CITATION: Chu v. Parwell Investments Inc., 2024 ONSC 5903
COURT FILE NO.: CV-18-00604410-00CP
DATE: 20241025

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: CLEMENT CHU, NAHOM ABADI, and IDA FABRIGA-CHU, Plaintiffs

AND:

PARWELL INVESTMENTS INC., 650 PARLIAMENT RESIDENCES LIMITED, 650 PARLIAMENT (LHB) INVESTMENTS LIMITED, and the ELECTRICAL SAFETY AUTHORITY, Defendants

BEFORE: Glustein J.

COUNSEL: *Theodore P. Charney and Caleb Edwards*, for the plaintiffs

Ted Frankel and Jeremy Martin, for the defendants Parwell Investments Inc., 650 Parliament Residences Limited, and 650 Parliament (LHB) Investments Limited

David Elman, for the defendant Electrical Safety Authority

HEARD: October 10, 2024

REASONS FOR DECISION

NATURE OF MOTION AND OVERVIEW

[1] The plaintiffs seek to bring a motion to certify additional proposed common issues ("PCIs") in the present class action (the "proposed certification motion"). The class action was initially case managed by Justice Belobaba and is now case managed by me.

[2] The defendants Parwell Investments Inc., 650 Parliament Residences Limited, and 650 Parliament (LHB) Investments Limited (collectively, the "Landlord Defendants") bring this preliminary motion to prevent the hearing of the proposed certification motion. The Landlord Defendants submit that:

(i) There is an agreement between the parties that the "Further Certification Order" of Justice Belobaba dated August 27, 2020 (the "FCO") was a final certification order. Consequently, the Landlord Defendants submit that the plaintiffs cannot seek certification of additional PCIs.

(ii) In the alternative, if the court does not find an agreement that the FCO was a final certification order, the plaintiffs (a) require leave under s. 8(3) of the *Class*

Proceedings Act, 1992, S.O. 1992, c. 6 (the "*CPA*") to bring the proposed certification motion and (b) leave should not be granted.

[3] The defendant, Electrical Safety Authority ("ESA") takes no position on the motion.

[4] For the reasons that follow, I dismiss this preliminary motion brought by the Landlord Defendants. I find that (i) there is no objective basis to find that the parties agreed that the FCO was a final certification order and (ii) no leave is required because there was no final certification order.

FACTS

Background to the action

[5] The class action arises from a major fire that took place on August 21, 2018 at two residential towers located at 650 Parliament Street in Toronto. Over 1,500 individuals from 570 living units were required to leave the property.

[6] The Landlord Defendants worked with the Office of the Mayor and the Canadian Red Cross to find emergency housing.

[7] Tenants and family members remained out of the building for at least 18 months and then started to return in phases once repairs were completed in their units.

The class action and PCIs

[8] The class action was commenced by Notice of Action, filed on August 31, 2018. On October 18, 2018, the plaintiffs filed a Fresh as Amended Statement of Claim (the "Claim"). The plaintiffs pleaded claims in: (i) negligence, (ii) breach of contract, (iii) nuisance and (iv) liability under both the *Residential Tenancies Act 2006*, S.O. 2006, c. 17 ("*RTA*") and the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2 ("*OLA*").

[9] In May 2019, the plaintiffs filed a certification record. In the notice of motion, the plaintiffs sought to certify 16 PCIs, which included all of the above causes of action, as well as claims for aggregate damages, punitive damages, and ancillary relief. I set out the PCIs below:

(i) **Negligence:** The plaintiffs alleged in the Claim that the Landlord Defendants "knew the electrical equipment should have been replaced long before the fire and knew it was dangerous to continue with an old, outdated set of transformers. It was therefore reasonably foreseeable to the Owners and the Landlord that there was a risk of an electrical fire causing catastrophic harm to the Class Members and the Family Class Members."

