CITATION: Graff v. 1960 Queen Street East Ltd., 2017 ONSC 629
DIVISIONAL COURT FILE NO.: 631/15
DATE: 20170130

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

SWINTON, C. HORKINS and EMERY JJ.

BETWEEN:	)	
	)	
BRIAN GRAFF	)	*M. Philip Tunley* and *Dennis H. Wood*, for the Appellant
Appellant	)	
	)	
– AND –	)	
	)	
1960 QUEEN STREET EAST LTD. AND RESERVE PROPERTIES LIMITED	)	*David Bronskill*, for the Respondents
	)	
	)	*Stan Floras* for the Ontario Municipal Board
Respondents	)	
	)	**HEARD at Toronto:** November 28, 2016

The Court:

OVERVIEW

[1] On August 26, 2015, the Ontario Municipal Board (the "Board") awarded costs of $28,693.22 to 1960 Queen Street East Ltd. and Reserve Properties Limited (the "Respondents"), payable by the Appellant, Brian Graff ('the "Initial Decision"). On November 10, 2015, in response to a request for review from the Appellant, the Associate Chair of the Board upheld the award of costs, but reduced the amount of those costs to $15,000 ("the Review Decision"). The Appellant appeals the costs order on the grounds that he was not a party to the proceeding in which those costs were awarded. Leave to appeal was granted by Pattillo J. on July 15, 2016.

[2] For the reasons that follow, we would allow the appeal and set aside the costs order.

BACKGROUND AND CONTEXT

[3] The prospect of change in the landscape of a neighborhood often brings an emotional response.

[4] 1960 Queen Street East Ltd. ("1960") is a property owner that is owned by the respondent Reserve Properties Limited. 1960 applied to Toronto City Council ("City Council") for a bylaw to change the zoning applicable to 1960 and 1962 Queen Street East, in the Queen Street East and Beach community in Toronto. 1960 applied for this rezoning to enable the construction of a six story condominium building.

[5] On June 8, 2012, City Council approved the application of 1960 to pass a bylaw for rezoning the two properties. Two appeals were commenced to the Board under the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28 (the "*OMBA*") with respect to this zoning bylaw. One of those appeals was commenced by the Beaches Residents Association of Toronto ("BRAT"). The other appeal was commenced by individuals unrelated to BRAT or the Appellant (the "Cramer appeal").

[6] The Appellant incorporated BRAT as a not-for-profit public interest corporation on July 5, 2012. He was one of the three founding directors of BRAT, along with Wayne Clutterbuck and Suzanne Giblon. On July 10, 2012, the Appellant filed the BRAT appeal of the rezoning bylaw to the Board. He signed the notice of appeal on behalf of BRAT. He was listed as a director of BRAT, and he gave his home address as the corporate head office for BRAT on the notice of appeal. BRAT subsequently retained Harold Elston as counsel for the appeal.

[7] In November 2012, Mr. Clutterbuck and Ms. Giblon resigned as directors of BRAT. There was no quorum of directors for its board to function until a new board of directors was elected. On December 11, 2012, Mr. Elston informed the Board and all parties that his firm no longer represented BRAT, and that all future correspondence should be directed to the Appellant.

[8] On December 21, 2012, a new board of directors was elected for BRAT. It consisted of three directors that did not include the Appellant. The new board formally took power on January 12, 2013. Unfortunately, the Appellant did not inform the Board or counsel for the Respondents that he was no longer a director.

[9] The Board had sent an appointment of hearing to all parties on December 19, 2012 to confirm that a hearing date had been scheduled for February 5-7, 2013. The Board enclosed a copy of its rules on adjournments with this notice.

[10] Counsel for 1960 wrote to the Appellant on January 12, 2013 to request the list of witnesses that BRAT proposed to call at the hearing. The Appellant responded that BRAT was still finalizing its team, and requested an adjournment of the hearing. 1960 responded promptly to advise him that 1960 would not consent to any adjournment request, and that a motion would have to be filed pursuant to the Board's rules on adjournments. 1960 also took this occasion to again request a list of the witnesses BRAT proposed to call at the hearing.

