In the Court of Appeal of Alberta

Citation: Aubin v Condominium Plan No 862 2917, 2025 ABCA 248

Date: 20250704
Docket: 2403-0070AC
Registry: Edmonton

Between:

Mary Jean Aubin

Appellant

- and -

The Owners: Condominium Plan No 862 2917

Respondent

The Court:

The Honourable Justice Frans Slatter
The Honourable Justice April Grosse
The Honourable Justice Karan M. Shaner

Reasons for Judgment

Appeal from the Order by
The Honourable Justice S.N. Mandziuk
Dated the 18th day of March, 2024
Filed on the 18th day of March, 2024
(2024 ABKB 156, Docket: 1903 00548)

Reasons for Judgment

The Court:

Introduction

[1] The appellant, Mary Jane Aubin, appeals from a decision of a chambers judge which concluded she is responsible for the drywall on her unit's side of a wall shared with common property, and which found the respondent, The Owners: Condominium Plan 862 2719, did not engage in improper conduct.

[2] The appeal is granted for the reasons below.

Background

[3] The appellant is the registered owner of a condominium unit in a two-building complex with 347 units. The respondent is the condominium corporation constituted pursuant to the *Condominium Property Act*, RSA 2000, c C-22.

[4] The appellant's bedroom shares a wall with the complex's social lounge, which is common property. The appellant's unit is the only one that shares the wall. The appellant discovered there was significant noise transference from the lounge to her bedroom. In summary, her evidence in the proceedings below was that sound passing from the lounge to her bedroom was at a high enough volume that it disrupted her ability to use and enjoy her bedroom, as well as causing her stress and exacerbating a health condition. She also provided evidence that she did not experience the same level of sound transference from the wall she shared with the unit next to hers. She raised these concerns with the respondent's board of directors and its property manager verbally and through email correspondence on numerous occasions.

[5] On June 13, 2018, the appellant wrote a letter to the respondent's board of directors and asked that an acoustics expert be retained to investigate the noise transference. Some weeks later, the respondent provided a written reply through its property manager indicating the board lacked authority to make structural changes to common property but several changes would be implemented respecting the lounge, including: clarifying the rules; installing a clock and a sign that stated the lounge closed at 11pm; directing security to confirm the lounge was vacant by 11pm; and increasing the security deposit required by residents to book the lounge. The respondent took no further action at the time.

[6] On August 16, 2018, the appellant sent another letter to the respondent about the sound transference through the shared wall. Among other things, she advised she had consulted with a sound engineer who told her an acoustical study could be done for approximately $600.00. She acknowledged that opening the wall to investigate could be costly and she asked the respondent to

consider putting up a "false wall" in front of the existing wall to dampen the sound emanating from the lounge into her bedroom.

[7] The appellant's complaint was added to the agenda for the respondent's board meeting of the same day. During the meeting, and at the appellant's invitation, the board members conducted their own sound experiment. Three board members went into the appellant's bedroom while the remaining members went to the lounge and attempted to make noise sufficient to be heard through the wall. The board members who attended in the unit reported back that the sound transference was no different than what they experienced in their own units.

[8] The respondent formally replied to the appellant's letter through its property manager on August 23, 2018. It indicated it had implemented the additional measures of asking cleaning staff not to vacuum until 9:00 a.m. and rearranging the lounge furniture so it would not be easily banged against the wall. With respect to other steps, the respondent advised:

> The Board has determined that it is unable to take further action to structurally modify the Common Property. The Corporation has a duty under the Bylaws to maintain and repair Common Property walls where they are damaged. However, given that the Common Property wall in question is intact and in good repair, your request to the Board must be interpreted as an enhancement from the original condition of the Property. Such an enhancement is not within the current mandate of the Board of Directors.
>
> Owners *do* have the ability to make their own changes to their respective units (with prior board approval as per the bylaws). This would allow an owner to pursue whatever soundproofing that they determine for themselves is desirable.
>
> [emphasis in original].

