



NO. S-238586
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

1038573 B.C. LTD.

PLAINTIFF

AND:

THE OWNERS, STRATA PLAN NW289, JENNY DONNA DICKISON, FERNANDO MARCELINO DUTRA DE SOUSA, 1276331 B.C. LTD., CARMELIA MARIA DA SILVA, HON-CHING RUDOLPH CHENG, 1161359 B.C. LTD., RICKY HEE MENG LAI, PIA FACCIIO, 1184416 B.C. LTD., MARK WILLIAM LOUETTIT and SARAH KINUKO LOUETTIT, BARRY DOUGLAS WATSON, AS ADMINISTRATOR OF THE ESTATE OF KENNETH JOHN WATSON, LI PING DUAN, NORMAN VICTOR LEECH, ROLANDO VINAS DIZON and NARCISA DIZON, NICHOLAS GEORGE KARAMOUZOS and MARIA KARAMOUZOS, CUI MING CHEN, YANKUI WANG and XIN TIAN, MARIA DA NATIVIDADE ALMEIDA, 1237765 B.C. LTD., JU-SHAN CHIANG and FLORA FU, 1184414 B.C. LTD., AMARSINGH BHATIA and NARANJAN KAUR BHATIA, PHUNG KIM VUONG and TUONG LAM, MONICA PAOLA ALIAGA, MARCELINO LOPES DE SOUSA and OLGA MARIA DUTRA DE SOUSA, 1184413 B.C. LTD., LUALHATI ONGKEKO CRISOSTOMO, RICHARD RAYMOND RAVENSBERGEN and DAWN MARIE RAVENSBERGEN, YUK FAR CHEUNG and YIN ON CHEUNG, GARY LUCIEN DREES, THOMAS PATRICK FLEMING, 1352962 B.C. LTD., WAN CHEN and HONG YANG, SU JUAN SITU, VAN DAO NGUYEN and THI BICH HANG NGUYEN, JULIAN BOZSIK, CHRISTIAN HERBERT JOSON-LIM and IRIS JUNE CALIBUGAN ADIONG, ANGELA JOY EYKELBOSH, NGUYEN THANH VUONG and TUYET NGOC DU, OM PARKASH LOOMBA and MERRAN LOOMBA, SUZANNE JUANITA KUDELSKI, YAN QIONG LU, PING HE, EDWARD LAWRENCE THUE, RICHARD CHARLES PATRICK SPENCER and DIANE MARIE SPENCER, ARTHUR SUMMERS WILLIAMSON, GARY DALE CHARTER and CRISTINA RIMANDO GAPAL, JU TAI ZHOU and YU QING LI, ZHI HAO YANG, DAISY CUETO EVANGELISTA and MARIA CHERRY EVANGELISTA, MEGAN MARY BURGHALL, NASIM BHALOO, HUI LIN DONG and LI WANG, MANSOUR MESHKI, , HSIANG CHIAO HUANG, GORDON WILLIAM PATERSON, YVONNE JO-ANNE ENGLAND, GRACE JOANNA LEVSEN, PING CHOR CHAN, SO FAN LEE and TAK TAI LUI

DEFENDANTS

AND:

1038573 B.C. LTD.

DEFENDANT BY WAY OF COUNTERCLAIM

APPLICATION RESPONSE

Application Response of: The Owners, Strata Plan NW289 as represented by the Liquidator, Crowe Mackay & Company Ltd. (the “**Application Respondent**”)

THIS IS A RESPONSE TO the Notice of Application of 1038573 B.C. Ltd. filed August 1, 2024.

The Application Respondent estimates that the application will take two days and is set for hearing August 21 and 22, 2024.

Part 1: ORDERS CONSENTED TO

The Application Respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application on the following terms:

Paragraph 4(b) and (c) – an order for specific performance of the purchase and sale agreement dated December 7, 2022, as amended, be granted with a completion date on Tuesday, November 19, 2024.

Part 2: ORDERS OPPOSED

The Application Respondent opposes the granting of the orders set out in paragraphs 1, 2, 3, 4(a), 4(d), and 5 of Part 1 of the Notice of Application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondent takes no position on the granting of the orders set out in paragraphs NIL of Part 1 of the Notice of Application.