[11] After he was formally replaced as a director, the Appellant forwarded two emails he had received from the Respondents to the new board of directors for BRAT. He informed the new board that he would no longer be communicating with the Respondents or anyone else on behalf of BRAT. He took the position that it was the responsibility of the new board of directors to communicate further with the Respondents, and not himself.

[12] The new board of directors for BRAT made the decision to continue with the appeal. The new directors retained Ian Flett to represent BRAT, subject to Mr. Flett's condition that the hearing scheduled for February 5, 2013 would be adjourned. On February 1, 2013, Mr. Flett filed a notice of motion to seek that adjournment.

[13] The Appellant wrote to the Board on February 4, 2013 to advise that he was no longer on the BRAT board of directors. He further advised the Board that he would be seeking party status on behalf of a newly incorporated non-profit corporation, Save Queen Street East Association Inc. ("SQS"). He advised the Board that if given party status, SQS would be seeking an adjournment of the hearing to permit adequate time to prepare. It was also on February 4, 2013 that the Cramer appeal was withdrawn.

[14] On February 5, 2013, the Board Member assigned to hear the appeal heard the motion to add SQS as a party and the motion BRAT had brought to adjourn the hearing. Both motions were contested by the Respondents. The Member dismissed the SQS request for party status. Instead, the Board offered participant status to the Appellant. Under the Board rules, a participant is a defined term that provides the participant the right to make a presentation to the Board, but no right to call evidence or to cross-examine witnesses. The Appellant declined that offer to be a participant and withdrew from the hearing.

[15] The Member then heard argument on BRAT's motion for an adjournment, and dismissed that adjournment request. Mr. Flett withdrew from the hearing as a result, and BRAT continued with the hearing through Mr. Bell, one of its new directors.

[16] Over the course of the hearing on February 5 and 6, 2013, the Member heard evidence from the City of Toronto, the Respondents and from six persons, including Mr. Clutterbuck, who opposed the development. On February 6, 2013, the Member gave an oral decision dismissing the BRAT appeal on the merits.

[17] At the conclusion of the hearing on February 6, 2013, the Respondents withdrew their motion for costs against BRAT and its current directors. Instead, they reserved the right to seek costs against BRAT's previous directors. The Appellant was not present when the Respondents reserved those rights.

[18] The Appellant asked the Board to review its decision on the merits under s. 43 of the *OMBA*. His request was denied on the ground that he was not a party to the BRAT appeal. The decision states as follows:

> Rule 113 provides that the Board will not consider a request if it is made by a non-party, unless the Chair finds that there is a valid and well-founded reason why the Requestor is not a party. You are not a party to this appeal and the Board

also denied party status to SQS. This basis alone is sufficient for me to dismiss your request since you lack standing under the Board Rules as a non-party to this Decision.

THE COSTS DECISION

[19] On March 13, 2013, counsel for the Respondents wrote to the Board, without sending a copy to the Appellant, requesting costs of the BRAT appeal against the Appellant personally. The Board wrote back, directing the Respondents to make their request for costs in writing only, and to serve them on the Appellant.

[20] On May 8, 2013, the Respondents filed their motion for costs against the Appellant. The Respondents did not seek costs against BRAT or any of its other past or present directors.

[21] After written submissions had been exchanged, the Member released her decision awarding costs against the Appellant personally. She ordered costs against the Appellant, finding him to be the "real litigant" in the matter. She stated, "Being the soul of BRAT, and of its incarnation, SQS, Mr. Graff was *de facto* a Party in this matter" (at para. 23). She held that the Appellant was responsible for BRAT's failure to prepare for the hearing. She awarded costs to the Respondents in the amount of $28,693.22, representing the full costs of the three experts called by the Respondents.

[22] On September 24, 2015, the Appellant requested that the Board review the costs decision under s. 43 of the *OMBA*. On November 10, 2015, the Associate Chair denied the request to set aside the costs order. He concluded that the Board had jurisdiction to award costs against a non-party who is found to be the real litigant, and that the Board had made no legal error in awarding costs against the Appellant. However, he reduced the amount of those costs to $15,000, finding that the original costs assessment should not have included the costs incurred with respect to the Cramer appeal, or the time to respond to the BRAT appeal and the evidence of witnesses called to testify.

