Court of King's Bench of Alberta

Citation: Aubin v Condominium Plan No 862 2917, 2024 ABKB 345

2024 ABKB 345 (CanLII)

Date: 20240613
Docket: 1903 00548
Registry: Edmonton

Between:

Mary Jean Aubin

Respondent/Applicant

- and -

The Owners: Condominium Plan 862 2917

Appellant/Respondent

Reasons for Decision on Costs
of the
Honourable Justice S.N. Mandziuk

Introduction

[1] On March 18, 2024, I issued my Reasons for Decision in the substantive action between these parties, reported at ***Aubin v Condominium Plan No 862 2917***, 2024 ABKB 156 (the **Appeal Decision**). I allowed the appeal of an Applications Judge's decision (**Application Order**) by the Appellant/Respondent (**Corporation**), set aside the Applications Judge's costs award in favour of the Respondent/Applicant (**Aubin**), and granted costs of the action to the Corporation.

[2] The parties were invited to provide written submissions if they could not agree on costs. An agreement on costs was not reached. I have been provided with briefs by each of the parties.

Background

[3] The Corporation and Aubin are in a long-running dispute concerning noise transference through a wall between Aubin's unit and a common area lounge (**Lounge**) in the Corporation's condominium complex. The full reasons and facts are set out in the Appeal Decision. Notable facts relevant to cost considerations are set out herein.

[4] Aubin was successful before the Applications Judge. The Applications Judge found improper conduct on the part of the Corporation under 67(2) of the *Condominium Property Act*, R.S.A. 2000, c. C-22 and directed the Corporation to retain an expert or experts to determine if the wall was reasonably adequate to diminish, lessen or dampen the sound heard in Aubin's unit from the Lounge and if not, to determine options available to improve the wall to achieve a reasonable standard in that regard. The Applications Judge also ordered costs in favour of Aubin.

[5] The Corporation applied for a stay of the Application Order as well as any enforcement steps pending appeal. The stay application was dismissed.

[6] To satisfy the terms of the Application Order, the Corporation retained an architect to review the acoustical performance of the wall between the Lounge and Aubin's unit. The Corporation also retained a contractor to expose the interior of the wall to allow the architect to carry out an inspection. The architect determined that the wall did not meet the sound transmission requirements (**ST Requirements**) of the applicable building codes, did not meet fire resistance rating requirements and found that the wall contained asbestos.

[7] The architect recommended that the Corporation add 5/8" Type X Gypsum wall board to both sides of the wall with a fire stop to increase the ST Requirements rating.

[8] Prior to hearing this appeal, the Corporation made at least two proposals to remediate the wall and address the noise transference issue. All proposals were refused by Aubin.

[9] The Corporation filed subsequent affidavit evidence for appeal purposes, outlining, among other things, the steps taken to comply with the Application Order.

[10] The Corporation appealed both the substantive portion of the decision and the costs decision. The appeal was granted on both issues.

Positions of the Parties

[11] The Corporation seeks $95,803 in costs, plus disbursements and GST, which represents a 50% indemnity of the legal expenses it incurred in responding to Aubin's legal action (**Indemnification Costs**). The Corporation cites ***McAllister v Calgary (City)***, 2021 ABCA 25 [***McAllister***], ***Barkwell v McDonald***, 2023 ABCA 87 [***Barkwell #1***], ***Barkwell v McDonald***, 2023 ABCA 183 [***Barkwell #2***] and ***Grimes v Governors of the University of Lethbridge***, 2023 ABKB 432 in support of its request for 50% indemnification. Alternatively, the Corporation seeks costs on Schedule C of the *Rules of Court*, Alta Reg 124/2010 (***Rules***), Column 1 (**Schedule C Costs**) with a multiplier of three.

[12] Aubin takes issue with the Corporation's claim for Indemnification Costs, stating that the Corporation "offers nothing more than the total amounts spent, leaving no ability for this Court to consider the reasonableness and proportionality of those expenses." Aubin refers to ***Kissel v Rocky View (County)***, 2020 ABQB 570 [***Kissel***], ***Ho v Lau***, 2023 ABKB 15 [***Ho***] in this regard.

2024 ABKB 345 (CanLII)

Aubin points to the lack of evidence to support the proportionately and reasonableness of the Indemnifications Costs claim.

[13] Aubin further disputes the Schedule C Costs claimed by the Corporation, as they include items that in her view do not attract costs and assumes the operation of a Calderbank offer that is disputed. Aubin argues that, at most, the costs should be limited to the appeal itself and one other court appearance.

