CITATION: Caras & Callini Group Ltd. v. Peel Standard Condominium Corporation No. 837, 2011 ONSC 7565
COURT FILE NO.: 11-CV-426459
DATE: December 19, 2011

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Caras & Callini Group Ltd.

Applicant

- and -

Peel Standard Condominium Corporation No. 837 and the Unit Owners and Mortgagees listed in the record of the Corporation

Respondents

COUNSEL:

- M. Michael Title for the Applicant
- David A. Di Lella

HEARING DATE: December 14, 2011

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] Pursuant to the *Condominium Act, 1998*, S.O. 1998, c. 19, Solstice One Limited ("Solstice") developed a commercial and residential condominium project in Mississauga, Ontario. As declarant, it registered the Declaration and Description for the project, and in that Declaration, although unit 12 of the condominium had been built as a commercial unit, Solstice designated it as a "storage unit."

[2] Although it had been built as a commercial unit, Solstice designated unit 12 as a storage unit to avoid the necessity of obtaining the zoning minor variance that was needed for unit 12 lawfully to be used as a commercial unit.

[3] Years before the registration of the Declaration, Solstice had sold unit 12 as a commercial unit. The Applicant, Caras & Callini Group, purchased and paid for unit 12 as if it was a commercial unit, which was how it was referred to in the agreement of purchase and sale.

[4] Years after the registration of the Declaration, after outfitting unit 12 as commercial space, Caras & Callini leased unit 12 to Dr. Giselle Patel as a commercial unit. Dr. Patel already had medical offices on the first floor of the condominium, and

she wished to use unit 12 as an expansion of her medical practice. Caras & Callini obtained the minor variance that was needed for the commercial use of unit 12, and it obtained a building permit to fixture unit 12 for Dr. Patel.

[5] After unit 12 was outfitted for the extension of Dr. Patel's medical practice for a spa, the Respondent Condominium Corporation gave Dr. Patel and Caras & Callini notice that Dr. Patel's use contravened the Declaration, which still described unit 12 as a storage unit.

[6] Pursuant to s. 109 of the *Condominum Act, 1998*, Caras & Callini now brings an application for an order to amend the Declaration. Section 109 authorizes the Superior Court to amend the Declaration "if satisfied that the amendment is necessary or desirable to correct an error or inconsistency that appears in the declaration or that arises out of the carrying-out of the intent and purpose of the declaration or description."

[7] For the reasons that follow, I grant the Application without costs.

B. FACTUAL BACKGROUND

[8] The evidence for this Application was provided by affidavits from Atef Demian, who is a director of Caras & Callini, and from Kamla Narinesingh, who is a member of the board of directors of the Respondent Condominium Corporation.

[9] In the mid-2000's, Solstice developed a commercial and residential condominium project in Mississauga, Ontario.

[10] By agreement of purchase and sale dated December 1, 2005, which was assigned to Caras & Callini, Solstice agreed to sell certain units in the project to Caras & Callini; namely:

> Commercial Unit(s) Level 1, Unit 1,2,3,4,5,6,7 and Level 3, Unit 6,7,8,9,10,11,12 together with five (5) storage units to be located on Level 1, Unit 8,9,10,11 and Level 3, Unit 13 and five (5) parking spaces to be designed by the Vendor

[11] It is to be noted that unit 12 is described as a commercial unit in the agreement of purchase and sale. At the time of the agreement, Solstice told Caras & Callini that all of the units being purchased were commercial units. Approximately $173,000 of the $3 million purchase price was allocated to unit 12 as a commercial unit.

[12] At the time of the agreement of purchase and sale, the Declaration and the Description for the condominium project had not been registered. It was registered on September 11, 2008. In the registered Declaration and Description, Unit 12 is designated as a storage unit in Schedules C (description of unit boundaries) and Schedule D (percentage contribution to common expenses and interest in common elements).

[13] For present purposes, the following provisions of the Declaration are relevant:

1.1 Definitions

The terms used in the Declaration shall have the meanings ascribed to them in the Act unless this Declaration specifies otherwise or unless the context otherwise requires and in particular: …

(f) "Commercial Units" means Units 1 to 7, inclusive, on Level 1 and Units 6 to 11 inclusive on Level 3; ….

