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

AND:

1038573 B.C. LTD.

DEFENDANT BY WAY OF COUNTERCLAIM

NOTICE OF APPLICATION

Name of Applicant: The Owners, Strata Plan NW289 as represented by the liquidator, Crowe Mackay & Company Ltd. (the "**Liquidator**")

This application is brought without notice.

TAKE NOTICE that an application will be made by the Applicant to the presiding judge at the Courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia on Monday, the 25th day of November, 2024 at 9:45 a.m. for the orders set out in Part 1 below.

The Applicant estimates that the application will take 15 minutes.

☒ This matter is not within the jurisdiction of an Associate Judge.

Part 1: ORDERS SOUGHT

1. The Owners, Strata Plan NW289 ("**Cameray Gardens**"), as represented by the liquidator Crowe MacKay & Company Ltd. (the "**Liquidator**"), seek the following relief:

   (a) An order that MLT Aikins LLP hold in trust the funds, and all interest earned thereon, paid into trust by or on behalf of 1038573 B.C. Ltd. as the "Deposit" payable pursuant to the Purchase and Sale Agreement dated December 7, 2022 between 1038573 B.C. Ltd. and the Liquidator, pending written agreement between 1038573 B.C. Ltd. and the Liquidator or a court order;

   (b) Costs in any event; and

   (c) Such further and other relief as this Honourable Court may deem just.

Part 2: FACTUAL BASIS

A. Overview

2. This is an urgent, *ex parte* application for a preservation order that will enjoin MLT Aikins LLP from releasing a $2.9 million deposit (the "**Deposit**") to its client, 1038573 B.C. Ltd. (the "**Purchaser**").

3. The Deposit is held in trust by MLT Aikins LLP pursuant to a contract for the purchase and sale between the Liquidator and the Purchaser dated December 7, 2022 (the "**PSA**"). Under the PSA, the Purchaser agreed to buy 101 strata lots and associated common property of Cameray Gardens for a purchase price of $61 million.

4. The Purchaser refused to complete the PSA on December 15, 2023, the original completion date, and instead filed a claim alleging that Cameray Gardens was not in a

position to convey clear title. The Purchaser also filed a certificate of pending litigation ("**CPL**") against all 101 strata lots of Cameray Gardens. The CPL remains on title.

5. The Liquidator denied the Purchaser's claim and brought a counterclaim, alleging that the Purchaser's non-completion was a repudiation of the PSA.

6. By court order, the completion date for the PSA was re-set to November 26, 2024.

7. In the early morning hours of November 19, 2024—one week before the new completion date—a fire broke out at Cameray Gardens (the "**Fire**"). It is clear from surveillance footage that the Fire was intentionally set by unknown parties. The Fire severely damaged and rendered uninhabitable one of the two buildings comprising Cameray Gardens.

8. The Fire is the subject of an ongoing RCMP investigation.

9. On Friday, November 22, 2024 at 5:45 p.m., MLT Aikins LLP delivered a letter to the Liquidator's counsel purporting to terminate the PSA because of the Fire, and advising of their intention to release the Deposit, and all interest thereon, to the Purchaser. The Purchaser did not indicate it would, and has not offered to, discharge the CPL on title to the vast majority of the 101 strata units.

10. The Purchaser's notice of termination is ineffective. In circumstances such as these, the law effectively suspends the parties' obligations under the PSA for a reasonable period to be negotiated between the parties. During this period, neither party may take steps to determine the PSA until each has had a reasonable opportunity to assess their position.

11. MLT Aikins LLP's advice that they intend to release the Deposit to the Purchaser less than one week after the Fire will not allow the Liquidator reasonable time to assess its legal position in circumstances that are highly unusual, namely, where:

    (a) the Fire appears to have been intentionally set (one week prior to the PSA's completion date); and

    (b) there is some suggestion that the Purchaser had not been able to secure the financing it needed to complete the PSA.