Part 4: FACTUAL BASIS

1. This is a straightforward summary trial application arising from the failed completion on December 15, 2023 of a contract of purchase and sale for 101 strata lots and the associated common property of The Owners, Strata Plan NW289 (“**Cameray Gardens**”).
2. The sale was entered into by the court-confirmed liquidator of Cameray Gardens, as vendor, and approved by the members of Cameray Gardens as part of a wind-up of the strata pursuant to the provisions of the *Strata Property Act*, S.B.C. 1998, c. 48 (the “**SPA**”).
3. By court order granted June 17, 2022, the appointment of Crowe MacKay & Company Ltd. as liquidator (the “**Liquidator**”) of Cameray Gardens was confirmed pursuant to the *SPA*.
4. By way of a written purchase and sale agreement dated December 7, 2022 (the “**PSA**”), the Liquidator, as vendor, and the plaintiff/defendant by counterclaim, 1038573 B.C. Ltd., as purchaser (the “**Purchaser**”), agreed to the conditional sale of the Cameray Gardens property (the “**Strata Lands**”) for a price of \$61 million (the “**Purchase Price**”).

5. On the completion date of December 15, 2023 (the “**Completion Date**”), the Liquidator was ready, willing, and able to complete the sale of the Strata Lands pursuant to the PSA. However, the Purchaser was not ready, willing, and able to complete the sale. The Purchaser failed to tender the Purchase Price and did not provide the Liquidator with any closing documents (as required by the PSA). As a result, the PSA did not complete.

6. On December 18, 2023, the Purchaser commenced a claim seeking specific performance of the PSA. The Purchaser named all the registered owners of the strata lots of Cameray Gardens as defendants and filed certificates of pending litigation against all 101 strata lots.

7. Originally, the Liquidator defended the claim on the grounds that the Purchaser was at fault for not completing and had repudiated the PSA. However, on August 2, 2024, the Liquidator filed an Amended Response to Civil Claim and an Amended Counterclaim seeking an order that the PSA be specifically performed and, only in the alternative, an order that the PSA Deposit be released to the Liquidator and the Liquidator be awarded damages against the Purchaser for breach of the PSA.

8. This matter is eminently suitable for summary disposition. The central facts are not in meaningful dispute and there are no material credibility issues that would require evidence beyond that already provided in affidavits and at examinations for discovery.

9. Importantly, a resolution of this proceeding by way of summary trial will save all parties significant time and expense—particularly the 100 strata lot owners the Purchaser named as defendants, notwithstanding that they are not parties to the PSA and had virtually no involvement in its non-completion.

B. The parties

10. The Purchaser is a numbered company incorporated under the laws of British Columbia on June 3, 2015.

11. Cameray Gardens is comprised of 101 residential strata lots and the associated common property shown on Strata Plan NWS289. It has municipal addresses at 3925 Kingsway and 5715 Jersey Avenue, Burnaby, British Columbia.

12. The remaining defendants are the registered owners of the 100 individual strata lots of Cameray Gardens. Cameray Gardens owns strata lot 66.

C. The wind-up and PSA

13. At a special general meeting (“**SGM**”) on February 15, 2022, Cameray Gardens’ members resolved to wind-up the strata corporation, appoint the Liquidator, and authorize the marketing and sale of the Strata Lands subject to the requirements of s. 282 of the *SPA*.

14. The wind-up of Cameray Gardens and the appointment of the Liquidator were confirmed by court order on June 17, 2022 (the “**Wind-Up Confirmation Order**”). It is a term of the Wind-Up Confirmation Order that title to the individual strata lots of Cameray Gardens only vests in the Liquidator upon the filing in the Land Title Office (“**LTO**”) of a certified copy of the Wind-Up Confirmation Order. To date, and for practical reasons, a certified copy of the Wind-Up Confirmation Order has not been filed with the LTO.

15. Once appointed, the Liquidator embarked on an effort to market and sell the Strata Lands, which culminated in the PSA.

