IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan LMS 992 (Re),* 2022 BCSC 1829

Date: 20221019
Docket: S217956
Registry: Vancouver

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

Before: The Honourable Justice Marzari

Reasons for Judgment

Counsel for the Petitioner:	G.S. Hamilton
Counsel for the Respondents Kenneth Kwok Ying Chan, Wei Lin Yuen Chan, Che Wing Chan, Yat Sin Wong, Ardeshir Soltani Razagh Sarab, and 0837963 B.C. Ltd.:	C. Armstrong
Counsel for the Respondent Intracorp Vanness Limited Partnership:	J. Cytrynbaum R. Mittal
Counsel for the Respondent Crowe MacKay & Company Ltd.:	P.J. Roberts, QC
Place and Dates of Hearing:	Vancouver, B.C. April 19 and 20, 2022
Place and Date of Judgment:	Vancouver, B.C. October 19, 2022

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INTRODUCTION

[1] This petition is brought by the Owners, Strata Plan LMS 992 (the "Strata Corporation") of a strata property known as Joyce Place, to confirm the resolutions of the owners to wind up their strata, appointing Crowe MacKay & Company Ltd. as liquidator, and selling the Strata Corporation's land and buildings to the respondent Intracorp Vanness Limited Partnership ("Intracorp") pursuant to the terms of a purchase and sale agreement dated January 11, 2021 (the "January 2021 PSA").

[2] Joyce Place is a mixed-use strata development comprised of 52 residential strata lots located in a 12-storey tower (the "Tower"), eight townhouse units (the "Townhouses"), and three non-residential strata lots located at the ground floor of the Tower (the "Retail Units"). I will refer to the Tower, Townhouses and Retail Units, together with the common property of the Strata Corporation, collectively as "the Strata Property". Joyce Place is located near the Joyce-Collingwood Skytrain Station in Vancouver, BC.

[3] Derek Lai of Crowe MacKay & Company Ltd. has agreed to act as liquidator, and his counsel filed a response to the petition indicating his agreement to the orders sought related to the role and responsibilities of the liquidator. His counsel appeared in court on this petition to argue that this response, together with counsel's presence, satisfied the conditions of the *Strata Property Act,* S.B.C. 1998, c. 43 [*SPA*] that the liquidator apply to and appear before the court to confirm their appointment, and have the property vested in them for the purpose of dissolution and sale of the strata property.

[4] Intracorp responded to the petition on limited issues, and sought a variation to the relief sought in the petition that would have canceled the commercial leases held by some of the commercial owners.

[5] A number of financial charge holders also responded to the petition, either formally or informally. None object to the relief sought nor appeared at the hearing of the petition.

[6] The respondents Kenneth Kwok Ying Chan, Yuen Mei Lin Chan, Che Wing Chan, Yat Sin Wong, and 0837963 B.C. Ltd. ("083 B.C. Ltd.") are the owners of the three Retail Units, and they oppose the petition. Ardeshir Soltani Razagh Sarab is the controlling mind of 083 B.C. Ltd. I will refer to these parties collectively as the "Commercial Owners".

[7] The legislative framework for a voluntary winding-up of a strata corporation is found in ss. 276–283 of the *SPA*. Briefly, it requires the approval of 80% of the owners, and court approval confirming the resolution. Subsections 278(1) to (3) provide for the calculation of each owner's share of the proceeds of distribution, based either upon the proportionate share of assessed value, or the schedule of interest upon destruction filed pursuant to the former *Condominium Act*, with the strata plan. It is uncontested that the latter distribution scheme applies to Joyce Place.

[8] In considering whether to confirm the resolution, the Court must consider the best interests of the owners, and the probability and extent of significant unfairness to one or more of the owners as well as any significant confusion or uncertainty that may arise from the confirmation or non-confirmation of the resolution.

[9] In this case, the Strata Corporation passed a series of resolutions to wind up the strata and sell the Strata Property to Intracorp by the requisite 80% vote at a special general meeting ("SGM") of the Strata Corporation on July 7, 2021 (the "July 2021 Resolutions"). However, the vote was not unanimous, and the Commercial Owners (amongst others) were opposed.

[10] Before me, the Commercial Owners resist the Strata Corporation's petition to confirm the July 2021 Resolutions on a number of grounds. Fundamentally, they say that the sale is not in the best interests of all the owners, and is significantly unfair to them in particular. As a result of their interest upon destruction filed with the strata plan, they will receive a portion of the sale proceeds that are significantly below the assessed value for their units, while most of the residential owners will receive proceeds above the assessed value for their units. They also raise a number of

technical arguments with respect to the deficiency of the July 2021 Resolutions and the petition to confirm it.

[11] The issues before me on this petition arising from the Commercial Owners' response are:

a) Does the Strata Corporation's petition comply with the legal requirements for such an application, including:

   i. A valid winding-up resolution;

   ii. The prompt filing of a statement of intent to liquidate with the Land Title Office ("LTO"); and

   iii. An application by the liquidator for the relief relating to the vesting and transfer of the Strata Property and related orders.

b) Pursuant to s. 278.1(5) of the *SPA*, is it contrary to the bests interests of the owners, or significantly unfair or cause significant confusion or uncertainty, to confirm the July 2021 Resolutions.

[12] For reasons that follow, I confirm the July 2021 Resolutions.

BACKGROUND AND FACTUAL FINDINGS

The Strata Corporation and Strata Plan

[13] The strata plan establishing Joyce Place was filed in the LTO on September 3, 1993.

[14] Pursuant to s. 4(g) of the former *Condominium Act*, R.S.B.C. 1979, c. 61 in effect at that time, the developer of Joyce Place was required to file with the strata plan a schedule setting out "the share of each owner as a tenant in common of the property and assets of the strata corporation on the destruction of the building . . . calculated in the proportion that the value of each strata lot bears to the total value of all strata lots on that strata plan" (the "Schedule of Interest upon Destruction").

The Schedule of Interest upon Destruction is distinct from the schedule of unit entitlement, which must also be filed, but which is generally based on proportionate square footage rather than proportionate value.

[15] The developer of Joyce Place prepared a disclosure statement in accordance with the requirements of the *Real Estate Act*, R.S.B.C. 1979, c. 356, as it then was. The developer's disclosure statement included a schedule of interest, containing both a column for the schedule of unit entitlement and the Schedule of Interest upon Destruction. The strata plan explained that the "Interest upon Destruction of each Lot is the figure indicating its share of the Development upon destruction or other termination." The disclosure statement also stated that the Schedule of Interest upon Destruction for Joyce Place was based on the relative market value of the strata lots in 1993. On the evidence, I find that the Schedule of Interest upon Destruction in the filed strata plan describes the relative value of each unit owner in the strata when the units were marketed in 1993, for the purposes of setting out the proportionate value of the units in the event of a cancellation or a wind-up of the Strata Corporation pursuant to s. 65 of the former *Condominium Act*.

[16] A review of this schedule in the strata plan shows that, starting around the fourth and fifth floors of the Tower, the relative values of the units (their interest upon destruction) starts to outstrip the relative square footage of the units (their unit entitlement) by 10–20% in some cases, with the higher floors having the higher interest upon destruction in relation to their unit entitlement.

[17] The three Retail Units belonging to the Commercial Owners have a scheduled interest upon destruction of about 10–20% below their unit entitlement. I understand this to broadly suggest that their commercial value per square foot, at the time the strata plan was filed in 1993 and the lots were sold, was lower than many of the residential units, and certainly less than the residential units on higher floors.

Building Repair and Winding-Up Resolutions

[18] The evidentiary record establishes that the building components of Joyce Place currently suffer from numerous deficiencies, including leaking windows, ineffective “face-seal” stucco cladding, “punky” gypsum board, decaying wood, and other structural defects.

[19] In a building envelope condition assessment report prepared for the Strata Corporation by MGH Consulting Inc. (“MGH”) in January 2017, the engineer who investigated Joyce Place recommended comprehensive repairs to the Tower and Townhouses at an estimated cost of $2.4–4.1 million, depending on how much of the repair work the owners elected to complete. A more recent order of magnitude report dated January 24, 2020 estimates the cost of these repairs at over $6 million. These repair costs are borne by the owners in accordance with unit entitlement. The average cost across 63 owners is over $30,000 per unit for repair costs of $2 million and over $95,000 for repair costs of $6 million. Given the proportionate size of their units as shown on the schedule of unit entitlement, two of the three Commercial Owners would bear a larger-than-average portion of these costs, though still less than the Townhouse owners and the four penthouse units in the Tower.

[20] After receiving the report from MGH in 2017, the strata council explored alternatives to address the financially burdensome repair expenses, including the possibility of winding up and selling the Strata Property to a developer.

