IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Kearsley v. The Owners, Strata Plan KAS 1215,*** 2008 BCSC 1606

Date: 20081124
Docket: 29596
Registry: Penticton

Between:

Linda Kearsley

Plaintiff

And

The Owners, Strata Plan KAS 1215, and Gary Robert Nevens

Defendants

Before: The Honourable Mr. Justice Cullen

Reasons for Judgment

Counsel for the Plaintiff	C.A. Schneiderat
Counsel for the Defendant, Gary Robert Nevens	E.L. Lund
Counsel for the Defendant, The Owners, Strata Plan KAS 1215	M. Fischer
Date and Place of Hearing:	October 3, 2008 Penticton, B.C.

I. Introduction

[1] This law suit arises out of the construction of a solarium by the plaintiff, Linda Kearsley, on limited common property (comprised of a patio in front of her unit #101) of the defendant Strata Plan KAS 1215. The solarium encloses an exterior window of the adjacent unit, #102, belonging to the defendant Gary Nevens. Before building the structure in 2000, Ms. Kearsley obtained the permission of the former owner of #102, Ernest Jones, as well as that of the defendant, Mr. Nevens, who at the time was a tenant of Suite #102. Ms. Kearsley also obtained the approval of the Strata Corporation. Mr. Nevens bought unit #102 in 2003. Both Mr. Nevens and Mr. Jones' permission for enclosing the window was premised on the understanding there would be no obstruction to the view or the light through the window.

II. Background

[2] When the solarium was built, the plaintiff did not obtain a permit from the City of Penticton. In the years following the construction of the solarium, unhappy differences arose between Mr. Nevens and Ms. Kearsley resulting in many complaints between the two of them, some originating from Mr. Nevens directed at obstructions placed over or in front of his exterior window enclosed by the plaintiff's solarium. Ms. Kearsley's complaints against Mr. Nevens involved allegations of conduct that was designed to interfere with her enjoyment of her property.

[3] In 2006, Ms. Kearsley was informed by the municipal authorities that her solarium did not conform to the applicable building code. The municipality itemized several non-compliant features, but eventually agreed to issue a retroactive building

permit if Ms. Kearsley replaced Mr. Nevens' exterior window with a particular type of fire retardant window described as a Georgian Wire-glass pyro-shield.

[4] The window in question is one of two windows located in the west wall of the living room of Mr. Nevens' unit. The two windows, referred to as piano windows, are situated six feet above the ground and are each fifteen inches in height and forty-two inches in length. If unobstructed, the windows each admit light into the living room and from certain angles provide a view of greenery outside the building. The enclosed window, to the south end of the west wall, is sometimes obstructed by blinds and other objects in Ms. Kearsley's solarium.

[5] There is evidence that the installation of the pyro-sheild window in Mr. Nevens' suite would not present aesthetically well and might hinder the marketability of his suite. The evidence is that such a window is considered appropriate for commercial or industrial use, but not for residential use. Mr. Nevens himself has deposed that he considers that the window would be unattractive and obstructive and he would not want to have it in his unit. He has declined to agree to have the window installed.

[6] In the result, the plaintiff has brought this action against The Owners, Strata Plan KAS 1215 and the defendant Gary Nevens, seeking the following relief:

a. a declaration that the plaintiff has received approval for the construction of the solarium;

b. an order directing the defendant Strata, through its counsel, to approve the prior construction of the solarium on the property;

c. a temporary injunction preventing the defendant strata or its agents from removing the solarium on the property;

d. an order pursuant to Section 165 of the ***Strata Property Act***, S.B.C. 1998 c. 43 directing the defendant, strata, to provide access to the plaintiff, or her agents and contractors, to unit 102 for the purposes of effecting replacement of the window; or, in the alternative

e. an order directing the defendant Nevens to allow reasonable access to unit 102 for the purposes of the installation of the required window; and

f. Costs.

