
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

1038573 B.C. LTD.

Defendant by way of Counterclaim

## NOTICE OF APPLICATION

**Name of applicant:** 1038573 B.C. Ltd. (**"573"**)

**To:** the defendant, The Owners, Strata Plan NW289 (the **"Strata Corporation"**)

TAKE NOTICE that an application will be made by the applicant to the presiding judge at the courthouse at 800 Smithe Street, Vancouver, BC, on August 20, 2024, at ~~9:45 a.m.~~ 21 10:00AM for the orders set out in Part 1 below.

The applicant estimates that the hearing of this application, together with the application of the Strata Corporation filed on January 30, 2024 and set for hearing on August ~~2021~~ 21-22, 2024, will take two days.

This matter is not within the jurisdiction of an associate judge.

**PART 1: ORDERS SOUGHT**

1. A declaration that the application filed by The Owners, Strata Plan NW289 (**"Strata Corporation"**) on January 30, 2024 is not suitable for determination under Rule 9-7(15).

2. An order under Rule 7-7(2) that the Strata Corporation is deemed to admit the truth of the facts set out in paragraphs 3 to 18 of the notice to admit of the plaintiff dated February 21, 2024.

3. An order under Rule 7-1(1), (7) and (17) that the Strata Corporation shall, within 14 days of this order, deliver to the plaintiff an amended list of documents that lists in Part 4 those documents over which the Strata Corporation maintains privilege, such list to include for each document information as to the date of the document, the nature of the document, and the names of any authors and recipients.

4. In the alternative to (1):

    a) a declaration that the Strata Corporation is in breach of the Purchase and Sale Agreement dated December 7, 2022 (**"PSA"**);

    b) an order that the Strata Corporation specifically perform the PSA;

    c) an order that the parties have leave to seek directions with respect to the completion of the PSA;

    d) in the alternative to (4)(b), an order that the plaintiff is at liberty to prove damages at a later hearing.

5. An order for costs against the Strata Corporation.

6. Such further and other relief as counsel may advise and as this Honourable Court may deem just.

## PART 2: FACTUAL BASIS

### A. Overview

1. This application seeks an order that the summary trial application of The Owners, Strata Plan NW289 (the "**Strata Corporation**"), through its representative Derek Lai of Crowe Mackay (the "**Liquidator**"), is not suitable for determination under Rule 9-7(15). That application is set for hearing on August 20 and 21, 2024. The suitability issue arises largely as a result of the Strata Corporation's failure to date to make proper discovery in the action – by failing to provide adequate response to a notice to admit, by putting forward a representative for discovery with purportedly no personal knowledge of the main issues in the action, and by failing (as of the date of this filing) to deliver responses to requests left at a May 2022 discovery. With the summary trial date approaching, the Strata Corporation has in effect resisted any disclosure of its contractual breaches – which would be fatal to its summary trial application. The language of Rule 9-7(15) – which bars summary determinations where it would be unjust – cries out for application in this case.

2. At issue in the case is a contract made in December 2022 (the "**PSA**") for the sale of a 101-unit strata property in Burnaby, British Columbia (the "**Property**") in exchange for $61 million. The Strata Corporation is the vendor under the PSA; the purchaser is the plaintiff, 1038573 B.C. Ltd. ("**573**"). Subjects were removed and the completion date was set for December 15, 2023. In the period before completion, the Strata Corporation's actions prevented the parties from being able to complete on December 15. Specifically:

a) the Strata Corporation did not have "good 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", contrary to s. 4.2(a) of the PSA. While the June 2022 court order appointing the Liquidator (the "**Milman Order**") provided that the interests of the Strata Corporation and the individual owners would pass to the Liquidator when a copy of the Milman Order was registered at the LTO,[1] the Liquidator never took the step of registering the Milman Order;

[1] Affidavit #1 of Jas King, Ex. "B", terms 4-5

b) the Strata Corporation failed to deliver copies of leases for leased strata units – contrary to s. 4.1(b)(i) and (iii) of the PSA – which were required by 573 to arrange financing to complete the transaction;

c) the Strata Corporation breached ss. 4.2(a) and 4.1(b)(i) and (iii) of the PSA by (i) allowing the leasing of units beyond those leased as of December 2022, and (ii) failing to disclose those leases (or any leases) to 573;

d) the Strata Corporation represented and warranted in the PSA that there was no claim against the Strata Corporation in respect of the Property which could affect the Strata Corporation's ability to perform its contractual obligations (s. 4.2(c) of the PSA). Yet the Strata Corporation failed to disclose to 573 the existence of an action which seeks proprietary relief against the Property (the "**Community Fire Claim**"); and

e) the Strata Corporation breached s. 4.1(d)(iii), by permitting sales of strata units to individuals not named in the Milman Order (at the least, a numbered company 1352962 B.C. Ltd., which has acquired  units since October 2022; the Strata Corporation has to date declined to provide information on other likely sales), and s. 4.2(p), by failing to disclose these non-permitted sales to 573. These sales to third parties, not contemplated in the Milman Order, are a further reason (beyond the Strata Corporation failing to register the Milman Order) why the Strata Corporation does not have authority to convey title.

3. Because of the above breaches of the PSA by the Strata Corporation, neither 573 nor the Strata Corporation were in a position to complete the PSA on December 15, 2023.

4. 573 advances this action seeking specific performance of the PSA. The Property, while intended for development, is unique in a number of respects which on the authorities have warranted orders of specific performance.[2] These include the unique location of the Property (near Central Park in Burnaby, favorable zoning for development, excellent sight lines, on a major thoroughfare and close to transit hub) and non-transferable work already done in furtherance of

[2] See e.g. *1247249 B.C. Ltd. v. 1098212 B.C. Ltd.,* 2022 BCSC 1230. Other cases to similar effect are detailed below.

development (including consultations with the City of Burnaby, and architectural plans unique to the Property's lot).

5. On this application, but for the discovery issues set out below, 573 would seek an order for specific performance. Applying *Basra v. Carhoun* (1993), 82 B.C.L.R (2d) 71 (C.A.) and later cases, including *Toor v. Dhillon*, 2020 BCCA 137, the result should be that – where neither party was in a position to close on December 15, 2023, and 573 has insisted on specific performance – the court should order specific performance and specify a new completion date.

6. But the Strata Corporation, having first filed for a Rule 9-7 determination in January 2024, has in the intervening months refused to provide the discovery necessary for 573 to demonstrate the above breaches on evidence of personal knowledge (required for a final order). In particular:

a) having received a notice to admit on February 21, 2024, the Strata Corporation responded on March 13, 2024 by stating that much of the notice to admit, paragraphs 3 to 18 – concerning issues such as how many strata units are subject to written lease agreements, how many strata units are subject to oral lease agreements (the existence of which have been suggested to 573), how many strata units have been sold since the Milman Order, and how many of the strata units are subject to foreclosure proceedings – was "unknown to the Liquidator", without providing any further explanation as is required at law.[3] A prompt on May 13, 2024 by counsel for 573 was met with silence;

b) while counsel for the Strata Corporation suggested on examination for discovery that communications between the Liquidator and the strata council or the unit owners were privileged, the Strata Corporation has failed to properly list such communications in Part 4 of the Strata Corporation's list of documents so that 573 could assess and potentially challenge those claims of privilege;

c) the Strata Corporation relied in its summary trial application on evidence from an affiant, the Liquidator Derek Lai, who swore that his evidence was on personal knowledge unless stated to be on information and belief. Yet on examination for discovery, Mr. Lai freely admitted that he did not have personal knowledge of aspects of the evidence to which he swore (including meetings he had not

[3] *Nouhi v. Pourtaghi*, 2021 BCSC 1779 at paras. 52 and 56

attended, and steps purportedly taken by the Liquidator with which Mr. Lai had no involvement); and

d) on discovery on May 22, 2024, Mr. Lai had concerningly little knowledge of key issues in the action which the Strata Corporation is involved – leases, property recent sales, and non-disclosure to 573 – and which will necessarily bear on any determination the court would make to resolve this action. Considerable requests were left at Mr. Lai's discovery (39 in all) in light of his lack of memory, and despite the passing of more than two months responses have not been delivered.

7. Largely because of the above issues, 573 says that the matter is not suitable for summary determination at this time and seeks an order to that effect. The court cannot grant judgment under Rule 9-7(15) where "the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law". Here, 573 has been prejudiced by being unable to subpoena witnesses who would have firsthand knowledge of the Strata Corporation's breaches (including the Strata Corporation's realtor, Marshall MacLeod, a strata council member Kulwant Chauhan who appears (on information and belief only) to be buying units while this litigation carries on, and David Grewal (who owns several units through corporations and has informed 573 of the Strata Corporation's breaches)). On the record before the court, the Strata Corporation asks the court to make a determination that 573 was on December 15, 2023 in breach of the PSA (by being unable to finance the closing and obtain insurance), without having before it the evidence showing that the Strata Corporation's own breaches led to the financing and insurance difficulties. The court may not be able to find the facts necessary to determine the Strata Corporation's own breaches of the PSA.

