



No. S-238586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

APPLICATION RESPONSE

Application Response of: the plaintiff and defendant by way of counterclaim, 1038573 B.C. Ltd. ("573")

THIS IS A RESPONSE TO the Notice of Application of the defendant, The Owners, Strata Plan NW289 (the “**Strata Corporation**”), filed January 30, 2024.

573 estimates that the application will take two days.

PART 1: ORDERS CONSENTED TO

Nil.

PART 2: ORDERS OPPOSED

573 opposes the granting of the orders set out in all of the paragraphs of Part 1 of the Notice of Application.

573 seeks an order that the application be dismissed, or alternatively that the court award specific performance of the PSA (defined below).

PART 3: ORDERS ON WHICH NO POSITION IS TAKEN

Nil.

PART 4: FACTUAL BASIS

A. Overview

1. The Strata Corporation applies, under Rule 9-7, to dismiss 573’s action for specific performance of an agreement for purchase and sale of a property. The Strata Corporation argues that the agreement is at an end (because the transaction did not close on the completion date), and that specific performance is unavailable.

2. Summary trial is not an appropriate route to resolve the dispute at this time. While summary trial may be appropriate in the future, it is at present premature – oral discoveries have not occurred and the Strata Corporation’s document production is incomplete. A viable timeline for summary trial is two to three months from now (as suggested by Justice Crerar, who gave judgment dismissing a previous application by the Strata Corporation). If the matter is determined summarily *now*, it will enable the Strata Corporation to avoid its discovery obligations, and will necessitate the chambers judge making findings of fact on an incomplete evidentiary record.

3. Alternatively, if the summary trial proceeds now, the Court ought to grant judgment in favour of 573 and award specific performance of the purchase contract. The Strata Corporation has breached the purchase contract for, among other reasons, failing to hold clear title on the completion date (and therefore, not being in a position to convey title free and clear to 573). 573 has elected to keep the purchase contract alive and has put forward a new completion date. Specific performance is the appropriate remedy to account for the unique features of the property.

B. Background

The Property

4. In or around early-fall of 2022, 573 and the Strata Corporation entered negotiations for the purchase and sale of 101 strata units located at 2925 Kingsway and 5715 Jersey Avenue, Burnaby (the “**Property**”).

5. The Property is unique, with special characteristics that include the following:

- a) the Property is designated “High Density Mixed-Use” in the City of Burnaby’s Metrotown Downtown Plan (the official community plan for the area). This designation lends to considerable opportunity for a high-density development including both residential and commercial retail space;
- b) the site contains an older strata building (as opposed to just being a bare land site), which generally (barring the issues described below), makes it easier to obtain financing;
- c) the Property is centrally located in Greater Vancouver, close to major roads and with convenient access to transit (including three Skytrain stations);
- d) a large park located immediately to the south (Central Park), would provide residents at a new development with access to recreation and sport facilities; and
- e) because of the proximity of the Property to Central Park, it is less likely that the City of Burnaby would impose height restrictions on a building.

6. 573 wanted to purchase the Property, and entered into a contract to purchase the Property, due to the unique features described above.

The Purchase and Sale Agreement

7. 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” – defined below) entered into a conditional agreement for the purchase and sale of the Property (the “**PSA**”).

8. In the fall of 2022, 573 received a rent roll from the Strata Corporation’s listing agent. The rent roll showed that 29 strata units were tenanted (the “**Existing Leases**”). 573 has not received copies of the Existing Leases (nor of any leases) and has not received details of their terms.

9. The PSA provided for a completion date of October 25, 2023, later extended by agreement to December 15, 2023 (the “**Completion Date**”).

10. Under the PSA, 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)):

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; [Emphasis added.]

11. 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".

12. 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
- b) that to the best of the Strata Corporation's knowledge, there were no leases other than the Existing Leases (s. 4.2(m)).

13. The Strata Corporation also represented and warranted (at s. 4.2(c) of the PSA) that there was no claim against the Strata Corporation in respect of the Property:

(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; [Emphasis added.]