THE ISSUES

[23] The Appellant brings this appeal with leave he obtained from Pattillo J. under s. 96 (1) of the *OMBA*, which allows an appeal with leave on a question of law. Leave was granted only with respect of the following issues:

1. Does the Board have jurisdiction to award costs against a non-party?

2. If the answer to question 1 is yes, did the Board err in principle in awarding costs against Mr. Graff in this case?

[24] On the first question, the Appellant argues that the Board did not have jurisdiction to award costs against him as a non-party. On the second question, he argues that even if the Board had jurisdiction to award those costs, the Board erred in principle in granting the costs as the Appellant was not the "real litigant" behind the BRAT appeal to the Board.

[25] The Respondents submit that the appeal should be dismissed because the Board had jurisdiction under the *OMBA* and the Board's rules to award costs against the Appellant as a non-party, and because the Board exercised its jurisdiction reasonably by awarding costs to the Respondents against the Appellant personally on the facts.

[26] The Board made submissions on the appeal to assist the Court in understanding the mandate of the Board, various policy considerations behind the power given to a Board to award costs, the Board's jurisprudence on costs, and the appropriate standard of review.

THE STATUTORY SCHEME

[27] In order to determine the appropriate standard of review, it is necessary to understand the statutory scheme governing the award of costs by the Board.

[28] Section 97 of the *OMBA* deals specifically with the Board's power to award costs. Subsection 97(1) provides the Board with the discretion to award costs. It states,

> The costs of and incidental to any proceeding before the Board, except as herein otherwise provided, shall be in the discretion of the Board, and may be fixed in any case at a sum certain or may be assessed.

Pursuant to s. 97(2), the "Board may order by whom and to whom any costs are to be paid, and by whom the same are to be assessed and allowed."

[29] Pursuant to s. 91 of the *OMBA*, the Board may make general rules concerning its practice and procedure. In addition, s. 17.1(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the "*SPPA*") confers a power on a tribunal to make rules respecting the order of costs, subject to subsection 2. That subsection stipulates that a tribunal shall not make an order to pay costs unless "the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith," and provided the tribunal has made rules under subsection (4).

[30] The Board has adopted detailed *Rules of Practice and Procedure*, including rules related to costs. Rule 96 provides when a party may seek costs. Rules 97 through 101 set out the procedure for the determination of a costs award. Most important for purposes of this appeal is rule 103, which sets out the circumstances in which a costs order may be made. The wording of the first sentence of the rule tracks s. 17.1(2) of the *SPPA*. The rule then sets out examples of conduct that can be characterized as clearly unreasonable, frivolous, vexatious or bad faith. The final paragraph emphasizes the discretionary nature of a costs award. Rule 103 reads:

> The Board may only order costs against a party if the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or if the party has acted in bad faith. Clearly unreasonable, frivolous, vexatious or bad faith conduct can include, but is not limited, to:
>
> (a) failing to attend a hearing event or failing to send a representative when properly given notice, without contacting the Board;

(b) failing to give notice without adequate explanation, lack of co-operation with other parties during prehearing proceedings, changing a position without notice to the parties, or introducing an issue or evidence not previously mentioned or included in a procedural order;

(c) failing to act in a timely manner or failing to comply with a procedural order or direction of the Board where the result is undue prejudice or delay;

(d) a course of conduct necessitating unnecessary adjournments or delays or failing to prepare adequately for hearing events;

(e) failing to present evidence, continuing to deal with issues, asking questions or taking steps that the Board has determined to be improper;

(f) failing to make reasonable efforts to combine submissions with parties of similar interest;

(g) acting disrespectfully or maligning the character of another party; and

(h) knowingly presenting false or misleading evidence.

The Board is not bound to order costs when any of these examples occur as the Board will consider the seriousness of the misconduct. If a party requesting costs has also conducted itself in an unreasonable manner, the Board may decide to reduce the amount awarded. The Board will not consider factors arising out of a mediation or settlement conference in determining whether there should be an award of costs.

