

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: November 24, 2023

CASE: 2023-00351SA

Citation: Cohen v. York Condominium Corporation No. 205, 2023 ONCAT 179

Order under section 1.47 of the *Condominium Act, 1998*.

Member: Brian Cook, Member

The Applicant,

Suzanne Cohen
Self-represented

The Respondent,

York Condominium Corporation No. 205
Represented by Colette Dagher, Agent

Hearing: Written Online Hearing – August 4, 2023 to October 11, 2023

REASONS FOR DECISION

A. INTRODUCTION

- [1] This Application alleges that York Condominium Corporation No. 205 (“YCC 205”) did not do the things it said it would do in a settlement agreement reached with Suzanne Cohen, a unit owner.
- [2] The settlement agreement resolved an earlier application from Ms. Cohen seeking access to records. The settlement agreement is dated June 9, 2023, and states that it fully resolves the issues in dispute.
- [3] The present Application was dealt with in writing and with a conference call with the parties on September 21, 2023.
- [4] For the reasons that follow, I conclude that the settlement agreement obliges YCC 205 to do certain things even though they are things that the Tribunal would not have the jurisdiction to order following a hearing. I also find that some of the terms in the settlement agreement are not permitted by the legislation and conclude that YCC 205 is not obliged to do those things.

B. BACKGROUND

- [5] Ms. Cohen was previously the president of the YCC 205 board of directors. At the conference call, she indicated that her concern and the reason she brought the initial application seeking the records as well as this current application is that she believes that some of the records provided to the owners are either not accurate or are insufficient.

C. ANALYSIS

What is a settlement agreement?

- [6] A settlement agreement is a legally binding contract between the parties, setting out terms the parties have jointly agreed to. The ability of parties to settle disputes instead of litigating is an important component of dispute resolution systems. For disputes arising out of condominium living, settlement promotes the objectives of collaborative problem solving and reduced frictions between people living in close proximity with shared resources. It allows the parties to craft their own solutions rather than having them imposed through adjudication.
- [7] The Tribunal encourages settlement. Stage 1 of the Tribunal's process, called negotiation, allows the parties to find a way to settle the case on their own without any assistance from the Tribunal. In Stage 2, a Tribunal member is assigned as a mediator to facilitate settlement discussions. If a mediation leads to settlement, the settlement is codified in a settlement agreement. If a party believes that another party has not complied with the settlement agreement, they may make a contravention of settlement application with the Tribunal. Section 1.47(6) of the *Condominium Act, 1998* ("the Act") provides that if the Tribunal determines that a party has contravened the settlement, "the Tribunal may make an order that it considers appropriate to remedy the contravention." An order of the tribunal can be enforced by the courts.
- [8] The parties to a settlement agreement can ask the tribunal to issue a settlement agreement as a consent order. In that case, an allegation that the settlement has been contravened is dealt with directly by the courts.
- [9] In this case, the parties agreed to a settlement agreement. Ms. Cohen alleges that YCC 205 has not complied with the settlement and has applied to the Tribunal for an order requiring compliance.
- [10] As discussed below, the settlement agreement obliged YCC 205 to do certain things that are not things that the Tribunal might not have the jurisdiction to order following a hearing. A recent decision of the Tribunal casts doubt on whether the Tribunal has the jurisdiction to enforce terms of a settlement agreement that

includes terms that are not things that the Tribunal could order following a hearing. In *Petersen v. Durham Condominium Corporation No. 139*, 2023 ONCAT 154 (“*Petersen*”), the adjudicator stated:

It should not be the case that parties to a Tribunal proceeding can simply make any agreement they wish as part of their settlement of that case and expect that the Tribunal can enforce it later on. The Tribunal has a limited jurisdiction established by statute. It cannot exceed that jurisdiction. If, for example, parties were to agree to the registration of a lien, or eviction of an individual from their home, how could the Tribunal be entitled to order compliance with such provisions, when it could not address or order either of them if they had been requested in a new application? (See section 1.36 of the Act for the Tribunal's clear restriction against dealing with those particular issues.) An interpretation of subsection 1.47 (6) of the Act that allows the Tribunal to enforce provisions of a settlement agreement regardless of whether they would otherwise fall within the Tribunal's jurisdiction seems to result in a likely unintended (by the legislature) potential override of the legislated limitations placed on that jurisdiction.

