CONDOMINIUM AUTHORITY TRIBUNAL

DATE: February 23, 2022
CASE: 2021-00028R
Citation: Emerald PG Holdings Ltd. v. Toronto Standard Condominium Corporation No. 2519, 2022 ONCAT 15

Order under section 1.44 of the *Condominium Act, 1998.*

Member: Michael Clifton, Vice-Chair

The Applicant,
Emerald PG Holdings Ltd.
Represented by Cameron Thomson, Agent

The Respondent,
Toronto Standard Condominium Corporation No. 2519
Represented by David Barkin, Agent, and by Richard MacGregor, Counsel

Hearing: Written Online Hearing – June 24, 2021 to November 30, 2021

REASONS FOR DECISION

[1] The parties in this case have a lengthy, antagonistic history. They have been before this Tribunal several times in the past few years, and I am aware that there are other court proceedings, as some of these were referenced in the parties' submissions in this case. All of this is most unfortunate, because it seems entirely avoidable if the parties would govern themselves in a manner that is more appropriate for the purpose of maintaining an effective and enjoyable condominium community.

[2] The Applicant (or "Emerald") is a corporation that owns a unit of the Respondent. However, it is Fatih Eroltu, the principal of Emerald, who seems to be the primary instigator of these proceedings; his attitude toward the Respondent's management and legal representatives appears aggressive and extreme. During the witness evidence, given by videoconference, Mr. Eroltu was unable to restrain himself from harsh and insulting outbursts against the Respondent's legal counsel and condominium manager, despite my warnings to him to cease such outbursts. When he was no longer present in the meeting, the parties were able to engage more amicably, and it even appeared that a settlement between these parties could be possible, though it so far has not been.

[3] Emerald brought this Application to the Tribunal in relation to a request for records

made under the *Condominium Act, 1998* (the "Act") on December 16, 2020. Emerald's agent, Cameron Thomson, asserted that a number of the requested records were not provided by the Respondent. After reviewing the parties' submissions on the scope of the issues to be decided by me, I have determined the issues to be as follows:

1. **Entitlement to Records:** Is the Applicant entitled to examine or obtain copies of the requested records that were not provided by the Respondent?

2. **Reasonable Excuse for Refusal:** Has the Respondent provided a reasonable excuse for refusing to permit the Applicant to examine or obtain copies of those records?

3. **Fees for Records:** What fee for the records is reasonable?

4. **Extent of Redaction:** To what extent is the Respondent entitled to redact the records?

5. **Waiver of Privilege:** Has the Respondent waived solicitor-client and/or litigation privilege with respect to certain of the records?

6. **Penalties & Costs:** As both parties seek both costs and penalties against the other, should these be awarded and, if so, in what amounts?

[4] In this decision, I find that the Applicant is entitled to all of the requested records, that the Respondent had no reasonable excuse for its refusal to provide some of the records, that the Respondent's fees for the records are not unreasonable, that the Respondent should minimally redact the records only to the extent that the exemptions (to disclosure) set out in the Act require and to the extent of legal privilege, which I find does apply to some of the records subject to ordinary limits. Due to its refusal to provide records without reasonable excuse, I award a penalty of $2,000 against the Respondent. I also find that neither party is entitled to its costs of these proceedings.

[5] I do not refer to all the evidence and submissions provided by the parties. Both parties submitted more information and commentary than was required to address the issues above. Their closing summations alone totalled a combined 62 typed pages. While I am sure that each party has in mind certain facts, arguments, and allegations they would be pleased to see set out in this decision, it is not necessary or appropriate for me to indulge that desire rather than, as succinctly as possible, to set out only those facts and arguments I consider sufficient and relevant to resolve the issues in this case.

