



S=246230

No. _____
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

INTRACORP VANNESS LIMITED PARTNERSHIP

PLAINTIFF

AND

**THE OWNERS, STRATA PLAN LMS992, and CROWE
MACKAY & COMPANY LTD., AS LIQUIDATOR OF THE
OWNERS, STRATA PLAN LMS992**

DEFENDANTS

NOTICE OF APPLICATION

Name of Applicant: The Plaintiff, Intracorp Vanness Limited Partnership

To: The Defendant, The Owners, Strata Plan LMS992 and Crowe Mackay & Company Ltd. as Liquidator of the Owners, Strata Plan LMS992

TAKE NOTICE that an application will be made by the applicant to the presiding Judge at the courthouse at 800 Smithe Street, Vancouver, British Columbia on September 9, 2024, at 9:45 a.m. for the orders set out in Part 1 below.

The Applicant estimates that the application will take 30 minutes.

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

Part 1: ORDERS SOUGHT

1. An order that the Liquidator (as defined herein) hold back \$525,000 from the proceeds of the sale of the Respondent's land and buildings located at 3362, 3364, 3366, 3368, 3370, 3372, 3374, 3376, 3378, 3380, 3382 and 3384 Vanness Avenue, Vancouver, British Columbia after closing of the sale and maintain those funds in trust with its counsel:
 - a. Until the earlier of:
 - i. final disposition of the Plaintiff's within claim or further order of this court; or
 - ii. the Vendor fixing the fire alarm system such that it is connected to the local fire service and is approved by an inspection with no deficiencies, and complying with the Court Orders (as defined below) in respect of the Townhouses
 - or, in the alternative
 - b. Until September 30, 2024 (the "Return Date") unless this order is varied or discharged by a further order of this court. The application in which this order is made shall come back to the court for further hearing on or before the Return Date; and
 - c. Anyone affected by the order may apply to the court at any time to vary or discharge it on giving no less than five (5) business days' notice to the Plaintiff's solicitor of their intention to do so, but the order will remain in force until further order of this court even if such an application is pending.
2. Costs.
3. Such further and other relief as counsel may advise and this honourable court sees fit to order.

Part 2: FACTUAL BASIS

Overview of Claim

4. The Plaintiff and the Defendant, The Owners Strata Plan LMS992 (the "Vendor" or the "Strata Corporation") are parties to a Purchase and Sale Agreement dated January 11, 2021, as amended from time to time (collectively, the "Agreement"), respecting the sale of certain land and buildings located at 3362, 3364, 3366, 3368, 3370, 3372, 3374, 3376, 3378, 3380, 3382 and 3384 Vanness Avenue, Vancouver, British Columbia (the "Property") made in the context of the Strata Corporation's voluntary liquidation and winding-up, with Crowe MacKay & Company Ltd. as liquidator (the "Liquidator").
5. The sale of the Property is set to close on September 9, 2024 (the "Closing Date").
6. The Agreement contains covenants by the Vendor to maintain and repair the Property to the same condition as on the date of the Agreement. The Plaintiff alleges that in breach of the Agreement, the Vendor has, among other things, failed to keep the Property's fire

alarm system in working order and failed to keep the townhouses on the Property in the same condition as on the date of the Agreement.

7. The Agreement also contains a representation by the Vendor that, to the best of the Vendor's knowledge, there is no pending or threatened claim, litigation, or proceeding by or before, *inter alia*, any court, tribunal, or government agency that pertains to the Property.
8. Contrary to this representation, which the Vendor represented and warranted was true when the parties entered into the Agreement and would remain true at the time of completion, the Vendor has been subject to several work orders from the City of Vancouver and the Provincial Court of British Columbia to remediate unsafe building conditions. This includes orders prior and subsequent to the date of the Agreement, which the Vendor had not complied with at the time of the Agreement and still has not complied with. The Vendor has provided no assurances that it will in fact comply with the orders.
9. The Property remains occupied by existing owners and tenants of the Property's strata lots (the "**Occupants**") who, under the Agreement, may remain in possession of their strata lot for up to twelve months after the Closing Date (in the case of owners), or until the owner is entitled to terminate the tenancy agreement (in the case of tenants).
10. The Property, and particularly the townhouses on the Property, require extensive repair work ordered by the Provincial Court necessary to ensure that the Property is safe for the Occupants to remain in their strata lots after the Closing Date.
11. The Vendor's breaches of the Agreement are serious and include: failing to maintain the condition of the Property, making misrepresentations respecting the outstanding work orders against the Vendor, allowing continual orders to be issued by the Provincial Court against the Vendor in respect of the unsafe condition of the Property, and failing to abide by those orders.
12. Notwithstanding those breaches, the Plaintiff intends to proceed with closing on the Closing Date, subject to the Plaintiff reserving all rights and remedies against the Vendor for breaches of the Agreement.
13. Upon closing, the Liquidator intends to disburse the sales proceeds to the Strata Corporation's strata lot owners despite the Plaintiff's claim. Despite its obligation to treat all parties fairly, including potential creditors, the Liquidator has refused to hold back limited funds from the \$41,400,000 purchase price even temporarily to allow the Plaintiff to bring this application in an orderly way.