(ff) "Storage Units" means Units 8,9,10 and 11 on Level 1 and Unit 12 on Level 3;

1.5 Inclusions and Exclusions of Units

… Notwithstanding the boundaries set out in Schedule "C" attached hereto, it is expressly stipulated and declared that the following items, matters or things are included/excluded from (as the case may be) each of the Units described below, namely: ….

(b) Parking Units, Visitor Parking Units, Locker Units, Storage Units, Garage Storing Units and General Purpose Storage Units, (including variations of these types of Units).

Each Parking Unit, Visitor Parking Units, Locker Unit, Storage Unit, Garage Storage Unit and General Purpose Storage Unit has no inclusions, save and except for the Visitor Parking Units, which shall include, the surface membranes and coatings, if any.

Each Parking Unit, Visitor Parking Units, Locker Unit, Storage Unit, Garage Storage Unit and General Purpose Storage Unit shall exclude, all equipment or apparatus, including any fans, pipes, wires cables, conduits, ducts, flues, shafts, fire hoses, floor area drains, sprinklers, lighting fixtures, air-conditioning or heating equipment appurtenant thereto which provide any services to the Common Elements or Units including all wall structures and support columns and beams as well as additional floor surfacing (membranes and coatings included) which may be located within any Parking Unit, Locker Unit Storage, Storage Unit, Garage Storage Unit and General Purpose Storage Unit.

(c) Commercial Units

(i) Each Commercial Unit shall include all pipes, wires, cables, conduits, ducts and mechanical or similar apparatus, including, but not limited to, heating, air conditioning and ventilation equipment and appurtenant fixtures attached thereto, all of which provide a service or utility to that particular Unit only, regardless of whether or not same are located outside the boundaries of the Unit described in Schedule "C," as well as, the exterior doors, door frames, windows and window frames.

(ii) Each Commercial Unit shall exclude all concrete, concrete block or masonry portions of load bearing walls, columns, and floor slabs and any pipe, wire, cable, conduit, duct, shaft and mechanical or similar apparatus which is situate within the Unit boundaries described in Schedule "C" and which provide a service or utility to another Unit or the Common Elements.

4.1 General Use

The occupation and use of the Units shall be in accordance with the following restrictions and stipulations: …

4.3 Commercial Units

(a) (i) The Commercial Units shall, subject to the provisions herein, be occupied and used in accordance with and only for such commercial purposes as are permitted by the relevant zoning by-laws of the City of Mississauga and for no other purpose, provided no Commercial Unit may be used for live adult entertainment or as a full service restaurant where significant cooking or baking is carried on within the Commercial Unit. ….

(iv) There shall be no restriction on the right of any Owner of a Commercial Unit from leasing his Commercial Unit or restrictions on any tenant of a Commercial Unit from subleasing its interest in a Commercial Unit to another tenant or subtenant. ….

(g) The Owner of a Commercial Unit and any person occupying the whole or any part of a Commercial Unit with any Owner's consent shall be entitled to erect, remove, replace or alter any internal walls or partitions within such Commercial Unit and to make any structural change or alteration in or to such Commercial Unit and to make any change to an installation upon the Common Elements or to encroach upon and alter the Common Elements and, if required have reasonable access to any other Commercial Unit or the Common Elements without the consent of the Board for the following purposes: …

4.6 Locker Units and Storage Units

(a) Each Locker Unit and Storage Unit shall only be used for the storage of non-hazardous and non-combustible materials and shall not constitute a danger or nuisance to the residents of the Corporation, the Units or the Common Elements. Each Unit Owner shall maintain his or her Locker Unit, or Storage Unit in a clean and sightly condition. …

(d) Any or all of the … Storage Units in this Corporation may at any time by sold, leased, charged, transferred or otherwise conveyed, either separately or in combination with other Units, provided however, that any sale, transfer, assignment or other conveyance of any … Storage Unit shall be made only to the Declarant, … and in respect of a Storage Unit, to any Owner of a Commercial Unit in this Corporation, but in no event shall a Storage Unit be sold, transferred, assigned or conveyed to an Owner of a Residential Unit, who is not also an Owner of a Commercial Unit. …. Storage Units may be leased to tenants in actual occupation of Commercial Units, subject to the provisions of this Article IV of the Declaration.

