Strata Plan VR2702 (Re), [2018] B.C.J. No. 440

British Columbia and Yukon Judgments

British Columbia Supreme Court

Vancouver, British Columbia

W.B. Milman J.

Heard: December 22, 2017; February 15, 2018.

Judgment: March 13, 2018.

Docket: S1710850

Registry: Vancouver

[2018] B.C.J. No. 440 | 2018 BCSC 390

RE: The Owners, Strata Plan VR2702 IN THE MATTER OF Section 278.1 of the Strata Property Act, S.B.C. 1998, C. 43

(92 paras.)

Counsel

Counsel for the Petitioner: E.N. Kornfeld, Q.C., D. Lucas.

Counsel for Lisa Francescato, Grace Francescato and Ramin Nouri: P. Roberts.

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Reasons for Judgment

W.B. MILMAN J.

I. Introduction

1 On September 26, 2017, the petitioner, the Owners, Strata Plan VR2702 (the "Strata Corporation") held a special general meeting (the "SGM") under s. 277 of the *Strata Property Act*, *S.B.C. 1998, c. 43*, as amended (the "Act") for the owners to vote on a resolution calling for the voluntary winding-up of the Strata Corporation and the appointment of a liquidator (the "Resolution").

2 The Strata Corporation administers a 26-year-old, seven-story concrete building containing 36 strata units, located at 1075 Barclay Street in the West End of Vancouver and known informally as "Barclay Terrace."

3 The result of the vote was never in doubt. The Resolution was approved by the owners of 34 of those units, or 94%. Those 34 units are owned by only two corporations: Barclay Thurlow Property Inc. ("BTPI"), which owns 28 units, and Shepstone Investments Inc. ("Shepstone"), which owns six. BTPI is affiliated with Westbank Corporation ("Westbank") and Shepstone with Bosa Properties Ltd. I will refer to BTPI and Shepstone collectively as the "Majority Owners."

4 The Majority Owners had gradually purchased those 34 units from their former individual owners in order to be in a position to drive the winding-up process so they can reap the significant redevelopment potential of the land.

5 Shepstone has also acquired all four units in an adjacent strata complex known as Strata Plan BCS212, which consists of four two-story town-houses located at 1063, 1065, 1067 and 1069 Barclay Street, respectively (the "Adjacent Properties"). The Majority Owners wish to sell those properties together with Barclay Terrace because the assemblage will have sufficient site frontage to permit redevelopment to the maximum density level under the governing municipal by-law, whereas the individual properties, if redeveloped separately, would not. I will refer to the assemblage of Barclay Terrace and the Adjacent Properties as the "Combined Properties."

6 The Majority Owners engaged an agent, Colliers Macaulay Nicolls Inc. ("Colliers"), to market the Combined Properties and have recently found a buyer. By an agreement of purchase and sale dated June 27, 2017 and subsequently amended (the "Sale Agreement"), Grand World Holdings Ltd. ("Grand World") has agreed to purchase the Combined Properties for a total price of approximately $105 million, provided, among other things, that a liquidator is successfully appointed and empowered through this proceeding to sell Barclay Terrace. The Sale Agreement allocates 75% of the sale price, or $78,750,000, to the owners of Barclay Terrace and the remaining 25%, or $26,250,000, to Shepstone, as owner of the Adjacent Properties, based on the surface areas of the unimproved lots.

7 The Strata Corporation now applies under s. 278.1 of the Act for an order to confirm the Resolution so that the Majority Owners can proceed with the sale.

8 The application is opposed by the respondents, Grace and Lisa Francescato (the "Francescatos") and Ramin Malekmohammadi Nouri (collectively, the "Minority Owners"), the only owners who still live in their units in Barclay Terrace - i.e., the only owners whose interests have not already been acquired by the Majority Owners.

9 The Minority Owners assert that the Resolution was not properly passed and should not be confirmed because:

a) it was improperly amended at the SGM, contrary to s. 50 of the Act;

b) they were not adequately consulted or kept informed during the sale process;

c) the sale price is too low;

d) Barclay Terrace's allocated share of the sale price is too low; and

e) the Sale Agreement contains deficiencies that may cause significant confusion and uncertainty, particularly if the proposed transaction does not close as contemplated.

10 For the reasons that follow, I am satisfied that the Resolution was properly passed and should be confirmed. I will address the various complaints of the Minority Owners in the sections that follow.

II. Should the Resolution be confirmed?

A. The Legal Framework

11 The test to be applied in determining whether a winding-up resolution should be confirmed is set out in s. 278.1 of the Act, which states as follows:

> [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, and
>
> (b) must do so within 60 days after the resolution is passed.
>
> (2) For certainty, the failure of a strata corporation to comply with subsection (1)(b) does not prevent the strata corporation from applying under subsection (1)(a) or affect the validity of a winding-up resolution.
>
> (3) A record required by the Supreme Court Civil Rules to be served on a person who may be affected by the order sought under subsection (1) must, without limiting that requirement, be served on the owners and registered charge holders identified in the interest schedule.
>
> (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.

