

CANADA / JUDGMENT

0980131 B.C. Ltd. v. The Owners, Strata Plan KAS2615

2019 BCSC 913

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2019 BCSC 913 0980131 B.C. Ltd. v. The Owners, Strata Plan KAS2615

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0980131 B.C. Ltd. v. The Owners, Strata Plan KAS2615,

2019 BCSC 913

Date: 20190610

Docket: 28206

Registry: Cranbrook

Between:

0980131 B.C. Ltd. and Dan Beaulac Holdings Ltd.

Plaintiffs

And

The Owners, Strata Plan KAS2615

Defendant

Before: The Honourable Mr. Justice Hori

Reasons for Judgment

Counsel for the Plaintiffs:

J.A. Bird

Counsel for the Defendant:

J.D. Flannigan

Place and Date of Trial:

Kelowna, B.C.

March 27 and 28, 2019

Place and Date of Judgment:

Kelowna, B.C.

June 10, 2019

Introduction

- [1] The plaintiff, 0980131 B.C. Ltd. ("098"), owns property described as Block A, District Lot 4247 ("Block A"). Block A lies to the west of the property owned and controlled by the defendant. 098 brings this summary trial application seeking a declaration that it is entitled to an easement over the defendant's property because:
- a) The easement is a charge against the defendant's property;
 - b) 098 is the beneficiary of a contract between the defendant and the former owner of the defendant's property; and
 - c) 098 has acquired the easement through the equitable principle of proprietary estoppel.

The lands involved

- [2] The defendant is a strata corporation. The defendant's strata development was established by Strata Plan KAS 2615 (the "Forest Strata"). The defendant is the owner of the common property in the Forest Strata. The Forest Strata was established on part of former Lot A, Plan KAP 74557. The remainder of Lot A (the "Forest Remainder Parcel"), after the establishment of the Forest Strata, lies to the west of the Forest Strata and abuts against the eastern boundary of Block A.
- [3] Access to the Forest Strata is from Snow Pines Way. The access road through the Forest Strata is known as Forest Lane. Forest Lane is part of the common property of the Forest Strata. Forest Lane bisects the Forest Remainder Parcel and ends at the eastern boundary of Block A. However, the roadway continues across the eastern boundary of Block A where it changes from a paved road maintained by the Forest Strata to a gravel road.

- [4] When the Forest Strata was developed, the property which eventually became Block A was Crown land. The original developer of the Forest Strata intended to expand the development onto the Forest Remainder Parcel. Therefore, when the strata plan was registered, the developer registered an easement on the Forest Strata property in favour of the Forest Remainder Parcel for access. The access easement in favour of the Forest Remainder Parcel included a covenant (the "Section 4 Covenant") which provided as follows:
4. The Transferor covenants with the Transferee that it shall, at the time title is raised to crown lands ("Crown Lands") lying adjacent to the Transferor's Lands, grant an easement for Facilities (as herein defined) in favour of the Crown Lands as well as lands DL 4213, SDYD; provided that such easement is reciprocal in nature and is in a form agreed to by the Transferor, acting reasonably.

The Transferor in the easement agreement is the Forest Strata and the Transferee is T219 Enterprises Ltd., the original developer of the Forest Strata.

- [5] T219 Enterprises Ltd. no longer exists. The Forest Remainder Parcel was sold and was owned by a number of different owners until it was purchased by the plaintiff, Dan Beaulac Holdings Ltd., on July 31, 2018.
- [6] Block A was created from the Crown land to the west of the Forest Strata by a Crown grant issued on May 12, 2006. The Crown grant was issued to Big White Real Estate Ltd. Block A was then transferred to High Forest Development Corporation Ltd. in 2006. 098 became the owner of Block A pursuant to an order approving sale made in foreclosure proceedings on September 30, 2013.
- [7] No easement was ever registered against the Forest Strata property in favour of Block A.

Summary of the evidence

- [8] Bruce Clarke is a director of 098. Mr. Clarke deposes that prior to his company purchasing Block A, he inspected the property. He gained access to Block A by travelling on Forest Lane through the Forest Strata. When 098 purchased Block A, a cabin was located on the property. Mr. Clarke understood that access to the cabin was through the Forest Strata on Forest Lane. Mr. Clarke believed that there was "legal access to Block A over Forest Lane until June 2017 when 098 began taking steps to develop the property".
- [9] As of June 15, 2017, Stephen Muller was an owner of a unit in the Forest Strata and the president of the Forest Strata Council. Mr. Muller deposes that he had spoken to Mr. Clarke before June 15, 2017, and was told by Mr. Clarke that 098 had an easement over the Forest Strata lands in favour of Block A. Mr. Muller further deposes that during those discussions, Mr. Clarke promised that his company would, as a good neighbour, complete the work on Forest Lane which had been left unfinished by the original developer.

