CONDOMINIUM AUTHORITY TRIBUNAL

DATE: August 11, 2022
CASE: 2022-00117R
Citation: Gale v. Halton Condominium Corporation No. 61, 2022 ONCAT 85

Order under section 1.44 of the Condominium Act, 1998.

Member: Susan Sapin, Member

The Applicant,
Jack Gale
Self-Represented

The Respondent,
Halton Condominium Corporation No. 61
Represented by Antoni Casalinuovo, Counsel

Hearing: Written Online Hearing – May 16, 2022 - July 11, 2022

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant, Jack Gale, is a unit owner of Halton Condominium Corporation No. 61 ("HCC61"), the Respondent.

[2] Mr. Gale submitted two Requests for Records to HCC61; the first on January 7, 2022, regarding elevator noise complaints, and the second on January 10, 2022, regarding a Reserve Fund Study (RFS). HCC61 provided the records, and there is no dispute about that.

[3] At mediation, the parties agreed that the sole, and narrow, issue to be decided in this case is whether a single set of board meeting minutes dated November 21, 2021, adequately reflect certain facts about the elevator noise complaints and the RFS.

[4] Arthur Alkerton, who co-owns the unit with Mr. Gale, provided a witness statement and shares Mr. Gale's concerns.

[5] HCC61 submitted that Mr. Gale's records requests at issue in this hearing were made for an improper purpose and were an abuse of process, because they are

two of a long line of requests and CAT applications whose purpose they submit is to harass and undermine HCC61's board of directors. HCC61 asked that I impose sanctions and/or an order to restrict Mr. Gale's ability to file further applications with the CAT, otherwise he will continue to abuse the CAT's process. As HCC61 tendered evidence in support of this submission, I added this issue to the hearing, with the proviso that I would only consider it if the first issue about adequacy of the November 21, 2021, minutes proved to be without merit. Mr. Gale's concern is that HCC61's board minutes are not transparent and lack sufficient detail for unit owners to understand what is happening in their condominium and how it is being managed.

[6] For the reasons set out below, I find that Mr. Gale has not established that the November 21, 2021, minutes are inadequate. I decline to issue an order restricting Mr. Gale's ability to file future CAT applications. However, I find an order of costs against Mr. Gale to be appropriate in this case.

B. <u>ISSUES AND ANALYSIS:</u>

[7] The issues to be decided in this hearing are:

1. Are the November 2021 board minutes "adequate" in accordance with subsection 55 (1) 2 of the *Condominium Act* (the "Act"), i.e., has the Respondent failed to keep adequate records?

2. Is the Applicant's Request for Records an abuse of process because it was submitted for an improper purpose?

3. Should the Tribunal order costs and/or a penalty?

Issue #1: Has the Respondent failed to keep adequate records, because the November 21, 2021, board meeting minutes do not contain sufficient detail to satisfy the Respondent's duty to keep adequate records?

[8] Subsection 55 (1) of the Act requires that a condominium corporation keep "adequate records," including a minute book containing the minutes of board meetings.

a. Elevator noise

[9] Mr. Gale submits that the following extract from the November 22, 2021 minutes is inadequate:

> *"5.2.6.* ***Elevator Noise:*** *Reported elevator noise will be addressed by having Directors confirm with residents if the noise has persisted since TSSA was onsite four weeks ago. If so, Trident will be called in to verify if counter-weight rollers need to be replaced."*

[10] Trident is the elevator service company. Mr. Gale submits that this record is inadequate because nothing is mentioned about correcting the issue; elevator noise was not brought forward in the minutes of December 2021; the minutes of the January 2022 meeting stating what repairs had been made were silent about "the various survey/test/investigation;" and it was not minuted that Mr. Wooller [a Director] or Mr. Behn [President] were to intervene in the elevator noise or that the board had authorized them to investigate. Mr. Gale further submits the February 2022 minutes were also inaccurate because they "confirmed that the knocking noise has been resolved, which in fact it hadn't been, as I was still complaining." The December 2021 and January and February 2022 minutes were not submitted as evidence in this hearing.