12 As I noted in *The Owners, Strata Plan VR 1966*, 2017 BCSC 1661 [*Bel-Ayre*], the legislation governing this application was only recently enacted and there is therefore little authority to assist in its interpretation. I began that judgment with the following observations in that regard:

> [1] Recent amendments to the *Strata Property Act*, *S.B.C. 1998, c. 43* (the *Act*) are intended to make it easier for strata corporations to wind themselves up voluntarily. Formerly, a resolution initiating the winding-up process was required to be approved unanimously and was therefore rarely achieved. Since the coming into force on July 28, 2016 of the relevant provisions of what had been known as Bill 40, however, a strata corporation may now proceed to wind itself up with a vote of 80%, provided it then obtains court confirmation. I am told that this is one of the first cases to come before the court under the newly amended legislation and the first that is contested.
>
> [2] There are two possible routes available to strata corporations seeking to wind themselves up voluntarily: they may do so either with or without a liquidator. The advantage of using a liquidator is that the individual strata lots and common property are vested in the liquidator, who is then empowered to sell them. The process without a liquidator results in the dissolution of the strata corporation and the cancellation of the strata plan with the owners becoming tenants in common, but no sale.
>
> [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.
>
> [4] This is an application under s. 278.1 seeking a confirmation order, at the second stage of that process.

13 In *Bel-Ayre*, I refused to confirm the resolution before me in that case because the interest schedule attached to it was missing the estimates of the values of the interests of the registered charge-holders, as required by s. 278(1)(d) of the Act.

14 Shortly after the release of my judgment in *Bel-Ayre*, Loo J. had occasion to consider another such application in *The Owners, Strata Plan VR2122 v. Wake*, 2017 BCSC 2386 [*Wake*], where she summarised the applicable test under s. 278.1 of the Act as follows:

> [81] The opposing respondents must establish something more than their respective individual views of why having to move from The Hampstead is not in their perceived best interests, if they are to establish that the proposed wind-up and sale is not in "the best interests of the owners." They have not done so.
>
> [82] The next step is for the court to consider the probability and extent, if the windup-up resolution is confirmed or not confirmed, of significant unfairness to one ore more of the owners. The onus is on the opposing respondents to establish the factors necessary to defeat an order confirming the winding-up

resolution. There is no claim of significant unfairness to or by one or more of the owners, registered charge holders, or other creditors.

[83] The court must make a qualitative assessment of both likelihood and probability of "significant unfairness" or "significant confusion and uncertainty" and its "extent". Any significant unfairness or significant confusion and uncertainty must be of such an extent that it warrants the court to override the clear legislative ability for a strata corporation to wind-up and be sold by 80% or more of the owners. Where the applicable requirements of the *SPA* are met, to justify dismissing an application for a confirmation order, the court must find pursuant to s. 278.1(5) or 284(3) the probability of both "significant unfairness to one or more owners" and "significant confusion and uncertainty in the affairs" of the strata corporation.

15 The notion of "significant unfairness", listed in s. 278.1(5)(b)(i) as one of the factors to be considered in this context, also appears in s. 164 of the Act, which states as follows:

[164] (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair

(a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or

(b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

(2) For the purposes of subsection (1), the court may

(a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,

(b) vary a transaction or resolution, and

(c) regulate the conduct of the strata corporation's future affairs.

16 The jurisprudence that has developed under that provision was recently summarised by Warren J. in *Barrett v. The Owners, Strata Plan LMS 3265*, 2016 BCSC 1477, as follows:

[95] The leading case on the application of s. 164 is *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. Garson J.A. identified the specific issues in that case as the appropriate degree of deference owed to a decision of a strata corporation and the meaning of the phrase "significantly unfair" in s. 164.

[96] On the first issue, Garson J.A. held, at para. 24, that a significantly unfair decision reached through a fair and democratic process is not insulated from judicial intervention under s. 164, and that the outcome of a fairly held vote may ground a finding that a particular decision is nevertheless unfair.

[97] On the second issue, Garson J.A. observed, at para. 26, that "the language of s. 164 bears some resemblance to s. 227 of the *Business Corporations Act*, *S.B.C. 2002, c. 57*, which concerns oppression remedies" and that "[t]he jurisprudence considering the oppression remedy has informed the interpretation of s. 164". She endorsed the decision in *Reid v. The Owners, Strata Plan LMS 2503*, 2001 BCSC 1578, aff'd 2003 BCCA 126, as correctly describing the meaning of significantly unfair in this context. In that case, Ryan J.A. stated:

[26] ... Under s. 42 of the ***Condominium*** *Act*, an owner could apply to the court to remedy behaviour of the strata corporation that was "oppressive" or acts or resolutions that were "unfairly prejudicial" to the owner. A review of how these terms had been defined by the courts can be found in the case of *Blue-Red Holdings Ltd. v. Strata Plan VR 857* (1994), 42 R.P.R. (2d) 49 (B.C.S.C.). In that case, the court found that oppressive conduct had been defined as conduct that is burdensome, harsh, wrongful, lacking in probity or fail dealing, or has been done in bad faith and that unfairly prejudicial conduct had been defined as conduct that is unjust or inequitable. In the case at bar counsel for both parties