The Background

14. On or about January 11, 2021, Intracorp Acquisition Co. Ltd. and the Vendor entered into the Agreement for the purchase of the Property.
15. On or about August 21, 2021, Intracorp Acquisition Co. Ltd. assigned, transferred, and conveyed to the Plaintiff its right, title, and interest in and to the Agreement and the Property pursuant to an Assignment Agreement.
16. The Agreement was subject to court approval pursuant to the liquidation and winding up provisions of the *Strata Property Act*, S.B.C. 1998, c. 43 ("**SPA**").

17. On October 19, 2022, on application of the Strata Corporation to this Court, Justice Marzari granted an order approving the Agreement, confirming the Strata Corporation's liquidation and winding up, and appointing the Liquidator.
18. The Property is a mixed-use strata development comprised of fifty-two (52) residential strata lots located in a 12-storey tower (the "Tower"), eight (8) townhouse strata lots (the "Townhouses"), and three non-residential strata lots located at the ground floor of the Tower.
19. The Plaintiff intends to redevelop the Property.
20. Residential units in the Tower and the some of the Townhouses remain occupied by the Occupants and will remain occupied after the Closing Date.

Relevant Provisions of the Agreement

21. Section 1(e) of Schedule C to the Agreement contains the following representation by the Vendor, which the Vendor represented and warranted was true when the parties entered into Agreement, would remain true at the time of completion, and will continue and survive the Plaintiff's purchase of the property [emphasis added]:

to the best of the Vendor's knowledge, there is no claim, litigation or proceeding, pending or threatened, by or before any court, government agency, commission, department, board, officer or other authority having jurisdiction that pertains in any manner to the Property or the right of the Purchaser to own the Property or to receive benefits therefrom;

22. Section 2 of Schedule C to the Agreement contains the Vendor's covenants. In particular, in section 2(a), the Vendor covenants and agrees as follows [emphasis added]:

From and after the date of this Agreement, the Vendor will cause the Property to be kept, repaired, and maintained to substantially the same condition and state of repair as of the date of this Agreement and to be insured at the Vendor's cost and expense so that on the Completion Date, the Purchaser will acquire the Property in substantially the same condition and state of repair as of the date of this Agreement, subject to reasonable wear and tear and save as otherwise provided for herein.

Breaches of the Agreement

23. The Plaintiff alleges that the Vendor has failed to maintain the Property in the same condition as at the time of the Agreement by failing, among other things, keep the fire alarm system in working order and maintain and repair the Townhouses, such that they have fallen into further disrepair and may pose health and safety risks to their Occupants, contrary to section 2(a) of Schedule C of the Agreement.
24. While the Vendor was working on fixing the fire alarm system up to the Closing Date, as of the time of filing this application, the Plaintiff has not received confirmation that the fire alarm system is once again operational and has passed inspection.

