



No. S217956
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE STRATA PROPERTY ACT, S.B.C. 1998, C.43

and

IN THE MATTER OF THE APPLICATION FOR THE WIND-UP OF THE OWNERS,
STRATA PLAN LMS 992

BETWEEN:

~~THE OWNERS, STRATA PLAN LMS 992~~

PETITIONERS

AND:

~~KENNETH KWOK YING CHAN, YUEN MEI LIN CHAN, CHE WING CHAN, YAT SIN
WONG, ARDESHIR SOLTANI RAZAGH SARAB, 0837963 B.C. LTD~~

RESPONDENTS

AMENDED RESPONSE TO PETITION

Filed by: Kenneth Kwok Ying Chan, Yuen Mei Lin Chan ~~WEI Lin Yuen Chan~~, Che Wing Chan, Yat Sin Wong, Ardeshir Soltani Razagh Sarab, 0837963 B.C. Ltd. (the "Respondents")

THIS IS A RESPONSE TO the petition filed September 2, 2021

Part 1: ORDERS CONSENTED TO

The Respondents consent to the granting of the orders set out in the following paragraphs of Part 1 of the petition: **Nil**

Part 2: ORDERS OPPOSED

The Respondents oppose the granting of the orders set out in the following paragraphs of Part 1 of the petition: **Paragraphs 1-15**

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The Respondents oppose the granting of the orders set out in the following paragraphs of Part 1 of the petition: **Paragraphs 1-15**

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Respondents take no position on the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: Nil.

Part 4: FACTUAL BASIS

1. The Petitioner, The Owners, Strata Plan LMS 992 (the "Strata Corporation"), is a strata corporation duly subsisting under the laws of British Columbia. It is commonly referred to as "Joyce Place".
2. The Petition Respondents ~~Kenneth Kwok Ying Chan and Wei Lin Yuen Chan~~ Yuen Mei Lin Chan are the registered owners of strata lot 9 ("SL9"). The civic address of SL9 is 3378 Vanness Avenue, Vancouver, BC V5R 5A8.
3. The Petition Respondents Che Wing Chan and Yat Sin Wong are the registered owners of strata lot 10 ("SL10"). The civic address of SL10 is 3382 Vanness Avenue, Vancouver, BC V5R 5A8.
4. The Petition Respondent 0837963 B.C. Ltd. ("083 B.C. Ltd.") is the registered owner of strata lot 11 ("SL11"). The Petition Respondent Ardeshir Soltani Razagh Sarab is the sole director of 083 B.C. Ltd. The civic address for SL11 is 3384 Vanness Avenue, Vancouver, BC V5R 5A8.
5. The Strata Corporation consists of 63 units, 3 non-residential units, 52 apartments and 8 townhouses. It contains two separate buildings: one high-rise tower where all of the non-residential and apartment units are located (the "Tower") and one separate low-rise building where all of the townhouses are located (the "Townhouses").
6. The strata plan indicates that all of the strata lots are residential. The Schedule of Interest on Destruction also does not differentiate between the strata lots. However, for all intents and purposes SL9, SL10 and SL 11 (the "Commercial Units") are commercial units.
7. The Commercial Units have been treated as such since the Strata Corporation was formed in 1993. They occupy three separate ground floor units in the high-rise tower. They each have glass store fronts, no bedrooms and have their own civic addresses. Conversely, the residential apartments are all designed to be apartment-style homes and are all located within 3380 Vanness Avenue, Vancouver, BC, V5R 5A8.
8. The Respondents ~~Mr. K. Chan and Ms. W. Chan~~ Ms. Y. Chan (the "SL9 Owners") purchased SL9 in 1993 as a long-term investment. The SL9 Owners are 70 years old and retired. They currently lease SL9 to a hair salon business for \$3473.40 a

month. They rely on the rental income to fund their retirement. The lease agreement for SL9 will not expire until mid-2022 at the earliest.

9. The Respondents Mr. C. Chan and Ms. Y. Wong (the "SL10 Owners") purchased SL10 in 1993 as a long-term investment. They currently lease SL10 to the Respondent Sarab and his brother, Golam Reza Solatani Rezagh Sarab, for \$4400 a month.
10. The SL10 Owners are both over 70 years old and retired. They rely on the rental income from SL10 to fund their retirement. The lease agreement for SL10 will not expire until June 2024 at the earliest.
11. The Respondent Sarab (the "SL11 Owner") purchased SL11 through 083 B.C. Ltd. in 2008 as a long-term investment. He currently owns and operates a restaurant named Donair Land out of SL11. He generates over \$260,000 a year in gross revenue from Donair Land.
12. The SL11 Owner has also operated a grocery store out of SL10 named Joyce Grocery with his brother for over 20 years. Joyce Grocery generates over \$679,000 in gross revenue a year.
13. The SL11 Owner is 50 years old and married with two adolescent children. He relies on the revenues from both Donair Land and Joyce Grocery to support his family.
14. In or around January 2017 it became apparent that the Townhouses were in need of urgent repairs.
15. In or around April 2018, the Strata Corporation owners (the "Owners") approved a special assessment of \$40,000 for urgent temporary shoring of the Townhouses. However, the temporary shoring was not completed until May 2021.
16. In or around January 28, 2019, the Strata Council held a meeting where it acknowledged that "regardless if the strata corporation winds up, the strata corporation is responsible to maintain and ensure the structure is safe and [there is] no exposure to liability".
17. In or around November 2019, it was discovered that the Strata Corporation's property manager had submitted false bids in relation to repairs that were needed on the Townhouses. The property manager seemingly did so in an attempt to have the Strata Corporation hire a company he was affiliated with.
18. On December 11, 2019, the Strata Corporation entered a purchase and sale agreement with Intracorp Acquisition Co. Ltd. ("Intracorp") for \$41,400,000. (the "~~December 2019 PSA~~").