> submitted that the meaning of "significantly unfair" would encompass, at the very least, oppressive and unfairly prejudicial conduct and the judge agreed with them. ...
>
> [27] ... I agree with Masuhara J. [in *Gentis v. The Owners, Strata Plan VR 368*, *2003 BCSC 120* at paras. 28-29] that the common usage of the word "significant" indicates that a court should not interfere with the actions of a strata council unless the actions result in something more than mere prejudice or trifling unfairness. This analysis accords with one of the goals of the Legislature in rewriting the ***Condominium*** *Act*, which was to put the legislation in "plain language" and make it easier to use (British Columbia, *Official Report of Debates of the Legislative Assembly*, Vol. 12 (1998) at 10379). I also note that the term "unfair" is defined in the *Canadian Oxford Dictionary* as "not just, reasonable or objective." It may be that this definition of "unfair" connotes conduct that is not as severe as the conduct envisaged by the definitions of oppressive or unfairly prejudicial. However, counsel argued this appeal on the basis that "significantly unfair" has essentially the same meaning as "oppressive and unfairly prejudicial". For the purposes of this appeal the distinction between the definitions makes no difference. On either definition, the resolution passed by the strata council cannot be said to be significantly unfair to Mr. Reid.
>
> [Emphasis added.]
>
> [98] Thus, "significantly unfair" in s. 164 of the *SPA* contemplates something more than mere prejudice or trifling unfairness. It includes conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust, or inequitable, and it might extend to less severe conduct as well.
>
> [99] In *Dollan*, at para. 30, Garson J.A. adopted a two-stage analysis focusing on the petitioner's reasonable expectations in determining whether particular conduct meets the threshold of significant unfairness. First, it must be determined whether the evidence supports the asserted reasonable expectations of the petitioner. Second, it must be determined whether those reasonable expectations have been violated in a way that is significantly unfair, applying the above-noted definition of that phrase.

17 From these authorities, the following principles emerge to inform the application of the s. 278.1 test:

a) the statutory requirements in s. 277 and 278 of the Act must be complied with unless specific provision is made there or elsewhere in the Act 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 purpose 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.

18 With those principles in mind, I turn to the Minority Owners' complaints in this case.

B. Were the amendments to the Resolution properly made?

i. The issue

19 The SGM was called at the request of the Majority Owners soon after they had entered into the Sale Agreement. On August 2, 2017, the strata council met in response to that request and set the SGM for September 26, 2017. The property manager mailed out the SGM materials to the registered owners on August 24, 2017.

20 The interest schedule that was attached to the proposed form of resolution did not include estimates of the values of the interests of the registered charge-holders, as required by s. 278(1)(d) of the Act. On September 21, 2017, five days before the SGM, I released my judgement in *Bel-Ayre* in which, as noted above, I refused to confirm a winding-up resolution because of that same deficiency. Recognizing that the Resolution would not be confirmed in its then current form in light of my decision in *Bel-Ayre*, the Strata Corporation opted to amend the Resolution at the SGM pursuant to s. 50 of the Act. In particular, the Resolution was amended in the following ways:

a) changing the name of the proposed liquidator from "Don Manning" to "D. Manning and Associates Inc.";

b) changing the number of charge holders from four to five and adding the missing value estimates; and

c) adding a statement that the Strata Corporation has no creditors.

21 The validity of such an amendment is governed by s. 50 of the Act, which states as follows:

> [50] (1) At an annual or special general meeting, matters are decided by majority vote unless a different voting threshold is required or permitted by the Act or the regulations.
>
> (2) Despite section 45 (3), during an annual or special general meeting amendments may be made to the proposed wording of a resolution requiring a 3/4 vote if the amendments
>
> (a) do not substantially change the resolution, and
>
> (b) are approved by a 3/4 vote before the vote on the resolution.

22 It has been held that in order to be properly made under s. 50(2), the amendments must be of a "technical and relatively minor" nature: *Thiessen v. Strata Plan KAS2162*, *2010 BCSC 464*, at para. 17.

23 Mr. Roberts, counsel for the Minority Owners, argues that the amendments that were made to the Resolution at the SGM substantially changed it in the sense contemplated by s. 50(2) and were therefore improper. With respect to the addition of the missing value estimates, he relies in particular on para. 51 of my judgement in *Bel-Ayre*, where I stated as follows:

> [51] It follows that the value estimates approved as part of the interest schedule are an essential term of the liquidator's mandate, rather than just another source of information that might affect the vote. Without them, the winding-up resolution is not validly approved. In other words, this was not just a mere "procedural irregularity" but an omission of substance.

24 Because in *Bel-Ayre* I found the omission of the value estimates from the interest schedule to be one of substance, it is argued that amending the Resolution to cure that same omission in this case must likewise be seen as a "substantial" change, contrary to s. 50(2) of the Act.

25 The Minority Owners also allege that the interest schedule was amended to state, falsely, that the Strata Corporation had no creditors, when in fact it is routinely indebted to trade creditors.

26 Mr. Kornfeld, counsel for the Strata Corporation, responds that the amendments were properly made because the changes were relatively minor and did not substantially change the Resolution. He asserts that the statement added to the interest schedule to specify that there were no creditors was accurate when it was made because the

trade creditors are routinely paid.

ii. Discussion

27 I agree with Mr. Kornfeld that the amendments were not so significant as to violate s. 50 of the Act and were properly made.

28 Although in *Bel-Ayre* I described the omission of the requisite value estimates as "an omission of substance," it does not follow that a correction of that omission as occurred here was a "substantial change" in the sense contemplated by s. 50 of the Act. The distinction I was dealing with in *Bel-Ayre* was the one between "substance" and "procedure." In s. 50 of the Act the legislation draws a different kind of distinction - i.e., one that is concerned with the relative importance of the change in the context of the resolution as a whole.

29 It is possible for an amendment to be one of "substance" (i.e., as opposed to procedure) but still "technical and relatively minor" so that it does not "substantially change" the resolution and thereby violate s. 50. That is indeed precisely what occurred in *Thiessen*. At para. 17, Beames J. described the impugned amendment in issue before her as being "an amendment of substance" that was nevertheless "technical and relatively minor" so as to be capable of being made without violating s. 50(2) of the Act.