[7] It is common ground among the parties that in light of s. 68(1) of the ***Strata Property Act***, S.B.C. 1998, c. 43, the window is partly common property and partly a portion of the defendant Nevens' strata unit. Section 68(1) reads as follows:

> Unless otherwise shown on the strata plan, if a strata lot is separated from another strata lot, the common property or another parcel of land by a wall, floor or ceiling, the boundary of the strata lot is midway between the surface of the structural portion of the wall, floor or ceiling that faces the strata lot and the surface of the structural portion of the wall, floor or ceiling that faces the other strata lot, the common property or the other parcel of land.

[8] The strata plan exhibited to an affidavit sworn on behalf of the strata corporation does not show the boundary of the strata lot in sufficient detail to allow a determination of the status of the window, and hence, it is governed by the provision of s. 68(1) which gives both the owner of the strata lot (#102) and the Strata Corporation an ownership interest in the window at issue.

[9] Each of the defendants to this action has brought an application for dismissal of the plaintiff's action: the defendant Strata Corporation seeks dismissal either under Rule 19(24) or under Rule 18A; and the defendant Nevens seeks dismissal under Rule 18A.

III. Suitability for summary Trial under Rule 18A

[10] The plaintiff resists the defendant's applications and seeks that this matter be remitted to the trial list. The plaintiff submits that a triable issue which is not amenable to resolution by reference to a summary form of trial Rule 18 or 18A exists in the case at bar. The plaintiff relies on ***Serup v. British Columbia School District No. 57*** (1989), 57 D.L.R. (4th) 261, 54 B.C.L.R. (2d) 258 [***Serup***] in which Lambert J.A. held at 262 as follows:

> On an application under Rule 18 the question is whether the plaintiff has raised a *bona fide* triable issue. The point has been put in some cases as being whether the plaintiff is bound to fail. This court has said on other occasions that it is inappropriate to use Rule 18 in order to decide difficult questions of law. There are other rules that are precisely designed for that purpose, including but not restricted to, Rule 18A.

[11] ***Serup*** was a case dealing with the applicability of Rule 18, not Rule 18A. The threshold of there being a *bona fide* triable issue is applicable to Rule 18, which is an application for summary judgment in an action, not to Rule 18A, which is an application for summary trial. Rule 18A clearly contemplates the existence of triable issues. The question under Rule 18A is whether, on the whole of the evidence before the court on the application, the court is unable to find the facts necessary to decide the issues of fact or law or whether it would be unjust to decide the issues in the application.

[12] In the present case, although there is some contradiction on the evidence, resolution of that evidence is not necessary to decide the issues on this application. On the issue of whether it would be unjust to determine the issues on a Rule 18A application, the plaintiff raises the question of whether there is some additional evidence, unrelated to the facts giving rise to the present action that might provide the

plaintiff with the means of compelling the Strata Corporation to take some action in relation to various windows in the premises, including the window at issue in this law suit. In particular, the plaintiff refers to a building plan review from 1992 referencing "privacy zone problems with living room windows on lower units, suggesting the removal or installation of frosted windows."

[13] As I see it, whether a line of enquiry arising from that building plan review might give rise to a duty under the ***Strata Property Act*** for the strata to take some action in relation to certain windows in the strata complex is not connected to the issues raised by this law suit. This action involves a question of whether the defendants have some legal obligation or duty, arising out of their acquiescence to the plaintiff's construction of a solarium on limited common property in front of her unit, to install a Georgian wire-glass pyro-shield window in the defendant Nevens' living room.

IV. Positions of the Parties

[14] It is the plaintiff's contention that because the city bylaws or building code provisions require such a window as a result of the construction of the solarium, the window is no longer in sound condition, not because of a defect inherent to the window, but because of the fact that it is enclosed by a structure which was built with the approval of the defendant Strata and the defendant Nevens and his predecessor, Mr. Jones. In the result, the plaintiff contends the Strata Corporation's duty under its bylaws, specifically bylaw 14(c)(iv) is triggered to restore the windows to a sound condition in accordance with the requirements of the building code. Bylaw 14 (iv) reads:

> 14. The strata corporation must repair and maintain all of the following:

...

(iv) doors, windows and skylights on the exterior of a building or that front on the common property, ...

[15] The Strata's right to enter upon the premises of the defendant Nevens to effect the necessary "repairs" is provided for in bylaw 7(1)(b), which reads:

7(1) A resident or visitor must allow 2 persons authorized by the strata corporation to enter the strata lot:

...