19. On May 13, 2020, the Strata Council held an SGM asking the Owners to vote simultaneously on resolutions to (1) approve a Strata Corporation wind up and (2) approve a \$1,800,000 special assessment for repairs on the Townhouses. Both resolutions were defeated.
20. On or around July 11, 2020 another SGM was held (the "July 2020 SGM") where the Owners approved a \$1,800,000 special assessment for long term repairs on the Townhouses. The July 2020 SGM meeting minutes provided a detailed schedule for the repairs, which indicated they would be complete by September 2021. However, to date, none of the associated repairs have taken place.
21. On or around January 11, 2021 the Strata Corporation entered a second purchase and sale agreement with Intracorp for \$41,400,000 (the "January 2021 PSA"). The January 2021 PSA does not provide the Respondents with rights of first refusal or beneficial leasing options after the January 2021 PSA completion date. It also does not include an indemnity clause to protect the Respondents with respect to their commercial leases.
22. Under the January 2021 PSA, the Respondents will each receive over \$100,000 less than the assessed value of the Commercial Units:

	<u>Assessed Value as of July 1, 2020</u>	<u>Assessed Value as of July 2021</u>	<u>January 2021 PSA Sale Proceeds</u>	<u>Loss Based on Assessed Values</u>
SL9	<u>\$605,600</u>	<u>\$659,900</u>	<u>\$489,863.68</u>	<u>\$115,736.32 - \$170.036</u>
SL10	<u>\$818,000</u>	<u>\$892,000</u>	<u>\$675,192.33</u>	<u>\$142,807.67 - \$216,807.67</u>
SL11	<u>\$814,000</u>	<u>\$887,000</u>	<u>\$691,955.73</u>	<u>\$122,044.27 - \$195,044.27</u>

23. On or around May 18, 2021, the SL9 Owners and the SL10 Owners listed SL9 and SL10 for sale with Patsy Hui as the listing agent. On the advice of Ms. Hui, SL9 was listed for \$1,100,00 and SL10 was listed for \$1,598,000.
24. By letter dated May 27, 2021 (the "May 2021 Letter") strata council for the Strata Corporation (the "Strata Council") notified the Owners that a special general meeting would be held on July 7, 2021 (the "July 2021 SGM"). The May 2021 Letter stated that at the July 2021 SGM, the Owners would be asked to vote on a number of resolutions including to:
- a) approve the cancellation of the strata plan and the appointment of a liquidator (the "Wind Up Resolution"); and
 - b) approve the sale of the Strata Corporation to Intracorp.
25. The May 2021 Letter included the following statements:

- a) "...if too many owners attend the meeting in person, owners will be putting themselves and others at risk and the Strata Corporation will not proceed with the meeting"; and
- b) "...there will be no way to join the meeting virtually."

26. The May 2021 Letter further included information on the sales of comparable residential units in the neighbourhood. No information was provided for the sales of comparable commercial units in the neighbourhood or otherwise.

27. On or around June 15, 2021 the SL11 Owner listed SL11 for sale with Reza (Ray) Kodabash as the listing agent. Under the advice of Mr. Kodabash, SL11 was listed for \$1,680,000.

28. On or around June 15, 2021 the SL9 Owners entered a purchased and sale agreement with Westcoast Sunset Holdings Corporation ("Westcoast Sunset") who offered to purchase the unit at the full asking price of \$1,100,000. The SL9 Purchase and Sale Agreement is subject to the city of Vancouver approving permits to allow West Coast Sunset to use SL9 as a retail cannabis store.

29. On or around August 20, 2021 the SL9 Owners requested permission from the Strata Council to post a City permit application sign in the Strata Corporation's common property. The Strata Council President responded by email dated August 26, 2021 rejecting the request stating that:

"I did research online and step 1 here in this City of Vancouver guide suggests that a cannabis store must be at least 300m away from a school..."

I'm fairly certain that we are less than 300m away from St. Mary's School, which is about 100m away from our tower, and there is a high probability that this license will not even get approved by the City of Vancouver.

Based on this information, council does not approve the permit signage to be displayed in common area. If you have information to suggest otherwise, please send it over and council will review."

30. On January 26, 2022, the Strata Council President emailed a representative of the City of Vancouver's Board of Variance, outlining numerous reasons why in his opinion the City Permit Application for SL9 should not be approved.

31. To date the permits have not been approved by the City. The SL9 Owners have agreed to numerous extensions on the condition removal date for the SL9 Purchase and Sale Agreement.

32. On or about July 10, 2021, the SL11 Owner entered a purchase and sale agreement for SL11 for \$1,280,000. However, in September 2021, the purchase and sale agreement was terminated.