12. In the six days since the Fire, the Liquidator's attention has been focused on the Cameray Gardens residents, many of whom have been effectively rendered homeless or are unable to access their units, vehicles, and belongings. The preservation order will provide the Liquidator with a reasonable period to assess its legal position, including its position as to the enforceability of the PSA or the Purchaser's ability to terminate in the circumstances.

B. The PSA

13. The Liquidator and the Purchaser entered into the PSA on or about December 7, 2022.

14. The PSA contains the following terms, among others:

    (a) The Purchaser was to pay the Deposit ($3 million) to its solicitors (MLT Aikins LLP) within three business days of the satisfaction of all conditions precedent (s. 2.3);

    (b) Upon the Liquidator obtaining a vote of the Cameray Gardens owners to approve the PSA, the sum of $100,000 would be released from the Deposit to the Liquidator (s. 2.5);

    (c) The closing documents were to be prepared by the Purchaser's solicitors (MLT Aikins LLP) or land surveyors at the Purchaser's sole cost and expense, and delivered to the Liquidator's solicitors prior to the completion date (s. 7.2);

    (d) In the event the Purchaser failed to complete the PSA, the remainder of the Deposit would be absolutely forfeited to the Liquidator and the PSA would be terminated forthwith upon such payment being made (s. 2.5(a)(ii)); and

    (e) Pending completion, the Liquidator will hold all insurance policies and any proceeds derived therefrom in trust for the Purchaser and in the event of loss or damage to the property occurring before such time by reason of fire, tempest, lightning, earthquake, flood or other act of God, explosion, riot, civil commotion, insurrection, war or otherwise howsoever, the Purchaser may, at its option, apply the amount of such insurance proceeds paid or payable to the Liquidator with respect thereto (and any applicable deductible amount) in reduction of the purchase price and complete the purchase of the property or terminate the PSA (s. 3.4).

15. By addenda dated January 27 and February 24, 2023, the Liquidator and the Purchaser agreed to extend the completion date to December 15, 2023.

C. Purchaser's failure to complete the PSA

16. On December 13, 2023, two days prior to the original completion date, the Purchaser took the position that the Liquidator had breached the PSA. The Purchaser did not convey the purchase price or provide the Liquidator with closing documents on the completion date. As a result, the PSA did not complete.

17. The Purchaser commenced this action on December 18, 2023, and filed a CPL against all 101 strata lots. On December 22, 2023, the Liquidator filed a response to civil claim and a counterclaim.

18. At all material times, the Liquidator denied the Purchaser's allegations and confirmed that it was ready, willing, and able to complete the PSA.

19. The Liquidator's position was (and remains) that the Purchaser did not complete the PSA not because of any defect in title, but as a result of its own failure to obtain financing, and its specific performance claim was a transparent effort to secure an extension to which the parties had not agreed.

Affidavit of Marshall MacLeod, filed January 30, 2024.

20. When examined for discovery, Kush Bhatia, the principal of the Purchaser, confirmed that the Purchaser did not have financing in place on December 15, 2023, and that the Purchaser was unable to complete the PSA for that reason.

Affidavit #1 of Azadeh Samimi, filed August 7, 2024, Ex. "A", pp. 48-49, Q569-570.

C. Lead-up to new completion date

21. On August 22, 2024, Justice McDonald ordered that the Liquidator and the Purchaser specifically perform the PSA, and set a new completion date of November 26, 2024. The parties consented to this relief.

22. In the course of negotiations leading up to this order, the Liquidator proposed a new completion date of November 19, 2024. However, the Purchaser specifically requested that the completion date be pushed out an additional week to November 26, 2024 and indicated that its representative may wish to access the common property at Cameray Gardens. No reason was given for these requests, to which the Liquidator agreed.