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

(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;

15. 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) (emphasis added)).

16. On May 20, 2023, the Strata Corporation held a special general meeting at which a resolution was proposed to approve the PSA (the “**Resolution**”). The Resolution achieved over 75 percent support from the strata unitholders (the “**Strata Lot Owners**”) and was therefore approved.

17. At all material times, 573 and its advisors worked diligently towards closing on the PSA, including by negotiating terms of financing and property insurance.

Breaches of the PSA

18. In or around the fall of 2023, 573 learned the following in respect of the Property:

- a) there is an outstanding claim by Community Fire Prevention Ltd. against the Strata Corporation and the strata unitholders, as they then were (BC Supreme Court Vancouver Registry Action No. S-204200, *i.e.*, the “**Community Fire Claim**”);
- b) there were at least 9 *additional* tenanted units, beyond the 29 units tenanted though the Existing Leases (which were therefore not Permitted Encumbrances); and
- c) there were municipal tax arrears on 13 different units, such that those units were subject to be sold by the City of Burnaby.

19. To date, the Strata Corporation (and its agents) have not provided copies of any leases to 573 (either Existing Leases or the additional, unpermitted leases).

20. As a result of the Strata Corporation’s failure to provide 573 with all copies of leases and tenant information, 573 was unable to secure financing or property insurance prior to the Completion Date.

C. Events Prior to Closing

21. On December 7, 2023, 573’s litigation counsel wrote to the Strata Corporation’s solicitor to confirm that the Strata Corporation would be in a position to provide clear title on the Completion Date. Correspondence ensued between counsel, and the requested confirmation was not provided.

22. 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. 573 did not accept that repudiation and designated March 15, 2024, as the new completion date under the PSA.

23. On December 19, 2023, the Strata Corporation wrote to 573, taking the position that 573 had repudiated the PSA. The Strata Corporation purported to accept that alleged repudiation, ostensibly ending the PSA.

D. History of Proceedings

24. On December 18, 2023, the notice of civil claim was filed. On that date, 573 also registered a Certificate of Pending Litigation (the "**CPL**") against title to all 101 strata lots as well as the common property of the Strata Corporation.

25. On December 22, 2023, the Strata Corporation filed a response to civil claim and counterclaim.

26. On January 30, 2024, the Strata Corporation filed this application, seeking judgment under Rule 9-7 and estimating that the application would take 60 minutes to be determined.

27. On January 31, 2024, a hearing was held before Justice Crerar in respect of an application by the Strata Corporation to strike the CPL on the basis of hardship (the "**CPL Hearing**"). Justice Crerar dismissed the Strata Corporation's application.

28. On February 14, 2024, the Strata Corporation issued a preliminary list of documents.

29. On February 20, 2024, 573 issued a request for further document production by the Strata Corporation.

30. On February 20, 2024, 573 served an appointment to examine a representative of the Strata Corporation for discovery (despite requests dating back to February 6, 2024, the Strata Corporation had failed to put forward a representative of its own volition).

31. On February 21, 2024, 573 served a notice to admit on the Strata Corporation. The notice to admit seeks admission of, among other things, the existence of the additional, unpermitted leases.

32. On February 21, 2024, 573 issued its list of documents.

33. On February 22, 2024, 573 learned through its registered and records office of a foreclosure proceeding filed February 8, 2024, by the mortgagee for two of the Property's strata units, seeking to foreclose on those units.

34. To date, no examinations for discovery have been held.

PART 5: LEGAL BASIS

35. The Strata Corporation's application ought to be dismissed as premature, as it (i) invites the chambers judge to make findings on an inadequate record, and (ii) prejudices 573's ability to develop its case.

36. Alternatively, if the summary trial proceeds, the Court ought to grant judgment in favour of 573 and award specific performance of the PSA. As explained below, the Strata Corporation was not "ready, willing and able" to complete the PSA, because it was itself in breach of the PSA's terms. 573 has elected to keep the PSA alive, and specific performance is the appropriate remedy to account for the unique features of the Property.

