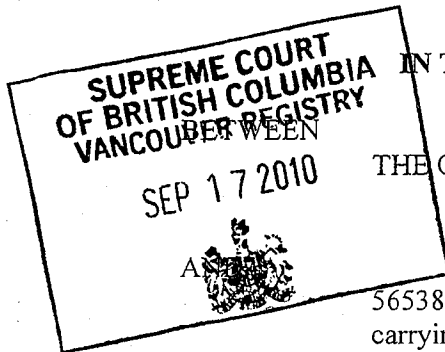


- *Original Writ of Summons with Endorsement filed August 10, 2006*
- *Notice of Civil Claim filed pursuant to Rule 24-1*

No.S065140  
Vancouver Registry



IN THE SUPREME COURT OF BRITISH COLUMBIA

THE OWNERS, STRATA PLAN LMS 4456

PLAINTIFF

565387 B.C. LTD. and 565388 B.C. LTD.  
carrying on business as ONE WALL CENTRE PARTNERSHIP, CALMONT  
INVESTMENTS LTD., WALL FINANCIAL CORPORATION, ING  
INSURANCE COMPANY OF CANADA formerly WELLINGTON  
INSURANCE COMPANY, NATIONAL HOME WARRANTY PROGRAMS  
LTD., VISIONWALL CORPORATION, and BRUNO WALL

DEFENDANTS

### NOTICE OF CIVIL CLAIM

This action has been started by the Plaintiff for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- file a Response to Civil Claim in Form 2 in the above-named registry of this court within the time for Response to Civil Claim described below, and
- serve a copy of the filed Response to Civil Claim on the Plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- file a Response to Civil Claim in Form 2 and a Counterclaim in Form 3 in the above-named registry of this court within the time for Response to Civil Claim described below, and
- serve a copy of the filed Response to Civil Claim and Counterclaim on the Plaintiff and on any new parties named in the Counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the Response to Civil Claim within the time for Response to Civil Claim described below.

### TIME FOR RESPONSE TO CIVIL CLAIM

A Response to Civil Claim must be filed and served on the Plaintiff,

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed Notice of Civil claim was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

#### CLAIM OF THE PLAINTIFF

### **Part 1: STATEMENT OF FACTS**

#### **The Players**

1. The Plaintiff, The Owners, Strata Plan LMS 4456 ("Strata Corporation") is a strata corporation created under the Condominium Act, R.S.B.C. 1979 c. 61 and continued under the Strata Property Act S.B.C. 1998 c. 43.
2. The Defendant, 565387 B.C. LTD. is a company incorporated under the laws of the Province of British Columbia with a registered and records office at 10th Floor, 938 Howe St., Vancouver BC V6Z 1N9.
3. The Defendant, 565388 B.C. LTD. is a company incorporated under the laws of the Province of British Columbia with a registered and records office at 10th Floor, 938 Howe St., Vancouver BC V6Z 1N9.
4. 565387 B.C. LTD. and 565388 B.C. LTD. carried on business under a partnership known as One Wall Centre Partnership (the "Partnership").
5. The Defendant, CALMONT INVESTMENTS LTD. ("Calmont") is a company incorporated under the laws of the Province of British Columbia with a registered and records office at 10th Floor, 938 Howe St., Vancouver BC V6Z 1N9.
6. The Defendant, WALL FINANCIAL CORPORATION ("WFC") is a company incorporated under the laws of the Province of British Columbia with a registered and records office at 10th Floor, 938 Howe St., Vancouver BC V6Z 1N9.

7. The Defendant, ING INSURANCE COMPANY OF CANADA formerly WELLINGTON INSURANCE COMPANY ("ING") is a company incorporated under the laws of the Province of British Columbia with a registered and records office at 400-2955 Virtual Way, Vancouver BC V5M 4X6.
8. The Defendant, NATIONAL HOME WARRANTY PROGRAMS LTD. ("NHW") is a company incorporated under the laws of the Province of British Columbia with a registered and records office at 800 885 West Georgia Street, Vancouver BC V6C 3H1.
9. The Defendant, VISIONWALL CORPORATION ("Visionwall") is a company incorporated under the laws of the Province of British Columbia with a registered and records office at 17915-118 Avenue, Edmonton, AB T5S 1L6.
10. The Defendant, BRUNO WALL, is a businessman and a director of the Partnership, Calmont and WFC.