[21] The strata council interviewed a number of experienced real estate agents to assist with the possibility of selling the property and ultimately entered into a listing contract with Colliers Macaulay Nicolls Inc. (“Colliers”). By September 2017, Colliers was actively marketing Joyce Place for sale.

[22] In early 2018, Colliers received an offer from Cressey Projects Corporation (“Cressey”) and helped to negotiate a letter of intent with a purchase price of $40 million. The total combined value of all the strata lots in Joyce Place based on values by the BC Assessment Authority was approximately $29 million at the time.

[23] On February 15, 2018, the strata council accepted the terms of Cressey's letter of intent and afterwards held an SGM of owners on April 12, 2018 to discuss the letter of intent and consider a resolution to raise money for projected legal expenses to negotiate a purchase and sale agreement ("PSA") with Cressey.

[24] On October 3, 2018, the Strata Corporation and Cressey negotiated and signed a PSA. However, Cressey elected not to proceed with its purchase and terminated the PSA on January 28, 2019.

[25] After the Cressey PSA came to an end, Colliers continued marketing the Strata Property and subsequently received an offer from Intracorp's parent company at a purchase price of $41.4 million. On or about December 11, 2019, the Intracorp offer was negotiated into a PSA, subject to approval of owners at an SGM.

[26] By that time, the Townhouses at Joyce Place were determined to be structurally unsafe for habitation and to the public. MGH had identified structural issues in the Townhouses as part of its report in 2017. In April 2019, the Strata Corporation subsequently hired Apex Building Science Inc. ("Apex") to assess the structural condition of the Townhouses. Apex found that the north walls of the Townhouses were subsiding and required immediate attention, and that the condition of the Townhouses presented a significant health and safety risk for both the occupants and the general public.

[27] On August 29, 2019, the Strata Corporation held an SGM to approve a special levy of $190,000 to repair wood rot and provide structural shoring for the Townhouses. This resolution was defeated; all three Commercial Owners voted against it, as did 16 residential owners.

[28] Without funding, the Strata Corporation did not take steps to repair the Townhouses and, on October 7, 2019, the Strata Corporation received an "Unsafe Order" from the City of Vancouver, which required the Strata Corporation to immediately provide improved shoring for the Townhouses. On November 18, 2019, it received another "Unsafe Order" from City of Vancouver.

[29] On November 7, 2019, the Strata Corporation held another SGM to approve a special levy of $190,000 for repairs to the Townhouses. The resolution was again defeated. Two of the three Commercial Owners voted against it, as did 14 residential owners. The third Commercial Owner abstained.

[30] After the November 7, 2019 vote, it was discovered that the Strata Corporation's property manager had submitted false bids in April 2019 for the required Townhouse repairs. The respondents say that the property manager did so in an attempt to have the Strata Corporation hire a company he was affiliated with. I find that little turns on this; there is no evidence that the estimates at that time were overstated, and the Strata Corporation's efforts to raise funds for the required Townhouse repairs during this time failed in any event. The Strata Corporation's contract with the property management company was subsequently terminated.

[31] On May 13, 2020, the Strata Corporation held an SGM to vote on a number of resolutions, including a resolution to wind up the Strata Corporation and to accept the Intracorp offer. The resolution to wind up the Strata Corporation was defeated with 50 votes (approximately 76%) in favour and 15.5 votes against. At the same SGM, a separate resolution to raise $1.8 million to fund the Townhouse repairs (including comprehensive building envelope repairs) was also defeated.

[32] I agree with the petitioner that following the May 2020 SGM, the strata council was facing a serious and immediate issue regarding the unsafe condition of the Townhouses and, without funding approved by owners, the Strata Corporation was unable to satisfy the City of Vancouver's work order.

[33] The record shows that the strata council considered the possibility of applying to the BC Supreme Court to appoint an administrator or, alternatively, to ask the Court to impose a special levy on owners to fund the Townhouse repairs. However, before doing so, the strata council scheduled another SGM for July 11, 2020 ("July 2020 SGM") to approve funding of $1.8 million to complete the most urgent Townhouse repairs. Under the pressure of a possible court application, the owners approved a special levy of $1.8 million to repair the Townhouses.

[34] Following approval of the $1.8 million special levy, the Strata Corporation hired RDH Building Science Inc. (“RDH”) to conduct a visual review of the Townhouses and evaluate the life safety issues associated with the existing deterioration. RDH subsequently provided a Targeted Structural Assessment to the Strata Corporation (the “TSA”). The TSA recommended that a structural engineer and contractor be retained to evaluate the underlying wood framing and the existing shoring of a number of the units.

[35] During this period, the City proceeded to prosecute the Strata Corporation for its failure to deal with the Unsafe Orders in a timely manner. On December 2, 2020, the Strata Corporation pleaded guilty to a bylaw offence, and the Provincial Court of BC convicted and fined the Strata Corporation $5,000. I understand another charge is still pending in relation to the continuing delay by the Strata Corporation to do this work. The Strata Corporation says that the most essential work to ensure life safety has been completed, but the Commercial Owners say that the work required by the City remains outstanding. Both agree that the record before me on the petition is insufficient to address this issue.

[36] In any event, I understand that a substantial portion of the $1.8 million special levy is still held by the Strata Corporation, less the amounts spent on the emergency shoring of the Townhouses. The strata council has told the strata members that, after it ensures the minimal requirements are met for life safety, it will not perform the bulk of the repairs on the Townhouses if the wind-up and sale is approved, and the owners will receive their pro-rata share of these funds back.

[37] On January 11, 2021, the strata council entered into the January 2021 PSA with Intracorp, on terms similar to its earlier agreement with Intracorp, with the main difference being that Intracorp removed its offer to advance money for the Townhouse repairs.

[38] The January 2021 PSA includes a 12-month guaranteed rent-back period at $2.00 per square foot monthly; a re-zoning protection bonus (i.e. should the City approve density greater than certain stated thresholds within five years of the sale,

a bonus payment will be made to owners); and a market value protection bonus (should assessed values for the units cumulatively increase by 4% or more, the owners will receive a price adjustment equal to 65% of the average value increase).

[39] On February 18, 2021, Intracorp removed the "Purchaser's First Condition" in the January 2021 PSA, which triggered the Strata Corporation's obligation to hold an SGM to approve a winding-up resolution in accordance with the *SPA*.

[40] On or about April 30, 2021, RDH delivered a final design report for repairs to the Townhouses. The scope of work included the replacement of windows, sliding doors, deck membranes, and face-sealed wall assemblies at a projected cost of $2.265 million.

[41] By letter dated May 27, 2021, strata council for the Strata Corporation notified the owners that an SGM would be held on July 7, 2021 (the "notice package"). The notice package stated that at this meeting, the owners would be asked to vote on the July 2021 Resolutions. The notice package attached the formal notice of the SGM and the January 2021 PSA, as well as various information, schedules, and proxy forms.

[42] At that time, there was a 50-person limit on gatherings due to Covid-19. In its letter to the owners advising of this SGM, the strata council strongly encouraged owners to participate and vote by proxy, rather than physically attend. Strata council cautioned that if more than 50 owners attended the meeting in person, the meeting would not be able to proceed pursuant to the gathering restrictions. No virtual attendance method was provided, though the notice package provided various information sources, and encouraged owners to attend scheduled "townhalls" if they had any questions about the July 2021 Resolutions.

[43] The notice package further included information on recent sales of comparable residential units in the neighbourhood. No information was provided for the sales of comparable commercial units in the neighbourhood.

[44] The notice package also attached the Schedule of Interest upon Destruction for the Strata Corporation and the share of the purchase price that would be paid to each unit (less costs) if the January 2021 PSA was accepted. It also attached a 2020 Order of Magnitude report prepared by Axiom Builders Inc. ("Axiom"), which set out the estimated costs of repairs to the Tower, Townhouses, and parkade, in the event that the sale was not approved. Not including the estimate of over $5 million for interior repairs, the building structure, envelope, and parkade costs were estimated at over $6 million at that time.

[45] On July 7, 2021, the Strata Corporation held its scheduled SGM to consider the January 2021 PSA and the July 2021 Resolutions to wind up the Strata Corporation. The owners approved the July 2021 Resolutions, with 52 votes in favour and 11. 5 votes opposed (including the 3.5 votes of the Commercial Owners), for a total of 81.9% of all owners in favour.

[46] On February 24, 2022, the Strata Corporation held its annual general meeting ("AGM"). The meeting minutes indicate that the Strata Corporation had not been able to secure property insurance in the previous year as a result of the condition of the Townhouses. The minutes further indicate that the Strata Corporation's premium for its general liability policy was substantially increasing as a result of the condition of its buildings. Due to the increased premium, the Strata Corporation decided to let the policy lapse. As a result, the Strata Corporation currently has no insurance coverage.