[14] Aubin argues that the Corporation played a role in pushing the parties into litigation and then "only satisfied its obligations in response to a valid court order […] and used those actions to vindicate itself on appeal."

2024 ABKB 345 (CanLII)

The Law

[15] The *Rules* provide that a successful party is entitled to costs (r 10.29). The Court has discretion in awarding costs (r 10.31). The *Rules* provide factors to consider in assessing costs (r 10.33) and can order that costs be assessed by an assessment officer (r 10.41).

[16] Judges have a wide discretion in awarding costs: ***McAllister*** at para 17, citing: ***Québec (Directeur des poursuites criminelles et pénales) v Jodoin***, 2017 SCC 26 at para 52; ***Goldstick Estates (Re)***, 2019 ABCA 508 at para 22:

> Notwithstanding that a judge has a wide discretion in awarding costs, r 10.33 sets out the factors the Court may consider in deciding quantum, the relevant consideration being reproduced below:
>
> - the result of the action and the degree of success of each party;
> - the amount claimed and the amount recovered;
> - the importance of the issues;
> - the complexity of the action;
> - the conduct of a party that tended to shorten the action;
> - any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

[17] R 10.33(b) sets out further factors the Court may consider to vary a costs award, including:

> - whether any application, proceeding or step in an action was unnecessary, improper or a mistake; and
> - any offer of settlement made, regardless of whether or not the offer of settlement complies with Part 4, Division 5.

[18] In ***McAllister,*** the Court of Appeal summarized the Court's discretion as follows:

> 25 Thus, in making a costs award under 10.31(1)(a), as in this case, the court is provided with a menu of orders it may make with respect to costs. Rule 10.31(3)(a)

> expressly provides that "all or part of reasonable and proper costs" may be ordered, "with or without reference to Schedule C." This suggests significant discretion on the part of a trial judge in implementing a reasonable and proper costs award and would appear to clearly permit an order for a lump sum percentage of legal costs. Rule 10.31(3)(d) expressly permits such a costs award. Rule 10.31(3)(b) permits the court to make an order directing the unsuccessful party to pay the successful party an amount equal to a multiple, a proportion or a fraction of an amount set out in any column of the Tariff of Recoverable Fees in Schedule C.

[19] Costs ought not to be oppressive. ***Smith v. Buller***, (1875), L.R. 19 Eq. 473 (Eng. V.-C.) (see also ***B & R Development Corp. v Trail South Developments Inc***., 2011 ABQB 706 at para 8) and again applied in ***Auer v Auer***, 2021 ABQB 860 at para 11.

Analysis

McAllister **costs: Indemnification of a portion of solicitor-client costs**

[20] Relying upon ***McAllister***, the Corporation argues that it is entitled to Indemnification Costs.

[21] Aubin asserts that the Indemnification Costs are excessive, lack reasonableness and proportionality and are not supported by evidence.

[22] The Indemnification Costs sought must be proportionate to the issue. In ***Barkwell #1*** the Court of Appeal stated at para 57:

> The overriding issue is proportionality. The rules on costs aim to balance indemnity of the winner without unreasonably discouraging access to the court, or unduly penalizing the losing party: *McAllister* at para 45. The winning party cannot simply claim a percentage of the fees paid if they are disproportionate to the issues and the amounts involved. Success is not a justification for disproportionate litigation.

[23] The principle of proportionality applies to non-monetary issues as well: ***Barkwell #1*** at para 57. The remedy sought before the Applications Judge was not monetary, rather it was a request that certain steps be taken in relation to noise transference. It was centered on the question of whether the Corporation acted improperly in response to Aubin's concerns.

[24] The Corporation took several steps to fulfill its obligations pursuant to the Application Order. In its investigation of the wall's "characteristics," the Corporation incurred $4,620.00 for the architect report, approximately $10,400.00 for demolition costs and presumably any repair/remediation costs that will need to be incurred. The evidence of costs of remediation before the Court are not proportionate to the legal fees requested.

[25] It is striking that the Indemnification Costs requested are far greater than the value of what was being sought by Aubin. Awarding a percentage of fees is not proper if the percentage is disproportionate to the issues and the amounts involved: ***Khaleel v Indar***, 2024 ABKB 203 at para 20; ***Barkwell #1*** at para 57; ***Merchant Law Group LLP v Bank of Montreal***, 2023 ABKB 597 at para 33.