THE STANDARD OF REVIEW

[31] The Appellant argues that the standard of review on this appeal is correctness, because the power of the Board to award costs is a question of jurisdiction. We disagree.

[32] The Board was applying its home statute and its rules when it made the Initial Decision and Review Decision. In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61, Rothstein J. stated that there is a presumption that reasonableness is the standard of review to apply to the exercise of a tribunal's power under its home statute (at para. 34). The standard of correctness applies in limited circumstances, as set out in *Dunsmuir v. New Brunswick,* 2008 SCC 9 and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53. For example, correctness applies to a question of central importance to the legal system that is also outside the adjudicator's specialized area of expertise. While correctness applies to "true" questions of jurisdiction, such questions are exceptional. That category is limited to situations where a tribunal must explicitly determine whether it has the authority to make the inquiry in the first place (*Alberta Teachers'* at paras. 33 and 42).

[33] In *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, the Supreme Court of Canada explained why deference is owed to a tribunal that interprets its enabling legislation. The Court explained that the tribunal is in the best position to understand and apply the policy considerations that are often involved in the interpretation of a tribunal's home statute (at para. 33). On an appeal, a court will defer to any reasonable interpretation applied by the tribunal even if there are other interpretations the statutory language can reasonably support.

[34] The courts have applied the standard of reasonableness to decisions of the Board when the questions of law under appeal involved the interpretation of the Board's enabling statute, the exercise of its costs powers, and the application of statutes which the Board frequently applies, such as the *Planning Act* (see, for example, *London (City) v. Ayerswood Development Corp.*, [2002] O.J. No. 4859 (C.A.) at para. 7; *Toronto (City) v. Home Depot Holdings Inc.*, 2010 ONSC 6071 (Div. Ct.) at paras. 31-32); *Clark (c.o.b. Barrie Paintball Adventure Club Inc.) v. Essa (Township)* (2007), 223 O.A.C. 72 (Div. Ct.) at para. 34).

[35] The issues raised in the present appeal are not true questions of jurisdiction that attract review on a standard of correctness. The Board has authority to award costs. It was interpreting and applying its costs powers, as set out in its enabling statute and the rules. These are matters within the core function and specialized expertise of the Board. There are no exceptional circumstances that rebut the presumption that a standard of reasonableness applies.

[36] In *Dunsmuir,* the Supreme Court defined the qualities of a reasonable decision on judicial review to be whether the decision under review was justified, transparent and intelligible within the decision making process. The Court went on that reasonableness is also concerned with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (at para. 47). The same test has been applied on statutory appeals (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 at para. 29).

ANALYSIS

[37] The issue of jurisdiction was not addressed by the Board because the Appellant did not challenge the jurisdiction of the Board to award costs against him. Accordingly, the Board's reasons do not address this question directly. Although it is usually preferable to refer an issue back to the tribunal for a ruling on an issue raised for the first time on appeal or judicial review, it would be counterproductive to do so here, given the time that has passed. The initial decision on the merits was made in 2013, and the initial costs decision given in 2015. It is in the interest of justice that decisions be made in the most expeditious and least expensive manner on the merits.

[38] The Board implicitly found that it had the jurisdiction to make the costs award against the Appellant by virtue of making the decision it did. Counsel for the Board in this appeal submitted that reasons in past decisions of the Board should be considered to assess whether they provide a reasonable explanation and basis for the Board's decision to award costs in the present case, noting that the Supreme Court of Canada looked to other decisions of the tribunals in both *Alberta Teachers'* and *McLean*, above.

[39] Turning to the legislation, s. 17.1 of the *SPPA* does not give the Board the power to award costs against a non-party. Section 17.1(1) of the *SPPA* confers a power to order costs against a party in certain circumstances, as described above.

[40] Section 97 of the *OMBA*, in contrast, gives the Board a broad discretion to award costs. Subsection 97(2) allows the Board to decide "by whom and to whom any costs are to be paid." However, the Board has adopted rules with respect to costs pursuant to the power it has been given under s. 91 of the *OMBA*. Those rules reflect the language of s. 17.1(2) of the *SPPA*.