30 In summary, I am not persuaded that any of the amendments that were made at the SGM, including the addition of the missing value estimates, were sufficiently significant to change the essential nature of the Resolution and thereby require a fresh notice period.

31 I also agree with Mr. Kornfeld that the Resolution was properly amended to state that there were no creditors because no monies were owed to any creditors at that time.

C. Failure to Consult with the Minority Owners and Keep Them Informed

i. The Issue

32 The Minority Owners complain that their units were improperly marketed without their knowledge or approval and that they were improperly shut out of the marketing process. They contend that they should have been consulted or at least kept informed at each stage.

33 In late 2015, it was apparent to the owners that at least two developers were actively seeking to acquire the strata units in Barclay Terrace *en bloc*, for the purpose of redeveloping the entire site. Lisa Francescato deposes in her affidavit that in December 2015, the Francescatos were approached by the Klein Group, the realtors engaged in that process, with a view to participating in a group sale. Initially, she assisted the Klein Group in assembling other owners for that purpose.

34 In the spring of 2016, the Francescatos entered into a contract to sell their unit to BTPI for a price of $1,860,000. BTPI failed to close on that transaction and instead repeatedly sought to extend the closing date, as it apparently struggled to obtain the requisite financing. Attached to Lisa Francescato's affidavit is a proposed addendum to the contract dated September 29, 2016 signed by the Francescatos but not BTPI, extending the completion date to October 5, 2016 and raising the sale price to $2,111,000. In the end, the sale never completed. Lisa Francescato deposes that the Francescatos changed their mind and were no longer prepared to sell to BTPI because she "distrusted Westbank given the many past assurances that proved to be untrue."

35 Mr. Nouri deposes that in or around September 2015 he was informed by another member of the strata council that recent changes to the zoning by-law had made Barclay Terrace particularly attractive to developers as a redevelopment opportunity and that at least one developer was looking to buy the building *en bloc* for that purpose. He later learned that 24 of the 36 owners had put their units up for sale as an assembly. In December 2015, he too was approached by the Klein Group to sell his unit. He refused to do so. On May 5, 2016, he received another letter

from the Klein Group advising him that a developer had now acquired over 80% of the units and offering him the same terms that the other owners had received if he was willing to sell. The letter added that refusing to participate "may impact the value of my property negatively." He says he did not want to sell his unit and therefore did not respond.

36 In January 2017, BTPI offered Mr. Nouri $3.5 million for his unit, and was prepared to offer more. According to Mr. Amzaleg, the realtor engaged by BTPI to negotiate with Mr. Nouri, Mr. Nouri said his price was $10 million. When Mr. Amzaleg responded that that figure was absurd and invited a counter-offer, Mr. Nouri came down to $9.75 million. That was the end of that negotiation.

37 By the time the Majority Owners entered into the Sale Agreement on June 27, 2017, they had acquired all but two of the Barclay Terrace units - i.e., the ones still owned by the Minority Owners.

38 Both Lisa Francescato and Mr. Nouri depose that they first learned that the Combined Properties, including their units, were being marketed for sale as part of the assemblage when they received a letter from Mr. Kornfeld's office dated June 1, 2017 informing them about the Sale Agreement, the $105 million sale price and the 75% allocation of that amount to Barclay Terrace. The letter advised them what their share of the sale proceeds would be (i.e., approximately $2,677,500 for the Francescatos and $2,205,000 for Mr. Nouri). They complain that they did not receive other details of the proposed transaction, such as the identity of the purchaser, when they requested them. Ms. Francescato deposes that she received only a marketing progress report from Colliers dated September 19, 2017 confirming the sale to "an Asia-based Purchaser that has waived its conditions on the deal."

39 The Majority Owners did not consider themselves to be at liberty to share the requested information because the Sale Agreement required them to keep such details confidential. An amendment to the Sale Agreement dated November 3, 2017 permitted the Majority Owners to share the Sale Agreement with the Minority Owners "for the specific purpose of allowing such owners to consider cooperating in the dissolution of the Strata Corporation or selling their properties to the Vendor." The Minority Owners received a copy of the Sale Agreement shortly thereafter.

40 The Minority Owners argue that their reasonable expectations are informed in part by the explanatory literature concerning the Act as published by the government on its website, where the following advice is given:

> Sometimes strata lot owners may be concerned about protecting their interests. The termination process has a number of safeguards built in including: advance notification to every owner; an 80% vote of approval from all owners (not a quorum vote from those present, or holding proxies, at a meeting); and court oversight. However, individual owners may also wish to consult a strata lawyer for independent advice.

41 They contend that in this case the Majority Owners have caused the Strata Corporation to disregard those "safeguards." They contrast what occurred here with the process that was followed in *Wake*, as described by Loo J. at para. 136:

> [136] [The dissenters] suggest that they were confused or troubled by the entire process, and the wording of the resolutions, but the preponderance of evidence is that the owners were informed every step of the way, the process was transparent, and all of the owners were provided with any information they sought, answers to any questions they had, and provided with any document they requested, except for copies of the two other competing bids.

42 Mr. Roberts argues that the Strata Corporation did none of those things in this case. On the contrary, the Minority Owners were not informed of what was occurring until it had already happened, the process was obscure, and they were not provided with the information they sought, answers to questions they had or documents they requested.