Consequently, the plaintiffs proposed five PCIs related to negligence issues concerning the "design, construction, operation, maintenance and monitoring of

the Buildings" and "the regulation, oversight, maintenance and monitoring of the electrical systems at the Buildings." (PCIs 1 to 5)

(ii) ***OLA***: The plaintiffs relied on the *OLA* in the Claim. They proposed two common issues based on (a) whether the Landlord Defendants were an occupier of the buildings and (b) if so, whether "one or more of those defendants breach[ed] the duty, pursuant to s. 3 of the *OLA*, to take such care as in all the circumstances of the case is reasonable to see that persons entering on the Buildings, and the property brought on the Buildings by those persons, are reasonably safe while on the Buildings." (PCIs 6 and 7)

(iii) ***RTA***: The plaintiffs relied on the *RTA* in the Claim. They proposed a common issue based on (a) s. 20(1) of the *RTA*, "to maintain the Buildings, including the rental units in it, in a good state of repair and fit for habitation and in compliance with health, safety, housing and maintenance standards" and (b) s. 22 of the *RTA*, "not to substantially interfere at any time with the Class Members' reasonable enjoyment of the Buildings, including their rental units in it, for all usual purposes." (PCI 8)

(iv) **Breach of contract:** The plaintiffs alleged in the Claim that "[i]t was an express term of the rental contract that the Landlord was responsible for maintaining 650 Parliament in a state of good repair and in a manner that was fit for habitation and for complying with health, safety and maintenance standards" and "[t]he Landlord failed to maintain 650 Parliament, including its electrical systems. The Landlord failed to maintain 650 Parliament in a good state of repair and in a state that is fit for habitation."

Consequently, the plaintiffs proposed two PCIs related to breach of contract issues concerning (a) "[w]as it an express or implied term of the rental contracts/tenancy agreements (the "Contracts") that the Landlord had with Class Members that the Landlord would maintain the Buildings in a good state of repair and fit for habitation and in compliance with health, safety, housing and maintenance standards" and (b) whether there was a breach of contract. (PCIs 9 and 10)

(v) **Nuisance**: The plaintiffs alleged in the Claim that "[t]he release of smoke, vapours and toxins during the Fire substantially and unreasonably interfered with the Class Members' use and enjoyment of 650 Parliament and their Units." Consequently, the plaintiffs proposed a PCI related to nuisance. (PCI 11)

(vi) **Strict liability**: The plaintiffs proposed a common issue of "Did the fire at the Buildings on August 21, 2018, fall within *Rylands v. Fletcher*, entailing strict liability for the damages suffered by the Class?" (PCI 12)

(vii) **Aggregate damages**: The plaintiffs proposed a common issue of "Can the damages of the Class and/or Family Class be determined, in part, on an aggregate

basis? If yes, what amount should the defendants pay, to whom and why?" (PCI 13)

(viii) **Punitive damages**: The plaintiffs proposed a common issue of "Should the defendants pay punitive damages to the Class and/or Family Class? If yes, in what amount?" (PCI 14)

[10] The plaintiffs also proposed common issues on (i) the availability and rate of prejudgment and postjudgment interest (PCI 15) and (ii) whether "the defendants pay the costs of administering and distributing any monetary judgment and/or the costs of determining eligibility and/or the individual issues" and if so, in what amount (PCI 16).

The Partial Certification Order

[11] As a result of the fire and the departure of the residents from the buildings, all of the tenants' possessions remained behind. In January 2019, without providing notice to the class, the defendants sent a private company to pack up the contents of the units so that they could start repairs. Following this work, the defendants filed an urgent motion in May 2019 for authorization to move and store class members' belongings. Counsel for the Landlord Defendants referred to the situation confronting the parties at that time as a "crisis".

[12] However, until the matter was certified, there was no class counsel and therefore no one who could negotiate on behalf of the class to preserve their rights while allowing the repairs to the buildings to go forward.

[13] In this context it was necessary for plaintiffs' counsel to have authority to negotiate on behalf of the then putative class.

[14] The solution was to enter a partial certification order on an urgent basis, so plaintiffs' counsel could be appointed as class counsel. On consent, an order entitled "Partial Certification", dated June 13, 2019, was signed by Justice Belobaba (the "PCO"). It was a bare-bones order explicitly intended to postpone substantive disputes over PCIs, class definition, and additional defendants to a later date. Pursuant to the PCO:

(i) Strossberg Sasso Sutts LLP and Charney Lawyers PC were appointed as class counsel.

(ii) Only the cause of action in negligence was certified.

(iii) Only two of the PCIs on negligence were certified.

