IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gray v. 1534 Harwood Street (St. Pierre) Ltd.,* 2024 BCSC 1345

Date: 20240618
Docket: S235251
Registry: Vancouver

Between:

Jon Scott Gray, Colin McTavish and Shirley Giggey

Plaintiffs

And

1534 Harwood Street (St. Pierre) Ltd.

Defendant

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:	A.P.L. Moore M.J. McDonald, Articled Student
Counsel for the Defendant:	J.L. Carpick L.A. Buitendyk L. Zhang
Place and Date of Trial/Hearing:	Vancouver, B.C. June 10–11, 2024
Place and Date of Judgment:	Vancouver, B.C. June 18, 2024

[1] **THE COURT:** The defendant applies for an order to preclude the plaintiffs from maintaining this action as a representative proceeding.

[2] The parties had intended that another application, the plaintiffs' application relating to the preservation of funds, would be heard immediately after this application, but there was insufficient time to do so. I regret that an offer I made to be seized of that application and hear it next week is no longer possible due to my schedule.

[3] Additionally, the defendant took the position that another one of its applications (to cross-examine one of the plaintiffs on his affidavit) ought to be heard together with this application. The defendant relied on that application and the necessity for it, in part, as support for an application for an adjournment, which I denied.

[4] Accordingly, this judgment only addresses the issue of whether it is appropriate that this action continue as a representative proceeding.

Background

[5] The dispute between the parties relates to the terms of the leases between them. The plaintiffs are tenants in a building located at 1534 Harwood Street in Vancouver called the “St. Pierre”. The defendant is the landlord. The building is a residential complex with 41 units.

[6] Each lease at the St. Pierre is for a term of 99 years commencing May 1, 1974. At that time, First Canadian Land Corporation Ltd. (“First Canadian”) was the owner of the building, and it entered into a lease with V.M. Prescott Ltd. However, First Canadian’s interest was subsequently assigned to the defendant (also referred to as “Harwood”).

[7] V.M. Prescott Ltd.'s interest as a tenant was assigned to individual tenants who, in turn, assigned their interest in their units to others from time to time. It is not

disputed that every tenant entered into an identical lease agreement with Harwood (the "Lease").

[8] In May 2017, the ownership of Harwood changed. Denise She is the director of Harwood, and she has made affidavits supporting Harwood's position in this litigation.

[9] The tenancies at issue are not subject to the *Residential Tenancy Act,* S.B.C. 2002, c. 78, because the lease is for a term greater than 20 years: s. 4(i).

[10] The plaintiffs bring an action "on behalf of themselves and on behalf of any person who is now, or has been at any time since May 2017, a leaseholder, on the basis that all such persons have the same interest in the within proceeding": paragraph 3 in Part 1 of the notice of civil claim filed July 24, 2023.

[11] Representative actions are authorized by R. 20-3 of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009, which states:

> (1) If numerous persons have the same interest in a proceeding, other than a proceeding referred to in subrule (10), the proceeding may be started and, unless the court otherwise orders, continued by or against one or more of them as representing all or as representing one or more of them.

[12] The defendant seeks this Court to declare "otherwise" and essentially prevent the plaintiffs from maintaining their action as a representative proceeding. It is not seeking to strike out the claim.

The Lease

[13] As noted, every Lease between the tenants and Harwood is identical.

[14] Tenants do not pay rent, but collectively pay the operating expenses of the St. Pierre. A summary of the relevant provisions of that Lease follows:

a. Article 7 entitles the landlord to bill the leaseholders for certain expenses it incurs in the performance of its covenants, which are referred to as "Operating Expenses".

b. In Article 7.01, “Operating Expenses” is a defined phrase:

> "Operating Expenses" … means the total amount paid or payable by the Lessor in the performance of its covenants … [which] includes … without restricting the generality of the foregoing, the amount paid or payable by the Lessor in connection with the maintenance, operation and repair of the Building…and legal and accounting charges and all other expenses paid or payable by the Lessor in connection with the Building, the common property therein or the Lands.

c. Article 7.01 also states that “Operating Expenses” does not include any amount directly chargeable by Harwood to any of the tenants.

d. Article 7.01 further requires Harwood to exercise “prudent and reasonable discretion” in incurring Operating Expenses.