(f) Any instrument or other document purporting to affect a sale, transfer, assignment or other conveyance of any … Storage Unit, in contravention of any of the foregoing provisions, shall be deemed to be null and void and of no force and effect whatsoever.

4.13 Restrictions on Sale and Lease of Units

Notwithstanding anything hereinbefore or hereinafter provided … the ownership, sale, leasing, charging, assigning, transferring, or otherwise conveying of any … Storage Unit(s) shall be subject to the following restrictions and limitations:

(a) any sale, transfer, assignment or other conveyance of aforesaid Units shall be made in accordance with paragraphs 4.4(d) and 4.5(d) of this Declaration;

(b) no one shall retain ownership of any such Unit after he or she has sold and conveyed title to his or her … Commercial Unit within Phase I …

[14] The standard condominium plan, which is the survey of the unit boundaries by an Ontario Land Surveyor, was also registered on September 11, 2008. The survey shows unit 12 as "office storage room" with dimensions of 4.97 metres by 14.68 metres. In the registered condominium plan, the closest commercial unit to unit 12; i.e., unit 8, has dimensions of 5.19 metres by 10.41 metres. In contrast, storage units in the condominium plan for this condominium typically have dimensions of 1.0 metres by 1.83 metres. Storage units are constructed without utilities.

[15] During 2007 and 2008, the condominium was constructed as a mixed commercial and residential development. The first floor and another floor, which is described as the mezzanine has commercial and office uses. Above these floors are 300 residential units. Storage lockers are located in the sub-grade level of the building.

[16] Unit 12 was constructed on the mezzanine level as a commercial unit with the usual utilities of plumbing and electrical services and a hot water heater. Caras & Callini was consulted about the location of the electrical and plumbing services for unit 12 as commercial space. Apart from unit 12, there are no designated storage units on the mezzanine level of the building.

[17] Caras & Callini's original plan was to use unit 12 as its head office. However, under the zoning, a commercial use was not available for the space due to an inadequate number of public parking spaces. To solve this problem, Caras & Callini applied for and on August 12, 2010, it received a minor variance from the City of Mississauga Committee of Adjustment.

[18] All of the unit owners were given notice of the meeting of the Committee of Adjustment where Caras & Callini's minor variance application was heard. No objections were made to the application before the Committee of Adjustment.

[19] In September 2010, Caras & Callini obtained a building permit to fixture unit 12 for office and commercial use. The building permit was posted on unit 12. The interior improvements were completed in the fall of 2010. The interior space was partitioned into a reception area and five offices.

[20] In October 2010, Dr. Patel contacted Caras & Callini about leasing unit 12 as an extension of her medical practice, which was located on the first floor of the building. Dr. Patel is a certified Family Physician. She has completed a course in medical aesthetics, and she planned to use unit 12 to offer medical spa services that can be offered only under the supervision of a medical doctor. She wished to use unit 12 for physiotherapy and for a laboratory for blood tests.

[21] Caras & Callini agreed to lease unit 12 to Dr. Patel. The agreement to lease is for a 10-year term with an annual rent beginning at $31,350 and escalating to $35,150 in the last year of the lease.

[22] Dr. Patel began providing her medical services in unit 12, but on January 17, 2011, the solicitors of the Condominium Corporation wrote Caras & Callini. The letter stated:

> Please be advised that we are the solicitors for PSCC 837 and that we have been asked to correspond with you in this matter.
>
> It is our understanding that Caras owns the above captioned commercial unit. It is our further understanding that Caras also owns a storage unit, being Unit 12, Level 3, and that Caras is operating a spa out of the storage unit without having obtained the prior consent of the board of directors of PSCC 837 for such use of the storage unit. Finally, it is our further understanding that, when approached by the property manager for PSCC 837, you advised that Caras had obtained approval from the City of Mississauga to operate the spa out of the storage unit. However, as you are aware, or reasonably ought to be aware, such a use of the storage unit contravenes the Declaration of PSCC 837. ….
>
> We hereby put you on notice that Caras' operation of a spa out of a storage unit is a clear breach of the Act and the Declaration of PSCC 837. If Caras had sought the approval of the board of directors before beginning to operate the spa out of its storage unit, the board would have advised you that such use of the storage unit is prohibited by the Declaration.
>
> Accordingly, Caras is required to immediately cease using its storage unit in this manner. Caras is further required to permanently refrain from using its storage unit or any other unit in a manner that contravenes the Act or the Declarations, by-laws or rules of PSCC 837. ….
>
> We expect Caras' immediate compliance with the matters set out above, along with the indemnification by Caras of the corporation's legal costs which to date amount to $458.78 inclusive of HST within 14 days of the date of this letter.

[23] On February 25, 2011, the Condominium Corporation's lawyers wrote Caras & Callini's lawyer and advised that Caras & Callini had 14 days to restore unit 12 to its original condition as a storage unit.

[24] On May 13, 2011, Caras & Callini commenced this Application, and it sought, among other things, an order to amend the Declaration by deleting the references to unit 12 as a "storage unit" and substituting instead the description "commercial unit."

[25] For the purposes of amending the Declaration, Caras & Callini is prepared to have its share of common expenses adjusted retroactively and prospectively so that unit 12 allocation concords with other commercial units. At the moment, the percentage contribution for unit 12 as a storage unit is 0.02396, in contrast to the percentage contribution of commercial units, which ranges from 0.07356 to 0.23470.

[26] Ms. Narinesingh deposes that if Caras & Callini's Application is granted, pedestrian and automobile traffic at the condominium will undoubtedly increase and there will be greater wear and tear on the common elements at a cost to all owners. Further, there will be greater competition for designated commercial visitor parking. She says that none of this is expected and the unit purchasers are entitled to rely on the disclosure afforded by the Declaration.

[27] Although the notice mis-stated the return date for the application, pursuant to the Order of Master Abrams dated November 25, 2011, all of the unit owners were served with a notice of this Application. None of the unit owners delivered an Appearance in response to the notice.

C. ANALYSIS

[28] Caras & Callini's application is brought pursuant to s. 109 of the *Condominium Act, 1998*, which states:

> *Court order*
>
> 109. (1) The corporation or an owner may make an application to the Superior Court of Justice for an order to amend the declaration or description.
>
> *Notice of application*
>
> (2) The applicant shall give at least 15 days notice of an application to the corporation and to every owner and mortgagee who, on the 30th day before the application is made, is listed in the record of the corporation maintained under subsection 47 (2), but the applicant is not required to give notice to the applicant. 1998, c. 19, s. 109 (2).
>
> Grounds for order
>
> (3) The court may make an order to amend the declaration or description if satisfied that the amendment is necessary or desirable to correct an error or inconsistency that appears in the declaration or description or that arises out of the carrying-out of the intent and purpose of the declaration or description. 1998, c. 19, s. 109 (3).
>
> Registration
>
> (4) An amendment under this section is ineffective until a certified copy of the order has been registered. 1998, c. 19, s. 109 (4).

[29] Caras & Callini submits that in the circumstances of the case at bar, the designation of unit 12 as a storage locker was an error or inconsistency within the meaning of s. 109 of the Act. It submits that the designation of the unit 12 is an error because unit 12 has the dimensions, location, and utilities of a commercial unit as defined under the Description and unit 12 cannot by reason of these attributes be a storage locker. It submits that the designation of unit 12 as a commercial unit should be consistent with the architectural scheme of the building and its designation as a storage unit would be anomalous and discordant with the scheme of the building and the condominium Declaration.

[30] However, relying on *York Condominium Corp. No. 344 v. Lorgate Enterprises Ltd.* (1984), 27 A.C.W.S. (2d) 484 (Ont. Co. Ct.), aff'd (1985), 32 A.C.W.S. (2d) 41 (Ont. C.A.), the Condominium Corporation submits that for the purposes of s. 109 of the *Condominium Act*, an "error" is an act "incorrectly done through ignorance or inadvertence." Because Solstice advertently misdescribed unit 12, it made no mistake, and the Condominium Corporation submits, therefore, that s. 109 is not available in the circumstances of this case.