(b) at a reasonable time, on 48 hours written notice, to inspect, repair or maintain common property, common assets and any portions of a strata lot that are the responsibility of the strata corporation to repair and maintain under these bylaws or insure under section 149 of the act.

[16] The plaintiff also submits that by virtue of s. 72 of the ***Strata Property Act***, the defendant Strata Corporation has an affirmative statutory duty to effect the repairs in question. Section 72 reads:

72 (1) Subject to subsection (2), the strata corporation must repair and maintain common property and common assets.

(2) The strata corporation may, by bylaw, make an owner responsible for the repair and maintenance of

(a) limited common property that the owner has a right to use, or

(b) common property other than limited common property only if identified in the regulations and subject to prescribed restrictions.

(3) The strata corporation may, by bylaw, take responsibility for the repair and maintenance of specified portions of a strata lot.

[17] The plaintiff further submits that if the defendant Strata Corporation fails to exercise its duty to effect the repairs, she has the basis for a remedy under s. 165(a) which reads:

> 165 On application of an owner, tenant, mortgagee of a strata lot or interested person, the Supreme Court may do one or more of the following:
>
> (a) order the strata corporation to perform a duty it is required to perform under this Act, the bylaws or the rules;

[18] In her pleadings the plaintiff made the following specific allegations against the defendant Strata Corporation and the defendant Nevens in para. 13 to 18 inclusive:

> 13. The City of Penticton has requested that the Structure be brought into compliance with the Building Code, which included a building permit and the installation of a fire rated window (replacing the existing window) on the exterior wall between the Structure and Unit 102.
>
> 14. The Plaintiff has made the necessary applications to the City of Penticton to which the City has indicated they require confirmation of approval by the Strata.
>
> 15. The Plaintiff has requested said confirmation/approval in accordance with the Strata's approval of June 16, 2000, but the Strata now refuses to confirm same. The Plaintiff has further offered to pay all costs associated with ensuring the Structure complies with appropriate By-Laws and Building Codes.
>
> 16. The Plaintiff had relied upon the previous approval of the Strata in June of 2000 and constructed the solarium in September of 2000. The Plaintiff pleads and relies on the principal of estoppel.
>
> 17. The Defendant Nevens has refused and continues to refuse to allow access to Unit 102 for the sole purpose of the installation of a fire rated window in accordance with Building By-Laws.
>
> 18. The Plaintiff, in constructing the Structure, had relied upon the previous approval and consent of the owner of Unit 102 and that of Nevens. The Plaintiff pleads and relies on the principal of estoppel.

[19] In the result, the plaintiff claims, among other things, an order under s. 165 of the ***Strata Property Act*** directing the defendant Strata to provide access to the plaintiff or her agents and contractors to unit #102 to effect replacement of the window; or, in the

alternative, an order directing the defendant Nevens to allow reasonable access to unit #102 to have the required window installed.

[20] It is the contention of the defendant Nevens that the evidence falls short of establishing an estoppel so as to justify the order sought by the plaintiff. The defendant Nevens submits that the only form of estoppel potentially applicable in the circumstances at bar is proprietory estoppel, and the test for its applicability is not met in the present case. The defendant Nevens contends that promissory estoppel is inapplicable, as it is a defence to a claim based on pre-existing legal relations between the parties in light of a promise made to affect those legal relations.

[21] In the present case, the plaintiff is relying on estoppel as a cause of action rather than as a defence to an action and therefore must establish the conditions requisite for proprietary estoppel or estoppel by encouragement or acquiescence. The defendant Nevens submits that the test for promissory estoppel has five parts as set out in ***Zelmer v. Victor Projects Ltd.***, (1997), 147 D.L.R. (4th) 216, 90 B.C.A.C. 302, quoting from ***Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co.***, [1970] S.C.R. 932, 12 D.L.R. (3d) 247, which in turn quoted the five *probanda* advanced by Fry J. in ***Willmott v. Barber*** (1880), 15 Ch. D. 96 (C.A.):

1. The plaintiff must have made a mistake as to his legal rights;

2. The plaintiff must have expended some money or done some act (not necessarily on the defendant's land) on the faith of his mistaken belief;

3. The defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it, he is in the same

position as the plaintiff and the *doctrine of acquiescence* is founded upon conduct of knowledge of your legal rights;

4. The defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not there is nothing which calls upon him to assert his own rights; and

5. The defendant, the possessor of the legal right, must have encouraged the plaintiff in the expenditure of money or in the other acts he has done, either directly or by abstaining from asserting his legal rights.

