

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: September 12, 2024

CASE: 2024-00040R

Citation: Bogue v. Carleton Condominium Corporation No. 288, 2024 ONCAT 141

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

Member: Laurie Sanford, Member

The Applicant,

Margaret Ann Bogue

Self-Represented

The Respondent,

Carleton Condominium Corporation No. 288

Represented by Cheryll Wood, Counsel

Hearing: Written Online Hearing – April 30, 2024, to August 30, 2024

REASONS FOR DECISION

A. INTRODUCTION

- [1] On December 15, 2023, Margaret Ann Bogue, a unit owner in Carleton Condominium Corporation No. 288 (“CCC 288”), requested a set of records from CCC 288. One of these records requests was unresolved and is the subject of this hearing. This was a request for “emails, opinions etc.” received by CCC 288 from various professionals, including CCC 288’s auditors, concerning how to account for a specific expense. Advice from its auditors was referenced in the minutes of a June 21, 2023, Board of Directors of CCC 288 (the “Board”) meeting. CCC 288 took the position that the only document that met Ms. Bogue’s request was an email chain and that was not a record. CCC 288 also alleged that Ms. Bogue already had this email chain in her capacity as a former Board member of CCC 288 and was engaged in a fishing expedition.
- [2] Following the closing submissions and in response to a question from me, CCC 288 clarified that the auditor’s advice does not exist in writing. It was an oral communication that was recorded in an email exchange between the Property Manager and the Board. The Property Manager testified that the summary of her

conversation with the auditor is contained in the email chain and that no other email exists that meets Ms. Bogue's request. For the reasons set out below, I conclude that Ms. Bogue is entitled to the part of the email that summarises the oral communication or communications with the auditor and that CCC 288 is entitled to redact any other part of that email.

- [3] I also conclude that Ms. Bogue has made a good faith request for records that she may be entitled to in her capacity as a unit owner, as opposed to documents she may have obtained during her tenure as a Board member. While she did have the email chain in question, she raised other substantive issues in her request. This was not a fishing expedition. In fact, it is CCC 288 which has delayed this legitimate request by not candidly acknowledging at an early stage of the proceeding that the advice which CCC 288 received was given orally, and that there was an internal email that contained a report of it.
- [4] I find that CCC 288 has maintained adequate records in this matter. I conclude that CCC 288 should not face a penalty in this matter as they raised a novel legal question. I will direct CCC 288 to reimburse Ms. Bogue \$200 on account of her filing costs with the Tribunal.

B. ISSUES & ANALYSIS

[5] The issues in this case may be summarised as follows:

1. Is Ms. Bogue entitled to the records she is seeking as a unit owner?
2. Is Ms. Bogue entitled to a penalty because CCC 288 refused without reasonable excuse to provide the records?
3. Has CCC 288 failed to keep adequate records?
4. Is either party entitled to their costs of the proceeding?

Issue 1 – Is Ms. Bogue entitled to the records she is seeking as a unit owner?

- [6] Under subsection 55(3) of the *Condominium Act, 1998* (the "Act"), an owner has the right to examine or obtain copies of the records of a condominium corporation in accordance with the provisions of the Act and regulations to it. The term "record" is not defined in the Act or in the regulations but the Act states that a condominium corporation must keep "adequate" records, including enumerated records.
- [7] The minutes of a meeting of the Board dated May 17, 2023, noted "It was also suggested that the survey expense should be allocated to the Reserve Fund. [The

Property Manager] is to contact our auditor”. The Board met again on June 21, 2023. The minutes of the meeting record state, “Confirmation was received from our auditors that the \$15,820 expense for the property survey could be allocated to the Reserve fund as it relates to our original Declaration. This adjustment is to be made [*sic*] by [the Property Manager].” Ms. Bogue was a member of the Board during this period.