33. On or about November 9, 2021, the SL11 Owner received a written offer for SL11 for \$1,450,000 from KHC Three Holdings Ltd ("KHC"). However, when KHC was advised of the Wind Up Resolution it pulled the offer.
34. On or about February 24, 2022, the Strata Corporation had its annual general meeting. At the meeting, the Strata Council confirmed that it had allowed the Strata Corporation's insurance policy to lapse. The Strata Council further indicated that its previous insurance policy only covered issues of general liability and did not include coverage for damage to common property.
35. To date, the Strata Council and its members have commissioned the following reports on the status of the Tower and the Townhouses:
- a) a building envelope condition assessment of MGH Consulting Inc. ("MGH") dated January 3, 2017;
 - b) a structural assessment of MGH, dated October 31, 2018;
 - c) a structural opinion review of Apex Building Science Inc, dated April 17, 2019;
 - d) a remediation report of Axiom Builders, dated January 4, 2020;
 - e) a targeted structural assessment of RDH Building Science Inc., dated June 25, 2021.
36. There is currently at least \$1,500,000 in the Strata Corporation's contingency reserve fund (the "CRF").
37. The Respondents remain ready and willing to sell the Commercial Units for fair market value.

Part 5: LEGAL BASIS

The Petition Respondents rely on:

- a) Rules 13-5, 14-1 and 16-1 of the *Supreme Court Civil Rules, as amended*;
- b) Sections 31, 164, 276-278.1 of the *Strata Property Act*, SBC 1998, c. 43, as amended; and
- c) Sections 319-323 of the *Business Corporations Act*, SBC 2002, c. 57, as amended.

"Voluntary" Wind Up

38. As of July 29, 2016, Strata Corporations in B.C. no longer require a unanimous vote to proceed with a strata wind up under section 277 of the *Strata Property Act* [the "SPA"].
39. Section 277 of the SPA now only requires an 80% vote by all eligible voters at an annual or special general meeting. However, in approving the amendments to s. 277 of the SPA, the B.C. legislature recognized that up to 20% of owners in a strata

could face unreasonable interference with their rights as property owners. This is supported by the British Columbia Law Institute's (the "BCLI") 2015 Report on Terminating a Strata, which the B.C. Legislature relied on when implementing the changes to the SPA. The BCLI's report expressly acknowledged that requiring only an 80% resolution to wind up a strata would require the SPA to "grapple with how to protect any owners...who disagree with a supermajority decision to terminate a strata."

British Columbia Law Institute, *Report on Terminating a Strata*, No. 79, February 2015 at page 79

40. To protect dissenting owners, the legislature accepted the BCLI's suggestion to include a provision in the SPA requiring the court's oversight and approval for wind up resolutions brought under s. 277.

41. Section 278.1(5) sets out the factors the court must consider when deciding whether to approve a voluntary strata wind-up:

...(5) In determining whether to make an order under subsection (4), the court must consider

(a) the best interests of the owners, and

(b) the probability and extent, if the winding-up resolution is confirmed or not confirmed, of

(i) significant unfairness to one or more

(A) owners,

(B) holders of registered charges against land shown on the strata plan or land held in the name of or on behalf of the strata corporation, but not shown on the strata plan, or

(C) other creditors, and

(ii) significant confusion and uncertainty in the affairs of the strata corporation or of the owners."

42. Notably, s.278.1(5) expressly states that significant unfairness and/or significant confusion and uncertainty experienced by a single owner can be sufficient reason for the court to withhold approval.

43. Since coming into force, a number of written decisions considering the amendments to the SPA's voluntary strata wind up provisions have been published. In *The Owners, Strata Plan VR2702 (Re)*, 2018 BCSC 390 [*Barclay Terrace*], the Honourable Mr. Justice Milman summarized the legal principles that have emerged from the case law:

a) the statutory requirements in s. 277 and 278 of the [SPA] must be complied with unless specific provision is made there or elsewhere in the [SPA] to relax them;

b) the onus is on the opposing respondents to establish the factors that would justify refusing an application for an order to confirm a winding-up resolution;

- c) in determining what is in the best interests of the owners for the purposes of s. 278.1(5)(a), the interests of all of the owners must be weighed, not just those of the dissenting minority;
- d) any alleged unfairness or uncertainty must be significant enough to override the interests of the majority who voted in favour of the winding-up;
- e) the kind of "significant unfairness" referred to in s. 278.1(5)(b)(i) includes conduct that is "burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust or inequitable, and might extend to less severe conduct as well"; and
- f) in determining whether confirming or refusing to confirm the winding-up order would cause significant unfairness, the court must consider whether the evidence supports the reasonable expectation asserted and if so, whether that expectation was violated in a way that is significantly unfair.

Barclay Terrace at para 17

Strict Adherence to the Legislation

44. All statutory requirements arising from a strata wind-up under section 277 must be strictly adhered to, unless discretion is expressly contemplated by the legislation. Where the legislative requirements are not met, the application must be dismissed.