[31] The Condominium Corporation adds that there is a strong presumption that the Declaration as registered is valid and that the Act is predicated on the registered Declaration being a document upon which the owners and prospective owners can dependently rely. I understand from this submission that the Condominium Corporation

is arguing that s. 109 of the Act should not be used in the circumstances of this case because the unit owners are entitled to insist that other unit holders are bound by the provisions of the registered declaration, which describes unit 12 as a storage unit.

[32] Further, the Condominium Corporation submits that through the improper use of s. 109, Caras & Callini is seeking to circumvent the democratic process provided by the *Condominium Act, 1998,* that also provides a means for the declaration to be amended.

[33] In *York Condominium Corp. No. 344*, *supra*, which is the main case relied on by the Respondent Condominium Corporation, Justice Taliano, dismissed an application to amend a condominium Declaration pursuant to a provision of the then *Condominium Act*, which is the predecessor to the current s. 109 of the Act.

[34] In *York Condominium Corp. No. 344*, Condominium No. 344 was constructed as 199 residential units and nine commercial units. During the construction phase of the project, purchasers of residential units were told that the residential units would each have one parking space and the commercial units would each have two parking spaces. However, when the condominium's Declaration was registered, commercial unit 1 of the condominium was allocated 73 parking spaces. Unit 1 along with its 73 parking spaces were sold by the developer to an associated company, Lorgate Enterprises. The Condominium Corporation purchased all of the commercial units with the exception of Lorgate's unit, which it refused to sell. The Condominium Corporation brought an application to have the condominium's Declaration amended to divest Lorgate Enterprise's Unit 1 of 71 of its 73 parking spaces. Justice Taliano dismissed the application.

[35] In his reasons for judgment, Justice Taliano stated:

> With respect, I am unable to grant the relief sought.
>
> (i) Even if I accept the unit holders were misled both by verbal representations and the blank Appendix I attached to the draft Declaration, as well as the registration of By-law No. 5 on title empowering the President and Secretary of the Corporation to lease the exclusive parking spaces, I am not convinced that I can disturb the rights of the present owner of Unit 1, level 1. Absent the consent of all parties, I am only empowered, under s. 3 (8) of the *Condominium Act*, to correct "an error or inconsistency in the Declaration." The *Short Oxford English Dictionary*, 3rd edition, defines "error" as "something done through ignorance or inadvertence". Since the Declaration itself disclosed no such error (or inconsistency), I adopt the approach of my brother, Misener, in *Peel Condominium Corporation No. 78 and Harthen* (1978), 20 O.R. (2d) 225 (Co. Ct.), where he stated at p. 228:
>
> > There is nothing to suggest that Bramalea made an error or that the vast majority of the ultimate purchasers thought so at any time, let alone at this stage. Rather the developer consciously chose to change the proposed Declaration, deliberately inserting the impugned s. 18 into the Declaration that represented the final draft and which, as I have said, was duly registered. On any ordinary understanding of the words, I do not think that anyone would say that as a result of that "a manifest error or inconsistency in the Declaration" arose. It may be unfair or unjust. But it is not an error.

> A similar conclusion was reached by His Honour Judge Shapiro in the unreported case of *Peel Condominium Corporation No. 195 v. Kerbal Developments Limited* (released February 16, 1984) where he stated at p. 10:
>
> > As I perceive it, the issue is not one of fairness or not. Rather, whether the percentage allocation constitutes an error or inconsistency in the intent of the condominium Declaration.
>
> (ii) The fact that the original developers filed a false confirmation under s. 24(b)((3) of the Act may expose those developers to serious financial jeopardy; but the Act clearly does not make that conduct a ground for amending the Declaration. ….
>
> Finally, I must conclude that the terms of the Declaration were registered on title for the whole world to see. Registration means that each and every individual unit holder was on notice, prior to closing, that the 73 parking spaces were vested in Unit 1, Level 1. When subsequent purchasers accepted their Deeds they were deemed, by the Declaration itself, to have accepted and ratified the terms and the covenants contained therein, which are elevated in the Declaration to the status of covenants running with the land.
>
> To persuade this Court that those covenant may now be so diminished in significance as to yield to verbal assurances, albeit supported by some documentary material, would require more compelling proof than this application has disclosed.

