

CANADA / JUDGMENT

Richter v. Stratton

2020 BCSC 654

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 654 Richter v. Stratton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Richter v. Stratton,

2020 BCSC 654

Date: 20200429

Docket: S28482

Registry: Cranbrook

Between:

Kirsten Maria Richter

Petitioner

And

Neal Edwin Scott Stratton, Yuriria Raquel Badillo Perez and The Owners, Strata Plan VR 1028

Respondents

- and -

Docket: S1813793

Registry: Vancouver

Between:

Neal Stratton and Yuriria Badillo Perez

Petitioners

And

Kirsten Maria Richter and The Owners, Strata Plan VR 1028

Respondents

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

In Chambers

Counsel for the Petitioner:

J.A. Bird

Counsel for Respondents:

A.J. Chang

Place and Date of Hearing:

Cranbrook, B.C.

May 30, 2019

Place and Date of Judgment:

Cranbrook, B.C.

April 29, 2020

[1] By consent order made March 14, 2019, the two actions referred to above were ordered heard together with a trial date of May 3, 2019. The initial amended petition filed April 9, 2019 sought:

1. A declaration that the Petitioner is entitled to an easement over the property owned by The Owners, Strata Plan VR. 1028, being legally described as No PID, The Common Property, Strata Plan VR. 1028, for the purposes of crossing the deck between the rear second-story exterior (kitchen) doorway of the Petitioner's strata lot and the stairway leading from the deck to the backyard area, with precise dimensions to be surveyed by the Petitioner.
2. Upon filing a certified copy of this order with the Vancouver Land Title Office together with a letter from the Petitioner's solicitor authorizing such registration, and subject to the terms of this order, the Registrar of Land Titles shall cause the easement (in a form to be approved by the court) to be registered over No PID, The Common Property, Strata Plan VR. 1028.
3. Alternatively, a declaration that the Petitioner is entitled to a restrictive covenant in the form attached to be registered against the property owned by the Respondents and described as:

PID: 006-293-875

STRATA LOT 1 DISTRICT LOT 526 STRATA PLAN VR. 1028, TOGETHER WITH AN INTEREST IN THE COMMON PROPERTY IN PROPORTION TO THE UNIT ENTITLEMENT OF THE STRATA LOT AS SHOWN IN FORM 1

("Strata Lot 1")

4. Upon filing a certified copy of this order in the Vancouver Land Title Office together with the a letter from the Petitioner's solicitor authorizing such registration and subject to the terms of this order, the Registrar of Land Titles shall cause the restrictive covenant to be registered over this Strata Lot 1 in the form attached to this order.
5. An interim and permanent injunction restraining the Respondents from in any way impeding the Petitioner's access from the rear second-story door (kitchen door) of her Strata Lot to and down the stairway that leads from the second story rear deck to the ground, and an injunction restraining the Respondents from placing objects upon the stairway.
6. The Petitioners also sought liberty to apply for further orders as may be necessary, a certificate of pending litigation, costs and such further relief as seems just.

Facts

- [2] The petitioner, Kirsten Richter, is a Chartered Professional Accountant currently practising with a firm in Calgary, Alberta.
- [3] She is the owner of the property with a civic address is 1870 W. 15th Avenue, Vancouver, British Columbia, legally described as PID: 006-293-913, Strata Lot 3 District Lot 526 Strata Plan VR. 1028, together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown in on Form 1 ("Strata Lot 3").
- [4] The petitioner has owned the Strata Lot 3 since November 22, 2004.
- [5] The petitioner lived in Strata Lot 3 from November 2004 until she commenced renting out Strata Lot 3 to long-term tenants in September 2017.
- [6] The respondents, Neal Stratton and Yuriria Perez, are a married couple and reside at the property with a civic address of 1866 W. 15th Avenue Vancouver, British Columbia, which is Strata Lot 1, as defined above.
- [7] The Owners, Strata Plan VR. 1028 (the "Strata Corp" or the "Strata Plan"), is a strata corporation created December 3, 1981 by conversion of a house built in 1912 into three strata lots, including Strata Lot 1 and Strata Lot 3.

