

Case Name:

Smithers v. York Condominium Corp. No. 60

Between

Jean Catherine Smithers, respondent in appeal, and
York Condominium Corporation No. 60, Vince Cianfarani, Cliff
Whittal, Renato Di Donato, Raymond Morrow, Shawak Hira, Andrea
Vergis, Nicola "Nick" Bongiovanni, Ivan Filipovic, Sid
Stulberg, Anthony Pileggi and Guy Sisto, appellants

[2003] O.J. No. 851
Court File No. 702/2001

**Ontario Superior Court of Justice
Divisional Court
Then, J. Macdonald and Swinton JJ.**

Heard: February 24, 2003.
Oral judgment: February 24, 2003. Released: March 4, 2003.
(7 paras.)

Counsel:

Jonathan H. Fine, for the respondent in appeal.
David E. Thiel, for the appellants.

The judgment of the Court was delivered by

¶ 1 **THEN J.** (orally):— At issue in this appeal is the interplay between sections 28(1) and 28(3) of the Condominium Act. The appellant submits that since s. 28(1) of the Condominium Act and in particular subsections (a) and (c) are stated permissively and since s. 28(3) is stated in a mandatory manner the Board of Directors was only required to pass a specific by-law setting out the remuneration and compensation as well as the duration of that remuneration for directors. However, it is submitted that the Board was not required, but only permitted, to pass a by-law with respect to remuneration for officers and agents because while s. 28(3) modifies subsection 28(1)(a), s. 28(3) does not modify s. 28(1)(c).

¶ 2 We agree with this interpretation of the effect on s. 28(1) of s. 28(3).

¶ 3 In the case of Mr. Sisto, he had been an officer but received his remuneration from the Board of Directors while a Director. There was no indication from the Board of

Directors when they remunerated Mr. Sisto, a fellow Director, as to the capacity in which they awarded the remuneration.

¶ 4 In our view, in the absence of such indication the applications judge was entitled to find that he was remunerated as a Director in circumstances where no by-law had been passed as required by s. 28(3). There was evidence to support that conclusion. It follows that we cannot interfere in the circumstances. The appeal as to Mr. Sisto must therefore be dismissed.

¶ 5 With respect to Mr. Cianfarani, it appeared to be common ground before the applications judge that as a principal of the management company he was in the same position as the management company vis-à-vis the Condominium Corporation. That is to say, he was an agent of the Condominium Corporation.

¶ 6 The applications judge held that as Mr. Cianfarani was "in control" of the Board, presumably because of his long association with the core group of directors, he was thereby disentitled to remuneration because in the circumstances he could be taken as directing his own remuneration. We are unable to accept this approach as the statute (s. 28(1)(c)) permits the Board to remunerate an officer or an agent without a by-law. Mr. Cianfarani was not a Director nor is there any evidence that he was in "control" of the Board of Directors. The Board was entitled under s. 28(1)(c) to remunerate Mr. Cianfarani as an agent without passing a by-law. Accordingly the appeal must be allowed with respect to Mr. Cianfarani.

¶ 7 In view of the divided success there will be no order as to costs.

THEN J.
J. MACDONALD J.
SWINTON J.

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