#### **Nature of Action**

11. The Strata Corporation's condominium development is known as One Wall Centre (the "Project") and is located at 938 Nelson St., in the City of Vancouver, B.C.
12. The Project consists of 74 Strata Lots on floors 31 – 48 within a 46 storey high-rise building of concrete and steel construction.
13. This is an action to recover, among other costs, the cost of replacing the windows (the "Window Replacement Program") at the Project. The Window Replacement Program is necessary to address the IGU Deficiencies and the HVAC Deficiencies more particularly described at paragraphs 17 and 18 herein.

#### **Background**

14. Construction of the Project commenced in June of 1998. Partial Occupancy permits were issued by the City of Vancouver in August, September and October, 2001.
15. During the course of construction a dispute ensued between the Developer and the City of Vancouver over the colour of the insulating glass units or glazing. A compromise was ultimately reached between the parties whereby the bottom two-thirds of the tower (with the exception of

the architectural notch) would be completed in dark glass and the residential top one-third (including the architectural notch) would be finished in a light translucent glass (the "Glazing Compromise"). The Glazing Compromise was reflected in Development Permit DE405109 dated May 23, 2000.

16. The Glazing Compromise was disclosed to potential purchasers in the Third Amendment to the disclosure statement filed by the Developer on June 7, 2000.

### **Deficiencies**

17. The glazing system installed at the Project consists of a four-sided structurally glazed unitized curtain wall system containing proprietary 3 element insulating glass units (IGU's) supplied by the Defendant, Visionwall. As designed and built, the IGU's contained deficiencies arising from faulty and inappropriate material, faulty workmanship, faulty inspections, and faulty and inappropriate design (the "IGU Deficiencies"). Particulars of the IGU Deficiencies include, but are not limited to:
  - a.) Discontinuities in the perimeter edge seal. The edge seal incorporates a PVC thermal break bonded to aluminium extrusions and a stainless steel edge band that is bonded and sealed to the thermal break with a thermoplastic butyl based sealant. As the sealant heats up and cools down, the process results in the formation of ridging and fish-mouths at the stainless steel edge band. The resulting discontinuities create an air leakage path through which moisture can, and does, pass. The condensation interacts with the low-e coating inside the IGUs resulting in permanent and irreparable corrosion of the low-e coating on the glass.
  - b.) The Structural sealant adhering the IGUs to the curtain-wall frames has become brittle and non-elastic, resulting in a substantial danger to the health and safety of the occupants in the Project and other, if not remediated.
18. The Project's heating; ventilation and air conditioning ("HVAC") systems were originally designed based on the understanding that the building would be clad in dark glass. Dark glass, and specifically the glass on the bottom two-thirds of the tower, performs better from a solar heat gain perspective than clear glass, and specifically the glass on the top one-third of the tower. When the Glazing Compromise was reached, the Developer did not adequately redesign the HVAC systems to accommodate the increased solar heat gain owing to the change in window

colour (the "HVAC Deficiencies"). In the result, the HVAC Deficiencies have made it difficult to regulate the temperature within the strata units and in many cases, the strata units are uncomfortably hot throughout the four seasons.

### **Development of the Project**

19. The Partnership, Calmont and WFC (collectively, the "Developer") and each of them, collectively or individually, arranged for the design, development, construction, and marketing of the Project.
20. The Developer entered into written contracts with individual purchasers for the purchase and sale of strata lots in the Project ("the Contracts").

### **Disclosure Statements**

21. On or about January 4, 1999, the Developer filed an initial disclosure statement with the Superintendent of Real Estate in British Columbia with respect to the development. The Developer subsequently filed 4 amendments to the disclosure statement on the following dates:
  - April 6, 1999 ("First Amendment");
  - January 31, 2000 ("Second Amendment");
  - June 7, 2000 (Third Amendment"); and
  - December 18, 2000 ("Fourth Amendment");(collectively, the "Disclosure Statements").
22. The Disclosure Statements were filed pursuant to the *Real Estate Act*, R.S.B.C. 1996 Chapter 397 as amended ("*RSA*"), for the purpose of providing information concerning the development to prospective purchasers of strata units in the development
23. Bruno Wall as director in the companies comprising the Partnership was a signatory to the Disclosure Statements. The Disclosure Statements contained sworn declarations of the Director as to the truth and accuracy of the representations contained therein.