The Owners, Strata Plan VR 1966, 2017 BCSC 1661 [Bel-Ayre Villa]

45. In this case, there has been a failure to comply with the applicable legislation. Instances of non-compliance include:

- a) the Strata Council's failure to hold a valid SGM on July 7, 2021 under the SPA and therefore a valid vote on the strata wind-up resolution under s.277;
- b) the Strata Corporation's failure to file a statement of intent to liquidate with the Land Title Office;
- c) the Strata Corporation's failure to obtain a unanimous vote as required by s. 276(1)(b) of the SPA; and
- d) the Strata Corporation's attempt to circumvent proper procedure with respect to:
 - i. vesting the Strata Corporation's property (the "Strata Property") in the liquidator; and
 - ii. the disposition of Strata Property by the appointed liquidator.

Invalid SGM

46. By letter dated May 27, 2021 (the "May 2021 Letter"), the Strata Council notified owners that an SGM would be held on July 7, 2021 where owners would be asked to vote on a strata wind-up resolution (the "July 2021 SGM"). The May 2021 Letter strongly encouraged owners not to attend the July 2021 SGM in person due to a 50-person limit on outdoor gatherings and threatened to cancel the meeting if too many people attended. It further advised there would "be no way to join the meeting virtually."

47. In *Shen v. The Owners, Strata Plan EPS3177*, 2020 BCCRT 1157 [*Shen*], the Civil Resolution Tribunal found that an SGM and the resolution voted on at the SGM were invalid under similar circumstances. The strata had 300-unit owners and at the time of the SGM, outdoor gatherings were limited to 50 people. Despite this, the strata council did not provide owners with the opportunity to attend the SGM virtually or by telephone.

48. In his reasons, Tribunal Member McCarthy considered the purpose of BC Ministerial Order No. M1114, which was introduced under the *Emergency Program Act*. Section 2(2) states as follows:

“Despite anything in a strata property enactment, a strata corporation may provide for attendance, or voting in person or by proxy, at a strata property meeting by telephone or any other electronic method, if the method permits all persons participating in the meeting to communicate with each other during the meeting.”

49. In finding the SGM and the resolution invalid, Tribunal Member McCarthy reasoned that the purpose of the Ministerial Order was to “accommodate the provincial 50-person limit on gatherings, and allow general meeting attendance by all eligible voters and proxies.”

Shen at para 31

50. In this case, the Strata Council’s failure to allow the Owners to attend virtually or by telephone while threatening to cancel the July 2021 SGM if they attended in person, interfered with the Owners right to attend the July 2021 SGM and communicate with each other. As a result, the July 2021 SGM and the Wind Up Resolution vote are invalid.

Failure to File a Statement of Intent

51. Section 276(1)(b) of the *SPA* states as follows:

276 (1) Except as otherwise provided in this Act and the regulations, the provisions of the *Business Corporations Act* that apply to a voluntary liquidation of a company apply to the voluntary winding up of a strata corporation with a liquidator...

...(c) a requirement in the *Business Corporations Act* as it applies for the purposes of this Act that documents must be filed with the registrar must be read as a requirement that the documents must be filed in the land title office.

52. Voluntary liquidation is addressed in Part 10 Division 3 of *The Business Corporations Act*, [SBC 2002] c. 57 and includes section 321, which sets out the following requirement:

321 (1) A company must, promptly after the resolutions referred to in section 319 (1) and (2) (a) are passed, file a statement of intent to liquidate with the registrar.

(2) The statement of intent to liquidate must

(a) be in the form established by the registrar,

(a.1) set out the commencement of the liquidation,

(b) set out the full name of each liquidator,

(c) set out the mailing address and the delivery address of each liquidator, and

(d) set out the mailing address and the delivery address of the liquidation records office.

53. In *Bel-Ayre Villa*, a strata's application under s. 278.1 of the SPA was dismissed by the court because the strata failed to attach a complete interest schedule to the wind up resolution. This was required by ss. 277(3) and 278(1)(d) of the SPA. The Honourable Mr. Justice Milman provided the following reasons at paragraph 36:

"To overlook the deficiency as the petitioner urges would be to rewrite the legislation. The legislature has determined that the value estimates are one of the essential ingredients in a valid winding-up resolution. There is therefore no mechanism in the Act to "rectify" their omission, regardless of whether it may have caused prejudice or not."

54. In this case, the Strata Corporation has not filed a statement of intent to liquidate with the Land Title Office. It has been almost 5 months since the Wind Up Resolution was voted on. The Strata Corporation's opportunity to "promptly" file the statement of intent has now expired. As such, the subject Application must be dismissed.

Legislative Frustration

55. The SPA's requirement under s. 277 for an 80% resolution for a strata wind up is frustrated by s. 276(1)(b) which still expressly requires a unanimous vote.

56. As above, s. 276(1)(b) of the SPA adopts the *Business Corporations Act's* voluntary liquidation provisions. Section 276(1)(b) states as follows:

(b) a reference to "commencement of the liquidation" in the *Business Corporations Act* as it applies for the purposes of [the SPA] must be read as a reference to the date on which the unanimous resolution referred to in section 277 of the [SPA] is passed..." [emphasis added]

57. Section 319(3) of the *Business Corporations Act* states that an "appointment of a liquidator under this section takes effect on the commencement of liquidation."

58. It follows that since the "commencement of the liquidation" requires a unanimous resolution, a liquidator cannot be appointed as contemplated by the *Business Corporations Act* when only an 80% vote is achieved.

