Court of King's Bench of Alberta

Citation: Catterall v Condominium Plan No. 752 1572 (Park Towers), 2024 ABKB 452

Date: 20240723
Docket: 2203 07686
Registry: Edmonton

Between:

Brian Catterall and Sharon Maybroda

Applicants

- and -

Condominium Plan No. 752 1572 (o/a Park Towers)

Respondent

Ruling on Costs
of the
Honourable Justice G.S. Dunlop

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1. Introduction

[1] On June 3, 2024 I dismissed the Applicants' action with written reasons: ***Catterall v Condominium Plan No. 752 152 (Park Towers)*** 2024 ABKB 329 (***Catterall***). I received costs submissions from the Respondent on June 17, 2024, from the Applicants on July 2, 2024 and from the Respondent in reply on July 9, 2024. The Respondent submits that it should receive solicitor and own client full indemnity costs, or alternatively enhanced costs. The Applicants submit that each party should bear their own costs, or alternatively that the Applicants should pay the Respondent Schedule C, column 1 costs.

[2] The Applicants are individuals who own a unit in the Park Towers condominium in Edmonton. The Respondent is the Park Towers condominium corporation.

[3] Having been entirely successful in the action the Respondent is entitled to costs: r 10.29.

2. Increased Costs: r 10.33(2)

[4] The Respondent submits that the following factors warrant increased costs:

- the Applicants had a political motive for bringing the action;
- the Applicants filed too much evidence;
- the Applicants delayed the action and wasted Court resources;

[5] The political motive alleged by the Respondent is that the Applicants wanted to force the Respondent's board to proceed with repairs the previous board had approved. Mr. Catterall was president of the board up to July 2021 when he was not re-elected, and Ms. Maybroda had been on a committee that proposed a repair program. Even if that were the Applicants' motive, there is nothing improper in that. It is certainly not an abuse of process. This point has no bearing on costs.

[6] The Applicants filed affidavits totalling 1,269 pages for the hearing of the action. The Respondent's affidavits totalled 553 pages. In absolute and relative terms those are not excessive or disproportionate for the issues in this action. Furthermore, most of the exhibits attached to Ms. Maybroda's first affidavit, which is the longest, are the Respondent's documents, such as reserve fund studies and engineer's reports. Presumably the Respondent was familiar with them. If counsel thought they were irrelevant, they could ignore them. The volume of evidence filed by the Applicants was not improper and has no bearing on costs.

[7] I agree with the Respondent's submission that the Applicants' counsel was not responsive in August and September 2022 when the Respondent was trying to schedule the hearing of the action in special chambers in the spring of 2023. That delayed the action. However, as discussed in section 3.7 of these reasons below, in the summer of 2022 the parties should have held off on the litigation to see how the repairs progressed, whether a reserve fund plan would be approved and how the City of Edmonton would respond regarding the balcony repairs, rather than trying to schedule the hearing.

[8] I also agree with the Respondent that it was a waste of Court resources to schedule this matter in morning chambers in August 2022, after a few adjournments from earlier morning chambers dates. It should have been obvious to the Applicants that a contested application with over a thousand pages of affidavit evidence could not be heard and decided in twenty minutes in morning chambers. Parties acting reasonably should have been able to agree on a consent order adjourning the matter to special chambers, along the lines of the order that was granted in morning chambers on August 10, 2022. On the other hand, I agree with the Applicants that it should not have taken the Respondent until October 2022 to approve the August 10, 2022 form of order, which was a necessary step to schedule the special chambers hearing.

[9] It is almost always possible to find something to criticize in the conduct of an opposing party in litigation that goes on for more than a year. So it is in this case. To the extent each side here can be criticized, it is evenly divided, so it has no bearing on costs.

[10] The Respondent submits that the Applicants engaged in pre-litigation misconduct which is relevant to costs. Two items of alleged pre-litigation misconduct are things done by the Respondent's board when Mr. Catterall was its president. Without making any finding that those things happened as the Respondent alleges, if they did, they were actions of either the Respondent's board or of the Respondent; they were not actions taken by either of the Applicants in their personal capacity. The third item of alleged pre-litigation misconduct is pushing their preferred repair plan forward and deliberately hiding its cost from the other condominium unit owners. To a certain extent this is again action by the board or the Respondent and not the Applicants in their personal capacity. To the extent it was personal action, I am not satisfied it was deliberately misleading, rather than accidental or inadvertent.

[11] None of the factors set out in r 10.33(2) is in play here to warrant varying a costs award. This is a case where reasonable and proper costs should be awarded, in light of the factors set out in r 10.33(1).

3. Rule 10.33(1) Factors

3.1.Degree of Success: r 10.33(1)(a)

[12] The Respondent was entirely successful in the action, so it should get costs.