(iv) The class was defined as "all persons, excluding the defendants, their senior employees, officers or directors, who on August 21, 2018, rented a Unit or was ordinarily resident in a Unit".

(v) The action was only certified against two of the defendants (Parwell Investments Inc. and 650 Parliament (LHB) Investments Limited).

[15] As indicated by the limited scope of the consent PCO set out above, there remained numerous issues to be determined on certification, including the many outstanding PCIs, the identities of additional defendants, and the certification of additional classes. Consequently, the PCO was made on a without prejudice basis to the plaintiffs' right to return to court for a certification motion to address such issues. The PCO provided, at para. 9:

> THIS COURT ORDERS that this order is made without prejudice to the plaintiffs' right to move for certification as against additional defendants and/or to move for certification of additional classes and/or common issues.

[16] Once there was a certified class, class counsel were able to negotiate with the Landlord Defendants regarding the process for removal of items. Counsel for the parties swiftly arrived at a solution so the contents could be safely and securely removed to a location where tenants could access them and would reduce the risk of property damage during the moving and storage stage.

Events leading to the FCO

The September 10, 2019 Case Management Conference before Justice Belobaba and the CMC Minutes

[17] On September 10, 2019, shortly after the PCO, the parties appeared at a case management conference ("CMC") before Justice Belobaba. Minutes of the September 10, 2019 CMC were taken (the "CMC Minutes") and circulated to counsel.[1]

[18] The CMC Minutes provide, at paras. 6 and 7 (quoted *verbatim*):

(i) Class counsel will prepare and circulate a draft amended certification order with a notice program, the draft notice of certification and the opt out date. The landlord defendants will pay for the cost of advertising the notice in the Toronto Star.

(ii) A motion to deal with certification against the additional defendants or any third parties, if necessary, and/or to move for certification of additional classes and/or common issues will be scheduled in due course. The parties will endeavor to resolve and/or narrow the issues prior to any such motion.

[1] It is not clear who drafted the CMC Minutes although counsel for the Landlord Defendants advised the court that he believed that it was Mr. Elman who attended on behalf of ESA. Mr. Elman advised the court that he had no direct recollection of drafting the CMC Minutes but (i) did not dispute the recollection of counsel for the Landlord Defendants and (ii) recalled that his office took notes during the September 10, 2019 CMC. The authorship of the CMC Minutes is not relevant as there is no dispute as to their accuracy.

(iii) Counsel for the landlord defendants will provide class counsel with an affidavit pertaining to the ownership of the property. The parties will seek to resolve issues concerning the addition and/or deletion of defendants and third parties before the motion dealing with the balance of certification.

Communications leading to the July 31, 2020 CMC

[19] With the onset of COVID, the parties did not begin discussions on the terms of an order until June 2020.

[20] The parties then began an exchange of emails, including draft orders and positions expressed by counsel. I review the key correspondence below.

[21] On June 9, 2020, Ms. Sharon Strosberg, class counsel, sent an email with a draft order to counsel for the Landlord Defendants (Messrs. Martin and Frankel). The order was entitled "Further Certification Order". In that order, Ms. Strosberg proposed:

(i) a broader class definition, which would extend beyond tenants and residents to those who, on the date of the fire, were "present in a Unit or owned property in a Unit or had an interest in property located in a Unit",

(ii) a new Family Class and representative plaintiff, and

(iii) an immediate opt-out process conducted by class counsel's choice of administrator, fully funded and largely operationalized by the Landlord Defendants.

[22] The proposed draft order sought no modification to the common issues.

[23] In her email, Ms. Strosberg stated her view that the purpose of the "Further Certification Order" was "so [class counsel] can get the opt out period going."

[24] On July 24, 2020, Mr. Frankel responded by email to counsel that "We are continuing to work through your draft certification order and have concerns about the viability of proceeding under the order as drafted, but look forward to discussing with a view to resolving those concerns collaboratively. As such, we are not in a position to settle the draft order next week."

[25] In his email, Mr. Frankel advised that he was willing to attend at a CMC before Justice Belobaba to "[o]btain a schedule for amending the partial certification order."

[26] On or about July 24, 2020, a further CMC was scheduled before Justice Belobaba to be conducted by telephone on July 31, 2020 to, *inter alia*, settle the draft order.