8. 573 seeks orders to partially remedy the Strata Corporation's lack of disclosure – that the Strata Corporation be deemed to admit paragraphs 3-18 of the February 2024 notice to admit, and that the Strata Corporation deliver a list of documents with a privilege schedule that complies with the authorities – but says that until those issues and the others set out above are resolved, determination by summary trial would not be appropriate.

9. Relatedly, under Rule 9-7(15) the court should equally not grant judgment where "the court is of the opinion that it would be unjust to decide the issues on the application". Here, the Strata Corporation has sought determination of one issue – a finding that 573 breached the PSA and that 573's $3 million deposit be paid out to the Strata Corporation, without determining the balance

of the issues in the action (573 has claimed for breach of the duty of honest performance, against the owners as well as the Strata Corporation for damages arising from their breaches of the PSA, and against the Strata Corporation for breach of warranty of authority – representing in entering into the PSA that it had authority to sell the Property, while the Milman Order was not filed at the LTO and thus having no such authority). All of those issues will need to be determined in the action regardless of the relief sought by the Strata Corporation. The Court of Appeal has expressed concern about "litigating in slices", as this approach frustrates the just determination of a dispute on its merits.[4]

10. Alternatively, if the court does find that it has the evidence necessary to determine the Strata Corporation's breaches (or can draw adverse inferences against the Strata Corporation to fill in evidentiary gaps), then 573 seeks an order for specific performance of the PSA. The Property is sufficiently unique such that damages would be an inadequate remedy (particularly given the work already done to advance development, and that nothing suggests that the sizeable resulting damages award – $24 million or more based on the appraisal evidence before the court – could be enforced against the Strata Corporation or the individual owners).

### B. The Property and the Milman Liquidation Order

11. This action concerns a 101-lot strata property shown on Strata Plan NW289 and located at 3925 Kingsway and 5715 Jersey Avenue, Burnaby (the "**Property**").

12. On June 17, 2022, in a petition brought by the Strata Corporation, Justice Milman ordered the appointment of Derek Lai of Crowe MacKay & Company Ltd. as the "**Liquidator**" of the Strata Corporation under s. 279 of the *Strata Property Act,* SBC 1998, c. 43 [*SPA*] (the "**Milman Order**").[5]

13. Appendix "A" to the Milman Order listed the registered owners of the Strata Lots as of that date (the "**Strata Lot Owners**"), each of whom was named as a respondent to the petition. Term 4 of the Milman Order provided that on the filing of the Milman Order with the Land Title Office, the interest of each of the Strata Lot Owners would pass to the Liquidator.

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[4] *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.*, 2002 BCCA 138.
[5] Affidavit #1 of Jas King, Ex. B

14. The Milman Order provided that after the Milman Order was registered in the Land Title Office, it would "be proven to the satisfaction of the court ... that the Liquidator has good, safeholding and marketable title to the" Property.[6]

15. The Strata Corporation never filed a copy of the Milman Order with the Land Title Office.[7]

### C. Negotiations and Attempts at Due Diligence

16. In September 2022, following the Milman Order, the Strata Corporation and Bellmont Pacific Development Group Ltd. ("**Bellmont**"), a company owned by 573's principal Kush Bhatia, entered into a conditional contract for Bellmont's potential purchase of the Property.[8]

17. Bellmont (and subsequently, 573) were interested in the Property, and agreed to buy it, due to its unique features, including the following:[9]

a) the Property was designated "High Density Mixed-Use" in the City of Burnaby's "High Density Mixed-Use Plan", meaning that it could likely be developed relatively quickly and a high-density development could be built that included both residential and commercial retail space;

b) the site is large (83,231 square feet), a size of lot which does not come onto the market often;

c) the site has an older strata building (as opposed to simply being a bare land site), which – barring other issues – would make it easier to obtain financing;

d) the Property is centrally located in Greater Vancouver, close to major roads and transit, including three Skytrain stations;

e) the large park located immediately to the south (Central Park) would provide residents with access to sport and recreation facilities, as well as excellent views

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[6] Affidavit #1 of Jas King, Ex. B, Terms 4 and 5 of the Milman Order
[7] Transcript from Examination for Discovery of Derek Lai held May 22, 2024, QQ. 286-288
[8] Affidavit #2 of Kush Bhatia at paras. 7-11
[9] Affidavit #2 of Kush Bhatia at paras. 5 and para. 8; Affidavit #1 of Kush Bhatia at paras. 4-10; Affidavit #1 of Matthew Cheng at paras. 8-9 and Exhibit "A"

(further, because of Central Park, it was less likely that the City of Burnaby would impose height restrictions on a building); and

f) there were no comparable properties on the market at the time, and the principal of Bellmont and 573, Kush Bhatia, had been looking for a new development project for some time.

18. Bellmont and its advisors commenced due diligence on the Property and took steps towards evaluating the Property's development potential. Bellmont obtained an appraisal of the Property (showing a valuation of $85 million) and retained an architectural firm, Matthew Cheng Architect Inc., to prepare development proposals and begin discussions with the City of Burnaby.[10]

19. In or around October 2022, Mr. Bhatia received rent rolls for the Property indicating that no more than 29 of the strata lots had been rented (the "**Existing Leases**"). Although Mr. Bhatia and his advisors requested copies of the Existing Leases from the Strata Corporation, they were not provided.[11]

20. The September 2022 deal ultimately collapsed, because Bellmont and its advisors were unable to obtain the information required to finish due diligence on the site in the time allotted to remove subject clauses. As a result, the September 2022 purchase agreement expired in early-November 2022.[12]

### D. October 2022 Transfer of Strata Lots 55 and 69 to Third Party

21. Unknown to 573 at the time, in October 2022 strata lots 55 and 69 were acquired by a numbered company, 1352962 B.C. Ltd. The Strata Corporation never disclosed these transfers to 573, Bellmont or Mr. Bhatia. 1352962 B.C. Ltd. was not a Strata Lot Owner listed in the Milman Order.[13]

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[10] Affidavit #2 of Kush Bhatia at para. 52 and Exhibit "R", Affidavit #1 of Matthew Cheng at paras. 3-7
[11] Affidavit #2 of Kush Bhatia at para. 10 and Exhibit "C"
[12] Affidavit #2 of Kush Bhatia at para. 11
[13] Second Notice to Admit at para. 37, Affidavit #1 of Tomomi Gohji at para. 9 and Exhibit "H"

### E. Purchase and Sale Agreement

22. On or about December 7, 2022 (the "**Execution Date**"), 573 and the Strata Corporation (on its own behalf and on behalf of the Strata Lot Owners) entered into a conditional agreement for the purchase and sale of the Property (the "**PSA**").[14]

23. The PSA provided for a completion date of October 25, 2023, later extended by agreement to December 15, 2023 (the "**Completion Date**").[15]

24. The Strata Corporation represented and warranted that it held clear title to the Property, and that it would deliver "good and marketable" title to 573 on the Completion Date (s. 4.2(a)):[16]

> **4.2 Vendor's Representations and Warranties**
>
> The [Strata Corporation] represents and warrants to [573] as representations and warranties that are true at the date hereof and will be true at the time of completion and that are to continue and to survive the purchase of the Property by [573] thereafter…
>
> > (a) the Liquidator [of the Strata Corporation] will have good 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;

25. The PSA restricted the Strata Corporation to the Existing Leases (and replacements of those *same* Existing Leases). Thus, "Permitted Encumbrances" was defined in Schedule A of the PSA to include "Leases (existing) (*i.e.,* the Existing Leases) and replacement Leases entered into by Strata Lot Owners on similar terms, between the Execution Date and the Completion Date".

26. Further terms with respect to leases included:

a) the Strata Corporation covenanted and agreed that it would deliver, or cause to be delivered, to 573 within ten business days of the Execution Date, copies of all leases in the Strata Corporation's possession and copies of all "Project Documents" (including leases) (s. 4.1(b)(i) and (iii)); and

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[14] Affidavit #2 of Kush Bhatia at para. 12 and Exhibit "D"
[15] Affidavit #2 of Kush Bhatia at paras. 12 and 15 and Exhibit "E"
[16] PSA, s. 4.2(a) (emphasis added)

b) that to the best of the Strata Corporation's knowledge, there were no leases other than the Existing Leases (s. 4.2(m)).

