99CV167316

Ontario Superior Court of Justice

BETWEEN:	)	
	)	
York Condominium Corporation No. 60	)	Carol A. Dirks, solicitor for
Applicant	)	the Applicant
	)	
AND	)	
	)	
Jean Catherine Brown also known as Kay Brown Smithers also known as Kay Brown Also known as Kay Smithers also known As Jean Kay Brown	)	Jonathan H. Fine, solicitor for the Respondent
Respondent	)	
	)	**HEARD**: March 28 & 29, 2001

00CV190866

BETWEEN:	)	
.	)	
Jean Catherine Smithers	)	Jonathan H. Fine, solicitor
Applicant	)	for Applicant
	)	
AND	)	
	)	
York Condominium Corporation No. 60, Vince Cianfarani, Cliff Whittall, Renato DiDonato, Raymond Morrow, Shawak Hira, Andrea Vergis, Nicola "Nick" Bongiovanni, Ivan Filipovic, Sid Stulberg, Anthony Pileggi and Guy Sisto	)	Carol A. Dirks, solicitor for the Respondents
Respondents	)	
	)	**HEARD**: May 14, 2001

KITELEY J.

REASONS FOR DECISION

[1] The applications were scheduled to be heard on March 28, 2001. The submissions with respect to the application brought by YCC were completed on March 29th. The next available date to continue the submissions with respect to the application brought by Smithers was May 14, 2001. Ms. Dirks took the position that reasons on the first ought not to be prepared until submissions on the second had been concluded. Mr. Fine took the position that they were distinct applications and that the submissions on the

second would have no bearing on the outcome of the first. Without determining the relevance of the second application to the first, I decided that both reasons ought to be released simultaneously.

RELIEF REQUESTED IN THE YCC APPLICATION:

[2] In the application issued April 9, 1999, YCC asked for the following:

(a) A Declaration that the Respondent is in breach of Section 31 of the Condominium Act and rule 21 of the Rules of York Condominium Corporation No. 60.;
(b) An Order requiring the Respondent to comply with the Condominium Act as well as the Declaration, By-Laws and Rules of York Condominium Corporation No. 60;
(c) An Order directing the Respondent to immediately cease creating or permitting the creation of or continuation of any disturbing noises on the condominium property;
(d) An Order directing the respondent to immediately cease doing or permitting anything that will interfere with the rights, comforts, or conveniences of other owners and occupants;
(e) An Order restraining the Respondent from interfering with or attempting to interfere with the management and operations of York Condominium Corporation No. 60;
(f) An Order prohibiting the Respondent from distributing any written material to any owner or resident of York Condominium Corporation No. 60;
(g) An Order prohibiting the Respondent from threatening or harassing or permitting or encouraging the threatening or harassing of any owner, resident, member of the Board of Directors of York Condominium Corporation No. 60 or of any management or security personnel doing business at the condominium property;
(h) An Order restraining the Respondent from using profanity directed at any person at the condominium property which profanity is disturbing or intimidating to any such person;
(i) An Order requiring the Respondent to sell her condominium unit within six months of the date of the Order;
(j) An Order requiring the Respondent to vacate her condominium unit within thirty days of the date of the Order;
(k) An Order that where the Respondent should fail to comply with any Order issued by this Honourable Court, the Applicant may reattend on three days' notice for a further Order to enforce compliance, or as the Court deems just;
(l) An Order that service of this Order upon the Respondent may be made by way of prepaid registered mail addressed to the Respondent at 370 Dixon Road, Unit 401, Toronto, Ontario, M9R 1T3;
(m) An Order requiring the Respondent to pay the costs of the Applicant on a solicitor and client basis in accordance with the Declaration and Rules of York Condominium Corporation No. 60.

[3] The application makes reference to Rule 14 of the Rules of Civil Procedure. Neither counsel drew to the attention of the court which part of rule 14 was relevant. I assume that the applicant intended to rely on Rule 14.05 (3)(d):

> The determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution.

Analysis:

[4] Ms. Dirks' factum at paragraph 79 made no reference to paragraph (c) above from which I infer that no such relief was requested. In paragraphs (i) and (j) above, YCC sought to compel Smithers to leave the condominium development. That relief had been pursued consistently, including during the cross-examinations which had taken place in March, 2001 and had been incorporated in YCC's factum dated March 23, 2001. On March 28, at about 11:00 a.m., after argument and rulings on certain evidentiary matters, Ms. Dirks began her submissions on the YCC application by indicating that YCC was content to let Smithers remain as an owner and occupant but that YCC needed the conduct by Smithers to stop. Ms. Dirks indicated that she would not make submissions with respect to paragraphs (i) and (j) and she reserved her right to pursue (k) in the future.

[5] With respect to the balance of the relief sought, Ms. Dirks and Mr. Fine referred to the following.