25. Further, contrary to the Vendor's representations in section 1(e) of Schedule C, on or around October 7, 2019, and November 18, 2019, the Vendor received orders from the City of Vancouver requiring the Vendor to take steps to remedy the unsafe condition of the Townhouses. The Agreement is dated January 11, 2021.
26. Thereafter, the Vendor was the subject of the following Provincial Court of British Columbia orders respecting the Townhouses:
- a. An order, issued on December 11, 2020, pursuant to a guilty plea by the Vendor, requiring the Vendor to complete remediation work to correct unsafe building conditions by or before January 31, 2021 (the "**December 2020 Order**");
 - b. An order, issued on April 5, 2023, pursuant to a guilty plea by the Vendor for breaching the December 2020 Order, requiring the Vendor to take certain steps towards remediating the unsafe building conditions by or before December 31, 2023 (the "**April 2023 Order**"); and
 - c. An order, issued on November 30, 2023, pursuant to the Vendor's application, extending the deadline for compliance with the April 2023 Order to September 30, 2024 (the "**November 2023 Order**")
- (together, the "**Court Orders**").
27. The Vendor has neither complied with nor provided assurances that it will comply with the Court Orders.
28. In response to the Vendor's breaches, the Plaintiff commenced on claim on September 9, 2024, seeking damages against the Vendor for breach of contract. At this stage, the Plaintiff expects its losses to be at least \$525,000.
29. On or shortly after the Closing Date, the Liquidator intends to distribute the sales proceeds (the "**Proceeds**") to the strata lot owners of the Strata Corporation. The Liquidator has refused a proposal from the Plaintiff to voluntarily hold back some funds until disposition of the Plaintiff's claim or, at the very least, until September 30, 2024, to allow the Plaintiff time to bring this application in an orderly way.
30. The Plaintiff's application is supported by a Critical System Assessment report obtained by the Plaintiff in respect of the Property dated September 4, 2024, and an affidavit from a representative of the Plaintiff who is familiar with the Property and the Agreement.

Part 3: LEGAL BASIS

The Orders Sought are within this Court's Jurisdiction and Justified in the Circumstances

31. Pursuant to the provisions of the *SPA* and the *Business Corporations Act*, S.B.C. 2002, c. 57 ("**BCA**"), this Court has broad jurisdiction order that the Liquidator retain funds from the Proceeds to satisfy a damages award.

32. Pursuant to section 276 of the *SPA*, the provisions of the *BCA* that apply to a voluntary liquidation of a company apply to the voluntary winding up of a strata corporation with a liquidator, except for Division 10 of Part 10 and section 324 of the *BCA*.

Strata Property Act, S.B.C. 1998, c. 43, s. 276(1-2).

The Owners, Strata Plan VR2702 (Re), 2018 BCSC 390 at paras. 87-89

33. Any person whom this Court considers to be an appropriate person to make the application may bring an application under section 325 of the *BCA* in respect of a corporation in liquidation.

Business Corporations Act, S.B.C. 2002, c. 57, s. 325(1)

34. Section 325 of the *BCA*, incorporated into the winding-up process for a strata corporation with a liquidator through section 276 of the *SPA*, "allows for applications to be made to the court in a winding-up proceeding by anyone the court considers appropriate and confers broad powers on the court to make orders and give directions as the court considers appropriate."

The Owners, Strata Plan VR2702 (Re), 2018 BCSC 390 at para. 88

35. Section 325 of the *BCA* provides an avenue for addressing "any confusion or uncertainty that may arise in the course of the winding-up process" for a strata corporation.

The Owners, Strata Plan VR2702 (Re), 2018 BCSC 390 at para. 90

36. On an application under section 325 of the *BCA*, this Court may make any order it considers appropriate, including:

"(m) an order

(i) approving the payment, satisfaction or compromise of any or all of the liabilities of the company and the retention of assets for that purpose, or

(ii) determining the adequacy of provisions for the payment or discharge of the liabilities of the company;"

"(o) an order giving directions on any matter arising in a liquidation;" and

"(t) subject to the obligation of the liquidator under section 330 (m) to pay or provide for the company's liabilities and the costs, charges and expenses incurred in the liquidation, an order approving any proposed interim or final distribution in money or other assets to shareholders."