- [8] The north side of the Strata Corp abuts West 15th Avenue, Vancouver, and the south side of the Strata Corp abuts a lane. Each of the three strata lots has a rear garage space immediately abutting the lane designated as limited common property for that strata lot. In between the building and the garages is a backyard area.
- [9] The Strata Corp building has three floors. Strata Lot 3 comprises the western side of the building on the first and second floor. Strata Lot 1 comprises the southeastern quadrant of the building on the first and second floor, along with a portion of the third floor that is above Strata Lot 2. Strata Lot 2 comprises the northeastern quadrant of the building on the first and second floor, along with a portion of the third floor that is above Strata Lot 3.
- [10] On the south side of the building, facing the backyard, the garages, and the lane, Strata Lots 1 and 3 are immediately beside one another on the southern half of the first two floors. On the north side of the building, facing West 15th Avenue, Strata Lots 2 and 3 are immediately beside one another on the northern half of the first two floors.
- [11] The first floor is at the ground level. There is no basement level. In the backyard, each of Strata Lots 1 and 3 have an area designated on the strata plan as "Yard LCP", being the limited common property for the use of Strata Lot 1, and Strata Lot 3, respectively, abutting their strata lots. These are called the "Strata Lot 1 Yard LCP" and the "Strata Lot 3 Yard LCP", respectively.

Strata Plan Inconsistencies

- [12] There is a deck (the "Rear Deck") on the second floor of the south side of the Strata Corp building. Each of Strata Lots 1 and 3 have an exterior door leading onto the Rear Deck. The Rear Deck is a rectangle. Strata Lot 1's door is on the north edge of the Rear Deck, and Strata Lot 3's door is on the west edge of the Rear Deck. There is a stairway (the "Stairway") that leads from the southwest corner of the Rear Deck to the common property of the backyard.
- [13] The Stairway is constructed entirely on, and supported entirely by, Strata Lot 3 Yard LCP.
- [14] The Stairway and Strata Lot 3's exterior door leading onto the Rear Deck were built either before the Strata Plan was registered, or shortly thereafter.
- [15] This Stairway has, ever since then, been used by the owners of both Strata Lots 1 and 3 to access the backyard from the Rear Deck. The use has been open and notorious and accepted by all owners of the strata lots within the Strata Corp. The owners of Strata Lot 3 have only used the Rear Deck to traverse the approximately two steps from the exterior door of Strata Lot 3 to the top of the Stairway. The rest of the Rear Deck has been used for the benefit of the owners of Strata Lot 1.
- [16] The Strata Plan, as filed, is internally inconsistent with respect to Strata Lot 3's use of the Rear Deck to access the Stairway. The Strata Plan does not show the Stairway or the top landing of the Stairway.

- [17] Sheet 2 of the Strata Plan shows that the Rear Deck is rectangular, but for a notch carved out of the southwest corner of the Rear Deck, which is where the top landing of the Stairway is located. Sheet 2 shows the Rear Deck divided into two areas, each of which is denoted as "Deck". One of the areas is on the northwest corner of the Rear Deck, and it is the area that the users of Strata Lot 3 pass across when leaving the exterior door of Strata Lot 3 and walking to the top landing of the Stairway. The petitioner seeks an easement, the precise dimensions of which are to be surveyed if this Court grants the order sought.
- [18] Sheet 6 of the Strata Plan shows the floor plan of the second floor. Sheet 6 shows only one deck area, and that the entire Rear Deck area is the limited common property for use of Strata Lot 1. Sheet 6 shows the Rear Deck as having a notch missing from the southwest corner, which is where the top landing of the Stairway is located.
- [19] When the Stairway was built, the top landing of the Stairway eliminated the notch on the southwest corner of the Rear Deck, and made the Rear Deck a perfect rectangle. Thus, the southwest corner of the Rear Deck (and the entire Stairway) is built on, and supported by, the Strata Lot 3 Yard LCP.
- [20] The Stairway is submitted to be the only convenient way for the owners of Strata Lot 3 to access the Strata Lot 3 Yard LCP for purposes such as accessing Strata Lot 3's limited common property single garage, activities such as barbecuing in the backyard and taking out garbage to the laneway. The only other access to the Strata Lot 3 Yard LCP is for a person to exit Strata Lot 3's front door on the first floor facing West 15th Avenue and then to walk on common property around the side of the building to the Strata Lot 3 Yard LCP or to go from the kitchen back down the stairs to the front door then all the way through the townhouse and through the master bedroom to go out of the master bedroom's patio door to the rear of the building. Such routes are alleged to make accessing the Strata Lot 3 Yard LCP very inconvenient and too time-consuming to use a barbecue, or to go back and forth between there and the kitchen on the second floor (near the exterior door leading to the Rear Deck).
- [21] In two other instances, accessing common utilities requires crossing property that is noted as limited common property in the Strata Plan.
- [22] There is a common property electrical room on the first floor of the property, as shown on Sheet 5 of the Strata Plan. The electrical room can only be accessed from outside through a door that opens onto the Strata Lot 1 Yard LCP.
- [23] The property's front yard water hose bib is located under the Deck shown on Sheet 6 of the strata plans as Deck LCP for Strata Lot 2. The front yard hose bib can only be accessed by Strata Lot 2's Yard LCP.
- [24] All owners have had access to the electrical room and the front yard hose bib, notwithstanding they have to cross limited common property to reach those locations.