27. The Strata Corporation also represented and warranted that there was no claim against the Strata Corporation in respect of the Property which could affect the Strata Corporation's ability to perform its contractual obligations (at s. 4.2(c) of the PSA):

> (c) there is no action, suit, claim, litigation or proceeding pending or to the [Strata Corporation's] knowledge threatened against the Strata Corporation 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 Strata Corporation, might materially affect the Strata Corporation's ability to perform any of the Strata Corporation's obligations hereunder and no state of fact exists which could constitute the basis of any such action, suit, claim, litigation or proceeding;

28. The PSA restricted contracts or agreements in respect of the Property to those "in the ordinary and usual course of business". The Strata Corporation covenanted and agreed that it would (at s. 4.1(d)(iii)):

> (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... and without limiting the generality of the foregoing:
>
> > (iii) not enter into or permit to be entered into any contract or agreement or any transaction whatsoever in respect of the Property other than in the ordinary and usual course of business;

29. The PSA does not contain any terms permitting owners or the Strata Corporation to sell their respective units pending completion of the PSA.

30. Finally, the Strata Corporation represented and warranted that it had "not failed to disclose to the Purchaser any material fact or information" (s. 4.2(p)).

### F. Conditions are Removed

31. In February 2023, 573 paid a $3 million deposit into trust, the first conditions under the PSA were removed, and the parties agreed to extend the Completion Date to December 15, 2023.[17]

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[17] Affidavit #2 of Kush Bhatia at paras. 14-15 and Ex. "E"

32. In May 2023, the remaining conditions under the PSA were removed, and the Strata Corporation passed a resolution approving the PSA.[18]

### G. Breaches of PSA Before Completion Date

33. The Strata Corporation breached the PSA in two principal respects in the period before the Completion Date.

34. *First,* the Strata Corporation failed to provide 573 with tenant information and copies of leases, which were required to arrange financing and insurance. In particular:

a) the Strata Corporation did not provide 573 with copies of any leases for the Property;

b) an agent of the Strata Corporation – Marshall MacLeod, a realtor – disclosed on October 10, 2023 to 573 that at least four extra units were rented beyond the Existing Leases (specifically, units 111 and 112 of the Jersey Building and units 117 and 303 of the Kingsway Building);[19] and

c) in or around November 2023, businessperson David Grewal advised 573 that he and Kulwant Chauhan – another investor – had rented out several units through their respective holding companies. These are oral leases without any written agreement, and are on top of the rentals identified by Mr. MacLeod in October 2023.[20]

35. *Second,* there was at least one lawsuit pending in the period before the Completion Date which claimed proprietary relief against the Property. In the fall of 2023, Mr. Bhatia first learned from prospective investors in 573 of a lawsuit filed by Community Fire Prevention Ltd. on April 17, 2020 (the "**Community Fire Claim**"), which seeks proprietary relief against the Property.[21] The existence of the Community Fire Claim had not been disclosed by the Strata Corporation.

36. The Community Fire Claim was filed on April 17, 2020. It concerns, among other things, the replacement of a fire alarm panel at the Property.

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[18] Affidavit #2 of Kush Bhatia at para. 16 and Ex. "F"
[19] Second Notice to Admit at paras. 24-27, Affidavit #2 of Kush Bhatia at para 27 and Exhibit "I"
[20] Affidavit #2 of Kush Bhatia at para. 29
[21] Affidavit #2 of Kush Bhatia at paras. 31-33; Affidavit #1 of Derek Lai at Exhibits "M", "N" and "O"

37. Among other things, the Community Fire Claims seeks proprietary relief, including a lien under the *Builders Lien Act*, S.B.C. 1887, c. 45; an order the Property be sold in default of payment; a certificate of pending litigation; and "such further and other relief as the nature of this case may require and this Honourable Court may deem proper".[22]

38. The Community Fire Claim is set for trial in April 2025.[23]

39. As a result of these breaches, 573 was unable to secure financing (or investment) and insurance prior to the Completion Date. 573 worked with two mortgage brokers, Aaron Chee and later Michelle Child. Both brokers were unable to obtain financing. Ms. Child's evidence is that the Community Fire Claim and the uncertainty surrounding leases were the reasons that 573 was unable to obtain financing. Further, since financing was a precondition to obtaining insurance on the Property, 573 was unable to secure insurance.[24]

### H. Events Before Completion Date

40. On December 7, 2023, 573's litigation counsel wrote to the Strata Corporation's solicitor seeking to confirm that the Strata Corporation would be able to provide clear title on the Completion Date. The Strata Corporation did not provide the requested confirmation.[25]

41. On December 12, 2023, the Strata Corporation's counsel suggested that it assume conduct of the defence of the Community Fire Claim, and hold back funds from the Property's sale proceeds to fund the ongoing defence of the claim (a mechanism not provided for in the PSA).[26]

42. On December 18, 2023, counsel for 573 wrote to counsel for the Strata Corporation, taking the position that the Strata Corporation had repudiated the PSA, and that 573 would insist on specific performance.[27]

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[22] Affidavit #1 of Derek Lai at Exhibit "M", p. 58
[23] Affidavit #2 of Alice Tsui at Exhibit "H"
[24] Affidavit #2 of Kush Bhatia at paras. 24, 26, 30, 33-37, Affidavit #1 of Michelle Child at paras. 10-11
[25] Affidavit #2 of Kush Bhatia at Exhibit "M"
[26] Affidavit #1 of Jas King at para. 5 and Exhibit "D"
[27] Affidavit #2 of Kush Bhatia at Exhibit "O"

## I. Notice of Civil Claim and CPL

43. On December 18, 2023, 573 commenced this action for specific performance. In its notice of civil claim (as amended on May 17, 2024), 573 pleads, among other things, that:

a) the Strata Lots Owners appointed the Strata Corporation (as represented by its liquidator) to represent them as their agent in carrying out the sale of the strata lots, as stated in the February 15, 2022 resolution, and confirmed by the Winding Up Order, and as such, the Strata Corporation was an agent of the Strata Lot Owners (paras. 5 and 6);

b) 573 relied on the Strata Corporation's representation that it had the authority to bind the Strata Lot Owners in respect of the PSA (para. 9);

c) 573 wanted to purchase the Property due to its unique features, including location, nearby parklands, the size and nature of the Property, and the Property's existing zoning (para. 12);

d) the Strata Corporation (acting on its own behalf and on behalf of the Strata Lot Owners) has failed to complete the purchase and sale because it has failed to convey clear title to the Property (para. 13);

e) 573 was at all times ready, willing and able to complete the sale and purchase of the Property, but the Strata Corporation's breaches prevented it from closing under the PSA (para. 14);

f) an alternative property would not be suitable (para. 15);

g) 573 breached its implied duty of contractual good faith for, among other reasons, failing to disclose that the legal and beneficial holders of the Property had changed since the time of the Winding-Up Order, that there existed other liens, claims, charges, and encumbrances in respect of the strata lots that were not contemplated under the PSA, by not taking the steps open to it to obtain copies of and information about leases, and by not registering the Milman Order in the land title office so as to jeopardize 573's rights under the PSA (as evidenced by the positions taken by the Strata Corporation in this litigation) (para. 23);

h) 573 relied on the Strata Corporation's and Strata Lot Owner's obligations to its detriment, including in agreeing to waive the conditions under the PSA and to pay a $3 million deposit at or about the time of waiving the first conditions (para. 24);

i) the Strata Corporation and the Strata Lot Owners are liable for breach of contract (paras. 26-30) and breach of the duty of honest performance, in the alternative to specific performance (para. 31);

j) the Strata Corporation is liable for breach of warranty of authority, in the further alternative (para. 32);

k) the Strata Lot Owners are vicariously liable for the acts and omissions of their agent, the Strata Corporation (para. 33); and

l) 573 is entitled to file a Certificate of Pending Litigation against title to the Property on the basis that 573 has an interest in the Property pursuant to the PSA (para. 34).

### J. Application to Discharge CPL

44. On December 18, 2023, 573 registered a Certificate of Pending Litigation against title to all 101 strata lots as well as the common property of the Strata Corporation (the "**CPL**").

45. On January 31, 2024, Justice Crerar heard an application brought by the Strata Corporation to strike the CPL due to alleged hardship. Justice Crerar dismissed the application, and in doing so commented on the (in)ability of owners to sell their units pending completion of the PSA:[28]

> [33] Second, it is not at all clear under the Winding-Up Order and the agreement between the individual units and the liquidator that an individual strata owner, in the pendency of the marketing of the units and the closing of the sale, is entitled to sell units. Certainly, it would be contrary to the spirit and intention of the agreement to sell any units that are already subject to an agreement entered into by all of the individual strata owners for a collective sale. The best that the liquidator can point to is the absence of any express prohibition in the order or the agreement against an individual strata owner selling their unit pending the sale.