e. Article 7.02 requires Harwood, prior to the commencement of each calendar year, to provide an estimate of Operating Expenses for the coming year based on the prior year's experience. Tenants are required to pay Harwood the first day of each month, one-twelfth of the landlord's estimated Operating Expenses.

f. Article 7.03 discusses how those expenses are reconciled at the end of the year. Where the actual expenses incurred exceed the estimate, the tenants must, within 30 days of a written demand from Harwood, pay such excess that is owing. If the actual expenses are less than estimated, then the tenant's share for Operating Expenses in the following year will be reduced.

g. Article 7.03 also states, “[t]he actual Operating Expenses shall be calculated by the Lessor for each calendar year and shall be certified by the auditors of the Lessor in accordance with generally accepted accounting principles.”

[15] There was no dispute that each tenant's share of Operating Expenses varies according to the square footage of their unit.

Alleged Breaches of the Lease

[16] The plaintiffs allege that since May 2017, Harwood has consistently breached the Lease. They allege breaches of Articles 5.03 and 5.07. Specifically, they allege that Harwood failed to keep the building in good repair and condition by failing to ensure safety standards, including fire safety standards, had been met.

[17] They also allege that exterior power washing and painting in 2020 did not complete, despite Harwood including $71,567 in the Operating Expenses for that maintenance. They allege that Harwood has failed to ensure consistent operation of the elevator since 2018.

[18] Another major dispute between the parties is Harwood's claim that the full amount of its legal fees and disbursements incurred in connection with multiple legal disputes with the individual tenants, including legal expenses relating to this action, are properly included as part of the legal expenses charged back under the Operating Expenses.

[19] Those expenses have risen dramatically since 2017. The actual legal expenses historically are as follows: 2017 – $2,000; 2018 – $39,137.57; 2019 – $4,147.40; 2020 – $13,124; 2021 – $77,407.63; 2022 – $98,252.58; and 2023 – $110,138.28.

[20] More generally, the actual Operating Expenses have more than doubled in the last eight years. The plaintiffs' position is that the legal fees that are being charged against them are a breach of the Lease and inequitable because they are not incurred prudently or reasonably. In relation to that, they point to the fact that Harwood has commenced a civil action for abuse of process against the plaintiffs. The plaintiffs allege that claim has no merit. The plaintiffs say that by continuing to charge legal expenses as Operating Expenses for that litigation, Harwood is, in effect, forcing the plaintiffs to finance a lawsuit against them, as well as finance their own defence.

[21] The plaintiffs also submit that the legal fees were not paid or payable by Harwood in the performance of its covenants.

[22] Lastly, they submit that to the extent any properly-claimed legal expenses fall under Operating Expenses, they are attributable and directly chargeable to the individual tenants engaged in the specific litigation, and not the leaseholders as a whole, and therefore they do not fall under the definition of Operating Expenses.

Analysis

[23] I turn to my analysis.

[24] Counsel went over in some detail the extensive litigation history that resulted in this action being filed in this Court, including numerous interim or pre-trial applications heard in this Court and the Provincial Court. They also reviewed the history of the test for common law class actions, both before and after the enactment of the class proceeding legislation in Canada, including in British Columbia.

[25] However, the issue before me on this application is narrower: Is the notice of civil claim, as framed, suitable as a representative action?

[26] There is no dispute that the test for whether an action is properly a representative action was set out in, among others, *Oregon Jack Creek Indian Band v. Canadian National Railway Co.*, 34 B.C.L.R. (2d) 344, 1989 CanLII 249 (C.A.) at 12, aff'd [1989] 2 S.C.R. 1069, 1989 CanLII 4. The court must ask the following three questions:

> 1. Is the purported class capable of clear and definite definition?
>
> 2. Are the principal issues of fact and law essentially the same as regard all members of the class? and
>
> 3. Assuming liability, is there a single measure of damages applicable to all members?

[27] The parties agree that the onus is on Harwood to demonstrate that the plaintiffs should not be allowed to pursue a representative proceeding: *Hwlitsum*

First Nation v. Canada (Attorney General), 2018 BCCA 276 at paras. 8–9, leave to appeal to SCC ref'd, 38325 (28 March 2019).