[25] The petitioner relies on the passage over the Rear Deck of Strata Lot 1, based on the prior experience of previous owners of the three strata lots, which are set forth in the chart below.

Strata Lot 1

Strata Lot 2

Strata Lot 3

1984 - 1988

Sarah S. Bender

1982 - 1987

Robert Odium

Lawrence Wong

1985 - 1994

Joel Slone

1988 - 1989

Linda A. Loo

1987 - 1988

Lawrence Wong

1994 - 2002

William R. O'Brien

Patricia J. O'Brien

1989 - 1994

Elizabeth L. Whiles

1988 - 1994

Donna L. Hossack

2002 - 2004

Patricia J. O'Brien

May - Aug 1994

Donald J. Hudson

1994 - 2003

James R. Dinsdale

Denise M.D. Dinsdale

Nov. 2004 - current

Kirsten M. Richter

1994 - 2010

Judy Zaichkowsky

2003 - 2006

Dominique Weis

James S. Scoates

2010 - 2014

Mario G. Cocchia

2006 - 2009

Martin G. Clarke

Annette L. Saliken

Dec 2014 - current

Neal E. S. Stratton

Yuriria R. Badillo Perez

2009 - 2018

Herbert O. Slaymaker

Margaet A. Slaymaker

June 2018 - current

Yunying Zhou

[26] The petitioner purchased Strata Lot 3 in 2004 and, prior to her purchase, was advised by the then owner of Strata Lot 1, Ms. Zaichkowsky, that prior to her purchase, the owners of Strata Lots 2 and 3 informed her:

1. The developer responsible for converting the building into a strata in 1981 lived in Strata Lot 3;
2. About when the Strata was registered, or shortly thereafter, the developer built the Stairway and installed the exterior door from Strata Lot 3 onto the Rear Deck; and

3. The owners of Strata Lot 1 and 3 have used the Rear Deck and Stairway to access the backyard since then, by agreement.

[27] Ms. Zaichkowsky is also alleged to have told the petitioner that:

1. There has never been any question about Strata Lot 3's right to walk across the Rear Deck to access the Stairway and backyard, particularly as the top landing and Stairway are built on the Strata Lot 3 Yard C LCP; and
2. While the Strata Plan is not perfect, the intention alleged by the petitioner is said to be obvious and has been longstanding that Strata Lot 3's owners/occupants would be able to cross the rear deck to access the Stairway.

[28] The petitioner relied upon Ms. Zaichkowsky's representations in calculating the value and purchase price of Strata Lot 3.

[29] In 2010, after Mario G. Cocchia purchased Strata Lot 1, the three Strata Lot owners agreed to renovate the Stairway. The three Strata Lot owners contributed equally to the costs of the renovation of the Stairway. In total, the renovation cost approximately \$3300.

[30] At the same time that the Stairway was renovated, the three Strata Lot owners agreed that the petitioner could build, at the petitioner's cost, a storage unit under and attached to the Stairway (and on Strata Lot 1 Yard LCP). The petitioner paid approximately \$4600 for the storage unit.

[31] The petitioner alleges that she contributed funds to the Stairway repair and renovation, and paid for the storage unit construction, in reliance upon her ability to continue to use the Stairway.

[32] The petitioner, her guests and tenants have continuously used the Rear Deck to access the Stairway from the time that the petitioner purchased Strata Lot 3, with the consent of the owners of Strata Lot 1, Judy Zaichkowsky, Mario G. Cocchia and the respondents, until the respondents blocked access as described below. The tenants to whom the petitioner leased Strata Lot 3 expected to be able to cross the rear deck to access the Stairway when their tenancy began in September 2017. The petitioner and her tenants wish to have access to:

- a. Escape safely, in the event of fire; and
- b. Access the Strata Lot 3 Yard LCP, for accessing the garage, taking out refuse to the laneway, barbecuing and playing with the tenants' child.

[33] As a result of the lack of access claimed by the tenants, the petitioner reduced the rent on Strata Lot 3 from \$3200-\$2800 per month to compensate tenants for not being able to use the rear exterior door.