16. The PSA contained the following terms, among others:

- (a) the Purchase Price was \$61 million (s. 2.2);
- (b) the Purchaser was to pay the Deposit (\$3 million) to its solicitors within three business days of the satisfaction of all conditions precedent (s. 2.3);
- (c) the sale was conditional on the Liquidator obtaining a vote of the Cameray Gardens members by April 24, 2023 approving the PSA and the sale of the Strata Lands pursuant to s. 282 of the SPA (the “**Section 282 Vote**”) (s. 6.1(b));
- (d) upon obtaining the Section 282 Vote, the sum of \$100,000 would be released from the Deposit to the Liquidator (s. 2.5);
- (e) time was of the essence (s. 10.4);
- (f) once the PSA conditions were satisfied or waived, the Completion Date was to be October 25, 2023 (s. 3.1); and
- (g) the closing documents were to be prepared by the Purchaser’s solicitors or land surveyor at the Purchaser’s sole cost and expense, and delivered to the Liquidator’s solicitors prior to the Completion Date (s. 7.2); and
- (h) in the event the Purchaser failed to complete the PSA, the remainder of the Deposit would be absolutely forfeited to the Liquidator and the PSA would be terminated forthwith upon such payment being made (s. 2.5(a)(ii)).

D. Lai #2, Ex. A.

17. By addenda dated January 27 and February 24, 2023, the Purchaser and the Liquidator agreed to extend the date by which the Section 282 Vote was to occur to May 24, 2023 and the Completion Date to December 15, 2023.

18. Importantly, in the addendum dated February 24, 2023 (the “**Second Addendum**”) the Purchaser specifically waived the financing condition and informed the Liquidator:

. . .they are satisfied and waive the following Conditions Precedent:

6.1(a) By 4:00 p.m. (Vancouver time) on the last day of the First Condition Period, the Purchaser will have satisfied itself in its sole discretion as to

(iii) The Purchaser being, satisfied in its sole discretion, able to secure satisfactory financing for the purchase and development of the Property.

D. Lai #2, Ex. A (p. 13) (emphasis added).

19. On May 20, 2023, the Liquidator held an SGM of the members of Cameray Gardens for the purposes the Section 282 Vote. The SGM was attended by 76 strata lot owners, either in-person or by proxy, and all 76 owners who attended voted to approve the PSA. As the Section 282 Vote required only a 75% vote, it passed.

D. Lai #1, para. 4, Ex. A.

20. By way of a Mutual Notice of Second Condition Satisfaction and/or Waiver dated May 24, 2023, the Purchaser and the Liquidator agreed that the conditions precedent in s. 6.1(b) of the PSA were satisfied and waived.

D. Lai #1, para. 5, Ex. B.

21. On June 6, 2023, the Liquidator demanded from the Purchaser’s counsel payment of \$100,000 from the Deposit pursuant to s. 2.5 of the PSA. To date, the Purchaser has refused or neglected to pay that \$100,000.

22. On October 31, 2023, the Purchaser and the Liquidator agreed to extend the deadline by which the Individual Strata Lot Contracts (as defined in the PSA) were to be assembled to November 14, 2023. A strata wind-up by way of 100% individual contracts saves a purchaser a considerable amount in property purchase tax.

D. Lai #1, para. 7, Ex. C.

23. On November 15, 2023, the Liquidator confirmed that it had not been able to obtain the approval of 100% of the strata lot owners to the Individual Strata Lot Contracts and, as a result, the sale of Cameray Gardens would complete via the “normal closing process”.

D. Lai #1, para. 7, Ex. D.

D. The Purchaser's failure to close

24. Kush Bhatia, the Purchaser's representative, confirmed on discovery that he did not start to look for financing for the purchase of Cameray Gardens until late in 2023. Mr. Bhatia spoke to and met with others in November 2023 to discuss where to obtain financing. The Purchaser did not have financing on December 15, 2023.

A Samimi #2, Ex. A, Q. 507-518, 535-536, 569-570;
M. MacLeod #1, paras. 5-7.