2024 ABKB 345 (CanLII)

[26] A Court's discretion can include awarding costs where no evidence of accounts is presented if the Court is able to determine reasonableness and the opposing party has not challenged the claim on that basis: see ***Ho*** at para 45 citing ***JWS v CJS***, 2022 ABCA 63.

[27] In ***Barkwell #2*** at para 74 the Court of Appeal specified:

> As noted, the reasons on trial costs (2022 ABQB 208) awarded the respondent 50% of solicitor and client costs, relying on *McAllister v Calgary (City)*, 2021 ABCA 25. As indicated in the appeal reasons, an award of party and party costs based on solicitor and client costs must be justified: 2023 ABCA 87 at paras. 52–61. The issue is not simply how much the successful party spent, but how much that party can reasonably expect the other party to pay. The amount actually charged to the client is not definitive. The rates and amount of time invested must be justified. The costs awarded must be proportionate to the amounts in issue.
>
> [Emphasis added]

[28] The amount requested seems inordinately high. The Corporation prepared a Bill of Costs reflecting the Indemnification Costs based on what was billed with no further explanation or description as to how the costs were determined and accounted for. I do not have sufficient evidence to support – or not support – the reasonableness and proportionality of the Indemnification Costs.

[29] The Corporation also provided the Court a benchmark Bill of Costs pursuant to Schedule C, with a baseline amount of $13,500.00, which included double costs on most items based on the existence of a Calderbank offer, a request for a multiplier of 3 on the baseline amount plus disbursements and GST.

[30] The Indemnification Costs far exceeds the Schedule C Costs. In ***Rock River Developments Ltd. v Village of Nampa***, 2023 ABKB 529 the Court stated:

> 17 The Rules include a Schedule "C", which is a tariff of suggested fee amounts for various steps taken in typical litigation. While I am not allowed to simply default to that Schedule; *McAllister v Calgary (City)*, 2021 ABCA 25 at para.27, it remains a tool for assessing reasonable costs, albeit it an out-of-date tool, it is now suggested that a costs award should, *prima facie*, aim to indemnify the successful party for approximately 40-50% of its actual costs paid; *McAllister* at para.41.

[31] The marked difference between the two Bill of Costs further supports the conclusion that ***McAllister***-based fees advanced by the Corporation are strikingly high and not reasonable.

[32] Given the lack of evidence to support the reasonableness of the amount claimed for indemnification and having regard to, among other things, the principle of proportionality I do not find that indemnification based on a percentage of solicitor-client costs is appropriate. The claim for Indemnification Costs is rejected.

Schedule C

[33] While the Court has significant discretion to order costs (r 10.31 and ***McAllister*** at para 25), I find Schedule C costs to be the appropriate tool to assess costs in this case giving appropriate weight to the considerations listed at r 10.33(1)(2).

2024 ABKB 345 (CanLII)

[34] In this prong of its argument, the Corporation seeks a 3 times multiplier of the Schedule C, Column 1 tariff of $13,500 (a total of $40,500) plus disbursements and GST. The argument for the 3 times multiplier is generally rooted in Aubin's aggressive approach, her insistence on unnecessary litigation steps and refusal to come to an acceptable resolution. The Corporation also includes double fees claiming the existence of a Calderbank offer for all steps incurred after December 20, 2022.

[35] Aubin calculates a far lower amount under Schedule C, Column 1, stating only the appearance for the appeal and potentially an appearance before Justice Mah should be included in the Bill of Costs. Aubin also disputes the applicability of a Calderbank offer.

a) Result of the Action and Degree of Success

[36] While the general rule provides that the successful party is entitled to costs (r 10.29), the steps the Corporation took to satisfy the terms of the Application Order were contributing factors to its success on appeal.

[37] Aubin relies on ***1808882 Alberta Ltd v Moderno Ventures Ltd.***, 2018 ABQB 1000 to argue the Corporation ought to bear cost consequences of failing to efficiently conduct the proceedings.

[38] While I do not find the Corporation failed to efficiently conduct the proceedings, new evidence of steps taken after the Application Order were factored into the Appeal Decision reasons. This somewhat mixed success of both parties favours granting costs pursuant to Schedule C.

b) The Amount Claimed and the Amount Recovered

[39] The claim brought forward by Aubin was not a monetary claim and the amount of money involved is relatively low. Aubin wanted the sound disturbance between her wall and the Lounge wall addressed. She wanted the Corporation to take steps to minimize or eliminate noise transferring between the shared wall of her bedroom and the Lounge. It appears that the remediation costs totalled approximately $15,000.00[1] which is an arguable proxy for the monetary stakes of the litigation absent something more specific.

