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DATE: May 5, 2009

TO: Christy J. Allen **FAX: 613-788-3687**
 Derek G. Nicholson **FAX: 613-241-3400**

FROM: Suzanne Lacroix (on behalf of Justice Power)

SUBJECT: CCC No. 26 v. The Unit Owners and Mortgagees et al
 Court File No.: 08-CV-40656

MESSAGE: Please find attached a copy of Justice Power's decision in the
 above-noted matter.

NUMBER OF PAGES INCLUDING COVER SHEET: 19

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COURT FILE NO.: 08-CV-40656

DATE: 2009/05/05

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CARLETON CONDOMINIUM CORPORATION NO. 26

Applicant

Christy J. Allen, for the Applicant

- and -

THE UNIT OWNERS AND MORTGAGEES LISTED IN THE RECORD OF THE CONDOMINIUM CORPORATION MAINTAINED UNDER SUBSECTION 47(2) OF THE CONDOMINIUM ACT AS AT THE 30TH DAY BEFORE THE DATE OF ISSUANCE OF THIS APPLICATION, SET FORTH IN THE ATTACHED SCHEDULE "A"

Respondents

Derek G. Nicholson, for the Respondent, Moyra Nicholson, a Unit Owner

HEARD: November 25, 2008

REASONS FOR DECISION

Power J.

Introduction

[1] Carleton Condominium Corporation No. 26 (hereinafter "CCC No. 26") brings this application pursuant to s. 109 of the *Condominium Act, 1998*, S.O. 1998, c. 19 (hereinafter the *Act*). It seeks an order amending the Declaration of CCC No. 26. It is the position of CCC No. 26 that, as originally registered, the Declaration contains errors or inconsistencies as follows:

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- (i) Article 8 (1) of the Declaration states that the corporation shall maintain all outside surfaces of the buildings, including exterior doors and door panes, and exterior windows and window panes. Article 11 of the Declaration also says that the corporation shall maintain the common elements.
- (ii) Article 8 (2) of the Declaration states that each owner must maintain and repair "parts of his unit including maintenance and repair to windows and interior surfaces of doors not maintained by the Corporation."
- (iii) According to Article 4 of the Declaration, the windows and exterior doors are within the common elements (apart from their interior surfaces), and accordingly are not part of the units (apart from the interior surfaces). Article 8 (2) is not consistent with this.
- (iv) Article 27 of the Declaration states as follows: "Subject to the provisions of the Act and the Declaration, the corporation shall repair the units and common elements after damage." This Article is not consistent with Article 8 (2).

[2] CCC No. 26 seeks the following amendments:

By replacing Articles 8, 11 and 27 of the Declaration with the following:

I Repairs and Maintenance

- (a) The Corporation shall maintain the common elements.
- (b) The Corporation shall repair the common elements after damage.
- (c) Each owner shall maintain the owner's unit, subject to paragraph (e) below.
- (d) Subject to Section 123 of the Act, each owner shall repair the owner's unit after damage.
- (e) The Corporation shall maintain the following parts of the units:
 - (i) the garage doors (units 67 to 132)
 - (ii) pipes, wires, cables, conduits and other facilities for the furnishing of drainage, utility services, television signals or electronic information, and which serve more than one unit.
 - (iii) the concrete floor slabs of the garage units (units 67 to 132)

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II Unit Alterations

An owner shall not make any alterations or repairs to the unit if the proposed alterations or repairs or the manner of carrying them out are likely to damage or impair the value of another unit or the common elements.*

[*NOTE: This sentence is currently contained in the Declaration.]

[3] Section 109 (1), (2), (3) and (4) of the *Act* provide as follows:

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.

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.

Registration

(4) An amendment under this section is ineffective until a certified copy of the order has been registered.

CCC No. 26 has complied with the above notice requirements.

[4] The respondent, Moyra Nicholson, is a unit owner and is the only respondent to oppose CCC No. 26's application.