59. Thus the 80% resolution required under s. 277 is frustrated by s. 276(1)(b) when a wind up resolution does not receive unanimous support. In this case, the Strata Wind Up resolution only received 81.9% of votes. As such, it cannot be approved.

Improper Procedure

60. Items 3-5 and 8-15 under Part 1 of the subject Application seek to circumvent the express statutory requirements of the SPA.

61. Sections 279 of the SPA states as follows:

279 (1) Within 30 days of being appointed, the liquidator must apply to the Supreme Court for an order confirming the appointment of the liquidator and vesting in the liquidator

(a) land shown on the strata plan,

(b) land held in the name of or on behalf of the strata corporation, but not shown on the strata plan, and

(c) personal property held by or on behalf of the strata corporation

for the purpose of selling the land and personal property and distributing the proceeds as set out in the interest schedule.

62. Section 282(1) of the SPA states as follows:

282(1) Before any land or personal property is disposed of, the liquidator must obtain the approval of the disposition by a resolution passed by a 3/4 vote at an annual or special general meeting, or the disposition is void.

63. In the subject Application, the Strata Corporation is seeking orders under Part 1 to have the Strata Property vest in the liquidator without an application being brought under s. 279(1).

64. The Strata Corporation is further seeking orders to permit the liquidator to dispose of the Strata Property without a 3/4 vote at an annual or special general meeting as required by s. 282(1).

65. These orders violate the express procedural requirements of the SPA.

66. In *The Owners, Strata Plan VR2122 v. Bradbury*, 2018 BCCA [Bradbury] the petitioner strata corporation sought similar orders and initially succeeded. However, on appeal, it was found that the judge "erred in appointing the liquidator, vesting the property in him and making orders ancillary to his role when the liquidator had not applied for that relief as required by the [SPA]."

Bradbury at para 66

67. In these circumstances, a strata corporation cannot circumvent the express procedural requirements of the SPA. As such, the orders sought under items 3-5 and 8-15 under Part 1 of the subject application must be dismissed.

The Best Interests of the Owners

68. When considering what is in the best interests of the owners, the interests of all of the owners must be weighed.

69. The fact that a wind up may benefit a majority of owners should not be determinative. In the context of a strata wind up where opposing owners will be involuntarily dispossessed of their property, this factor requires special consideration. Writing on the subject, property law legal scholar Douglas C. Harris, recommended the following approach:

"In considering "best interests", if the starting point is that non-consensual dissolution results in the taking of property, then the courts should not simply equate "best interests" with "the greatest good for the greatest number."... While it may be an appropriate framework to resolve disputes over common property, the taking of individual interests in land requires more attention to individual circumstances and interests, particularly of those who confront involuntary dispossession and the loss of home. In short, the courts should not consider an 80 percent vote to have determined the best interests of the owners. It may be evidence of best interests, but should not be determinative."

Douglas C. Harris, *"When deciding whether to allow a taking of property we need to ask what we want property rights to do"*, (February 2, 2018), CanLii Connects [<https://canliiconnects.org/en/commentaries/54749>].

70. It follows that the court should adopt a holistic approach when looking at the "best interests of the owners" factor and take into consideration the surrounding circumstances of a wind up resolution. ~~This should include an examination of the conduct of a strata council and its members both before and after the vote. including:~~

- a) the deleterious impacts on dissenting owners;
- b) the strata council's conduct with respect to same; and
- c) whether the strata council acted in bad faith in order to secure approval for a wind up resolution.

71. This is consistent with the legislation.

72. As above, significant unfairness experienced by just one owner can be sufficient grounds for the court to withhold approval of a strata wind up resolution. This is expressly contemplated by s. 278.1(5)(i) of the SPA.

73. Section 31 of the SPA further requires strata council members to "act honestly and in good faith with a view to the best interests of the strata corporation" and under s.164 of the SPA, strata councils cannot ignore issues of significant unfairness with impunity.

74. ~~This is further supported by the fact that strata council members already have a duty to consider the best interests of the owners under s. 31 of the SPA.~~

75. Notably, the conduct of a strata council and its members in these circumstances has already been considered by this court. In *The Owners, Stata Plan VR2122 v. Wake*, 2017 BCSC 2386 [*Wake*], the court left open the possibility that “the duties that are said to bear upon the [court when considering a strata wind up resolution] are duties that should be imposed on a strata council under the SPA.”

Wake at para 138

76. Thus, the Respondents submit that where strata councils and their members recognize that one or more owners will face significant and objective losses under a wind up deal, they cannot turn a blind eye. It follows that a strata council also cannot act directly against the best interests of dissenting owners in an effort to secure court approval of a deal.

77. In this case, the Wind Up Resolution is certainly not in the best interests of the Respondents. If the Wind Up Resolution is approved the Respondents will experience the following losses:

- a) they will each receive over \$100,000 less than the assessed values for their units;
- b) they will lose their rental and business income;
- c) they will be unable to purchase comparable commercial units with their proceeds of sale;
- d) they will be forced to breach their lease agreements; and
- e) they will not benefit from any other terms in the January 2021 PSA, such as rights of first refusal.