43 Mr. Kornfeld responds that the Minority Owners received the information and documents to which they were

entitled under the Act for the purpose of allowing them to vote on the Resolution. The Majority Owners say that the situation in this case is unlike the one that Loo J. was dealing with in *Wake*, which involved a mixed-use development held by owners with varying interests that needed to be reconciled. Here, it is argued, there is no need for such a process because 34 of the 36 units in the development are held by two corporations who, with a controlling interest, have already decided to sell the building as a redevelopment opportunity.

ii. Discussion

44 I agree with Mr. Kornfeld that the extent of the procedural accommodations to which the Minority Owners can fairly lay claim must vary at least to some extent with the context. The circumstances of this case are unlike those in the other winding-up resolution confirmation applications that have come before this Court - if only because of how title is now held in Barclay Terrace.

45 The original strategy of the Majority Owners appears to have been to purchase all of the units individually and thereby bring about a winding-up and sale in the old-fashioned, pre-Bill 40 way: i.e., by a unanimous rather than an 80% vote. That strategy foundered because they were unable to reach agreement to purchase the interests of the Minority Owners or secure their cooperation. But the Majority Owners were almost (if not quite entirely) successful in that effort - they have now acquired all but two of the units, or 94%, putting them well beyond the 80% threshold needed to control the vote.

46 The Minority Owners were not taken by surprise by what occurred. They were able to see the writing on the wall by late 2015 or early 2016, when the Majority Owners sought and then acquired a controlling block in pursuit of their patent agenda to redevelop the property. At that point, a dissolution and sale of Barclay Terrace was all but inevitable (and, in the case of the Francescatos at least, initially welcomed). All that remained to be determined for the Minority Owners was the timing of the transaction and the amount they could expect to receive for their units.

47 Although they were not informed until late in the day that the Majority Owners' marketing and sale effort included the Adjacent Properties, they were not prejudiced by that unexpected development but rather, on the contrary, stand to benefit from it. By that means, the Majority Owners have significantly improved the redevelopment potential of the Combined Properties, and therefore the return to all owners - including the Minority Owners.

48 This was not an inevitable outcome or one that was without risk to the Majority Owners. The Majority Owners have put up all of the capital and borne all of the risk associated with assembling the Combined Properties for sale. If the transaction proceeds as contemplated, the Minority Owners will share rateably in the added benefit of the assemblage, having put up no capital and taken no risk to obtain it.

49 What legitimate expectation can the Minority Owners have to participate in the marketing and sale process in such circumstances? They cannot reasonably expect to exercise any measure of control or a veto over any deal that is struck. In summary, I am not persuaded that they have been prejudiced by the process that was followed.

D. The Price

i. The Issue

50 The Minority Owners allege that the sale price of $105 million is grossly inadequate. They allege that the discount may be partly due to Colliers being in a conflict, having acted for both sides in the transaction. They allege that Colliers did not spend sufficient time or money in its marketing effort.

51 The Minority Owners rely primarily on two kinds of evidence in support of their contention that the resulting price is far below market. First, they refer to two of the 36 offers that the Majority Owners made to acquire the 36 individual strata units, one in relation to unit #33 (which was accepted by the former owner) and the other, in relation to Mr. Nouri's unit (which was not). With respect to unit #33, they note that BTPI paid $2.5 million, whereas

they calculate the share of the sale proceeds that would be allocable to that unit under the proposed transaction to be only $1.8 million. With respect to Mr. Nouri's unit, they note that the Majority Owners at one point offered him $3.5 million, whereas under the proposed transaction he is slated to receive only $2.2 million.

52 Second, the Minority Owners sought to adduce and rely upon a legal assistant's affidavit attaching an appraisal report dated February 14, 2018 (i.e., the day before the hearing) concluding that the fair market value of the Combined Properties is $150 million, assuming all 40 units were sold together.

53 In response, Mr. Kornfeld argues first and foremost that the interests of the Majority Owners and the Minority Owners are aligned in that they both seek to maximize the price received for the Combined Properties. It is therefore unrealistic for the Minority Owners to allege that the Majority Owners are selling the Combined Properties at an artificial discount, to the prejudice of the Minority Owners.

54 Mr. Kornfeld submits further that the Minority Owners are selectively presenting only two of the richest offers that the Majority Owners made in acquiring the individual units. He suggests that it would be more informative to consider the prices paid for the other 33 units they acquired which, he assures me, display a broader spectrum. Unfortunately, those other contracts are not currently in evidence before me.

55 Mr. Kornfeld objects to the appraisal report being considered in this hearing. He complains in particular about its late delivery and his inability to respond to it.

56 In any event, Mr. Kornfeld argues that I need not reach any conclusions on the fairness of the sale price or indeed any aspect of the transaction contemplated by the Sale Agreement. All I need do at this stage, he suggests, is confirm the winding-up resolution. The fairness of the proposed transaction may be addressed at the next hearing when the liquidator applies for a vesting order under s. 279 of the Act.

ii. Discussion

57 Dealing with the last point first, I am not prepared to follow Mr. Kornfeld's suggestion that I defer my review of the transaction until the next hearing.

58 Section 278.1 requires that I consider each of the factors set out in s. 278.1(5) in determining whether to make a confirmation order. A consideration of those factors necessarily involves a review of the transaction that the liquidator will be mandated to carry out upon its appointment.