[27] On July 29, 2020, class counsel Mr. Harvey Strosberg sent an email to defendants' counsel enclosing a draft agenda for the upcoming July 31, 2020 CMC, in which he set out the item of "[s]ettle the form of the opt out order."

[28] On July 29, 2020, Mr. Martin responded to Mr. Strosberg's email stating that he took issue with Mr. Strosberg's characterization of the upcoming CMC as "settling the opt-out order". Mr. Martin stated his position that the CMC should address the terms of a "complete certification order" so that "class members can meaningfully choose to opt out." Mr. Martin set out his position as follows:

> We disagree that the agenda item [at the case conference] can be properly characterized as "settling the opt-out order". We must have a complete certification order settled before class members can meaningfully choose to opt out. The partial certification order was agreed to as an expedient in a crisis and was never intended to be the final version of the Order that will be certified and relied on at the common issues trial. The existing partial certification order is not adequate for that purpose, as I think you would have to agree given your certification materials.

[29] With his email, Mr. Martin delivered a draft order entitled "Complete Certification", which set out numerous PCIs, many based on the PCIs proposed by the plaintiffs in their notice of motion, including (i) negligence (PCIs 1 to 5)[2], (ii) liability under the *OLA* (PCIs 6 and 7, (iii) liability under the *RTA* (PCI 8), and (iv) breach of contract (PCIs 9-10).

[30] Notably, the Landlord Defendants' draft order attached to Mr. Martin's email:

(i) removed the PCI for aggregate damages,

(ii) did not accept the PCI for punitive damages, and insisted on wording in the PCI for punitive damages that would "specify the conduct that you intend to [sic] upon to establish some basis in fact for this form of relief being available to the class," and

(iii) removed the PCIs for the claims for nuisance and strict liability.

[31] In his email, Mr. Martin requested that class counsel immediately advise if they "intended to restrict yourself to the common issues and causes of action certified in the partial certification order." He stated:

> That said, if it is your intention to restrict yourself to the common issues and causes of action certified in the partial certification order, please advise and we will seek further instructions in advance of our case conference.

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[2] The PCI references are to the Landlord Defendants' draft "Complete Certification" order.

[32] In his email, Mr. Martin also proposed that the agenda for the July 31, 2020 CMC include an item to "[s]et a timetable for a motion to amend the partial certification order."

[33] Ms. Strosberg responded to Mr. Martin's email a few hours later that day. Ms. Strosberg advised defendants' counsel that she would forward an agenda and the plaintiffs' draft order to Justice Belobaba. Ms. Strosberg advised defendants' counsel to "[k]indly send your draft order black lined (without the comments) as well to the judge."

[34] Shortly thereafter on July 29, 2020, class counsel's office sent an email to Justice Belobaba, copied to all counsel, providing (i) an agenda for the July 31, 2020 CMC and (ii) the plaintiffs' proposed draft certification order. Class counsel advised Justice Belobaba that "[t]he defendants will send a copy of their draft order to you as well."

[35] The plaintiffs' proposed agenda contained three items. Notably, class counsel proposed both item 2, to "[s]et a timetable for a motion to amend the partial certification order", and item 3, to "[d]iscuss proposed draft certification orders."

[36] By email to counsel dated July 30, 2020, Mr. Martin advised that (i) the defendants would not be submitting their version of a draft order and (ii) except for the proposed "expansion of the general class definition in the new order" to "those who owned property in a Unit or had an interest in property located in a Unit", the defendants were "content to proceed with your draft order exclusively as the basis for our discussion tomorrow."

The July 31, 2020 CMC

[37] Ms. Strosberg's uncontested evidence is that the question of whether the plaintiffs' proposed order was a 'complete' certification order barring additional common issues was never raised before Justice Belobaba at the July 31, 2020 CMC.

The FCO

[38] After the July 31, 2020 CMC, defendants' counsel circulated a marked-up version of class counsel's draft and the parties worked through minor revisions.[3] A final version was sent to Justice Belobaba on August 27, 2020, and the FCO was issued an hour later.

[39] As noted above, the FCO was entitled "Further Certification Order" and was issued on consent. Subject to various minor revisions, the FCO largely tracked the draft order sent by plaintiffs' counsel on July 9, 2020.