A. The Application is Premature

37. The matter is not suitable for determination by summary trial at this time. There are numerous conflicts and unresolved issues on the evidence, including the number of unpermitted leases and their terms. Moreover, the action is still in its infancy, and there would be prejudice to 573 if the matter were adjudicated before the completion of document and oral discoveries (which may shed light on and resolve the existing uncertainties in the evidence).

38. A summary trial decision can be made under Rule 9-7 when the court is satisfied that (i) it has sufficient facts to decide the matter, (ii) the process is adequate in the circumstances of the case, and (iii) given the savings to the parties in terms of costs, and to the adjudicative process, the intent of speedy and inexpensive dispute resolution is achieved.

King v. Malakpour, 2015 BCSC 2272 at para. 73

39. The Court may look to a variety of factors when determining if a summary trial is appropriate. In this matter, the determinative factors include (i) the inability of the Court to resolve the issues on the present evidentiary record and (ii) prejudice to 573 if the matter were decided without oral discoveries and (adequate) document production.

Gichuru v. Pallai, 2013 BCCA 60 at paras. 30-31

The Issues Cannot be Determined on the Evidence

40. The existing factual record does not enable the Court to resolve the essential issues in the claim. Among other issues, the following matters are unresolved:

- a) **Leases:** the number of leased units, the terms of such leases, and the number of leases in the Strata Corporation's possession which have not been provided to 573;
- b) **Tax arrears:** whether the tax sale proceedings by the City of Burnaby have been resolved;

- c) **Sale of units:** the number of units sold after the Execution Date and the terms of such sales (none of which have been disclosed by the Strata Corporation to 573);
- d) **Foreclosure proceedings:** whether there are, or were, any units subject to foreclosure proceedings (which would lead to yet another mark on the Strata Corporation's ability to convey clear title); and
- e) **Closing procedures:** whether the Strata Corporation has failed to provide an accounting as required by s. 2.5 of the PSA.

41. It also bears noting that the Strata Corporation appears to be effectively controlled by two individuals – Kulwant Chauhan and David Grewal – whose respective holding companies own almost half the units in the Property (as shown at Appendix “A”) and may have recently purchased more (not shown in Appendix “A”). The extent to which these individuals and their holding companies have purchased or leased additional units after the Execution Date – in breach of the PSA – is an issue that merits further exploration.

Prejudice Arises to 573 if the Matter is Determined on this Application

42. Prejudice arises to 573 if the Court determines the matter summarily on this application. The action is in its infancy – oral discoveries have not occurred, and the Strata Corporation has not yet completed its document production. Without the benefit of these procedures, 573 is prevented from exploring and obtaining evidence on the essential issues described above.

43. At the CPL Hearing, Justice Crerar posited a two- to three-month timeline to summary trial, with which 573 agrees. This hurried application (set in regular chambers, with a 60-minute time estimate) is an attempt to short-circuit the plaintiff's discovery rights, which the plaintiff diligently has pursued by delivering (i) its own list of documents, (ii) a request for further production by the Strata Corporation, and (iii) an appointment to conduct an examination for discovery of a representative of the Strata Corporation.

Tassone v. Cardinal, 2014 BCCA 149 at para. 37; *Mayer v. Osborne Contracting Ltd.*, 2012 BCCA 77 at paras. 68-84; *Central Mountain Air Ltd. v. Prince George (City)*, 2012 BCSC 1221 at paras. 21-23

44. Ultimately, it would not be appropriate to resolve these issues by way of summary trial on the limited evidentiary record, absent oral discoveries, adequate document production by the Strata Corporation, and sufficient court time. There is evidence on this application, which can be considered on the question of suitability, if not on the merits, that there are matters which would benefit from discovery.

B. Strata Corporation was not “Ready, Willing and Able” to Complete the PSA

45. In the alternative, if the application proceeds now, judgment ought to be granted in favour of 573. The Strata Corporation was not “ready, willing and able” to deliver clear title on the Completion Date. Accordingly, because neither party was in a position to complete and 573 has

designated a new completion date, the PSA remains in effect. Given the uniqueness of the Property, specific performance is an appropriate remedy.

