

In the Court of Appeal of Alberta

Citation: Aubin v Condominium Plan No 862 2917, 2024 ABCA 201

Date: 20240612
Docket: 2403-0070AC
Registry: Edmonton

Between:

Mary Jean Aubin

Respondent

- and -

The Owners: Condominium Plan No 862 2917

Applicant

**Reasons for Decision of
The Honourable Justice Kevin Feehan**

Application for Security for Costs

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I. Overview

[1] The Owners: Condominium Plan No 862 2917 apply for security for costs against Mary Jean Aubin, submitting that her appeal of the order of a chambers judge has no merit and she will be unable to pay costs in the event she is unsuccessful.

[2] For the reasons below, the application is dismissed.

II. Background

[3] An applications judge found Ms Aubin had made out a *prima facie* case that the condominium corporation had a duty to investigate whether the wall separating her condominium unit and a common property lounge was deficient in the transfer of sound. He decided there had been improper conduct on the part of the condominium corporation under s 67 of the *Condominium Property Act*, RSA 2000, c C-22. The applications judge directed the condominium corporation to retain an expert to determine if the wall between Ms Aubin's unit and the lounge was reasonably adequate to diminish, lessen, or dampen the sound from the lounge, and if not, to determine options available to improve the wall to achieve a reasonable standard for use. He awarded Ms Aubin 80% of solicitor-client costs.

[4] After the application judge's decision, and in compliance with his order, the condominium corporation obtained an updated reserve fund study to assist with setting its budget and reserve fund plan and two architectural performance reports, and retained a property services company to investigate exposing the interior of the wall in the lounge including asbestos remediation. The chambers judge permitted as new evidence on appeal the three new reports and invoices from the property services company. He concluded there was no improper conduct on the part of the condominium corporation; its conduct did not rise to the level required by the *Condominium Property Act*. The chambers judge allowed the appeal, vacated the costs decision of the applications judge, and awarded costs of the action to the condominium corporation.

III. Security for costs

[5] Rules 4.22 and 14.67 of the *Alberta Rules of Court* read:

4.22 The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:

- (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;

- (b) the ability of the respondent to the application to pay the costs award;
- (c) the merits of the action in which the application is filed;
- (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
- (e) any other matter the Court considers appropriate.

14.67(1) A single appeal judge may order a party to provide security for payment of a costs award pursuant to Part 4, Division 4.

- (2) Where a party does not provide security as ordered, the appeal is deemed to have been abandoned and the other party is entitled to a costs award.

[6] The test for granting security for costs is set out in *Poole v City Wide Towing and Recovery Service Ltd*, 2020 ABCA 102, paras 47-50; *Milot Law v Sittler*, 2024 ABCA 116, para 15; *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABCA 36, para 15, 18, 20, 75 CBR (6th) 179; *Haymour v The Owners Condominium Plan No 802 2845*, 2016 ABCA 367, para 8. The applicant bears the burden of establishing, on a balance of probabilities, that it is just and equitable to order security for costs or that the respondent will be unable to pay costs that may be awarded.

[7] This Court said in *Parker v Parker*, 2019 ABCA 114, para 4, 89 Alta LR (6th) 104:

A security for costs order is discretionary and balances the reasonable expectations of the parties with their rights in order to arrive at a just and reasonable outcome: *Haymour* ... at para 8. The onus rests with the applicant to establish that the factors in r 4.22 are met: *Aski Construction Ltd v Markos*, 2017 ABCA 341 at para 8. A failure to pay costs awarded in previous trial court processes, along with a demonstrated inability to pay costs if an appeal is unsuccessful, will be sufficient to grant a security for costs order in most cases: *DataNet Information Systems, Inc v Belzil*, 2011 ABCA 40 (chambers) at para 4. "Access to justice does not equate to access to civil processes without fear of costs consequences": *ibid*.

See also *Stoney v Trustees for the 1985 Sawridge Trust*, 2017 ABCA 437, para 6.

[8] Concerns regarding a party's ability to pay costs coupled with modest prospects of an appeal's success have been sufficient to justify granting an application for security for costs: *Skolney v Nisha*, 2018 ABCA 78, para 15, 10 RFL (8th) 34.

[9] Granting security for costs is discretionary and requires the court to look to the equities of the case before making an order. The court may make an order if it “considers it just and reasonable to do so”, taking into consideration the elements set out in rule 4.22: *Skolney*, para 21.

a) *Does Ms Aubin have the ability to pay a costs award? Is the condominium corporation likely to be able to enforce an order against assets in Alberta?*

[10] The condominium corporation says it is unlikely Ms Aubin will be able to pay an adverse costs award and it should not be subject to litigation where it has no prospect of recovering its costs.