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[28] *1038573 B.C. Ltd. v. The Owners, Strata Plan NW289*, 2024 BCSC 405 at paras. 33-34 and 42-44 [***CPL Reasons***]

[34] Indeed, that agreement includes specific provisions allowing owners to deal with their units in specific manners pending the sale completion. The agreement does not expressly contemplate or permit the full sale of a unit: one would expect the agreement to similarly specify terms governing such a sale, if a sale were permitted or contemplated. ...

[42] Second, I recognise the purchaser's fear, which really should be a fear shared by the liquidator. If, indeed, the individual owners have the ability to sell or otherwise encumber their individual units despite the existence of the purchase and sale agreement and Winding-Up Order, it could greatly imperil the anticipated sale.

[43] If multiple individual unit owners sell their properties, it could raise the spectre of an innocent third party, without notice of the Winding-Up Order or the purchase and sale agreement, purchasing a unit and then being surprised after closing that they are obliged to sell their new unit. A single or indeed multiple single sale or encumbrance could cloud the title and work contrary to a claim in specific performance, which, of course, is founded in equity.

[44] I would also note that leaving the CPL on all 101 units accords with the spirit of the agreement amongst the individual owners, as confirmed by Justice Milman's Winding-Up Order. There shall be a sale of all units. That sale presumptively shall proceed in as smooth and uncomplicated a manner as possible, such that all of the other unit owners not be deprived of this lucrative opportunity to profit from the sale of their units either through delay, or litigation. It would expose the owners to the costs in time and money of litigation. Indeed, given that we can no longer be guaranteed that Vancouver real estate will continually rise in value, the other owners may face the prospect of diminished value in their units. In other words, the liquidator's constituents, viewed as a whole, have a vested interest in not clouding up title through individual sale or encumbrance of units that may occur if the liquidator were successful in removing the individual CPLs.

### K. Breaches of PSA After Completion Date

46. After the Completion Date, 573 learned the following in respect of the Property:

a) since the Milman Order, various of the Strata Lot Owners (as at the time of the order) had entered into agreements to sell their respective units (the "**Recent Sales**"); and

b) a petition had been filed to foreclose on two units in the Kingsway building.

*i.* *The Recent Sales*

47. As discussed above, strata lots 55 and 69 were transferred in October 2022 to a numbered company, 1352962 B.C. Ltd., which was not an owner at the time of the Milman Order.[29]

48. Further sales to 1352962 B.C. Ltd. were approved by order of this court in April 2024. Specifically, on April 11, 2024, this court approved a sale to 1352962 B.C. Ltd of units 111, 115, 117, 216, 217, 301, 302, 305, 312, 315 in the Kingsway building and units 115, 116, and 202 in the Jersey building. These sales completed on May 25, 2024.

49. There is also other evidence that more units have been transferred. In or around late-December 2023 or early-January 2024, Mr. Grewal advised 573 that Mr. Chauhan had been buying units (at a discounted rate) from Strata Lot Owners who wanted to sell and were not willing to wait for 573 to close on the Property. In early February 2024, Mr. Grewal advised 573 that Mr. Chauhan had purchased two or three units at a discount of about $100,000 relative to the PSA. 573 does not otherwise know anything about these transactions.[30] Kulwant Chauhan is not a Strata Lot Owner as listed in the Milman Order.

50. At his examination for discovery, the Strata Corporation's representative, Derek Lai, stated that he could not recall whether any strata units had been sold since the February 2022 general meeting of the Strata Corporation or since the date of the Milman Order.[31]

*ii.* *The Bayfield Petition*

51. On February 22, 2024, 573 was notified by a third party (not by the Strata Corporation) that on February 8, 2024, Bayfield Mortgage Investment Corp. had filed a petition (New Westminster Registry Court File No. S-H-252390) seeking to foreclose (based on a mortgage of $886,123.31, and interest) against units 204 and 209 of the Kingsway building (the "**Bayfield Petition**"). The Bayfield Petition seeks sale of the units in default of payment on the mortgage, an order divesting the owners of their interest in the subject lands, and a certificate of pending litigation.[32]

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[29] Second Notice to Admit at para. 37, Affidavit #1 of Tomomi Gohji at para. 9 and Exhibit "H"
[30] Affidavit #2 of Kush Bhatia at paras. 41-42
[31] Transcript from Examination for Discovery of Derek Lai held May 22, 2024, QQ. 286-320
[32] Affidavit #2 of Kush Bhatia at Exhibit "P"

52. On May 10, 2024, in its second amended list of documents, the Strata Corporation produced two residential tenancy agreements – the first, from January to July 2023, and the second, from April 2023 to April 2024. Neither written tenancy agreement had previously been disclosed to 573.[33]

### L. Strata Corporation Provides Improper Response to Notice to Admit

53. On February 21, 2024, 573 served a notice to admit on the Strata Corporation. The Notice to Admit sought admission of, among other things, the sale of units following the Execution Date; existence of the additional, unpermitted leases; the existence of the Community Fire Claim; and the existence of foreclosure proceedings in respect of some Strata Lots. In its response served on March 13, 2024, the Strata Corporation stated that these facts were outside of its knowledge, and did not provide any further explanation. The Strata Corporation failed to admit or explain why such facts are outside of its knowledge (as required by the jurisprudence, including *Nouhi v. Pourtaghi*, 2021 BCSC 1779), despite counsel's subsequent prompting on May 13, 2024.[34]

### M. Discovery of Derek Lai and Second Notice to Admit

54. Derek Lai was discovered by counsel for 573 on May 22, 2024.

55. To date, and despite repeated prompting by counsel for 573, Mr. Lai has refused to respond to the requests left at his discovery.[35]

56. On July 30, 2024, the Strata Corporation issued a second notice to admit, seeking admissions related to leases and the Strata Corporation's non-disclosure of leases, tenant information and the Strata Corporation's non-disclosure of tenant information, and the sales to 1352962 B.C. Ltd.[36] As of the date of filing this notice of application, the Strata Corporation has not responded to the second notice to admit.

## PART 3: LEGAL BASIS

57. 573 submits that this matter is not suitable for summary trial, as the evidentiary record is insufficient for the court to find the facts it must. Alternatively, should the court proceed with a

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[33] Second Notice to Admit at paras. 1-7, Affidavit #1 of Tomomi Gohji at para. 5 and Exhibit "D"
[34] Affidavit #1 of Tomomi Gohji at paras. 3-4, & 6 and Exhibits "B", "C", & "E"
[35] Affidavit #1 of Tomomi Gohji at paras. 7-8 and Exhibits "F" & "G"
[36] Affidavit #1 of Tomomi Gohji at para. 9 and Exhibit "H"

determination on the merits, 573 seeks an order for specific performance, and in the alternative an order that 573 have leave to later prove damages.

### A. Issues Not Suitable for Summary Determination (Para. 1 of Relief Sought)

58. On a summary trial, the court under Rule 9-7(15) may grant judgment unless:

a) the court is unable, on the whole of the evidence, before the court on the application, to find the facts necessary to decide the issues of fact or law, or

b) the court is of the opinion that it would be unjust to decide the issues on the application,

59. "The Rule makes the judge a gatekeeper. It is a crucial role. Notwithstanding the wishes or indeed often the vociferous submissions of counsel, judgment should not be given if the court is unable, on the evidence, to find the necessary facts or if it would be unjust to do so."[37] As noted by Justice Southin in *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited*:[38]

> [28] . . . the judge before whom a proceeding of this kind comes must not think of himself or herself as a puppet in the hands of the litigants.

60. While parties are entitled to seek judgment on individual issues "absent good reason, courts should not isolate individual issues in a proceeding and decide them separately from the rest of the litigation".[39]

61. In *Greater Vancouver Water District v. Bilfinger Berger AG*, Madam Justice Griffin (as she then was) noted the factors the court must consider on summary trial applications brought to determine only part of the issues in a lawsuit:[40]

a) whether the court can find the facts necessary to decide the issues of fact or law; and

b) whether it would be unjust to decide the issues by way of summary trial, considering amongst other things:

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[37] *Main Acquisitions Consultants Inc. v. Yuen*, 2022 BCCA 249 at para. 89 [*Main Acquisitions*]
[38] *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited*, 2002 BCCA 138 at para. 28
[39] *Main Acquisitions* at para. 92
[40] *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485 at para. 110

i. the implications of determining only some of the issues in the litigation, which requires consideration of such things as:

1. the potential for duplication or inconsistent findings, which relates to whether the issues are intertwined with issues remaining for trial;

2. the potential for multiple appeals; and

3. the novelty of the issues to be determined;

ii. the amount involved;

iii. the complexity of the matter;

c) its urgency;

d) any prejudice likely to arise by reason of delay; and

e) the cost of a conventional trial in relation to the amount involved.