3.2.Amount Claimed and Recovered: r 10.33(1)(b)

[13] The Applicants did not seek monetary relief directly, but the remedies they sought could have put the Respondent to substantial expense. Had I ordered the Respondent to complete repairs as the Applicants sought, it could have cost millions of dollars. However, the reserve fund plan approved by the Respondent's board in November 2022 projects repair expenses of $2,598,750 over seven years. It is not clear whether the repairs sought by order would have cost more than the repairs the Respondent is doing. In addition to the cost of repairs, the Respondent faced the prospect of paying for an administrator or an investigator, but I have no evidence regarding what those costs would have been. I am not satisfied that the amount at issue was greater than $75,000, the top end of column 1 of Schedule C. Taking the Originating Application literally, there was no amount claimed, and, of course, no amount was recovered.

[14] The Applicants sought no monetary compensation for themselves, other than costs of this action. On the contrary, their action had the potential to cost them money, because as owners of a unit they would share the costs borne by the Respondent of any repairs ordered or any administrator or investigator appointed.

3.3.Importance of the Issues: r 10.33(1)(c)

[15] In simplified terms, the issues were whether the Respondent was maintaining the Park Towers common property to the standard required by the *Condominium Property Act*, whether it had approved a reserve fund plan as that *Act* requires, and whether the Respondent had engaged in improper conduct as defined in the *Act*. Those issues were important to both parties.

3.4.Complexity of the Action: r 10.33(1)(d)

[16] This was not a complex action. There are three parties. There were a few affidavits and some questioning. It was heard by special chambers application with written briefs. There was no trial.

3.5.Apportionment of Liability: r 10.33(1)(e)

[17] There was no liability found and consequently no apportionment. Given the nature of the claim, it is not clear that there could have been any apportionment. However, as set out below, both sides litigated aggressively and failed to take any available off-ramp to resolution.

3.6.Conduct Tending to Shorten the Action: r 10.33(1)(f)

[18] Some of the alleged misconduct could fit under this heading. I have addressed that in section 2 of these reasons. I am not aware of any other conduct by either party that tended to shorten the action.

3.7.Other Matters: r 10.33(1)(g)

[19] The repair and maintenance of the Park Towers condominium common property and the establishment of a reserve fund plan to cover those expenses is at the heart of this dispute. The Respondent did some repairs and approved a reserve fund plan during this litigation. Those developments are relevant to costs.

[20] The Applicants filed their Originating Application on April 25, 2022, seeking an order requiring the Respondent to complete repairs to the Park Towers common property including the balconies, and other relief. About a week and a half earlier the City of Edmonton had issued a Safety Codes Order requiring various steps to remediate the balconies including their immediate closure. Shortly after receiving the Safety Codes Order the Respondent retained RJC Engineers which issued a balcony assessment report on May 9, 2022. The Respondent commenced balcony repairs in July 2022. By December 2022, the repairs satisfied the City of Edmonton with respect to all aspects of the Safety Codes Order that were the Respondent's responsibility. The Respondent also commenced window and patio door work in October 2022 which was scheduled for completion in 2024. The Respondent approved a reserve fund plan in November 2022.

[21] On January 26, 2023 the Applicants wrote the Respondent offering to settle this action on the following terms:

- The Respondent take no further steps in its application for historic resource designation.
- The Applicants "withdraw their within action" and seek "an indemnity of their legal costs in the amount of $100,000".

[22] The Respondent wrote the Applicants on January 31, 2023 responding regarding the historic resource issue, but not agreeing to take no further steps on that front, and without making a settlement proposal.

[23] Given the reports to the Respondent by Aegis West and Wade Engineering in 2020 and Morrison Hershfield in 2021 (see ***Catterall*** paras 58 - 71) and the inaction by the Respondent in the face of the recommendations in those reports, together with the April 2022 Safety Codes Order, it was reasonable for the Applicants to seek Court intervention to require the Respondent to take action to repair and maintain the Park Towers common property. This action was further justified by the long history of reserve fund studies prior to 2020 stating that Park Towers' reserve fund was inadequate (see ***Catterall*** para 101).

[24] The evidence does not establish whether the Respondent would have taken the steps it did in 2022 and subsequent years had the Applicants not filed this action. However, by the end of

2022, the Respondent had taken reasonable steps, resulting in the City varying the Safety Codes Order and resulting in the Applicants proposing to end their action with no Court order, but still seeking full indemnity for their costs.

[25] The parties questioned each other's affiants in June and July 2022 just as repairs were beginning, and they each filed additional affidavits in July through December 2022 and April through June 2023. While they were each entitled to take those steps to move the litigation forward, it would have been more prudent for both sides to wait and see how the repairs progressed and whether a reserve fund plan would be approved. They both incurred unnecessary legal expenses by proceeding as they did up to January 2023 when the Applicants made their settlement proposal. At that point the reserve fund plan was in place and repairs had been started. That was a logical time to consider settlement, which the Applicants did.