[11] From his submissions, the heart of Mr. Gale's concerns appears to be that the elevator noise persisted from the time of his first complaint to the condominium manager on October 17, 2021, until the noise problem was finally resolved to his satisfaction in April 2022, and that the November 2021 and later minutes do not reflect that the noise problem was ongoing. To support this claim, Mr. Gale submitted 51 emails to and from the condominium manager and various board members that document his complaints.

[12] I find Mr. Gale's submissions to be without merit for two reasons.

[13] The first reason is that, to the extent that Mr. Gale's issue is that he disagrees that the board dealt with the noise complaint in a timely fashion, this is a complaint about board governance, i.e., how the corporation managed the elevator noise issue. Governance issues are outside the jurisdiction of this Tribunal in a records case. The issue before me is whether the minutes of November 2021 are adequate, not whether the corporation failed to address the elevator noise issue in an appropriate or timely way.

[14] The second reason is that I do not find the November 2021 minutes to be inadequate. As stated in *Rahman v. Peel Standard Condominium Corporation No.* 779, 2021 ONCAT 32 (CanLII) at paragraph 20, it is well settled law at this point that the purpose of minutes is to document a board's business transactions and to show how the corporation's affairs are controlled, managed, and administered. There is an implied requirement that the minutes be accurate, but the Act does not impose a requirement for comprehensive facts and detail surrounding every

decision. Minutes are not required to be a verbatim account of a meeting.

[15] According to the witness statement of Jurgen Behn, president of the board of directors of HCC61 since June 29, 2017, the Board believed the elevator noise was resolved as of November 21, 2021, because "... Trident had been on site several times and subsequent to their last attendance Trident informed HCC61 that all prior noise issues appeared to be resolved." Mr. Behn further testified that, "If HCC 61 was wrong, it had a plan in place to address the issue namely the re-engagement of its elevator service contractor Trident. This is reflected in the minutes of the November 21, 2021, meeting at section 5.2.6."

[16] I prefer the evidence of Mr. Behn over that of the Applicant, as the bulk of the 51 emails tendered by the Applicant are post November 21, 2021. Many of these emails confirm the testimony of Mr. Behn, that the board continued to engage with Mr. Gale and investigate the elevator noise. Minutes are, and should be, an accurate record of what was known at the time of a board meeting and what was discussed there. I find the minutes reflect what the board knew and believed about the state of the elevator noise at the time of the November 2021 meeting and that they indicate what specific action would be taken.

[17] As for Mr. Gale's concern that the November 21 minutes did not specify that the board had authorized Mr. Behn or Mr. Wooler to investigate ongoing complaints, I agree with the reasoning in *Tanner-Kaplash v. Middlesex Standard Condominium Corporation No. 564,* 2020 ONCAT 44 (CanLII) at paragraph 47, that there is no obligation to provide the "granular" level of detail that the Applicant is seeking. Minutes may not contain the detail an applicant would prefer but may nevertheless contain sufficient detail to be adequate. In this case, I find the statement in the minutes, that "Reported elevator noise will be addressed by having Directors confirm with residents if the noise has persisted since TSSA was onsite four weeks ago," adequately reflects the action the board was prepared to take at that time.

[18] The parties agreed that only the November 21, 2021, minutes were in dispute.

b. The Reserve Fund Study

[19] The Applicant submits that item 5.1.4. of the November 21, 2021, minutes approving a 0% increase in Reserve Fund contributions is inadequate. This paragraph reads:

> *"Final Reserve Fund Study and Notice of Future Funding: Mr. Wooller asked to be on record as opposing the recommended zero-percent increase in Reserve Fund Contributions for three years, preferring a rise of one percent per year.*

On a motion by Mr. Koehli, seconded by Mr. Rowan, it was resolved that the final Reserve Fund Study Cion Coulter, dated November 16, 2021, with a zero percent increase in Reserve Fund contributions for each of 2022, 2023, and 2024, be approved, and that the Notice of Future Funding be issued to Owners."