59 In *Wake*, the opposing respondents had argued that it had been improper for the strata council to enter into a sale agreement in advance of the liquidator's appointment, because, they argued, that responsibility was reserved under the legislation for the liquidator. Loo J. rejected that argument, finding that it was incumbent on the strata council to enter into a specific transaction in advance of the confirmation hearing so that it could be voted upon at the meeting and subject to review by the Court at the confirmation hearing. She explained her reasoning as follows:

> [122] I am unable to accept the opposing respondents' argument on this point. The purpose of the *SPA* wind-up provisions is to allow a supermajority of 80% of the owners to approve a resolution to cancel the strata plan. Protection of the dissenting owners is provided by court oversight of the sale. If the interpretation urged by the opposing respondents is correct, then court oversight for the dissenting owners is limited to basically approving the liquidator and not much more. That cannot have been the intent of the legislation.
>
> ...
>
> [124] ... It is council - and not the liquidator - who obtains a price for the property before there is a resolution for wind-up and sale, and an application to court for an order confirming the winding-up resolution. I do not find the process to have been flawed.

60 To confirm the resolution before considering the factors set out in s. 278.1(5) as they apply to the proposed transaction would in itself give rise to significant confusion and uncertainty in the affairs of the strata corporation and the owners, and is therefore to be avoided. I will therefore consider the factors set out in s. 278.1(5) before making a confirmation order, with particular regard to the Minority Owners' specific complaints about the transaction that is proposed.

61 I am not persuaded that the price that has been agreed upon for the Combined Properties has been shown to be so far below market value as to give rise to significant unfairness to the Minority Owners, as they allege.

62 First, there is evidence suggesting that at least some of the prices that the Majority Owners paid to acquire the individual strata units comprising Barclay Terrace were lower than the amount that would be allocated to those units under the proposed transaction. The Francescatos had entered into a contract in the spring of 2016 to sell their unit to BTPI for $1.86 million. They later raised their price to $2,111,000. Under the Sale Agreement, they are slated to receive $2,677,500 for that unit. Although the Francescatos did not proceed with that sale, it appears that the original offer was part of a group including at least 26 others, presumably at a similar price point, that did eventually close.

63 In addition, it is reasonable to infer that the Majority Owners paid more for some units than others, depending on how hard the individual owners bargained and how late in the process they held out. As the last few sales were being negotiated, the Majority Owners would likely have been prepared to offer a robust premium to achieve 100% cooperation in order to avoid the litigation risk that they are now facing, as they appear to have done with Mr. Nouri.

64 I am reluctant to give significant weight to the Minority Owners' appraisal report in light of the fact that Mr. Kornfeld has had no opportunity to respond to it. This matter was originally set to be heard on December 22, 2017. At that time, the Minority Owners sought an adjournment to adduce further evidence, which I eventually granted after Grand World agreed to extend the deadline for court confirmation. The hearing of this matter was then set for February 15, 2018 with the agreement of both parties. Any additional evidence that the parties intended to rely upon at that hearing, particularly an expert opinion, should have been adduced earlier.

65 In any event, I note that the appraisal report assumes that the sellers have achieved 100% ownership of the 40 units comprising the Combined Properties. The Majority Owners were unable to achieve that result when they negotiated the price in the Sale Agreement, due to the refusal of the Minority Owners to sell their units or otherwise cooperate in the process. At least some of the price differential, if indeed it exists, may be attributable to the litigation risk arising from that state of affairs.

66 The Majority Owners have adduced the affidavit of Simon Lim, a realtor and executive Vice President at Colliers. Mr. Lim describes the advertising and marketing that was done between the execution of the Listing Agreement on December 5, 2016 and the Sale Agreement on June 27, 2017. Those efforts yielded two offers that were made through Colliers. Two other offers were made to the Majority Owners via other brokerages. Mr. Lim completed the negotiation with Grand World, the highest bidder, and secured the sale price that was ultimately agreed upon.

67 In the end, the Minority Owners are to receive enormous premiums over the 2017 assessed values of their units as a result of the efforts of the Majority Owners in marshalling the Combined Properties for sale as an assemblage - the Francescatos are to receive $2,677,500 for a unit assessed at $793,000 and Mr. Nouri is to receive $2.2 million for a unit assessed at $672,000.

68 I agree with Mr. Kornfeld's primary submission that the Majority Owners have the same interest as the Minority Owners in maximizing the price that is paid for the Combined Properties. There is no sound basis in the evidence to conclude that the Minority Owners are being unfairly treated in that regard.

E. Allocation

i. The Issue

69 The Minority Owners raise a closer question in relation to the allocation of the sale price as between Barclay Terrace and the Adjacent Properties. As I noted earlier, the Sale Agreement allocates 75% of the sale price, or $78,750,000, to Barclay Terrace and 25%, or $26,250,000, to the Adjacent Properties, based on the undeveloped surface area of the lots. The Minority Owners allege that this allocation is significantly unfair to them because it undervalues Barclay Terrace relative to the Adjacent Properties.

70 Mr. Nouri, who is himself a realtor, reviewed public tax filings to discover that Shepstone paid a total of $12,250,000 for the Adjacent Properties when it acquired them between September 2015 and October 2016. He calculates that if, as anticipated, Shepstone receives $26,250,000 for them when the Sale Agreement closes, it will have earned a $114% return on its investment in that brief period.

71 Mr. Nouri compared the rental income-earning potential of the two properties. He calculates that Barclay Terrace could earn 7.5 times more rental income than the Adjacent Properties.