ISSUE 1: ENTITLEMENT TO RECORDS

[6] During Stage 2 of the Tribunal proceedings, the Respondent submitted a revised response to Emerald's requests for records and determined that certain records it was previously not willing to deliver would be given, subject to the payment of fees and certain redactions. The following records either have been delivered already or the Respondent has agreed to deliver them:

1. Records of owners, current as of December 16, 2020 (provided electronically to the Applicant without charge on January 15, 2021);

2. Mutual use agreements (also known as shared facilities or reciprocal agreements) mentioned in sections 113 or 154 (5) of the Act (available to be provided to the Applicant without charge);

3. The Respondent's General Ledger for the period of May 1, 2019, through December 16, 2020 (subject to redaction and payment of a fee);

4. The Respondent's "Aged Receivables Report" current as of December 16, 2020 (available to be provided to the Applicant without charge);

5. Minutes of the Respondent's owners' meeting held on August 1, 2019 (provided electronically to the Applicant without charge on January 15, 2021);

6. All instruments appointing a proxy, or ballots, for the Respondent's owners' meeting held on August 19, 2020 (subject to redaction and payment of a fee);

7. Copies of paid and outstanding invoices issued to the Respondent by Agro Zaffiro LLP up to December 16, 2020 (subject to redaction and payment of a fee);

8. A copy of the retainer agreement between the Respondent and Miller Thomson LLP (provided electronically to the Applicant without charge on January 15, 2021); and

9. Copies of paid and outstanding invoices issued to the Respondent by Miller Thomson LLP from May 1, 2016, through to December 16, 2020 (subject to redaction and payment of a fee).

[7] Therefore, the Applicant submits that the question of entitlement is relevant with respect to just the following requested records:

1. Records relating to determinations about the invalidity of certain proxy forms and ballots on August 19, 2020;

2. Records showing how many unit owners were barred from voting on August 19, 2020, having been deemed to be in arrears of the payment of common expense contributions for more than 30 days;

3. A copy of the retainer agreement between the Respondent and Agro Zaffiro LLP;

4. A copy of the retainer agreement between the Respondent and Deacon, Spears, Fedson and Montizambert LLP ("DSFM");

5. Copies of DSMF's paid and outstanding invoices;

6. All court documents (including Statements of Claim, original and amended, Statements of Defense, Crossclaims and Responses to Crossclaims) filed by DSFM on behalf of the Respondent (including filings in matters for which the Respondent was paying an indemnified party's legal fees).

[8] Although the Applicant cites the question of entitlement to these records as a live issue in this case, and the Respondent's amended response to the request for records indicated Emerald was not entitled to them, the Respondent's closing submissions do not directly address this issue. Rather, the Respondent addresses matters relating to the fees for and redaction of such records. As these issues can only arise after there has been a determination of entitlement, this infers that the Respondent now concedes that Emerald does have a basic entitlement to each of the identified records. Whether or not that inference is deliberate, I agree that it does.

[9] I also note that the parties have referenced an earlier Tribunal decision involving the Respondent, namely *North York Medicare Centre v. Toronto Standard Condominium Corporation No. 2519*, 2021 ONCAT 111, in which the Respondent provided the Applicant in that case with all requested records, which included all of the items identified in paragraph 7 above. I find there is nothing in the submissions of the Respondent to indicate a substantive or relevant difference, as it pertains to entitlement, between the applicant in that case and its request for such records, and Emerald and its request in this case. Accordingly, I find that Emerald is entitled to all of the requested records.

[10] For the purposes of issuing the order that concludes this decision, I note that the Applicant has indicated it already has obtained, from another unit owner, copies of the retainer agreements between the Respondent and Agro Zaffiro LLP and between the Respondent and DSFM, and all court documents filed by DSFM on behalf of the Respondent, and that delivery of them by the Respondent is no

longer required.

ISSUE 2: REASONABLE EXCUSE FOR REFUSAL

[11] Despite there being no dispute as to entitlement, the submissions of both parties confirm that the Respondent did initially refuse to provide some of the records to Emerald. The Respondent believes it was justified in doing so.