- [11] In my view, a settlement agreement does not have to mirror a result that might happen if the case were to proceed to adjudication instead of settlement. A settlement might include terms that would not be the subject of an order of the Tribunal, but which may be important to the parties. It is often the ability of the parties to craft their own solution that makes settlement preferable to an adjudicated outcome.
- [12] As noted in *Petersen*, there is nothing in the language of section 1.47 to suggest that a settlement can only include terms that the Tribunal would have jurisdiction to make following an adjudication. *Petersen* suggests that this broad language is unintended and that a limitation on the extent of terms that can be in an agreement can be inferred to avoid a jurisdictional overreach.
- [13] On this point, I note that decision makers are required to give legislation “such fair, large and liberal interpretation as best ensures the attainment of its objects” (section 64(1) of the Legislation Act, 2006). As discussed earlier, settlement between the parties encourages respectful and collaborative relationships between people living in condominiums, which is an objective of the Act. This argues for a liberal interpretation of section 1.47.
- [14] I do, however, agree with *Petersen* that there are limits on the Tribunal's power to enforce a settlement term. As noted in *Petersen*, there are some things that the Act expressly states the Tribunal cannot deal with, including liens and eviction and potentially matters falling under section 117(1) of the Act (relating to potential

damage to the property or assets or potential injury or illness).

[15] I agree that the Tribunal would not have jurisdiction to enforce a term that involved a lien or an eviction or any other matter that the Act expressly provides that the Tribunal does not have jurisdiction to deal with.

[16] Another limitation on the enforcement of a settlement term is if the term contemplates a party doing something that it is not permitted under the Act – parties cannot contract out of the Act. As discussed below, that limitation arises in this case because one of the terms of the settlement requires YCC 205 to provide a record to Ms. Cohen that it is expressly not allowed to disclose.

[17] To summarize, in my view, the Tribunal's authority to remedy a contravention of a settlement agreement does not include the jurisdiction to enforce terms that the Act expressly states the Tribunal does not have jurisdiction to deal with. The Tribunal also cannot order a remedy that is contrary to the Act. However, subject to those limitations, the Tribunal does have general jurisdiction to remedy contraventions of a settlement agreement that require a party to do something or not do something even if that remedy is not one that the Tribunal would otherwise have the power to make. The jurisdiction to do that comes from section 1.42(1) of the Act, which gives the Tribunal exclusive jurisdiction to exercise the powers conferred on it under the Act. Those powers include the power to deal with alleged contravention of a settlement agreement under section 1.47.

The settlement agreement

[18] The settlement agreement deals with three categories of records: the record of leased units; the record of owners and mortgagees; and Periodic Information Certificates.

The record of leased units

[19] The Agreement includes three terms relating to the record of leased units:

2. YCC 205 acknowledges that for a record of notices of leased units to be considered adequate under s. 83(3) of the Act, it must contain, for each unit for which one or more notices has been received, an indication of the type of notice received (i.e. a notice of lease, or renewal or of termination) and the date on which each notice was received. The record should also include not only units that are currently leased, but all units for which one or more notices have ever been received.

3. YCC 205 undertakes to provide a revised list of the leased units - units 25, 76 and 78 - to include the lessee's name, the owner's address and copy of the lease renewal or a summary, within 14 days of this settlement agreement.
4. YCC 205 shall ensure that all reporting of leased units is consistent with PIC's, Status Certificates and Records.

[20] Ms. Cohen submits that she has not received the full record of notices of leased units that YCC 205 said it would provide. Although provided later than the 14 days agreed to, she did receive some information about units 25 and 76, but not concerning unit 78. She says the information provided for units 25 and 76 was not adequate.

[21] I accept that YCC 205 has not fully complied with term 3 above which required them to provide information about the three leased units identified. However, I find that there is a problem with the provisions of this term.

[22] Access to records is governed by section 55 of the Act. The provisions relevant to this decision are as follows:

55 (3) The corporation shall permit an owner, a purchaser or a mortgagee of a unit or an agent of one of them duly authorized in writing, to examine or obtain copies of the records of the corporation in accordance with the regulations, except those records described in subsection (4).

(4) The right to examine or obtain copies of records under subsection (3) does not apply to,

...

(c) subject to subsection (5), records relating to specific units or owners;

(5) Clause (4) (c) does not prevent,

(a) an owner, a purchaser or a mortgagee of a unit or an agent of one of them duly authorized in writing from examining or obtaining copies of records under subsection (3) if the records relate to the unit of the owner, the unit being purchased or the unit that is subject to the mortgage, as the case may be;

(b) an owner of a unit or an agent of the owner duly authorized in writing from examining or obtaining copies of records under subsection (3) if the records relate to the owner; or

(c) an owner, a purchaser or a mortgagee of a unit or an agent of one of them duly authorized in writing from examining or obtaining copies of the record that section 46.1 requires the corporation to maintain.