[26] The parties could have engaged in settlement negotiations, but the Respondent rebuffed the Applicants' overtures on that front. They could have attempted mediation, conciliation or arbitration pursuant to s. 69 of the *Condominium Property Act*. They did not. Instead, they continued to file affidavits and extensive briefs for the hearing of the action which took a half day on March 5, 2024. Based on their exchange of correspondence in January 2023, I conclude that the Applicants were open to resolving the matter without further litigation, but the Respondent was not. On the other hand, the Applicants could have unilaterally withdrawn or discontinued their action at any time: rr 3.10 and 4.36. In that case, absent a Court order otherwise, the Applicants would have been liable to pay the Respondent Schedule C, column 1 costs. Based on the Bill of Costs submitted by the Respondent, in January 2023 those costs would have been less than $10,000. The Respondent incurred additional legal expenses of more than $70,000 between January 2023 and the hearing of this application. I expect the Applicants also incurred substantial additional expenses.

[27] If the Applicants had succeeded in their application for appointment of an administrator or an investigator, the Respondent would have been put to substantial expense. Consequently, it was reasonable for the Respondent to vigorously oppose this action, as long as it was being vigorously prosecuted, but once the Applicants opened the door to resolution, it would have been more reasonable for the Respondent to explore settlement.

[28] In a sense this is litigation between neighbours, because the Applicants and all the members of the Respondent's board live in Park Towers (or at least own one of the 49 units there). Given the fact that they may all continue to live there after the litigation is over, it was always in all their interests to try to reach an amicable resolution.

[29] The facts set out above are factors in determining costs, pursuant to r 10.33(1)(g).

4. Costs as a Percentage of Solicitor and Client Costs.

[30] As set out in section 2 of these reasons, above, neither party engaged in misconduct warranting any increase in costs and certainly not solicitor and own client costs. As an alternative to solicitor and own client costs, the Respondent seeks two-thirds of its solicitor and client costs, following the decisions in ***McAllister v Calgary (City)*** 2021 ABCA 25 and ***Barkwell v McDonald*** 2023 ABCA 87.

[31] According to the Applicants' January 2023 settlement proposal, the Applicants incurred legal expenses of $100,000 to that point in this action. Based on the summary of its accounts, the

Respondent incurred total legal expenses of $147,121 through to the end of the hearing on March 5, 2024, with about half incurred before January 2023 and half after. With respect, the costs incurred on each side were out of proportion to the issues and the amounts in issue. They could have negotiated or mediated this dispute at a lower cost and with less acrimony. They could have mutually engaged an engineer not previously involved in the building to provide an independent opinion to assist negotiation, mediation or arbitration. Any of those options would likely have led to a resolution at far less than $250,000 in combined expense.

[32] Given the excessive spending on litigation on both sides, this is not an appropriate case to award costs based on a percentage of solicitor and client costs: ***Barkwell v McDonald*** 2023 ABCA 183 at para 75.

5. Conclusion

[33] The Respondent is entitled to its reasonable and proper costs: r 10.31(1)(a). One measure of that is Schedule C. I am not satisfied that any better measure is available. Based on the Respondent's Bill of Costs, the total under Column 1 of Schedule C, including disbursements other charges and GST would be $10,854.27. Costs in that amount, adjusted for inflation, would recognize that the Respondent succeeded in the litigation while also recognizing that the Respondent created the conditions that justified the action, that both parties litigated when they could have negotiated, that the Respondent failed to answer the Applicants' invitation to negotiate, that the Applicants could have withdrawn their action in January 2023, and that this is fundamentally a dispute among neighbours. An appropriate award of costs is one which recognizes success in the action and mutual responsibility for the commencement and continuation of the action, without further inflaming relations among neighbours.

[34] The amounts in Schedule C are out of date. An 25% increase is appropriate: ***Grimes v Governors of the University of Lethbridge*** 2023 ABKB 432 at paras 88 – 89; ***Merchant Law Group LLP v Bank of Montreal*** 2023 ABKB 597 at para 25; ***Achor v Ihekweme*** 2023 ABKB 606 at para 82; ***Breen v Foremost Industries Ltd*** 2024 ABKB 9 at para 50.

[35] The Applicants shall pay the Respondent Schedule C, column 1 costs of the action up to the costs submissions with a 25% increase in the fee amounts. If the parties are not able to agree on the amount, costs may be assessed by an Assessment Officer.

[36] Each party shall bear their own costs of their submissions on costs, because my costs award falls between most extreme position each party advanced. In other words, success on costs was divided.

Heard via written submissions on the 17th day of June, 2nd and 9th days of July, 2024.
Dated at the City of Edmonton, Alberta this 23rd day of July, 2024.

G.S. Dunlop
J.C.K.B.A.

Appearances:

Roberto Noce, KC and Michael Gibson
Miller Thompson LLP
for the Applicants

Hugh Willis and Brian G Anslow
Willis Law
for the Respondent