[12] The Respondent admits that underlying its reasons for refusal was a determination that the records in question required redaction since they contained confidential unit owner information and/or information relating to actual or contemplated litigation. The fact that a record requires redaction is not, of course, a valid or reasonable basis, or excuse, for refusal. But this is not the whole of the Respondent's reasoning. The Respondent's core reason for refusing to provide the records was based upon what it alleges were breaches by Emerald of the order of this Tribunal in *Emerald PG Holdings Ltd. v Toronto Standard Condominium Corporation No. 2519*, 2020 ONCAT 24.

[13] The Respondent alleges that at the time that Emerald provided its December 16, 2020, request for records, it had also failed to pay fees ordered in that case for the preparation of redacted documents. The order in that case provided as follows:

> 4. The Applicant shall pay to the Respondent a fee of $1920 for redaction and photocopying of the general ledger. If the actual cost is less than this amount, the Respondent shall pay the Applicant the difference, as per s. 13.8(1)(d) of the Regulation. Further, if the actual cost is more than $1920, the Applicant shall pay the amount of difference to a maximum of $192, as per s. 13.8 (2) of the Regulation. Payment shall be made prior to delivery of the minutes, and the minutes shall be made available within 30 days of this decision.

[14] It was confirmed during the examination of Mr. Eroltu in these proceedings that this amount was not paid. Instead, Emerald provided a cheque for $1.00 in an envelope at the time the Respondent sought to deliver the redacted records. As a result of this alleged behaviour, the Respondent sought advice from its legal counsel when it received Emerald's December 16, 2020, request for records, and was advised by its counsel to refuse to provide any records that would require redaction. The Respondent acted accordingly.

[15] I find that this is not a reasonable excuse for refusing to provide the requested records. Even though the Respondent was acting in agreement with directions given by its legal counsel, a condominium corporation is not relieved of accountability if it follows direction from its professional advisers that is

inconsistent with its actual statutory obligations.

[16] In the circumstances described by the Respondent, it was at no risk even if Emerald – or, more particularly, Mr. Eroltu – was inclined to try again the same alleged sort of tactic (in respect of which the Applicant provided a lengthy explanation and justification), since the condominium is not obliged, in the ordinary course, to redact the records, or deliver them, until after it has received its estimated fee. I recognize that the Respondent appeared to be seeking to satisfy the terms of the order in the earlier case, resulting in it preparing the redacted records prior to receiving payment, but that this was a unique circumstance should have been considered when the Respondent determined how to reply to Emerald's December 16, 2020, request. The approach taken by the Respondent in relation to the new request was both unnecessary and inconsistent with its statutory duties and therefore cannot be viewed as reasonable.

[17] The Respondent further submits that its refusal was based upon Emerald having allegedly breached another term of the order in the earlier case, by disclosing to other unit owners the contents of a "settlement decision" that had been included in the records provided to Emerald. The order stated, "The Applicant shall keep the terms of the settlement decision confidential and shall not disclose it to other persons." According to the Respondent, Emerald (or, rather, either Mr. Thomson or Mr. Eroltu) had shared the contents of the settlement decision with other unit owners.

[18] This disclosure appears to have been admitted to by Mr. Eroltu during examination in this hearing. However, for the purposes of this hearing, whether such alleged breach occurred, or whether it was a breach of the earlier order, are immaterial. Even if there was a breach of the earlier order, it is not a sufficient or reasonable excuse for the Respondent's refusal to provide the records in response to Emerald's later request. Refusing to properly respond to Emerald's further valid request for records based on its suspicions and interpretations of events, was arbitrary and, again, constituted a breach of the Respondent's own statutory obligations. It therefore cannot be viewed as reasonable.

[19] Notwithstanding that the Respondent later (after Emerald filed this Application) determined it would provide the records in question to Emerald subject to redaction and payment of fees, I find that it had no reasonable excuse for its initial refusal to provide the requested records. I will address below the issue of whether it is appropriate for a penalty to be awarded.