78. Throughout negotiations with Intracorp, the Strata Council knew of the disadvantages the Wind Up Resolution posed to the Respondents. However, there is no evidence the Strata Council or its members made any attempt in its negotiations with Intracorp to obtain more favourable terms for the Respondents, ~~under the January 2021 PSA.~~ Instead, the Strata Council catered only to the concerns and needs of the residential unit owners.

79. For instance, in the May 2021 letter notifying the Owners of the July 2021 SGM, the Strata Council enclosed information on sales of comparable residential units in the neighbourhood. No information was provided on comparable commercial units in the neighbourhood or otherwise. ~~The needs and interests of the Respondents were ignored entirely.~~

80. There is also no indication the Strata Council attempted to negotiate favourable lease or buy back terms for the Respondents or even include an indemnity clause to protect the Respondents with respect to their commercial leases. The Respondents' interests were completely ignored.

81. Furthermore, since the July 2021 SGM, the Strata Council has acted directly against the best interests of the Respondents. For instance, the Strata Corporation is currently seeking an order that all commercial leases be terminated. This was not contemplated by the Wind-Up Resolution or the January 2021 PSA. If granted, this order would force the SL9 Owners and the SL10 Owners to breach their lease agreements and expose them to claims for breach of contract. The decision to seek this order was unilaterally made by the Strata Council and its members in bad faith.
82. The Strata Council and its members have also interfered with the SL9 Owners' attempts to sell SL9. On June 15, 2021, the SL9 Owners entered into a purchase and sale agreement with Westcoast Sunset Holdings Corporation for \$1,100,000. The SL9 Purchase and Sale Agreement is conditional on the City of Vancouver granting permits to allow the purchaser to open a cannabis retail store.
83. Since then, the Strata Council and/or its members have attempted to thwart the SL9 Purchase and Sale Agreement. For instance, on August 26, 2021, the Strata Council President refused a request of the SL9 Owners to post a permit application sign on common property based on his own opinion that the City would not approve it. There was no indication that the Strata Council even voted on the issue.
84. Furthermore, in January 2022 the Strata Council President wrote an email to the City of Vancouver in his capacity as Strata Council President outlining numerous reasons why in his opinion the permits should not be approved.
85. These extensive efforts suggest that the Strata Council and/or its members do not want the SL9 sale to go through because it will serve as proof that the true market value of the Commercial Units is exponentially higher than their assessed values.
86. Notably, these are not the only instances where the Strata Council and its members have acted in bad faith in an effort get the Strata wound up and sold. There is a history of this conduct, particularly with respect to the much-needed repairs on the Townhouses.
87. Specifically, the Strata Council has allowed the townhouses to fall into disrepair despite Owners repeatedly voting in favour of and contributing money for the required work. In March 2018, a special assessment for \$40,000 was passed for the purpose of temporarily shoring the townhouses. However, the shoring was not completed until May 2021 after the City sent two Unsafe Orders and issued a \$5000 fine against the Strata.
88. ~~The Strata Council has repeatedly raised money for urgent repairs on the Townhouses and failed to follow through on having them performed. For instance, in March 2018 a special assessment for \$40,000 was passed for the purpose of temporarily shoring the townhouses. However, the shoring was not completed until May 2021 after the City sent two Unsafe Orders and issued a \$5000 fine against the Strata Corporation.~~

89. In July 2020, the Strata Council passed a further special assessment of \$1.8 million for permanent repairs on the Townhouses. However, to date, despite paying for numerous reports from engineers, consulting companies and contractors, none of the contemplated repairs have been performed.

90. As a result, the Townhouses have fallen into further disrepair and become uninsurable and Owners may now be in breach of their mortgage agreements as mortgage lenders often require strata owners to ensure their strata corporation has adequate property insurance coverage. The Strata Council is now leveraging the consequences of their inaction to support the Strata Wind Up.

91. However, the overall evidence indicates that the Owners actually support investing in repairs, ~~but that~~ They are simply opposed to spending significant amounts of money for repairs and projects that never materialize. This is supported by the fact that the Owners voted against winding up the Strata Corporation in May 2020 and voted in favour of having the Townhouses repaired in July 2020.

92. Notably, the City is now pursuing further action against the Strata Corporation for not applying for a permit to have the Townhouses repaired.

93. In these circumstances, the Respondents submit that the best interests of the Owners would better be served by dismissing the subject Application and ordering the Strata Council to commence repairs the Owners have already paid for.

Significant Unfairness

94. Significant unfairness was considered by the BCCA in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44 [*Dollan*]. At paragraph 30, the BCCA set out the following test for claims of significant unfairness:

1. Examined objectively, does the evidence support the asserted reasonable expectations of the petitioner?
2. Does the evidence establish that the reasonable expectation of the petitioner was violated by action that was significantly unfair.

95. This test was subsequently applied to the significant unfairness consideration under s. 278.1(5) of the SPA by Justice Milman in *Barclay*.

Reasonable Expectations

96. In this case, the Respondents had the following reasonable expectations:

- a) the Strata Council and its members would take the Respondents' best interests into consideration when negotiating the terms of the January 2021 PSA;

- b) the Respondents would receive at least the assessed value for their units under a strata wind up sale;
- c) the Strata Council would not interfere with the Respondents' attempts to sell the Commercial Units;
- d) the Respondents would be able to buy a comparable commercial space with the proceeds of sale from the Commercial Units;
- e) the Strata Council would not force the Respondents to breach their leases by seeking an order that all commercial leases be terminated; and
- f) the Strata Council would follow through on repairs that the Owners, including the Respondents, have already paid for.