[10] Mr. Muller says that based on Mr. Clarke's representation that 098 had an easement over the Forest Strata lands, he sent an email to the Ministry of Transportation and Infrastructure on June 15, 2017. The purpose of this email was to determine if there were documents creating obligations attached to the easement in favour of Block A. In his email Mr. Muller writes as follows:

. . . I am a property owner/board member at The Forest at Big White. We have all been told by the original developer that our road section would be completed when the High Forest was developed. We have never been given anything in writing and have always been concerned about the accuracy of that statement. It looks like the High Forest is in the process of completing construction of the subdivision and we want to secure our position in getting our road section completed. We had a street lighting issue that came before us last year and it was determined at the District Office that our road section was private and [did] not fall under the Big White umbrella. I'm asking that you review your file to see if you have a signed agreement giving the High Forest access to our road. If you do, I would like a copy of said agreement and anything that would document conditions tied to the agreement. If not, I would ask that all High Forest activity be stopped until such time that an agreement is put in place. It is not our intentions to stop or delay development of the High Forest. We do want to protect our rights and to craft an agreement that covers completion of our road section, terms of ongoing maintenance of the road and coverage for damage to our road section during construction as well as provisions for cleaning the road and units from dust and dirt associated with development traffic through our subdivision. . . .

[11] Bruce Clarke received a copy of Mr. Muller's June 15, 2017 email along with the response sent by the Ministry of Transportation on June 19, 2017. Mr. Clarke says he began negotiating an easement with Stephen Muller in the summer of 2017 and on June 23, 2017, Mr. Clarke sent an email to Mr. Muller as follows:

We located the documents, our lawyer reviewed everything and all is in order . . . The easement was organized by Mr. Griffiths back when he was developing The Forest. There is an easement for road access in place, along with rights of way for utilities. Dan (my business partner) and I reviewed everything this morning and agreed that we will take care of the road (preparation and paving) in good faith, as promised by the previous developer. We realize we also need to cover our relevant share of periodic road repairs in future, etc. All of which we're happy to discuss with you.

Attached you'll find the legal survey recently completed by Runnals Denby, which shows Forest Lane going right up to our Eastern property boundary, as well as title searches for KAS2615:

1. Title search KAS2615 Common Property shows easements and rights of way.
2. Title search KAS2615 (The Forest) - Easement shows the original documentation signed by Mr. Griffiths, the original owner of our property, which grants access to our property as described on page 4, Section C(f) and page 5, Section 4 at the bottom of the page.

- [12] Mr. Muller responded to Mr. Clarke on June 26, 2017, thanking him for getting the documents and indicating to Mr. Clarke that he had always hoped there were written agreements.
- [13] By an email dated July 18, 2017, Mr. Clarke advised Mr. Muller that 098 was working with their lawyer on a first draft of an agreement with the Forest Strata and requesting a list of things that had been promised to the Strata by the original developer. Mr. Muller's response on the same date was to say that he was putting a list together but he wanted to run it by the Board before sending it to Mr. Clarke. Mr. Muller delivered the requested list of unfinished items to Mr. Clarke on July 20, 2017.
- [14] On July 26, 2017, Mr. Muller delivered an email to Bill Sparkes, the approving officer for the Block A development, indicating as follows:

The Board of Directors of The Forest Strata (KAS 2615), which includes a private access road called Forest Lane, have been working with Bruce Clarke of Monashee Ridge Development regarding the use of Forest Lane as their access road. We the board have always known that there were additional phases of development beyond our project and are in support of said development provided that expansion took care of deficiencies to our project that we were told by our developer would be completed by said expansion. The board presented those items to Mr. Clarke and his partner and they have agreed to take responsibility for completing them during construction of the first phase of their project. In addition, the parties have agreed to put a joint maintenance agreement in place providing a proportional liability for the maintenance and repair of Forest Lane and any shared utilities between the two projects. We have had to deal with many issues over the years pertaining to the incomplete status [of] the property being developed as Monashee Ridge and are excited to have it moving forward to completion. I believe you have received copies of our emails covering the items to be addressed. We are in support of Monashee Ridge moving forward, sooner than later, as we would like to get these items addressed. We have no expertise in road or storm water requirements pertaining to the addition of 48 lots to our road section and would only ask that those that do protect our interests as we are the ones at the bottom of the hill.