ISSUE 3: FEES FOR RECORDS

[20] The Respondent has estimated that redaction and delivery of all the requested records should cost no more than $1,070. (Its original estimate was higher, but during these proceedings the condominium manager obtained new software that they explained will make some redactions easier and take less time.) It bases this estimate upon a $30 per hour rate for labour, and an estimated two minutes, on average, per sheet, plus $0.20 per page for copying charges. These rates are consistent with what have been found to be reasonable in other Tribunal decisions relating to similar sets of records.

[21] Mr. Thomson states that Emerald takes no issue with the rates proposed to be charged but only with the Respondent's redaction protocols which affect the time likely to be taken, since it is the time taken that will determine the ultimate amount of the fees to be charged. Mr. Thomson described in some detail how he believes the redactions should be carried out and the amount of time that each process should take based on each different type of record in question. His conclusions appear to be based upon both his reasoning and his personal efforts to replicate such processes. While this demonstrates an impressive dedication to rigour and detail in his submissions, it does not constitute sufficiently objective information on which I can base my decision.

[22] For its part, the Respondent provides no alternative explanation for the time it estimates redaction should take, and merely reiterates that it has a statutory right to estimate and charge reasonable fees for records noting that in another case (the *North York Medicare Centre* case mentioned earlier in this decision) the Tribunal had determined that two minutes per page was a reasonable estimate of time for such labour.

[23] However, the Respondent does raise an issue that appears not to be fully contemplated in Mr. Thomson's analysis. The Respondent submits that the parties' ongoing and litigious relationship requires it to carry out a more diligent and probing review of the information in each record to ensure that both private information and information relating to contemplated or actual litigation are not inadvertently disclosed.

[24] While I am persuaded that both parties have presented reasonable arguments for their positions, I am sensitive to the fact that the amount in dispute here barely exceeds $1,000, which could be less than either party has paid its representatives to argue the point. I do not believe that excessive analysis on this topic is warranted in this case.

[25] In principle, I do not find an estimate of two minutes on average per page to be unreasonable, recognizing the Respondent's admission that some pages may take

seconds to process, while others may involve a lengthier review. I agree with Mr. Thomson that the Respondent may be able to employ some sensible processes, including by-passing review of any parts of the records that it is reasonably foreseeable should not contain information that requires redaction. The Respondent may wish to consider some of Mr. Thomson's specific suggestions, which are set out in the Applicant's submissions. However, being impressed by the detail in Mr. Thomson's approach is not the same thing as having an objective basis on which to establish a finding.

[26] For the reasons set out above, I find the Respondent's estimate of $1,070 to be a reasonable estimate of the maximum fees for the work of redacting and providing copies of all of the requested records. If the actual amount is different than this, the parties shall adjust accordingly as the Regulations under the Act require.

ISSUES 4 & 5: EXTENT OF REDACTION & WAIVER OF PRIVILEGE

[27] These two issues are sufficiently related to one another that I have combined them for the purposes of this analysis.

[28] Emerald does not dispute the entitlement of the Respondent to redact the records it provides, to remove or cover all information appropriately falling within the range of the exceptions to disclosure that are set out in section 55 (4) of the Act. The dispute between the parties relates primarily to the proposed redaction of the legal invoices, which the Respondent claims are subject to both the exception in section 55 (4) (b) of the Act and legal concepts of privilege. The Respondent states that, effectively, the only information that may be disclosed on the invoices are their dates and the amounts invoiced, "but all private dockets and information must be preserved [i.e., redacted] to ensure the sanctity of solicitor client privilege is upheld."