[28] In *Araya v. Nevsun Resources Ltd*., 2016 BCSC 1856, aff'd 2017 BCCA 401, re-aff'd 2020 SCC 5, the Court held that what was referred to as a common law class action was no longer available once comprehensive class proceeding legislation was passed as it was in British Columbia.

[29] The Court also stated that the representative proceedings have been limited to a narrow class of cases. One class is distinct from the facts in this case, and that is proceedings alleging common statutory or collective rights, including Aboriginal or language rights.

[30] The second category is those proceedings seeking "a common statutory declaration or remedy such as game show participants, remedies under a collective agreement, owners in a housing development and the like": para. 499. However, I do not read that passage as the Court suggesting that those are the only types of actions that are appropriately brought as a representative proceeding. Rather, the summary was characterized as past representative proceedings.

[31] The Court in *Araya* also stated that while the former common law test for class actions might be of assistance when considering whether a representative proceeding is appropriate, there are significant differences between the former common law class action test and the test for a representative action: para. 511. One is that the phrase "same interest" in Rule 20-3 is not necessarily equivalent to common issues, as that phrase is used in class proceedings. Also, there is no requirement in a representative proceeding to file a litigation plan as required under s. 4(e)(ii) of the *Class Proceedings Act,* R.S.B.C. 1996, c. 50, although the plaintiffs can choose to do so. Lastly, in a representative action, there is no ability for the creation of separate classes with entitlement to potentially different remedies.

[32] The Court of Appeal has also commented that the purpose of the rule is to avoid a multiplicity of actions and allow for the orderly disposition of litigation in a

convenient and inexpensive matter: *Shaw et al. v. Real Estate Board of Greater Vancouver,* 36 D.L.R. (3d) 250 at 260, 1973 CanLII 1061 (B.C.C.A.).

[33] Even where the requirements of Rule 20-3 are met, a court has discretion to refuse to allow a representative proceeding. That discretion was discussed in *McLellan v. Insurance Corporation of British Columbia,* 29 B.C.L.R. 83 at paras. 1, 22–23, 1981 CanLII 757 (S.C.), aff'd 32 B.C.L.R. 154 at para. 9, 1981 CanLII 459 (C.A.), which was relied on by Harwood. That case was decided before class action legislation was passed, so the particular test applied is not directly applicable, but neither party disputed that the decision before me is a discretionary one.

[34] I turn to the three questions in the test for a representative proceeding.

Purported Class Capable of Clear and Definite Definition

[35] The first question is whether the purported class is capable of clear and definite definition. The plaintiffs say it is easy to ascertain anyone who is or was a tenant between May 2017 to the present. Harwood submits that while current tenants are easily identified, there may be difficulties with identifying former tenants.

[36] Denise She, Director of Harwood, deposed that there have been 22 new tenants in the St. Pierre since May 2017 and that five units have changed hands more than once. However, as she confirms, no Lease can be assigned without consent of Harwood, so Harwood would have knowledge of all former tenants who have transferred their interest, making those former tenants easily identifiable, both in number and in names.

[37] The fact that former tenants are easily ascertainable is demonstrated by Ms. She, who was able to calculate precisely how many former tenants there have been. She then refers to the possibility of some units being occupied by sub-tenants, stating she is unaware of how many sub-tenancies there may be. However, she confirms that Harwood has the right to approve of sub-tenancies and that it has not done so. In other words, there are no legal sub-tenancies.

[38] The plaintiffs are not seeking relief on behalf of any sub-tenants, but only tenants or former tenants. Even if “unauthorized sub-tenants” exist, the plaintiffs do not purport to include them in this action, so that cannot be a factor militating against a representative proceeding.

[39] Moreover, there is an inherent contradiction in Harwood's position. Harwood has not approved any sub-tenants. In my view, it cannot maintain that there are a number of people who might have a claim, while at the same time acknowledging that those sub-tenants are unauthorized. I also find that Ms. She's evidence about sub-tenancies was speculative.

[40] However, to be clear, even if it turns out there are sub-tenants, I do not consider that to be a bar to a representative proceeding, as a sub-tenant does not, by definition, fall within the class.

The Same Principal Issues of Fact and Law

[41] I now turn to the second factor, the same principal issues of fact and law.

