



NO. S-217956
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

APPLICATION RESPONSE

Application response of: The Owners, Strata Plan LMS 992 (the “Application Respondent”)

THIS IS A RESPONSE TO the Notice of Application of Kenneth Kwok Ying Chan, Yuen Mei Lin Chan, Che Wing Chan, Yat Sin Wong, Ardeshir Soltani Razagh Sarab, and 0837963 B.C. Ltd. (the “Applicants”) filed April 4, 2022.

Part 1: ORDERS CONSENTED TO

The Application Respondent consents to the granting of the orders set out in Part 1 of the Notice of Application: Nil.

Part 2: ORDERS OPPOSED

The Application Respondent opposes the granting of the orders set out in paragraphs 1 and 2 of Part 1 of the Notice of Application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondent takes no position on the granting of the orders set out in Part 1 of the notice of application: Nil.

Part 4: FACTUAL BASIS

1. The Owners, Strata Plan LMS 992 (the “**Strata Corporation**”), is a strata corporation organized and subsisting pursuant to the provisions of the *Strata Property Act*, SBC 1998 c 43 (the “*Act*”).

2. The Strata Corporation is a mixed-used strata development comprised of 52 apartment style strata lots (strata lots 12 to 63), 8 townhouses (strata lots 1 to 8) and 3 non-residential strata lots (strata lots 9 to 11) and is also known as “Joyce Place”.

3. The building components of Joyce Place suffer from a number of deficiencies, which include leaking windows, ineffective “face-seal” stucco cladding, and structural defects.
4. On July 7, 2021, the Strata Corporation held a special general meeting (the “**July 2021 SGM**”) to vote on a purchase and sale agreement for the sale of the Strata Corporation and to wind-up the Strata Corporation. The owners approved the wind-up of the Strata Corporation.
5. On September 2, 2021, the Strata Corporation filed the Petition in these proceeding to wind-up and sell the Strata Corporation.
6. On September 10, 2021, counsel for the Applicants advised counsel for the Strata Corporation that she had been retained by 2 of the 3 commercial strata lot owners at Joyce Place.
7. On September 15, 2021, counsel for the Strata Corporation sent the Petition and supporting Affidavit in these proceedings to counsel for the Applicants electronically.
8. On September 30, 2021, counsel for the Applicants sent an email to counsel for Intracorp Vanness Limited Partnership, and copied counsel for the Strata Corporation and advised, *inter alia*, that the commercial owners were not happy with the amount that they would be receiving under the Purchase and Sale Agreement with Intracorp and that it was their position that they would be receiving well below the assessed and market value for their units.
9. On October 8, 2021, the Strata Corporation obtained an order for alternative service in these proceedings.
10. The Petition materials were all served by an alternative method of service on the Applicants in October of 2021.
11. On October 25, 2021, counsel for the Applicants sought an extension of time to file response materials to January 10, 2022, as response materials were due by November 10, 2021.
12. On October 26, 2021, counsel for the Strata Corporation emailed counsel for the Applicants to advise that the Strata Corporation was unlikely to agree to such a lengthy extension and advised that she should be prepared to file responsive materials by November 12, 2021.

13. On November 1, 2021, counsel for the Strata Corporation emailed counsel for the Applicants requesting responsive materials be filed by November 12, 2021.

14. On November 16, 2021, counsel for the Strata Corporation emailed counsel for the Applicants requesting an update on the filing of her clients' responsive materials. Counsel for the Applicants responded and advised that she expected to have them finalized by the end of the week and that she had issues with her power going out.

15. On November 17, 2021, counsel for the Applicants wrote to counsel for the Strata Corporation to advise that her office was experiencing technical issues stemming from the blackouts, which may interfere with the filing of the Applicants' response materials.

16. On November 26, 2021, counsel for the Applicants emailed counsel for the Strata Corporation copies of the Applicants' unfiled response materials.

17. On December 1, 2021, counsel for the Applicants emailed counsel for the Strata Corporation copies of the Applicants' filed response materials.

18. On December 3, 2021, counsel for the Strata Corporation canvassed dates for the hearing of the Petition with counsel for the Applicants for a hearing in February 2022. However, counsel for the Applicants advised that the earliest she was available was in April due to trial commitments.

19. On April 4, 2022, counsel for the Applicants sent counsel for the Strata Corporation the Affidavit of Philip Law filed on April 4, 2022 (the "**Expert Report**").

20. There was no agreement or discussions between counsel for the Strata Corporation and counsel for the Applicants regarding the late service of the Expert Report.