[22] The defendant Nevens submits, in effect, that the evidence in the present case does not engage the principle of proprietary estoppel given the five *probanda* set out in ***Willmott v. Barber***.

[23] The Strata Corporation, in its notice of motion, seeks alternative orders, the first of which is that the defendant Nevens provide reasonable access to his strata lot for the purpose of permitting the installation of a fire rated window in place of the existing piano window adjacent to the subject solarium/patio enclosure, in accordance with certain terms. In the alternative, it seeks an order that the subject solarium/patio enclosure be removed within thirty days, unless Mr. Nevens agrees to permit the installation of the fire rated window and such installation is completed within the thirty days, subject to terms. In submissions before me, counsel for the defendant Strata Plan KAS 1215 supported the submissions of the defendant Nevens on the footing that the test for proprietary estoppel has not been made out in the present case.

V. Analysis

[24] After hearing argument from counsel, I reserved judgment, and before giving reasons, asked counsel for additional submissions on the applicability and effect of

Erickson v. Jones, 2008 BCCA 379, which was issued only shortly before this matter was argued before me.

[25] In ***Erickson***, what was at issue was whether proprietary estoppel could justify an order creating an easement on land where a road had been built to permit the plaintiff access across the defendant's land to his own land. The road (the "new road") had been built at the request of the previous owner of the defendant's land to replace an existing road (the "old road") which ran through the middle of the defendant property. At the time the new road was requested and built, it was believed by the parties that the old road was a public road and hence, one to which the plaintiff had access as of right. Because of this, at the time the new road was built, it was viewed as an accommodation by the plaintiff to the previous owner, who thought the use of the old road was adversely affecting his pasture land.

[26] The new road was built to replace the old road in 1977. In 2002, the defendant/appellant (who had been paid to help build the new road) bought the land on which both the new and old roads were located. The defendant then informed the plaintiff/respondent that he intended to close the new road. The plaintiff/respondent sued, seeking an easement over the area of land through which the new road ran. The plaintiff was successful at trial, although the trial judge concluded that the old road was not a public road, based on the evidence before him, and that the plaintiff's use of it was based on the acquiescence or consent of the former owner, not based on the plaintiff's legal right.

[27] In finding that notwithstanding the nature of the plaintiff's use of the old road, it would be inequitable for the appellant to prevent the respondents from using the new road to access their property, Chiasson J.A. noted that the old road had been used for many years and its use had been an issue from time to time. He held as follows at para. 50:

> ... A confrontation concerning the old road was avoided when Mr. Loper [the original owner] asked the Ericksons to agree to access using the new road.
>
> What the Ericksons gave up was the opportunity to have resolved their right to use the old road either by litigation or through some other means, perhaps by agreement, with a person who shared their interest in obtaining a resolution. In that context, the parties worked co-operatively to achieve a practical result. Thirty years later, the landscape for resolution has changed. In my view, now to prevent the respondents from using the new road to access the Erickson property would be inequitable.

[28] In coming to his conclusion, Chiasson J.A. referred to what he described as the "modern approach" to equitable estoppel, and referred to the case of ***Willmott v. Barber*** and its five *probanda* as a "starting point" for raising a proprietary estoppel.

[29] Chiasson J.A. went on to quote Newbury J.A. in ***Trethewey-Edge Dyking District v. Coniagas Ranches Ltd.***, 2003 BCCA 197, 12 B.C.L.R. (4th) 46, where she noted at para. 64 that:

> ... the five elements or "probanda" famously cited by Fry J. in ***Willmott v. Barber*** ... have now been overtaken by a broader and less literal approach to proprietary estoppel....