(6) Despite subsections (3) and (4), a corporation may disclose a record described in clause (4) (b) but shall not disclose,

...

(b) subject to subsection (5), a record described in clause (4) (c); or

[23] What all of this means is that an owner such as Ms. Cohen has a right to examine records relating to her own unit. Under section 55(5)(c), there is also a right to access the record of owners and mortgagees that is required under section 46.1. However, under section 55(6), a condominium cannot disclose records relating to specific units or owners. The information identified in term 3 is information relating to specific units or owners.

[24] As noted earlier, a term of a settlement agreement that requires someone to do something that is expressly not allowed under the Act cannot be enforced. The records concerning leasing of the three units identified in the settlement agreement are records concerning specific units or owners. It follows that they cannot be disclosed to Ms. Cohen.

[25] However, I interpret the settlement agreement as requiring YCC 205 to do more than it is required to do under the Act and to proactively contact the owners of the three units in question and obtain the required information about the lease of the unit if it is leased, instead of recording only the information received from those owners. However, when this information is collected, section 55(6) means that the record cannot be shared with Ms. Cohen.

[26] I interpret the requirement that YCC 205 ensure that all reporting of leased units is consistent with PIC's, Status Certificates and Records to mean that information about leased units in PICs, and Status Certificates be consistent with the information about leased units that YCC 205 receives.

Record of owners and mortgagees

[27] The settlement agreement includes the following provisions concerning the record of owners and mortgagees:

7. With respect to the record of owners and mortgagees, YCC 205 shall provide an updated list that contains the mortgagee information for each unit, the

correct address for service for the owner(s) of unit 76 and the method of communication chosen or consented to by the unit owners, whether by mail or email, within 14 days of this settlement agreement.

8. The Applicant acknowledges that the maintaining of the record of owners and [mortgagees] is the sole responsibility of YCC 205.
9. YCC 205 shall take steps to ensure that unit owners comply with their obligations regarding notices of lease and information required for the record of owners and mortgagees by issuing regular reminders once a year.

[28] Unlike the record of leased units, Ms. Cohen is entitled to access the record of owners and mortgagees.

[29] Section 46.1 requires the corporation to maintain a record of owners but only if the owner gives written notice to the corporation. Records of certain mortgagees are also only required to be maintained if the mortgagee gives written notice.

[30] Term 7 of the settlement agreement obliges YCC 205 to provide an “updated list” that includes the mortgagee information for each unit, the method of communication for each unit and the correct address for service for unit 76.

[31] I find that term 7 obliges YCC 205 to contact the owner(s) of unit 76 to ask for a correct address for service. I find that the term does not oblige YCC 205 to contact any other owners to clarify or confirm mortgagee information or the method of communication. YCC 205 is obliged to provide an updated list that includes information it has received from owners regarding mortgagee information and the method of contact as well as information received about the service address from the owner(s) of unit 76. This updated list shall be provided to Ms. Cohen within 14 days of the date of this decision.

[32] Ms. Cohen says that her own research indicates that there are errors in the record of mortgagees and method of communication she received after the settlement agreement. She says that she spoke to the owners of units 22 and 76 who told her they had gave the condominium manager the form to indicate they wished to have electronic communications, but they are listed on the record she received as receiving communication by mail. If Ms. Cohen believes that the owners of these units have advised that they wish to have electronic communication instead of communications by mail, she may advise the owners to ask YCC 205 to update the record. As Ms. Cohen notes, as a result of recent amendments condominiums can send communications electronically unless the owner has specified that they do not want to have electronic communications.

[33] Ms. Cohen suggests that the information collected about mortgagees should be available on the “Constair system”. The Constair system is not mentioned in the settlement agreement and there was no undertaking to make the record of mortgagees publicly available.

[34] The undertaking to send yearly reminders to owners to update ownership, mortgagee, and lease information is not something the condominium is required to do by the Act. However, it is now obliged to do this under the terms of the settlement agreement.

Period Information Certificates

[35] The settlement agreement included the following terms regarding PICs:

5. With respect to the two PICs for 2022, due May 30, [2022] and November 29, 2022, YCC 205 acknowledges that the PIC due May 30 was not sent to the Applicant on time. It was eventually prepared and sent August 22, 2022 but was undated, contrary to the Act, and contained errors. The second PIC was provided late on December 22, 2022.
6. YCC 205 undertakes to provide the PICs on or before their due dates May 30 and November 29 and to ensure that they are accurate and complete.