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[3] One change accepted by the plaintiffs was to remove, from the class definition, the proposed addition of any person who "was present in a Unit; or owned property or had in interest in property located in a Unit".

Conduct after the FCO

[40] Following the FCO, there were numerous third party and fourth party pleadings as parties were added to the complex litigation. That process was completed in 2024.

[41] On December 8, 2022, the plaintiffs served a notice of motion to bring the proposed certification motion, in which the plaintiffs sought to add the further PCIs raised in their initial notice of motion.

Evidence of Ms. Strosberg as to her understanding that there was no agreement that the FCO was a final certification order

[42] While the issue of whether an agreement is reached between parties requires the court to conduct an objective assessment (as I discuss below), I nevertheless briefly review the evidence of Ms. Strosberg as to her understanding that there was no agreement that the FCO was a final certification order.

[43] Based on the evidence set out above, Ms. Strosberg states in her affidavit (quoted *verbatim*):

> (i) The document is subtitled "Further Certification Order" and adds the Family Class (and a proposed representative plaintiff for the Family Class). There was no reference in my draft order to further common issues as I felt this could wait until notice of certification had gone out to the Class and would likely require a motion. As noted above, the goal was not to have a final certification order, but an order to which the Class Members and Family Class Members could receive notice and have the opportunity to opt out of the class action.
>
> (ii) I did not respond to Mr. Martin's comments that the Landlords required a 'complete' certification order. I was of the view that it was not useful to further delay the commencement of the opt-out period while we negotiated about additional common issues. Our focus was on getting notice to the entire class, including the Family Class members, however, we were content to bring the question to the attention of Justice Belobaba.
>
> (iii) From my perspective the question of additional common issues remained to be determined at a contested certification hearing.
>
> (iv) In none of the correspondence is there mention of the alleged agreement or some sort of an agreement that the plaintiffs would not raise additional common issues in the future. I am certain that no such agreement was reached. I verily believe that had an agreement been reached to limit the common issues it would have been clearly set out in writing, signed by counsel and must be in an order by Justice Belobaba approving the agreement.

ANALYSIS

[44] There are two issues before the court on this preliminary motion:

(i) Was there an agreement between the parties that the FCO was a final certification order that precluded the plaintiffs from seeking further certification relief?

(ii) If there was no such agreement, (a) do the plaintiffs require leave under s. 8(3) of the *CPA* to bring the proposed certification motion and (b) if so, should leave be granted?

[45] I address each of these issues below.

Issue 1: *Was there an agreement between the parties that the FCO was a final certification order that precluded the plaintiffs from seeking further certification relief?*

The applicable law

[46] It is settled law that for there to be a contract, "there must be a meeting of minds, commonly referred to as *consensus ad idem*. The test as to whether there has been a meeting of the minds is an objective one -- would an objective, reasonable bystander conclude that, in all the circumstances, the parties intended to contract?": *UBS Securities Canada, Inc. v. Sands Brothers Canada, Ltd.*, 2009 ONCA 328, 95 O.R. (3d) 93, at para 47.

A note on the subjective beliefs of the parties

[47] I accept both parties' positions that they had their respective subjective beliefs based on the same series of events and correspondence.

[48] Ms. Strosberg believes that "the question of additional common issues remained to be determined at a contested certification hearing" and "I am certain that no such agreement ['that the plaintiffs would not raise additional common issues in the future'] was reached. I verily believe that had an agreement been reached to limit the common issues it would have been clearly set out in writing, signed by counsel and must be in an order by Justice Belobaba approving the agreement."

[49] The Landlord Defendants believe that based on Mr. Martin's email of July 29, 2024 and the plaintiffs forwarding their draft order (which maintained the negligence cause of action), an agreement was reached that the FCO was a final certification order.

[50] In effect, the parties, represented by counsel with significant class action experience, did not have the same views as to the purpose and effect of the FCO.

Review of the evidence on an objective standard

[51] The subjective beliefs of the parties do not assist the court. It is settled law that if an objective agreement is demonstrated on the evidence, it is not relevant whether a party has a different subjective understanding. The court must review the evidence on an objective basis, and ask "would an objective, reasonable bystander conclude that, in all the circumstances, the parties intended to contract?"