[41] The rules are the code the Board has adopted to establish criteria for awarding costs under s. 97 of the *OMBA*. This was recognized by the Board in *865503 Ontario Inc. v. London (City)*, [2009] O.M.B.D. No. 502 at para. 12 and *Kimvar Enterprises Inc. v. Innisfil*, [2009] O.M.B.D. No. 33 at para. 36.

[42] Those rules include rule 96 that provides that only a party may ask for an award of costs at the end of the hearing event. Rule 99 specifically sets out the rights of a party or parties to respond to a request for costs. Rule 103 sets out the circumstances in which a costs order may be made, limiting it to circumstances where the conduct of a party has been unreasonable, frivolous or vexatious or the party has acted in bad faith. Nowhere in the rules is there any provision for the award of costs against a non-party.

[43] The Board provided six cases decided by the Board since 1981 where costs were awarded against a non-party. These cases include the present decision under appeal. The other five were decided before 2008, when changes were made to the Board's rules (*Davis v. Ottawa (City) Committee of Adjustment* (2005), 51 OMBR 224; *Brayman v. Kawartha Lakes (County)* (2005), 50 OMBR 345; *Tempo Foundation v. Owen Sound (City)*, [1997] OMBD No 1162; *Hazelton v. Clarendon and Miller (Township) Land Division Committee* (1996), 34 OMBR 105; *Leidel v. Innisfil (Township)*(1981), 13 OMBR 111).

[44] Since the rule changes in 2008, three decisions of the Board have held that there is no jurisdiction to award costs against a non-party (*865503 Ontario Inc. v. London (City)*, [2009] O.M.B.D. No. 502 at paras. 9 and 12; *Kimvar Enterprises Inc. v. Innisfil*, [2009] O.M.B.D. No. 33 at paras. 34-37; and *Joanisse v. Hawkesbury (Town)*, [2015] O.M.B.D. No. 266). However, in *Kimvar*, the Board did indicate that there were two exceptions to this principle: where the non-party is the "real litigant", and where there has been an abuse of process (at para. 34).

[45] For purposes of this appeal, we need not determine whether the Board can award costs to a non-party who has committed an abuse of process. The Respondents argued that the Board had the power to do so pursuant to s. 23(1) of the *SPPA*. That provision allows a tribunal to "make such orders or give such directions in proceedings before it as it considers proper to prevent an abuse of process."

[46] We would not give effect to the abuse of process argument because neither of the Board's decisions invoked this section of the *SPPA*, nor made a finding of an abuse of process. Moreover, we note that in *Royal & Sun Alliance Insurance Co. of Canada v. Volfson*, [2005] O.J. No. 4523, the Divisional Court upheld a tribunal's costs award against a person who had fraudulently commenced proceedings in the name of his client. However, before making the

award, the tribunal made an order pursuant to s. 23 adding the person as a party to the proceeding he had commenced.

[47] The Respondents also argue that s. 38 of the *OMBA* could have been invoked to support an order of costs against the Appellant. Section 38 allows the Board to add or substitute parties. However, that section was not referred to nor relied upon by the Board in the present costs decisions. Indeed, the Member had denied the Appellant party status at the outset of the merits hearing, and she did not make him a party for purposes of the costs proceeding. Therefore, s. 38 does not support the costs award made in this proceeding.

[48] That brings us to the "real litigant" issue. In earlier cases, the Board made reference to court decisions where costs were awarded against a non-party on the grounds that the non-party was the real litigant, and the named litigant was a "man of straw". However, the Board in those cases failed to address the fact that the basis of the court's authority to make such an order lies in its inherent jurisdiction.