- [8] On December 15, 2023, Ms. Bogue requested copies of the following records from CCC 288: “Any and all emails, opinions etc. from legal counsel, auditors, engineers and property manager confirming costs for 2022/2023 property survey” from January 1, 2022, to the date of the request. At the time, the Board denied her request by saying, “The emails between the Board and consultants do not form records of the Corporation.”
- [9] At the hearing, CCC 288 argued that the only document which met Ms. Bogue’s request was an email chain between the Board and its Property Manager, which was not, in its submission, a record. This position was in apparent contradiction to the original response to Ms. Bogue, which refers to emails from consultants. CCC 288 also took the position during this hearing that Ms. Bogue had already received this email chain during her tenure as a Board member. CCC 288 stated that Ms. Bogue had made numerous previous requests for records and was presently on what it characterised as a “fishing expedition”.
- [10] Ms. Bogue testified to a conversation that she had with the Chairman of the Board following a September 2023 meeting in which she recalls him advising that there were emails from both CCC 288’s legal counsel and its auditor supporting charging the survey costs to the reserve fund. Ms. Bogue also testified that her understanding is that the Property Manager had more than one conversation with CCC 288’s auditors concerning how to account for the expense of the property survey.
- [11] At the conclusion of the hearing, CCC 288 clarified that the “confirmation from our auditors” referred to in the June 21, 2023, Board minutes was an oral confirmation. The Property Manager of CCC 288, who is also a registered Condominium Manager, but whose job title is Property Manager, testified. It was her testimony that only written mention of the auditor’s opinion was in an email chain containing “a discussion between myself and the Board of the oral conversation that I had with the auditor”. The Property Manager testified that this email chain is the only written document that meets Ms. Bogue’s request and that there are no emails from consultants that would. The Property Manager did not expressly refute Ms. Bogue’s understanding that she had more than one conversation with the auditor

on the subject of how to account for the expense of the property survey. CCC 288 produced the email chain with the body of the emails redacted.

- [12] The Chairman of the Board also testified. He recalled having the conversation with Ms. Bogue and other directors after the September Board meeting. He remembers referring to an email chain and concedes that it is possible that he mistakenly stated that the email was from the auditor rather than a report of a conversation between the auditor and the Property Manager. He testified that he did not refer to emails from legal counsel as he is not aware of any. While neither the Chairman nor the Property Manager testified expressly that no opinions from consultants in a format other than an email exist, I conclude, taking their testimony as a whole, that this is what was meant. I conclude that none of the other emails and opinions from legal counsel or engineers that Ms. Bogue requested exist.
- [13] The question remains is whether Ms. Bogue is entitled to the email chain, or any part of it, that references the auditor's confirmation that the property survey costs could be charged to the reserve fund. Not every document received by a condominium corporation, including documents reporting or containing advice, is a record. In the case of *Kai Sin Yeung v Metropolitan Toronto Condominium Corporation No. 1136*, 2019 ONCAT 11 (CanLII) ("Yeung"), the Tribunal considered a request for email correspondence relating to the renewal of a gas contract. The board of directors had referred to an email in the minutes of a board meeting saying that the renewal of the gas contract, "has already been approved by the board via e-mail". The decision of the Tribunal that the applicant was not entitled to the email correspondence was primarily based on the condominium corporation's testimony that the email no longer existed. However, the Tribunal also opined that, if the email had survived, it would not have been a record of the corporation. The Tribunal found, "Section 55(2) of the Act speaks to condominium corporations keeping a minute book containing the minutes of owners' meetings and board meetings. It does not require a condominium corporation to keep a transcript of discussions (oral or by email) between directors within or beyond duly constituted Board meetings."
- [14] In the case of *Ronald Smith v Metropolitan Toronto Condominium Corporation No. 773*, 2019 ONCAT 24 (CanLII) ("Smith"), the Tribunal ruled, at paragraphs 34 and 35, that the list of records set out in section 55 of the Act is not exhaustive. Property management reports "are drafts or notes and only become a record of the corporation to the extent that they are accepted by the Board and reflected in the minutes of a Board meeting."
- [15] In this case, the minutes of the Board first referred to seeking the auditor's opinion

by asking the Property Manager to obtain it and then to the auditor's confirmation. The Property Manager testified that she spoke with the auditor and prepared a written summary of the discussion. This, according to her testimony, is the only written report of the conversation. The *Yeung* case is distinguishable from the present situation. Here we have an instruction from the Board to the Property Manager to obtain an opinion from the auditor, followed by a summary of the conversation contained in an email from the Property Manager to the Board, which was accepted by the Board and recorded in the Minutes of the June meeting. The Tribunal adopts the reasoning in the *Smith* case. The fact that the underlying auditor's opinion was delivered orally does not change the fact that the reference to that opinion in the email from the Property Manager to the Board became a record of CCC 288 when the Board accepted it and reflected it in the Board meeting minutes.