[9] The appellant continued to raise concerns about the noise with the respondent. Several pieces of correspondence were exchanged between the parties' lawyers. The appellant repeated her request that the respondent hire an expert to perform an acoustical study. The respondent refused.

[10] The appellant retained an acoustical consultant at her own expense. He attended at her unit to perform a sound analysis on the shared wall on December 5, 2018, and he subsequently issued a report with his findings and recommendations. He found the sound dampening across the shared wall was "very low" and that noise from parties within the lounge would have been "audible, intelligible and unacceptable". He indicated his testing showed the wall had a Noise Isolation Class rating of 38 and he recommended upgrading the wall to a Noise Isolation Class/Sound

Transmission Class of 60 or more. The report was provided to the respondent; however, it took no further investigative steps.

[11] On January 7, 2019, the appellant filed an application seeking, among other relief, a declaration that the respondent was engaging in "improper conduct" contrary to s 67 of the *Condominium Property Act* and an order directing the respondent to either implement an appropriate acoustic barrier or limit access to the lounge. The applications judge found that while the respondent's earlier attempt to limit noise from the lounge was a proper "initial response", the appellant's expectation that more would be done to address the problem was reasonable in the circumstances. The applications judge found that the respondent had engaged in improper conduct by failing to investigate further. Accordingly, he directed the respondent to retain an expert to "determine if the wall is reasonably adequate to diminish, lessen or dampen the sound from a public space to a private space and if not, to determine options available to improve the wall to achieve a reasonable standard for that use". The applications judge expressly refrained from making additional directions as to what should be done with the wall; however, he stated the respondent would be required to take reasonable steps within the bounds of its authority to respond to the results of the investigation: ***Aubin v Condominium Plan No 862 2917***, 2022 ABKB 723 at paras 25 and 37-38 [***Aubin #1***].

[12] The applications judge subsequently awarded partial solicitor and client costs to the appellant. The amount, $32,948.62, was confirmed in an order dated March 23, 2023. The respondent filed a notice of appeal from the applications judge's order on December 19, 2022.

[13] Before the appeal was heard, the respondent hired an architect to assess the wall. The architect provided two reports. The initial report, dated February 24, 2023, indicated the wall did not meet the minimum sound transmission class ("STC") required by the National Building Code: 1970, which was in effect when the building was constructed in the early 1970s. The report did not contain any recommendations to address the problem. A subsequent report by the same architect, dated June 13, 2023, indicated that in addition to the sound transfer deficiencies, the wall did not meet applicable fire resistance rating requirements. Among the architect's recommendations was adding a layer of 5/8" gypsum wall board to both sides of the wall.

[14] The respondent also commissioned a reserve fund study, completed on November 17, 2022, which indicated the respondent was facing significant expenses for maintenance and repairs over the following five years.

[15] At various points throughout the parties' dealings on this matter, the respondent offered to add a sheet of 5/8" drywall to the lounge-side of the wall. This would not, on its own, bring the wall up to code. The respondent invited the appellant to add drywall to her side of the shared wall at her own expense. The appellant rejected this proposal.

[16] The respondent's appeal was heard by the chambers judge in the Court of King's Bench on November 1, 2023. Written reasons allowing the appeal are indexed at ***Aubin v Condominium Plan No 862 2917***, 2024 ABKB 156 [***Aubin #2***].

[17] Three of the issues that were before the chambers judge are relevant to this appeal: whether to admit the architect's reports, the reserve fund study, and various invoices as fresh evidence; what portion of the wall between the appellant's unit and the lounge constitutes common property; and whether the respondent engaged in improper conduct under the *Condominium Property Act.*

[18] The chambers judge found the architect's reports, the reserve fund study, and the invoices were relevant and material. He admitted them in accordance with r 6.14(3) of the *Alberta Rules of Court*, Alta Reg 124/2010, noting the low threshold set out in ***Boyd v Cook***, 2013 ABCA 266 at para 5.