Toor v. Dhillon, 2020 BCCA 137 at paras. 33-34 [*Toor*]

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

Toor at paras. 46 and 74; *Norfolk v. Aikens* (1989), 41 BCLR (2d) 41 at 8 (CA); *Basra v. Carhoun* (1993) 82 BCLR (2d) 71 at para. 97 (CA); *Crown Fortune International Investment Group Inc. v. Bonnefield Canada Farmland LP III*, 2023 BCCA 441 at paras. 65-66

47. Here, s. 4.2(a) of the PSA obligated the Strata Corporation (and the Liquidator) to convey “good and marketable title” to the Property, “free and clear of all liens, claims, charges, encumbrances... other than the Permitted Encumbrances” (emphasis added). For at least four reasons set out below, the Strata Corporation was not on December 15, 2023, in a position to convey “free and clear” or “good and marketable” title in accordance with the PSA. Accordingly, the Strata Corporation was not ready, willing and able to complete.

The Community Fire Claim

48. The 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)). Despite this, the Property was (and remains) subject to an ongoing claim – namely, the Community Fire Claim.

49. 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). At paragraph 45 of their 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.

50. 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 Corporations ability to perform [its] obligation” under the PSA – including the obligation to deliver clear title (in breach of s. 4.2(c)). In addition to 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 pursuant to 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 Property units 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”.

51. The relief set out above encompasses *in rem* elements that bind the Property. Firstly, a claim of builder's lien is a statutory lien that creates an interest in land. A Certificate of Pending Litigation may only be registered by those claiming “an interest in land” or where another enactment gives that person “a right of action in respect of land”. If the plaintiff in the Community Fire Claim is successful in obtaining the relief it pleads, it will have an interest in the Property (thus impeding 573's right to clear title).

BSSD Excavating & Landscaping Ltd. v. Green Blvd. Construction Ltd., 2023 BCSC 1685 at para. 55; *Land Title Act*, RSBC 1996, c. 250, s. 215(1)

52. The Strata Corporation has also recognized that the Community Fire Claim places it in breach of the PSA, by suggesting a mechanism not contemplated by the PSA. Namely, on December 12, 2023, the Strata Corporation's counsel proposed that the Liquidator would assume conduct of the Community Fire Claim and would “withhold sufficient funds from the sale proceeds to fund the ongoing defence of the claim and pay any judgment that may be awarded”. This proposal is a recognition that the Community Fire Claim was likely to continue after the completion of the PSA and bear on the Property (indeed, the action is set for a 10-day trial in April 2025). Thus, it is an admission that the Strata Corporation was not in a position to deliver title free of “claims” in accordance with s. 4.2(a) of the PSA.

Breaches of the Lease Terms

53. *Second*, the Strata Corporation has breached the terms of the PSA concerning leases. Firstly, the Strata Corporation has allowed the leasing of strata lots over and beyond the Existing Leases, in breach of ss. 4.2(a) and (m) of the PSA. Relatedly, the Strata Corporation has also breached terms requiring it to provide details of lease terms and copies of the leases in its possession (ss. 4.1(b)(iii) and 4.2(p) of the PSA).

Unpermitted Leases

54. As set out above, the PSA required the Strata Corporation to deliver title free and clear of all “all liens, claims, charges, encumbrances and legal notations other than the Permitted Encumbrances” (s. 4.2(a)). “Permitted Encumbrances” includes the “Existing Leases” and “replacement Leases entered into by the Strata Lot Owners on similar terms, between the Execution Date and the Completion Date” (Sched. A).

55. Prior to the Execution Date, the Strata Corporation's listing agent disclosed that there were 29 leased units (*i.e.*, the Existing Leases). In the PSA, the Strata Corporation represented that, “to the best of [its] knowledge, there were no leases other than the Existing Leases”. Yet, as of October 2023, there were at least 9 further tenancies in place. Details with respect to such leases have not been forthcoming.

