

**CITATION:** YCC No. 76 v. 20 The Marketplace, 2024 ONSC 5437  
**COURT FILE NO.:** CV-22-00682916  
**DATE:** 20241001

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
)  
YORK CONDOMINIUM CORPORATION ) Antoni G. Casalnuovo and Yulia Pesin for  
NO. 76 ) the Applicant  
Applicant )  
)  
– and – )  
)  
20 THE MARKETPLACE LIMITED, ) Ian J. Cantor, for the Respondent 20 The  
CRESCENT TOWN CLUB INC., ) Marketplace Limited and  
PINEDALE PROPERTIES LTD. ) Pinedale Properties Ltd.  
)  
Respondent ) John Richardson, for the Respondent  
) Crescent Town Inc.  
)  
)  
)  
) **HEARD:** August 13, 2024 In Writing

2024 ONSC 5437 (CanLII)

**PAPAGEORGIU J.**

**COSTS ENDORSEMENT**

**Overview**

[1] I dismissed York Condominium Corporation No. 76’s (“YCC76”) application to prevent Crescent Town Club Inc. (“CTC”) from releasing certain disputed lands to 20 the Marketplace Limited (“TMP”) and Pinedale Properties Ltd. (“Pinedale”).

**Decision**

[2] For the reasons that follow I am awarding Pinedale and TMP costs in the amount of \$58,655.44 and CTC costs in the amount of \$35,008.44.

**Issues**

Issue 1: Should the ordinary cost consequences apply?

Issue 2: What is the proper scale of costs?

Issue 3: What costs could YCC76 reasonably expect to pay?

## Analysis

### Issue 1: Should the ordinary cost consequences apply?

[3] The Respondents are the successful party and presumptively entitled to costs.

[4] YCC76 argues that this is an appropriate case to relieve the unsuccessful party of costs on the basis that this matter was in the public interest or novel citing *Deluca v. Buciarelli*, 2022 ONSC 32 at para 21. However, I disagree that this matter was a matter of public interest. It was about a private litigant's wish to prevent the re-leasing of certain lands. It did not involve novel issues, but rather contractual interpretation of the agreements in question pursuant to well-settled contractual interpretation principles. The fact that the matters were important to YCC76 does not make them in the public interest or novel. Most litigants, and probably all, are involved in litigation because the issue is important to them.

[5] I also disagree that the fact that YCC76 is a condominium corporation means it should not have to pay costs. It argues that courts have recognized that the *Condominium Act*, 1998 S.O. 1998 is consumer protection legislation and that condominium litigation is inherently different than general civil litigation given the potential impact on innocent unit owners: *Carleton Condominium Corporation No. 396 v. Claude-Alain Burdet et al.*, 2015 ONSC 1361, at paras 37, 44 and 102. It argues that I should take into account the fact that condominium owners will have to pay for any costs award and that a decision to make any award beyond a nominal amount would be punitive and manifestly unfair.

[6] I disagree that this is a basis to deny the successful party its costs in this case. This would mean that condominium corporations could engage in litigation without any consequences. The condominium corporation should be factoring in the risk of costs into decisions that it makes about litigation that it decides to pursue.

[7] As well, *Carleton Corporation v. Burdet* is not relevant. That case was about a dispute between two competing groups of unit holders in the same commercial condominium corporation regarding the levying of certain expenses. It does not establish or suggest that condominium corporations that decide to take up litigation against third parties should be treated any differently on costs issues than any other unsuccessful litigant. Like every other party, condominium corporations are subject to Ontario's cost regime.

### Issue 2: What is the proper scale of costs?

[8] TMP and Pinedale seek substantial indemnity costs on the basis of an Offer to Settle that they say they beat.

[9] On February 14, 2023, TMP and Pinedale served a Rule 49 offer to settle whereby it would pay \$75,000 to CTC76. It was not accepted.

[10] TMP and Pinedale concede that the cost consequences of an unaccepted offer to settle in r. 49.10(2) does not apply because YCC76 did not obtain a judgment as favourable or less favourable than the terms of the offer to settle. Rather, YCC76 obtained no judgment at all.

[11] However, they take the position that in accordance with r. 49.13 in exercising its discretion with respect to costs, the court may take into account any offers to settle made in writing. There is certainly some case law where courts have exercised their discretion taking into account an offer to settle where the cost consequences of r. 49.13 do not apply; however, in my view it is not appropriate in this case.