23. In the weeks leading up to the new completion date, the Liquidator and its counsel observed that the Purchaser's conduct and communications were unusual and inconsistent with those of a party to a transaction involving a property worth tens of millions of dollars. For example:

(a) Despite repeated request, the Purchaser refused to identify its lender's counsel;

(b) The Purchaser did not readily respond to inquiries regarding whether it would be assuming service contracts pertaining to Cameray Gardens, and only advised that it would not be terminating the service contracts after the Liquidator had issued instructions for their termination;

(c) The Purchaser did not provide closing documents (as required by the PSA) or comments on other draft forms that were necessary to effect the closing;

(d) The Purchaser did not obtain property tax searches and, after repeated request by the Liquidator, obtained property tax certificates from the City of Burnaby (saving approximately $8,000 in disbursements); and

(e) The Purchaser did not provide an invoice for its real estate agent's commission which was required to finalize adjustment, and its agent was the Purchaser's principal, Mr. Bhatia.

24. According to the Liquidator's real estate agent (Marshall MacLeod), Mr. Bhatia attended Cameray Gardens on October 25, 2024 with an unnamed "investor", and these individuals toured and took pictures of areas of the property including the electrical room. According to Mr. MacLeod (who is currently out of the country), Mr. Bhatia advised that financing was all in place and he was just negotiating final terms and rates.

Affidavit #3 of Azadeh Samimi, made November 25, 2024, Ex. "D".

C. The Fire

25. The Fire broke out in the early hours of November 19, 2024—one week before the new completion date. The Fire severely damaged one of the two residential buildings comprising Cameray Gardens. The other building was also evacuated.

26. Many Cameray Gardens residents were displaced as a result of the Fire, and some sought shelter at a local community centre.

27. The Fire has attracted significant media attention. Some journalists have noted the "suspicious" timing of the Fire, one week before the new completion date.

28. Several outlets have published surveillance footage, captured from a neighbouring property. The footage shows two individuals approaching the lobby of a Cameray Gardens building and breaking the glass door, then a large and bright explosion as the individuals turned and ran away. The clear implication of the footage is that the Fire was intentionally started.

C. Communications with the Purchaser post-Fire

29. On November 20, 2024, the Purchaser's litigation counsel advised that his client was "investigating" and "taking advice on next steps" in light of the Fire, and sought the Liquidator's position.

30. In response, the Liquidator advised that a closing on November 26, 2024 seemed unworkable, and proposed that the parties consider a short extension to the completion date to allow time to address the issues created by the Fire.

31. On Friday, November 22, 2024 at 5:45 p.m., the Purchaser's counsel delivered a letter to the Liquidator's counsel, advising as follows:

> Our client is exercising their unilateral right, in light of the recent fire, to terminate the purchase and sale agreement dated for reference December 7, 2022 (the "PSA") pursuant to section 3.4.
>
> Pursuant to Section 2.5(b)(iv), we will be releasing the remainder of the Deposit (as defined in the PSA) together with interest earned to our client.

32. On November 24, 2024, the Liquidator's counsel advised the Purchaser's counsel of its position on this application: that the Purchaser's notice of termination is ineffective and the parties are entitled to a reasonable period of time to assess their positions as a result of the Fire. The Liquidator's counsel further advised of its intention to bring this *ex parte* application.

Part 3: LEGAL BASIS

33. Rule 10-1 of the *Supreme Court Civil Rules* governs applications for orders preserving property. On such an application, the relevant considerations for the court are as follows:

(a) Is there a claim on the evidence and not just the pleadings to a proprietary interest in property?

(b) Is there some evidence to render reasonable the belief of the plaintiff that the property is threatened with disposition or transfer outside the jurisdiction?

(c) Is there a substantial question to be decided as the to plaintiff's entitlement to property?

(d) Does the balance of convenience favour granting the order?

Kepis & Pobe Financial Group Inc. v. Timis Corporation, 2018 BCCA 420 [***Kepis***] at para. 21, citing *Osooli-Talesh v. Emami*, 2003 BCSC 1924.