- [15] A draft agreement addressing access to Block A was delivered by Mr. Clarke on October 12, 2017. Negotiations and revisions to the terms of the agreement continued until February 2018. No final agreement has been concluded between the parties.
- [16] Mr. Muller deposes that he learned through his legal counsel on February 26, 2018, that 098 did not have an easement for access over the Forest Strata property.

Claims of 098

- [17] In this case 098 argues that it is entitled to an easement over the Forest Strata property on the following basis:

- a) that the Section 4 Covenant runs with the land and creates an easement over the Forest Strata properties;
- b) that 098 has a contractual entitlement to an easement over the Forest Strata property because it is the beneficiary of the Section 4 Covenant; and
- c) that an easement is established based on the equitable principle of proprietary estoppel.

Does the Section 4 Covenant run with the land?

[18] 098 conceded during submissions that the Section 4 Covenant is not an easement and does not run with the land because it creates a positive obligation on the part of the Forest Strata: *Nordin v. Faridi*, [1996] BCJ No. 61.

Is the Section 4 Covenant a contract which can be enforced by 098?

[19] The easement agreement in which the Section 4 Covenant appears is an agreement between the original developer, T219 Enterprises Ltd., and the Forest Strata. It is not an agreement between 098 and the Forest Strata nor is it an agreement between Dan Beaulac Holdings Ltd. and the Forest Strata. There is no privity of contract between 098 and the Forest Strata nor is there privity of contract between Dan Beaulac Holdings Ltd. and the Forest Strata. No consideration flowed between the plaintiffs and the Forest Strata. Therefore, there is no direct contractual obligation upon the Forest Strata to grant an easement to either of the plaintiffs.

[20] It was argued by the plaintiffs that even though there may not be a direct contract with the Forest Strata, the plaintiffs are nevertheless entitled to enforce the Section 4 Covenant because they are parties for whose benefit the Section 4 Covenant was made. The plaintiffs rely on *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 SCR 108. In *Fraser River*, the Supreme Court of Canada established a principled exception to the doctrine of privity of contract. The Court held that a non-party to a contract may enforce the terms of the contract against a contracting party if:

- a) the parties to the contract intended to confer a benefit on a third party; and
- b) the activities performed by the third party are the very activities contemplated by the contract.

[21] After a close examination of the facts and the analysis in *Fraser River*, I cannot conclude that the principles set out in *Fraser River* are applicable to the facts of this case. The Supreme Court of Canada in the *Fraser River* case was considering the Supreme Court's decision in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299. In *Fraser River*, a charterer was seeking to avoid judgment in a subrogated action brought by an insurer. The charterer relied on a waiver of subrogation in which the insurer agreed with the insured boat owner that it would not subrogate against the charterer. In the *London Drugs* case the employees of the defendant company were seeking to limit their liability by relying upon a contract between the plaintiff and their employer. In each of those cases the contractual

provisions sought to be relied upon was in defence to a claim brought by a party to the contract.

[22] In both of these cases, the Supreme Court of Canada was careful to emphasize that the principled exception to the doctrine of privity of contract should be confined to the circumstances in those cases. In particular, in *Fraser River*, the Supreme Court sets this limitation:

[44] . . . In this case, I do not accept Fraser River's submission that permitting third-party beneficiaries to rely on a waiver of subrogation clause represents other than an incremental development. To the contrary, the factors present in *London Drugs*, in support of the incremental nature of the exception, are present as well in the circumstances of this appeal. As in *London Drugs*, a third-party beneficiary is seeking to rely on a contractual provision in order to defend against an action initiated by one of the contracting parties. Fraser River's concerns regarding the potential for double recovery are unfounded, as relaxing the doctrine to the extent contemplated by these reasons does not permit Can-Dive to rely on any provision in the policy to establish a separate claim. In addition, the exception is dependent upon the express intentions of the parties, evident in the language of the waiver of subrogation clause, to extend the benefit of the provision to certain named classes of third-party beneficiaries.