[5] For ease of reference I set out below some relevant extracts from the Declaration:

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1. Definitions:

The terms used herein shall have ascribed to them the definitions contained in the Act.

...

4. (a) Boundaries:

Vertical: (Units 1 to 66 inclusive)

- (1) The back side surface of the drywall
- (2) In the basement the interior face of the poured concrete walls
- (3) The unfinished interior surface of the exterior doors and windows

...

(8) Maintenance

1. By the Corporation. The corporation shall maintain at the expense of the corporation the following parts:

(a) All outside surfaces of the buildings, including without limiting the generality of the foregoing all outside painted surfaces, exterior door and door panes, exterior windows and window panes, roofs and eavestroughs that are constructed or installed at the date of registration of this Declaration and the description.

(b) All conduits, ducts, plumbing (other than plumbing fixtures), sewers, wiring, (including television antenna) and other facilities for the furnishing of utility services, which service more than one unit.

2. By the unit owner. Each unit owner shall maintain and repair at his own expense parts of his unit including maintenance and repair to windows and interior surfaces of doors not maintained by the corporation pursuant to subclause (1) of this clause. The owner shall not make any alterations or repairs to his unit if the proposes [*sic*, proposed] alterations or repairs or the manner of carrying them out are likely to damage or impair the value of another unit or the common elements.

...

11. Maintenance

The Corporation shall maintain all the common elements including without limiting the generality of the foregoing, all lawns, shrubs and landscaped areas, sidewalks, walkways, driveways, parking spaces, all electrical wiring circuits and lighting fixtures and light bulbs and television antennae located in the

common elements, sewer and water pipes in the common elements, notwithstanding that such maintenance may be required as a result of reasonable wear and tear or otherwise.

PART VI - DAMAGE

27. Repair after damage

Subject to the provisions of the Act and the Declaration, the corporation shall repair the units and common elements after damage.

[6] CCC No. 26 filed a Supplementary Application Record in which it added some further detail with respect to the alleged inconsistencies in the Declaration. Apparently, the applicant failed to include reference to the garage floors. The garages are defined as units 67 to 132 in the Declaration. Article 4 of the Declaration states that, with respect to units 67 to 132, the lower boundary of the garage units is the "horizontal plane 16" below top of poured concrete foundation wall." The survey drawings for those units however, show that this boundary is below grade, and runs under the concrete floor slab of the garage units. The concrete floor slabs are, therefore, part of the units. Throughout the history of the condominium, the Corporation has been responsible for the maintenance of the concrete floor slabs of the garage. This, therefore, is part of the units for which the Corporation has assumed responsibility.

[7] Ms. Nicholson's objection to this application can be summarized as follows:

- (a) There are no errors or inconsistencies appearing in the Declaration or that arise out of the carrying out of the intent and purpose of the Declaration and, in particular, there are no errors or inconsistencies in Articles 8, 11 and 27;
- (b) There being no errors or inconsistencies, s. 109 of the *Act* is not applicable and, therefore, the application should be dismissed for that reason alone. Ms. Nicholson argues that the Corporation must, accordingly, resort to s. 107 of the *Act* which authorizes amendments with the owners' consent;
- (c) This application is a covert attempt to remove s. 89 of the *Act* (the damage repair obligation) as encapsulated in Article 27 of the Declaration in order to avoid liability to a potential claimant. Ms. Nicholson argues that this Court has no jurisdiction to remove substantive obligations from the Declaration. Section 89(1) of the *Act* reads as follows:

"Repair after damage

89. (1) Subject to sections 91 and 123, the corporation shall repair the units and common elements after damage."