[47] To date, the strata council and its members have commissioned the following reports on the status of the Tower and the Townhouses:

a) January 3, 2017 Building Envelope Condition Assessment of MGH;

b) October 31, 2018 Structural Assessment of MGH;

c) April 17, 2019 Structural Opinion Review of Apex;

d) January 24, 2020 Order of Magnitude of Axiom;

e) June 25, 2020 Targeted Structural Assessment of RDH; and,

f) April 30, 2021 Design Report of RDH.

[48] Cumulatively, I consider these reports to indicate that there are serious issues regarding water ingress to the structure of the Tower, Townhouses, and parkade, although the issues relating to the condition of the Townhouses have been the main focus of various strata meetings and resolutions given their imminent threats to life safety. I also find that the current funds raised by special levy are insufficient to complete the required Townhouse repairs, and hamper the Strata Corporation from going to a binding tender for this work. I find that the special levy funds and contingency reserves are entirely inadequate to address the cost of building envelope issues and other needed repairs that have been identified since 2017 in relation to the Tower and the rest of the Strata Property.

The Commercial Owners and their Circumstances

[49] The Commercial Owners own the three commercial ground level strata units.

Strata Lot 9

[50] Kenneth Kwok Ying Chan and Yuen Mei Lin Chan are the registered owners of strata lot 9 (“SL9”). The Chans purchased SL9 in November 1993 as a long-term investment and, in the almost 30 years they have owned SL9, they have only had two lessees. The Chans depose that they rely on the rental income from SL9 to fund their retirement.

[51] For over ten years, SL9 has been leased to a hair salon business that pays the Chans $3,473 monthly in rent. The lease was set to expire on August 31, 2022. Although there is a right of renewal in the lease for a further three years, the lessee had not given notice within the required time, and the Chans say the lease will therefore expire on that date.

[52] On May 18, 2021, after the Strata Corporation entered into the January 2021 PSA with Intracorp, the Chans listed SL9 for sale for $1.1 million. On June 15, 2021,

the Chans entered a purchase and sale agreement for the asking price with a cannabis retailer. This agreement was conditional on the City of Vancouver granting permits to operate a cannabis retail store in that location. The City of Vancouver rejected the cannabis retail permits and, on February 8, 2022, the Vancouver Board of Variance rejected the appeal of this decision. As a result, that sale did not complete.

[53] The 2020 BC Assessment value for SL9 is $605,600. The 2021 BC Assessment value is $659,900. Under the January 2021 PSA, assuming there are no density bonuses or lifts for increased value or zoning changes, the SL9 owners will receive $489,864.

Strata Lot 10

[54] Che Wing Chan and Yat Sin Wong are the registered owners of strata lot 10 ("SL10"). Mr. Chan and Ms. Wong are both over age 70 and retired. They also purchased SL10 in 1993 as a long-term investment. In 2005, Mr. Chan and Ms. Wong leased SL10 to the owner of strata lot 11 ("SL11"). The most recent lease modification extends the lease period to June 2024. Mr. Chan and Ms. Wong currently receive $4,400 monthly in rent from their unit, which they rely upon to fund their retirement.

[55] On May 18, 2021, after the Strata Corporation entered into the January 2021 PSA with Intracorp, Mr. Chan and Ms. Wong listed SL10 for sale for $1.598 million. Their realtor deposes that she has received numerous inquiries about this unit, but that there have been no offers because prospective purchasers are generally more interested in purchasing owner-occupied units and are deterred by the Strata Corporation's wind-up resolution. Although this is hearsay evidence, I accept that a wind-up resolution and an accepted PSA (anticipated to close in 2023, subject to court approval), would be a significant deterrent to most purchasers of a strata lot in Joyce Place—at least one where the asking price is significantly above what any owner will ultimately receive from the proceeds of sale at the time of the wind-up.

[56] The 2020 BC Assessment value for SL10 is $818,000. The 2021 BC Assessment value is $892,000. Under the January 2021 PSA, provided that there are no density bonuses or lifts, SL10's owners will receive $675,192.

Strata Lot 11

[57] 083 B.C. Ltd. is the registered owner of SL11. Mr. Sarab is the sole director of 083 B.C. Ltd. Mr. Sarab bought SL11 through 083 B.C. Ltd. in 2008 as a long-term investment. He currently runs a restaurant out of it named Donair Land. Mr. Sarab deposes that last year Donair Land generated over $260,000 in gross revenue, although the corporate tax filings he attaches show that the net revenues were slightly below $55,000.

[58] Mr. Sarab and his brother also operate a grocery store out of SL10, named Joyce Grocery. Mr. Sarab attests that, in 2019, Joyce Grocery generated over $679,000 in gross revenue, though no evidence is provided to indicate its net profits. Some indication of the value of the grocery business might be inferred from its listing price of $275,000 in March 2021; however, there is no evidence to assist me in determining the reasonableness of this price, and no offers have been received for the business.

[59] In June 2021, Mr. Sarab listed SL11 and Donair Land together for sale for $1.68 million. On July 10, 2021, three days after the July 2021 Resolutions were passed, Mr. Sarab entered a purchase and sale agreement for SL11 and Donair Land for $1.28 million. However, in September 2021, the purchaser pulled the offer after learning of the July 2021 Resolutions. On November 9, 2021, Mr. Sarab also received a conditional written offer for SL11 and Donair Land together for $1.45 million. This offer was also revoked once the purchaser was advised of the July 2021 Resolutions.

[60] The 2020 BC Assessment value for S11 is $814,000. The 2021 BC Assessment value is $887,000. Under the January 2021 PSA, assuming no density bonus or lift, the SL11 owner will receive $691,956.

Comparative Values

[61] The Commercial Owners provided the following table setting out what they say is the respective range of their losses based on the 2020 and 2021 BC assessment values:

	Assessed Value as of July 1, 2020	Assessed Value as of July 1, 2021	January 2021 PSA Sale Proceeds	Loss Based on Assessed Value
SL9	$605,600	$659,000	$489,863.68	$115,736.32–$170,036
SL10	$818,000	$892,000	$675,192.33	$142,807.67–$216,807.67
SL11	$814,000	$887,000	$691,955.73	$122,044.27–$195,044.27

[62] I note that the "loss based on assessed value" ranges for SL9, as provided by the Commercial Owners in the above table, is slightly off. These ranges should instead read: $115,736.32–$169,136, but nothing turns on this difference.

[63] The petitioner did not raise any objection to the Commercial Owner's use and reliance upon the BC Assessment values, despite the Court of Appeal's decision in *Dosanjh v. Liang*, 2015 BCCA 18. Acknowledging that this evidence can only be used for ballpark evidence of value, it is generally uncontentious that the Commercial Owners will receive about 80% of assessed value for the commercial units. In contrast, the petitioner calculates that the residential unit owners will receive approximately 145% of their 2018 assessed value.

[64] The Commercial Owners applied at the hearing of the petition to adduce an expert report of a commercial appraiser, filed approximately two weeks before the hearing of this petition. This report suggests a higher value for SL9, SL10, and SL11. The Strata Corporation objected to the admissibility and late delivery of this report, which was months outside of the time frame for responsive affidavits under the *Supreme Court Civil Rules*, including the extensions already granted to the Commercial Owners. Indeed, the report was not requested until December 2021, after the Commercial Owners had already filed their formal response and affidavits.

[65] I reserved my ruling on the admissibility of this report, and the Commercial Owners largely restricted their submissions to the BC Assessment values included in their original materials. Having reviewed the report, I note that the appraiser was not provided with any information about the ongoing significant building envelope issues in the Towers or the Townhouses: the report assumes no significant levies or maintenance costs, and a 40+ year economic life of the building without renovations. Even had the report not been served so late so as to preclude an evidentiary response from the Strata Corporation, I would have found it so unhelpful as to the market value of these units in their current state as to be inadmissible.

The Legislative Framework

[66] The relevant provisions of the *SPA*—including the requirement for the orders sought to confirm the winding-up, appointment of the liquidator, and vesting in the liquidator the title to the Strata Property—can be found at ss. 277–283 of the *SPA,* which state as follows:

> **Appointment of liquidator**
>
> **277** (1) To appoint a liquidator to wind up the strata corporation, a resolution to cancel the strata plan and appoint a liquidator must be passed by an 80% vote at an annual or special general meeting.
>
> (2) A liquidator must have the qualifications of a liquidator that are required by the *Business Corporations Act*.
>
> …
>
> **Interest schedule**
>
> **278** (1) The interest schedule must meet any requirements as to form and content that are required by this Act and the regulations, and must do all of the following:
>
> …
>
> (f) list each owner's share of the proceeds of distribution in accordance with the following formula:
>
> $$\frac{\text{most recent assessed value of an owner's strata lot}}{\text{most recent assessed value of all the strata lots in the strata plan, excluding any strata lots held by or on behalf of the strata corporation}}$$
>
> …
>
> (3) If a strata corporation has a schedule of interest on destruction that was required under section 4 (g) of the *Condominium Act*, R.S.B.C. 1996, c. 64, or a similar

schedule that was required under any former Act, that schedule determines the owner's share of the proceeds of distribution on the winding up of the strata corporation and for that purpose replaces the formula in subsection (1) (f).