[19] On the issue of how much of the wall was common property, the chambers judge concluded the appellant was responsible for the drywall on the side of the wall in her unit. In reaching this conclusion, the chambers judge considered s 9(1) of the *Condominium Property Act* and the registered condominium plan. Section 9(1) provides:

> 9(1) Unless otherwise stipulated in the condominium plan, if
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> (a) a boundary of a unit is described by reference to a floor, wall or ceiling, or
>
> (b) a wall located within a unit is a load bearing wall,
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> the only portion of that floor, wall, or ceiling, as the case may be, that forms part of the unit is the finishing material that is in the interior of that unit, including any lath and plaster, panelling, gypsum board, panels, flooring material or coverings or any other material that is attached, laid, glued or applied to the floor, wall or ceiling, as the case may be.

With respect to common property, the condominium plan states that "the boundary of any unit with common property is the undecorated interior surface of the unit floor, wall, or ceiling as the case may be."

[20] The appellant's position before the chambers judge (and on this appeal) was that the description of common property in s 9(1) of the *Condominium Property Act* is a default position overridden by the description of common property in the condominium plan such that the phrase "undecorated interior surface" in the condominium plan excludes the drywall on her side of the shared wall. Accordingly, the appellant argues that the drywall on her side is part of the common property for which the respondent bears responsibility. The chambers judge disagreed, stating:

> [55] The condominium plan in this case defines the boundary of a unit with reference to the "unit floor, wall, or ceiling". In my view, this description does not override the default position outlined in s 9 of the *CPA*. Therefore, any finishing material – as described under s 9(1) of the *CPA* – within a condominium unit forms part of the unit and is not considered common property.
>
> [56] In light of the foregoing, I find that Aubin is responsible for the drywall within her Unit and any expenses associated with the same.
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> (***Aubin #2*** at paras 55-56)

[21] The chambers judge turned next to whether the respondent had engaged in improper conduct. He reviewed the definition of improper conduct under s 67 of the *Condominium Property Act* and the respondent's responsibilities as a condominium corporation under s 37. He applied the two-part test for determining whether a condominium corporation has engaged in improper conduct, set out in ***Laakso v Condominium Corporation No 8011365,*** 2013 ABQB 153 at paras 25 and 26 [***Laakso***], specifically: whether there was a breach of the appellant's reasonable expectations and, if so, whether the respondent's conduct was oppressive, unfairly prejudicial, or unfairly disregarded the appellant's interests. He found the appellant's expectations were not reasonable and that the respondent had not engaged in improper conduct. With respect to the appellant's reasonable expectations, the chambers judge stated:

> In my view, the reasonable expectation would be that a cost-effective investigation would occur and then all steps within the power of the Board, short of immediately proceeding to expend Corporation funds, be taken. This is what was done. Reasonableness does not require the Board to do exactly what Aubin wanted, or to respond beyond what is reasonable in managing the affairs of a sizeable complex.
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> (***Aubin #2*** at para 69).

[22] The chambers judge concluded that by having six of its board members participate in the sound transference experiment during the board meeting on August 16, 2018, and subsequently implementing a number of changes to the rules surrounding activities in the lounge, the respondent performed an appropriate investigation and took adequate steps to address the complaint's concerns. Additionally, he found the respondent's offer to attach a 5/8" sheet of drywall to the lounge side of the wall was reasonable.

[23] The chambers judge found that even if the appellant's reasonable expectations were not met, it was not possible on the facts to find the respondent was oppressive, unfairly prejudicial, or that the respondent unfairly disregarded the appellant's interests. In his view, she was not treated inequitably "vis-à-vis similarly situated unit owners. They did not single her out, show bias, or

behave inequitably. They received a complaint and took reasonable steps to deal with it": ***Aubin #2*** at para 71.