- [34] The petitioner alleges that when the respondents purchased Strata Lot 1 in December 2014, the use of the Rear Deck by occupants of Strata Lot 3 to access the Stairway was apparent, open and notorious, and was apparently accepted by the respondents without question.
- [35] Approximately three years later, in late September 2017, the petitioner alleges that the respondents blocked the exterior door of Strata Lot 3 by placing a large planter box with trees immediately outside the door, preventing it from being used. The petitioner alleges that this conduct of placing a planter in front of the doorway was designed to extract concessions from the petitioner regarding a proposed alteration by the respondents to their enclosed third floor deck.
- [36] Strata Lot 1 has, on the east side of the third floor, an exterior deck that is limited common property. Strata Lot 2 has, on the south side of the third floor, an exterior deck that is limited common property. Sometime in the 1980s, according to the petitioner, both of these decks were enclosed to resolve water leaking issues, and they have been closed since that time. The enclosure of the decks was done without obtaining City of Vancouver building permits, and puts all three units' overall square footage above the City of Vancouver's floor space ratio limits.
- [37] In 2015, the respondents demanded various concessions from the other two strata lot owners. In particular, the respondents wanted to alter an exterior wall of the building to expand their strata lot. The respondents sought in 2015 to tear down the exterior wall between the interior and the third-floor enclosed deck, thereby incorporating the limited common property deck area into the strata lot and increasing the habitable area of Strata Lot 1.
- [38] The removal of the exterior wall and incorporation of the limited common property into a strata lot requires an amendment to the strata plan and an amendment to the Schedule of Unit Entitlement, which is based on the habitable area of each strata lot. Both of these amendments require unanimous votes of the owners. The strata plan amendment also requires the approval of all charge holders on all strata lots.
- [39] The petitioner considered allowing the change proposed by the respondents, provided a number of conditions were met. Various proposals between the three strata lot owners were discussed. According to the petitioner, although the respondents were initially willing to formalize Strata Lot 3's right to cross the Rear Deck to access the Stairway, the respondents were not willing to enter into an agreement to indemnify other owners for any damage to the building caused by the renovation they proposed. The parties also disagreed on a number of matters relating to the proposals for a fully fenced enclosure of Strata Lot 1 Yard LCP and a requirement that the petitioner pay a portion of the permitting required.
- [40] In April 2018, the Strata Corporation passed a Resolution to adopt an alternative expense allocation formula for common expenses related to the replacement of windows, skylights and doors. This document was filed with the Land Title Office. The remaining Strata Agreement of importance to the petitioner which has not been legally formalized is that the

owners formally record that Strata Lot 3 has a right of passage over the rear deck to access the Stairway. The petitioner realized that for her interest to be sufficiently protected, she requires either an easement or a restrictive covenant registered against the title to the property.

- [41] The disagreements between the parties were taken before the Civil Resolution Tribunal in Dispute Number ST-2018-004491, and on September 11, 2018, the Civil Resolution Tribunal refused to resolve the dispute saying it had no jurisdiction, pursuant to s. 11(1)(e) of the Civil Resolution Tribunal Act, S.B.C. 2012, c. 25 given the in rem nature of the claim.
- [42] The petitioner is prepared to grant a reciprocal restrictive covenant over the Stairway in favour of Strata Lot 1. The respondents say that the relief sought by the petitioner is barred by provisions of the Strata Property Act, S.B.C. 1998, c. 43 [SPA], that the petitioner has not fulfilled any of the criteria set out in *Cowper-Smith v. Morgan*, 2017 SCC 61, and that s. 29(2) of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA], prevents the petitioner from relying on an unregistered interest in this case.

Discussion

- [43] The petitioner alleges that at the time the respondents purchased Strata Lot 1, they were aware there was a doorway which provided access to the rear deck from Strata Lot 3, and that the owner of Strata Lot 1 had placed planters on the rear deck indicating the area used by Strata Lot 3 to cross the rear deck. The petitioner also alleges it is clear on the Strata Plan that the Stairway located on Strata Lot 3 is limited common property, and it is therefore for the benefit of Strata Lot 3. The petitioner says that the shape of the rear deck is different as built from that shown on the Strata Plan owing to the presence of the landing at the top of the Stairway. The petitioner relies on proprietary estoppel and common intent.
- [44] The respondents argue, at the outset, that the petitioner seeks to override the consumer protections designed to protect uses of limited common property. A difficulty which this case raises is that the Strata Plan, as filed with the Land Title Office, does not accurately reflect the "as built" construction of the condominium complex in several aspects.
- [45] The respondents rely in part on the fact that once property has been designated as LCP, the owners have a substantial degree of control over that LCP: *Frank v. Strata Plan LMS 355*, 2016 BCSC 1206, at para. 35, aff'd 2017 BCCA 92. In effect, owners have a right to veto any changes to the LCP designation under the SPA. However, the respondents' "veto" is not engaged by this dispute. The petitioner is asking for the acknowledgment of a right which is alleged to have already been agreed to by prior owners of Strata Lot 1, not a change to the LCP. The petitioner essentially alleges that prior owners of Strata Lot 1 used their substantial degree of control to allow access over the rear deck to the owners of Strata Lot 3.