[29] In the course of their submissions, each of the parties cited relevant leading and informative cases including, *Maranda v. Richer* [2003] 3 SCR 193, 2003 SCC 67 (CanLII), *Fisher v Metropolitan Toronto Condominium Corp. No. 596*, [2004] OJ No 5758, 204 CarswellOnt 6242, and the following Tribunal cases: *Mellon v Halton Condominium Corporation No. 70*, 2019 ONCAT 2, *Jack Gale v Halton Condominium Corporation No. 61*, 2019 ONCAT 46, *Steenkamp v. York Condominium Corporation No. 279*, 2021 ONCAT 49, and *Robinson v. Durham Condominium Corporation No. 139*, 2021 ONCAT 81. Collectively, these cases provide comprehensive explanations and analysis of privilege as it applies in the context of condominium record requests. I do not intend to repeat their analyses here.

[30] Based upon such case law and the submissions of the parties, I find that the legal invoices in question are subject to both solicitor-client privilege and, where specifically relating to actual or contemplated litigation proceedings, litigation privilege and/or the exception set out in section 55 (4) (b) of the Act.

[31] Emerald alleges that the Respondent waived such privilege by publishing to the unit owners generally various items of correspondence that expressly discussed the context, content and costs of its various legal proceedings involving the Applicant. Emerald further submits this is similar to the situation in the Jack Gale case noted above, where the condominium had disclosed this kind of information to unit owners and the Tribunal there determined that privilege was, indeed, waived by and to the extent of such disclosure. The same conclusion could be reached here. However, the Respondent has indicated that the correspondence referred to in Emerald's submission does not, in fact, relate to the same matters that are subject of the requested legal invoices, since all of those invoices pre-date December 2020, and the correspondence in question pertains to litigation that was commenced in February 2021.

[32] Since Emerald's entire submission in this regard relied upon that correspondence as evidence of waiver, I must find there is no evidence that privilege was waived with respect to the legal invoices subject of the Applicant's December 16, 2020, request for records.

[33] The mere fact that the Applicant has not been able to prove privilege was waived with respect to the records in question, does not mean that the Respondent should not duly consider whether privilege was in fact waived with respect to them, which it should be able to determine with the assistance of its legal counsel. Further, the Respondent should consider whether certain portions of the invoices are not the subject of privilege at all. The mere fact that information exists in the invoices, might not qualify it as privileged. In any event, it is expected that the Respondent will act in honesty and good faith in making its redactions and will not redact any information that ought not to be redacted.

[34] When making redactions, the Respondent is reminded not to simply blank out whole sections of content, as the Respondent's submissions suggest it might think can be done; but, as is supported by the case law cited by the parties, redactions should be minimal, sufficient to remove just the information that is appropriately considered privileged or is otherwise exempted from disclosure under section 55 (4) of the Act.

[35] Lastly, for the sake of clarity I remind the parties that the Respondent must also redact the invoices to protect the confidentiality or privacy of other unit owners

under section 55 (4) (c) of the Act. In this regard, I note that Mr. Thomson made the somewhat novel argument that information about other unit owners that appears in the invoices should not be redacted, since they only appear there "in their role as adversaries" and not "in their statutory capacity as unit owners". This argument is not correct. Clearly such entries would not escape the application of litigation privilege with respect to those other owners' proceedings; but, also, the argument is not consistent with either the language or the spirit of the Act. There is no basis for reading into section 55 (4) (c) an additional qualification that depends upon the capacity in which the owner is being referenced in the record.

[36] Mr. Thomson made a similar (though contrary-seeming) argument to the effect that entries in the invoices relating to Emerald should not be redacted, despite the otherwise valid application of privilege and section 55 (4) (b), since Emerald's request for records was being made in its capacity as a unit owner and not in its capacity as a legal adversary. This qualification is also not reasonably read into the Act. While inventive, I find this to be an inappropriate attempt to undermine the valid application of privilege. Further, in effect, it seeks to rely on the provisions of section 55 (5) (c) to create an exception to the application of section 55 (4) (b), to which it does not apply. A proper reading of the statute will not find its provisions in such direct competition. Therefore, when redacting the records, the Respondent is permitted to also redact parts that relate to the Applicant, if they are the proper subject of privilege or relate to actual or contemplated litigation and have not otherwise been waived, having consideration to the principles and directions set out above.