[20] Although Mr. Gale's submissions are not entirely clear on this point, his argument appears to be that this paragraph of the minutes is inadequate because it lacks detail and does not show how the decision to impose a 0% increase was arrived at, and neither do previous board minutes. Specifically, Mr. Gale submits that:

1. The minutes of March 22, 2021, indicate that the "Board Executive will compile a list of Reserve Fund items completed and contemplated".

2. The minutes of June 21, 2021, indicate the Reserve Fund Study was deferred to the next board meeting, but there were no details about what the review was all about.

3. The minutes of July 26, 2021, indicate that approval for the Updated Reserve Fund Study was deferred, but do not indicate what was being approved or why it was deferred.

[21] Mr. Gale requested and obtained a copy of the Reserve Fund Expense tables, and he also received a copy of an email to the board from Cion Coulter, the reserve fund engineer, recommending a 0 % increase because the reserve fund was well-funded.

[22] According to Mr. Gale, there is no record in any of the minutes of a draft version of the Reserve Fund Study, or when or if it was reviewed, and no minuted explanation for a reduction of one of the Reserve Fund items in the expense tables from $1.5 million to $35,000. This item refers to fireplaces in the units which are planned to be converted from gas to electric in 2027. According to Mr. Gale, the proposed fireplace conversion has been the subject of much disagreement between owners and the board, and several meetings were held to discuss it. He submits that there are no minutes about providing an explanation to unit owners for why the fireplaces are being switched from gas to electric in 2027.

[23] I find Mr. Gale's arguments to be without merit. The issue in this application is not the adequacy of HCC61's decision-making or its minutes overall, including the previous minutes mentioned. It is about the adequacy of the November 21, 2021, minutes specifically. Previous minutes are not part of this application, were not submitted in evidence, and are not the subject of this decision. Item 5.1.4 of the November 21, 2021, minutes records the decision of the board to adopt the Final Reserve Study with a 0% funding increase and appears to be an accurate

statement of what occurred at the meeting.

[24] I find that Mr. Gale is requesting a level of detail that is not required in board meeting minutes, which in this case set out the decision taken by the board. In any event, in this particular circumstance, further detail is available in the Reserve Study itself. A Reserve Fund Study is a core record a corporation must keep. Under s. 94 (8) and (9) of the Act, the corporation must review the study within 120 days of receiving it and propose a plan for future funding. Within 15 days of proposing the plan, the board must send owners a notice containing a summary of the study, a summary of the proposed plan and a statement indicating any areas where the proposed plan differs from the study. It must also send a copy of the study, the proposed plan and the notice sent to owners, to the auditor. Furthermore, any unit owner is entitled to receive a copy of the Reserve Fund study on request.

[25] As noted in paragraph 17 above, there is no obligation to provide the level of detail that the Applicant is seeking. In this case, I find the November 21, 2021, minutes, on their face, clearly communicated the nature of the decision being made by the corporation. As such, I find that they are adequate.

Issue #2: Is the Applicant's request for records made for an improper purpose and/or an abuse of process or vexatious?

[26] HCC61 submits that, while the Act does not require an owner to state their purpose or reason when requesting a record, the evidence shows that Mr. Gale's motivations are to intimidate and undermine the Board, and to abuse the CAT's process for political ends. Hence, the corporation is seeking that the CAT make a negative inference that Mr. Gale's records requests, the lack of merit of the records issue in dispute, and this application were all initiated by Mr. Gale for an improper purpose. HCC61 asks that I impose sanctions and/or an order that restricts Mr. Gale's ability to file further applications with the CAT, otherwise he will continue to abuse the CAT's process.

[27] In support of its submissions, HCC61 submitted the following:

1. A previous CAT case involving the parties (2019 ONCAT 46, issued November 8, 2019), where the member found that:

   [33] There is evidence that Mr. Gale has in the past abused the records request process by emailing requests rather than using the prescribed form and by approaching people other than the staff of HCC61. While this pattern of conduct is troubling, it is not, in itself, grounds for denying his request in this case.