Confirmation by court of winding-up resolution

278.1 (1) A strata corporation that passes a winding-up resolution in accordance with section 277, if the strata plan has 5 or more strata lots,

(a) may apply to the Supreme Court for an order confirming the resolution, …

…

(4) On application by a strata corporation under subsection (1), the court may make an order confirming the winding-up resolution.

(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.

Vesting order

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.

(2) The court may grant the order if satisfied that

(a) the requirements of section 277 have been met, and

(b) if the strata plan has 5 or more strata lots, the winding-up resolution under section 277 has been confirmed by an order of the court under section 278.1.

(3) For the purposes of subsection (1), the liquidator is appointed on the date the winding-up resolution under section 277

> (a) is passed, if the strata plan has fewer than 5 strata lots, or
>
> (b) is confirmed by an order under section 278.1, in any other case.
>
> **Filing vesting order**
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> **280** (1) The liquidator must deliver a certified copy of the vesting order under section 279, accompanied by the interest schedule, to the registrar.
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> …
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> **Effect of filing vesting order**
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> **281** When the vesting order is filed
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> (a) the strata plan is cancelled,
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> …
>
> **Approval of disposition**
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> **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.
>
> (2) The resolution may specify the conditions under which a disposition may be made.
>
> [Emphasis added.]

[67] In 1993, when Joyce Place was marketed and sold, ss. 64 and 65 of the *Condominium Act* provided that a strata corporation could deem a strata building to have been destroyed by special resolution if they did not want to repair it. Wind-up required a court application. About seven years later, with the introduction of the *SPA*, a unanimous resolution of the strata members was required to cancel or wind up a strata plan.

[68] This was changed again on July 29, 2016, by way of a further amendment to the *SPA*. Since that date, strata corporations in BC no longer require a unanimous vote to proceed with a wind-up under s. 277 of the *SPA*. Instead, s. 277 now provides for an 80% vote of all eligible voters at an annual or special general meeting. As was discussed by the Court of Appeal in *The Owners, Strata Plan VR2122 v. Bradbu*ry, 2018 BCCA 280 at paras. 9–18, the BC Legislature recognized that, as a result of this amendment, up to 20% of owners in a strata corporation could face a wind-up despite their opposition, and this could unreasonably interfere with their rights as property owners. To protect dissenting owners, it would appear

that the Legislature included ss. 278.1(4) and (5), which require the court's oversight and approval for s. 277 wind-up resolutions.

[69] Section 278.1(5) sets out the factors that the court must consider when deciding whether to approve a voluntary strata wind-up, including "the best interests of the owners" and the "probability and extent" of any "significant unfairness to one or more owners" or "significant confusion and uncertainty in the affairs of the strata corporation" if the winding-up resolution is confirmed (or not confirmed).

[70] Since coming into force, there have been a number of written decisions considering the amendments to the *SPA*'s voluntary strata wind-up provisions. In *The Owners, Strata Plan VR2702 (Re)*, 2018 BCSC 390 [*Barclay Terrace*] at para. 17, Justice Milman summarized the legal principles that have emerged from the case law to inform the application of the s. 278.1 test:

> 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.

ISSUES

[71] The respondents acknowledge that they have the burden to establish the factors that would justify the Court's refusal to confirm a winding-up resolution.

[72] The Commercial Owners say that the effect of the winding-up resolution is oppressive to them primarily because of the disparity between the market value of their properties and the share of the sales proceeds they would receive calculated on the basis of the Schedule of Interest upon Destruction. However, they also raise a number of preliminary issues related to compliance with the *SPA* and the *Business Corporations Act,* S.B.C. 2002, c. 57 [*Business Corporations Act*].

[73] I will address the preliminary issues raised by the Commercial Owners first, before moving to their primary argument regarding the fairness of the July 2021 Resolutions in light of the financial disadvantage to them.

The Validity of the July 2021 SGM

[74] The Commercial Owners say that the notice package of the July 2021 SGM was deficient, and as a result, the SGM at which the July 2021 Resolutions were passed was improperly constituted. Accordingly, they say that the July 2021 Resolutions are invalid. Specifically, the Commercial Owners say that owners "were warned away from physically attending the July 2021 SGM under the threat of it being cancelled" and that they were given no option to attend the SGM virtually or by telephone despite a ministerial order permitting this type of attendance. They also say that the limitations on how the owners could vote by proxy are contrary to the *SPA*.

[75] The Commercial Owners point to Ministerial Order No. M114 issued during the pandemic state of emergency, which stated that strata corporations "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." They say that in failing to provide a virtual method of participation, and in discouraging owners from attending the SGM in person and using proxies instead, the Strata Corporation fell afoul of the requirements of the *SPA* which provide that all eligible voters may vote in person or by proxy.

[76] The Commercial Owners further submit that the notice package did not advise the owners that they were permitted to choose who they wanted to be their proxy, but rather instructed owners to vote in one of two ways: (a) emailing their vote to the Strata Corporation's law firm, or (b) submitting a paper proxy vote to the strata council president.

[77] They say that the notice and voting procedures at the SGM were similar to those in a series of cases decided by the BC Civil Resolution Tribunal ("CRT"), starting with *Shen v. The Owners, Strata Plan EPS3177,* 2020 BCCRT 1157. In *Shen,* the CRT found that resolutions passed at an SGM held during pandemic-related gathering restrictions were invalid because the strata failed to properly notify strata lot owners of the SGM, and chose to limit attendance at the SGM without offering alternative attendance measures.

[78] In *Hiedary v. The Owners, Strata Plan BCS 2143*, 2021 BCCRT 1176 at para. 31, the CRT confirmed the principles in *Shen* stating, "strata corporations must hold general meetings in a manner that permits owner attendance and participation, and that any restrictions placed on proxy voting are not permitted under the [*SPA*]."

[79] Finally, the Commercial Owners argue that this Court should follow the precedents set by the CRT in this regard in light of its recognized expertise in strata matters: *Yas v. Pope*, 2018 BCSC 282 at para. 15.

[80] The Strata Corporation acknowledges that it did not provide for a virtual means of attendance at the SGM as it would have been permitted to do pursuant to the Ministerial Order. However, it says that the notice package was appropriately crafted pursuant to the requirements in *Shen* and the CRT's line of authority on this issue, and did not restrict owner attendance or participation in person, but merely encouraged the use of proxies as an equally valid method of participation and voting. They also say that unlike in *Shen*, there was no restriction on who could be appointed by proxy, and they did not "threaten" to cancel the SGM if more than 50 persons attended in person rather than by proxy.

Determination

[81] I accept that the CRT's body of decisions can provide this Court with non-binding guidance as to the interpretation of the *SPA*, and specifically the scope of attendance and voting rights under ss. 54 and 56 of the *SPA*. However, in my view, these decisions turn on the Tribunal's interpretation of the notice provided, and whether the notice does, in fact, communicate a restriction on attendance or voting at the SGM or an impermissible limitation on who can be assigned as a proxy.

[82] Although the Ministerial Order empowers strata councils to allow for virtual attendance and voting at strata meetings, it does not require that strata corporations provide this means of attendance, which has its own set of barriers to access. Attendance and voting by way of proxy is specifically authorized by s. 56 of the *SPA*, and it is lawfully open to a strata corporation under the *SPA* to allow in-person attendance and voting, but to encourage attendance and voting by proxy. However, doing so raises the acknowledged risk that the meeting may be cancelled and rescheduled if more owners wish to attend in person than is permissible under applicable gathering restrictions.

[83] As I read the *SPA*, what is not permitted is to direct owners not to attend a meeting in person and to require them to vote by proxy instead. It is also not permitted to require owners to select a specific proxy to represent them in person at a meeting.

[84] In my view, the notice package in this case comes close to the line of what is permissible, but does not cross it. It encourages, but does not direct, owners to participate by way of proxy rather than in person. It does not "threaten" owners, but it does warn of the potential for cancellation of the SGM if more than 50 owners attend in person. It sets out the mechanisms by which owners may advise the strata council of their personal proxy selection, but also how they may alert the strata council of their intention to attend in person. Read as a whole, I find that the notice package acceptably advises owners of their rights to attend in person or by their chosen

proxy, and the reasons that owners are encouraged to consider voting by proxy instead of in person, without requiring or directing them to do so.