Declaration of YCC 60:

> Article XX Units subject to Declaration By-Laws and Rules and Regulations
>
> (a) All present and future owners, tenants and residents of units shall be subject to and shall comply with the provisions of the Declaration, the by-laws and the rules and Regulations.

Rules and Regulations of YCC 60:

> Preamble:
>
> The following rules are made pursuant to Section 29 of the Condominium Act, R.S.O. 1980, Ch. 84, as amended, and shall be complied with by all owners of condominium units within York Condominium Plan No. 60. The term "owner" shall include the legal or beneficial owners of the unit, their families, tenants, servants, employees, visitors and agents and any person occupying a condominium unit with the owner's approval.
>
> Any loss, cost or damages incurred by York Condominium Corporation No. 60 by reason of the non-compliance by any owner of any Rule in force from time to time may be recovered by York Condominium Corporation No. 60 against such owner in the same manner as common expense arrears or by such other legal proceedings as may be proper.

Condominium Act R.S.O. 1990 Ch.C26

[6] According to Ms. Dirks, the following sections are relevant:

> 12(1) The objects of the corporation are to manage the property and any assets of the corporation.
>
> 12(2) The corporation has a duty to control, manage and administer the common elements and the assets of the condominium corporation.
>
> 12(3) The corporation has a duty to effect compliance by the owners with this Act, the declaration, the by-laws and the rules.
>
> 31(1) Each owner is bound by and shall comply with this Act, the declaration, the by-laws and the rules.
>
> 31(2) Each owner has a right to the compliance by the other owners with this Act, the declaration, the by-laws and the rules.

[7] In addition to the foregoing, Mr. Fine relied on the following:

> 12(5) Each owner and each person having a registered mortgage against a unit and common interest has the right to the performance of any duty of the corporation specified by this Act, the declaration, the by-laws and the rules.
>
> 31(3) The corporation, and every person having an encumbrance against any unit and common interest, has a right to the compliance by the owners with this Act, the declaration, the by-laws and the rules.

[8] Both counsel referred to rule 21 to which I will make reference below.

[9] As noted above, the Application was issued on April 9, 1999. At the time of issuance, the evidence in support was contained in affidavits by Vince Cianfarani and others. Mr. Fine subsequently brought a motion to strike many parts of the affidavits of Cianfarani and others. He was successful. As a result, a fresh affidavit was prepared by Vince Cianfarani and was sworn November 1, 2000. It contains 202 paragraphs. Paragraphs 1 to 83 refer to events which had occurred up to and including the early part of April, 1999. The balance of the affidavit refers to events which occurred after the Application was issued. In view of the disposition I have made, I need not address whether it was appropriate for the applicant to rely on events which occurred after the issuance of the Application.

[10] The essence of Ms. Dirks' position was that Smithers had breached rule 21 and had interfered with the corporation's duty under s. 12(2) to control, manage and

administer the common elements and the assets of the condominium corporation and that the court should apply the wide discretion in s.49(2) to make an order for the relief requested. The essence of Mr. Fine's position was that Smithers was a responsible owner who was standing up to the directors, officers and managers and that her David v. Goliath conduct could not be perceived as a breach of rule 21; consequently there was no breach of s.12(2) and therefore, no justification for the application of s.49. The starting point is an interpretation of rule 21.

> Rule 21. No noxious or offensive activities shall be carried on in any units or in the common elements nor shall anything be done therein, either willfully or negligently, which may be or become an annoyance or nuisance to the other owners or occupants. No owner shall make or permit any disturbing noises in the buildings, nor do or permit anything that will interfere with the rights, comforts or conveniences of other owners or occupants.

[11] I was referred to definitions of "noxious". The first was from *Black's Law Dictionary* [revised 4th edition] as follows:

> "noxious" hurtful; offensive; offensive to the smell. . . The word "noxious" includes the complex idea both of insalubrity and offensiveness. That which causes or tends to cause injury, especially to health or morals.

[12] And from *Words and Phrases* as follows:

> "noxious" applying the word "noxious" in its plain, ordinary meaning, i.e. "hurtful, harmful, unwholesome, or causing or liable to cause hurt, harm, or injury".

[13] While counsel did not make specific reference to the following, these definitions are also from *Black's supra:*

> "offensive" in the law relating to nuisances and similar matters, this term means noxious, causing annoyance, discomfort, or painful or disagreeable sensations. In ordinary use, the term is synonymous with "obnoxious" and means objectionable, disagreeable, displeasing and distasteful.
>
> "annoyance" discomfort; vexation.
>
> "disturb" to throw into disorder; to move from a state of rest or regular order; to interrupt a settled state of, to throw out of course or order.

[14] A literal reading of rule 21 leads to the conclusion that the rule was designed to prevent the activities of one owner in her unit and in the common elements from doing anything which would be an annoyance or nuisance to other owners or occupants and

from interfering with the "rights, comforts and conveniences" of other owners and occupants in individual units or in the common elements. The specific activities caught by the rule are those where the unit owner deliberately or otherwise causes smells or sounds to interfere with other owners.