[23] Finally, at the conclusion of the decision, the Court limits the application of the principled exception in this way:

[45] I conclude that the circumstances of this appeal nonetheless meet the requirements established in *London Drugs* for a third-party beneficiary to rely on the terms of a contract to defend against a claim initiated by one of the parties to the contract. . . .

[24] Similarly, in *London Drugs*, the Court said:

[244] Moreover, recognizing a right for a third party beneficiary to rely on a limitation of liability clause should have relatively little impact on the rights of contracting parties to rescind or vary their contracts, in comparison with the recognition of a third party right to sue on a contract. In the end, the most that can be said against the extension of exceptions to the doctrine of privity in this case is that the respondent employees are mere donees and have provided no consideration for the contractual limitation of liability.

[25] I have not been provided with any authorities to establish that a non-party beneficiary to a contract can initiate a claim of its own to enforce the terms.

[26] In *RS II Productions Inc. v. B.C. Trade Development Corp.*, 2000 BCCA 674, our Court of Appeal refused to expand the "narrow exception" to the principle of privity of contract in reference to the *London Drugs* and *Fraser River* cases. In that case the Court of Appeal held as follows at paragraph 67:

- [67] Mr. Grant on behalf of RDS and RSP urges us to conclude the trial judge erred in finding that London Drugs recognized only a "narrow exception" to the rule of privity of contract. But it would be a large step to move from the exceptions made in London Drugs and Fraser River to permit RSP to recover damages in this case. First, in both London Drugs and Fraser River, the defendants were relying on a contractual term for a defence to liability -- the exception to privity supplied a 'shield not a sword.' I acknowledge that it is sometimes fortuitous whether a particular party is a defendant in need of a shield or a plaintiff seeking a sword. However, different considerations, in terms of mutuality and fairness, usually apply to the two situations.
- [27] Therefore, I am not persuaded that 098 or Dan Beaulac Holdings Ltd. can enforce the Section 4 Covenant simply because they stand to benefit from its terms. Expanding the principled exception to the privity of contract doctrine in this case would not be in keeping with the cautious approach taken by the Supreme Court of Canada. It would allow 098 and Dan Beaulac Holdings Ltd. to use the principled exception as a sword rather than a shield. It would have the effect of opening the floodgates of litigation brought by third-party beneficiaries contrary to the intentions of the Court in London Drugs.
- [28] Accordingly, I have concluded that the Section 4 Covenant cannot be enforced by 098 or Dan Beaulac Holdings Ltd.

Proprietary estoppel

- [29] Proprietary estoppel is an equitable remedy in which the court exercises its equitable jurisdiction to relieve a party of its strict legal obligations or to prevent a party from insisting on its strict legal rights in order to do justice between the parties. As such, the Court in *The Owners Strata Plan NES33 v. Westshore Developments Limited*, 2015 BCSC 1280, citing from *Tretheway-Edge Dyking District v. Coniagas Ranches Ltd.*, 2003 BCCA 197, describes proprietary estoppel in this way at paragraphs 67:
- [67] . . . The real test is said to be whether upon the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it. the true test is that the facts must be such that the owner of the legal right has done something beyond mere delay to encourage the wrongdoer to believe that he does not intend to rely on his strict rights, and the wrongdoer must have acted to his prejudice in that belief. The modern approach is a broad one and the tendency is to reject any classification of equitable estoppel into exclusive and defined categories.
- [30] Based on these principles, 098 must establish the following in order to rely on the creation of an easement through proprietary estoppel:
- a) that the Forest Strata has done something beyond mere delay to encourage 098 to believe that the Forest Strata did not intend to rely on its strict rights;

- b) that 098 acted to its prejudice based on that belief; and
- c) that it would be dishonest or unconscionable to allow the Forest Strata to enforce its strict rights.

[31] In this case, 098 claims that it relied to its detriment on:

- a) the Section 4 Covenant;
- b) the acquiescence of the Forest Strata in allowing access to Block A through Forest Lane; and
- c) representations made by Steve Muller, a former president of the Forest Strata and a strata property owner, to the effect that the Forest Strata accepted that access to Block A was over its strata property.