56. Despite the assertion of the Strata Corporation (at paragraph 48 of their Notice of Application), the unpermitted leases are not Permitted Encumbrances. The term “Replacement Leases” connotes replacement of the 29 Existing Leases “on similar terms” (Sched. A). It would be contrary to the plain meaning of the term “replacement” to interpret it as permitting the renting of units in the Property over and above replacement of the Existing Leases.

Oxford English Dictionary, “replacement” (online)

57. 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))

Breach of the Requirement to Deliver Leases and Disclose Material Facts

58. Moreover, 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, and has been informed that there are oral leases in place beyond the 9 additional written leases. The Strata Corporation’s actions constitute, at minimum, breaches of s. 4(1)(b)(iii) (the obligation to deliver copies of leases in its possession to 573) and s. 4.2(p) (the obligation to disclose “material fact[s] and information” in respect of the Property (s. 4.2(p)).

59. The above breaches have impeded 573’s ability to obtain financing for the purchase, as lenders require details of the leases to advance funds. As a result, it is the Strata Corporation’s breaches that have led to 573’s non-performance.

Walker v. Jones, 2008 CanLII 47725 at 61 (ONSC); *Toor* at para. 87

The Tax Arrears

60. *Third*, the Strata Corporation has breached the PSA (i) by failing to disclose the potential that the City of Burnaby would force the sale of several strata units in order to pay outstanding tax bills on those units; and (ii) by failing to provide details with respect to those potential sales.

61. In or around October 2023, 573 learned of the potential tax sales from a third-party. On December 12, 2023, counsel for the Strata Corporation advised 573’s counsel that the tax notices had been discharged after the claims by the City of Burnaby had been resolved. Neither the Strata Corporation (nor their counsel) has provided confirmation and documents evidencing any such resolutions, despite demand from 573’s counsel on December 7 and 13, 2023.

62. The Strata Corporation’s failure to disclose tax information in respect of municipal tax arrears is a breach of the Strata Corporation’s obligation to provide material facts and information in respect of the Property, in accordance with s. 4.1(p). It also adds further uncertainty in respect of the Strata Corporation’s ability to convey clear title in accordance with s. 4.2(a) of the PSA.

The Unpermitted Sales

63. *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. This is 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.

64. More fundamentally, these sales call into question the entire validity of the sale process, and raise further questions regarding 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 the PSA. Where 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 was not persuaded by the Strata Corporation that the PSA permitted sales after the Execution Date and prior to closing.

C. Specific Performance is an Appropriate Remedy

65. If the application proceeds to summary trial, specific performance ought to be granted. When *both* parties are unable to complete the contract on the completion date, there is an implied waiver of the time of the essence provision and 573 need only show it will be ready, willing, and able to complete on the date to be set by the court if specific performance is granted.

Toor at paras. 33 – 34 and 79, citing *Basra and Shaw Industries Ltd. v. Greenland Enterprises Ltd.* (1991), 54 B.C.L.R. (2d) 264 (C.A.)

66. Neither party was able to complete the PSA. As a result of the above breaches, the Strata Corporation was not in a position to convey clear title to 573. Resultingly, 573 could not complete because the Strata Corporation’s breaches prevented it from obtaining the necessary financing and insurance.

67. Specific performance can be granted for 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.

Hundley v. Garnier, 2011 BCSC 414 at para. 185 (citing *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2003), 63 OR (3d) 304 (C.A.)), *aff’d* 2012 BCCA 199; *1247249 B.C. Ltd. v. 1098212 B.C. Ltd.*, 2022 BCSC 1230 at paras. 250-251

68. The Property is unique such that specific performance should be ordered, as detailed in the affidavits adduced on behalf of 573. In overview:

- a) the Property has substantial development potential, given the zoning allowance for redevelopment (and the age of the Property and buildings thereon);
- b) the Property is uniquely located, adjacent to Burnaby's Central Park and close to transit, major thoroughfares, and centrally located within Greater Vancouver;
- c) 573 has worked towards development of the Property, including by retaining an architect to prepare plans of a new building and liaise with the City of Burnaby; and
- d) 573 is not aware of any similar properties on the market that would achieve its particular development objectives.