[85] In my view, the Commercial Owners' submissions overstate these proxy restrictions. Although the notice package suggests that the owners may provide their proxy form to either the strata council president or to legal counsel for the Strata Corporation, this is not an "instruction to owners to vote" in only "one of two ways" or state that one of those two persons would then be required to be their proxy. Rather, it gives the owners the option of choosing someone who will be attending the SGM in person. This includes the strata council president or legal counsel, but also indicates that the proxy could be someone else of their choosing who will be attending the meeting in person.

[86] In this case, the minutes of the July 2021 SGM indicate that the Commercial Owners, and a number of other owners, attended in person. As was required for the 80% wind-up resolution, 100% of the owners were in attendance either by way of personal attendance or designated proxy, and voted on that Resolution.

[87] Overall, I am satisfied that the July 2021 Resolutions were passed at a validly-held SGM.

Registration of the Notice of Wind-Up

[88] The Commercial Owners argue that the Strata Corporation did not comply with the legislative requirement to file a statement of intent "promptly" after the wind-up Resolution was passed. They say that this is "further grounds to dismiss" the petition.

[89] Specifically, the Commercial Owners rely on s. 276(1)(b) of the *SPA*, which provides that the provisions of the *Business Corporations Act* relating to voluntary liquidation apply to the voluntary wind-up of strata corporations (noting that filings with the registrar under the *Business Corporations Act* should instead be filed with the LTO). Section 321(1) of the *Business Corporations Act* provides that "a company

must, promptly, after the resolutions . . . are passed, file a statement of intent to liquidate with the registrar."

[90] The Commercial Owners argue that while the Strata Corporation did eventually file a statement of intent on January 5, 2022, this was almost six months after the July 2021 SGM, and was therefore "too late".

[91] As to the meaning of "promptly", the Commercial Owners rely on a 1995 decision in relation to a default on a construction bond*, Fraser Gate Apartments Ltd. v. Western Surety Co*., 1995 CanLII 1717 (B.C.S.C.) at para. 81, rev'd in part but not on this point in [1999] 54 B.C.L.R. (3d) 1 (C.A.), where this Court stated that "the question of whether or not a surety has acted "promptly", must depend upon the particular facts of the case, the context of that case. The surety must act as soon, and with such dispatch, as is reasonably possible." The Commercial Owners say that the Strata Corporation did not file the statement of intent as soon as reasonably possible, and that the prompt filing of a statement of intent is an essential aspect of a strata winding up. They rely on Milman J.'s decision in *The Owners, Strata Plan VR 1966,* 2017 BCSC 1661 [*Bel-Ayre Villa*]*,* where this Court identified a series of required steps in the winding-up of a strata corporation, of which they say that prompt registration of this notice is such a step, without which the wind-up is missing one of its essential "ingredients".

[92] However, the Commercial Owners also concede that the failure to file the notice in the LTO would not, in and of itself, invalidate the July 2021 Resolutions.

Determination

[93] While I can imagine circumstances in which a failure to promptly register a notice of wind-up in the LTO may negatively affect third parties not aware of the wind-up and thereby lead to legal consequences for a strata corporation, in my view this is not such a case. *Bel-Ayre Villa* does not include "prompt" registration of the notice of the wind-up resolution in the LTO as one of the steps required to effect a wind-up of the strata corporation. The timing of such a registration is, in my view,

quite different from a deficiency in the required process to pass a wind-up resolution, as was considered in *Bel-Ayre Villa* or required in ss. 277–283 of the *SPA*.

[94] Accordingly, I do not find the July 2021 Resolutions invalid on this basis.

The Role of the Liquidator

[95] The Commercial Owners say that, even if the July 2021 Resolutions were technically properly passed, the relief sought in the petition goes beyond what this Court can order at this stage of the winding-up process. Specifically, they say that the order sought relating to the appointment of the liquidator, and the liquidator's authority, obligations, and ability to vest the property in himself and to complete the sale contemplated in the January 2021 PSA, are beyond the relief that can be granted at this stage in the winding-up process.

[96] Specifically, the Commercial Owners rely on ss. 279 and 282 of the *SPA*. Section 279 provides that the liquidator must apply to this Court for an order confirming his appointment and vesting the Strata Property in the liquidator. The liquidator must do so within 30 days of an order of this Court confirming the winding-up resolution pursuant to s. 278. Section 282 then requires that the liquidator obtain a 75% vote of the Strata Corporation for the proposed disposition of the lands, "or the disposition is void."

[97] The Commercial Owners say that by seeking to have this Court approve not only the winding-up resolution under s. 278 of the *SPA*, but also the appointment of the liquidator and vesting of the Strata Property under s. 279 together with the approval of the disposition of the Strata Property in accordance with the January 2021 PSA in the same petition, the Strata Corporation is "seeking to circumvent the legislative procedures of the *SPA*."

[98] They rely on *Bradbury* at para. 43 to argue that even where the legislative scheme is seemingly inefficient, "it is not the role of the court to ignore the words of the statute and create a 'better' scheme." Finally, the Commercial Owners argue that appointing the liquidator at the same time as affirming the wind-up resolution (as

opposed to within 30 days of this order) “will result in uncertainty with respect to the commercial lease agreement” because it is “unclear who will have responsibility for them in the period after the strata corporation’s property vests in the liquidator and before the PSA completes, likely sometime in 2023.”

[99] The liquidator appeared in court, through counsel, on this petition to address the issue of his appointment and authority, and the terms of the relief sought in the petition that relate to the liquidator, including those that are challenged by the Commercial Owners.

[100] The liquidator took the position that there is no substantive difference between the liquidator appearing in court in response to a petition that contains the relief that would ordinarily be sought by the liquidator, and filing a simultaneous but separate petition to be heard at the same time, seeking this relief (as was contemplated in *Bradbury*). Indeed, the liquidator’s position was that it was preferable for all parties for the liquidator to proceed in the manner contemplated by this petition, rather than file his own petition, because wind-ups are costly and best done as quickly and efficiently as possible. Delays are problematic for individual owners who are constrained in dealing with their property during the wind-up period. Moreover, the liquidator’s costs are borne by the strata owners, which come out of their proceeds of sale. Therefore, the liquidator argues that his response to this petition—as opposed to filing his own petition or application and scheduling a separate appearance—reduces time and legal costs by reducing the number of applications that require counsel and court time on the same matter.

[101] The liquidator relies on *The Owners, Strata Plan VR456 (Re)*, 2022 BCSC 502 [*Spruce West*], where Justice Matthews considered the Court of Appeal’s decision in *Bradbury* and concluded that if the liquidator can bring a simultaneous petition for this relief, the liquidator may also appear before the Court in formal response to a petition seeking this relief.

[102] The liquidator also sought to clarify the issue of the commercial leases and the timing of the vesting of the property. The liquidator took the position that,

although the order sought would authorize the liquidator to vest the Strata Property at any point after the liquidator's appointment was confirmed by the Court, the liquidator would not actually seek to so vest the Strata Property in its name in the LTO until immediately prior to the closing of the January 2021 PSA. The liquidator supported changes to the order sought in the petition to clarify this.

[103] The Strata Corporation supported the position of the liquidator in this regard.

Determination

[104] In *Bradbury,* the Court of Appeal adopted the summary of the legislative steps initially set out by Milman J. in *Bel-Ayre Villa* at para. 3*,* where a strata corporation decides to wind up with the assistance of the liquidator under the 2016 amendments to the *SPA*:

> [3] The new provisions governing the voluntary winding-up process using a liquidator are to be found in Division 2 of Part 16 of the Act. That process consists of the following steps:
>
> (a) passing a resolution under s. 277 at an annual or special general meeting by a margin of at least 80% to cancel the strata plan and appoint a liquidator;
>
> (b) obtaining an order of this court under s. 278.1 confirming the resolution;
>
> (c) obtaining a vesting order from this Court under s. 279, on application by the liquidator, confirming the appointment of the liquidator and vesting the individual strata lots and common property in the liquidator for the purpose of selling them and distributing the proceeds of sale;
>
> (d) delivering the vesting order to the registrar of titles and filing of the vesting order by the registrar under ss. 280 and 281;
>
> (e) disposing of the property by the liquidator following approval by resolution passed by a 3/4 vote at an annual or special general meeting under s. 282; and
>
> (f) applying for dissolution following approval of the liquidator's final accounts by 3/4 vote at an annual or special general meeting under s. 283.
>
> [Emphasis added.]