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(Counsel observes that if there are provisions in the Declaration that are inconsistent with the *Act*, the provisions of the *Act* prevail "and the Declaration shall be deemed to be amended accordingly." (See s. 7(5) of the *Act*));

- (d) The Corporation is attempting to do indirectly that which it is not able to do directly – *i.e.*, it unsuccessfully attempted to accomplish the sought after amendments pursuant to the s. 107 amending formula. (Section 107 provides that the Corporation shall not amend the Declaration except in accordance with the procedures set out in that section);
- (e) The Corporation failed to seek authorization from the unit owners to commence this application;
- (f) The Corporation has failed to give adequate and fair notice to the unit owners regarding the fundamental change being sought by it;
- (g) The amendments sought by the Corporation are too broad and are themselves unclear; and
- (h) The application seeks to completely remove the Corporation's responsibility under Article 27 "to repair units after damage" which is a statutory obligation under s. 89, 90, and 91 of the *Act*.

Discussion

[8] According to counsel for the applicant, this application deals primarily with the issue concerning who is responsible for the repair to units after uninsured damage has occurred. There is no issue with respect to insured damage to units because the Condominium Corporation is responsible for maintaining insurance on all units for damage to units. This obligation is mandated by the *Act*.

[9] The Condominium Corporation has, indeed, been faced with an issue regarding the interpretation of the Declaration. As I understand it, there is an outstanding dispute with a unit owner.

[10] I agree with the applicant that the Declaration does, in fact, contain errors and/or inconsistencies. I also agree that amendments are necessary or desirable to correct these errors or inconsistencies.

[11] The error and inconsistencies relate, in particular, to paragraphs 8 and 27 of the Declaration. Counsel for the applicant has explained these errors and inconsistencies in her final written submissions which I quote below:

- 9. Paragraph 8(2) of the Declaration, which is called "Maintenance", states that unit owners are responsible for maintenance and repair of those parts of the

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units not otherwise maintained by the condominium. The declaration does not, however, specify which parts of the units the condominium is responsible to repair, and which parts of the units the unit owners are responsible to repair. Further, it is not clear if this paragraph is meant to relate to maintenance or repair of the units, which are two separate responsibilities. While the unit owner responsibilities under this paragraph relate to maintenance and repair, the condominium responsibilities under this paragraph relate to maintenance only (there is no reference to the condominium's responsibility to repair units).

10. The applicant submits that, having consideration for the particular wording of paragraph 8(2) of the Declaration, this provision imposes the obligation on unit owners to repair their units. Notwithstanding this provision, paragraph 27 of the declaration states that, subject to the Act and the declaration, the corporation shall repair the units after damage.

11. Paragraph 27 is included in the section of the declaration which relates to substantial damage and insurance. The inclusion of paragraph 27 in this section of the declaration (rather than together with the above-noted paragraphs, which also relate to repair of units) causes confusion (although the inclusion of paragraph 27 in the section of the declaration relating to substantial damage and insurance, would seem to imply that it relates to repair after substantial damage (which is different under the Act than regular repair after damage) and insurance). Further, paragraph 27 contradicts the repair obligations outlined at paragraph 8, as paragraph 8 states (or implies) that unit owners are responsible for repair to units, and paragraph 27 states (or implies) that the corporation is responsible for repair to units (or to a part of the units).

12. The applicant submits that, as paragraph 27 is subject to the other provisions of the declaration (including paragraph 8), it was the intent of the declarant that the declaration require unit owners to assume responsibility for repair to their units after uninsured damage. However, given the particular wording of paragraphs 8 and 27, this intent is unclear, and the declaration is not certain.

13. Further to the foregoing, the applicant submits that the fact that the declarant of this condominium failed to specify the particular parts of the unit that unit owners are responsible for, should not be taken advantage of, by holding the condominium responsible for repair to the units in their entirety by relying upon article 27. The applicant submits that this was never the intention of the declarant, and has never been the manner in which the condominium has interpreted the declaration.

14. The Act and its predecessor legislation deal with maintenance of units and common elements and repair of units and common elements as two separate

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responsibilities. Section 89 of the Act deals with repair after damage and section 90 of the Act deals with maintenance.