[36] While I do not doubt the correctness of *York Condominium Corp. No. 344 v. Lorgate Enterprises Ltd. supra*; *Peel Condominium Corporation No. 78 and Harthen, Peel Condominium Corporation No. 195 v. Kerbal Developments Limited,* which are the cases cited by Justice Taliano, in my opinion, the notion of "error" in s. 109 of the *Condominium Act, 1998,* is not so limited as those cases might suggest.

[37] In *York Condominium Corp. No.* 344, Justice Taliano quoted only that part of the definition of "error" that was relevant to his decision, but the definition in The *Short Oxford English Dictionary,* 3rd edition, is actually more expansive and extensive. The complete definition or "error is as follow:

> **Error** … see Err, … **1**. The action of wandering; hence a devious or winding course. Now only *poet.* 1594. **2**. Chagrin, fury; extravagance of passion – 1460. **3.** The condition of erring in opinion; the holding or mistaken beliefs; a mistaken belief; false beliefs collectively, Also *personified.* M.E. **4.** Something incorrectly done through ignorance or inadvertence; **(a)** a mistake M.E. – **(b)** A flaw, malformation, a miscarriage – 1791 **(c)** *Law.* – A mistake in matter of law appearing on the proceedings of a court of record 1495 **(d)** *Math.* The difference between an approximate result and the true determination 1726. **5.** A departure from moral rectitude; a transgression ME. …

[38] The definition contains a cross-reference to "err," which the *Short Oxford English Dictionary,* 3rd edition, defines as follows:

> **Err** … **1.** To ramble, roam, stray – 1697. **2.** To go astray; to miss, fail (rare) M.E. **3.** To go wrong in judgement or opinion; to be incorrect M.E. **4.** To go astray morally, to sin M.E. **5.** *trans* To do or go wrong**.**

[39] In the *York Condominium Corp. No. 344,* Justice Taliano was quite correct in deciding that there was no error. On the facts of that case, it could not be said that the Declaration was erroneous or mistaken or flawed or malformed or miscarried. In that

case, there may have been false promises made when the declarant told purchasers that the commercial units would have two associated parking spaces, but the declarant made no error but intentionally designed unit 1 to have 73 parking spaces. In *York Condominium Corp. No. 344*, there was no discordance between the Declaration and what the declarant had intended for the Declaration. The declarant intended the condominium plan to attribute 73 parking spaces to unit 1 and that is what the Declaration said and did.

[40] The case at bar is different, and I would add that s. 109 is fact driven and each case must be decided based on its own facts. In the case at bar, the declarant Solstice intended that unit 12 be a commercial unit. Solstice built unit 12 as a commercial unit. Solstice sold unit 12 as a commercial unit. If one looks at the registered condominium plan, then the surveyed dimensions and location of the unit, shows unit 12 to be a commercial unit and not a storage unit. Unit 12 had the inclusions of utilities, etc. that is consistent only with it being a commercial unit and not a storage unit. If Solstice had not acted unlawfully to avoid the hassle of obtaining a minor variance, it would and ought to have designated unit 12 in the Declaration for what it was and for what it was intended to be, namely, a commercial unit. The owners of other condominium units are not harmed by the designation of unit 12 to be consistent and in accord with how the unit was originally conceived and how it was in fact constructed to be.

[41] The designation of unit 12 as a storage unit in the Declaration is a flaw, malformation, and miscarriage, and a departure from what was intended to be the plan for the condominium and from what was in fact constructed.

[42] In these circumstances, I am satisfied that an "amendment is necessary or desirable to correct an error or inconsistency that … that arises out of the carrying-out of the intent and purpose of the Declaration or description.

[43] In determining the scope of s. 109 of the Act, it is significant to note that s. 109 (3) is disjunctive. It provides for: (a) amendments that are necessary or desirable to correct an error or inconsistency that arises out of the carrying out the intent and purpose of the declaration or description, which is the ground that I rely on and which was not available in the circumstances of the *York Condominium Corp. No. 344* case and (b) amendments that are necessary or desirable to correct an error or inconsistency that appears in the declaration or description, which is the alternative ground, that I do not rely on.