[30] Chiasson J.A. also quoted from Justice Newbury's judgment where she quoted from Halsbury's Laws of England, Lord Hailsham of St. Marylebone, ed., 4th ed.(London: Butterworths, 1992) at para. 1072, as follows:

> The more recent cases raise the question whether it is essential to find all the five tests literally applicable and satisfied in any particular case. 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 belief on which the person seeking protection from equity relies need not relate to an existing right nor to a particular property. It may be easier to establish acquiescence where the right in question is equitable only. Where, on the hypothesis that liability has been established, the question is whether equitable relief should be withheld in the case of a continuing legal wrong, 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.

[31] Chiasson J.A. went on to consider another example of the modern or broad approach in ***Zelmer v. Victor Projects Ltd.*** (1997), 34 B.C.L.R. (3d) 125, 147 D.L.R. (4th) 216, where Hinds J.A. held in paras. 36 and 37 as follows:

> A few months after the decision in Western Fish Products, Lord Denning affirmed his decision in Crabb, in his judgment in Amalgamated Investment & Property Co. Ltd. (in Liquidation) v. Texas Commerce International Bank Ltd., [1981] 3 All E.R. 577. At 584 he spoke thus:
>
> > The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence; estoppel cannot give rise to a cause of action; estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to

> do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[32] In light of those authorities, Chiasson J.A. in ***Erikson v. Jones*** held as follows in paras. 58 – 60:

> In this case, Messrs. Jones, Loper and Erickson worked together to eliminate physical problems created by the Ericksons' use of the old road. By agreement, access to the Erickson property was moved to the new road. Mr. Jones constructed the new road. The Ericksons paid for part of the construction of the new road. The road also passed through Mr. Jones's property at a location specified by him. The new road has been used by the Ericksons for 25 years. In these circumstances, they did nothing to crystallize their access: to determine through litigation whether they had a right to it or to ensure they had a right to it by some other means. The conduct of Messrs. Loper and Jones belied the need for them to do so.
>
> Insofar as detriment must be shown to establish an equitable estoppel, it is present in this case by the payment of money to construct and maintain the new road and by the Ericksons' forbearance of pursuing their entitlement to access in reliance on the conduct and acquiescence of Messrs. Loper and Jones.
>
> In my view, it would be inequitable to allow Mr. Jones to assert his right to the land so as to deprive the respondents to access to the Erickson property. An equity is raised and proprietary estoppel established.

[33] As I see it, the present case is in some important respects factually distinct from that of ***Erickson***, in which the broader approach led to the establishment of proprietary estoppel. In ***Erickson***, the plaintiff's use of the defendant's property was established long before it was discovered that the use was based on the defendant's consent or acquiescence rather than the plaintiff's right. In the present case, by contrast, the plaintiff claims a prospective right to use (enter upon and alter) the defendant Nevens' property based only on his (and the strata's) acquiescence to her use of limited common property.

[34] In the present case, as with ***Erickson***, the defendant's consent or acquiescence to the plaintiff's land use was based on a mutual misunderstanding of a legal right of the plaintiff. The critical difference is that in ***Erickson***, the mutual misunderstanding of the plaintiff and the defendant's predecessor in title was that the plaintiff had a right to use a portion of the defendant's land (the old road) and the plaintiffs conducted themselves accordingly for many years. In the present case, by contrast, the mutual misunderstanding was only that the plaintiff was legally entitled to use the limited common property and not that she was entitled to use or alter Nevens' property.

[35] In other words, in ***Erickson***, the acquiescence relied on in establishing an estoppel was the long-term use of the defendant lands; in the present case, the acquiescence relied on embraced no contemplated interference with or use of the defendant Nevens' property. It could not be argued that the acquiescence of the defendant Nevens or his predecessor in title, Jones, led to the plaintiff's forbearance in pursuing her entitlement to interfere with the defendant's property through litigation or agreement, as was the case in ***Erickson***. The need to pursue that entitlement or agreement before the solarium was built was not foreborne by the plaintiff due to the conduct of Jones or Nevens. Rather, it was overlooked as a result of the failure of the plaintiff to seek the necessary building permit from the municipality.