[52] For the reasons that follow, I do not find that based on the evidence, an objective, reasonable bystander would conclude that the parties intended that the FCO was a final certification order.

(i) The PCO and September 10, 2019 CMC

[53] The starting point of an objective review is the PCO, which was clear that it was not a final certification order. It was a term of the PCO that the order was made without prejudice to the plaintiffs' right to seek a full certification motion on the many other proposed causes of actions and PCIs, as well as any other issues related to additional defendants or additional classes.

[54] The next step was the September 10, 2019 CMC, which took place only a few months after the PCO was signed. As set out at para. 18 above, the CMC Minutes show that the parties were directed to a two-stage process.

[55] In the first stage, the parties were to "prepare and circulate a draft amended certification order with a notice program, the draft notice of certification and the opt out date."

[56] The "notice and opt out" order contemplated in the CMC Minutes was independent of the second stage, *i.e.* "[a] motion to deal with certification against the additional defendants or any third parties, if necessary, and/or to move for certification of additional classes and/or common issues." The latter motion, which would have involved a lengthy hearing on additional PCIs, class definition, and additional defendants, was to "be scheduled in due course", with the parties attempting to "resolve and/or narrow the issues prior to such motion."

[57] Consequently, there is no objective evidence from either the PCO or the CMC Minutes that the parties were directed to reach a final certification order as a pre-condition to the notice and opt out issues being resolved.

(ii) Events from June 9 to Mr. Martin's July 29 Email

[58] Similarly, the fact that Ms. Strosberg sent a draft order on June 9, 2020 entitled "Further Certification Order" does not objectively suggest that an agreement was reached that it was a final certification order. To the contrary, Ms. Strosberg referred to the draft order as being required "to get the opt out process going." These changes are consistent with class counsel attempting to put an effective notice program in place and clarifying the scope of parties to be affected by the notice. The addition of a new Family Class and class definition can objectively be

viewed as terms to facilitate completion of the first stage rather than determine the second stage issues with finality.

[59] Similarly, the proposed agenda Mr. Strosberg sent on July 29, 2020 suggests that the July 31, 2020 CMC was intended to "[s]ettle the form of the opt out order," and makes no reference to a schedule for a motion to amend the PCO.

[60] On an objective review of the evidence, I find that following receipt of the June 9 and July 29 emails, proposed draft order, and the agenda, Mr. Martin understood that the plaintiffs were not proposing a final certification order that would prohibit determination of any further issues, including certification of additional PCIs.

[61] Mr. Martin's understanding is illustrated by his email of July 29, 2020. Mr. Martin insisted on a "complete certification order". He included many, but not all, of the PCIs the plaintiffs sought to certify in their notice of motion.

[62] Mr. Martin's email demonstrates that the parties were still in the process of discussing the issues and had not settled the matter. Consequently, at that point, the objective evidence demonstrates that the parties had not reached an agreement regarding a final certification order.

(iii) Events following Mr. Martin's July 29 Email

[63] Despite the ongoing discussions evidenced by Mr. Martin's July 29, 2020 email, the Landlord Defendants submit that the evidence after this email demonstrates that the plaintiffs subsequently agreed to abandon all other PCIs and accept a final certification order limited only to the negligence claim in the PCO. I do not find that an objective review of the evidence supports such a conclusion.

[64] In the draft agenda that class counsel sent to the court after receiving Mr. Martin's email, class counsel maintained its position regarding the distinct phases of the two-stage process. As noted above, class counsel proposed: item 2, to "[s]et a timetable for a motion to amend the partial certification order", and item 3, to "[d]iscuss proposed draft certification orders."

[65] The plaintiffs did not accept Mr. Martin's request to address a "complete certification order". Class counsel did not engage and instead advised Mr. Martin by email that the plaintiffs would provide the court with their draft order and agenda, and that the defendants could do the same. This position was consistent with the CMC Minutes; notice issues were to be addressed by an order, before the remaining certification issues were addressed by another motion scheduled "in due course."