### **Windows**

24. Visionwall was engaged by the Developer to manufacture and supply the windows for the construction of the Project.

25. On August 12, 2009 and on Visionwall's application, the Queen's Bench of Alberta granted a stay of proceedings under the Companies' Creditors Arrangement Act R.S.C. 1985, c. C-36, as amended.
26. On December 15, 2009, a Meeting of Creditors was convened to consider a plan of arrangement (the "Plan") proposed by Visionwall, and its related companies. The Plan was approved by the requisite majority of each of the Affected Secured Creditors and the Affected Unsecured Creditors (which group included the Strata Corporation).
27. Under the approved Plan, each Affected Unsecured Creditor with a proven claim was to receive payment in full of the first \$1,000 of its claim and shares issued by a newly created company, Visionwall Solutions Inc. ("Solutions") at a deemed value of \$1.00 per share in the total amount of 5% of the balance of each unsecured creditor's claim.
28. On December 21, 2009, the Queen's Bench of Alberta granted an Order sanctioning the Plan. The Order included a provision whereby Visionwall was released from all claims of Affected Creditors.

### **Third Party Warranty**

29. ING, through its agent NHW (collectively, the "Warranty Provider"), administers a home warranty insurance program in accordance with the provisions of the *Homeowner Protection Act*, S.B.C. 1998, c.31 and the *Homeowner Protection Act Regulation*, B.C. Reg. 203/2000 and issued a New Home Limited Warranty Certificate (the "Warranty Certificate") to the Strata Corporation.

### **The Loss and Damage**

30. The IGU Deficiencies and HVAC Deficiencies have caused the Strata Corporation to suffer and continue to suffer loss and damage, particulars of which include but are not limited to the following:
  - a) expenses for the inspection, investigation, and retainer of professional advice;
  - b) consulting engineering expenses;
  - c) expenses for effecting temporary remedial work to repair the building;

- d) expenses for removing, redesigning, and rebuilding the wall cladding system, including windows;
- e) expense for temporary accommodation for occupants during remediation;
- f) diminution in value of strata lots and the Project;
- g) loss of use and enjoyment of the Project; and
- h) such further and other damage as might become evident (collectively the "Loss and Damage").

## **Part 2: RELIEF SOUGHT**

1. The Plaintiff claims against the defendants jointly and severally:
  - a) general damages;
  - b) special damages;
  - c) interest pursuant to the *Court Order Interest Act*;
  - d) costs; and
  - e) such further and other relief as this Honourable Court may deem just.

## **Part 3: LEGAL BASIS**

### **Statutory Provisions**

1. The Strata Corporation brings this action pursuant to section 171 of the *Strata Property Act* S.B.C. 1998 c. 43 in respect of the common property, common facilities, and other assets of the Strata Corporation, and as authorized pursuant to section 172 of the Act in respect of matters affecting individual strata lots. Any further reference to the "Strata Corporation" in this Statement of Claim shall include a reference to the individual owners authorizing the action under section 172 of the Act.
2. The Strata Corporation specifically pleads and relies upon the postponement provisions of section 6 of the *Limitation Act*.
3. The Defendants are jointly and severally liable for the loss and damage suffered by the Strata Corporation, and the Strata Corporation specifically pleads and relies upon the *Negligence Act*, R.S.B.C. 1996 c. 266.

### **Claim against the Developer**

4. It was a term and condition of the Contracts that the Developer would:
  - a) ensure that the Project was constructed in a good and workmanlike manner, free of construction deficiencies or structural defects, including any defects due to faulty design, materials, equipment or workmanship;
  - b) exercise all reasonable care, skill, diligence, and competence as a developer while causing the construction of the Project to be carried out;
  - c) ensure that the construction of the Project would be performed in accordance with generally accepted construction and engineering standards;
  - d) ensure that the construction of the Project would be free from defects;
  - e) provide a warranty of habitability; and
  - f) warn purchasers of any defects in the construction of the Project.
5. By its words and conduct in designing, developing, constructing, and marketing the Project, the Developer expressly and impliedly represented to the Strata Corporation that the Project would be free from any design or construction defects, and that they would carry out such remedial actions as might become necessary to repair any defects which might arise.
6. In the foregoing circumstances, the Developer was in a relationship of sufficient proximity with the Strata Corporation to owe it a duty in law to ensure that the Project was designed and built in accordance with all applicable codes and standards and that it would be fit for habitation.
7. The IGU Deficiencies and HVAC Deficiencies were caused solely and wholly, or in part, by the breach of the terms and conditions of the Contracts, representations, and/or duties owed by the Developer, particulars of which include:
  - a) in failing to ensure that the Project was designed in accordance with all applicable codes and standards and with the use of all reasonable care, skill, and diligence so as to make the Project fit for human habitation;