72 Mr. Nouri compared the values of the two properties per developed square foot, both as assessed for 2017 and under the Sale Agreement. He calculates those values as follows:

Property	2017 assessed value psf	allocated Sale Agreement values psf
Barclay Terrace	$728	$2,842
Adjacent Properties	$883	$4,680

73 From those figures, he calculates that the Adjacent Properties have been allocated 1.88 times more value than Barclay Terrace under the Sale Agreement.

74 Lisa Francescato asserts in her affidavit that the allocation is unfair because the assessed value of Barclay Terrace is 82.4% of the aggregate value of the Combined Properties, rather than the 75% it has been allocated.

75 Finally, Mr. Nouri challenges the Majority Owners' premise that the assemblage of Barclay Terrace with the Adjacent Properties adds sufficient street frontage to qualify the Combined Properties for the highest density redevelopment potential, thereby making the Combined Properties more valuable together than either would be alone. He notes that according to a city planning by-law administration bulletin published January 11, 2017, corner sites "may be considered" for higher density redevelopment notwithstanding that they do not have sufficient street frontage. He argues that because Barclay Terrace is situated on a corner, whereas the Adjacent Properties are not, Barclay Terrace has intrinsic redevelopment value on its own that the Adjacent Properties do not share.

76 In response, the Majority Owners adduced the affidavit of Michael Braun, one of their representatives. Mr. Braun says that Mr. Nouri's analysis is misleading, in that Mr. Nouri focuses on a comparison of the square footage and rental income-potential of the *improvements* on the two properties, rather than on the bare land, which is where their real value as a redevelopment opportunity lies and how they were marketed and sold. Mr. Kornfeld adds that Mr. Nouri's mode of comparison was bound to produce a skewed result because there are 36 strata units in Barclay Terrace and only four in the Adjacent Properties.

77 Instead, Mr. Braun has added up the 2017 assessed values for the land component of the lots comprising the Combined Properties. He has calculated that the Barclay Terrace lands comprise 77% of that total combined value,

i.e., a 2% difference from the allocation made to Barclay Terrace in the Sale Agreement.

ii. Discussion

78 I agree with the Majority Owners that it was more appropriate to allocate the purchase price between the two properties by reference to the bare land rather than the improvements, for the reasons identified by Mr. Braun.

79 The only question left is whether it was significantly unfair to the Minority Owners for the Majority Owners to have based that allocation on the undeveloped surface area rather than the 2017 assessed land component values, or perhaps some other factor that was not raised in argument.

80 Although using the undeveloped surface area method notionally allocated 2%, or $2.1 million, more to Shepstone, as owner of the Adjacent Properties, than the 2017 assessed land component value method would have yielded, it was not manifestly unreasonable for the Majority Owners to allocate the sale price between the two properties by that means. The Minority Owners are not necessarily entitled to the allocation method that is the most favourable one for them.

81 In summary, I am not persuaded that the allocation method that was used in the Sale Agreement was significantly unfair to the Minority Owners, given the amounts they are receiving for their units.

F. Confusion and Uncertainty

i. The Issue

82 The Minority Owners raise several other miscellaneous concerns with the terms of the Sale Agreement, which they allege create a risk of confusion and uncertainty for them. These include the following:

a) there is no provision in the Sale Agreement for an appeal from an order confirming the winding-up resolution;

b) there is no term in the Sale Agreement preventing Grand World from flipping Barclay Terrace, in which case the Minority Owners will lose the benefit of any increase in price that may be realised;

c) there is no possession date stipulated in the Sale Agreement for the Minority Owners' units, leaving the Minority Owners uncertain as to when they must vacate;

d) there is no provision in the Sale Agreement to permit the Minority Owners to rent their units back while they search for new accommodation; and

e) Grand World (a newly-incorporated company that is not in good standing and has only a single, foreign director) may not complete the transaction, which will cause confusion and uncertainty if the Strata Corporation has been wound up, the vesting order has been filed in the land title office and the strata plan has been cancelled.

83 In order to address some of these concerns, Mr. Kornfeld has indicated, on behalf of the Majority Owners, that the liquidator will not submit any filings to the land title office until the Combined Properties have finally sold. In the event the Grand World transaction does not close as anticipated, the Majority Owners will renew their marketing efforts until they have a sale. In that event, they will return to court for approval of any replacement sale in which they propose to engage, notwithstanding that s. 282 of the Act allows the liquidator to dispose of real and personal property without court approval following a 3/4 vote at an annual or special general meeting.

84 This is consistent with representations that Mr. Kornfeld has already made to the Minority Owners in his letter of June 1, 2017, which stated as follows:

> If for any reason the purchaser under the offer does not satisfy or waive its conditions, then the Majority Owners will continue to market the property for sale at the best price possible. Any final sale by the liquidator would be subject to court approval and certainly will be discussed with you prior to seeking that approval.

ii. Discussion

85 I am satisfied that most of the concerns that the Minority Owners have raised can be addressed by including terms giving effect to Mr. Kornfeld's assurances in the vesting order that the liquidator must seek under s. 279 of the Act.

86 In addition, the vesting order should include a direction to the liquidator that the Minority Owners be given sufficient advance notice of the possession date to allow them to acquire new accommodation.