62. Finally, the masses of material before the court on this application – at least 10 affidavits as of the date of this filing, and considerable excerpts from the discoveries of Mr. Lai and Mr. Bhatia – weigh heavily against a summary determination. In *Inspiration Management Ltd. v. McDermott St. Lawrence* (1989), 36 B.C.L.R. 2(d) 202; 1989 CanLII 229 (BCCA), Chief Justice McEachern warned that it was "unfair to scoop-shovel volumes of disjointed affidavits and exhibits upon the judge and expect him or her to make an informed judgment" (at 216).

63. The inability to compel a witness to give evidence under subpoena has been held a factor which weighs against finding a matter suitable for determination under Rule 9-7.[41]

[41] *Gibson v. Insurance Corporation of British Columbia*, 2016 BCSC 814 at para. 81; A subpoena may not be issued to compel attendance of a witness at a summary trial, because Rule 12-5 does not apply to summary trials under Rule 9-7 except as provided in Rule 9-7 (Rule 23-5(1)), and the portions of Rule 12-5 which have application to summary trials, and are identified in Rule 9-7(6), do not include the provisions of Rule 12-5 concerning subpoenas: *Hannigan v. Ikon Office Solutions Inc.*, [1997] B.C.J. No. 786 (S.C.), revd on other grounds [1998] B.C.J. No. 2868, 61 B.C.L.R. (3d) 270 (C.A.).

**B. Compelling Discovery from the Strata Corporation (Paras. 2-3 of Relief Sought)**

64. Relatedly, 573 seeks orders that:

a) the Strata Corporation be deemed to admit the truth of the facts set out at paragraphs 3-18 of the notice to admit dated February 21, 2024; and

b) the Strata Corporation deliver a privileged document schedule.

65. These orders are necessary to ensure that the Strata Corporation comply with its discovery obligations, and are required before any determination on the merits of this dispute can occur. The basis for each order is set out below.

*i.* *Strata Corporation is Deemed to Admit Paragraphs 3-18 of Notice to Admit (para. 2 of relief sought)*

66. The facts listed at paragraphs 3-18 of the February 21, 2024 Notice to Admit are all facts which appear *prima facie* within the knowledge of the Strata Corporation and its representative Mr. Lai. In particular:

a) paragraphs 3-12 concern what strata units are tenanted, what units have written agreements, and whether the Strata Corporation has disclosed the terms of such tenancies or leases to the plaintiff;

b) paragraphs 13-16 concern whether units within the Strata Corporation have been sold in the period since the Execution Date, and whether the Strata Corporation has provided to the plaintiff notice or details of such transactions; and

c) paragraphs 17 and 18 concern the existence of foreclosure proceedings, and whether the Strata Corporation has provided the plaintiff with notice of such proceedings.

67. The Strata Corporation's response to these facts – "Paragraphs 3 to 18 of the Notice to Admit are unknown to the Liquidator" – is not compliant with Rule 7-7(2) and the authorities, as it does not "set out in detail the reasons why" the Strata Corporation cannot make the admission.

68. Rule 7-2(2) provides that a party is deemed to admit a fact set out in a notice to admit unless that party, within 14 days after service, delivers a compliant response:

> Effect of notice to admit
>
> (2) Unless the court otherwise orders, the truth of a fact or the authenticity of a document specified in a notice to admit is deemed to be admitted, for the purposes of the action only, unless, within 14 days after service of the notice to admit, the party receiving the notice to admit serves on the party serving the notice to admit a written statement that
>
> > (a) specifically denies the truth of the fact or the authenticity of the document,
> >
> > (b) sets out in detail the reasons why the party cannot make the admission, or
> >
> > (c) states that the refusal to admit the truth of the fact or the authenticity of the document is made on the grounds of privilege or irrelevancy or that the request is otherwise improper, and sets out in detail the reasons for the refusal.

69. In *Ceperkovic*, Justice Dillon described the purpose of a notice of admit as follows:[42]

> [30] The purposes of the notice to admit are multiple. The primary purpose is to "save both the Court and litigants the time and expense involved in proving the authenticity of documents or in proving facts" ... The rule is intended to eliminate issues altogether from a case or to facilitate proof of issues that cannot be eliminated ... Thus, the notice to admit can isolate important factors from a strategic and cost efficient perspective ... It enables the parties to "prepare for an efficient trial focused on what is disputed" ... The notice to admit obviates the necessity and expense of calling evidence at trial ... Ultimately, it is a means to foster the timely adjudication of a claim on its merits ...

70. As set out by Justice Skolrood (as he then was) in *Nouhi,* a party cannot decline to admit a fact based on a lack of knowledge unless the party has taken some steps to inform themselves:[43]

> [52] As a general proposition, lack of personal knowledge of a fact or document may be a valid reason for declining to admit that fact or document if the party in receipt of the notice to admit has taken some steps to inform themselves. Justice Dillon made this point in *Ceperkovic* at para. 36, where she said:
>
> > [36] ... While lack of knowledge may be a proper ground for refusing to admit a fact or document, it is unlikely that this explanation would be accepted if the party has not taken reasonable steps to inform themselves about the fact or document (see e.g. Pershad v. Lachan, 2015 ONSC 5290 at para. 81). This is in keeping with the basic duty under the discovery rules

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[42] *Ceperkovic v. MacDonald*, 2016 BCSC 939 at para. 30 (citations omitted)
[43] *Nouhi v Pourtaghi*, 2021 BCSC 1779 at paras. 52 and 56 (emphasis added)

> that the party discovered should take reasonable steps to inform himself or herself.
>
> ...
>
> [56] That said, I will make a couple of observations:
>
> > c) ... there are also numerous facts alleged about specific events involving the plaintiff, for example, meetings that he is alleged to have attended and documents that he is alleged to have signed. For him to profess a lack of personal knowledge of these facts suggests a failure to make reasonable efforts to properly respond to the notice.

71. On May 13, 2024, counsel for 573 wrote to counsel for the Strata Corporation, setting out this non-compliance and inviting the Strata Corporation to deliver a compliant response. As of the filing of this application, the Strata Corporation has not responded.

72. And, on discovery, Derek Lai could not explain what steps were taken to respond to the notice to admit or why the facts at paragraphs 3-18 were outside of the Strata Corporation's knowledge.[44]

73. As a result, the court should under Rule 7-7(2) order that the Strata Corporation be deemed to admit the truth of the facts stated at paragraph 3-18 of the notice to admit. In the alternative, the court may order that the Strata Corporation provide, within 14 days, a proper and compliant response to paragraphs 3-18.[45]

*ii. Strata Corporation Should Deliver Privileged Schedule (para. 3 of relief sought)*

74. 573 also seeks an order that the Strata Corporation be required to provide a detailed Part 4 privileged list describing every document over which privilege is asserted.

75. Where material documents are said to be privileged, their description in Part 4 of a party's list of documents must be sufficient to permit the opposing party to determine and scrutinize the basis for the claim of privilege. A party claiming privilege must individually list each document over which privilege is claimed and provide sufficient information respecting the nature of the document

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[44] Transcript from Examination for Discovery of Derek Lai held May 22, 2024, QQ. 581-590
[45] Analogous to the order made by Justice Dhillon in *Nouhi*.

and the privilege asserted to reasonably allow the other party and the court to evaluate the claim of privilege.[46]

76. Here, counsel for the Strata Corporation has suggested that communications between Mr. Lai and the strata owners, or between Mr. Lai and strata council, are privileged.[47] If that is the case, it would appear to be a novel claim of privilege, and all such documents should be listed with an adequate description so that 573 can assess the claim of privilege and whether to challenge it.

### C. Alternative Relief (Para. 4 of Relief Sought)

#### *i. Strata Corporation Was Not Ready, Willing and Able to Complete the PSA*

77. If the court decides that a determination under Rule 9-7 is appropriate, 573 says that specific performance is an available remedy, because neither party could complete on the closing date.

78. The Strata Corporation's failure to complete arose from its inability to convey clear title to 573 on the closing date. 573 has not accepted the Strata Corporation's repudiation and has sought a new closing date, that the court will designate. Accordingly, the PSA remains in effect and specific performance is the appropriate remedy.