25. In the weeks leading up to the Completion Date, the Liquidator and its counsel took steps to prepare for the closing of the PSA, including:

- (a) requesting property tax certificates from the Purchaser's counsel (to ensure that any pre-authorized payments plans were cancelled before the Completion Date);
- (b) providing input on the content of the Form A Freehold Transfer that the Purchaser was to prepare under s. 7.2 of the PSA;
- (c) drafting and executing a generalized form of notice to effect the termination of any service contracts the Purchaser did not intend to keep (of which the Liquidator was never advised by the Purchaser);
- (d) preparing an application to deposit the wind-up plan, to the extent it was able to be completed by the Liquidator;
- (e) preparing and executing a Notice of Appointment of Liquidator;
- (f) preparing and executing a property transfer tax exemption form;
- (g) obtaining a certified copy of the Wind-Up Order;
- (h) drafting a letter to the LTO setting out the Liquidator's request for registration of the Notice of Appointment of Liquidator;
- (i) preparing a certified copy of the strata corporation's resolutions approving the wind-up, signed by two council members; and
- (j) communicating with numerous owners along with the strata council with respect to closing steps.

D. Lai #1, para. 8, Exs. E to L.

26. By letter dated December 7, 2023, the Purchaser advised that the "PSA [was] scheduled to complete on December 15, 2023" and sought confirmation that the Liquidator

would be able on closing to deliver title “free and clear of all liens, claims, charges, encumbrances and legal notations other than the Permitted Encumbrances”, as represented and warranted by the Liquidator in s. 4.2(a) of the PSA. The Purchaser noted the following:

- (a) an extant proceeding filed by Community Fire Prevention Ltd. against The Owners, Strata Plan NW289 and other defendants (SCBC Action No. S-204200, Vancouver Registry) (the “**Community Fire Claim**”);
- (b) “claims by the City of Burnaby to tax arrears on several strata units”; and
- (c) “multiple strata unit owners having entered into leases of their respective strata units, beyond the limited number of leases contemplated in the PSA” (the “**Additional Residential Tenancies**”).

D. Lai #1, Ex. C.

27. Despite not being contractually obliged to do so, on December 12, 2023 the Liquidator provided assurances that it was ready, willing, and able to complete the PSA and that on the Completion Date it would be able to convey to the Purchaser clear title to the Strata Lands in accordance with the PSA. Specifically, the Liquidator advised:

- (a) the Community Fire Claim was a debt claim that did not materially affect the Liquidator’s ability to perform its obligations in the PSA (and was therefore permitted under s. 4.2(c) of the PSA), and the Liquidator would withhold funds from the sale proceeds to fund either (i) the ongoing defence of the claim and any judgment that may be awarded, or (ii) any settlement arising from negotiations between the Liquidator and the plaintiff, Community Fire Prevention Ltd.;
- (b) the tax sale notices were discharged in September 2023 when the tax arrears were paid, and in any event all tax arrears would be paid on closing and would not impair the Liquidator’s ability to transfer clear title; and
- (c) the Additional Residential Tenancies were “Permitted Encumbrances” (defined in the PSA to include “Leases (existing) and replacement Leases entered into by the Strata Lot Owners on similar terms, between the Execution Date and the Completion Date” [emphasis added]).

D. Lai #1, Ex. D.

28. By letter dated December 13, 2023 from the Purchaser’s counsel, the Purchaser took the position that the fact of the Community Fire Claim and the Additional Residential Tenancies were breaches of the PSA by the Liquidator, amounting to a repudiation of the PSA.

The Purchaser did not accept that repudiation and demanded that the Liquidator specifically perform the PSA.

J. King #1, Ex. E.

29. On December 15, 2023—the Completion Date—the Liquidator, as vendor, was ready, willing, and able to complete the PSA. However, in breach of the PSA, the Purchaser did not provide any of the closing documents required of it under the PSA and did not tender the Purchaser Price. As a result, the PSA did not complete.

D. Lai #1, para. 11;
D. Lai #2, para. 10.

E. Subsequent events

30. Since the PSA failed to close on December 15, 2023, the Community Fire Claim has been settled by the Liquidator and it is in the process of being dismissed.

D. Lai #2, paras. 13-15, Exs J to L.

31. Since the PSA failed to close on December 15, 2023, and despite not being required to do so under the PSA, the Liquidator has assembled information, including some leases, about residential tenancies at Cameray Gardens. All these records have been provided to the Purchaser.