And where the Member also stated:

[41] I would caution Mr. Gale that if in a future proceeding it were determined that he had abused the records request process, there might be cost consequences. In the circumstances of this case, however, no costs award will issue.

2. The testimony of Jurgen Behn that Mr. Gale and Mr. Alkerton have made 70 records requests since November 2017 and sent over 1000 emails either demanding records or complaining about services or undermining HCC61's board decisions since December 2018;

3. The testimony of Jurgen Behn that Mr. Gale has commenced nine applications regarding requests for records to the CAT since its inception, including the previous CAT case above and the current application; and

4. The testimony of Jurgen Behn that in the seven previous CAT applications, the parties either settled because the "the Applicant changed the scope of records sought to something they were entitled to or withdrew the application because the requests were improper."

[28] In his submissions, Mr. Gale admits to a letter writing campaign against the board because he feels it is not transparent. Mr. Alkerton testified that the transparency of board minutes has been a concern of his for many years. Mr. Gale's position is that settling matters at Stage 2 is part of the process of CAT proceedings, and "it's not about abusing the system, trying to get answers and using the proper channels as the Board will not respond to letters requesting information as it's lacking in HCC61 not being transparent. [sic]" In his witness statement, Mr. Alkerton agrees with Mr. Gale's concerns that the board of HCC61 is not transparent.

[29] I have no reason to doubt Mr. Behn's testimony, nor any reason to doubt his belief that the barrage of emails HCC61 receives from Mr. Gale and/or Mr. Alkerton are for the purpose of intimidating, undermining, and challenging the board. I find it evident from the testimony of Mr. Gale and Mr. Alkerton that they do not agree with how the condominium is managed. Both parties agree that the acrimony between the parties is longstanding and began after Mr. Alkerton abruptly resigned from the board in 2006. I find the evidence, including reference to a board email where board members are urged to put their "personal feelings" towards Mr. Gale aside in order to resolve an issue, indicates that the disputes between the parties have a personal component.

[30] In a previous decision involving the parties, Jack Gale v. Halton Condominium Corporation No. 61, 2019 ONCAT 46, the Member found the Tribunal has no

authority to intervene in a battle of wills waged by email between unit owners and their board of directors, however troubling that behaviour might be. However, it is a different story when the parties' disputes are before the Tribunal in the form of a records request. There are remedies available where the Tribunal finds that a party has filed an application for an improper purpose.

[31] For example, s. 19.1 (d) of the CAT's *Rules of Practice* provides that, "The CAT can dismiss an Application or Case at any time in certain situations, including where the Applicant is using the CAT for an improper purpose (e.g., filing vexatious Applications)."

[32] Rule 4.6 further provides that:

> *If the CAT finds that a Party has filed a vexatious Application or has participated in a CAT Case in a vexatious manner, the CAT can dismiss the proceeding as an abuse of the CAT's process. The CAT may also require that Party to obtain permission from the CAT to file any future Cases or continue to participate in an active Case. The CAT may also require a Party to agree to an undertaking that they will comply with the Rules and with any CAT Orders.*

[33] In *Manorama Sennek, v. Carleton Condominium Corporation No. 116*, 2018 ONCAT 4, the Tribunal adopted the criteria established to identify vexatious conduct outlined in *Lang Michener et al v. Fabian et al* (1987) 1987 CanLII 172 (ON SC), 59 O.R. (2nd) 353. These criteria are:

1. bringing of one or more actions to determine an issue which has already been determined;
2. where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;
3. bringing a proceeding for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
4. rolling forward grounds and issues into subsequent actions; and,
5. persistently taking unsuccessful appeals from judicial decisions.

[34] In this case, the only criteria that are potentially relevant are the second and third.

[35] With respect to the second of these criteria, given Mr. Gale's mixed success in six previous CAT proceedings, I do not find it is "obvious" that he would not succeed in this one.