Bests Interests of the Respondents

97. As above, the Strata Council and its members did not consider the best interests of the Respondents when negotiating with Intracorp. Even if the Strata Council could not obtain a higher purchase price, the Respondents had a reasonable expectation that the Strata Council would at least negotiate to include other favourable terms for the Respondents in the January 2021 PSA. This could have included rights of first refusal for the Respondents or favourable lease terms after the completion date.

98. Instead, the Strata Council and its members focused solely on the best interests of the residential owners. As a result, the January 2021 PSA in its current form provides little to no benefit to the Respondents.

Adequate Compensation

99. The Respondents had a reasonable expectation that they would receive at least the assessed values for the Commercial Units in the event of a strata wind up sale.

100. Under the January 2021 PSA, the Respondents will receive less than the assessed value for their units. They will also receive less than market value. Between May and June 2021, the Respondents listed the Commercial Units for sale. The listing prices were based on advice from their respective realtors.

101. The below table sets out the listing prices, assessed values, projected proceeds under the January 2021 PSA and the range of loss in relation to each unit:

	Market Value	Assessed Value as of July 1, 2020	Assessed Value as of July 2021	January 2021 PSA Sale Proceeds	Loss
SL9	\$1,100,000	\$605,600 \$650,600	\$659,900	\$489,863.68	\$115,736.32- \$610,136.32
SL10	\$1,598,000	\$818,000	\$892,000	\$675,192.33	\$142,807.67- \$992,807.67

SL11	\$1,680,000	\$814,000	<u>\$887,000</u>	\$691,955.73	\$122,044.27- \$988,044.27
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102. As above, on June 15, 2021, the SL9 Owners entered into the SL9 Purchase and Sale Agreement. The price agreed on in the SL9 Purchase and Sale Agreement is equal to the asking price of \$1.1 million. The SL9 Purchase and Sale Agreement is conditional on the purchaser Westcoast Sunset obtaining the permits, which is expected to occur prior to November 30, 2021.
103. Notably, the SL11 Owner has also received two written offers for his unit. The first was for \$1,280,000 and the second was for \$1,450,000. Neither of the offers resulted in a sale. The second offer was pulled as a direct result of the Wind Up Resolution.
104. No formal written offers have been received for the SL10 Owners' unit. However, there have been numerous inquiries all of which have fallen through due to the Wind Up Resolution.
105. The high level of interest, multiple written offers and the SL9 Purchase and Sale Agreement indicate that the true market value for each of the Commercial Units is significantly higher than the City's assessed value. It further indicates that the losses the Respondents will experience if the Wind Up Resolution is approved will fall on the higher end of the ranges of loss set out in the table above.
106. If the Wind Up Resolution is approved, the Respondents will each lose hundreds of thousands of dollars. These are objective and significant losses, which constitute a significant breach of the ongoing reasonable expectations of the Respondents from their respective dates of purchase.

Ability to Mitigate

107. The Respondents had a reasonable expectation that the Strata Council and its members would not interfere with their attempts to mitigate the above losses by selling the Commercial Units. However, as above, the Strata Council and its members have acted in bad faith in an effort to obstruct the sale of the SL9 Owners' unit.

Comparable Commercial Units

108. When the Respondents purchased the Commercial Units, they had the reasonable expectation that if they were forced to sell, they would be able to purchase comparable commercial units that generated a similar amount of rent or revenue with the proceeds. However, with the proceeds of sale the Respondents will receive under the January 2021 PSA, this will not be possible.

109. The Respondents currently take in the following amounts of income from the Commercial Units:

- a) the SL9 Owners receive \$3473.40/month in rent;
- b) the SL10 Owners receive \$4400/month in rent; and
- c) the SL11 Owner generates over \$260,000 a year in revenue from his business, Donair Land.
- d) the SL11 Owner also generates \$679,000 a year from the Joyce Grocery which he runs out of SL10 with his brother.

110. Notably, the SL9 Owners and the SL10 Owners are both retired and over the age of 70. They rely on this income to fund their retirement. The SL11 Owner is married with two children. He relies on the revenue he generates from his businesses to support his family.

111. If the Respondents are forced to sell their units for less than market value, they will not be able to replace this income with the proceeds. This will have a significant effect on their long-term financial stability, which is a substantial burden to place on retirees and a father of two.

Breach of Contract

112. The Respondents had a reasonable expectation that the Strata Council and its members would not expose them to claims for breach of contract,

113. However, Item 6 under Part 1 of the subject Application seeks an order that all commercial tenancies be terminated. If granted, the SL9 Owners and SL10 Owners will be forced to breach their leases. This order was not contemplated by the Wind Up Resolution and is not a term of the January 2021 PSA.

114. There is furthermore no indemnity agreement in place to protect the SL9 Owners and SL10 owners against other possible claims that could be brought by the lessees.

115. This is yet another example of the Strata Council and its members acting in bad faith in an effort to benefit themselves and Intracorp at the cost of the Respondents.

