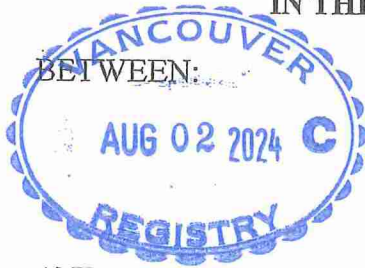


NO. S-238586
VANCOUVER REGISTRY

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 FACCIO, 1184416 B.C. LTD., MARK WILLIAM LOUTTIT and SARAH KINUKO LOUTTIT, 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

AMENDED RESPONSE TO CIVIL CLAIM

Filed by: The Owners, Strata Plan NW289 as represented by the liquidator, Crowe MacKay & Company Ltd. (the "Liquidator").

Part 1: RESPONSE TO AMENDED NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendant’s Response to Facts

1. The facts alleged in paragraphs 2, 4, 7, 10, and ~~4 to 7~~11 of Part 1 of the Amended Notice of Civil Claim are admitted.
2. The facts alleged in paragraphs 5, 6, 8, 9, 10, 12, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and ~~12~~24 of Part 1 of the Amended Notice of Civil Claim are denied.
3. The facts alleged in paragraphs 1 and 3 of Part 1 of the Amended Notice of Civil Claim are outside the knowledge of the Defendant.

Division 2 – Defendant’s Version of Facts

4. The defendant strata corporation, The Owners, Strata Plan NWS289 (“**Cameray Gardens**”) is comprised of 101 residential strata lots and the associated common property shown on Strata Plan NWS289 (the “**Cameray Gardens Lands**”). The Cameray Gardens Lands have municipal addresses at 3925 Kingsway and 5715 Jersey Avenue, Burnaby, British Columbia.
5. The remaining defendants are the registered owners of the 100 individual strata lots of Cameray Gardens. Cameray Gardens owns strata lot 66.
6. On February 15, 2022, Cameray Gardens held a special general meeting (the “**SGM**”) at which its members passed resolutions to wind-up the strata corporation, appoint a liquidator and authorize the marketing and sale of the Cameray Gardens Lands, subject to the requirements of section 282 of the *Strata Property Act*, S.B.C. 1998, c. 43 (the “**SPA**”).
7. At the SGM, Crowe MacKay & Company Ltd. was appointed as the liquidator of Cameray Gardens (the “**Liquidator**”).
8. In answer to paragraphs 5 and 6 of the Amended Notice of Civil Claim, the Liquidator’s authority is derived from the court’s approval of its appointment, the SPA, and the applicable provisions of the Business Corporations Act (as set out in s. 276 of the SPA).
9. ~~8.~~ On June 17, 2022, pursuant to Part 16, Division 2 of the SPA, the wind-up of Cameray Gardens and the appointment of the Liquidator were confirmed by the court (the “**Wind-Up Confirmation Order**”).

10. 9.-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 of a certified copy of the Wind-Up Confirmation Order. To date, a certified copy of the Wind-Up Confirmation Order has not been filed with the LTO.

11. 10.-Upon the confirmation of its appointment, the Liquidator embarked on an effort to market and sell the Cameray Gardens Lands. As a result of that process, the Liquidator entered into a conditional purchase and sale agreement dated December 7, 2022 (the "PSA") with the plaintiff, 1038573 B.C. Ltd (the "**Purchaser**").

12. 11.-The terms of the PSA included:

- (a) The Purchase Price is \$61 million (s. 2.2);
- (b) The Purchaser is to pay a deposit of \$3 million (s. 2.3(a)) (the "**Deposit**");
- (c) The sale is conditional on the Liquidator obtain a vote of the Cameray Gardens members by April 24, 2023 approving the PSA and the sale of the Cameray Gardens Lands pursuant to section 282 of the SPA (s. 6.1(b)) (the "**Section 282 Vote**");
- (d) Upon obtaining the Section 282 Vote, the sum of \$100,000 is to be released from the Deposit to the Liquidator (s. 2.5);
- (e) Time is of the essence (s. 10.4); and
- (f) Once the PSA conditions were satisfied or waived, the completion date is to be October 25, 2023 (the "**Completion Date**") (s. 3.1).