15. Section 89 of the Act states that subject to section 91 (and 123, which deals with substantial damage, and is not applicable in this case) of the Act, the corporation shall repair the units and common elements after damage. Section 90 of the Act states that, subject to section 91, the corporation shall maintain the common elements and the unit owners shall maintain their units. Section 91 of the Act states that, notwithstanding sections 89 and 90, the declaration of a condominium may alter the obligations to repair and maintain set out in those sections.

16. The applicant submits that the declaration of CCC 26, as currently worded, though unclear and uncertain, does alter the obligation to repair units after damage. The declaration, as currently worded, indicates that unit owners are primarily responsible for repair to their units, after damage.

[12] CCC No. 26, in the alternative, submits that if there is no error or inconsistency, the Court should, pursuant to s. 109 of the *Act*, find that an error or inconsistency has arisen in relation to the Condominium carrying out the intent and purpose of the Declaration. Based on the evidence before me, I make such a finding – *i.e.*, that an error or inconsistency has arisen in carrying out the intent and purpose of the Declaration.

[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.

[14] I observe that, in this case, the reason the resort to s. 107 was unsuccessful was the applicant's failure to obtain the required 90% written consent to the amendments. There is no evidence that any objections to the proposed amendments were made at that time. Therefore, I conclude that the applicant is not seeking to do indirectly that which it cannot do directly. In addition, I conclude that there is nothing covert about CCC No. 26's attempt to obtain a remedy pursuant to s. 109. In my opinion, it is in the interest of all unit owners to have this matter heard under s. 109.

[15] There is no evidence before me upon which I can find that CCC No. 26 was required to seek authorization for the commencement of this application nor is there a statutory or other legal obligation on CCC No. 26 to do so. The record demonstrates, quite clearly, that the unit owners have been kept apprised of all relevant information including the nature of the changes being sought.

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[16] Before embarking on a discussion of the other issues raised by this application, it is necessary to set out some additional facts. CCC No. 26 was created by the registration of its Declaration on February 18, 1974. It consists of 66 residential townhouse units. Throughout the condominium's history, owners have been responsible for repair and maintenance of their own units with the exception of garage doors, pipes, wires, cables, conduits and other facilities for the furnishing of drainage, utility services, television signals or electronic information, and which serve more than one unit.

[17] The *Act* requires all condominiums to maintain insurance coverage for the benefit of all owners on all common property and all units (up to the "standard unit") for certain specified perils and damage. Therefore, where damage occurs to a unit and the corporation's master insurance policy provides coverage for such damage, the corporation is responsible for repairs to such damage (either by making an insurance claim, or where it elects not to make such a claim for economic reasons, the corporation is itself responsible for repairs to the damage). There is a by-law in effect defining the standard unit. CCC No. 26 has historically maintained the required insurance on all common property and/or units up to the standard unit and intends to continue to do so.

[18] CCC No. 26 became aware of the above-noted inconsistencies in 2002. Because the inconsistencies left open the interpretation of obligations to repair and maintain the units and common elements, the Condominium Board became concerned about the liability and risks that the identified inconsistencies presented to the Corporation as well as to all of the unit owners.

[19] The Condominium Board is concerned about its exposure to liability that might arise out of the interpretation of the aforementioned Articles. The condominium's current common expenses do not include required contributions for uninsured repairs to units.

[20] The boundaries of each unit are defined within the Declaration for each condominium as well as in the survey plans of the units registered with the Land Registry Office. Common elements are defined as everything except the units. As aforesaid, I agree with the applicant that including or excluding certain portions of the units and/or common elements in setting out repair and maintenance responsibilities can, indeed, create confusion and ambiguity, especially where the qualified use of the terms "units" and "common elements" is not consistent throughout the Declaration.

[21] I do not accept as convincing the respondent's argument that CCC No. 26 is seeking to remove established rights that all owners possess under the *Act* and the current Declaration and, in particular, a right of unit owners to have their respective units repaired by the Corporation. The evidence relied on in support of this application demonstrates clearly that the requested amendments reflect a 34 year history of agreement between the Condominium Corporation and the unit owners as to how the Declaration, in its present form, has been consistently interpreted. The status quo should be preserved and the wording of the Declaration should be amended to ensure that this status quo is maintained.