- b) in failing to ensure that the Project was constructed in a good and workmanlike manner free of the IGU Deficiencies, HVAC Deficiencies and Resultant Damage;
  - c) in refusing to honour its warranties against the IGU Deficiencies, HVAC Deficiencies and Resultant Damage and to carry out remedial work in a proper and timely fashion; and
  - d) such further and other particulars as may be shown at the trial of this action.
8. As a result of the Developer's breaches, the Strata Corporation has suffered and continues to suffer the Loss and Damage as defined at paragraph 30 to Part I of this Notice of Civil Claim.

**Disclosure Statement Liability**

9. Pursuant to ss. 66, 72 and 75 of the *RSA*, the Developer and Bruno Wall, owed a duty to disclose to prospective purchasers any facts material to the prospective purchasers' decision to purchase in the Project, and to provide amendments to the Disclosure Statement disclosing such problems and defects.
10. Prior to the completion of the Project, the Developer entered into the Contracts with certain members in the Strata Corporation.
11. Purchasers, in entering into the Contracts, relied on the existence of this fiduciary relationship and the expectation that the fiduciary duties would be fulfilled.
12. Pursuant to section 75 of the *RSA* purchasers are deemed to have relied on the representations in a Disclosure Statements.
13. At the time the Disclosure Statements were filed, and in any event prior to the sale of the last strata lot by the Developer, the Developer and Bruno Wall knew or were recklessly indifferent to the fact that the Disclosure Statements were false and failed to include material facts which Developer and Bruno Wall were obliged to disclose. The material omissions included the following:
- a.) the Developer and/or Bruno Wall had knowledge of the IGU Deficiencies and that no, or inadequate, measures were being taken to remedy the deficiencies;
  - b.) the Developer and/or Bruno Wall had knowledge of the HVAC Deficiencies and that no, or inadequate, measures were being taken to remedy the deficiencies;

- c.) the Developer and/or Bruno Wall had knowledge that some or all of the IGU Deficiencies presented a risk of injury or death to the occupants of the Project; and
  - d.) the Developer and/or Bruno Wall had knowledge that the operating budget, attached as an exhibit to the Disclosure Statements, understated the expenses associated with the HVAC systems.
- (collectively "the Material Facts").

14. The Disclosure Statements were relied upon, or are deemed to have been relied upon, by purchasers in the Project to their detriment, prior to purchasing their individual strata lots. Had the Developer and Bruno Wall disclosed the Material Facts through amendments to the disclosure statements, the purchasers would never have purchased strata lots in the Project, or alternatively, they would have purchased the strata lots at a reduced price.
15. Further, and in the alternative, if the representations set out in the Disclosure Statements were true when issued, they constituted a continuing representation and became false with the emergence of information rendering them false. The Developer and Bruno Wall were required by the RSA to further amend the Disclosure Statements to reflect any material change in circumstances.
16. At no time did Developer or Bruno Wall correct the inaccuracies contained in the Disclosure Statements.
17. The failure to disclose the Material Facts constitute a material false statement for which Developer and Bruno Wall are liable pursuant to Section 75 of the *REA*.
18. As a result of the Developer's and Bruno Wall's breaches, the purchasers have suffered and continue to suffer the Loss and Damage as defined at paragraph 30 to Part I of this Notice of Civil Claim.

#### **Claim Against Warranty Provider**

19. Pursuant to the Warranty Certificate, the Warranty Provider agreed to provide coverage for:
  - a) any defects in materials and labour, for a period of 15 months;

- b) any defects in material and labour supplied for plumbing, heating, ventilation and air conditioning delivery and distribution systems, for a period of 24 months ("HVAC Defect");
- c) any defects in materials and labour supplied for the exterior cladding system, including windows that may lead to detachment or material damage to the home, for a period of 24 months ("Cladding System Defect");
- d) any building code defect, for a period of 24 months ("Building Code Defect");
- e) those assemblies, components and materials intended to separate and protect the interior space of the project from the adverse effects of exterior climactic conditions (the "Building Envelope Defect") for a period of 5 years ; and
- f) structural defects ("Structural Defects") for a period of 10 years.