[32] The claim by 098 that it is entitled to an easement because it relied to its detriment on the Section 4 Covenant is without merit. I have already found that 098 is not a party to the Section 4 Covenant and is not entitled to enforce its terms against the Forest Strata. The Forest Strata, simply by being a party to the Section 4 Covenant, has done nothing to encourage 098 to believe that it did not intend to rely on its strict legal rights. The Forest Strata made no representations that the Section 4 Covenant created an obligation on the Forest Strata to allow access over its property in favour of 098. If 098 relied upon the Section 4 Covenant, it did so based on its own conclusions about its legal effect.

[33] The claim that 098 relied on the acquiescence of the Forest Strata in historically allowing access to Block A through Forest Lane as a basis for its claim of proprietary estoppel also cannot be accepted. When 098 purchased Block A, a cabin was located on the property. Access to the cabin was via Forest lane. It appears that the Forest Strata took no serious issue with this access and allowed it to continue. However, now 098 seeks to significantly increase the development on Block A from a cabin to 49 lots. Access across the Forest Strata property for 49 lots is a much different thing than access for a cabin. 098 may have had a point if it were seeking an easement to service the existing cabin rather than 49 lots but acquiescence for access to a cabin cannot be equated to acquiescence for access to a 49 lot development.

[34] 098 also claims that the Forest Strata acquiesced in allowing it to continue development work on Block A when it knew it was doing so. It is submitted by 098 that if the Forest Strata took issue with access over its property to Block A it should have taken steps to raise the issue with 098 or to stop the work when it began. This submission cannot be accepted because:

- a) When 098 commenced work on the development, the Forest Strata understood from Mr. Clarke that an easement already existed over its property; and
- b) Mr. Clarke was aware in June 2017, that no easement in favour of Block A existed and was in the process of negotiating the terms of an easement with the Forest Strata.

Therefore, the Forest Strata allowed the work to continue under the mistaken assumption that 098 was entitled to access over its property. Further, Mr. Clarke would have known that no formal agreement for access was in place but chose to proceed with the development work while negotiating with the Forest Strata.

- [35] I come now to the question of whether representations made by Steve Muller about the access to the 098 development were sufficient to establish an easement by proprietary estoppel.
- [36] It is submitted on behalf of 098 that Mr. Muller's e-mail to the Ministry of Transportation on June 15, 2017, acknowledged that 098 was entitled to access to its development on Block A through the Forest Strata property. In that e-mail Mr. Muller requests a copy of any signed agreements giving 098 access to Forest Lane and anything that would establish conditions tied to the agreement. In that same e-mail Mr. Muller states that it is not the intention of the Forest Strata to stop or delay the development but that it was only seeking to protect its rights. This e-mail found its way to Mr. Clarke through the Ministry of Transportation and is part of the conduct relied upon by 098 in its claim for proprietary estoppel.
- [37] 098 further claims that from June 15, 2017 to February 2018, the Forest Strata represented to 098 and to other third parties that it was in support of the development on Block A. In particular, 098 relies upon the e-mail from Mr. Muller to the approving officer for the Block A development dated July 26, 2017, in which Mr. Muller expresses support for the development. In addition, 098 relies upon the fact that Mr. Muller, on behalf of the Forest Strata, was negotiating the terms of an easement with 098 and its legal counsel.
- [38] Mr. Muller claims that his actions and his e-mails after June 15, 2017, were based on his belief that an easement was already in place because Mr. Clarke had told him so verbally and had confirmed it in writing by his e-mail of June 23, 2017. Mr. Muller did not discover that there had never been an easement over the Forest Strata property in favour of Block A until he was so advised by one of the Forest Strata's lawyers on February 26, 2018.
- [39] Mr. Clarke denies that he represented to Mr. Muller in June 2017, that 098 already held an easement over the Forest Strata property. Mr. Clarke states in his affidavit sworn January 31, 2019, as follows:
7. . . . I never said that Block A already had an easement registered in its favour. What I did say is that there was an easement in favour of the Forest Remainder Parcel that required the Forest Strata to grant an easement in favour of Block A; in other words, we had access rights pursuant to the Forest Remainder Parcel. If he recalls that I said "there's an easement in place", that is the easement I was referring to. That's why in my June 23, 2017 email to Steve Muller, I expressly drew his attention to clause 4 of the Forest Remainder Easement that required the Forest Strata to grant an easement to Block A.