ISSUE 6: PENALTIES & COSTS

A. Penalty under section 1.44 (1) 6 of the Act

[37] Under section 1.44 (1) 6 of the Act, the Tribunal is empowered to award a penalty, payable to the Applicant in the particular case, against a condominium corporation that has without reasonable excuse refused to permit the Applicant to examine or obtain copies of properly requested records. The maximum penalty is $5000.

[38] A penalty in the amount of $1000 was awarded against the Respondent in one of the Applicant's previous cases, *Emerald PG Holdings Ltd. v Toronto Standard Condominium Corporation No. 2519*, 2020 ONCAT 24. The penalty was based upon the Respondent having failed to understand its obligations. The Tribunal identified that the Respondent had refused to provide documents on the erroneous basis that they were not "core records." The penalty was awarded despite the fact that the Respondent later agreed to provide the refused records to the Applicant.

[39] The Respondent's refusal to provide records in this case is more egregious than in that earlier case. At the time of Emerald's December 16, 2020, request for records, the Respondent knew its obligation to provide the records. Its decision not to do so was not based on an assessment of the Applicant's entitlement to them but was an arbitrary, defensive and/or possibly punitive measure based on its untested conclusion that Emerald had breached the earlier order. I do not find the nature of this refusal to be redeemed in any way by the fact that the Respondent relied upon the advice of its legal counsel in this regard.

[40] The purposes of awarding penalties have been set out well in other Tribunal decisions. They include that the penalty should both remind condominium corporations of their legal responsibilities under the Act and encourage them to take them seriously. Penalties may also signal to other potential parties what sort of conduct is not acceptable. Lastly, penalties may demonstrate the Tribunal's commitment to fair and complete resolution of condominium related disputes.

[41] While I do not ignore the possibility that the conduct of Mr. Eroltu or other representatives of the Applicant may have provoked the Respondent's decision to refuse to provide the records – a point about which the Respondent's legal counsel provided somewhat excessive information in closing submissions – I note, as has been observed by this Tribunal before, that good conduct is not a criteria or condition precedent for the exercise and satisfaction of a unit owner's rights under section 55 (3) of the Act.

[42] Regardless of provocation, a condominium corporation is accountable for its non-compliance, particularly when this is done deliberately and is not reasonably seen as necessary to protect some valid interest. Considering the principle of proportionality, the usual range of penalties awarded by this Tribunal, the substantially improper reasons for the Respondent's initial refusal to provide the records, and its continuing justification of that decision (despite ultimately agreeing to provide them), I find that a penalty of $2,000 is appropriate.

B. Penalty against the Applicant

[43] The Respondent also requested that a penalty be awarded against the Applicant in this case, in an unspecified amount, payable to the Tribunal. It suggested that the purpose of this penalty would be "to discourage [the Applicant's] behaviour and to compensate the CAT from the significant resources incurred."

[44] The Respondent provided no authority for this request, and, in fact, there is none. The Tribunal does not have authority to issue a penalty or, in effect, a fine against any party other than the penalty described in section 1.44 (1) 6. However, under

section 1.44 (1) 5 of the Act, the Tribunal does have authority to issue “an order directing a party to the proceeding to pay the costs of the Tribunal,” which might align in part with the Respondent’s request.

[45] However, not only is this a highly exceptional remedy, it is also not clear that this is the kind of order that the Respondent is actually seeking. The Respondent provides no details of extraordinary costs that might have been incurred by the Tribunal or any explanation of the circumstances that it believes might warrant an order that the Tribunal’s costs of the hearing be paid by the Applicant. In fact, the Respondent appears to have no reason for this request other than its desire that the Applicant should be penalized for its conduct in and management of this case.