79. To close on a contract of purchase and sale, a party must be "ready, willing and able" to complete in accordance with the terms of the contract on the closing date. The vendor must remove all encumbrances against the property, except those specifically contemplated in the contract. When one party has made it clear that it is not "ready, will and able" to complete the transaction, the other party is not required to tender closing documents or the purchase price on the agreed upon completion date.[48]

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[46] *Gardner v. Viridis Energy Inc.,* 2013 BCSC 580 at paras. 39-40; *Stone v. Ellerman*, 2009 BCCA 294

[47] Transcript from Examination for Discovery of Derek Lai held May 22, 2024, QQ. 113-118

[48] *Toor v. Dhillon*, 2020 BCCA 137 at paras. 46 and 74 [*Toor*]; *Norfolk v. Aikens* (1989), 41 B.C.L.R. (2d) 41 at 8 and 19 (CA) [*Norfolk*]; *Basra v. Carhoun* (1993) 82 B.C.L.R. (2d) 71 at para. 97 (CA) [*Basra*]; *Crown Fortune International Investment Group Inc. v. Bonnefield Canada Farmland LP III*, 2023 BCCA 441 at paras. 65-66 [*Crown Fortune*]

80. A party seeking to rely on time of the essence may not do so where he or she was not ready, willing, and able to close on the agreed date or where he or she was responsible for the later performance of the other party.[49]

81. In *Toor*, the purchasers paid the deposit late, but had otherwise substantially performed their obligations. The vendors had repudiated the contract by refusing to allow an appraiser access to the property, which was a precondition to the purchasers' mortgage approval. The court held that the vendors were not entitled to rely on the "time is of the essence" clause to defeat the purchasers' right to specific performance of the contract.[50] In turn, the purchaser could insist on specific performance and designate a new closing date.[51]

82. In *Gill,* the defendants refused to adjust a closing date following a fire.[52] The plaintiffs had been unable to tender the purchase price on closing, because they could not secure mortgage financing. In finding that the plaintiffs were entitled to specific performance with an abatement of the purchase price, the court held that:[53]

> [105] As the Court in *Hundley* confirmed, at para. 77, it was not open to the defendants to call for payment of the balance of the purchase price in circumstances where they were unable to convey what they were required to under the Contract.
>
> [106] Furthermore, I do not consider that it is open to the defendants to argue that the plaintiffs were unable to tender the balance of the purchase price when that inability was brought about by the defendants' breach. This is so in two respects. First, the defendants were unable to deliver what they had contracted to ... They were in "essential default". Second, the defendants failed to provide the information or to discuss reasonable accommodations that would have enabled the plaintiffs to secure alternate financing.
>
> [107] I would make one further observation. On the authority of *Shaw*, *Hundley* and *Hao Sun*, even if the plaintiffs were in default of their obligations by not tendering or by not being able to tender the purchase price on the Completion Date, or in lacking the mortgage funds to do so, the Contract continued and neither party was relieved of their obligations.

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[49] *Toor* at para. 4; *Walker v. Jones*, 2008 CanLII 47725 at 59-61 (ONSC); *Basra v. Carhoun* (1993) 82 B.C.L.R. (2d) 71 (C.A.))
[50] *Toor* at paras. 34 and 45-50
[51] *Toor* at paras. 84-88
[52] *Gill v. Zhang*, 2016 BCSC 1464 [*Gill*]
[53] *Gill* at paras. 105-107 (emphasis added)

83. 573 submits that the circumstances at bar are analogous to *Toor* and *Gill*. The Strata Corporation was in "essential default" of the PSA because it was not "ready, willing and able" to complete under the PSA. Namely:

a) by having not registered the Milman Order on title, the Strata Corporation did not have good and marketable title and could not convey the Property to 573;

b) various issues resulted from the Strata Corporation's failure to register the Milman order, including actions by registered owners of the strata lots (i) to convey their lots to third parties (such as 1352962 B.C. Ltd.) or (ii) to rent their lots to third parties via non-permitted leases.

c) ongoing proceedings, including the Community Fire Claim and the Bayfield Petition, which would have remained in existence post-closing.

84. Accordingly, the Strata Corporation was not in a position on closing to convey what 573 had contracted for under s. 4.2(a) of the PSA: "good and marketable title" to the Property, "free and clear of all liens, claims, charges, encumbrances... other than the Permitted Encumbrances".

85. Because of this default, 573 was unable to obtain the financing and insurance necessary to complete on the purchase. Since neither party could complete and 573 has not accepted the Strata Corporation's repudiation, specific performance is the appropriate remedy.

*ii.* *Breaches by the Strata Corporation*

a) Unpermitted Leases

86. The Strata Corporation has breached the terms of the PSA concerning leases, in at least the following ways:

a) first, it allowed the leasing of strata lots over and beyond the Existing Leases and Replacement Leases after the Execution Date, in breach of ss. 4.2(a) (obligation to convey clear title) and s. 4.1(d)(iii) (obligation not to deal with Property except in the ordinary course of business);

b) second, it breached its disclosure obligations, including under s. 4.2(m) of the PSA (no leases other than existing leases), ss. 4.1(b)(iii) (obligation to provide leases), and 4.2(p) of the PSA (obligation to disclose material facts).

87. *First,* under the PSA, the Strata Corporation was required to deliver title free and clear of all "all liens, claims, charges, encumbrances and legal notations other than the Permitted Encumbrances":[54]

> Vendor's Representations and Warranties
>
> [Strata Corporation] represents and warrants to [573] as representations and warranties that are true at the date hereof and will be true at the time of completion and that are to continue and to survive the purchase of the Property by [573] thereafter…
>
> the Liquidator [of the Strata Corporation] will have good 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;

88. The term "Permitted Encumbrances" includes the "Leases (existing)" and "replacement Leases entered into by the Strata Lot Owners on similar terms, between the Execution Date and the Completion Date" (Sched. A). Thus, to have "good and marketable" title to the Property on the Completion Date, there could be no other leases on the Property other than those that were existing as of the Execution Date, or "replacement…" of those *existing* leases, on similar terms.

89. Before the Execution Date, the Strata Corporation's listing agent disclosed to 573 that there were no more than 29 leased units (i.e., Existing Leases and "Permitted Encumbrances" under the PSA). As of October 2023, there were at least 4 further tenancies in place with written agreements, and since November 2023, there are an unknown number of additional leases in place with oral terms. 573 has only been provided with two written lease agreements, both entered into after the Execution Date.

90. The unpermitted leases are not Permitted Encumbrances, and therefore, the Strata Corporation was not in a position to convey "good and marketable title" on the Completion Date. The term "replacement" means the "action or an act of replacing something". The term "Replacement Leases" in the definition of "Permitted Encumbrances" therefore connotes replacement of the 29 *Existing* Leases (Sched. A). The fact that the "Replacement Leases" must be entered into on "on similar terms" further demonstrates that the Strata Lot Owners could not enter into additional leases on new terms.[55]

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[54] PSA s. 4.2(a) (emphasis added)
[55] Oxford English Dictionary, "replacement" (online)

91. It would be contrary to the plain meaning of the term "replacement", and the parties' bargain, to define the "Replacement Leases" as anything other than the replacement of the Existing Leases on their similar terms. Thus, the existence of additional leases on the Completion Date was a breach of the Strata Corporation's obligation to hold clear title on the Completion Date under s. 4.2(a).[56]

92. Moreover, the leasing of units beyond the leases authorized by the Permitted Encumbrances is also a breach of the terms requiring the Strata Corporation not to deal with the Property except in the ordinary course of business (s. 4.1(d)(iii)).

93. *Second,* regarding disclosure obligations, under s. 4.1(b)(i) and (iii) of the PSA, the Strata Corporation covenanted and agreed that it would deliver, or cause to be delivered, to 573 within ten business days of the Execution Date, copies of all leases in the Strata Corporation's possession and copies of all "Project Documents" (including leases). Further, under s. 4.2(p) of the PSA, the Strata Corporation was required to disclose all "material fact[s] and information" in respect of the Property.

94. Further, under s. 4.2(m) PSA, the Strata Corporation also agreed that, to the best of its knowledge, there were no leases other than the Existing Leases. To the extent there were additional leases after the Execution Date, of which 573 was not informed, the Strata Corporation has breached s. 4.2(m) of the PSA.

95. The Strata Corporation has failed to deliver copies of leases in its possession (including the Existing Leases), to disclose the terms of the leases, and to confirm the true number of leased units (despite demand). 573 is unaware of the full number of unpermitted leases with respect to the Property. Disclosure of this information is critical, as under s. 29(2) of the *Land Title Act*, 573 will assume all leases that are for a period less than three years.

96. These actions, and the failure of the Strata Corporation to disclose material information about leases, constitute breaches of s. 4.1(b)(i) and (iii) and s. 4.2(p) of the PSA.[57]

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[56] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 58
[57] *Walker* at 61 (ONSC); *Toor* at para. 87; *Gill* at para. 108

b) Community Fire Claim

97. The existence of the Community Fire Claim has led the Strata Corporation to breach the PSA in at least two ways. First, it is a breach of the obligation to provide title free and clear of all claims under the Property. Second, it is a breach of the Strata Corporation's disclosure obligations under s. 4.2(p).

98. As for the first breach, PSA expressly required the Strata Corporation to deliver title free and clear of (among other things) all claims in respect of the Property (s. 4.2(a)). In particular, the Strata Corporation "represented and warranted" that it would have "good 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".