Proprietary Estoppel

[46] Initially, citing *Cowper-Smith v. Morgan*, 2017 SCC 61, at para. 15, the respondents challenge whether:

- a) the petitioner received an unambiguous representation or assurance that she had an irrevocable right to use the deck; and
- b) if such a representation was given:
 - i. Was the petitioner's reliance on that representation reasonable in all the circumstances?
 - ii. Did the person making that representation have a sufficient interest in the deck to fulfil the respondents' expectation?
 - iii. Did the petitioner suffer any detriment based on that reliance?

The respondents submit the answer to all of those questions is no.

[47] In *Cowper-Smith*, the Court outlined a three-step approach for determining whether an equity has arisen:

15 An equity arises when (1) a representation or assurance is made to the claimant, on the basis of which the claimant expects that he will enjoy some right or benefit over property; (2) the claimant relies on that expectation by doing or refraining from doing something, and his reliance is reasonable in all the circumstances; and (3) the claimant suffers a detriment as a result of his reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on her word

[48] The respondents argue that the owners of Strata Lot 1 have been permissive in allowing the owners of Strata Lot 3 to use the deck for the purpose of accessing the stairs, suggesting this was a "neighbourly indulgence". In effect, the previous owners of Strata Lot 1 have also used the Stairway on the limited common property of Strata Lot 3.

[49] The petitioner relies upon representations made directly to her by Ms. Zaichkowsky, who owned Strata Lot 1 for the period from 1994 to 2010. Those representations were to the effect that the petitioner was authorized to access the Stairway by crossing a very small portion of the deck. The petitioner swore she initially valued the Strata Lot and purchased the Strata Lot based partly on that representation. The petitioner also noted that in 2010, all three Strata units agreed to divide the cost of repairs to the staircase.

[50] The respondents point to the affidavit of Ms. Zaichkowsky, in which she stated she would "always allow [the petitioner] to use that right of way, even though it was undocumented", to suggest this arrangement was a revocable license. However, the respondents focused their argument on the word "allow", and did not address the word "always", which suggests permanence to the agreement.

[51] The respondents also claim that only the strata corporation, not the previous owners of Strata Lot 1, had a sufficient interest in the property to designate a right-of-way over LCP. They say that no representation was ever made by the strata corporation that Strata Lot 3

could have access over the rear deck. Section 71 of the SPA provides that a strata corporation must not make "significant change in the use or appearance of common property" without a 3/4 vote at a strata meeting. However, as noted above in Frank, strata owners enjoy a "significant amount of control" over LCP. I find that entering an agreement to allow the owners of Strata Lot 3 to take two steps to access the rear stairs is not a "significant change in the use" of the deck which would require a 3/4 vote of the strata corporation.

- [52] The petitioner also noted that while the Strata Plan fails to show the Stairway at all as registered, the electrical room accesses and the front wall hose bib all require access, not marked in filed plans, but which is necessary for operation of the Strata by the three neighbours.
- [53] In the case of *Young v. Beck*, 2017 BCCA 248, the court dealt with a case where neighbouring property owners fell out over long-standing access rights running across one property to the other. The petitioners sought an equitable easement to permit access across their neighbours' land based on long-term use. The problem arose when one party, who owned all four lots, and as a result required no easement, sold some of the property without the easement attaching to the sold property. When two of the lots were sold without reference to any easement, the result was that there was no defined access to Lot 4. Mr. and Mrs. Young brought a claim for access, by way of an equitable easement, and were successful at trial relying on the decision of *Harris J. and Dykes v. Nagel*, 2011 BCSC 1549 at paras. 58 - 60. The trial judge concluded that where parties appeared to have assumed there was an easement, and continue to order their affairs on that basis, it would be unconscionable and unjust to say that there was no entitlement to access. Mr. Beck then appealed the trial judgment on a number of grounds, including that the trial judge erred in his application of the law of promissory estoppel.
- [54] The Court of Appeal noted at para. 21 that the record below shows an easement had originally been registered for access to the Youngs' Lot, by error; but representations made by prior owners of the adjoining property concerning access to the Youngs' property were that by traversing the driveway on Lot 2, the Youngs would have access to their property. This provided a basis for the Youngs' belief they had authority to traverse Lot 1 to their own property.
- [55] In that case, the prior owner of Lot 3 agreed and confirmed that the assumption of the Youngs was correct. The owners of the lots, including the Youngs, had, in the past, shared the cost of paving the access driveway. The Court of Appeal, on the facts in the *Young* case, accepted at para. 23 the proposition that:

"A good place to start is [Lord] Coke, who is quite clear that estoppels ("an excellent and curious kinde [sic] of learning") bind privies in estate (that is, successors) to O. There are many cases in the nineteenth century and earlier applying this principle."

- [56] A similar approach was taken by Madam Justice Newbury in *Trethewey-Edge Dyking District v. Coniagas Ranches Ltd.*, 2003 BCCA 197, where the Court of Appeal adopted a broader approach to proprietary estoppel.
- [57] On the facts of this case, I find the petitioner was given an assurance by the previous owners of Strata Lot 1 that she could cross the rear deck to access the staircase. I find that a similar assurance was given by the petitioner to previous owners of Strata Lot 1 that they could use the staircase on Strata Lot 3's property. The representations made to the petitioner, the history of use of the stairwell, the existence of other areas of the Strata requiring common access over LCP, and the jointly-funded repair of the stairwell in 2010 all suggest this arrangement was meant to be permanent.
- [58] On the second factor from *Cowper-Smith*, the respondents argue that reliance upon the representation was not reasonable because an easement was not granted and registered. The respondents rely on the case of *Chen v. Strata Plan VR1856*, 2016 BCSC 1946, which they say bears a number of similarities to the case at bar.
- [59] In *Chen*, the owners of two adjacent strata lots both had access to a back deck. Previous owners of both lots had treated the back deck as common property, but the strata plan indicated the deck was divided in two parts, with each part the LCP of the respective lot. The petitioner applied for an order that the deck be designated as common property. The petitioner argued she would not have made a previous investment in renovating the deck if she knew the deck would be treated as LCP. The court found that the prior common use of the deck in that case arose from a desire amongst neighbours to be good owners, not any legal entitlement. The court concluded the designation of the deck as LCP in the strata plan bound the parties and dismissed the application.
- [60] I do not find that *Chen* is similar to the case at bar for the following reasons. First, in *Chen*, both owners could still enjoy the use of half of each deck if the deck were designated as LCP. In the case at bar, mutual assurances were necessary to allow the owners of both lots to enjoy the access provided by the rear stairs. Without a mutual agreement, the use of the staircase would be lost.
- [61] Second, the court in *Chen* proceeded on the assumption that both owners paid a going market rate for their lots which reflected the designation of the deck as LCP. In the case at bar, I find the petitioner paid a rate that reflected the understanding of the petitioner and the previous owners of Strata Lots 1 and 3 that Strata Lot 3 had access to the rear stairs.
- [62] Finally, *Chen* involved an application under s. 164 of the SPA, which allows the Supreme Court to remedy a significantly unfair action or exercise of voting rights, and involves a somewhat different legal test than the one described in *Cowper-Smith*. The appellant in *Chen* did not allege a prior agreement between owners, as alleged in the case at bar, and the court was dealing with a different factual scenario in applying s. 164 of the SPA.

- [63] Here, previous neighbours made a common sense agreement dealing with access from doors and decks of an as-built condominium to recreation areas, garbage collection and garages. Without access over the deck, neither neighbour would have enjoyed the use of the Stairway. The fact that in 2010, all of the owners of the Strata agreed to pay equally for the renovation and repair of the Stairway is evidence of the intended use of the Stairway by all three owners in an equal fashion.
- [64] I find the petitioner reasonably relied on assurances of access to the staircase when purchasing the unit and when agreeing to pay for the costs of repairing the Stairway in 2010.
- [65] Dealing with the third factor from Cowper-Smith, the loss of the cross-deck access to the rear of the complex, including the recreation area, garage and garbage removal is beyond any doubt a detriment to Strata Lot 3. The respondents' submission that the petitioner has not suffered a detriment is without merit.
- [66] In these circumstances, the petitioner has established that she is entitled to an irrevocable right-of-way based on the principles of proprietary estoppel, as defined by Cowper-Smith and detailed above. Clearly, the previous owners of Strata Lot 1 accepted this right-of-way and as owners for those many years they had the right to grant that access, a right binding on subsequent owners. The respondents also continued to have a right to access the Stairway.
- [67] Given my findings above, I do not need to address the petitioner's alternative argument under common intent.