[44] In my opinion, it is desirable to have the condominium Declaration accord with how the condominium building was actually built and sold. While I do not approve of the "it's better to ask forgiveness than to ask permission" tactics of Solstice, neither the Applicant Caras & Callini nor the Respondent Condominium Corporation are the perpetrators of that misconduct, and, rather, they both are the victims of Solstice's misconduct. Of these two innocents and also Dr. Patel, another innocent, the one least harmed by amending the Declaration is the Condominium Corporation.

[45] The minor variance for unit 12's commercial use would have been available had Solstice applied for it, and Solstice's misconduct, which includes registering an

erroneous description, turns out to have been unnecessary. Caras & Callini are prepared retroactively and prospectively to pay their appropriate share of the common expenses. I doubt that there will be much of an increase of pedestrian and automobile traffic especially given that the patients using unit 12 are already patients of Dr. Patel and, in any event, as I have already noted, the design of this condominium project was for unit 12 to be a commercial unit. If the Declaration is not amended, Caras & Callini has paid $177,000 for a storage unit that is useless. Moreover, as a storage unit, under the provisions of the Declaration, unit 12 cannot even be conveyed, because it has been orphaned from the commercial units, all of which have already been sold.

[46] Notwithstanding the Condominium Corporation's arguments to the contrary, in my opinion, the application of s. 109 of the *Condominium Act, 1998* to the circumstances of the in the case at bar is not inconsistent with the scheme of the Act. The Condominium Corporation's interpretation of the Act diminishes the remedial powers of the court and inappropriately privileges the democratic processes of the Act as the predominant means to amend a Declaration. The procedures to amend the Declaration are mutually exclusive.

[47] In *Carleton Condomium Corp. No. 26 v. Nicholson*, [2009] O.J. No. 1831 (S.C.J.), there were inconsistencies in a condominium declaration with respect to the allocation between the unit owners and the Condominium Corporation with respect to the obligation to make repairs if the condominium building was damaged. In the *Careleton Condominium Corp.* case, the Condominium Corporation first attempted to amend the declaration to resolve the inconsistencies by resort to s. 107 of the Act, which authorizes amendments with the owner's consent. When one owner, Ms. Nicholson refused consent, the Condominium Corporation resorted to s. 109 of the Act. Ms. Nicholson opposed that application, but Justice Power granted the application. He held that in the circumstance that there had been an unsuccessful resort to s. 107 of the Act did not preclude resort to s. 109 of the Act. The sections are mutually exclusive routes to an amendment of the declaration. Thus, Justice Power stated in para. 13 of his judgment:

> 13. I conclude that, there being errors or inconsistencies and/or problems carrying out the intent and purpose of the Declaration, s. 109 of the *Act* does, indeed, operate to authorize the bringing of this application. The fact that the applicant unsuccessfully pursued an attempt to amend the Declaration under s. 107 of the *Act* is not a bar to this application under s. 109 of the *Act*. There is nothing in the *Act* to suggest that an unsuccessful attempt to amend with the owners' consent is a bar to an application under s. 109 nor is there any logical reason, in my opinion, why an unsuccessful attempt to amend under s. 107 should be a bar. Sections 107 and 109, in my opinion, are mutually exclusive.

[48] Although I think the fair outcome of this Application to amend the Declaration on terms that Caras & Callini pay its appropriate share of expenses both retroactively and prospectively, I appreciate that s. 109 is not to be involved as a matter of fairness or expediency. However, in the circumstances of this case, the resort to s. 109 is not a matter of fairness or expediency. As it happens, s. 109, is available because there is an error or inconsistency that arises out of the carrying out the intent and purpose of the Declaration or Description.

D. CONCLUSION

[49] For the above reasons, I grant the Application.

[50] There should be no order as to costs. Although the Condominium Corporation was unsuccessful in resisting this Application, its opposition was reasonable and consistent with its responsibility to the unit owners of the condominium. In these circumstances, each party should bear their own legal costs.

_____

Perell, J.

Released: December 19, 2011

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