[105] As I read *Bradbury*, the Court of Appeal has endorsed an interpretation of this process that does not require gaps in time between each step, or this specific order

of steps. A simultaneous application by the liquidator for the court order pursuant to s. 279 of the *SPA* detailed in step (c) predicated upon an 80% vote appointing the liquidator and a three-quarters majority vote passed at an AGM or SGM as contemplated in steps (e) and (f) that is tied to a specific purchase and sale agreement and passed at the same time as the winding-up resolution, would be acceptable.

[106] Furthermore, the Court of Appeal has recognized the helpfulness, not only to the owners affected by any winding-up, but also the court in its supervisory role, of having the winding-up resolution tied to a specific purchase and sale agreement, rather than providing the liquidator with the authority to vest the property in themselves and pursue a sale and disposition of the Strata Property, then return to the strata council for approval of the proposed terms of sale and dissolution after the winding-up and vesting has already been approved by the court.

[107] Prior to 2016, there was no requirement for the winding-up resolution to be approved by the court, and so the liquidator's application and appearance in court pursuant to s. 279 of the *SPA* to confirm the appointment and to vest the individual strata lots and common property, was the first, and potentially only, opportunity for court review. Now that s. 278.1 of the *SPA* provides for a more robust supervisory role as to the fairness of the winding-up resolution and its terms, s. 279 has less unique practical utility. In *Bradbury* at para. 42, the Court of Appeal found that it was still important, pursuant to that section, that the liquidator apply and appear, not only because the provision is unchanged and still required under the *SPA*, but also because the "liquidator is assuming important responsibilities and should be before the court seeking its approval. The court must be able to determine that the liquidator is qualified and suited to carry out these responsibilities."

[108] I agree with Matthews J. in *Spruce West,* that there is no meaningful difference between the liquidator bringing a new petition, or filing a response to an existing petition proceeding, so long as they formally seek orders to confirm their appointment pursuant to s. 279(1) of the *SPA*, and associated powers and

responsibilities, and appear before the court so that the court can be satisfied of their qualifications and suitability to carry out the responsibilities the order would vest in them.

[109] The purpose of these provisions of the *SPA* is not to provide the owners of a strata corporation with a second opportunity to review a specific sales agreement and disposition. As *Bradbury* confirms, in reality, most strata corporations would prefer to know and consider up front the terms of a PSA and the resulting distribution of the sales proceeds before passing a wind-up resolution, and the court's review will be of that agreement and distribution as part of the s. 278.1 confirmation hearing.

[110] The Court of Appeal's main concern in *Bradbury* was the failure of the liquidator to appear before the court, establish their credentials, and describe the process by which they were going to give effect to the resolutions of the owners. In addition, the Court of Appeal was concerned with ensuring that the liquidator obtained a 75% dissolution vote of the owners before disposing of the Strata Property. In that case, no such vote had yet been conducted, but it was still possible that it could be conducted without precluding any further court application: see para. 44.

[111] In my view, where there is a signed purchase and sale agreement that is the basis for the owners voting to wind-up and passing of a 75% vote to dispose of their personal and common property in accordance with that agreement, approving both the wind-up and an order confirming the vesting of the strata property in the liquidator in accordance with the strata-approved sale makes sense and avoids significant potential future complications and costs.

[112] In this specific case: the Strata Corporation approved the wind-up (conditional on the January 2021 PSA); appointed the liquidator to proceed with this dissolution and sale; and passed the 75% vote approving the dissolution and sale of the Strata Property on that basis. In my view, an interpretation of the *SPA* that ignores this Strata Corporation's vote to authorize the liquidator to dispose of the Strata Property

only on the basis of the specific purchase and sales agreement they approved by their 75% vote, would suggest that other dispositions would be open to the liquidator. This would undermine the basis upon which the owners voted and upon which this Court has performed its review of the fairness of the winding-up resolution.

[113] I agree with the liquidator that some language ought to be added to clarify that the liquidator will not seek to vest the Strata Property in the liquidator's name until the January 2021 PSA is about to close. This will ensure that there is minimal impact on the commercial leases prior to the closing.

[114] Overall, the Commercial Owners' objections to the petition on this ground do not go to the Strata Corporation's entitlement to wind up, but to the form and sequence of court proceedings. There is no substantive issue in this case with the appointment of the liquidator, his qualifications, or his proposed authority and responsibilities.

[115] I will go on then to consider the substantive concerns of the petitioners with respect to the July 2021 Resolutions pursuant to s. 278.1 of the *SPA*.

The Winding-Up Resolutions

[116] The Strata Corporation's petition to the Court for confirmation of the winding-up resolutions is made pursuant to s. 278.1 of the *SPA*. Pursuant to the 2016 amendments to the *SPA,* this is the point in the winding-up process where the Court considers the merit of the July 2021 Resolutions themselves.

[117] The courts have recognized that the language of significant unfairness in s. 278.1 has similarities to the remedies under s. 164 of the *SPA*, and the oppression remedy more generally. The leading case on the application of s. 164 is *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44 where Justice Garson considered the meaning of the phrase "significantly unfair" in s. 164. Although in dissent, Garson J.A.'s articulation of the test has been widely accepted:

see e.g., *Barclay Terrace* at para. 16; *Barrett v. The Owners, Strata Plan LMS 3265,* 2016 BCSC 1477 at paras. 95–99, rev'd 2017 BCCA 414 but not on this point.

[118] In *Barclay Terrace*, Milman J. reviewed the authorities on s. 164, as well as their application to s. 278, and concluded at para. 17(c) that "in determining what is in the best interests of the owners for the purpose of s. 278.1(5)(a), the interests of all of the owners must be weighed, not just those of the dissenting minority."

[119] I will turn first to the question of what is in the best interests of the owners for the purpose of s. 278.1(5)(a), before moving on to consider the issues of significant unfairness and uncertainty.

Best Interests of the Owners

[120] The Commercial Owners note that, in considering the best interests of the owners, the interests of all owners must be weighed. Therefore, the fact that a wind-up may benefit a majority of owners is not determinative of the best interests of the owners for the purposes of s. 278.1(5)(a).

[121] The Commercial Owners argue that, in considering the best interests of the owners, the Court should consider not only the negative impacts on the dissenting owners, but also the strata council's "effort to advocate for or defend the best interests of the dissenting owners" and whether the strata council has acted in bad faith in relation to the wind-up. In relation to the latter argument, the Commercial Owners rely on this Court's decision in *The Owners, Strata Plan VR2122 v. Wake,* 2017 BCSC 2386, rev'd in part 2018 BCCA 280, where Justice Loo referenced, in *obiter*, the factors considered for strata wind-ups in Singapore. They say that I should infer from these factors that a strata council cannot act "directly against the best interests of the dissenting owners."

[122] The Commercial Owners submit that the July 2021 Resolutions are clearly not in their best interests for several reasons, including that:

a) each of the Commercial Owners will receive more than $100,000 below the assessed values of their strata units;

b) the Commercial Owners will lose their rental business income;

c) the Commercial Owners will likely be unable to purchase comparable commercial property in the same area; and

d) the January 2021 PSA provides for no benefits to them, such as a right of first refusal or beneficial leaseback terms.

[123] They also say that since the wind-up Resolutions the strata council (or the strata council president) has acted directly against their best interests, for example by not supporting—and even opposing—the issuance of a cannabis retail permit to the prospective purchaser of SL9.

[124] Finally, they say that the wind-up is not in the best interests of all of the owners because the July 2021 Resolutions have caused a delay in the needed repairs to the Townhouses. They say that these repairs will not proceed in the wake of the passage of the July 2021 Resolutions, and that this is contrary to the best interests of all the owners, not least because the Strata Corporation can no longer afford to pay for its sky-rocketing insurance premiums.

[125] In essence, the Commercial Owners argue that approving the July 2021 Resolutions means that the Townhouses will remain unrepaired and that the Strata Corporation will remain uninsured for at least a year-and-a-half. On the other hand, if the petition to confirm the July 2021 Resolutions was dismissed, the Strata Corporation would proceed to repair the Townhouses and become eligible for insurance coverage again. They say that the Strata Corporation is “leveraging the consequences of its failure to do repairs” to support the wind-up and sale.

[126] The Strata Corporation says that the immediate Townhouse repairs necessary to meet the minimum life safety requirements have been completed, and that the special levies to date are so inadequate that they are not able to go to

tender to complete the remainder of the required Townhouse repairs without further special assessments. Certainly, there are insufficient funds to repair the remainder of the Strata Property, including the work that has been recommended to repair the building envelope of the Tower since 2017.