- [16] CCC 288's argument that Ms. Bogue already had the email in her capacity as a director ignores that fact that while directors of a condominium may have access to a range of documents created for or received by a condominium corporation, unit owners only have an entitlement to the subset of those documents which constitute records. By the same token, although directors may have restrictions, such as confidentiality restrictions, on the use to which they may put the documents they receive, a unit owner will usually gain access to records without restriction. Therefore, the distinction between documents which Ms. Bogue has as a director and the records she is entitled to receive as a unit owner is significant. Having said that, if the only reason Ms. Bogue brought this Application was to determine which documents already in her possession she was entitled to in her capacity as an owner, that would have been a misuse of the Tribunal. However, in this case, Ms. Bogue was also seeking other records that she understood had been referred to in her conversation with the Board Chairman.
- [17] CCC 288 alleges that Ms. Bogue is on a fishing expedition with this request. Fishing expeditions are characterised by their wide range, either in the types of documents sought or the date range. In this case, Ms. Bogue's request is very specific and targeted. There is no persuasive evidence that Ms. Bogue is on a fishing expedition.
- [18] In fact, this proceeding might have been substantially shortened, if it was necessary at all, if CCC 288 had been candid at the beginning of this proceeding in saying that the auditor's confirmation was oral and that the only written evidence of it was in the report of the conversation by the Property Manager to the Board and that no other opinions of outside consultants exist.

[19] I conclude that Ms. Bogue is entitled to that part or those parts of the email chain between the Property Manager and the Board of CCC 288 that summarise the conversation, or conversations, if there were more than one, that the Property Manager had with the auditor concerning the auditor's confirmation that the expense for the property survey could be allocated to the reserve fund. All other parts of the email chain may be redacted.

Issue 2 - Is Ms. Bogue entitled to a penalty because CCC 288 refused without reasonable excuse to provide the records?

[20] Under subparagraph 1.44 (1) 6 of the Act, the Tribunal may order a penalty if it considers that a condominium corporation has refused access to records without reasonable excuse. The question of when reports from a condominium or property manager or from a property management provider to the board of directors are records was litigated and decided in the *Smith* case. However, the *Yeung* case on which CCC 288 relied finds, as a secondary matter, that transcripts of email discussions between directors that take place outside meetings are not records, even when the fact that email exchanges have occurred is referenced in the minutes. The present case raises the novel question of whether an email chain prepared in the circumstances of this case could be considered a record to which Ms. Bogue was entitled. Therefore, I will assess no penalty against CCC 288.

Issue 3 – Has CCC 288 failed to keep adequate records?

[21] CCC 288 submits that there is no requirement for it to have obtained the auditor's opinion in writing. It had the account of the conversation from its Property Manager, and it duly recorded the fact of the confirmation in its minutes. I agree. The reference to the confirmation in the minutes, supported as it was by the email containing an account of the conversation, was an adequate record. Whether it would have been an adequate record in the absence of the email account of the conversation is not a question I need to decide.

Issue 4 – Is either party entitled to their costs of the proceeding?

[22] Under Rule 48.1 of the Condominium Authority Tribunal's Rules of Practice, effective January 1, 2022, the successful party will usually be entitled to the reimbursement of the filing fees paid to the Tribunal. I will direct CCC 288 to pay Ms. Bogue the amount of \$200 on account of the filing fees she paid to the Tribunal. I make no other order as to costs.

C. ORDER

[23] The Tribunal orders that:

1. CCC 288 will provide Ms. Bogue with that part or those parts of an email chain between its Property Manager and the Board of Directors of CCC 288 that summarise the conversation(s) between the Property Manager and the auditor of CCC 288 concerning the auditor's confirmation that the \$15,820 expense for the property survey could be allocated to the reserve fund. All other parts of the email chain may be redacted.
2. CCC 288 will reimburse Ms. Bogue the amount of \$200 for the fees she has paid to the Tribunal in filing this application.

Laurie Sanford
Member, Condominium Authority Tribunal

Released on: September 12, 2024