[15] The burden of proof is on YCC to establish that the conduct of Smithers contravened that rule. Mr. Cianfarani's affidavit, the affidavits of others in support of YCC and the transcripts of the cross-examinations recite the many grievances against Smithers. Her affidavits and those whose evidence supports her position contain explanations. There are dozens of incidents referred to in the evidence, including many where credibility is relevant. It is neither possible nor necessary to review each incident in detail. I agree with Mr. Fine that it is convenient to look at the different categories of her alleged conduct.

[16] Cianfarani described the assorted legal proceedings in which Smithers was engaged. She did bring an application in 1999 on the eve of the Annual General Meeting in an effort to restrain the holding of the meeting. She was not successful in her challenge to the AGM but she was successful in enforcing her entitlement to access to records. Smithers admitted that she had not been refused the opportunity to review records before the hearing of her application. As Ms. Dirks pointed out, the part of the order of O'Leary J. as it related to access to records was on consent. Smithers immediately sought to vary that order of O'Leary J. to require YCC to produce privileged and confidential documents. Smithers was not successful. In this application brought by YCC, Smithers brought a motion to strike portions of 4 affidavits filed on behalf of the applicant. She was successful. On consent, an order was made to strike all 4 affidavits with leave to refile. And she did initiate the companion action with respect to remuneration of directors and officers. In each of those proceedings, Smithers was entitled in law to initiate such steps. None of that conduct could be subject to rule 21.

[17] Cianfarani alleged that Smithers disseminated false and malicious information about certain directors and the property management team. There is considerable evidence on this matter. The allegations are based largely on insinuation and conjecture and statements from unidentified sources. Smithers denies that she authored or distributed the statements; or if she concedes being the author, she denies that they were defamatory. I do not accept that the applicant has met the burden of proof on this issue. But even if I were persuaded that on the balance of probabilities, Smithers is the author and/or the distributor, none of that conduct could be subject to rule 21. In any event, Cianfarani and others issued a statement of claim based on the same allegations and those issues are outstanding.

[18] Specifically, Cianfarani alleged that Smithers accused him of dishonesty and that the fruits of that conduct were represented in a valuable home in Kleinberg. Smithers acknowledges that she did inform others that Cianfarani owned the home and that she was wrong. She called it an "honest mistake" because the home in question was owned by Vince Cianfarani – but a different person by the same name. Without agreeing that

the mistake she made was an "honest" one, I find that such conduct cannot be subject to rule 21.

[19] Cianfarani alleged that Smithers pursued her fraud claims with the police. Smithers admits to inquiring about laying charges. Smithers was entitled in law to make such inquiries. That conduct could not be subject to rule 21.

[20] Cianfarani alleged that Smithers used abusive language to office staff and particularly Mark Cianfarani. Smithers admitted that she referred to Mark Cianfarani in a less than polite manner. She did not admit that her language was abusive, vulgar or disparaging. In the context in which it occurred, she said that he deserved it. I consider her vocabulary to have been rude and vulgar. I need not determine whether it was deserved. Even if it were intemperate and undeserved, such conduct is not the subject of rule 21.

[21] Cianfarani also alleged that Smithers' conduct was inappropriate at the AGM in December 1998. Smithers accepted most of the description of her behaviour at the audiotaped meeting. Yet in her context, she said she was entitled to act that way as a result of what she considered to have been a written threat from Cianfarani. Mr. Fine described her behaviour as "sounding off" which an owner is permitted to do at the AGM. Without accepting that her behaviour was justified, I find her behaviour at the AGM to have been rude and belligerent. But that cannot be conduct which is subject to rule 21.

[22] Cianfarani alleged that Smithers' current conduct is reminiscent of her earlier behaviour. Smithers agreed that in 1981 when she was on the Board, as a result of a close vote, she lost her seat. Legal proceedings ensued. I consider that allegation to be so stale that it ought to be disregarded.

[23] Cianfarani alleged that Smithers disrupted the process for pre-registration of proxies in connection with the AGM in 2000. Mr. Fine argued that a pre-registration process is only a convenience for the Board, it is not a necessity. And in any event, it was his view that "proxy fights are fair game". I don't accept that anything goes in a proxy fight. But I find that whatever conduct she exhibited did not constitute a breach of rule 21.

[24] Cianfarani alleged that other owners Poppelreiter, Penney and Passero were misled by Smithers. Without finding that her behaviour was acceptable, even if it was as described, it is not conduct which is subject to rule 21.

[25] Lastly, Cianfarani alleged that Smithers has harassed members of management by her demands for access to records of the corporation. Considerable evidence on this subject was produced by the applicant and by the respondent. Before dealing with the impact on rule 21, I digress to consider the rights of a unit owner to access to records.