Part 5: LEGAL BASIS

1. Rules 16-1 and 14-1 of the *Supreme Court Civil Rules*.

2. Rule 16-1(7) provides that unless all parties of record consent or the court otherwise orders, a party must not serve any affidavits additional to those served under subrule (3), (4).

3. The Court has discretion to permit a party to serve additional affidavits. However, the Strata Corporation submits that the Court should not admit the Expert Report for a number of reasons. In particular, the Strata Corporation is prejudiced by not being able to prepare a rebuttal report, the Expert Report was served late due to the unexplained delay in retaining an expert by the Applicants, the Applicants are simply trying to bolster their case through the use of the Expert Report, and the Expert Report is not necessary or essential to the Applicant's case.

Prejudice to the Strata Corporation

4. The Applicants rely on *The Owners, Strata Plan VR29 v. Kranz*, 2021 BCCA 32, however, the case is distinguishable for a number of reasons. The Judge in that case admitted an affidavit, however, the Judge found that the petitioner was not splitting its case by filing an additional affidavit as it was not seeking to fill in "evidentiary gaps." In addition, the hearing of the petition had not commenced and the respondent was in a position to provide responsive affidavits and to amend his response to petition if required.

5. The Expert Report is not a straightforward affidavit to respond to as it requires the Strata Corporation to retain its own expert to respond. Due to the late service of the Expert Report the Strata Corporation is deprived of the opportunity to have a rebuttal report prepared.

6. The Strata Corporation will be prejudiced if the Expert Report is admitted as it does not have the ability to respond due to the late filing of the Expert Report.

Unexplained Delay

7. The Applicants seemingly failed to take any steps to retain an appraiser until December 17, 2021, which was well after the deadline for filing response materials. No explanation has been provided by the Applicants for the delay in retaining an expert.

8. Counsel for the Applicants was retained as early as September 10, 2021, and had access to the Petition materials as early as September 15, 2021.

9. As early as September 30, 2021, counsel for the Applicants had voiced the commercial owners' concerns regarding the Petition proceedings; in particular, that the

commercial owners were allegedly receiving less than the market value and assessed value for their units.

10. The Applicants' response materials were due by November 12, 2021, and after a number of extensions they filed their response materials on or about November 29, 2021.

11. No explanation has been provided as to why the Applicants failed to retain an appraiser until after the filing of their response materials. If they wished to rely on appraisals at the hearing of the Petition it was incumbent on them to take steps to obtain appraisals in a timely manner.

12. Furthermore, in Mr. Law's affidavit he does not provide any explanation whatsoever as to why he took several months to complete the appraisals or whether he had even agreed to complete the appraisals by January 17, 2022.

Expert Report Not Necessary or Essential

13. The Applicants rely on *Tietz v Cryptobloc Technologies Corp.*, 2021 BCSC 190. At paragraphs 31 and 32, Justice Wilkinson provides as follows:

[31] All parties cite *Servatius v. Alberni School District No. 70*, 2020 BCSC 15 at paras. 111-112, for the premise that the discretion under the R. 16-1(7) should be exercised where the affidavit is important to the petitioner's case and "necessary" to establish proof of one of the requisite elements of the case. However, the petitioners in this application before me do not assert the affidavit material is necessary for them to establish the elements as required under the test for leave.

[32] The petitioners have not proven to me that the affidavit material is essential or otherwise necessary for success on their petition, nor have they provided an adequate explanation for why they could not have included the material, apart from the Brusatore Affidavit, with their original affidavits in support of the petition. Furthermore, to submit that a party has not responded or has responded in a pro forma manner does not justify granting leave to file a supplemental affidavit.

14. The Applicants in this case rely on the Expert Report to bolster their evidence. The Applicants have not demonstrated that the Expert Report is necessary or essential to their case.

Part 6: MATERIAL TO BE RELIED ON

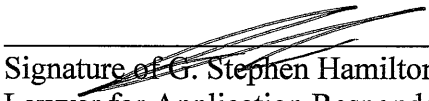
1. Affidavit #3 of Vivien Hsu made on April 12, 2022.

2. The Pleadings filed in this proceeding.

The Application Respondent estimates that the application will take 60 minutes.

<input checked="" type="checkbox"/>	The Application Respondent has filed in this proceeding a document that contains the application respondent's address for service.
<input type="checkbox"/>	The Application Respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is: n/a.

Date: April 12, 2022



Signature of G. Stephen Hamilton
Lawyer for Application Respondent
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