[36] Term 5 seems to be a statement of fact and not an undertaking to do anything. The acknowledgement that the May 2022 PIC was “not sent to the Applicant on time” might suggest that the undertaking in term 6 was to provide advance copies to Ms. Cohen to ensure they are accurate and complete. However, in the absence of clear language directing this result, I interpret the undertaking to be that the PICs will be sent to the owners on or before the due date and that the Board will “ensure they are accurate and complete”. In the absence of clear language to say that Ms. Cohen should have received advance copies of the PICs, I conclude that she will receive the PICs at the same time as the other owners. She then has the same rights as other owners to raise concerns about accuracy or completeness. On this point, I note that in her submissions Ms. Cohen notes that it is not her responsibility to point out errors in a PIC. Rather, it is her expectation that the information is reviewed to ensure it is accurate before it is sent out.

[37] In her submissions, Ms. Cohen indicates that in her opinion, there are continuing accuracy issues with respect to the May 2023 PIC. The settlement agreement is dated June 6, 2023 and the issues about the May 2023 PIC pre-date the agreement. If the intention of the parties was that something was to be done to correct the May 2023 PIC, this should have been identified in the agreement, but it

was not.

[38] The undertaking of the board with respect to PICs was to send them out on or before the due date and to ensure they are accurate and complete. If Ms. Cohen or any other owner believes the PICs are not accurate or complete, they can raise those concerns and the board may revise the PIC if it considers it appropriate to do so to ensure accuracy and completeness. I find that YCC 205 has not failed to do anything it undertook to do with respect to PICs. However, it has a continuing obligation to send the PICs to the owners on time and to ensure they are accurate and complete.

Costs

[39] Under the Tribunal's Rule 48, the unsuccessful party will be required to pay the successful Party's CAT fees unless the CAT member decides otherwise.

[40] In this case, the settlement agreement was ambiguous on some points which required clarification and included a term that is not permitted under the Act. In these circumstances, I find that the filing fees paid by Ms. Cohen in the amount of \$125 should be split between the parties. YCC 205 shall pay Ms. Cohen \$62.50.

Other remedies

[41] Ms. Cohen submits that at least two of the members of the board should be required to take an advanced director training program available through the Condominium Authority of Ontario. I am not satisfied that this proposed remedy is necessary in this case. The concerns that underlie the proposal seem to relate to general issues of management of a condominium. These are not directly related to the issues in dispute either in the original application or this current application.

D. CONCLUSIONS

[42] The settlement agreement in this case obliged YCC 205 to do various things. As discussed above, some of the things that YCC 205 agreed to are not things that they are obligated to do under the legislation, including proactively asking owners for information and sending reminders to owners. However, having agreed to do these things in the settlement agreement, they are now obligated. The settlement agreement also obliged YCC 205 to provide lease information about specific units. However, this is not something that is permitted by the Act.

[43] The history of this case suggests that there may be continuing issues regarding the records of the corporation as between these parties. Underlying the original application and the current application are concerns that Ms. Cohen has about

how the current board is managing the condominium, partly in comparison with how things were managed when she was on the board. It appears that Ms. Cohen already had the records she requested in the original application and that the reason for the request was to demonstrate deficiencies in the records.

[44] Owners clearly can use information to help ensure that the records of the condominium are accurate, and this appears to be a motivating factor in this case. However, going forward, it will hopefully be possible for the parties to find a more efficient approach.

E. ORDER

[45] The Tribunal Orders that:

1. Within 14 days of the date of this decision, YCC 205 shall contact the owner(s) of units 25, 76 and 78 to request the name of any lessee, the address of the owners of these units, and a copy of the lease renewal(s) or a summary. This information shall cover the period from January 2021 to April 6, 2023. YCC 205 shall advise Ms. Cohen when the information has been obtained and, if it has not been obtained within 14 days, what steps that have been taken to obtain the information. Pursuant to section 55(6) of the Act, Ms. Cohen is not entitled to access these records.
 2. Within 14 days of the date of this decision, YCC 205 shall contact the owner(s) of unit 76 to update or confirm a service address and provide Ms. Cohen with an updated list of owners and mortgagees that includes information it has received from owners regarding mortgagee information and the method of contact, as well as information received about the service address from the owner(s) of unit 76. YCC 205 is not obliged to contact other owners to update owner and mortgagee information.
 3. YCC 205 shall ensure that all future PICs are sent to owners on or before the due dates and ensure they are accurate and complete.
 4. YCC 205 shall send yearly reminders to owners to update ownership, mortgagee, and lease information.
 5. Within 14 days of the date of this decision, YCC 205 shall pay Ms. Cohen \$62.50, representing half of the cost of filing this Application with the Tribunal.
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Brian Cook
Member, Condominium Authority Tribunal

Released on: November 24, 2023