[24] The chambers judge vacated the applications judge's order awarding costs to the appellant and, following written submissions by the parties, awarded enhanced costs to the respondent for reasons indexed at ***Aubin v Condominium Plan No 862 2917,*** 2024 ABKB 345 [***Aubin #3***].

Grounds of Appeal

[25] The appellant advances three grounds of appeal. First, she argues the chambers judge erred in relying on documents admitted as fresh evidence to overturn the applications judge's decision because it was evidence of the respondent's conduct which occurred after the applications judge issued his decision and directions. Second, the appellant says the chambers judge erred in law in concluding the provisions of the condominium plan respecting unit boundaries did not override the default position set out in s 9(1). The third ground of appeal is that the chambers judge incorrectly applied the legal test for determining the appellant's reasonable expectations which led him to err in concluding the respondent did not engage in improper conduct.

[26] The first ground of appeal can be disposed of briefly. Although the chambers judge admitted, and at some points referred to, the fresh evidence, it did not form the basis of his conclusion that the respondent had not engaged in improper conduct. As noted, he found the sound transfer experiment the respondent's board members conducted during the August 16, 2018 meeting was sufficient to discharge the respondent's obligation to investigate the appellant's complaint: ***Aubin #2*** at paras 66(b) and 69.

[27] The two other grounds of appeal are addressed below.

Standards of Review

[28] Determining the unit boundary required the chambers judge to interpret the meaning of the words in both s 9(1) of the *Condominium Property Act* and the condominium plan, an exercise analogous to statutory interpretation. In interpreting the effect of s 9(1) "one must apply the principle of statutory interpretation that the specific overrides the general": ***Condominium Plan No 762 1828 v Marusyn,*** 2010 ABQB 523 at para 19 [***Marusyn***], aff'd 2011 ABCA 356. Statutory interpretation is a question of law. Accordingly, the question of whether the chambers judge erred in finding the description of the unit boundaries in the condominium plan did not override the default position in s 9(1) is reviewable on a standard of correctness: ***Housen v Nikolaisen***, 2002 SCC 33 at para 8.

[29] Whether the respondent engaged in improper conduct is a question of mixed fact and law, reviewed for palpable and overriding error: ***Housen v Nikolaisen*** at para 28.

Discussion

a. The chambers judge misinterpreted the unit boundary provisions of the condominium plan

[30] This issue between the parties arises out of a dispute over which party is responsible for maintaining a shared wall and, specifically, making any modifications to that wall necessary to address sound transference. Determining the extent to which the shared wall is common property is key to resolving the issue.

[31] Section 9(1) expressly states that its terms prevail unless "otherwise stipulated" in the condominium plan. The term "otherwise stipulated" was considered in relation to a previous version of the *Condominium Property Act* in ***Marusyn***. To stipulate something means to set it out specifically: ***Marusyn*** at para 18. Here, the condominium plan stipulates the unit boundaries with sufficient specificity to displace the default position in s 9(1). The condominium plan provides "the boundary of any unit with common property is the undecorated interior surface of the unit floor, wall, or ceiling as the case may be" [emphasis added]. This is distinct from how unit boundaries are described in s 9(1), which says, "the finishing material that is in the interior of that unit, including any lathe and plaster, panelling, gypsum board, panels, flooring material or coverings or any other material that is attached, laid, glued or applied to the floor, wall or ceiling, as the case may be" [emphasis added].

[32] The wording of each provision is substantially different. The interpretation offered by the chambers judge does not give effect to what is clearly "otherwise stipulated", resulting in an erroneous conclusion. The default provisions in s 9(1) treat finishing material, such as drywall, as part of the unit but the condominium plan treats only the *decoration* on that finishing material, for example, paint or wallpaper, as part of the unit. There is no ambiguity. The terms are plain, and their meaning is obvious. In this case, the entirety of the wall separating the appellant's unit from the lounge, save for any decoration on the surface in the appellant's unit, is common property and the respondent is responsible for it.

b. The respondent engaged in improper conduct

[33] The chambers judge's finding that the drywall on the appellant's side of the shared wall did not form part of the common property, and therefore was the appellant's responsibility, tainted his analysis and the conclusion he reached on the question of improper conduct.