[11] It points to Ms Aubin’s affidavit of January 2, 2019, in which she said she was under the impression the wall separating her unit from the lounge was her property and she would have to undergo any expense to address the noise. She said “I was never in a position to undertake such an expense and now I understand that the wall in question is common property”. The condominium corporation says Ms Aubin “never even looked into what soundproofing would cost”. It also says that on questioning, Ms Aubin said she was not in a position to sell her unit because of the drop in property values “without a huge loss, financially”. It points to evidence given by Ms Aubin on further questioning pursuant to r 6.8 of the *Alberta Rules of Court* that she purchased her unit approximately fifteen years ago for “Roughly 175[,000] dollars” and it still has a mortgage on title, although she does not know the amount owing on that mortgage. Her monthly condominium fees are between \$800 and \$900 and are in good standing. She pays approximately \$70 per month for municipal and education property taxes. She currently rents her unit to a sub-tenant for \$1,075 per month.

[12] Ms Aubin’s evidence was that she has worked full-time at Alberta Blue Cross for 24 years as a group underwriter. She has both a savings and chequing account. She did admit that if she were required to pay back the \$32,948.62 received in costs following the applications judge’s decision, she would not be able to do that “without incurring debt”. She said if there was a security for costs order for \$10,000 she would be able to pay that amount.

[13] Ms Aubin says that none of those statements show an inability to pay a potential costs award, but that if she were required to repay the costs paid to her following the applications judge’s decision, and a further costs award, she would be “required to undertake debt to do so”.

[14] This evidence, taken in its totality, does not show it is likely the condominium corporation would be unable to enforce a costs order against Ms Aubin in Alberta; nor that she would be unable to pay a costs award. She is employed full-time in a steady position, has property assets, a savings and chequing account, could make an immediate costs award payment of \$10,000, but would have to take on debt to repay the costs paid to her following the applications judge’s decision and any further costs award. That does not establish impecuniosity or unwillingness to pay any potential costs award. The onus on the condominium corporation on a balance of probabilities has not been met.

b) Merits of the appeal

[15] The appeal has merit in that it is neither frivolous nor vexatious. Ms Aubin was successful before the applications judge. At the time of that decision, she had an expert report indicating that the sound rating of the wall between her unit and the lounge was inadequate and did not meet building code standards. Ms Aubin says the steps taken by the condominium corporation prior to that decision were minimal and its offer to install 5/8" drywall on the lounge side of the separating wall only was said by the architectural report to be inadequate.

[16] Ms Aubin says all of the new evidence put before the chambers judge was obtained as a result of following the direction of the applications judge. It cannot be relied upon to determine whether or not the condominium corporation had engaged to that point in improper conduct, had unfairly disregarded her interests, and was oppressive or unfairly prejudicial to her. She characterized the new information not as "new evidence but of new actions". In any event, she says the evidence of the condominium corporation's retained architect confirmed the inadequacy of the sound protection in the wall and breach of the building code. Further, Ms Aubin says the appeal raises issues of general importance to the public.

[17] The condominium corporation says an order for security for costs would be "just and reasonable" as access to justice does not equate to access to civil processes without fear of costs consequences, and Ms Aubin cannot repay the vacated costs award and subsequent costs awards without incurring further debt.

[18] The threshold to demonstrate merit to the appeal is low at this stage. On the facts here, that threshold has been met.

c) Would a security for costs award unduly prejudice Ms Aubin's ability to continue the appeal?

[19] Costs have not yet been determined in the Court of King's Bench. Ms Aubin has submitted that those costs should be set at \$7,425 and the condominium corporation has submitted they should be set at 50% of solicitor-client costs: approximately \$102,000. If Ms Aubin were required to post security for costs in this Court, repay the costs paid to her following the applications judge's decision and pay Court of King's Bench costs, it appears she could not do so without incurring debt, and possibly substantial debt.

[20] However, on the immediate issue of an order for security of costs of the appeal to this Court, it does not appear that providing security for costs would unduly prejudice Ms Aubin's ability to continue the appeal. She calculates a potential costs award in this Court of approximately \$6,078.50 based on Schedule C of the *Alberta Rules of Court*. On that same basis, the condominium corporation estimates a potential costs award of \$11,684.13. As noted, during questioning, Ms Aubin agreed she would be able to pay an immediate security for costs award of \$10,000.

IV. Conclusion

[21] The majority of the factors in r 4.22 weigh against granting a security for costs order. It does not appear that Ms Aubin's ability to continue the appeal would be unduly prejudiced by a security for costs award in the suggested amounts; however, the condominium corporation has not established it is likely to be unable to enforce a costs award against Ms Aubin in Alberta, and the appeal is neither frivolous nor vexatious.

[22] The application is dismissed.

Application heard on May 29, 2024

Reasons filed at Edmonton, Alberta
this 12th day of June, 2024

Feehan J.A.

Appearances:

H N Besuijen
for the Respondent

R Noce, KC
M P Gibson (no appearance)
for the Applicant