[36] Regarding the third criteria, bringing a proceeding for an improper purpose, I find this includes bringing a proceeding for the purpose of using the Tribunal to harass other parties to get what one wants or to prove a point, and to challenge the board's authority, which is what HCC61 alleges Mr. Gale has done. Mr. Gale's own admission that he instigated a letter writing campaign and Mr. Behn's evidence of 1000 emails and 70 records requests noted above, indicate a longstanding pattern of conduct. Both sides acknowledge a power struggle between them. In this case, I find this is in part due to Mr. Gale's unrealistic expectations about what board minutes should contain and how the board should make and communicate its decisions. The fact that I have found Mr. Gale's application to be without merit in this proceeding is not something that could be predicted in advance. On its own, it is not enough to support a finding that Mr. Gale brought the proceeding for an improper purpose or has abused the Tribunal's process.

[37] However, the evidence presented about his past pattern of conduct towards the board indicates he was at least partly motivated to bring this application for an improper purpose, i.e., to cast doubt on the board's decision-making and to harass it into keeping minutes and providing information in the way he feels is appropriate, and to providing detail he is not entitled to. Furthermore, I note that in the decision referred to in paragraph 29 above, Mr. Gale's pattern of conduct was considered troubling, and he was previously cautioned that if in a future proceeding it were determined that he had abused the records request process, there might be cost consequences. I have found Mr. Gale's expectations to be unreasonable, and I find his conduct in pursuit of having them met is unreasonable. While I am not prepared to make an order restricting Mr. Gale's access to the tribunal at this time, given my findings, I find an award of costs is appropriate.

Issue #3: Should the Tribunal order costs and/or a penalty?

[38] Mr. Gale did not claim costs in this matter. HCC61 did claim costs. It submitted a Bill of Costs claiming legal fees of $6,713 on a partial indemnity basis. It submits that Mr. Gale's behaviour has already been called into question by this Tribunal when it determined that his relentless pursuit of records was "troubling" (see paragraph 26, above). It further submits that Mr. Gale was previously cautioned by this Tribunal, that if in a future proceeding it were determined that he had abused the records request process, there might be cost consequences. It further submits that the costs of responding to this proceeding should not be borne by "the innocent unit owners who are paying for the cost through their common expenses."

[39] Section 1.44 (2) of the Act states that decisions on costs are to be determined in accordance with the Tribunal Rules. Under Rule 48.2 the CAT generally will not

order one party to reimburse another for legal fees or disbursements ("costs") incurred in the course of the proceeding. However, where appropriate, the CAT may order a party to pay all or part of the other's costs, including costs that were directly related to a party's behaviour that was unreasonable, undertaken for an improper purpose, or that caused a delay or additional expense.

[40] Further guidance is provided in the Tribunal's Practice Direction: Approach to Ordering Costs, effective January 1, 2022. Section 3 (b) provides that one of the factors to consider when awarding costs is, "Whether the Case was filed in bad faith or for an improper purpose; If the CAT determines that the case was filed in bad faith or for an improper purpose (e.g., the case was filed to annoy or frustrate other parties), the CAT may order the party who acted in bad faith or for an improper purpose to pay some or all of the other parties' costs."

[41] Another factor to consider is the impact on the parties of a cost award.

[42] As I have found that Mr. Gale undertook this proceeding at least partly for an improper purpose, I find that he should pay a portion of the costs incurred by HCC61. I also agree with HCC61 that it is the unit owners who will end up bearing the brunt of its legal costs. I find that an award of $2,000 to HCC61 is reasonable in all of the circumstances.

[43] Rule 48.1 of the Rules of Practice states that the unsuccessful Party will be required to pay the successful Party's CAT fees unless the CAT member decides otherwise. As Mr. Gale was unsuccessful in this application, there will be no order for reimbursement of his filing fees.

C. <u>CONCLUSION</u>

[44] For the reasons explained above, I find that the November 2021 minutes are an adequate record under s. 55 (1) of the Act.

D. <u>ORDER</u>

[45] The Tribunal Orders that:

1. Under section 1.44 (1) 4 of the Act, within 30 days of the date of this Order, Jack Gale shall pay costs of $2000 to Halton Condominium Corporation No. 61 within 30 days of this decision.

Susan Sapin
Member, Condominium Authority Tribunal

Released on: August 11, 2022