[42] The plaintiffs submit that because the terms of the Lease are the same for everyone, it is clear that they have the same principal issues of fact and law. They point to the notice of civil claim where they seek primarily declarations regarding what can be included in Operating Expenses.

[43] Harwood disagrees. It contends it has defences that would apply differently to different members of the class.

[44] There were disagreements between the parties as to how this factor is analyzed. While it is clear that the common law class proceeding test no longer applies (sometimes called the *Dutton* test after *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46), both sides refer to cases decided before *Araya* and/or before legislation for class proceedings was passed in British Columbia. I accept, in doing so, they were arguing by analogy and drawing on what they say are commonalities to the test as expressed in those cases and the test that I have to

apply, and that they were not purporting to revive the *Dutton* test. Specifically, to the extent Harwood submits that the plaintiffs' submissions were an attempt to broaden the governing law for what can appropriately be a representative proceeding, I do not find that to be the case.

[45] With those comments in mind, I do find some comments from *G.M. (Canada) v. Naken*, [1983] 1 S.C.R. 72, 1983 CanLII 19 [*Naken*], to be of assistance, recognizing I must be mindful to ensure that none of the concepts applicable only to class proceedings seep into my analysis.

[46] The proposed action in *Naken* was for damages for breach of warranty and breach of representation with respect to the sale of the 1971–1972 Firenza motor vehicles in Ontario. The Supreme Court of Canada held it was not appropriate to proceed under what was then Ontario's rule for a class proceeding or a representative class action. The Court recited the origins of the representative proceeding, which comes from a UK Supreme Court rule and case law commenting on that rule as far back as the early 1900s.

[47] What I take from that discussion is that it is essential to look at the “nature of the claim” and ask whether, in its nature, it is beneficial to proceed as a representative proceeding to all whom the plaintiff wants to represent (*Naken* at 79, paras. (c)–(g)).

[48] In *Naken*, the nature of the claim included breach of warranty and allegations of misrepresentation. The latter would depend upon what was communicated to each car buyer and how, and what each car buyer understood was communicated. That significantly detracted from the commonality of the legal issue. Effectively, each person who bought a car may have relied on a “different” representation, thus making it difficult to see how they could have, in the pleadings, the “same issue”.

[49] The Supreme Court of Canada in *Naken* referred to *Duke of Bedford v. Ellis*, [1901] A.C. 1. The passages the Court chose to comment on from that case are also helpful to my analysis. In *Duke of Bedford*, the United Kingdom Court of

Appeal held that even if it could be said that individual claims may be different in quantum or amount, that does not diminish the concept of there being the same interest at stake. The defendant was the owner of a market regulated by statute. The plaintiffs were farmers that were given certain rights to the market by that same statute.

[50] Lord Macnaghten held that the court has to "consider what is common to the class, not what differentiates the cases of individual members": *Naken* at 80. Lord Shand said that their statutory privilege was the same for each of them, and therefore one cause of action. A subsidiary question as to what amount might be owed to individuals who claimed refunds for excessive charges did not diminish from the commonality of the claim.

[51] I infer that the gravamen of the claim resided in the statutory provisions, and thus the interpretation of the statute was the common issue, making it appropriate to procced as a representative proceeding.

[52] Therefore, the material question before me is: what is the nature of the claim? I agree with the plaintiffs that, at its heart, this is a claim about the interpretation of the Lease, which is clearly common to all tenants.

[53] The plaintiffs allege breaches of the Lease as of 2017 going forward. The alleged breaches are:

a. overcharging by including in the Operating Expenses the full cost of maintenance not completed;

b. not providing a full accounting of the Operating Expenses;

c. not providing an audit of the Operating Expenses; and

d. improperly including legal expenses as Operating Expenses.

[54] In relation to those allegations, the claim seeks declarations, specific performance, and/or a mandatory injunction requiring Harwood to comply with the

terms of the Lease to do the things specifically listed in the future, as well as judgment for damages for breach of the contract, and judgment for any overpayment of the Operating Expenses.

[55] Apart from the defences that I will next address, it is clear from the response to notice of civil claim that Harwood's main defence is that it interpreted and applied the Lease correctly and, at all times, complied with its obligations under the Lease as it relates to the maintenance of the building. In that manner, much of the response to the notice of civil claim also raises common issues.