13. Further, section 6.1(a) of the PSA provided:

6.1 The obligation of the Purchaser and the Vendor to complete the purchase of the Property on the Completion Date is subject to the following conditions precedent being satisfied, or waived if expressly permitted hereunder, in the manner and within the time provided herein:

- (a) by 4:00 p.m. (Vancouver time) on the last day of the First Conditions Period, the Purchaser will have satisfied itself in its sole discretion as to
 - (i) the physical condition of the Property, including the results of any environmental and geotechnical investigations by or on behalf of the Purchaser;

(ii) the status, form and substance of the Leases (including the rent payable and the tenants' covenants thereunder), and the Service Contracts;

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

(collectively, the "First Conditions"):

14. ~~12.~~ In the event the Purchaser failed to complete the PSA, section 2.5(a)(ii) provided that the remainder of the Deposit, after deduction of the \$100,000, is to be:

(a) paid to the Liquidator on behalf of the Purchaser:

...

(ii) together with interest earned on the Deposit, upon the default of the Purchaser, if the Purchaser is in default of its obligation to complete the purchase of the Property hereunder, unless such default is waived in writing by the Liquidator, and the Deposit so paid to the Liquidator will be absolutely forfeited to the Liquidator on behalf of the Vendor as liquidated damages as the Liquidator 's and Vendor's sole and exclusive remedy and this Agreement will terminate forthwith upon such payment being made;

15. ~~13.~~ By addendum dated January 27, 2023, the Purchaser and the Liquidator agreed in writing to:

(a) the satisfaction and waiver of the First Conditions contained in sections 6.1(a)(i) and (ii) of the PSA; and

(b) extend the Completion Date to December 15, 2023.

16. ~~14.~~ By addendum dated February 24, 2023, the Purchaser and the Liquidator agreed in writing to:

(a) the satisfaction and waiver of the remaining First Conditions contained in sections 6.1(a)(iii) of the PSA; and

(b) extend the date by which the Section 282 Vote was to occur to May 24, 2023.

17. ~~15.~~ On May 20, 2023, the Liquidator held a special general meeting of the members of Cameray Gardens for the purposes of the Section 282 Vote at which the resolution to approve and ratify the PSA was passed by the requisite a $\frac{3}{4}$ vote of the members.

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

19. ~~17.~~ On June 6, 2023, the Liquidator demanded from the Purchaser's counsel payment of \$100,000 from the Deposit pursuant to section 2.5 of the PSA. To date, the Purchaser has refused or neglected to pay that \$100,000 and, as a result, is in breach of the PSA.

20. ~~18.~~ At all material times thereafter, the Liquidator was ready, willing and able to complete the PSA and the sale of the Cameray Gardens Lands to the Purchaser.

21. In specific answer to paragraphs 18, 19, 20 and 21 of the Amended Notice of Civil Claim, and as is common practice in strata wind-ups, the sale and transfer of individual strata lots after the date of the Wind-Up Confirmation Order is permitted by the SPA and the Wind-Up Confirmation Order. Until and unless the Wind-Up Confirmation Order is set aside by court order, all the strata lots of Cameray Gardens remain subject to the terms of the Wind-Up Confirmation Order and, upon the filing of a certified copy of the Wind-Up Confirmation Order in the Land Title Office, all the strata lots of Cameray Gardens, including any transferred to new owners subsequent to the date of the Wind-Up Confirmation Order, vest in and become the property of the Liquidator. As a result, upon the filing of a certified copy of the Wind-Up Confirmation Order in the Land Title Office, the Liquidator is capable of conveying clear title (subject to the terms of the PSA) to all the strata lots and the common property of Cameray Gardens to the Purchaser pursuant to the PSA.

22. In specific answer to paragraphs 22, 23 and 24 of the Amended Notice of Civil Claim, and for the reasons set out in paragraph 19, it was not an implied term of the PSA that the Strata Corporation, the Strata Lot Owners or the Liquidator maintain title of the strata lots in the names of the registered owners on the date of either the SGM or the Wind-Up Confirmation Order. Any transfer of title for individual strata lots that occurs after either the SGM or the Wind-Up

Confirmation Order does not affect or potentially affect the Liquidator's ability to perform the PSA and transfer title to the Purchaser pursuant to the PSA.

23. In further answer to paragraphs 22, 23 and 24 of the Amended Notice of Civil Claim, the Strata Corporation, the Strata Lot Owners and the Liquidator have at all times acted in good faith and the breaches of the PSA alleged by the Purchaser are not directly linked to the performance of the PSA. Further, the Purchaser did not rely upon any of the breaches of the PSA alleged by it in agreeing to waive the conditions under the PSA.