[12] Here the offer to settle was a monetary payment and this Application was never about money, but rather about the preservation of disputed land that YCC76 claimed its residents have used and enjoyed since its inceptions. They say that throughout this proceeding they advised the Respondents that they would forego the Application if Pinedale and TMP undertook not to develop the lands and permit YCC76 residence access.

[13] As well, I take into account direction from appellate courts that although the court's discretion to award substantial indemnity costs, such costs are "rare and exceptional" and only warranted where there has been reprehensible, scandalous or outrageous conduct on the part of a party: see *DUCA Financial Services Credit Union Ltd. v. Bozzo*, 2010 ONSC 4601, at para. 5; *Foulis v. Robinson* (1978), 21 O.R. (2d) 769 (C.A.); and most recently *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239, 140 O.R. (3d) 81, at para. 43.

[14] Thus, in my view, the proper scale of costs is on a partial indemnity basis.

### **Issue 3: What costs could YCC76 reasonably expect to pay?**

[15] Pursuant to s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, costs are in the discretion of the court. Rule 57 of the *Rules* sets out the factors which courts should have regard to when awarding costs. The overall objective is "to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant": *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4; *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 26; *Clarington (Municipality) v. Blue Circle Canada Inc.*, 2009 ONCA 722, 100 O.R. (3d) 66, at para. 52; and *G.C. v. Ontario (Attorney General)*, 2014 ONSC 1191, at para. 5.

[16] The matter was important to the parties and of a moderate complexity. The Respondents stood to lose the benefit of an agreement that they had entered into. YCC76 ought to have expected that the Respondents would devote significant resources to the matter.

[17] No one raised any issues that YCC76 had engaged in any conduct that lengthened the proceedings or that any steps they took were improper, vexatious or unreasonable.

[18] I have reviewed the rates charged by the Respondent solicitors which is appropriate and within the range for lawyers with the same years of call. I add that YCC76 did not raise any issues about the rates charged.

[19] The total number of hours spent by the Respondent solicitors is as follows:

- TMP and Pinedale: Mr. Cantor (34-year call): 169.2 hours, Ms. Sgambelluri (1<sup>st</sup> year call): 15.7 hours: Total: 184.9 hours
- CTC: Mr. Richardson (48-year call): 193.4 hours.

[20] YCC76 spent a similar number of hours.

- Antonio Casalnuovo (16-year call): 31.1 hours, Yulia Pesin (12 year call): 150.4 hours: Total: 181.5 hours

[21] The total cost claim of YCC76 and Pinedale and TMP is different however, because of the way in which the hours were divided up with YCC76 having more junior counsel, both as senior and junior counsel. YCC76 had a more junior lawyer doing the bulk of the work. As well, YCC76 spent time preparing a motion for a certificate of pending litigation which was settled without the Respondents preparing any materials.

[22] YCC76's total partial indemnity fees are \$44,484 compared to \$70,225 for Pinedale and TMP and \$49,317 for CTC. I note here that Pinedale and TMP did not provide the calculation of their fees on a partial indemnity basis throughout, but only a calculation of partial indemnity costs up to the offer to settle and then substantial indemnity costs afterwards. Thus, I have calculated it using all of the figures in its Bill of Costs. It would have been more helpful for counsel to have provided this and I suggest that in future, counsel should provide these calculations and not anticipate that they will be successful at obtaining substantial indemnity costs of part of the matter.

[23] In my view, the total costs expended by the Respondents in the amount of \$119,542 could not have been reasonably foreseeable. It is more than double the amount spent by YCC76 and there was duplication in the argument before me from all of these Respondents. As well, although reasonably complex, in my view, the more junior lawyers for YCC76 would have had to spend more time on the legal issues whereas the lawyers for the Respondents, with their considerable experience, should have had to spend less.

[24] In the exercise of my discretion, taking all of the above into account, I award TMP and Pinedale their partial indemnity costs which I fix in the amount of \$50,000 and CTC is entitled to its costs in the amount of \$30,000. In that regard, TMP and Pinedale were the main Respondents, filed more materials and carried more of the ball.

[25] Therefore, I award TMP and Pinedale costs in the amount of \$50,000 on a partial indemnity basis plus with HST in the amount of \$6,500, disbursements in the amount of \$2,155.44 for a total of \$58,655.44.

[26] I award CTC partial indemnity fees in the amount of \$30,000 with HST in the amount of \$3,900 plus disbursements in the amount of disbursements in the amount \$1,108.44 for a total \$35,008.44.

[27] Such costs are payable within 30 days.

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Papageorgiou J.

**Released:** October 1, 2024