D. Lai #2, paras. 16-24, Ex. O.

32. On August 6, 2024, the Liquidator, through counsel, notified the Purchaser that s. 10.4 of the PSA (“time will be of the essence”) was being reinstated and gave notice of a new completion date of November 19, 2024.

D. Lai #2, para. 9, Ex. G.

Part 5: LEGAL BASIS

33. The Liquidator relies upon Rules 9-7 of the Supreme Court Civil Rules, Part 16 of the *SPA*, and Part 3 of the *Land Title Act*, R.S.B.C. 1996, c 250.

34. The Purchaser filed its Notice of Application on August 1, 2024 seeking, among other things, a determination of this proceeding by summary trial pursuant to Rule 9-7.

Notice of Application, para. 77.

35. All parties to an action must come to a summary trial prepared to prove their claim, or defence, as judgment may be granted in favour of any party, regardless of which party has brought the application.

The Boxmaker, Inc. v. Prime Packaging Company, 2024 BCSC 879 at para. 6.

36. Rule 9-7(2)(a) provides that a party may apply to the court for judgment, either on an issue or generally, in an action in which a response to civil claim has been filed.

37. Rule 9-7(15) provides that, on hearing a summary trial application, the court may grant judgment in favour of any party, either on an issue or generally, unless the court is unable to find the necessary facts or is of the view that it would be unjust to do so.

38. In deciding whether a matter is appropriate for summary trial, the court may consider a number of factors including the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise from delay, proportionality, the course of proceedings, and whether the evidence is sufficient to decide the dispute.

Cepuran v. Carlton, 2022 BCCA 76 at paras. 149-50.

39. The Liquidator submits that this Court can and should determine this matter by way of summary trial. Each of the parties has attributed the non-completion of the PSA to the other's conduct, and the key facts giving rise to these allegations are not disputed. The matter is largely an interpretation of the PSA and its application to these key facts.

40. On this application, the parties ask this Court to determine, based on those facts: (a) whether it was the Purchaser or the Liquidator that breached the PSA; (b) whether an order for specific performance, with a completion date of November 19, 2024, is appropriate; and (c) whether an award of damages for breach of the PSA, to be assessed at a later date, is appropriate and to whom it should be granted. Courts have resolved similar disputes summarily.

Panegos v. O'Byrne, 2019 BCSC 679.

41. These issues involve the application of established legal principles and can be decided on the affidavit and discovery transcript evidence before the Court. A trial would result in unnecessary delay and cost to all parties, and in particular to the individual defendants the Purchaser named in this action (*i.e.*, every strata lot owner) notwithstanding that they were not parties to the PSA to begin with.

A. The Purchaser's excuses for non-performance are without merit

42. Prior to the Completion Date, the Purchaser alleged that the Liquidator had repudiated the PSA by "refusing to provide the requested confirmation" that it would be in a position to convey good and marketable title to the Strata Lands to the Purchaser. The Purchaser

identified the Community Fire Claim and the Additional Residential Tenancies as evidence that “the Vendor [would] not be in a position to fulfill its obligations on closing”.

J. King #1, Ex. E.

43. Since that date, the Purchaser has also alleged that sales of individual strata lots after the date of the PSA and after the original “Completion Date” (the “**Individual Sales**”) are a breach of s. 4.1(d)(iii) of the PSA.

Notice of Application, para. 102-106.

44. As recognized by s. 4.2(a) of the PSA, a vendor must have and be able to convey good title, meaning:

merchantable or a marketable title: one which at all times and under all circumstances can be forced upon an unwilling purchaser who is not compelled to take a title which would expose him to litigation or hazard: one which is free from litigation, palpable defects and grave doubts and couples a certainty of peaceful possession with a certainty that no flaw will appear to disturb [the] market value.

375069 Alberta Ltd. v. 400411 Alberta Ltd., 2000 ABQB 29 at paras. 23-24;
1764139 Ontario Inc. v. Stewart Title Guaranty Co., 2010 ONSC 1692 at para. 11.

45. There is no prospect that either the Community Fire Claim, the Additional Residential Tenancies or the Individual Sales posed a risk to the Liquidator’s ability to convey clear title to the Strata Lands to the Purchaser, subject to the Permitted Encumbrances.