[26] Section 21 of the Condominium Act Chap.C26 is as follows:

> The corporation shall keep adequate records, and any owner or agent of an owner duly authorized in writing may inspect the records on reasonable notice and at any reasonable time.

[27] In *McKay v. Waterloo North Condominium Corporation No. 23* [1992 11 O.R. (3d) 341] Cavarzan J. dealt with an application by an owner for access to records of the corporation dealing with the parking control service and expenditures for repairs. McKay had inspected documents on 3 occasions. He asked for copies but was refused. He asked for a 4th opportunity and was refused. The Board passed a resolution requiring requests to inspect corporate records to be submitted in writing with a clear indication of the documents requested. McKay made the written request. The Board declined to permit him access to all documents requested and permitted him access on only 1 occasion without providing photocopies. Cavarzan J. held as follows:

> I begin with the proposition that it is necessary to read s.21 [of the Condominium Act] in the context of the entire Act in order to interpret it properly. The Act embodies a legislative scheme of individual rights and mutual obligations whereby condominium units are separately owned and the common elements of the condominium complex are co-operatively owned, managed and financed. In the interest of administrative efficiency an elected board of directors is authorized to make decisions on behalf of the collectively organized as a condominium corporation, *on condition that the affairs and dealings of the corporation and its board of directors are an open book to the members of the corporation, the unit owners. (emphasis added)*

[28] He concluded that the legislature intended a "very open and inclusive" definition of "records". He decided that "all of the corporation's records are open to inspection by owners under s.21, subject only to records for which a claim of privilege or confidentiality may legitimately be made". He found that it was implicit in s.21 that the owner had the right to obtain photocopies but that the owner had to pay the cost. He directed the Condominium Corporation to provide access on those terms.

[29] In *National Trust Co. v. Grey Condominium Corp. No. 36*, [1995] O.J. 2079, Greer J. adopted the reasons by Cavarzan J. and ordered the condominium corporation to produce and give possession of all records in its care, control and possession, including all invoices and accounts with respect to professional fees and all the corporation's banking documentation.

[30] Ms. Dirks agreed that Smithers has a right to inspect the corporate records. She argued that Smithers has used her right to have access to records in an abusive way. As indicated above, pursuant to s.12(2) the corporation has a duty to "control, manage and administer the common elements and the assets of the condominium corporation". Smithers has made dozens of requests. She has attended at the management office on

many occasions, spent more than 20 hours reviewing documents and has obtained almost 1800 photocopies. To respond to those requests, some members of the Board, some officers and some managers have collectively spent hundreds of hours retrieving documents from storage, identifying those sought, supervising Smithers' inspections and making copies. Over and over, those involved in the response asserted that Smithers' behavior was a form of harassment which was interfering in the corporation's ability to discharge its statutory duties. This theme is reflected in the presentation of the applicant's materials where it is repeatedly referred to as the "interference application".

[31] I have read the many letters exchanged between and among Smithers and management, corporation counsel and Smithers, and Smithers' counsel and the corporation. [I have segregated the correspondence related to undertakings because different considerations apply.] I observe the following. First, there are many requests which are consistent with her entitlement to records according to s. 21 of the Condominium Act. Second, there are many supplementary requests of the same quality – asking for a document which was referred to in a document which was produced. But there is a third category which goes beyond Smithers' rights pursuant to s.21 such as where Smithers demands an explanation. The following are just two examples:

> Letter March 1, 2000 from Smithers to the Board of Directors pg. 2:
>
> 6. The Dixon-Peel Gas Consortium file was missing the most important information of all: where is the complete updated copy of the contract? Who signed on behalf of YCC No. 60? Is there a conflict if only the secretary, V. Cinfarani, signs on our behalf? The copies I saw, and photocopies I received are out-of-date (1988). What are we paying for gas vs dealing direct with Consumers or Enbridge for the last 11 years? If the rebates were returned directly to YCC No. 60, what would the full rebate amounts be for the last 11 years, no deductions?

Only the question seeking the updated copy of the contract was appropriate.

> Letter dated March 5, 2001 from Smithers to the Board of Directors pg. 1:
>
> 6.a May 18/00 when Mr. Bhatti asked why Philip Mayers (corporate accountant) was also the gas consortium accountant/treasurer, Vince Cianfarani responded that Philip is not the treasurer anymore. When did this happen? Note, the consortium information was addressed to Philip, and he had been signing on their behalf. No written answer received to date.

[32] The unit owner is entitled to access to records. She is not entitled to engage in an investigation and demand responses from Directors, Officers or managers. The unit owner's rights do not include the right to make written interrogatories and then complain when answers are not provided or not provided in what the unit owner considers a timely

manner. To the extent that Smithers has demanded access to information (as opposed to access to records), she has exceeded any right under the Act, Declaration or rules.