20. It is an express or implied term of the Warranty Certificate that:

- a) the Warranty Provider would make all reasonable efforts to avoid delays in responding to a claim, evaluating the claim and scheduling any required repairs;
- b) the Warranty Provider would repair or cause to be repaired all defects covered by the Warranty Certificate in a timely manner;
- c) all work under the Warranty Certificate would be completed in a reasonable manner using materials and labour conforming to the *Vancouver Building By-Law* ("VBBL") and all architectural, engineering and construction standards, and be warranted against defects in materials and labour until the later of the first anniversary of the date of completion of the work or the expiry of the applicable warranty coverage;
- d) if the Warranty Provider determined that a claim was not covered by the Warranty Certificate, it would provide the Plaintiff with written reasons for its decision;
- e) the Warranty Provider would deal fairly and in good faith with the Plaintiff; and
- f) the Plaintiff and its constituent members would enjoy peace of mind with respect to defects covered by Warranty Certificate.

21. The IGU Deficiencies and/or HVAC Deficiencies, and each of them, constitute:

- a) defects in materials and labour;
- b) HVAC Defects;
- c) Cladding System Defects;
- d) Building Code Defects;
- e) Building Envelope Defects; or
- f) Structural Defects

and as such are covered under the Warranty Certificate.

22. By letters dated October 11, 2002, September 19, 2003, and October 29, 2003 the Strata Corporation, through its agents, placed the Warranty Provider on notice of IGU Deficiencies and the HVAC Deficiencies.

23. The Warranty Provider has refused or neglected to honour its obligations under the Warranty Certificate. As a result of the Warranty Provider's breach, the Strata Corporation has suffered and continues to suffer the Loss and Damage as defined at paragraph 30 to Part I of this Notice of Civil Claim.

Plaintiff's address for service:  
Jenkins Marzban Logan LLP  
900 – 808 Nelson Street  
Vancouver BC V7Z 2H2  
Attention: Timothy Peters

*One or both of a fax number and an e-mail address may be given as additional addresses for service.]*

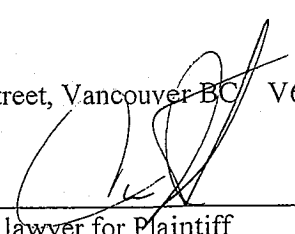
Fax number address for service (if any): 604 681.0766

E-mail address for service (if any): tpeters@jml.ca.

Place of trial: Vancouver, BC

The address of the registry is: The Law Courts, 800 Smithe Street, Vancouver BC V6Z 2E1

Dated: September 16, 2010

  
\_\_\_\_\_  
Signature of lawyer for Plaintiff  
Timothy Peters

Rule 7-1(1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

- (a) prepare a list of documents in Form 22 that lists
  - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
  - (ii) all other documents to which the party intends to refer at trial, and
- (b) serve the list on all parties of record.

#### APPENDIX

##### **Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:**

The plaintiff seeks damages against the defendants for their respective roles in the development , design, installation and inspection of the defective window wall and HVAC systems forming part of the condominium project owned by the plaintiff and its constituent members.

##### **Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:**

- ☐ a motor vehicle accident
- ☐ medical malpractice
- ☐ personal injury, other than one arising from a motor vehicle accident
- ☐ contaminated sites
- ☐ construction defects
- ☐ investment losses
- ☐ real property (real estate)
- ☐ personal property
- ☐ the lending of money
- ☒ the provision of goods or services or other general commercial matters
- ☐ an employment relationship
- ☐ a will or other issues concerning the probate of an estate
- ☐ a matter not listed here

##### **Part 3: THIS CLAIM INVOLVES:**

- ☐ a class action
- ☐ maritime law
- ☐ aboriginal law
- ☐ constitutional law
- ☐ conflict of laws

☐  
☐

none of the above  
do not know

**Part 4:**

*[If an enactment is being relied on, specify. Do not list more than 3 enactments.]*