[127] The Strata Corporation says that, if the Court does not confirm the wind-up resolution and sale to Intracorp, Joyce Place requires extensive repairs totalling $6 million, including the additional costly work required on the Townhouses. The owners have previously demonstrated a resistance to raising money for expensive repairs. The most recent special levy of $1.8 million was approved with the cudgel of threatened legal proceedings, and approximately 25% of owners have not yet paid the special levy. While the need for more money to repair Joyce Place is certain, the willingness of owners to approve resolutions to fund repairs is uncertain and may result in further conflict and financial hardship for owners.

[128] On the other hand, the Strata Corporation says that other than the emergency work already done to shore up the Townhouses to date, no more work would be required in the next year or two if Joyce Place was slated to be demolished in any event.

[129] The Strata Corporation says that if the wind-up and sale of Joyce Place is denied, the owners are condemned to funding and maintaining an increasingly costly building and deprived of an opportunity to realize on the higher development value of the entire strata lands.

[130] The Strata Corporation concedes that the strata council has a duty of good faith, but denies that it has any specific obligations to advocate for one of group of owners over another. They say that in negotiating the January 2021 PSA and its terms, strata council was obliged to negotiate in the best interests of all of the owners. They also say that the distribution of the proceeds is dictated by the *SPA* and there are no terms that they could have negotiated then, or could negotiate in the future, that would more evenly distribute the sale proceeds or achieve assessed value for the Commercial Owners.

[131] The Commercial Owners have provided the Strata Corporation and Intracorp a “with prejudice” settlement proposal in which they demand approximately 150% of their strata lots’ 2020 assessed values. The Strata Corporation says that achieving this level of compensation for the Commercial Owners under the *SPA* would require a dramatic increase in any global offer from a developer. In this case, Intracorp’s offer would need to be increased to over $70 million to allocate to the commercial owners (based on the Schedule of Interest upon Destruction) the amounts they are demanding.

[132] Finally, the Strata Corporation says that if this proposed wind-up is not possible because of the gap between market value and value payable under the *SPA* pursuant to the schedule of interest on deduction, this Strata Corporation could never wind up, because it will need an offer close to double its assessed value to provide market value to the Commercial Owners.

[133] With respect to the commercial leases, both the Strata Corporation and Intracorp note that the January 2021 PSA contains a favourable leaseback rate of $2.00 per square foot for a year after closing, which would allow the Commercial Owners to continue to receive income on any existing leases or to favourably leaseback their business space after they have received the proceeds of sale for their units. It also provides for Intracorp to take possession of the Strata Property subject to any existing commercial leases, so existing leases are not compromised (although Intracorp requests a term of the order on this petition to preclude renewals of existing leases for more than a year after the possession date in lieu of cancelling these leases).

Determination

[134] A strata operates as a democratic entity in which each owner has many of the rights associated with sole ownership of real property, but by virtue of their co-ownership with others, some of those rights are subordinated to the will of the majority. An equitable balance must exist between the independence of the individual owners and the interdependence of them all in a cooperative community:

see *2475813 Nova Scotia Ltd. v. Rodgers*, 2001 NSCA 12. As summarized by Justice Dickson in *King Day Holdings Ltd. v. The Owners, Strata Plan LMS3851,* 2020 BCCA 342:

> [4] Strata developments offer a unique form of land ownership and administration. As Justice Cromwell explained in *2475813 Nova Scotia Ltd. v. Rodgers*, 2001 NSCA 12, they serve as a vehicle for holding land that combines the advantages of individual ownership with those of a multi-unit development in which the individual owners make up a democratic society. A portion of the property is divided into individually owned units, the balance is owned in common and a strata corporation manages the common property and common assets for the benefit of the owners, who are generally "all in it together". The success of such developments depends largely upon whether an equitable balance is struck between the independence of individual owners and their interdependence as members of a cooperative community: *Rodgers* at paras. 3–4; *The Owners, Strata Plan LMS 1537 v. Alvarez*, 2003 BCSC 1085 at para. 35.

[135] The best interests determination pursuant to s. 278.1(5)(a) of the *SPA* must be informed by this democratic tension.

[136] In this case, I accept that the wind-up and sale of the Strata Corporation is disadvantageous to the Commercial Owners, and that there is a firm evidentiary basis for the Commercial Owners' position that the July 2021 Resolutions are not in their best interests. However, I am not convinced that the Strata Corporation or strata council has an obligation to ensure that the Commercial Owners' best interests are equally served by the wind-up. The unfairness to their position is better considered pursuant to s. 278.1(5)(b) of the *SPA*.

[137] I agree with the Commercial Owners that the fact that over 80% of all owners supported the July 2021 Resolutions does not necessarily mean that they are in the best interests of the Strata Corporation as a whole. However, in this case, I find that these Resolutions are not simply financially favourable to the majority of owners, but they also address long-standing and future-reaching building deficiency issues for the entire Strata Corporation that are in the Strata Corporation's best interests to resolve. The winding-up resolution has the most support of any solution proposed to date.

[138] This is not a case where the sole issue engaging the best interests of the parties is their varying profit on investment. Nor is it a case where the parties are divided between those that seek to sell a compromised building to avoid costly repairs, and those that seek to invest in the building to repair it and ensure its longevity. The Commercial Owners who oppose the wind-up of the Strata Corporation have fairly consistently opposed the special levies required for even the most immediate and urgent repairs needed to the common property.

[139] On the basis of the evidence before me, the Commercial Owners have not established that the strata council has been leveraging a failure to complete repairs to force a sale and wind-up. To the contrary, there are numerous instances of the strata council seeking funding for repairs which the owners, including the Commercial Owners, have opposed. It does not sit well for the Commercial Owners to now complain that most of those repairs have not been completed, or to allege bad faith against the strata council in this regard, given their own contribution to the delays to that work.

[140] I agree with the Strata Corporation that the July 2021 Resolutions represent one solution that is within the best interests of the Strata Corporation. The other would be to require the owners to collectively contribute over $6 million to preserve and maintain Joyce Place. Based on the voting record of the strata members over the last five years, I find that it is unlikely that this latter option will have any success, at least not without the threat of prosecution, or a court-appointed administrator as was required to raise the $1.8 million to address safety issues in the Townhouses. Nor does the evidence before me support the proposition that completion of the Townhouse repairs alone would be sufficient to ameliorate the long-standing health and safety issues in the Tower, or insurance costs that the Strata Corporation is facing.

[141] I find that the Commercial Owners have not proven bad faith by the strata council or its president in relation to actions taken after the July 2021 Resolutions were passed. With respect to their position on a cannabis retail licence in the

building, the evidence before me falls far short of establishing that objection was directed at harming the owner of SL9, as opposed to expressing a *bona fide* position regarding the legality and desirability of a cannabis retail outlet in that location. Nor does the evidence suggest that it was strata opposition to the licence was the reason that the licence was not issued.

[142] Finally, although I do not agree with the Commercial Owners that the Strata Corporation has a duty to specifically advance the interests of dissenting owners (before or after a wind-up resolution is passed), I am satisfied that the January 2021 PSA could not have provided for a more favourable distribution of the proceeds of sale to the Commercial Owners in light of the Schedule of Interest upon Destruction filed in the LTO and s. 278(3) of the *SPA*. In any event, the terms of the January 2021 PSA do address the interests of the Commercial Owners in some of the ways they have raised before the Court, particularly by providing for existing commercial leases to continue for a year after completion, and for a favourable leaseback rate during this period.

Significant Unfairness and Uncertainty

[143] Pursuant to s. 278.1(5)(b) and (c) of the *SPA,* the Court must also assess the likelihood and extent of any significant unfairness to the dissenting owners, and the potential for significant confusion and uncertainty if the petition is confirmed or dismissed. Any unfairness or uncertainty for some must be considered in light of the best interests of the Strata Corporation as a whole.

[144] As summarized in *Barclay Terrace*, “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.” Furthermore, “any alleged unfairness or uncertainty must be significant enough to override the interests of the majority who voted in favour of the winding-up.” 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": *Barclay Terrace* at para. 17(d) and (e).

[145] Lastly, the Court must assess whether refusing to confirm a winding-up resolution will result in "significant confusion and uncertainty." This includes assessing whether there is some existing uncertainty or confusion that can only be resolved by winding up the strata. It involves a consideration of the rights and interests of all owners and a balancing of equitable interests with justice and the "reasonable expectations" of the parties.

Parties' Positions

[146] The Commercial Owners say they had the following reasonable expectations with respect to any winding up of the Strata Corporation:

a) the strata council would take their best interests into consideration when negotiating the terms of the January 2021 PSA;

b) the strata council would not interfere with their attempts to sell their units;

c) the Commercial Owners would receive at least the assessed value of their units;

d) the Commercial Owners would be able to buy a comparable commercial space from the proceeds of sale from their units; and,

e) the strata council would follow through on repairs that the owners had already paid for.