[33] Having said that, the question is: where does that lead? The corporation has the duty to effect compliance by owners. To the extent that Smithers acted within her rights, her behaviour cannot be the subject of rule 21. To the extent that Smithers acted beyond her rights, the corporation may have been correct in trying to reign her in. Indeed, her demands for information have no doubt had an impact on the ability of those involved to perform other aspects of their work. But even that behaviour cannot be the subject of rule 21. There is no reading of rule 21 which could be applied to this situation. The circumstances may be unsatisfactory for all concerned but rule 21 is not the remedy.

[34] Before concluding, I pause to make a final observation about rule 21. It speaks to the effect on *owners and occupiers*. Deponents who were owners and or occupiers and who gave evidence about the effect of Smithers' behaviour included Manning, Inglis, Penney and Poppelreiter. Their evidence arose out of exchanges with Smithers in elevators or other common elements or in their own units when Smithers came by. In some of their affidavits, there are references to "other owners" which I disregard because it is hearsay. Accepting all of what they say, and recognizing that Smithers gives her version of the same events, I am not satisfied that YCC has established on a balance of probabilities that that is the kind of conduct caught by rule 21.

[35] Most of the evidence of harassment and interference relates to members of the Board, officers and management. Some of those are also owners and occupiers. But it is in their official capacities that they depose to the harassment and interference. Even if I accepted the entirety of their evidence, behaviour which affects non-owners and non-occupiers cannot be the subject of rule 21.

[36] Ms. Dirks argued that rule 21 ought to be interpreted to encompass all of the foregoing behavior. I disagree. Such an interpretation is not warranted nor reasonable. Based on my interpretation, Smithers is not in violation of rule 21.

[37] Had I found that there had been a breach of rule 21, Mr. Fine made submissions that I ought to exercise the discretion which Ms. Dirks concedes that I have under section 49 which is as follows:

> 49(1) Where a duty imposed by this Act, the declaration, the by-laws or the rules is not performed, the corporation, any owner, the bureau, or any person having a registered mortgage against a unit and common interest, may apply to the Ontario Court (General Division) for an order directing the performance of the duty.
>
> 49(2) The court may by order direct performance of the duty and may include in the order any provisions that the court considers appropriate in the circumstances.

[38] Counsel referred to *Metropolitan Toronto Condominium Corp. No. 776 v. Gifford* [1989] O.J. No. 1691, where Herold J.identified the criteria which ought to be considered in applying the discretion under s. 49, and after considering the factors, he declined to exercise his discretion in favour of the owner and directed that the owner comply with the "no animals" provision in the Declaration; *Peel Condominium Corp. No. 449 v. Hogg* [1997] O.J. No. 623 where Carnwath J. adopted the criteria in *Gifford, supra* but nonetheless declined to exercise the discretion in s. 49 and instead directed the unit owner to comply with the "no-pets" provision contained in the Declaration and remove the dog; *York Condominium Corp. No. 382 v. Dvorchik* [1997] O.J. No. 378 where the Court of Appeal allowed an appeal, found that the rule in question was neither unreasonable nor inconsistent, and made a declaration that the owner was in breach of the rule which prohibited pets weighing more than 25 pounds; *Niagara North Condominium Corp. No. 46 v. Chassie* [1999] O.J. No. 1201 where MacDonald J. agreed that the cat which the respondent had was contrary to the declaration and the rules, but that the pet prohibition was not reasonable and consequently, it would not be fair to enforce it; *Carleton Condominium Corp. No. 279 and Rochon et al.* [1987] 59 O.R. (2d) 545 where the Court of Appeal refused to exercise discretion under s.49 and directed the owner to comply with the rules of the corporation which prohibited television antenna, aerial, tower or similar structure even though the Board of Directors had consented to the owner installing a satellite dish; *Peel Condominium Corporation No.516 v. Williams* [1999] O.J. No. 770 where Molloy J.declined to exercise discretion under s. 49 with respect to the conduct of a special general meeting primarily because the owners had already purported to exercise their remedy under s.19 and an order under s.49 would be inappropriate; *Metropolitan Toronto Condominium Corp. No. 850 v. Oikle* [1994] O.J. No. 3055 where Lissaman J. held that by leasing the unit to Executive Suites for purposes of short term rentals, the owner breached the Act, the Declaration and a rule of the corporation and directed the owner to comply.

[39] Other than the principles in *Gifford, supra* those cases are not helpful. Nor are the several others to which counsel referred where I have been given simply the order made by the court, or where the moving party's material has been provided but not the responding party's material, or where the judgment indicates that no one appeared for the respondent and the affidavit by the corporation disclosed allegations against the owner which are materially different, or where a brief endorsement has been produced but is not sufficiently detailed to ascertain whether the reasoning ought to apply or not.