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[22] As aforesaid, counsel for Ms. Nicholson argues that the effect of the proposed amendments is to "eradicate Article 27 (which encapsulates Section 89 of the Act)." I disagree. Section 89 of the *Act*, as part of the governing statute, continues to operate and, as aforesaid, any inconsistent provision in the Declaration is deemed to be amended by the provisions of the statute. In any event, I do not see anything in the proposed amendments that is inconsistent with s. 89 of the *Act*. The Declaration and the *Act*, of course, must be read together and must be read in their entirety.

[23] Mr. Nicholson argues that the application of s. 109(3) of the *Act* is restricted to amending Declarations that are inconsistent with the *Act*, not when there are errors or inconsistencies within the Declaration itself. In my opinion, this interpretation is unwarranted – it is far too limiting. There is nothing in subsection (3) that I can see to justify the respondent's argument.

[24] Counsel for the respondent argues that, in the alternative, if there are errors and inconsistencies in the Declaration, they are "self-corrected by Section 7(5) which would make them comply with the meaning, spirit and intention of Section 90 of the Act." First of all, such an interpretation totally reads down s. 109(3) of the *Act*. Secondly, if there are errors and inconsistencies in the Declaration, logic itself would suggest that there should be a method available to a condominium corporation and its members to remedy the situation. Section 107 provides an amendment formula as does s. 109. Section 109(3), as aforesaid, restricts the court's power to make amendments to the Declaration to amendments that are 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. As noted above, the amendments are necessary and desirable.

Conclusion

[25] In the result, therefore, I have concluded that the application should be granted allowing CCC No. 26 to amend its Declaration as follows:

By replacing Articles 8, 11 and 27 of the Declaration with the following:

I Repairs and Maintenance

- (a) The Corporation shall maintain the common elements.
- (b) The Corporation shall repair the common elements after damage.
- (c) Each owner shall maintain the owner's unit, subject to paragraph (e) below.
- (d) Subject to Section 123 of the Act, each owner shall repair the owner's unit after damage.
- (e) The Corporation shall maintain the following parts of the units:

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- (i) the garage doors (units 67 to 132)
- (ii) pipes, wires, cables, conduits and other facilities for the furnishing of drainage, utility services, television signals or electronic information, and which serve more than one unit.
- (iii) the concrete floor slabs of the garage units (units 67 to 132)

II Unit Alterations

An owner shall not make any alterations or repairs to the unit if the proposed alterations or repairs or the manner of carrying them out are likely to damage or impair the value of another unit or the common elements.*

[*NOTE: This sentence is currently contained in the Declaration.]

Caution

[26] As will have been noted from a reading of this decision I have made reference to evidence respecting a dispute which has arisen between CCC No. 26 and a unit owner. Nothing contained in these reasons is intended to directly impact on the merits of that dispute or to finally resolve it. The unit owner or owners with whom there is a dispute, did not participate in the hearing of this application.

Costs

[27] In the event that within 60 days following the release of these Reasons for Decision the parties have been unable to agree on the question of legal costs, they may make brief written submissions to me.



Power J.

Released: May 5, 2009

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COURT FILE NO.: 08-CV-40656
DATE: 2009/05/05

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CARLETON CONDOMINIUM CORPORATION
NO. 26

Applicant

- and -

THE UNIT OWNERS AND MORTGAGEES
LISTED IN THE RECORD OF THE
CONDOMINIUM CORPORATION
MAINTAINED UNDER SUBSECTION 47(2) OF
THE CONDOMINIUM ACT, AS AT THE 30TH
DAY BEFORE THE DATE OF ISSUANCE OF
THIS APPLICATION, SET FORTH IN THE
ATTACHED SCHEDULE "A"

Respondents

REASONS FOR DECISION

Power J.

Released: May 5, 2009