(i) The Community Fire Claim does not materially affect the Liquidator’s ability to deliver good title

46. The Community Fire Claim was a debt claim against Cameray Gardens, its individual strata lot owners, and others in which the plaintiff sought, *inter alia*, judgment in the amount of \$223,930.28 for unpaid invoices arising from an (alleged) contract for the installation of a new fire panel at Cameray Gardens. While the Notice of Civil Claim sought certificates of pending litigation (“**CPL**”) and builders’ liens, none were ever registered in the LTO on title to any of the individual strata lots or the Strata Lands.

47. The Community Fire Claim is consistent with the Liquidator’s representation in s. 4.2(c) of the PSA: it did not materially affect the Liquidator’s ability to convey good title. There were no CPLs or builders’ liens on title to any strata lots arising from the Community Fire Claim or otherwise that would have impaired the ability to convey clear title.

48. Pursuant to section 23 and Part 3 of the *Land Title Act*, R.S.B.C. 1996, c. 250, upon conveyance of the Strata Lands from the Liquidator, the Purchaser would have received title clear of any unregistered interests in the Strata Lands.

49. In any event, the Community Fire Claim has now settled and the prospect of any adverse claim against the Strata Lands no longer exists.

(ii) The Additional Residential Tenancies are “Permitted Encumbrances”

50. A contract of purchase and sale for clear title of a property requires that all encumbrances registered against the property be removed by the vendor, except those specifically contemplated in the contract.

Crown Fortune International Investment Group Inc. v. Bonnefield Canada Farmland LP III,
2023 BCCA 441 at para. 66.

51. The Additional Residential Tenancies are specifically contemplated in Schedule A of the PSA, which provides that “Leases (existing) and replacement Leases entered into by Strata Lot Owners on similar terms, between the Execution Date and the Completion Date” are Permitted Encumbrances.

52. Section 4.1(d)(iv) of the PSA further provides that:

... if any Strata Lot Owner enters into, modifies, terminates or accepts a surrender of any Lease, or enters into a replacement Lease on similar terms, the Vendor will provide or cause to be provided a copy of same, and of any new Strata Property. The Vendor shall not be in breach of this Agreement, if any of the Strata Lot Owners enters into a month-to-month lease of their Strata Lots and fails to provide the same to the Vendor; (emphasis added)

D. Lai #2, Ex. A (p. 8).

53. This clause establishes that: a) the Purchaser was aware that “Strata lot Owners” may enter into “month-to-month lease of their Strata Lots” after the date of the PSA; and b) the Liquidator may not be aware of or be provided with copies of those “month-to-month lease[s]”.

54. Mr. Bhatia confirmed on discovery that he read and understood this clause to mean that the Liquidator “will not be in breach of the [PSA] if it fails to provide [the Purchaser] any month-to-month tenancies entered into after the date of the [PSA]”

A. Samimi #2, Ex. A, Q. 242-243.

55. Further, the PSA contains the following term regarding “Delayed Possession”:

Each Strata Lot Owner whose Strata Lot is not occupied by a tenant, and is occupied by the Owner of a family member, on the Closing Date will have a period of up to Two (2) months beginning on the day after the Closing Date without payment of any rent or license fee to the Purchaser.

In the event the Strata Lot is not occupied by Owner but is occupied by a tenant, the Purchaser shall assume the tenancy as required by the Residential Tenancy Act.

D. Lai #2, Ex. A (p. 22).

56. This clause confirms that for a large number of the Cameray Gardens strata lots, the Purchaser expected to take title subject to either a two-month, rent-free tenancy for the owner occupant or, if not occupied by an owner, “shall assume the tenancy as required under the Residential Tenancy Act”.

57. For these reasons, the Additional Residential Tenancies are clearly the “replacement Leases” referred to in Schedule A. The PSA contemplated the sale of *tenanted* strata units and permitted, among other things, strata lot owners to lease their units to third parties while the PSA was in effect without the Purchaser’s knowledge or approval.

58. This interpretation gives effect to the intention of the parties in entering the PSA—to facilitate the sale of the Strata Lands—and is consistent with the agreement as a whole and the fact that each strata lot is individually owned and controlled until the date the Liquidator files the Wind-Up Confirmation Order in the LTO. The parties could have, but did not, specify that “replacement Leases” were only month-to-month leases existing at the date of the PSA and continued after the expiry of a lease term. The broad wording of Schedule A must be given effect.