[40] Had I found that Smithers was in breach of rule 21, I would have applied the *Gifford, supra* criteria to the extent that they are relevant and I would have exercised my discretion under s. 49 in favour of the owner for these reasons. The development consists of three highrise buildings containing 897 units and appurtenant common elements. The buildings contain residences of over 3000 people. It is one of the largest condominium developments in Canada. As a consequence, it's corporate affairs are extensive and complex. Opposition by some owners to decisions made by the Board is to be expected because unanimity in a project with such dimensions is unlikely. Some of the owners/occupants are particularly interested in the issues presented by the application as is apparent from the competing affidavits. Smithers' conduct might be described by

some as rude and aggressive. As indicated above, in some respects I agree. But by others she has been described as responsible and assertive, although intemperate on occasion. The complaints made directly by the other unit owners (as opposed to the complaints expressed on behalf of the Board, officers and managers) are few and relatively modest. Even if Smithers' behaviour is not above reproach, I accept her evidence that her intention was to pursue what she understood were her legal rights and not to interfere with or attempt to interfere with the other owners or with management and operations of YCC. Smithers has acknowledged that she was not sensitive to cultural diversity in the over-crowding issue and that she was mistaken in the Kleinberg issue from which I conclude she will be more cautious in the future. The relationship between and among Smithers and certain members of the Board, certain officers and certain managers is highly conflictual as is apparent from the evidence, and from the issuance of this application and the defamation action on the same day, and from the other proceedings which have occurred. If the behaviour of Smithers were restrained in the ways sought, it would reduce a burden on the Board, on officers and on managers, but it would send a message that a challenge to the authorities will attract serious negative consequences. That is not a message which ought to be communicated when the legislative environment is one which is intended to encourage openness.

[41] In *Peel Condo v. Williams, supra*, Molloy J. observed that counsel had offered "good ideas" about how the special general meeting could be conducted in an efficient and orderly manner. But she noted:

> However, it is not enough for me to be satisfied that these are good ideas. I must be satisfied that the circumstances warrant a court order imposing these terms on the meeting.

[42] In a similar vein, it is apparent that the relationships between Smithers and those in authority are dysfunctional. But unless an owner has breached a provision in the Declaration or any rules without mitigating factors which afford relief pursuant to s. 49 the court ought not to be an instrument for making an order which would be seen to be punishment of the owner.

RELIEF REQUESTED IN SMITHERS' APPLICATION:

[43] On May 23, 2000, Smithers issued an application against YCC and 10 present and past directors or officers and 1 manager. She sought the following relief:

> An order requiring any of the respondents, former officers or directors who received any remuneration as director or officer from the respondent condominium corporation, to account for same, and to disgorge such monies, together with interest, and return same to the condominium corporation forthwith.
>
> An order requiring Vince Cianfarani to account for any funds received by him from the respondent condominium corporation and to disgorge any

such monies to which he was not lawfully entitled, with interest, and to return same to the condominium corporation forthwith.

An order prohibiting the respondent condominium corporation from remunerating any present or future officer or director of the condominium corporation until such time as a by-law required by section 28(3) of the Condominium Act is passed by the board of directors, confirmed by the unit owners in accordance with section 28(2) of the Condominium Act, and registered in accordance with section 28(5) of the Condominium Act.

The applicant's costs of this application on a solicitor and client basis.

[44] The following is the status of the respondents: Vince Cianfarani is the principal of Vista Property Management, the property manager engaged by the Corporation since 1982. In December, 2000, neither Cianfarani nor Vista were Directors or Officers. In December, 2000, Whittal, Di Donato, Sisto, Hira, Morrow and Vergis were Directors and Officers. Bongiovanni, Filipovic and Stulberg are all former Officers and Directors. Pileggi is a former unit owner and Officer.

[45] Not all of the former directors and officers were named as co-respondents. The respondent Filipovic had died after the application had been issued without an order to continue having been obtained.

[46] Mr. Fine's position was that there was no distinction between directors and officers and that all those named (with the exception of Filipovic) were liable to disgorge the payments which had been made without compliance with the Act by enacting a by-law. At the outset, Mr. Fine argued that Smithers had asked for and received records dating from 1995 which would justify the following relief: a direction that no further payments be made until the required by-law had been made and confirmed and registered; repayment back to 1995 based on the records available; a direction that the condominium corporation produce records of earlier years and counsel would attend on a future occasion to determine whether the earlier records also justified disgorgement.

[47] Ms. Dirks' position was that this application had been issued on May 23, 2000 in the middle of significant controversy arising from the YCC application, and that Smithers' application was further harassment. Ms. Dirks characterized the Smithers' application as another breach of rule 21 and she asked that I consider the evidence and the circumstances in the Smithers' application as additional to those on which she had relied in making her earlier submissions on the YCC application. With respect to the merits of the remuneration application, Ms. Dirks took the position that there was a distinction between directors and officers because a by-law was required for directors but not for officers and that the individuals named were remunerated for their duties as officers.