[66] At no point did class counsel agree that the draft order class counsel proposed was intended to be a final order. It cannot be said that class counsel agreed to abandon all of their

other causes of action and PCIs (including breach of contract, the claims under the *RTA* and *OLA*,[4] and the claim for aggregate damages[5]), and instead (as the Landlord Defendants submit) agree to rely only on the single negligence issue certified on consent in the PCO in an urgent situation.

[67] This conclusion is further supported by the FCO that was eventually negotiated between the parties. In his email, Mr. Martin insisted on a "Complete Certification Order" and provided one in draft form. The evidence demonstrates that despite his initial insistence, Mr. Martin decided not to submit his draft order and agreed to use the plaintiffs' proposed "further" certification order. The consent order also made no reference to a "Complete Certification Order" and instead bore the same title as the plaintiffs' initial draft: "Further Certification Order."

[68] The Landlord Defendants submit that the fact the plaintiffs forwarded the "Further Certification Order" without an express rejection of Mr. Martin's position objectively demonstrates that the plaintiffs accepted that the FCO was a final certification order. I do not agree.

[69] The position of the Landlord Defendants is not supported by an objective review of the evidence. Given the importance of the restriction the Landlord Defendants seek, the plaintiffs' lack of any acknowledgement of Mr. Martin's position does not demonstrate agreement. It was clear from the outset of the discussions that the plaintiffs' position was that there first needed to be a draft order related to the notice and opt out issues. The separate and outstanding nature of the issues was acknowledged throughout the proceedings; for example, the PCO contained "without prejudice" language and the CMC Minutes from the September 10, 2019 CMC adopted similar treatment. Further, the issue of whether or not the order was final was not raised at the July 31, 2020 CMC.

[70] Finally, there is no post-FCO conduct that supports an objective finding of an agreement. While the plaintiffs did not pursue the litigation for slightly more than two years after the FCO, the uncontested evidence is that COVID intervened, Ms. Strosberg changed law firms, and time was required to complete complex pleadings. There were no steps taken by the plaintiffs during that time that would support the conclusion that they had abandoned all causes of actions and PCIs, except for the single claim of negligence.

[71] For the above reasons, I find no objective basis to conclude that an agreement was reached between the parties that the FCO was a final certification order and precludes the plaintiffs from seeking further certification relief.

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[4] All of these claims would be critical if the claim in negligence did not succeed.

[5] The claim for aggregate damages would be critical to the relief available to the class at a common issues trial.

Issue 2: *Leave under s. 8(3) of the CPA*

[72] In the alternative, the Landlord Defendants submit that if there was no agreement that the FCO was a final certification order, (i) the plaintiffs require leave under s. 8(3) of the *CPA* to bring the proposed certification motion and (b) leave should not be granted.

[73] In previous CMC endorsements, (i) I used the term "continued certification motion" from the plaintiff's submissions to refer to the plaintiffs' proposed certification motion and (ii) I referred to the preliminary motion as a "s. 8(3) motion" based on the Landlord Defendants submissions at the CMCs.

[74] The question of leave was not argued before me at the CMCs because a CMC is not the appropriate forum. A hearing with proper submissions was necessary to decide the issue of whether leave under s. 8(3) of the *CPA* was required for the proposed certification motion.

[75] I have considered the parties' submissions on this issue and for the reasons that follow, find that leave is not required.

The applicable law

[76] The Landlord Defendants rely on numerous cases that have held that a "change in circumstances" is required in order to obtain leave under s. 8(3) to amend a certification order: *Fanshawe v. LG Phillips LCD Co., Ltd.,* 2016 ONSC 3958 at para. 53, leave to appeal ref'd 2017 ONSC 2763 (Div. Ct.); *Nova Scotia (Attorney General) v. Murray,* 2017 NSCA 29 at para. 25; *Ducharme v. Solarium de Paris Inc.,* 2013 ONSC 2540, at para. 19.

[77] The Landlord Defendants further submit that even if a plaintiff can establish a change in circumstances, leave can still be refused by the court if:

(i) "it would be a fundamental change in the proceeding as certified,"[6] or

(ii) "it would be contrary to the *Dutton* factors of access to justice, judicial economy and behaviour modification to do so."[7]

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[6] For this proposition, the Landlord Defendants rely on *Douez v. Facebook*, 2019 BCSC 715, at para. 70, citing *Maxwell v. MLG Ventures Ltd.*, [1995] O.J. No. 2698 (Ont. Gen. Div.); *Andersen v. St. Jude Medical, Inc.*, 2010 ONSC 77 at paras. 10-12 and *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City),* 2017 ONCA 555 at para. 28.