- [40] Unfortunately, Mr. Clarke's e-mail of June 23, 2017, leaves the reader with the impression that the easement to which he is referring is an easement in favour of Block A. The reference to "clause 4 of the Forest Remainder Easement" is a passing reference only with no explanation as to its significance. Whether this lack of clarity by Mr. Clarke was intentional or not cannot be resolved on the evidence but it is not necessary to do so for the purposes of this application.
- [41] In addition, Mr. Clarke suggests to Mr. Muller in his June 23, 2017 e-mail that 098 has "access rights pursuant to the Forest Remainder Parcel". In my view, this is an inaccurate interpretation of the Section 4 Covenant. As I have previously determined in these reasons, the Section 4 Covenant is not enforceable by 098 and does not establish access to Block A across the Forest Strata property.
- [42] Based on Mr. Clarke's explanation about what he told Mr. Muller in June 2017, it is not surprising that Mr. Muller understood that 098 already had an easement in its favour over the Forest Strata property. Therefore, I have concluded that the comments and actions of Mr. Muller about access to Block A are premised on his understanding that the easement in favour of 098 was already in existence.
- [43] In these circumstances, I cannot conclude that the Forest Strata has, by its words or conduct, encouraged 098 to believe that it would allow 098 access to Block A over its strata property. The conduct of the Forest Strata was based upon the representations of Mr. Clarke which led the then president of the Forest Strata Council, Mr. Miller, to believe that an access easement already existed. When considering an equitable remedy such as proprietary estoppel, it would not be equitable to allow 098 to rely upon conduct by the Forest Strata which was precipitated by erroneous representations made by Mr. Clarke, the directing mind of 098. This is especially so when it appears from the affidavit of Mr. Clarke of January 31, 2019, that by June 2017, he knew that an easement in favour of Block A did not exist.
- [44] The passage from Mr. Clarke's affidavit of January 31, 2019, quoted above, compels me to infer that Mr. Clarke knew that the Section 4 Covenant was all that 098 had to establish access. He must also have been aware that an easement in favour of Block A had not been registered. As I have found earlier, the Section 4 Covenant was an agreement to which 098 was not a party and which was simply an agreement to grant an easement in a form to be agreed upon by the Forest Strata. Therefore, Mr. Clarke, on behalf of 098, commenced negotiations for an easement with Mr. Muller in the summer of 2017.
- [45] Therefore, by the time 098 started to develop Block A in June 2017, Mr. Clarke:
- a) knew that 098 had no easement across the Forest Strata property for access to Block A;
 - b) had a mistaken interpretation of the Section 4 Covenant; and
 - c) knew that 098 needed to negotiate the terms of an easement with the Forest Strata.

- [46] When negotiations with the Forest Strata commenced, Mr. Clarke should have known that if the negotiations failed and the parties could not reach an agreement, then 098 may not have access to Block A through the Forest Strata property. In these circumstances it would not be reasonable for 098 to have relied upon the existence of an easement or a right of access over the Forest Strata property to start work on its development.
- [47] Finally, on the facts of this case, I cannot conclude that it would be dishonest or unconscionable for the Forest Strata to rely on its strict legal rights to deny an easement over its property. The conduct of the Forest Strata was premised on Mr. Clarke's representation that the Forest Strata was required to allow access to the 098 development. 098 has found itself in this position not as a result of the conduct of the Forest Strata but as a result of Mr. Clarke's interpretation of the Section 4 Covenant.

SUMMARY

[48] Based on the foregoing analysis, I have found as follows:

- 1) The Section 4 Covenant is not an easement and does not run with the land because it creates a positive obligation on the part of the Forest Strata;
- 2) The Section 4 Covenant cannot be enforced by either of the plaintiffs because they are not privy to the agreement which establishes the covenant and the principled exception to the doctrine of privity of contract does not apply;
- 3) 098 has not established an easement across the Forest Strata property pursuant to the equitable remedy of proprietary estoppel because:
 - a. The Forest Strata has done nothing to encourage 098 to believe that it would not be relying on its strict legal rights;
 - b. 098 has not reasonably relied upon any words or conduct on the part of the Forest Strata to commence work on its development; and
 - c. In these circumstances, it is not dishonest or unconscionable for the Forest Strata to rely on its legal rights to restrict access to Block A.

[49] Therefore, the plaintiffs' application is dismissed.

[50] The parties have liberty to address the issue of costs by further submissions. Arrangements for those submissions are to be made within 30 days otherwise costs will follow the event.

"Hori J."

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