Additional Facts

Permitted Encumbrances

24. 19-As at the date the PSA was signed on December 7, 2022, a number of the strata lots of Cameray Gardens were rented to residential tenants by individual strata lot owners (the "**Existing Residential Tenancies**").

25. 20-Between December 7, 2022 and the Completion Date, as amended, a number of individual strata owners entered into additional month to month residential tenancy agreements with tenants for their individual units (the "**Additional Residential Tenancies**").

26. 21-At all material times, the Liquidator, to the knowledge of the Purchaser, was not aware of all the residential tenancy agreements at Cameray Gardens and had no legal authority to govern the rental of individual strata lots pursuant to the *Residential Tenancy Act*, the SPA or otherwise.

27. 22-The PSA contemplated that the Purchaser would take title to the Cameray Gardens Lands subject to both the Existing Residential Tenancies and any Additional Residential Tenancies.

28. 23-Section 4.1(d)(iv) of the PSA provides that the vendor covenants and agrees it will:

- (d) from the Execution Date until the Completion Date, conduct or cause to be conducted all business in respect of the Property in accordance with prudent business practices given the nature of the Property, and without limiting the generality of the foregoing:

(iv) 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 Act Form K received, to the Purchaser as soon as reasonably possible. 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 Lot and fails to provide the same to the Vendor; (emphasis added)

29. ~~24.~~ Section 4.2(a) of the PSA provides that the vendor represents and warrants that:

the Liquidator will have good and marketable legal and beneficial title to the Property on the Completion Date, free and clear of all liens, claims, charges, encumbrances and legal notations other than the Permitted Encumbrances; (emphasis added)

(the "Title Representation").

30. ~~25.~~ "Permitted Encumbrances" are defined in Schedule A to the PSA to include:

Leases (existing) and replacement Leases entered into by Strata Lot Owners on similar terms, between the Execution Date and the Completion Date.

31. ~~26.~~ The PSA defines the term "Leases" as follows:

"Leases" means every agreement, whether written or oral, partly written and partly oral, pursuant to which any person has any interest in the Property in the nature of a tenancy or a right to occupy premises, including any modification or extension thereof, and "Lease" means any of such Leases;

32. ~~27.~~ The PSA defines "Strata Lot Owners" to mean "all of the owners of the Strata Lots, and "Strata Lot Owner" means the owner of any Strata Lot".

33. ~~28.~~ The PSA defines "Strata Lot" to mean "all of strata lots in the Strata Plan, and "Strata Lot" means any of the Strata Lots".

34. ~~29.~~ The Existing Residential Tenancies and the Additional Residential Tenancies are both Permitted Encumbrances under the PSA.

Vendor Covenants

35. ~~30.~~ Pursuant to section 4.2(c) of the PSA, the vendor covenants that:

there is no action, suit, claim, litigation or proceeding pending . . . in respect of the Property or the use or occupancy thereof before any court, arbiter, arbitration panel or administrative tribunal or agency which, if decided adversely to the Vendor, might materially affect the Vendor's ability to perform any of the Vendor's obligations hereunder and no state of facts exists which could constitute the basis of any such action, suit, claim, litigation or proceeding;

36. ~~31.~~ Cameray Gardens was named as a defendant in a claim commenced by Community Fire Prevention Ltd. (“**Community Fire**”) on April 17, 2020 in the Supreme Court of British Columbia, Vancouver Reg. Action No. S-204200 (the “**Community Fire Claim**”). The Community Fire Claim sought judgment in the amount of \$223,930.28 relating to the installation of fire prevention equipment by Community Fire at Cameray Gardens. The Community Fire Claim also sought a declaration of entitlement to a builders’ lien and a certificate of pending litigation against the Cameray Gardens Lands.

37. ~~32.~~ Community Fire did not registered any builders’ liens against or file a CPL on title to any of the strata lots of Cameray Gardens.

38. The Community Fire Claim was settled in or around April 2024, which settlement was recorded in a written agreement dated July 4, 2024, providing for the dismissal of the Community Fire Claim.

Purchaser’s Asserted Breaches of the PSA

39. ~~33.~~ By letter dated December 7, 2023 from the Purchaser’s counsel, the Purchaser confirmed the “PSA is scheduled to close 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”. Specifically, the Purchaser sought confirmation and documentary evidence relating to the Community Fire Claim and the Additional Residential Tenancies.

40. ~~34.~~ 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 the Liquidator would be able to transfer clear title to the Cameray Gardens Land to the Purchaser in accordance with the PSA.