[7] For this proposition, the Landlord Defendants rely on *Fanshawe* (Div. Ct.), at para. 19; citing *Dutton v. Western Canadian Shopping Centres*, 2001 SCC 46; *Levac v. James*, 2019 ONSC 5092 at para. 19; and *Ducharme*, at para. 19.

[78] The plaintiffs rely on *Fanshawe* (Div. Ct.), at para. 19, to submit that a change in circumstances may not be required to obtain leave under s. 8(3), if a party can establish that the *Dutton* factors are otherwise met by granting leave.

[79] However, for the purposes of the present motion, it is not necessary to determine the applicable test. As explained above, I have found that there was no agreement between the parties that the FCO was a final certification order. Consequently, even if I apply the test proposed by the Landlord Defendants, there is no "change in circumstances" that arises in this case.

Analysis

[80] Without an agreement that the FCO is a final certification order, there is no change in circumstances. There has been no court determination of the issues regarding certification, either on consent or by opposed motion. Under both the PCO and FCO, issues regarding additional PCIs, additional defendants, or additional classes were contemplated and deferred for determination at a later date, to be scheduled between the parties.

[81] In *Fanshawe* (SCJ), at para. 59, the court required proof of a change of circumstances. The court cited *Risorto v. State Farm Mutual Automobile Insurance Co.*, (2009), 70 C.PC. (6th) 390 (Ont. Div. Ct.), at para. 41, where the court explained that finality was particularly important for certification motions since "[b]oth parties will usually devote substantial amounts of time and resources on the motion."

[82] In the present case there was not an objective agreement that the FCO is a final certification order. Consequently, the basis for the change in circumstances test set out in *Fanshawe* does not apply.

[83] For the above reasons, I find that s. 8(3) of the *CPA* does not apply. I accept the plaintiffs' submission that the proposed certification motion is a "continued certification motion". Therefore, the certification requirements have not been determined (on consent or by a contested motion), aside from the limited issues certified in the PCO: the negligence cause of action and two of the negligence PCIs. As mentioned, the urgent PCO was made without prejudice to the plaintiffs' right to return to court to address additional PCIs, additional defendants, and the certification of additional classes.

[84] Similarly, the FCO was not the result of a court determination or consent order addressing the finality of certification requirements.

A note on the merits of the proposed certification motion

[85] The Landlord Defendants made a brief submission in their factum (which they did not strongly pursue at the hearing) that the proposed amendments to the PCIs should not be permitted because they "are doomed to fail."

[86] While the motion records for this preliminary motion are the same as those on the proposed certification motion, it is not appropriate for the court to assess the merits of the proposed certification motion at this stage. The issue of whether there is some basis in fact for the additional PCIs must be considered upon a full review of the law and evidence before the court.

ORDER AND COSTS

[87] At the hearing I advised counsel that I would dismiss this preliminary motion with reasons to follow. I scheduled a hearing of the proposed certification motion for April 1 and 2, 2025. Parties agreed upon the following timetable:

(i) Plaintiffs deliver their factum by December 13, 2024.

(ii) The Landlord Defendants deliver their responding factum by February 13, 2025.

(iii) Plaintiffs deliver their reply factum by March 13, 2025.

[88] The parties also agreed that costs would be reserved to the partial certification motion, which I so order.

GLUSTEIN J.

Date: 20241025

CITATION: Chu v. Parwell Investments Inc., 2024 ONSC 5903
COURT FILE NO.: CV-18-00604410-00CP
DATE: 20241025

ONTARIO

SUPERIOR COURT OF JUSTICE

CLEMENT CHU, NAHOM ABADI, and IDA FABRIGA-CHU

Plaintiffs

AND:

PARWELL INVESTMENTS INC., 650 PARLIAMENT RESIDENCES LIMITED, 650 PARLIAMENT (LHB) INVESTMENTS LIMITED, and the ELECTRICAL SAFETY AUTHORITY

Defendants

REASONS FOR DECISION

Glustein J.

Released: October 25, 2024