[40] In ***Barkwell #1*** the Court indicated, "one important feature of the tariff in Schedule C is that it does not measure how much in fees was paid by the winning party, but rather, gives a rough measure of how much should have been incurred in the ordinary case having regard to the amounts in dispute" (at para 57). Given the relatively low amount at stake, Schedule C is an appropriate tool to assess costs.

c) The Importance of the Issue

[41] While the issues were of course important to Aubin and the Corporation, they were not such that this issue ought to have been litigated for years with considerable resources devoted thereto. In ***Barkwell #1*** the Court of Appeal stated at para 57: "[s]uccess is not a justification for

[1] January 1, 2023: $6.825.00 – Kalloway Property Services (removal and disposal of asbestos); January 26, 2023: $3,558.11 – Kalloway Property Services (Repair work in Lounge); February 17, 2023: $4,620.00 – KS.P Architect (Acoustical Report).

2024 ABKB 345 (CanLII)

disproportionate litigation." The jurisprudential value of this case is fact-specific and likely minimal.

d) Other Matters the Court Considers Appropriate

[42] The matter was not overly complex. It was made more complex by the conduct of the parties. Given the nature of the issue, any costs greater than costs rooted in Schedule C would be oppressive. In ***Kissel*** at para 35 the Court noted: "[a] costs award must fairly balance the competing considerations of 'the unfairness of requiring a successful party whose conduct is not blameworthy to bear any costs and the chilling effect on parties bringing or defending claims if the unsuccessful party is required to bear all the costs' (citing ***Weatherford Canada Partnership v. Artemis Kautschuk und Kunstoff-Technik GmbH***, 2019 ABCA 92 (Alta. C.A.) at para 12).

[43] Aubin was not vexatious or frivolous in bringing her action. I do not find that either party conducted themselves in such an overt way to merit a departure from Schedule C costs.

[44] While I find that Schedule C, Column 1 fees are the proper measure for costs (given that there was no monetary amount sought), the considerations listed at r 10.33(2) allow the Court to enhance those costs and determine whether a multiplier is appropriate.

[45] The Corporation asserts the existence of a Calderbank offer (dated December 20, 2022) and doubles all the items listed in the draft Bill of Costs subsequent that date and further applies a multiplier of 3. Aubin disputes the existence of such an offer. There is no evidence before the Court that such an offer existed. As such I do not find it appropriate to double item costs in the initial calculation.

Multiplier

[46] The Court can award multiples of the columns for various reasons, which include the considerations listed in r 10.33: ***RVB Management Ltd. v Rocky Mountain House (Town)***, 2015 ABCA 304 at para 13.

[47] R 10.33(2)(h) provides me with the discretion to vary a costs award (including enhancing costs by a multiplier) by considering any offer of settlement made, regardless of whether or not the offer of settlement complies with Part 4, Division 5 of the *Rules*.

[48] Subsequent to the Corporation taking steps to satisfy the terms of the Application Order, the Corporation offered to add 5/8" of Type X Gypsum to the lounge portion of the wall. I found that offer to be reasonable however it was refused by Aubin.

[49] The offer was made around March 29th, 2023 prior to the parties filing any written submissions for the appeal before me. This would have been an avenue for resolution of this matter that did not come to fruition. While I do not find the offer complies with Part 4, Division 5 of the *Rules*, I see fit to give it proper consideration to allow enhanced Schedule C costs.

[50] Giving weight to the considerations listed in r 10.33, costs pursuant to Schedule C, Column 1 are appropriate with a multiplier of 1.5 for the appeal.

2024 ABKB 345 (CanLII)

Conclusion

[51] The Corporation shall have costs under Column 1 of Schedule C, multiplied by 1.5 for the appeal and under Column 1 with no multiplier for all other steps taken in the action, including but not limited to the appearance before the Applications Judge.

[52] The Assessment Officer shall review the Bill of Costs and the parties can appear before the Assessment Officer for resolution of any disputes concerning steps taken or not taken as there is some dispute in that regard that have not been resolved in this decision.

Written Submissions filed April 10th and April 17th, 2024.

Dated at the City of Edmonton, Alberta this 13th day of June, 2024.

S.N. Mandziuk
J.C.K.B.A.

Appearances:

Heidi Besuijen
for the Applicant

Roberto Noce, KC and Michael Gibson
for the Respondent

2024 ABKB 345 (CanLII)