[48] Bill 38, An Act to Revise the Law Relating to Condominium Corporations was proclaimed in force on May 5, 2001, after the hearing of YCC's application and before

the hearing of Smithers' application. Section 184 of the new Act repealed the old Act. During the course of submissions, Ms. Dirks and Mr. Fine both suggested that I ought to apply the old Act with respect to the payments which had been made and that I ought to apply the new Act to Mr. Fine's request that future payments be prohibited. I have taken that approach.

[49] The relief requested in the Smithers' application did not limit the years for which disgorgement was required. In her submissions, Ms. Dirks raised issues of laches and limitation periods. In his reply submissions, Mr. Fine revised his earlier position. He conceded that he was not challenging reimbursement of expenses. He indicated that he accepted that the payment of $200.00 per month to Nick Bongiovanni was reimbursement of expenses. He elected not to challenge any payments made before 2000. He clarified that he was only challenging whether directors and officers had been paid for the time they spent in carrying out their duties. He pragmatically pointed out that if the earlier years were not pursued, then he would avoid the limitation period and laches issues, he would avoid a suggestion that with respect to the period between 1975-1981 when Smithers was a director, she had failed to disclose (indeed she had initially denied it) that she too had received remuneration when the records indicated that remuneration had been paid to directors and officers without a by-law. By arguing only with respect to those payments made in 2000, he asserted that the court could then respond to the important question of principle, namely whether payments could lawfully be made without a by-law. Mr. Fine accepted all payments except those made in December, 2000 in the amount of $2000.00 to each of the following who were Directors and Officers: DiDonato, Hira, Morrow, Whittal, Vergis; and to Director and Officer Sisto in the amount of $500.00; and to members of management: Mark Cianfarani in the amount of $1000.00 and Vince Cianfarani in the amount of $2000.00.

[50] According to the Analysis of General Ledger Accounts, similar payments in 1995 were called "Reimbursement of Expenses". In 1996, 1997, 1998 and 1999, they were described as "Xmas Bonus". And in 2000, they were again described as "Reimbursement of Expenses". It is conceded by Ms. Dirks that none of these were reimbursement of expenses.

Analysis:

[51] **Condominium Act chap. C.26**

> s.28(1) The Board may pass by-laws, not contrary to this Act or to the declaration,
>
> *(a)* to govern the number, qualification, nomination, election, term of office and *remuneration of the directors;*
>
> (c) to govern the appointment, *remuneration,* functions, duties and removal of agents, *officers* and employees of the corporation and the security, if any, to be given by them to it. . . *(emphasis added)*

[52] Counsel agreed that in the original 1967 Condominium Act, s.9(10) was the predecessor of s. 28(1) and it permitted the compensation of directors to be authorized by declaration or by-laws but it was silent with respect to officers. In 1979, the reference to declaration was removed and subsection (c) with respect to officers was added:

> s.28(2) Subject to subsection (5), a by-law passed under subsection (1) is not effective until it is confirmed, with or without variation, by owners who own not less than 51 per cent of the units at a meeting duly called for that purpose.
>
> s.28(3) A by-law relating to the remuneration of a director or directors shall fix the remuneration and the period for which it is to be paid.
>
> s.28(5) When a by-law or special by-law is made by the corporation, the corporation shall register a copy of the by-law or special by-law together with a certificate executed by the corporation that the by-law was made in accordance with this Act, the declaration and the by-laws, and until the copy and certificate are registered the by-law is ineffective.

[53] Both counsel referred to other sections of the Condominium Act chap. C26 and to the by-laws. However, once Mr. Fine made the concessions in his reply submissions referred to above, many of those references became irrelevant.

[54] Mr. Cianfarani (and others) recite the practices of the corporation from 1975 (and including the 6 year period until 1981 during which Smithers was a Director) to the present. He deposed that when he became involved in 1982, he was advised that the previous board had adopted a practice of paying a yearly "Christmas bonus" to directors. It was his view that while it was so described, he did not consider it to be a form of gratuitous bonus. He pointed out that directors were entitled to be indemnified for costs, charges and expenses and officers and employees could be remunerated for their services. He said that most directors had also been appointed as officers. He recited some of the complex and significant issues with which the corporation had been confronted over the years and indicated that as officers, the directors spent considerable time outside of regular board meetings undertaking their respective officer functions.

[55] DiDonato, Hira, Whittall, Vergis, Morrow and Sisto were all Directors in December, 2000. S. 28(1)(c) requires that before a director receives remuneration, certain important procedural steps must be followed. Those steps were not taken. [Indeed, the attempt to pass such a by-law in March, 2001 (on the eve of the hearing of the YCC application) failed because a quorum was not present.] The remuneration paid to those Directors was paid in contravention of s.28 of the Condominium Act and must be repaid.