[56] However, Harwood says it has raised other defences that defeat a representative proceeding. Harwood emphasized a passage in where the Court of Appeal commented that the “defences raised to the claims which have been advanced are defences which apply equally to all of the plaintiffs”: at 16.

[57] If, by emphasizing that sentence, Harwood is suggesting that if a defence could possibly apply differently to different members of a proposed class, that necessarily means it cannot be a representative proceeding, I do not agree. That was made clear by the Supreme Court of Canada in *Naken* in its discussion of *Duke of Bedford*, where the fact that individual claims for refunds amongst the various class of growers (some of whom were denied access to the market) “did not have the effect of destroying the entitlement of the class or group to bring an action”: *Naken* at 80.

[58] However, I agree that one can look at defences pled as being relevant to the issue of deciding whether the nature of the claim is appropriate for a representative action.

[59] Harwood's point is that it raises defences which would require “fairly minute factual … analyses, plus different damages unique to each tenant and dependent on detailed examination of several different kinds of situations”.

[60] I emphasize that at this stage I am not making any determinations about the validity of the claims or the possible defences. My task is to view what has been pled to determine if a representative action is plausible.

[61] I turn then to each of the defences Harwood says would require individualized examinations.

Limitation

[62] Harwood argues that there are *Limitation Act,* S.B.C. 2012, c. 13, issues which create the probability of varying defences to the claim. It claims this shows that there are issues of fact and law that would not be the same. In the response to the notice of civil claim, it pleads that facts relating to when the named plaintiffs "discovered their claims", pleading either that they discovered them no later than 2018 when they filed their claims with the Civil Resolution Tribunal or, alternatively, when they commenced their small claims action (response to notice of civil claim, Part 1, at paras. 47–52). Based on that, Harwood says the plaintiffs cannot claim for anything before March 2018, since that would be statute-barred.

[63] It also pleads and argues that whichever dates work for "discovery" of claims must be imported to the present matter with respect to the present plaintiffs only, meaning other members of the class would have different limitation periods. Harwood also says, in the alternative, that it is unknown when the other plaintiffs discovered their claim. On this basis, they say the limitation defence establishes that the claims are not common and that there are different factual and legal issues.

[64] I do not agree. The focus of the claim is not on each tenant. The focus is on Harwood, and, in relation to that, there are no different time periods. It is alleged that since May 2017, there are specific acts and actions taken under the Lease by Harwood that the plaintiffs say are in contravention of the Lease. Therefore, the claim, in essence, has to do with the interpretation of the Lease and Harwood's performance of its duties.

[65] The question at trial will be whether the legal expenses charged as Operating Expenses appropriately fall within Article 7. There will also be issues about whether other expenses were properly charged as Operating Expenses.

[66] There were submissions about the production of an auditor's report and whether that is mandatory, and in what form and whether supporting documents have to be produced. In my view, those are all subsidiary evidentiary issues that are not determinative. The essence of the claim is whether Harwood's interpretation and application of what can be included in Operating Expenses is contrary to the Lease.

[67] Operating Expenses are assessed against the St. Pierre as a whole and pursuant to a formula applied to each tenant. Thus, whether a specific expense incurred before 2018 is affected by a limitation period is a common issue to all, and is not an issue that I can determine at this stage.

[68] The plaintiffs also allege specific instances relating to maintenance involving elevators, power washing, and painting. They say that amounted to a breach of the Lease or they were improperly included as Operating Expenses. Again, those discrete events and charges do not vary by time or tenant. They are common to Harwood and, therefore, common to the group. The same can be said relating to specific performance and/or the mandatory injunction to ensure future compliance, which would presumably be based on the Court's interpretation of the Lease.

[69] The issue of whether a breach occurred based on the alleged facts is not specific to each tenant, but rather to Harwood's conduct in maintaining and operating the building, and it may be there is a limitation on whether damages for breach of contract apply, but if it is does, it applies to everyone, and in that way, it is a common issue. I am not persuaded that the *Limitation Act* will operate differently on different tenants or that the plaintiffs are seeking individualized claims based on that.