41. ~~35.~~ 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 vendor amounting to a repudiation of the PSA. The Purchaser did not accept that repudiation and demanded the vendor specifically ~~perform~~perform the PSA.

42. ~~36.~~ On December 15, 2023, 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 documents required of it under the PSA and did not tender the purchase price. As a result, the PSA did not complete.

43. ~~37.~~ On December 18, 2023, the Liquidator, as vendor, demanded the release of the Deposit but, to date, the Purchaser has refused or neglected to release those funds, instead claiming the Deposit for itself.

44. ~~38.~~ By letter dated December 19, 2023, the Liquidator, as vendor, notified the Purchaser that its breaches of the PSA and failure to complete the purchase of the Cameray Gardens Lands amounted to a repudiation of the PSA.

45. The Liquidator ~~accepted~~does not accept the Purchaser's repudiation of the PSA and ~~demanded~~insists on the ~~release~~specific performance of the ~~Deposit~~PSA. The Liquidator was and remains ready, willing and able to complete the PSA subject only to the establishment of a Completion Date.

Part 2: RESPONSE TO RELIEF SOUGHT

46. ~~39.~~ The Defendant consents to the granting of the relief sought in paragraphs ~~NIL~~paragraph 25(a) of Part 2 of the Amended Notice of Civil Claim.

47. ~~40.~~ The Defendant opposes the granting of the relief sought in paragraphs ~~1325~~25(ab) to (hi) of Part 2 of the Amended Notice of Civil Claim.

48. ~~41.~~ The Defendant takes no position on the granting of the relief sought in paragraphs ~~NIL~~ of Part 2 of the Amended Notice of Civil Claim.

Part 3: LEGAL BASIS

49. ~~42.~~ At all material times up to December 15, 2023, the PSA was an enforceable agreement between the Purchaser and the Liquidator, as vendor. Time was of the essence.

50. ~~43.~~ The Liquidator was not in breach of any term of the PSA as ~~alleged~~alleged in the Amended Notice of Civil Claim or at all. The existence of the Community Fire Claim and the Additional Residential Tenancies do not constitute breaches of the PSA. Even if they do, which is not admitted, their existence is not a fundamental breach of the PSA amounting to a repudiation.

51. ~~44.~~ At all material times, the Liquidator was ready, willing and able to complete the PSA and, in particular, was able to transfer clear title to the Cameray Gardens Lands in accordance with the PSA.

~~45.~~ ~~The remedy of specific performance is not available to a purchaser where the fault for failing to meet the closing deadline is attributable to them, including the failure to deliver closing documents on a timely basis.~~

*For v. Dhillon, 2020 BCCA 137;
Walker v. Jones, 2008 CanLII 47725 (Ont. S.C.J.).*

52. ~~46.~~ By failing and neglecting to complete the purchase the Cameray Gardens Lands, the Purchaser repudiated the PSA. ~~On December 19, 2023, the~~The Liquidator accepted~~does not accept the Purchaser's repudiation, and is entitled to specific performance~~ of the PSA.

~~47.~~ ~~As a result, the PSA is no longer an enforceable agreement between the~~The Purchaser was and the Liquidator and is, therefore, incapable of specific performance. ~~48.~~ ~~There~~remains ready, willing and able to complete the PSA subject only to the establishment of a Completion Date.

53. In the alternative, the Purchaser is liable to the Liquidator for damages for breach of the PSA.

54. ~~49.~~ In addition, the Purchaser is obliged pursuant to the terms of the PSA to release to the Liquidator the entirety of the Deposit.

Defendant's address for service is c/o the law firm of Lawson Lundell LLP, whose place of business and address for service is 1600 – 925 West Georgia Street, Vancouver, British Columbia V6C 3L2 (Attention: Peter J. Roberts, K.C. / Sarah B. Hannigan).

Fax number address for service is: n/a

E-mail address for service is: proberts@lawsonlundell.com / shannigan@lawsonlundell.com

Dated at the City of Vancouver, in the Province of British Columbia, this 22nd day of August, 2024.



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

This Amended Response to Civil Claim 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.

Rule 7-1(1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.

NO. S-238586
VANCOUVER REGISTRY

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BETWEEN:

1038573 B.C. LTD.

PLAINTIFF

AND:

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DEFENDANTS

AMENDED RESPONSE TO CIVIL CLAIM



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PJR/aeesSBH