[56] It is the case that those six individuals were also Officers. I do not agree that payments made in their capacity as Officers distinguishes them for these reasons. First, to make such a distinction, it would have to have been recorded as such. In the ledger,

there is no distinction. Second, at various points, the Directors thought that they were being remunerated as directors. The following is an excerpt from the January 1996 edition of the KingsView Kronicle, the newsletter for the community:

> **CORRECTION**
>
> In a previous issue of the KingsView Kronicle, it was indicated that the Directors received an honorarium for serving on the Board. This is incorrect. The Directors receive a reimbursement of expenses for such things as attending court, attending off-site meetings, etc. We apologize for the misunderstanding that this caused at the December AGM.

Furthermore, in response to a question at the 1999 AGM, members were told that directors were receiving an "honorarium" in the amount of $2000.00 for each board member for services undertaken by them during the year. It is disingenuous to now describe a payment in one way when to describe it in the way in which it was originally labeled might attract liability. Third, even if they were paid as officers, I agree with Mr. Fine that s.28(1)(c) nonetheless applies and a by-law was required.

[57] The payment to Vince Cianfarani falls into a different category since he was neither officer nor director. The ledger indicates that the payment was to Vince Cianfarani, yet it was Vista Management which was the Property Manager. Neither counsel made an issue of that distinction and hence neither will I. I will assume that the payment was to Vista Management and that it was received by Vista in that capacity. Mr. Fine argued that s.28(1)(c) requires that that payment had to be authorized by a by-law. Ms. Dirks pointed out that if the Board had to pass a by-law for the remuneration of every employee, that it would lead to an unreasonable result: for everyone from the caretaker to the security contract to the occasional plumber, a by-law would be necessitated. I agree with Ms. Dirks that s.28(1)(c) ought not to be interpreted so broadly as to lead to that unintended result. But that is not the case here. Vista received payment for its property management services without a by-law. That is not in dispute. What is in issue is whether it ought to be remunerated above and beyond whatever amount is stipulated in the service contract. In keeping with the "open book" principle, the objective of this section is to ensure that those who are in control of the corporation do not use their authority to pay themselves without disclosure and approval by the members of the corporation. Vista falls into this category. Accordingly, I find that the payment to Vista was in violation of s.28(1)(c) and must be disgorged. Since the payment was made to Vince Cianfarani and since he is a respondent, it is his responsibility to repay.

[58] I will not deal with the payment to Mark Cianfarani since he is not a respondent.

[59] Counsel did not ask that I apply s.49 to this issue. Without determining whether s.49 is available, I would not invoke it to allow the respondents the opportunity to avoid disgorgement. I accept that historically the payments were made in good faith. While not fully disclosed, there had been some disclosure and some discussion at annual general meetings. If Mr. Fine had not abandoned the earlier years, I would have found the directors in breach of their duty, but I would not have required repayment. *[Adamson v.*

Huckins and York Condominium Corp. No. 217 (unreported) 1983] But different considerations apply to the payments made in December, 2000. This application by Smithers was initiated in May, 2000. Notwithstanding that the issue of remuneration of officers and directors was squarely before them, they nonetheless initiated and accepted the payment. To allow them to avoid repayment would be to reward such risk taking.

[60] Given the modest amounts involved, I see no point in awarding interest.

[61] Counsel have agreed that insofar as future payments are concerned, they will be governed by the Condominium Act, 1998.

Conclusion:

[62] The application by YCC is dismissed.

[63] The application by Smithers as it relates to Bongiovanni, Filipovic, Stulberg and Pileggi is dismissed. The application by Smithers as it relates to the payments made in December 2000 referred to at the end of paragraph 49 above is allowed. Within 60 days of the release of these reasons, the respondents DiDonato, Hira, Morrow, Whittall, Vergis, Sisto, and Vince Cianfarani shall repay to the corporation the amount each received in December, 2000.

[64] Counsel ought to confer to determine whether the costs consequences of these applications might be settled. Counsel will advise by joint letter in writing by October 31, 2001 whether settlement of the costs has occurred. Failing such resolution, counsel will participate in a telephone conference call with me on November 7, 2001 at 10:30 a.m. at which time a timetable will be established for the process by which submissions as to costs will be made. I expect that counsel will have conferred in advance as to the substance of the timetable. Ms. Dirks shall initiate the call. She will obtain from my assistant on the preceding day the telephone number at which I can be reached.

Addendum:

[65] After submissions were concluded and the decisions had been reserved, one counsel wrote to me with further input. The letter reached the other counsel before it reached me. The second counsel objected to what appeared to be additional submissions being made after the opportunity for doing so had finished and without approval of counsel. I agreed with the objection. I did not read the letter.

DATED AT TORONTO THIS 27th DAY OF SEPTEMBER, 2001

KITELEY J.