[34] At the heart of the appellant's argument on improper conduct is that the respondent failed to discharge its duties in relation to common property under ss 37(1) and (2) of the *Condominium Property Act*. These provide, in part:

> 37(1) A corporation is responsible for the enforcement of its bylaws and the control, management and administration of its real and personal property, the common property and managed property.
>
> (2) Without restricting the generality of subsection (1), the duties of a corporation include the following:
>
> > (a) to keep in a state of good and serviceable repair and properly maintain the real and personal property of the corporation, the common property and managed property.

A failure to comply with its obligations under s 37 may constitute improper conduct under s 67(1)(a)(i) of the *Condominium Property Act.*

[35] The scope of a condominium corporation's responsibilities under s 37 was considered in ***Hnatiuk v Condominium Corporation No. 032 2411,*** 2014 ABQB 22 at para 9 [emphasis added]:

> Section 37(1) of the *Condominium Property Act* and, in this case, by-law No. 4, gives the Respondent responsibility for the control and management of the common property. The statute and the by-law impose a specific obligation to maintain and keep the common property in a state of good and serviceable repair. In my view, section 37 and the corresponding by-law cannot be read to require the Respondent only to preserve a state that may prove to be deficient, or to maintain the status quo, particularly if this might create a danger to the health and safety of the occupants. The statute and the by-law impose not only a duty to maintain, but an obligation to correct deficiencies or, at the very least, to investigate and bring the conclusions to a meeting of the owners.

[36] Given the shared wall is properly characterized as common property, and applying the test in ***Laakso,*** it was reasonable for the appellant to expect that the respondent would comply with its duties under s 37(1) to correct the deficiency or a least carry out an investigation and bring its findings back to the appellant and the board. Certainly, it was reasonable for her to expect something beyond an informal sound transfer experiment would be undertaken, particularly after she obtained an acoustical analysis in December of 2018 indicating the sound barrier was inadequate. Further, given the wall is common property, it was reasonable for the appellant to reject the respondent's offer to attach another layer of drywall to the lounge side of the wall only, which might not address the whole of the problem.

[37] The chambers judge did not consider the December 2018 acoustical analysis in assessing the reasonableness of the appellant's expectations and the respondent's responsibilities under s 37(1). This was a palpable and overriding error. That analysis may not have proved on a balance

of probabilities that the shared wall was deficient. However, it was new information sufficient to raise a *prima facie* case and trigger the respondent's obligation to investigate further using appropriately qualified individuals. The appellant had an expectation this would occur, and this expectation was both subjectively and objectively reasonable.

[38] Finally, the chambers judge's finding that the respondents did not treat the appellant inequitably in relation to other unit owners by singling her out, showing bias, or in other ways, is unreasonable because it is not supported by the facts. The appellant may have been treated *equally* and not specifically singled out, but she was not treated *equitably*, nor were her concerns fairly considered. It was undisputed that the appellant's unit was the only unit, out of 347, that abutted the lounge. She was therefore the only unit owner to bear the sound transference burden created by the alleged deficiency in the wall, something arguably disproportionate to the point of unfairness.

Disposition

[39] The appeal is granted.

[40] The orders arising from ***Aubin #2*** and ***Aubin #3*** are set aside.

[41] The order arising from ***Aubin #1***, pronounced October 31, 2022, and the order setting the quantum of costs, dated May 23, 2023, are restored.

Appeal heard on March 6, 2025

Reasons filed at Edmonton, Alberta
this 4th day of July, 2025

Slatter J.A.

Authorized to sign for: Grosse J.A.

Shaner J.A.

Appearances:

H. Besuijen
for the Appellant

R. Noce, KC
M. Gibson
for the Respondent