Section 29(2) of the Land Title Act

- [68] The respondents have also submitted that s. 29(2) of the LTA prevents the petitioner from obtaining an equitable right of access from the back door of Strata Lot 3 to the staircase. Section 29(2) provides:
- (2) Except in the case of fraud in which he or she has participated, a person contracting or dealing with or taking or proposing to take from a registered owner
- (a) a transfer of land, or
- (b) a charge on land, or a transfer or assignment or subcharge of the charge,
- is not, despite a rule of law or equity to the contrary, affected by a notice, express, implied, or constructive, of an unregistered interest affecting the land or charge other than
- (c) an interest, the registration of which is pending,
- (d) a lease or agreement for lease for a period not exceeding 3 years if there is actual occupation under the lease or agreement, or
- (e) the title of a person against which the indefeasible title is void under section 23 (4).

[69] The question then to be answered is whether in the circumstances of this case the respondents' refusal to continue to allow access across the deck to the Stairway amounts to fraud. In *Nicholson v. Riach* (1997), 34 B.C.L.R. (3d) 381 (S.C.), it was held that "mere knowledge" of the claim of another party will not in and of itself necessarily produce a finding of fraud. A similar finding was made in *Vancouver City Savings Credit Union v. Serving for Success Consulting Limited*, 2011 BCSC 124:

89 To prove equitable fraud it must be established that the party acquiring a registered interest in land had sufficient actual knowledge of the conflicting interest in the property to cause a reasonable person to make inquiries as to the terms and legal implications of the prior instrument. In addition, there must be some other circumstance to take the matter out of the ordinary course of business or to show some clear intention to use the statute to defeat the respondents' interests in circumstances contrary to common morality such that it would be inequitable for the court to allow reliance upon the statute as protection. Something more than simple knowledge is required. This interpretation seems consistent with the clear words of ss. 20, 29 and 30 of the Land Title Act. [Emphasis added]

[70] In *Szabo v. Janeil Enterprises Ltd.*, 2006 BCSC 502, the court noted at para. 40 that imposing too high a burden on purchasers would undermine the importance of certainty in the Torrens system. Purchasers should not be expected to "investigate every known, suspected or rumoured, prior unregistered claim before entering into their contract".

[71] It has been submitted, with some force, that from December 2014, when the respondents purchased Strata Lot 1, until August 2017, the respondents accepted the prior accommodations agreed to by the former owners which were binding on them in any event. The petitioner filed several affidavits from people she has permitted to use Strata Lot 3 for extended periods of time. These people all claim to have used the deck to access the staircase without incident up until August 2017, sometimes in view of the respondents.

[72] The respondents submit that they did not have sufficient notice of the alleged right-of-way when they purchased Strata Lot 1.

[73] While the petitioner did not recall raising the issue with the respondents at the time of purchase, I find there were two indications that a right-of-way existed. First, the previous owners of Strata Lot 1 had left a row of planters in the middle of the deck marking the small area where Strata Lot 3 accessed the stairs. This delineation was consistent with the line drawn on Sheet 2 of the Strata Plan.

[74] Second, the existence of both the staircase and the rear door would have been obvious to anyone who viewed the back deck. The respondents placed a significant reliance on the Strata Plan itself, but the Strata Plan does not show the stairs as they presently exist, and shows the area where the stairs are built as being on the LCP of Strata Lot 3. If the petitioner was relying on the Strata Plan, seeing the rear door and nearby staircase should have at least prompted questions. Similar to the situation described at para. 48 of *Szabo*, it would have taken a simple knock on the door for the respondents to ask about access to the rear stairs.

Having not made any further enquiries, I find that the respondents had sufficient actual knowledge of the right-of-way when they purchased Strata Lot 1.