[49] For example, in *Television Real Estate Limited v. Rogers Cable T.V. Ltd.*, [1997] O.J. No. 1944, the Court of Appeal confirmed that the phrase "by whom ... the costs should be paid" in s. 131 of the *Courts of Justice Act* had judicially been interpreted to mean "by which of the parties to the proceedings before the court or judge." This interpretation was drawn from the decision of Arnup J.A. in *Rockwell Developments Ltd. v. Newtonbrook Plaza Ltd.* (1972), 27 D.L.R. (3rd) 651 (Ont. C.A.) where he considered the scope of s. 82 of the *Judicature Act* (the predecessor of s. 131 of the *Courts of Justice Act* today).

[50] At issue in *Television* was an award of costs by the trial judge against the officers of the plaintiff corporation who were not parties to the action on the basis that they were the real litigants. Finlayson J.A. found that the trial judge exceeded the jurisdiction given to the court under the statute to award costs of a proceeding when he made the costs award against the non-parties. In addition to *Rockwell*, Finlayson J.A. reached back to the decision in *Sturmer v. Beaverton (Town)* (1911), 25 O.L.R. 190 (Ont. H.C.) affirmed at (1912), 25 O.L.R. 566 (Div. Ct.). In *Sturmer*, Justice Middleton recognized the inherent jurisdiction of the court to prevent any abuse of its process. In exercising this jurisdiction, the court may stay a proceeding where those really litigating the case have put forward a "man of straw" as the named party to shield themselves from costs, until they have been added as parties or they have put up adequate security.

[51] Thus, according to the decision in *Television*, the statutory language used to give the courts the power to determine by whom costs should be paid extends only to awards against parties to a proceeding. This power is subject to the exception that the court may exercise its inherent jurisdiction to award costs against a non-party in extraordinary circumstances where it is found that the named party is a "straw man" put forward by the real litigant as a shield against a costs order or for some other strategic reason.

[52] While s. 97 of the *OMBA* gives the Board jurisdiction to determine by whom costs should be paid, the Board has no inherent jurisdiction to award costs against a non-party. Moreover, and most importantly, its rules provide only for an order of costs against a party.

[53] Nevertheless, the Board is entitled to deference in its interpretation of the meaning of a party in those rules and its application in a particular fact situation. In previous cases, the Board, in determining who is a party for purposes of the rules, has looked behind the named litigant, (often a corporation) to see if it is a man of straw. In doing so, the Board was not relying on inherent jurisdiction, as in the court cases cited above, but rather determining the meaning who is the real "party" in a proceeding and therefore subject to the costs regime.

[54] The problem in the present case is that the scope of the Board's authority to order costs against a "real litigant" was never raised in the Board's proceedings. This Court does not have the benefit of the reasons of the Board for finding that it had the authority to find the Appellant a party in the circumstances. Assuming without deciding that "party" may include the individual who is the "real litigant", the question for this Court is whether the Board made an error in law in finding that the Appellant was the real litigant in the proceedings. In our view, it did err.

[55] The Member failed to articulate the principles relevant to a determination whether a named party is a "straw man" and another individual is the "real litigant". She quoted from the 1997 decision of the Board in an earlier case, *Tempo Foundation,* above. However, the situation in *Tempo* was significantly different. The individual against whom costs were ordered was the president of the Tempo Foundation. Tempo had only two members – the individual and his wife. He represented the Foundation throughout the hearing and was found to be essentially one and the same with the Foundation. For this reason, he was found to be *de facto* a party.

[56] In cases where the courts have applied the straw man test, they have considered the following factors: did the non-party have status to commence the proceedings; is the non-party the true litigant; and was the man of straw put forward to protect the non-party from liability for costs? See, for example, *Moja Group (Canada) Inc. v. Pink,* [2005] O.J. No. 5023, where the Court of Appeal allowed an appeal of an individual who was the director of a corporation that was a party to proceedings, but was not a party himself. The costs order against him personally was set aside because he was not a party to the proceeding. The Court in *Moja Group* held that the company must be shown to be a sham or a "man of straw" put forward by the real litigant to shield himself from liability for costs.

[57] The Member made findings at paragraphs 23 and 24 of her decision about the Appellant's conduct. Those findings are relevant to the issue as to whether an award of costs should be made because of misconduct, but those findings do not assist in resolving the issue of whether the Appellant was the "real litigant."