[36] I thus conclude that even in light of the modern, broader approach to proprietary estoppel as explained by Chiasson J.A. in ***Erickson***, the circumstances of the present case do not support the relief sought by the plaintiff against the defendant Nevens. It follows I would grant the defendant Nevens his application for dismissal of the plaintiff's claim against him.

[37] The plaintiff's claim against the Strata Corporation must similarly fail. The essential contention of the plaintiff is that Nevens' window is in need of repair because its non-compliance with the provisions of the City's building code triggers the Strata's duty to repair it to meet the requirements of the code pursuant to s. 72 of the ***Strata Property Act*** and bylaw 71(d) of the Corporation. The plaintiff contends that the Strata's approval of the construction of the solarium raises an estoppel that warrants orders entitling her to maintain the solarium on the property and directing the Strata to effect the necessary repairs to the window to permit her to comply with the code.

[38] I do not accept the premise of the plaintiff's argument that the Nevens window is in need of repair. The problem with the window is not intrinsic to the window, it is the result of the plaintiff's construction of a solarium which encloses the window. It is the enclosure of the window that is the problem, not the window itself.

[39] The plaintiff's contention that the Strata Council's past approval of her structure operates as an estoppel creating an affirmative duty to take the necessary steps to permit her to comply with the City of Penticton building code cannot prevail. The Strata's approval did not contemplate any alteration to property partly owned by an adjacent strata lot owner. The difficulty that has arisen in this case did not arise from the Strata's approval of the structure, it arose from the plaintiff's failure to secure a building permit and address its requirements before she built the structure. There is nothing to implicate the Strata in the dilemma facing the plaintiff. It is occasioned by the municipality's building code and requirement of a permit, and Mr. Nevens' unwillingness to agree to an alteration to the window in his living room.

[40] In ***Erickson***, the mistaken assumption that founded the claim in proprietary estoppel was between the parties and involved the plaintiff/respondents' equitable right to continue to do what they had done for years with the defendant/appellant's predecessor's acquiescence. That acquiescence for 25 years was detrimental to the plaintiff/respondents in that it deprived them of an early opportunity to crystallize their right through litigation or by agreement, and thus created conditions conducive to an equitable estoppel.

[41] In the present case, although the parties mistakenly assumed the plaintiff had the right (with the acquiescence of the defendant Strata Corporation and the defendant Nevens) to occupy the limited common property with a solarium, neither the assumption nor the acquiescence extended to any right to alter the Nevens window or to enter his premises for that purpose. Unlike ***Erickson***, it could not be said that the plaintiff in the present case is basing her claim on an equitable right to do what she had been doing for years with the defendant's acquiescence. She is in fact seeking to expand both what she is doing and to extend the defendant's acquiescence to accommodate her failure (for whatever reason) to obtain and address the requirements of a building permit.

[42] For those reasons, I am unable to conclude that the principle of estoppel as explained and applied by Chiasson J.A. in ***Erickson*** is applicable to the circumstances in the case at bar. While the Strata Counsel's approval of Ms. Kearsley's structure no doubt constituted acquiescence or encouragement of its being built, it could not be taken as acquiescence or encouragement that it be built without a necessary permit in a manner that infringed the building code, or contrary to the consent of an affected strata

lot owner. I accordingly dismiss the plaintiff's action against both defendants pursuant to Rule 18A, and I make an order in the terms set forth in paragraph 2 of the defendant Strata Corporation KAS 1215's notice of motion.

[43] The dispute in the case at bar is unfortunate. Given what is at stake, it could have and should have been resolved by an agreement. Unfortunately, an antagonism that could have been avoided by the exercise of goodwill and neighbourly compromise has resulted in this law suit with a result that will adversely affect the plaintiff, both aesthetically and economically. While I am not in a position to assign ultimate responsibility for the antagonism that developed, there is evidence that both parties have contributed to it. In the circumstances, including the fact that the defendant Strata granted its approval of the solarium without ensuring that the plaintiff had obtained a building permit, I order each party to bear their own costs. I also encourage the parties to attempt to resolve this matter in a reasonable and responsible way within the thirty day window of opportunity I have granted.

"A.F. Cullen J."
The Honourable Mr. Justice A.F. Cullen