underweight. Some of the ponies and donkeys, and many of the birds and other animals required veterinary care.

[24] It is clear from Ms. Tanti's evidence that the birds and animals were kept in overcrowded conditions, often without proper ventilation. It is also clear that their cages, stalls or accommodations were not kept clean, and many of the birds and animals lacked food and water, and required veterinary care.

[25] The defendant argues that there should have been a compliance order as opposed to a removal order since none of the birds or animals were in immediate need of veterinary care. He said that he was cooperative with Ms. Tanti and that he complied with the orders that she issued under the *Act*. As a result, he contends that Ms. Tanti was not justified in removing the 87 birds and animals.

[26] Ms. Tanti testified that she issued the removal order because she felt the birds and animals were in distress and she did not believe the defendant would carry out any compliance orders that she might issue. She said she acted on the advice of a veterinarian and she believes she was justified in removing the birds and animals.

[27] I did not find the defendant, Steve Straub to be a credible witness. I accept Ms. Tanti's evidence that he was abusive towards her and he made it clear that he had no intention of complying with her orders. I am satisfied that he was not providing proper care for his birds and animals, and that he resented Ms. Tanti's intervention.

[28] I find that the 87 birds and animals identified by the plaintiff were in distress and were removed in accordance with s. 14(1) of the *Act*. My finding concerning the condition of the birds and animals is reinforced by the decision of the Animal Review Board that the birds and animals in question were properly removed from the defendant's premises.

Damages

[29] Section 15(1) of the *Act* provides that:

15(1) Where an inspector or an agent of the Society has provided an animal with food care or treatment, the Society may serve upon the owner or custodian of the animal by personal service or by registered mail to the owner's or custodian's last known place of address a statement of account respecting the food, care or treatment and the owner or custodian is subject to subsection 17(6) liable for the amount specified in the statement of account.

[30] The plaintiff suggests that because the Animal Review Board found that the Society was not responsible for the cost of removal of the birds and animals, and because the defendants were served with a statement of the plaintiff's account, the defendants are liable under s. 15(1) of the *Act* for payment of that account. As a result, the plaintiff did not prove the largest part of its claim.

[31] The Animal Review Board did not comment on the items included in the plaintiff's statement of account or the amount of that account. It made no comment on the validity of the invoices placed before it other than to say that the plaintiff should not have to pay the cost of

removal. As a result, there was no assessment by the Animal Review Board of the plaintiff's statement of account or scrutiny of the charges that make up that statement of account.

[32] Although s. 15(1) provides that the owner or custodian is liable for the amount specified in the plaintiff's statement of account, it does not relieve the plaintiff of the obligation to act reasonably and to justify the charges included in its account. Those charges must reflect the actual cost of caring for the animals and the care provided must be reasonable.

[33] A major part of the plaintiff's account is the charge of \$15 a day for the care and feeding of each of the birds and animals removed by the plaintiff. Ms. Tanti testified that the claim of \$15 a day is based on a standing order issued by the plaintiff to its agents requiring them to charge that amount. That order was not produced at the trial and there is no evidence as to how it was arrived at.

[34] A charge of \$15 a day for the care of the birds and small animals is, in my view, excessive. I do not believe that a cost of \$15 a day for the care of each of the 25 ferrets, 16 quail and 12 budgies is reasonable.

[35] The plaintiff also filed invoices for the care of the ponies and donkeys at a rate of \$15 a day for each animal. A charge of \$450 a month to pasture or even board a pony or donkey is also excessive.

[36] The plaintiff has, however, filed some statements relating to the cost of removal and veterinarian care which Ms. Tanti testified have been paid by the plaintiff. Those statements include the following:

Inspector's time:	\$ 1,360.00
Mileage:	\$ 274.88
Trucking expense:	\$ 689.00
Veterinarian expense:	\$ 2,041.62
Farrier expense:	\$ <u>662.50</u>

Total: \$ 5,028.00

The plaintiff advised the defendants on September 19, 2006 that its account totalled \$31,128 which included the above mentioned amounts plus \$26,100 for boarding costs.

[37] By letter dated October 12, 2006, the plaintiff advised the defendants that its account had increased to \$61,133 as a result of additional boarding costs which were accruing at a daily rate of \$1,305. Then by letter of November 10, 2006, the plaintiff advised the defendant, Steve Straub that the boarding costs continued to accrue at \$1,305 per day and the plaintiff's account totalled \$97,673.

[38] In its Statement of Claim the plaintiff indicates that the costs of boarding the birds and animals continued to run at a rate of \$1,305 a day until the birds and animals were adopted or otherwise disposed of. As of the date of issuance of the Statement of Claim, the plaintiff's claim, after credit for the amount recovered from the sale of the birds and animals, totalled \$168,746.86.

[39] The largest part of that account is made up of charges the plaintiff alleges it incurred or paid for boarding the birds and animals. Those charges were arrived at by applying a flat rate of \$15 a day, for each bird and animal, regardless of the actual cost of maintaining it. At the trial, the plaintiff made no effort to justify this rate and no evidence was presented as to how the rate was arrived at.

[40] In *Sheets v. OSPCA*, [1984] O.J. No. 1339 (Div. Ct.), the court said in upholding the trial judge's decision:

The learned judge found that the applicant's evidence was not acceptable and he went on to say this:

12. I think the Society for the Prevention of Cruelty to Animals must be taught that if they are going to seize animals, they will have to keep records of the cost of maintaining those animals, and if they do not keep those costs, and keep records, and be able to show a proper basis for the charges that they are asking, that they are going to suffer as a consequence.

[41] The plaintiff had to prove two things. It had to prove that the rate it charged for the care of the birds and animals was reasonable and that it incurred or paid out the amount claimed. A claim of over \$165,000 for the care of these birds and animals is not supportable by any standard of reasonableness. In addition, the plaintiff failed to prove that it in fact incurred or paid out the total amount claimed.

[42] The plaintiff called very little evidence as to what care was actually provided. In addition, the plaintiff failed to call anyone with firsthand knowledge as to what amounts were actually incurred or paid for the care of these birds and animals and who received those amounts.

[43] I am not allowing any amount for boarding costs. I am, however, allowing the accounts which the plaintiff has proved, and which total \$5,028.

[44] The defendant is entitled to a credit of \$1,763.40 which is the amount recovered by the plaintiff on the sale of the birds and animals. The balance owing by the defendant, Steve Straub is \$3,205.75.

Judgment

[45] The plaintiff will have judgment against Steve Straub for \$3,205.75. The action is dismissed as against John Straub. If necessary, the parties may make written submissions concerning the costs of this action within 30 days of the date of this judgment.

“Justice W. A. Jenkins”
Justice W. A. Jenkins

Released: May 21, 2009