[70] Harwood argues that because the notice of civil claim seeks judgment for damages for breach of contract and/or overcharging of Operating Expenses, that means it is a claim for damages which are personal in nature and inappropriate for a

representative proceeding. With respect, I find Harwood has misconstrued the nature of the claim. The claim for judgment for damages arising from a breach and/or interpretation of Operating Expenses are consequential on the primary issue which is the interpretation of the Lease and whether Harwood's conduct amounts to a breach of the Lease.

[71] The plaintiffs are not suggesting that individual tenants would be entitled to individual, different judgment for damages. The claim is for damages paid by Harwood as a whole for its overall breach for the specific acts alleged.

[72] For all those reasons, I am not convinced that the *Limitation Act* defence diminishes the commonality of the interests assessed.

Res Judicata

[73] Harwood contends that the plaintiffs Mr. Gray and Mr. McTavish brought before the Civil Resolutions Tribunal (“CRT”) the same claim relating to Operating Expenses, but withdrew it in 2019. Harwood pleads that because they withdrew their claims against Harwood and did not, and cannot now, get the CRT to consent to continue those claims, the claims are *res judicata*.

[74] The only basis contained in the response to notice of civil claim that supports the notion that the plaintiffs cannot refile with the CRT is an alleged settlement in 2018.

[75] The plaintiffs say this defence is bound to fail based on Rule 6.1 of the CRT's “Standard Rules”, created under the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25. Rule 6.1(3) specifically allows for the possibility of refiling. It states that when a party withdraws a claim, it can refile but only with the CRT's permission, subject to certain listed factors contained in Rule 6.1(5).

[76] Whether that provision is applicable or not and whether the plaintiffs could, if they chose to, take advantage of it, is up to the CRT.

[77] The more important point is that the plaintiffs do not seek to refile with the CRT, so the *res judicata* issue, with respect, is essentially a straw person argument. Even if I am not right about that, there is another reason why I find the argument cannot succeed as pled.

[78] As noted, Harwood refers to a “settlement offer” in 2018, which I understood from counsel's submissions, was contained in a letter. In my respectful view, Harwood cannot rely on what I say it has mischaracterized as a settlement offer to argue against a representative proceeding based on the doctrine of *res judicata*.

[79] To understand that pleading, one needs to look at the background relating to some of the complicated procedural history between the parties. I will only refer to the necessary details of the progression from the CRT to this action:

a. Each of the plaintiffs (and a number of other tenants) commenced a claim before the CRT against Harwood in the spring of 2018. In part, this was prompted by Harwood not providing, when asked, an account of its 2017 Operating Expenses or an auditor's report.

b. I note in passing that there is no dispute that Harwood has not provided the tenants, as required, the accounting of those expenses or auditor's report for the years 2017, 2018, and 2022. However, the parties disagree whether an “auditor's report” is required under the Lease and what that means and whether it has, in fact, been provided.

c. Nevertheless, the claims before the CRT sought reimbursement for Operating Expenses the tenants claim were for maintenance and/or service that was never completed. In that way, those claims are repeated in the notice of civil claim in this action.

d. However, the tenants were not represented by lawyers when they filed their CRT claims.

e. Harwood was represented by counsel, and counsel sent correspondence dated June 6, 2018, to the plaintiffs, which stated, in part:

> [Harwood] is respondent to a number of proceedings commenced by you (individually, or in one case by four of you together) with the [CRT], namely:
>
> … [eight CRT files are listed]
>
> [Harwood] filed one response (to the claim by Mr. McTavish), but has asked or will ask for additional time to respond to the other claims.
>
> In the meantime, [Hardwood] intends to apply to the Small Claims Court at Vancouver to exempt all of these claims from CRT Jurisdiction.
>
> … [I note in passing the proposed grounds for exemption]
>
> If that order is granted, [Harwood] intends to apply to have the matters tried together and treated as being consolidated (one proceeding) in the Small Claims Court.
>
> …
>
> [Harwood] wants the matters heard together in Small Claims Court because they raise the same issue, they are worth in the aggregate substantially more than each case is worth individually, the resolution of the cases will affect the other tenants who are not parties to the proceedings, and there is a risk (to be avoided) that the CRT will each [sic] different results in different cases.
>
> Also, this consolidation will reduce [Harwood's] costs, an important factor since [Harwood] will bill those costs to the tenants as part of the operation costs of the property …
>
> …
>
> I asked you to consent to the exemption application. What I do now is ask is [sic] that you withdraw the CRT claims altogether (this would make the exemption application moot). This will be without prejudice to your right to an accounting and to the credit (if any) due by application of the process in the lease, once the accounting is done (I'm told soon).
>
> …
>
> I suggest that you get together and discuss this as a group, but I will deal with you individually if you prefer.