- [75] The respondents did not dispute that the deck was used by the petitioner or her guests or tenants without incident prior to August 2017. The respondents agree they were "initially permissive" until their relationship with the petitioner soured.
- [76] In August 2017, the current tenants of Strata Lot 3 were being shown the unit by the petitioner's rental manager when the rental manager opened the rear door to show the tenants the access to the rear stairs. Ms. Perez was standing on the deck at the time, and a verbal altercation ensued in which Ms. Perez told the rental manager she could not use the rear stairs.
- [77] In September 2017, the respondents set out plant pots in an attempt to bar the rear door and access to the deck from Strata Lot 3. The respondents replaced these plant pots with heavier plant pots in 2018, which could not be easily moved. A fire marshall eventually became involved, and said the rear door of Strata Lot 3 must be allowed to fully open in case of an emergency. The parties filed several affidavits relating to these plant pots and other alleged barriers to the rear door of Strata Lot 3 in 2018 and 2019. I do not need to deal with this evidence for the purposes of this case except to say there is clear animosity between the parties.
- [78] As previously noted, in 2015 the respondents wanted the other two strata lot owners to allow the respondents to alter an exterior wall to expand their strata lot. This would have required an amendment to the Strata Plan via unanimous vote. In exchange for approval, the petitioner wanted a number of concessions, including the legal formalization of past agreements and an agreement to indemnify the other owners for any damage caused to the building by the renovation. The parties ultimately could not reach an agreement.
- [79] I find that the denial of access to the staircase by the respondents was an attempt on the part of the respondents to extract concessions from the petitioner, and was part of a souring of the relationship between the two owners relating to the respondents' proposed renovations. The denial of access means both parties are unable to use a staircase to access the rear yard, likely reducing the market value of both lots. To borrow language from Vancouver City Savings Credit Union, the actions of the respondents in this case show a clear intention to use the LTA to defeat the petitioner's interests in circumstances contrary to common morality, and it would be inequitable to allow the respondents to rely on s. 29(2) of the LTA.

Information Certificate

- [80] The respondents state that pursuant to s. 59 of the SPA, they received a Form B signed by the petitioner which did not disclose the right-of-way she now claims. Section 59 states that an owner or purchaser may request an information certificate which includes, in part:

- (h) any resolution passed by a 3/4 vote or unanimous vote that is required to be filed in the land title office but that has not yet been filed in the land title office;
 - (i) any notice that has been given for a resolution that has not been voted on, if the resolution requires a 3/4 vote, 80% vote or unanimous vote or deals with an amendment to the bylaws;
 - (5) The information in subsection (3) disclosed in a certificate is binding on the strata corporation in its dealings with a person who relied on the certificate and acted reasonably in doing so.
- [81] As noted above, there was no resolution passed by a vote in relation to the right-of-way. Therefore, I find that the Form B provided to the respondents was not required to include information about the right-of-way.

Orders

- [82] Based on the foregoing reasons and a review of the case law cited in the submissions of counsel for the parties, and the oral arguments made by counsel, the Court is satisfied that the petitioner is entitled to an easement for transient crossing of the deck discussed above.
- [83] Therefore, I grant the following orders:
1. A declaration that Strata Lot 3 is entitled to an easement over the property owned by The Owners, Strata Plan VR. 1028, being legally described as PID 006-293-875, The Common Property, Strata Plan VR. 1028, for the purposes of crossing the deck between the rear second-story exterior (kitchen) doorway of the petitioner's strata lot and the Stairway leading from the deck to the backyard area, with precise dimensions to be surveyed by a practicing B.C. Land Surveyor instructed by the petitioner, but which dimensions shall not exceed the width of the east/west dimension of the top landing of the Stairway or 1.16 metres as shown on Exhibit K to the Affidavit of the petitioner sworn November 14, 2018, and the north/south dimension at right angles to the north from the eastern edge of the Stairway top landing to the south wall of Strata Lot 1; sufficient to allow the full opening of the kitchen door in the east wall of Strata Lot 3;
 2. A declaration that Strata Lot 1 is entitled to an easement over the property owned by The Owners, Strata Plan VR. 1028, being legally described as PID 006-293-875, The Common Property, Strata Plan VR. 1028, for the purposes of using the Stairway leading from the rear second-story deck to the backyard area;
 3. Upon filing a certified copy of this order with the Vancouver Land Title Office, together with a letter from the petitioner's solicitor authorizing such registration and subject to the terms of this order, the Registrar of Land Titles shall cause the easement (in a form to be approved by the court) to be registered over PID 006-293-875, The Common Property, Strata Plan VR. 1028;

4. An interim and permanent injunction restraining the respondents from in any way impeding access from the rear second-story door (kitchen door) of Strata Lot 3 to and down the Stairway that leads from the second story Rear Deck to the ground, and an injunction restraining the respondents from placing objects upon the Stairway;
5. Liberty to apply for further orders as may be necessary; and
6. The petitioner has been substantially successful in this proceeding and is therefore entitled to the costs of this proceeding which shall include the expense of the survey of the easement referred to above, and be payable by the respondents forthwith after assessment, pursuant to Appendix B, as a matter of ordinary difficulty.

"Ball J."

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