(iii) Individual Sales

59. The sale of particular strata lots between the date of a strata wind-up purchase and sale contract and the completion of that contract are a normal part of strata wind-ups under the SPA. In the language of s. 4-1(d)(iii) of the PSA, they are “in the ordinary course of business.”. These sales do not hinder or preclude a wind-up sale to a third party purchaser and do not preclude a liquidator from conveying title, including of the subsequently sold strata lots.

J. Sych #2.

60. In any event, it was not material to the Purchaser who the registered owner was of any particular Cameray Gardens strata lot provided that the Purchaser received clear title on the Completion Date.

A. Samimi #2, Ex. A, Q. 98-109, 368-369.

(iv) **No repudiation by the Liquidator in any event**

61. Even if the Purchaser were able to establish a breach of the PSA on the part of the Liquidator, which is denied, such breach would not excuse the Purchaser of its failure to complete the PSA.

62. Where a purchaser seeks to resile from a contract of purchase and sale by alleging an impediment to title, the court will consider whether the vendor can convey substantially what the purchaser contracted to get. In this exercise, the court can have regard to the surrounding circumstances to determine if the alleged impediment to title would, in any significant way, affect the purchaser's use or enjoyment of the property.

Comet Investments Ltd. v. Northwind Logging Ltd., [1998] B.C.J. No. 1622 at para. 28, citing *Stefanovska v. Kok* (1990), 73 O.R. (2d) 368 (Ont. H.C.) at 378 ("*Stefanovska*"); *Bryson v. Egerton*, [1999] B.C.J. No. 1581 at para. 68 ("*Bryson*").

63. The court will give no weight to the subjective views of the purchasers if it is felt that the so-called needs are capricious or arbitrary and contrived to avoid contractual obligations.

Bryson at para. 68, citing *Stefanovska* at 378.

64. The Community Fire Claim and the Additional Residential Tenancies are immaterial to the agreed-upon sale of the Strata Lands for the Purchase Price (\$61 million). Neither are significant enough defects to justify the Purchaser's election not to complete the sale. There is no reasonable prospect of either of the Purchaser's complaints impacting its use or enjoyment of the Strata Lands. This particularly the case because:

- (a) the Community Fire Claim is *prima facie* a debt claim for an amount that equates to less than 0.4 percent of the Purchase Price. No CPLs or builders' lines were filed on title to any of the Cameray Gardens strata lots;
- (b) as part of its re-development of the Strata Lands, the Purchaser will need to address (and terminate in accordance with the *Residential Tenancies Act*) all the existing residential tenancies it assumes under the PSA (all "Permitted Encumbrances"). The fact of a few more or different tenancies will not change that process in any material respect; and
- (c) the change of registered ownership of any individual strata lot would not preclude the Liquidator conveying clear title to the Purchaser and the Purchaser did not treat a material the registered ownership of any particular strata lot provided it received clear title.

65. The Liquidator has tendered evidence of the Purchaser's efforts to secure a later Completion Date (precisely March 15, 2024) for a reason unrelated to either of the Community Fire Claim or Additional Residential Tenancies: to secure financing.

M. MacLeod #1.

66. Kush Bhatia, the Purchaser's representative, confirmed on discovery that the requests made of the Liquidator in the fall of 2023 for tenancy information and copies of the lease was for the purposes of obtaining financing. However, the Purchaser waived the financing condition on February 24, 2023.

A. Samimi #2, Ex. A, Q. 163-164, 316-317;
D. Lai #2, Ex. C.

67. The Purchaser's requests for tenancy information, and the refusal to complete the PSA without it, are a patent effort by the Purchaser to create a new financing condition. This Court should find that the Purchaser's actions and complaints are immaterial, and its motive in advancing them was to secure an extension to the PSA or a way to recover the Deposit that would otherwise be payable.

B. Setting a new Completion Date

68. The general rule is that where the parties have not closed on the agreed-upon completion date, the contract remains in force and either party is entitled to set a new date for completion.