[46] Finding no basis for a costs award under section 1.44 (1) 5 or authority for the proposed penalty, I cannot make the order that the Respondent requests.

C. Costs against the Respondent

[47] With respect to costs, although Emerald has not been entirely successful in this case, it has succeeded in demonstrating that the Respondent had no reasonable excuse to refuse to provide records, and it was not until Stage 2 of these proceedings that the Respondent agreed to provide them all. Further, although I have concluded that the Applicant had no evidence of a waiver of privilege by the Respondent, it was not unjustified for the Applicant to seek to ensure that the Respondent was reminded of its duty not to engage in excessive redaction. It is evident that not all the matters between these parties that are addressed in this decision could or would have been resolved by them at Stage 2. The Applicant not having been entirely unsuccessful or unjustified in these proceedings, it would be appropriate to order the usual costs award in the amount of $200. For reasons set out below, however, the Applicant will not be entitled to this award.

D. Costs against the Applicant

[48] The Respondent also sought an award of costs under section 1.44 (1) 4 of the Act payable by the Applicant, in the amount of $5,000, to compensate it in part for its management and legal fees incurred on account of these proceedings. No bill of costs or other evidence or analysis was provided to explain how this figure was determined. The Respondent simply states that its actual legal fees would greatly exceed this amount. No information was provided relating to management fees.

[49] This request was made under Rules 45.1 and 46.1 of the Tribunal’s rules that were in effect at the time of these proceedings. Although the rules were recently amended, since submissions in this case concluded prior to those amendments being made, my decision will be made based on the rules relied on by the parties

in making their submissions.

[50] Rule 45.1 referred to reimbursement for Tribunal fees and other expenses directly related to the proceedings or related to a party's unreasonable behaviour or delays during proceedings. Rule 46.1 provided that the Tribunal would not order a party to pay another party's legal fees unless there are exceptional reasons to do so.

[51] With respect to Rule 46.1, the Respondent cited four reasons it considers to be exceptional. One of the reasons cited is the conduct of Mr. Thomson and Mr. Eroltu in circumstances outside of these proceedings, including in connection with other, prior Tribunal cases. This is not an appropriate consideration for a costs award in the present case and will not be considered.

[52] The other reasons concern the following conduct that is relevant to these proceedings:

1. That Emerald allegedly refused to "negotiate or concede on any issues";

2. That Emerald caused the proceedings to be delayed by requiring proof of the legitimacy of the appointments of the Respondent's representatives in this case (a matter that was addressed during the hearing, and their authorization was verified); and

3. Mr. Eroltu's excessively rude and disruptive conduct during examinations.

[53] The relevant question to justify an award of costs is not whether these matters caused some delays, distractions, or irritation to the Respondent in the proceedings, but whether they are exceptional. Of the three grounds cited, I find that only Mr. Eroltu's conduct during examinations might be viewed as exceptional. Regarding the other two, while an overly positional approach might not help to produce a voluntary and amicable settlement, a party should not be penalized in costs simply because it maintains a belief that its position is correct or refuses to concede to its opponent's point of view; and, although it was determined the Respondent's representatives were properly authorized, the Applicant's questions in this regard were not without reason.

[54] Regarding Mr. Eroltu's conduct, it is plausible that there are some genuine causes for Mr. Eroltu's frustration with the Respondent and its representatives, but these do not justify his persistent rudeness, aggression, and disruptive behaviour during witness testimony which both complicated and extended the time taken in that part of these proceedings unnecessarily. In the colloquial sense, such behaviour was clearly exceptional. However, I note that in other Tribunal decisions, exceptional

reasons giving rise to an award of costs relating to legal fees have been defined as circumstances that are “grossly unreasonable” or have “unduly complicated” the proceedings, where a party has acted “in bad faith or with malice”. Merely being unreasonable, rude, impolite, or irascible, and causing some delay or irritation during the proceedings, will not rise to this level. I therefore find that there is no basis for the award of costs sought by the Respondent.