Pre-Paid Repairs

116. The Owners have paid over \$1,800,000 for repairs on the Townhouses, with the reasonable expectation that the repairs would be performed. The Strata Council has even expressly acknowledged its duty to maintain the Townhouses and ensure they are safe.

117. Despite this, the Strata Council has consistently failed to act on these expectations and obligations even at the behest of the City. As a result, the

Townhouses have fallen into further disrepair, become uninsurable and the Strata Corporation is now facing further municipal fines and prosecution by the City.

118. The Strata Council's refusal to use the funds is thus a breach not only of the Owners' reasonable expectations but also of the Strata Council's statutory obligations ~~as well as~~ and City bylaws.

~~*Oppressive and Significantly Unfair Conduct*~~

Significant Unfairness

119. The terms of the Strata Wind Up are significantly unfair to the Respondents. As above, the Respondents will suffer significant and objective financial losses, exposure to claims for breach of contract, and uncertain financial futures.
120. The conduct of the Strata Council in relation to the Wind Up Resolution has also been significantly unfair.
121. The Respondents submit that the Strata Council's conduct has been oppressive, burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust and inequitable. In the alternative, it amounts to conduct that is less severe but is nonetheless significantly unfair as contemplated by Justice Milman in *Barclay Terrace*.
122. As stated in *Whitehorse Condominium Corporation No. 95 v. 37724 Yukon Inc.*, 2013 YKSC:

"Because condominium owners give up certain rights and privileges associated with private home ownership, it is important that the rights, privileges and obligations of the Act are enforced in a fair and equitable way." (emphasis added)

123. In this case, it is neither just nor equitable to approve the Wind Up Resolution. The Respondents remain ready and willing to sell the Commercial Units as long they receive a fair price and fair terms of sale. The Strata Council and Intracorp have proved unwilling to accommodate these reasonable expectations.
124. The Respondents submit that these are the exact circumstances the court oversight required under section 278.1 was designed to protect against.

Significant Confusion and Uncertainty

125. This factor requires the court to consider whether ~~refusing to approve~~ approving or dismissing the Wind Up Resolution will result in significant confusion and uncertainty and whether there is some existing confusion that can only be resolved by approving or dismissing the Wind Up Resolution.

Whitehorse Condominium Corporation No. 95 v. 37724 Yukon Inc., 2013 YKSC 4;

Whitehorse Condominium Corporation No. 95 v. 37724 Yukon Inc., 2014 YKSC 2.

126. As stated by the Petitioner, this factor requires the te-court to consider the rights and interests of all owners and to balance equitable interests with justice and the “reasonable expectations” of the parties.
127. In this case, refusing to approve the Wind Up Resolution will not result in significant confusion and uncertainty. Furthermore, there is no existing confusion that can only be resolved if the Wind Up Resolution is approved.
128. The Strata Corporation has already raised adequate funds to have the repairs on the Townhouses performed and the Strata Council has previously indicated that it will use the funds to begin repairs if the Wind Up Resolution is unsuccessful. Accordingly, no confusion or uncertainty will occur if the within Application is dismissed.
129. Conversely, significant confusion and uncertainty will occur if the Wind Up Resolution is approved. Firstly, it is unclear what the Wind Up Resolution will mean for the commercial tenancies. The Petition seeks an order that they be terminated immediately. However, the January 2021 PSA indicates that upon completion, Intracorp will assume the role of landlord under them.
130. Secondly, the Wind Up Resolution will result in significant confusion and uncertainty for the SL11 owner who is both an owner and a lessee of the Commercial Units. It is unclear whether he will be required to shut down Donair Land, which operates out of his own unit, or Joyce Grocery, which operates out of SL10. If he is required to cease operations for one or both of his businesses, it is unclear when or how this must take place.
131. Finally, there is some existing confusion regarding the accuracy of the Schedule of Interest on Destruction (the “SID”). The SID sets out the formula for how the proceeds from the January 2021 PSA will be distributed amongst the Owners. However, similar to the Strata Plan in this case, the SID does not distinguish between residential and commercial units. This indicates that the Commercial Units’ projected values when the SID was created were based on the assumption that they were small ground floor residential apartments. Accordingly, the Commercial Units may have inadvertently been undervalued on the SID.
132. In summary, the Respondents submit that significant confusion and uncertainty can only be avoided if the Wind Up Resolution is dismissed.


Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Ardeshir Soltani Razagh Sarab, sworn November 23, 2021;
2. Affidavit #1 of Kenneth Kwok Ying Chan, sworn November 26, 2021;
3. Affidavit #1 of Che Wing Wang, sworn November 26, 2021;

4. Affidavit #1 of Denise Brackstone, sworn November 29, 2021;
5. Affidavit #1 of Patsy Hui, sworn, December 6, 2021;
6. Affidavit #1 of Mohammad Reza Khodabaksh, sworn December 6, 2021;
7. Affidavit #1 of Janet Yngson, sworn March 7, 2022
8. The Respondents reserve the right to serve an expert appraisal report,
9. Supreme Court Civil Rules; and
10. Any other materials permitted by this Honourable Court.

The petition respondents estimate that the application will take 8 hours.

Date: 07/March/2021



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Lawyer for the Respondents

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