87 The Act allows for additional applications to be made to the court in a voluntary winding up through s. 276, which states as follows:

> [276] (1) Except as otherwise provided in this Act and the regulations, the provisions of the *Business Corporations Act* that apply to a voluntary liquidation of a company apply to the voluntary winding up of a strata corporation with a liquidator and, for that purpose,
>
> (a) a reference to "registrar" in the *Business Corporations Act* as it applies for the purposes of this Act must be read as a reference to the registrar as defined in this Act,
>
> (b) a reference to "commencement of the liquidation" in the *Business Corporations Act* as it applies for the purposes of this Act must be read as a reference to the date on which the unanimous resolution referred to in section 277 of this Act is passed, and
>
> (c) a requirement in the *Business Corporations Act* as it applies for the purposes of this Act that documents must be filed with the registrar must be read as a requirement that the documents must be filed in the land title office.
>
> (2) Division 10 of Part 10 and section 324 of the *Business Corporations Act* do not apply to the voluntary winding up of a strata corporation with a liquidator.
>
> (3) A person commits an offence who contravenes section 327 (2) or 335 of the *Business Corporations Act* as it applies for the purposes of this Act and sections 428 to 430 of the *Business Corporations Act* apply in relation to those offences.

88 Among the provisions of the *Business Corporations Act*, *S.B.C. 2002, c. 57*, that are incorporated through s. 276 of the Act, s. 325 is of particular relevance in this context because it 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.

89 That provision states as follows:

> [325] (1) An application to the court in respect of a company in liquidation may be made under this section by the company, a shareholder of the company or a beneficial owner of a share of the company, a director of the company *or any other person, including a creditor or liquidator of the company, whom the court considers to be an appropriate person to make the application*.
>
> (2) Nothing in subsection (1) prevents the court from requiring that security for costs be provided by a person bringing an application under that subsection.
>
> (3) *On an application made in respect of a company in liquidation, the court may, in respect of that company, make any order it considers appropriate*, including any of the following orders:
>
> (a) an order appointing one or more liquidators, with or without security;

(b) an order setting the remuneration of a liquidator;

(c) an order replacing or removing a liquidator;

(d) an order appointing auditors or inspectors for any purpose, including for the purpose of auditing or examining those of the records of the liquidator, and those of the records in the custody or control of the liquidator, that the court considers appropriate;

(e) an order specifying the powers of, setting the remuneration of and removing or replacing auditors or inspectors;

(f) an order determining the notice to be given to any interested person, or dispensing with notice to any person, in relation to any application to court under this section;

(g) an order that a meeting of some or all of the shareholders or creditors of the company be called, held and conducted in the manner and for the purposes the court considers appropriate;

(h) an order determining the validity of any claims made against the company;

(i) an order restraining the directors and officers of the company from doing any or all of the following except as permitted by the court:

(i) exercising any or all of their powers;

(ii) collecting or receiving any debt owed to the company or any other assets of the company;

(iii) paying out or transferring any money or other assets of the company;

(j) an order determining and enforcing the duty or liability of any past or present director, officer, receiver, receiver manager, liquidator, shareholder or beneficial owner of shares of the company

(i) to the company, or

(ii) for an obligation of the company;

(k) an order that there be an examination into the conduct of any person who has taken part in the formation or promotion of the company, or of any past or present director, officer, receiver, receiver manager, liquidator, shareholder or beneficial owner of shares of the company, if it appears that that person has misapplied, retained or become liable or accountable for any property, rights or interests of, or has been guilty of any breach of trust in relation to, the company;

(l) an order that a person referred to in paragraph (k) of this subsection do one or both of the following, whether or not the conduct complained of is conduct for which the person may be liable to prosecution:

(i) repay or restore all or any part of the property, rights and interests that the person misapplied or retained, or for which the person is liable or accountable, with interest at the rate the court considers appropriate;

(ii) contribute the sum that the court considers appropriate to the assets of the company by way of compensation for the conduct complained of;

(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;

(n) an order permitting the disposal or destruction of

(i) records of the company, or

(ii) records retained by the liquidator under section 333 (1);

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

(p) an order to confirm, reverse or modify any act or decision of a liquidator;

(q) if it appears to the court that a liquidator has not faithfully performed the liquidator's duties, an order requiring that whatever action the court considers appropriate be taken;

(r) despite any other provision of this Part, an order imposing restrictions on the rights, powers and duties of a liquidator, either generally or with respect to certain matters;

(s) an order discharging, on terms and conditions the court considers appropriate, a liquidator who has resigned or has been removed as liquidator;

(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;

(u) an order respecting liabilities due to creditors of the company, or money or other assets due to shareholders of the company, whose whereabouts are unknown;

(v) an order, on the terms and conditions the court considers appropriate, continuing, or staying or discontinuing, the liquidation;

(w) if an order is made staying or discontinuing the liquidation under paragraph (v) of this subsection, an order that the liquidator restore to the company all of the company's remaining property, rights and interests.

(4) If an order is made under subsection (3) (v), the liquidator must file with the registrar a copy of the entered order promptly after the making of the order.

[Emphasis added.]

90 I am satisfied that any confusion or uncertainty that may arise in the course of the winding-up process can be addressed through such an application, if necessary.

III. Conclusion

91 I have determined that confirmation of the Resolution pursuant to s. 278.1(4) of the Act is in the best interests of the owners and will not give rise to significant unfairness to the Minority Owners or lead to significant confusion or uncertainty in their affairs or those of the Strata Corporation.

92 I therefore order that the Resolution be confirmed.

W.B. MILMAN J.