99. Despite this, the Strata Corporation has breached the obligation to deliver title free of any claims as the Property was (and remains) subject to the Community Fire Claim, which is a claim in respect of the Property within the meaning of s. 4.2(a). At paragraph 31 of its response to civil claim, the Strata Corporation has expressly recognized that the Community Fire Claim is a "claim" that impedes its ability to convey clear title under s. 4.2(a). Additionally, at paragraph 45 of its Notice of Application, the Strata Corporation has attempted to minimize the Community Fire Claim as a mere "debt claim" – seemingly suggesting that such a claim is permitted under the PSA. This is, on the plain language of s. 4.2(a), contrary to the PSA, which requires that the Property be free of *all* claims.

100. In any event, the Community Fire Claim is more than a simple "debt claim". It is an "action, suit, claim, litigation or proceeding" that "materially affect[s] the Strata Corporation's ability to perform [its] obligation" under the PSA – including the obligation to deliver clear title (in breach of s. 4.2(c)). Besides a monetary judgment with interest, the plaintiff in the Community Fire Claim seeks, among other relief:

a) a declaration that it is entitled to a lien under the *Builders Lien Act*, S.B.C. 1997, c. 45, which is to stand as a first charge against the Property;

b) an order that units in the Property be sold, in default of payment of the monetary judgment;

c) general and special damages;

d) a Certificate of Pending Litigation; and

e) "such further and other relief as the nature of this case may require and this Honourable Court may deem proper".[58]

101. The relief set out above encompasses *in rem* elements that bind the Property. First, a claim of builder's lien is a claim for a statutory lien that creates an interest in land. A Certificate of Pending Litigation may be registered only by those claiming an "interest in land" or where another enactment gives that person "a right of action in respect of land". Indeed, a Certificate of Pending Litigation registered without a proper foundation to a claim to an interest in land is improperly registered and will be cancelled on application. If the plaintiff in the Community Fire Claim is successful in obtaining the relief it seeks, it will have an interest in the property (thus impeding 573's right to clear title). It does not matter that a lien or CPL has not been filed yet. The very existence of the extant claim exposes the Property to registrations in the future, after title has transferred to 573.[59]

c) Unpermitted Sales

102. Finally, in further breach of the PSA, 573 has since learned (in late-December 2023 or early-January 2024) that several Strata Lot Owners have entered into contracts of purchase and sale of their respective strata units. 573 has also learned that at least 13 units have been sold, as of May 25, 2024, to a company of which Mr. Chauhan is the sole director.[60]

103. These sales after closing are a breach of s. 4.1(d)(iii) of the PSA, which prohibits any contract, agreement, or transaction "whatsoever in respect of the Property other than in the ordinary and usual course of business". The strata unit sales entered into after execution of the PSA are not contracts "in the ordinary and usual course of business". Further, this is yet another breach of s. 4.1(p) of the PSA and the obligation to inform 573 of all material facts in respect of the Property.

104. More important, these sales cast doubt on the entire validity of the sale process, and raise further questions about the Strata Corporation's ability to deliver clear title on closing. The entire structure of the PSA is premised on the May 2023 resolution of existing unit owners to approve

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[58] Affidavit #1 of Derek Lai at Exhibit "M", pp. 57-58
[59] *BSSD Excavating & Landscaping Ltd. v. Green Blvd. Construction Ltd.,* 2023 BCSC 1685 at para. 55; *Land Title Act,* RSBC 199, c. 250, s. 215(1); *Bilin v. Sidhu*, 2017 BCCA 429 at para. 36
[60] Affidavit #2 of Kush Bhatia at paras. 41-42

the PSA. When the identity of the unit owners has now changed (perhaps significantly), it is questionable whether the Strata Corporation even has the authority to close the transaction. Notably, and albeit in the context of an interlocutory application, Justice Crerar in the CPL Reasons was not persuaded by the Strata Corporation that the PSA permitted sales after the Execution Date and before closing. As Justice Crerar stated in the CPL Reasons:

> [33] Second, it is not at all clear under the Winding-Up Order and the agreement between the individual units and the liquidator that an individual strata owner, in the pendency of the marketing of the units and the closing of the sale, is entitled to sell units. Certainly, it would be contrary to the spirit and intention of the agreement to sell any units that are already subject to an agreement entered into by all of the individual strata owners for a collective sale. The best that the liquidator can point to is the absence of any express prohibition in the order or the agreement against an individual strata owner selling their unit pending the sale.
>
> [34] Indeed, that agreement includes specific provisions allowing owners to deal with their units in specific manners pending the sale completion. The agreement does not expressly contemplate or permit the full sale of a unit: one would expect the agreement to similarly specify terms governing such a sale, if a sale were permitted or contemplated.

d) Strata Corporation's Breaches Led to Non-Performance by 573

105. The above breaches have impeded 573's ability to obtain financing, investment, and insurance for the purchase, as lenders require details of the leases to advance funds. The evidence of Michelle Child (the second mortgage broker retained by 573) and Kush Bhatia is that financing could not be obtained without the leases and with the prospect of a certificate of pending litigation (from the Community Fire Claim) on title.[61]

106. Thus, as neither party was in a position on closing to complete the PSA, and 573 has throughout insisted on specific performance, the PSA remains in effect and specific performance is an available remedy.

*iii. Strata Corporation Should Specifically Perform the Purchase and Sale Agreement*

107. Specific performance is the appropriate remedy in this case. Damages would be inadequate given the unique attributes of the Property, the nature of the transaction, and the difficulty in quantifying damages.

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[61] Affidavit #2 of Kush Bhatia at para. 24, Affidavit #1 of Michelle Child at paras. 8 and 10-11

108. "[I]t is inaccurate to describe the remedy of specific performance as an 'extraordinary remedy'. In determining whether or not to grant specific performance, the fundamental question is whether the plaintiff has shown that the land rather than its monetary equivalent better serves justice between the parties."[62]

109. In *Lucas*, the Ontario Court of Appeal held that in determining whether a plaintiff has shown that the land rather than its monetary equivalent better serves justice between the parties, courts should typically examine and weigh three factors: (i) the nature of the property involved; (ii) the related question of the inadequacy of damages as a remedy; and (iii) the behaviour of the parties, having regard to the equitable nature of the remedy.[63]

a) Nature of the Property Involved

110. The Strata Corporation does not in its existing materials dispute that specific performance is appropriate, and has not filed any evidence with the court disputing the uniqueness of the Property.

111. Specific performance can be granted for a commercial property when the "property in question has a quality that cannot be readily duplicated elsewhere. This quality should be related to the proposed use of the property and be a quality that makes it particularly suitable for the purpose for which it was intended". A plaintiff is not required to prove the negative proposition that there is an absence of other, similar properties.[64]

112. There are several recent examples of Canadian courts ordering specific performance in relation to similar properties:

a) *124 BC Ltd.*: Justice Veenstra held that the plaintiff was entitled to specific performance of a contract for purchase of a development property in Nanaimo. Significant features of the property included its size, its proximity to amenities, the fact that its zoning promoted development of multi-family housing, and the fact that the plaintiff had planned for a multi-year, multi-phase development project. Further,

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[62] *2730453 Ont. Inc. v. 2380673 Ont. Inc.*, 2022 ONSC 6660 at para. 127
[63] *Lucas v. 1858793 Ontario Inc. (Howard Park)*, 2021 ONCA 52 at para. 71
[64] *Hundley v. Garnier*, 2011 BCSC 414 at para. 185 [*Hundley*], aff'd 2012 BCCA 199; *1247249 B.C. Ltd. v. 1098212 B.C. Ltd.*, 2022 BCSC 1230 at paras. 250-251 [*124 B.C. Ltd.*]

Justice Veenstra considered the fact that the plaintiff had invested in due diligence and pre-development work and was ready to move on to the next stages;

b) *2730453 Ont Inc. v 2380673 Ont Inc.*: the plaintiff was successful in seeking an order for specific performance of a contract for purchase of a development property. In awarding specific performance, the court noted the plaintiff's business plan for the property, as well as proximity to major thoroughfares and facilities;[65]

c) *Bellwoods Brewery Inc. v 1896841 Ontario Limited*: the plaintiff obtained an order for specific performance of a commercial lease agreement. The court noted that the commercial building in question was uniquely suited for the plaintiff's uses (establishing a brewery and brewery-related businesses), notwithstanding evidence of some 30 other properties in the area which were available for lease at the time;[66]

d) *M&M Homes Inc. v. 2088556 Ontario Inc.*: the plaintiff obtained an order for specific performance for a contract to buy a commercial development property, with the court noting (i) the plaintiff's efforts relating to the development (including engineering investigations) and (ii) a lack of evidence of any substitute properties;[67] and

e) *Hundley*: Justice Greyell held that a development property at 334 West 12th Avenue in Vancouver was sufficiently unique to warrant an order for specific performance, noting (i) its zoning for development, (ii) its proximity to a hospital and transit, and (iii) its location on a main street and in the "right" area. (The plaintiff ultimately abandoned her claim for specific performance, and was awarded damages in lieu of specific performance.) [68]