f. If this letter is meant to be a "settlement", with respect, it does no such thing. It was a request that the plaintiffs withdraw the claims in the CRT for the convenience of Harwood. It is true that Harwood maintained then, as it does now, that the claims have no merit and that they stated an intention to have the matter heard collectively in the Provincial Court, but in my

respectful view, this does not amount to raising the doctrine of *res judicata* before the CRT.

g. Harwood filed an application to exempt the CRT claims and have them transferred to the Provincial Court. However, in a decision made August 28, 2018, it was unsuccessful in that application.

h. However, by July 2018, the plaintiffs withdrew their CRT claims. They then filed their claims in Small Claims Court. It is my understanding that at least, in part, this involved some discussions between counsel for Harwood and either present or former counsel for the plaintiffs who may have been acting on a limited retainer.

[80] What followed was a great deal of other proceedings and adjudications in Provincial Court, none of which are germane to this particular issue.

[81] By June 2023, the parties apparently came to an agreement about the transfer of the proceedings from Provincial Court to this Court.

[82] I have not been directed to anything in the voluminous record to suggest that, before the parties came to that agreement, Harwood was clear the claims were barred by the doctrine of *res judicata* because the plaintiffs withdrew their claims from the CRT.

[83] Apparently, the parties have a disagreement about whether Harwood understood the plaintiffs intended that the transfer would be from the consolidation of a small claims action to a representative proceeding. In any event, the small claims matters were transferred on June 20, 2023. This notice of civil claim was filed July 24, 2023, and the response, including the argument about *res judicata*, was filed November 23, 2023.

[84] It is difficult to see how the defendant could possibly succeed on its claim of *res judicata* based on the facts as pled. Counsel for Harwood and Ms. She asserts a particular reason the plaintiffs withdrew their CRT claim which may, in fact, rest on

another disputed issue. This dispute centers on what the plaintiffs say was the inadvertent disclosure of minutes from the St. Pierre Leaseholders Association, including information subject to solicitor-client privilege. Justice Gomery upheld the claim for privilege, but Harwood is applying for leave to appeal that ruling. If that ruling is upheld, to the extent that Harwood's factual basis for the plaintiffs' withdrawal of their claims is based on any of that privileged information, then Harwood's claim would not be permitted.

[85] In any event, I am not persuaded that the *res judicata* as pled by the defendant detracts from the common nature of the claim raised from the plaintiffs. Any of my other comments about the success of that defence are obviously not binding.

Other Defences

[86] Harwood argues the alleged existence of sub-tenancies creates different claims. This argument fails for the same reasons that I indicated above, and that is that the sub-tenancies are not included by the plaintiffs in the class and are not part of the proceeding.

[87] Harwood also refers to one former tenant who waived the right to compensation. With respect, I do not see how that affects the commonality of the Lease interpretation issues as pled.

Single Measure of Damages

[88] The last factor is assuming liability, whether there is a single measure of damages applicable to all members.

[89] Harwood claims that those tenants that sold their right to occupy their unit may have different entitlement to compensation than the plaintiffs and other tenants because of the *res judicata* issue. They also say that the amount due to each tenant will vary for other reasons.

[90] I do not agree. The fact that tenants may have different entitlements because they ceased to be a tenant at different times is not a bar. It is true that if the plaintiffs succeed on their interpretation of the Lease, there would have to be different calculations for each tenant to determine whether they were overcharged Operating Expenses in any particular year.

[91] However, there would, in fact, be one measure of damages. The important point is that the measure of damages does not differ because different tenants may have different rights on the primary issue of the interpretation of the Lease. They have the same legal issue. The amounts that the Court might award for the overcharging pursuant to the formula will differ potentially for each tenant because of the varied math, not because of a different “measure” of damages.