Business Corporations Act, S.B.C. 2002, c. 57,
ss. 325(3)(m), 325(3)(o), 325(3)(t);

see also Masala Bites Enterprises Ltd. v. Sohal, 2018 BCSC 1 at para. 58

37. The Strata Corporation is undergoing a winding-up process. Further to the Winding Up Order, the Property will be surrendered to and vested in the Liquidator, subject to the mortgages, assignments of rent, and other charges registered on the title to the Property immediately before title to the Property is to be transferred to the Plaintiff.
38. Further to the Winding Up Order, the Liquidator shall pay out or deal with the Proceeds of the sale by:
- a. Firstly, by making and paying out adjustments;
 - b. Secondly, by paying any legal fees incurred by the Respondent or the Liquidator in relation to the winding up; and
 - c. Thirdly, by distributing the remaining amount rateably among the strata unit owners.
39. If, in the course of the winding-up process, the Liquidator distributes all of the Proceeds after the Closing Date and before the claim is determined, the Liquidator will have effectively placed the funds sufficient to satisfy a judgment against the Vendor beyond the Plaintiff's reach.
40. The potential prejudice to the Plaintiff from having an unenforceable award against a wound up and dissolved strata corporation outweighs any potential prejudice to the individual strata lot owners of the sixty-three strata lots from a delay in distribution of the requested \$525,000 hold back if the Vendor succeeds in its defence of the claim.
41. The order sought is reasonable given this Court's broad powers under section 276 of the SPA and section 325 of the BCA to approve the retention of assets to satisfy the Respondent's liabilities, approve any proposed interim distribution in money to the strata unit owners, and give directions on any matter arising in the winding-up.

The Orders Align with a Liquidator's Duties

42. A liquidator is "an officer of the court whose function it is to close up the company's business and distribute its assets to its creditors" and "an independent, objective, and experienced person" to liquidate and dissolve the corporation.

***Coopérants (Les), Société mutuelle d'assurance-vie (Liquidateur de) c. Dubois*, 1996 CanLII 242 (SCC), [1996] 1 SCR 900 at para. 34; *Masala Bites Enterprises Ltd. v. Sohal*, 2018 BCSC 1 at para. 57**

43. A liquidator's duties include:

"(d) subject to this part [of the BCA], use the liquidator's own discretion in realizing the assets of the company or distributing those assets among the creditors and shareholders of the company," and

"(i) if at any time the liquidator determines that the company is unable to pay or provide for the discharge of its liabilities, promptly apply to the court to

(i) stay any proceedings taken under this Part, and

(ii) seek directions," and

"(l) dispose of the assets of the company, other than assets that are to be distributed in kind to the company's shareholders, and pay or make provision for all of the company's liabilities"

Business Corporations Act, S.B.C. 2002, c. 57,
ss. 330(d), 330(i), 330(l)

44. Similarly, section 8(d) of the Winding Up Order requires the Liquidator to deal with any creditors of the Strata Corporation, including the payment, compromise, or settlement of any claims by those creditors.

45. The order sought is reasonable given the Liquidator's duties under the *BCA* to make provision for all the Strata Corporation's liabilities and to stay any Liquidation proceedings and seek directions if the Liquidator determines that the Strata Corporation cannot provide for the discharge of its liabilities.

Conclusion

46. Based on the above legal principles and the Vendor's status as a strata corporation undergoing a winding up with the Liquidator pursuant to Part 16 of the *SPA*, the Plaintiff submits that an order that the Liquidator retain \$525,000 from the Proceeds after closing of the sale for the Plaintiff's claim is appropriate and necessary in the circumstances.

Part 4: MATERIAL TO BE RELIED ON

47. Affidavit of Evan Allegretto made September 8, 2024.

48. Affidavit of Michelle Hsieh made September 9, 2024.

49. The pleadings filed herein.

50. Such further and other materials as counsel may advise.

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

file an application response in Form 33,

file the original of every affidavit, and of every other document, that

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

has not already been filed in the proceeding, and

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

a copy of the filed application response;

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

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

Date: September 9, 2024



Signature of Lawyer for applicants
Jordanna Cytrynbaum, Rajit Mittal

THIS NOTICE OF APPLICATION was prepared by **Jordanna Cytrynbaum and Rajit Mittal**, of the firm of Cassels Brock & Blackwell LLP, Lawyers, whose place of business and address for delivery is 2200 - 885 West Georgia Street, Vancouver BC V6E 3C8, Telephone: (604) 691-6100.

To be completed by the Court only:

Order made

- in the terms requested in paragraphs _____ of Part 1 of this notice of application
- with the following variations and additional terms:

Date: _____

Signature of Judge Associate Judge

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery

- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts
- none of the above