113. 573 submits that the cases surveyed above are analogous, and that the Property has qualities which cannot readily be duplicated elsewhere (there is no conflicting evidence from the Strata Corporation in the record). Given the lengthy history of negotiations for this specific property, and the resources expended by 573 to date, the uniqueness of the Property goes

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[65] *2730453 Ont Inc. v 2380673 Ont Inc.*, 2022 ONSC 6660 at paras. 129-143
[66] *Bellwoods Brewery Inc. v 1896841 Ontario Limited*, 2023 ONSC 2845 at paras. 74-85
[67] *M&M Homes Inc. v. 2088556 Ontario Inc.*, 2019 ONSC 5403 at paras. 73-78, aff'd 2022 ONCA 364; see also *Matthew Brady Self Storage Corp v. InStorage Limited Partnership*, 2013 ONSC 4345, aff'd 2014 ONCA 858
[68] *Hundley* at paras. 184-201

beyond its potential to provide 573 with an opportunity to profit. The evidence on this application – which is uncontradicted on the record before the court – shows that the Property and the nature of this transaction are unique:[69]

a) the Property was designated "High Density Mixed-Use" in the City of Burnaby's "High Density Mixed-Use Plan", meaning that it could likely be developed relatively quickly and a high-density development could be built that included both residential and commercial retail space;

b) the site is large (83,231 square feet), a size of lot which does not come onto the market often;

c) the site had an older strata building (as opposed to simply being a bare land site), which – barring the issues caused by the Strata Corporation in this case – would make it easier to obtain financing;

d) the Property is centrally located in Greater Vancouver, close to major roads and transit, including three Skytrain stations;

e) the large park located immediately to the south (Central Park) would provide residents of a new development with access to sport and recreation facilities, as well as excellent views (further, because of Central Park, it is less likely that the City of Burnaby will impose height restrictions on a new building);

f) 573 has been looking for comparable opportunities for quite some time, and had been specifically interested in the Property since 2020;

g) 573 has invested significant resources into development of the Property, including in obtaining a preliminary proposal, which could not be transferred to another property;

h) the parties have been in negotiations for the Property since early fall 2022 (albeit initially through a different company, Bellmont).

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[69] Affidavit #2 of Kush Bhatia at paras. 5-8 and Exhibit "A", Affidavit #1 of Matthew Cheng at paras. 8-9 and Exhibit "A"

114. Finally, while not determinative, this conclusion finds support in Justice Crerar's conclusions when dismissing the Strata Corporation's CPL application:[70]

> ... I am satisfied on the brief materials before me that there is a particular value in this particular Property that is sought by the purchaser through the purchase and sale agreement: specifically, the Kingsway property's location, and proximity to transit, roads, and a park. There are few similar market opportunities available in the area. The plaintiff makes a persuasive case supporting its claim in specific performance.

b) Inadequacy of Damages

115. On this factor, the court "must stay focused on the fundamental question: has the plaintiff shown that the property, rather than its monetary equivalent, better serves justice between the parties?"[71] Concerns about enforcement of damages should be taken into account.[72]

116. Any damages award would be significant; while current appraisal evidence is not before the court, the appraisal report commissioned for the Property, dated August 25, 2023, values the Property at $85 million.[73] Given a purchase price of $61 million, this would put the plaintiff's damages at $24 million. There is no evidence that the Strata Corporation itself has the resources to satisfy such an award, and enforcing the award against the individual strata lot owners would be costly and inefficient.

c) Behaviour of the Parties

117. Equitable relief, such as specific performance, may be refused if the party seeking relief has been guilty of misconduct in relation to the contract that party seeks to enforce.[74] Here, there is nothing in 573's conduct that would disentitle it to equitable relief. 573 has repeatedly attempted to complete the PSA but has been prevented from completing due to the Strata Corporation's various breaches.

118. In sum, the remedy of specific performance is appropriate here and should be ordered.

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[70] *CPL Reasons* at para. 37
[71] *Bellwoods Brewery Inc. v 1896841 Ontario Limited*, 2023 ONSC 2845 at para. 87
[72] *Sihota v. Soo*, 2010 BCSC 886 at para. 64
[73] Affidavit #2 of Kush Bhatia at para. 52 and Exhibit "R",
[74] *Bellwoods Brewery Inc. v 1896841 Ontario Limited*, 2023 ONSC 2845 at para. 90

*iv.* *Damages Should be Determined Later*

119. Should the court decline to grant specific performance, 573 seeks an order that damages be determined later.[75] A determination of 573's damages – which will include loss of bargain, the difference between the market value of the property and the purchase price – is best determined using expert appraisal evidence, and should be resolved at a later hearing.

120. A damages assessment will only be necessary if 573's claim to specific performance fails. It would not serve Rule 1-3 or the objectives of a Rule 9-7 application – including speedy and inexpensive dispute resolution – to require 573 to prove its damages now

**D. No Release of Deposit and No Discharge of CPL**

121. The Strata Corporation is not entitled to the deposit. To retain a deposit, a vendor must show that they themselves are not in breach of the purchase contract. For all the reasons above, the Strata Corporation is in breach of the PSA and is not entitled to 573's deposit.[76]

122. Further, 573 is not in breach of the obligation to release $100,000 from the total deposit of $3 million (s. 2.5 of the PSA), as suggested at paragraph 20 of the Strata Corporation's Notice of Application. Section 2.5 of the PSA required that the Strata Corporation provide an accounting of costs before the release of the $100,000. The Strata Corporation never provided this accounting, despite request, and therefore there was no obligation on 573 to release this sum of $100,000.

123. In the alternative, the Strata Corporation cannot claim the deposit if it had no authority to enter into the PSA on behalf of the Strata Lot Owners. As discussed above, the Strata Corporation never filed a certified copy of the Milman Order with the LTO, a precondition to obtaining title under the *SPA*. If the Strata Corporation had no authority to enter into the PSA, it has no contractual entitlement to claim the deposit.

124. On January 31, 2024, Justice Crerar heard and dismissed an application to discharge the CPL. Justice Crerar recognized that filing the CPL was an appropriate step and dismissed the application. Should the court order specific performance then there is no basis to revisit Justice

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[75] *Sihota v. Soo*, 2010 BCSC 886 at para. 67;*Trinden Enterprises Ltd. v. Ramsay et al*, 2004 BCSC 226 at paras. 50-51

[76] *375069 Alberta Ltd. v. 400411 Alberta Ltd.*, 2000 ABQB 29 at para. 22

Crerar's decision: the CPL ought to remain on title until the new completion date designated by the court, or as otherwise agreed by the parties.

**PART 4: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Tomomi Gohji made August 1, 2024.
2. Affidavit #1 of Kush Bhatia made January 29, 2024.
3. Affidavit #2 of Kush Bhatia made February 23, 2024.
4. Affidavit #1 of Michelle Child made February 23, 2024.
5. Affidavit #1 of Matthew Cheng made February 27, 2024.
6. Affidavit #2 of Alice Tsui made February 22, 2024.
7. The pleadings and proceedings filed herein.
8. Such further and other materials as counsel may advise and this Honourable Court may permit.

Dated: August 1, 2024

Counsel for the plaintiff and defendant by way of counter claim, 1038573 B.C. Ltd.
Craig Dennis, K.C. / Ray Power

This NOTICE OF APPLICATION is prepared by Dennis James Aitken LLP, solicitors for the plaintiff, whose place of business and address for service is 800-543 Granville Street, Vancouver, BC, V6C 1X8. Telephone: (604) 659-9479; Email: cdennis@djacounsel.com and rpower@djacounsel.com

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs ..... of Part 1 of this notice of application

[ ] with the following variations and additional terms:
.....
.....
.....

Date: ..... .....

Signature of [ ] Judge [ ] Associate Judge

## APPENDIX

**THIS APPLICATION INVOLVES THE FOLLOWING:**

[ ] discovery: comply with demand for documents

[ ] discovery: production of additional documents

[ ] other matters concerning document discovery

[ ] extend oral discovery

[ ] other matter concerning oral discovery

[ ] amend pleadings

[ ] add/change parties

[ ] summary judgment

[X] summary trial

[ ] service

[ ] mediation

[ ] adjournments

[ ] proceedings at trial

[ ] case plan orders: amend

[ ] case plan orders: other

[ ] experts

[ ] none of the above