Norfolk v. Aikens, 1989 CanLII 245 (B.C. C.A.), para. 22;
345 Builders Ltd. v Su, 2021 BCSC 2509, para. 93.

69. On August 6, 2024, the Liquidator, through counsel, advised the Purchaser, through counsel, that it was reinstating the "time is of the essence" provisions of the PSA and fixing a new completion date of Tuesday, November 19, 2024 (the "**New Completion Date**"). To date, the Purchaser has not responded to this notification.

D. Lai #2, Ex. G.

C. Order for deemed admissions is not warranted

70. The Purchaser's application for an order that the Liquidator be deemed to admit the truth of the facts set out in the Purchaser's notice to admit (the "NTA") should be refused. The Liquidator's responses to the NTA that are at issue concern details as to whether any of the 101 units of Cameray Gardens have been leased, sold, or foreclosed upon. These are all facts unknown to the Liquidator directly.

71. A notice to admit must be reasonably capable of evaluation within the requisite timeframe, and parties must take adequate steps to inform themselves before responding. At the

time of responding to the NTA, the Liquidator did not possess this knowledge, as indicated in its response. By seeking these admissions, the Purchaser sought to have the Liquidator do factual research that the Purchaser was equally capable of undertaking.

Ceperkovic v. MacDonald, 2016 BCSC 939, para. 36;
Nouhi v. Pourtaghi, 2021 BCSC 1779, paras. 45 and 52.

72. The Liquidator is not the property manager, nor does it have day-to-day supervision of Cameray Gardens' strata operations or immediate access to information pertaining to each of the 101 strata lots. The Liquidator is not privy to information regarding units that have been sold or foreclosed upon beyond that which is publicly available. With respect to leased units, the Liquidator's evidence is that various inquiries have been made to assemble this information, and all relevant records have now been produced in this litigation.

D. Lai #2, paras. 16-24, Ex. O.

D. Conclusion

73. The Purchaser was the party who breached the PSA by failing to complete on December 15, 2023. The Liquidator was and remains ready, willing, and able to close the PSA on the New Completion Date. The Purchaser purports to be ready, willing, and able to complete and is seeking specific performance. The Liquidator now seeks orders to carry out the Purchaser's request for specific performance.

74. The Liquidator seeks costs of this application and proceeding against the Purchaser.

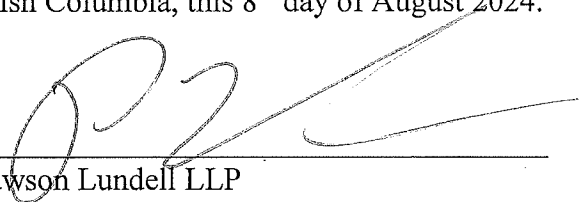
Part 6: MATERIAL TO BE RELIED ON

- 75. Affidavit #1 of D. Lai filed January 30, 2024.
- 76. Affidavit #2 of D. Lai sworn August 7, 2024 (excluding all but pages 75-89 of Ex. O).
- 77. Affidavit #1 of M. MacLeod, made January 30, 2024.
- 78. Affidavit #1 of J. Sych, made January 30, 2024.
- 79. Affidavit #2 of J. Sych, made August 6, 2024.
- 80. Affidavit #1 of J. King, made January 12, 2024.
- 81. Affidavit #1 of A. Samimi, made January 26, 2024.
- 82. Affidavit #2 of A. Samimi, made August 7, 2024.

83. The pleadings and process filed herein; and

- The Application Respondent has filed in this proceeding a document that contains the Application Respondent's address for service.

Dated at the City of Vancouver, in the Province of British Columbia, this 8th day of August 2024.



Lawson Lundell LLP
Solicitors for the Application
Respondent, The Owners, Strata Plan
NW289 as represented by the Liquidator,
Crowe MacKay & Company Ltd.

This Application Response is filed by Peter J. Roberts, K.C. / Sarah B. Hannigan, of the law firm of Lawson Lundell LLP, whose place of business and address for delivery is 1600 – 925 West Georgia Street, Vancouver, British Columbia, V6C 3L2, e-mail address: proberts@lawsonlundell.com / shannigan@lawsonlundell.com; telephone number: 604-685-3456.