69. Specific performance is an appropriate remedy. 573 says that the Court should make the orders set out in Part 2 of 573's notice of civil claim: (i) an order that the Strata Corporation take and do all steps necessary to complete the sale of the Property to 573; (ii) an order for specific performance on a date to be designated by the Court (being not less than 90 days after the Strata Corporation provides the documents sought by 573); and costs.

D. Discharge of CPL

70. 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.

71. There is no basis to revisit on this application Justice Crerar's decision in the Strata Corporation's prior application (all the more so given the recent filing of a foreclosure proceeding against two of the units, which demonstrates the necessity of the CPL to preserve 573's interest in the Property). If the orders sought by the Strata Corporation at paragraphs 1(a) and (c) of its application are dismissed, then there is no independent basis to cancel the CPL. 573's claim for specific performance will necessarily continue and on that basis, the CPL is valid and enforceable.

E. Release of Deposit

72. 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.

375069 Alberta Ltd. v. 400411 Alberta Ltd., 2000 ABQB 29 at para. 22

73. 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 prior to the \$100,000 being released. The Strata Corporation never provided this

accounting, despite request, and therefore there was no obligation on 573 to release this sum of \$100,000.

F. The Application Cannot be Heard in Regular Chambers

74. Further, the Strata Corporations's application – set for one hour – relies on four affidavits, comprising more than two hundred pages of evidence. In responding, 573 has been forced to put forward a number of affidavits and many hundred pages of evidence.

75. This application is a matter for a hearing in long chambers (of at least two days). It is not something capable of being heard in chambers in one hour (something acknowledged by Justice Crerar at the hearing of the Strata Corporation's CPL discharge application, who expressed doubt that a summary trial in this action could be heard in less than two hours).



PART 6: MATERIAL TO BE RELIED ON

1. Affidavit #2 of Kush Bhatia.
2. Affidavit #1 of Kush Bhatia.
3. Affidavit #1 of Michelle Child.
4. Affidavit #1 of Kevin Dhesi.
5. Affidavit #1 of Matthew Cheng.
6. Affidavit #2 of Alice Tsui.
7. The pleadings and proceedings filed herein.
8. Such other material as counsel for the plaintiff may advise and this Court may permit.

573 has filed in this proceeding a document that contains 573's address for service.

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

Dated: February 23, 2024

 Lawyer for 1038573 B.C. Ltd.
 Craig P. Dennis, K.C. / Ray Power

THIS APPLICATION RESPONSE is prepared and delivered by Craig P. Dennis, K.C. and Ray Power, of the firm Dennis James Aitken LLP, 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

APPENDIX "A" – OWNERS OF MULTIPLE UNITS IN PROPERTY

	COMPANY NAME	DIRECTOR INFORMATION	LOTS OWNED AT CAMERAY GARDENS PROPERTY
GREWAL HOLDING COMPANIES	1184416 B.C. Ltd.	Devinder Singh Grewal	12 52 58 67 75
	1184414 B.C. Ltd.	Devinder Singh Grewal	29 44
	1184413 B.C. Ltd.	Devinder Singh Grewal Sarbjit Bajwa	37 47
			7
		David (Devinder) Grewal Helen Chan Sun	10 11 30 51 57 70
			TOTAL 16
CHAUHAN HOLDING COMPANIES	1352962 B.C. Ltd.	Kulwant Chauhan	55 69
			3
			6
			14
			24
			25
		26	
		28	
		34	
		39	
		41	
		42	
		43	
		45	

			<p>48 53 54 60 61 73 76 78 82 87 88 89 90 91 92 97</p>
			<p>TOTAL 31</p>
<p>CHAO HOLDING COMPANIES</p>	<p>1237765 B.C. Ltd.</p>	<p>Zhang Chao</p>	<p>23 36</p>
			<p>TOTAL 2</p>