34. The test for a preservation order under Rule 10-1 differs from that of a *Mareva* injunction, as the latter requires a higher threshold of a "strong *prima facie* case" and is only granted in exceptional circumstances.

Kepis at para. 24.

35. In this case, the Liquidator has a proprietary interest in the Deposit. Under s. 2.5(a)(ii) of the PSA, the Deposit is to be paid to the Liquidator in the event "the Purchaser is in default of its obligation to complete the purchase of the Property".

36. There is a risk of dissipation of the Deposit if it paid out to the Purchaser at this time. The Purchaser is a numbered company with no apparent assets in this Province. In the event the Deposit is released to the Purchaser, but it is later determined that it ought to have been paid to the Liquidator, the Liquidator's prospects of recovering the Deposit are low—particularly if the funds are transferred to a different entity.

37. Without speculating as to the source of the Fire at this time, there is also a substantial question to be decided as to the Purchaser's entitlement to the Deposit. The law provides for a period of reasonable time for the parties to a purchase and sale agreement to assess their positions following fire damage to the subject property. In these circumstances, there is a duty of reasonableness on both parties.

Gill v. Zhang, 2016 BCSC 1464 at para. 87;
AK (007) GP Management Ltd. v. Wang Dong, 2023 BCSC 363 at para. 31.

38. The Liquidator's position is that the Purchaser's purported termination of the PSA is ineffective because:

(a) The Purchaser has not engaged in any discussions with the Liquidator about extending the completion date of the PSA such that each party can assess their position as a result of the fire; and

(b) The Liquidator and others have not had time to assess the cause of the Fire and the damage it caused and whether that impacts the enforceability of the PSA or the Purchaser's ability to terminate.

39. The effect of the preservation order sought would be to enforce the Liquidator's legal rights by providing it with a fair opportunity to assess its position before the Deposit is released. The balance of convenience strongly favours granting this relief. The Deposit has been held in trust since February 2023. There will be no significant inconvenience to the Purchaser if it is held in trust a bit longer in these unusual circumstances.

Part 4: MATERIAL TO BE RELIED ON

40. Affidavit #1 of Marshall MacLeod, filed January 30, 2024;

41. Affidavit #1 of Derek Lai, filed January 30, 2024;

42. Affidavit #3 of Derek Lai made November 25, 2024;

43. Affidavit #1 of Jas King, filed January 12, 2024;

44. Affidavit #2 of Azadeh Samimi, filed August 7, 2024;

45. Affidavit #3 of Azadeh Samimi, made November 25, 2024;

46. The pleadings and process filed herein; and

47. Such further and other material as counsel may advise and this Honourable Court may allow.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this Notice of Application, you must, within 5 business days after service of this Notice of Application or, if this application is brought under Rule 9-7, within 8 business days after service of this Notice of Application.

(a) file an Application Response in Form 33,

(b) file the original of every affidavit, and every other document, that

(i) you intend to refer to at the hearing of this application, and

(ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed Application Response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: November 25, 2024

Lawson Lundell LLP
Solicitors for the Applicant

This Notice of Application 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, email address: proberts@lawsonlundell.com, shannigan@lawsonlundell.com; telephone number: 604-685-3456.

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

The following information is provided for data collection purposes only and is of no legal effect.

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
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts
- ☒ none of the above

NO. 238586
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

1038573 B.C. LTD.

PLAINTIFF

AND:

THE OWNERS, STRATA PLAN NW289 et al.

DEFENDANTS

AND:

1038573 B.C. LTD.

DEFENDANT BY WAY OF COUNTERCLAIM

NOTICE OF APPLICATION

LAWSON LUNDELL LLP

Barristers & Solicitors
1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
V6C 3L2
Phone: (604) 685-3456
Attention: Peter J. Roberts, K.C. / Sarah B. Hannigan

39565.160191.SBH.26562194.1