[147] The owner of SL11 also says that he had a reasonable expectation that he would be able to sell his business together with his commercial unit, thereby achieving a higher value.

[148] The main thrust of the Commercial Owners' submissions before me was the adequacy of their compensation under the January 2021 PSA and the schedule of interest upon dissolution, because it results in compensation that is hundreds of

thousands of dollars below assessed and market value. They would be prepared to proceed with the wind-up if the offer on their units was "topped up" in accordance with their with-prejudice offer to settle. They say that Intracorp's offer to separately purchase their lots at their 2020 assessed value is not desirable, as it would require them to provide vacant possession of their units at the time of the closing of the January 2021 PSA, and would restrict their ability to enter lease agreements in the interim.

[149] Intracorp says its offer to separately purchase the Retail Units at their 2020 Assessed value was made in an attempt to resolve the Commercial Owners' objections in this petition proceeding, and is not an option before this Court to order, as it would provide compensation outside of the *SPA* regime for the distribution of the sales proceeds upon a wind-up and sale. It is akin to an offer to settle litigation or a private purchase agreement for these units. Intracorp does argue, however, that the Commercial Owners' rejection of their offer demonstrates that the Commercial Owners' expectations are unreasonable.

[150] The Strata Corporation says that the Commercial Owners' demands and Intracorp's offer are a departure from the *SPA* (and before that the former *Condominium Act*), with respect to the relative distribution of sales proceeds upon winding up, and therefore cannot be a "reasonable expectation" for the purposes of s. 278.1 of the *SPA*. They note that two of the Commercial Owners were original owners, who purchased directly from the developer in 1993 and would have received the Schedule of Interest upon Destruction directly from the developer at that time.

[151] The Strata Corporation argues that a failure to confirm the July 2021 Resolutions will lead to considerable uncertainty, as it is unlikely any other offer to purchase the Strata Property pursuant to the *SPA* would be any more acceptable or favourable to the Commercial Owners and it is unclear whether the Strata Corporation could voluntarily raise the funds to repair and maintain the failing structural elements of Joyce Place.

Determination

[152] The *SPA* provides for the termination or amendment of strata corporations and strata plans. The rights, privileges, and obligations of the *SPA* must be enforced in a fair and equitable way. Assessing the "probability and extent of significant unfairness" requires a consideration of the rights of all owners and any inequity in treatment as between them: *Whitehorse Condominium Corporation No. 95 v. 37724 Yukon Inc.*, 2013 YKSC 4.

[153] I agree with the petitioner that the Strata Corporation has no control over the manner in which the sale proceeds are shared between owners. Subsection 278(3) of the *SPA* mandates a distribution based on the Schedule of Interest upon Destruction filed in 1993, which reflects the relative value of the strata units almost 30 years ago. Even if a proportionate division of proceeds based on current assessed value might seem more fair now given the different rates of accrued value in commercial and residential units, that option is not permitted under s. 278. It is clear that the legislation considered both of these bases for compensating owners at the time of destruction or wind-up, and found that the original apportionment of property values was the more appropriate basis for this distribution.

[154] In this case, the Schedule of Interest upon Destruction and the legal implications of its existence were known by the Commercial Owners from the outset of their ownership. At least the two Commercial Owners that purchased their lots in 1993 benefitted from this disparity in value at the time of their purchase.

[155] I therefore agree with the Strata Corporation that, to the extent that the question is one of reasonable expectations, the Commercial Owners' reasonable expectations are defined by the *SPA* (and before that, the former *Condominium Act*) with respect to the relative proportion of sale proceeds they would be entitled to upon wind-up. It cannot be a reasonable expectation, protected by the *SPA*, that strata owners would receive more upon dissolution or destruction than the *SPA* provides for. Furthermore, the law generally does not recognise an expectation of profit on investment as grounds for an oppression remedy: see *Stahlke v. Stanfield,*

2010 BCSC 142 at para. 21, aff'd 2010 BCCA 603; *Saunder v. 360373 Alberta Ltd. (Arlington Apartments),* 2020 ABQB 300 at para. 76, aff'd 2021 ABCA 222, leave to appeal to the SCC ref'd.

[156] With respect to the other expectations set out by the Commercial Owners, I find that the evidence either does not support the existence of the expectation (including the ability to buy a comparable commercial space from the proceeds of sale from their units, or to sell their business together with the strata unit), or that it was breached. For the reasons largely set out above, the *SPA* does not require the strata council to consider the interests of the commercial owners apart from its consideration of the interests of the owners as a whole. In addition, I am not convinced that the conduct of any of the parties after the July 2021 Resolutions had already been passed is relevant to the validity of these Resolutions themselves, but even if it were, I have found that the strata council did not improperly interfere with the Commercial Owners' attempts to sell their units.

[157] However, s. 278.1(5)(b) is not solely concerned with reasonable expectations, but also with 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."

[158] In this case, the distribution of sales proceeds mandated by the *SPA* might be called "inequitable" as it relates to the disparity between the assessed values of the property in the Strata Corporation and the proceeds each unit will receive. The Commercial Owners will not only receive less than their assessed value at the time of the January 2021 PSA, but also will be at a disadvantage with respect to recovering the value of the businesses they are directly involved in.

[159] In another case, such a significant discrepancy in financial recovery for one group of owners might be grounds for this Court to refuse to confirm a wind-up resolution. Were it not for the history of significant building failures at Joyce Place, together with the history of the owners (including the Commercial Owners) being unwilling (or perhaps financially unable) to do what it takes to ensure the buildings

are repaired and maintained, I might have found this discrepancy so sizeable as to be significantly unfair to the Commercial Owners.

[160] However, the condition of Joyce Place, through no obvious fault of any of the owners, needs extensive and costly repairs to its structural elements. On the basis of the existing cost estimates (which are already somewhat dated), the required repairs to the exterior elements and building envelope alone will total over $6 million, and the proportionate cost of these repairs would account for a significant portion of the value of each owner's unit. Even assuming that some of the special levy has already been, or will still need to be, applied to the emergency repairs to the Townhouses, the remaining repair costs established by the evidence are daunting.

[161] The Commercial Owners argue that the Strata Corporation has a duty to maintain the Strata Property, and I agree. However, by focusing solely on the emergency work required for the Townhouses, the Commercial Owners have vastly understated the amount of work that is still required, and its cost. Their own estimates of the value of their units and their potential profits of a market sale ignore the impact of these financial obligations that they, together with all of the owners, will be subject to if the buildings of Joyce Place are to be made livable into the future.

[162] Finally, I have no assurance that if this petition is dismissed, the Strata Corporation will be able to raise the funds necessary to repair and maintain Joyce Place without the further assistance of the Court. I find that there is a significant and extensive uncertainty with respect to the future of Joyce Place if the July 2021 Resolutions are not confirmed.

CONCLUSION

[163] I am satisfied that the Strata Corporation has complied with the procedural requirements of the *SPA* relating to a wind-up with the assistance of a liquidator. More than 80% of owners supported the winding-up and sale of the Strata Property, and the overall value of the deal is significantly above the collective assessed value of the individual strata units and common property, with no apparent discount for the problematic condition of the buildings. I find that the July 2021 Resolutions and

proposed sale are in the best interests of the owners generally, and not so unfair to the Commercial Owners that these Resolutions should not be confirmed.

[164] I also consider it appropriate, on the basis of the appearance and submissions of the appointed liquidator, to confirm Mr. Lai as the liquidator and grant him the authority and responsibilities sought in the petition, including to vest the Strata Property in himself for the purposes of completing the sale and dissolution of the Strata Property approved in the July 2021 Resolutions.

[165] I grant the petitioners and the liquidator the order as sought at the hearing of the petition, with the proviso that para. 3 is to be amended to clarify that the liquidator shall not file this order in the LTO until "immediately before title to the Strata Property is to be transferred to the purchaser", as was contemplated by the Court of Appeal in *Bradbury* at para. 46.

[166] Intracorp also requested that two additional paragraphs be added to the order, in place of the relief sought in the petition for the cancellation of all commercial tenancies. In my view, it is reasonable to grant the order preventing owners from entering into any new lease or tenancy agreements, or modifying existing leases or tenancy agreements, to create, extend, or renew the term of any lease beyond November 10, 2024, in place of a term requiring the cancellation of all existing commercial tenancies. I am also prepared to grant the order requiring all owners to provide to the liquidator a copy of any and all leases or tenancy agreements applicable to their strata lot within 28 days of this order, and authorizing the liquidator to provide these agreements to the purchaser.

[167] The Strata Corporation is entitled to its costs from the Commercial Owners at Scale B.

"Marzari J."