[58] With respect to conduct, the Member found that the Appellant had responsibilities to prepare for the hearing he had in fact initiated, and that he was responsible for the fact that BRAT was unprepared for the appeal on February 5, 2013. She also found that the Appellant played games with both the Board and with the developers. When requested, he did not give the Respondents information they needed to know the case they had to meet, requiring them to engage three expert witnesses to meet any contingency. She described the Appellant as leaving BRAT "holding the bag" after his departure.

[59] Ultimately, she concluded that the appellant was the real litigant and BRAT was the "straw man". In her words, which were also quoted earlier, "Being the soul of BRAT, and its reincarnation, SQS, Mr. Graff was *de facto* a party in this matter".

[60] This decision demonstrates several errors in principle. First, the question is not whether he is *de facto* a party. It is whether BRAT was a "straw man" for him in the proceedings.

[61] Second, it was too late in the game for the Board to find that the Appellant was *de facto* a party when the costs decision was released on August 26, 2015. He applied for party status on behalf of SQS at the outset of the hearing in February 2013 and was refused. He was never a party himself in name or in function after that. It should also have been apparent to the Member by February 1, 2013 that BRAT was constituted with different directors. BRAT continued the appeal under the authority of those directors, even calling Mr. Clutterbuck as a witness. Indeed, the reasons of the Member on the merits show that BRAT was represented by Ian Flett and Scott Bell. The Appellant was not in attendance during the hearing on the merits.

[62] There is no evidence that the Appellant played a role in the appeal after he withdrew from the hearing. It would also have been apparent from Mr. Flett's motion for an adjournment on behalf of BRAT that the Appellant's involvement had come to an end. The Member acknowledged that fact by ruling that the Appellant was not entitled to request that the Board review its decision on the merits because he was a non-party.

[63] Third, the Member failed to consider significant evidence that shows the Appellant did not meet the "real litigant" test, as in *Tempo*, and that is an error in law. She did not consider, for example, that the Appellant was one of three directors of BRAT; that there was a new board in place at the time of the hearing and that board had retained counsel; that the Appellant had no status to act for BRAT after January 12, 2013 at the latest; that he was not a party nor a participant in the hearing; that BRAT continued to participate in the hearing, first asking for an adjournment and then continuing when counsel ceased to represent it; and that the Respondents engaged in settlement discussions with BRAT in the Appellant's absence. The Member also failed to consider whether the Appellant was using BRAT to protect himself from liability for costs. In fact, there was no evidence to support such a conclusion.

[64] The Member's determination that the Appellant was the real litigant and that BRAT was a straw man was unreasonable, given the applicable principles and the record before her. The Member failed to articulate and apply the operative principles for determining whether a non-party is the real litigant, and it failed to consider material evidence which showed that the Appellant was not the driving force of the litigation at all material times. Accordingly the Board, in the Initial Decision and Review Decision, had no authority to order costs against the Appellant, as he was not a party to the proceeding.

CONCLUSION

[65] Accordingly, the appeal is granted. There shall be an order setting aside the costs order dated August 26, 2015 and the Review Decision dated November 10, 2015. Given that there is no basis to award costs against the Appellant as a non-party, there is no need to refer the matter back to the Board.

[66] The order of Pattillo J. dated July 15, 2016 fixed costs in the amount of $5,000.00 for the leave motion, reserving disposition to the panel hearing the appeal. Those costs, along with the costs for this appeal in the amount of $10,000.00, a sum agreed upon by the parties, are awarded to the Appellant for a total of $15,000.00 all inclusive. These costs are payable by the Respondents within 30 days.

K. Swinton J.

Swinton J.

C Horkins J.

C. Horkins J.

Emery J.

Date of Release: JAN 30 2017

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SUPERIOR COURT OF JUSTICE
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SWINTON, C. HORKINS and EMERY JJ.

BETWEEN:

BRIAN GRAFF

Appellant

– AND –

1960 QUEEN STREET EAST LTD. AND RESERVE PROPERTIES LIMITED

Respondents

REASONS FOR JUDGMENT

BY THE COURT

Date of Release: January 30, 2017