[92] The measure of damages, if the plaintiffs are ultimately successful, would be relating to specific findings that particular expenses for particular years were improperly included in Operating Expenses. The Operating Expenses are calculated as against all tenants for the whole building. Therefore, there is a single measure for those damages.

[93] Each tenant's contribution is based on a formula. If the Court were to find that there was overcharging for a particular year for particular expenses, that affects the overall formula for that year, meaning it is a single measure. That different tenants might have different entitlements does not detract from the uniformity of the measure used to calculate the damages.

[94] The parties agree that the portion of Operating Costs that each tenant pays varies depending on the square footage of their unit. Harwood appropriately admits that this is not a factor that differentiates the common issue amongst the tenants. In my view, the timing of when someone became a tenant or ceased to be one is exactly the same type of issue and, therefore, cannot be a bar to it being a representative proceeding.

[95] Thus, the main issue is whether damages claimed creates an issue of law or fact that is different among the members of the class to make a representative action untenable. I do not find that it does for the reasons I have expressed.

[96] All of the other arguments rest on Harwood being correct in its position about the limitation and the *res judicata* issues. As noted, I do not find the defendant's approach to those defences as pleaded detracts from the common interests that are raised by the pleadings or the commonality of the principal issue and, thus, it does not detract from the action being a representative proceeding.

Other Grounds to Dismiss

[97] The defendant seeks a finding that the plaintiffs are not appropriate to be representative plaintiffs. However, as I understood, that was relying on the same basis to support its argument on the limitations period and the *res judicata* arguments, therefore it similarly cannot succeed on this ground.

[98] The defendant raised two other issues: a) abuse of process; and b) whether other tenants want to pursue the claim.

[99] On January 27, 2023, Harwood filed a notice of civil claim against the plaintiffs, the St. Pierre Leaseholders Association, and Mark Hansen for abuse of process. That is a separate claim which the plaintiffs themselves allege is an abuse of process.

[100] It will be up to a future presider to determine if the defendant's notice of civil claim should be heard at the same time as the representative proceeding, but it surely cannot be the case that by filing a notice of civil claim, based on the very litigation history of the representative proceeding, a defendant can succeed in defeating the representative proceeding itself. If that were allowed, every single defendant could attempt that, thus eviscerating the representative procedure itself.

[101] Also, the abuse of process claim appears to be based on an allegation that the plaintiffs pursued this litigation when they knew it could not succeed. Again, to

the extent that argument relies in any part on material over which Justice Gomery has confirmed was covered by solicitor-client privilege, it may not be a position that Hardwood can maintain.

[102] As to the issue about whether other tenants “want to pursue” the claim, I was presented with no authority to suggest that is a bar to the matter proceeding as a representative action. The cause of action at its heart is the interpretation of the Lease and what consequences might flow from that, which is clearly a common issue to all members of the class.

[103] For all of those reasons, Harwood's application is dismissed.

[SUBMISSIONS BY COUNSEL ON COSTS]

[104] **THE COURT:** The parties addressed the issue of costs.

[105] As noted earlier, there was previously a hearing before Justice Gomery, but that was limited to only an evidentiary ruling about the disclosure of certain documents over which the plaintiffs claimed litigation privilege and solicitor-client privilege. Justice Gomery held that those documents were, in fact, covered by privilege and ordered that the impugned information be redacted.

[106] However, Justice Gomery left the issue of costs of the hearing in front of him to be decided along with this application, which is appropriate because what was argued in front of him was simply an evidentiary dispute underlying this application, and was not a separate application.

[107] The plaintiffs submit that the attachment of a document containing privileged information should not have been done, and that forms a basis to say that costs should be awarded in any event of the cause.

[108] Even if that view had favour, I find it would be inappropriate to order costs in any event of the cause for the entire application. The application in front of me, which took a whole day, was primarily the pleadings application, and there is no basis to award anything other than the standard costs. I cannot see how I dissect out

of that, or somehow have a potential ruling on what was done in front of Justice Gomery, in a manner that overtakes the characterization of the application in front of me.

[109] For all those reasons, the plaintiffs are entitled to costs in the ordinary course.

"Sharma J."