[55] As noted above, Rule 45.1 offered the possibility of reimbursement for expenses directly related to the proceedings, including a party’s unreasonable behaviour or delays. While I have found that Mr. Eroltu’s behaviour during the witness testimony portion of these proceedings was not exceptional for the purposes of Rule 46.1, it was unreasonable, and it did create delays and difficulties during that part of the hearing which justify a costs award under Rule 45.1. I note that Mr. Barkin, the Respondent’s condominium manager, was the lead representative throughout the hearings. He is neither a lawyer nor a paralegal, and so reimbursement of costs incurred on account of his participation properly fall within the ambit of that rule.

[56] Although the Respondent provided no specific details or bill of costs, it submits that it did incur additional management fees with respect to these proceedings, and I have no reason to doubt that this is true. Lacking precise details, I cannot order the significant costs award requested by the Respondent; however, given that the basis for the award is the conduct of the Applicant’s principal, Mr. Eroltu, I award the Respondent costs in the same amount as I determined above should be awarded to Emerald, with the result that each award exactly sets off the other and, as a result, each party shall bear entirely its own costs of these proceedings.

ORDER

[57] It is hereby ordered that:

1. Within seven (7) days of the date of issuance of this order, the Respondent shall, without charging any fee, provide the Applicant with copies of the following records requested in the Applicant’s request for records of December 16, 2020, if not already delivered by the time this order is issued:

    a. Mutual use agreements (also known as shared facilities or reciprocal agreements) mentioned in sections 113 or 154 (5) of the Act; and

    b. The Respondent’s "Aged Receivables Report" current as of December 16, 2020;

2. Within thirty (30) days of the issuance of this order, the Respondent shall pay

to the Applicant a penalty under section 1.44 (1) 6 of the Act in the amount of $2,000;

3. Within thirty (30) days of receipt by the Respondent of payment in the amount $1,070 from the Applicant, the Respondent shall prepare (including making such redactions as are necessary) and provide the Applicant with the following records:

    a. The Respondent's General Ledger for the period of May 1, 2019, through December 16, 2020;

    b. All instruments appointing a proxy, or ballots, for the Respondent's owners' meeting held on August 19, 2020;

    c. Records relating to determinations about the invalidity of certain proxy forms and ballots on August 19, 2020;

    d. Records showing how many unit owners were barred from voting on August 19, 2020, having been deemed to be in arrears of the payment of common expense contributions for more than 30 days;

    e. Copies of paid and outstanding invoices issued to the Respondent by Agro Zaffiro LLP up to December 16, 2020;

    f. Copies of paid and outstanding invoices issued to the Respondent by Miller Thomson LLP from May 1, 2016, through to December 16, 2020; and

    g. Copies of paid and outstanding invoices issued to the Respondent by Deacon, Spears, Fedson and Montizambert LLP up to December 16, 2020;

4. In making its redactions of the foregoing records, the Respondent shall comply with the direction set out in this decision to redact minimally and only what is necessary to satisfy the exceptions set out in section 55 (4) of the Act and any actually applicable legal privilege that has not been waived, and upon delivery of the records to the Applicant shall also provide the Applicant with the statements required under section 13.8 (1) (b) of Ontario Regulation 48/01;

5. Further, upon delivery of the said records, the Respondent shall also provide the Applicant with the statements relating to the actual costs of redacting and producing the records as required under section 13.8 (1) (c) of Ontario

Regulation 48/01, based upon a rate for labour of $30 per hour and a cost per copy of $0.20, and the Applicant and Respondent shall make the applicable adjustment as described in section 13.8 (1) (d) or section 13.8 (2) of the said Regulation; and

6. Each party shall bear its own costs of these proceedings.

Michael Clifton
Vice-Chair, Condominium Authority Tribunal

Released on: February 23, 2022