

CANADA / JUDGMENT

Abboud v. Jung

2020 BCSC 736

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 736 Abboud v. Jung

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Abboud v. Jung,

2020 BCSC 736

Date: 20200513

Docket: S183635

Registry: Vancouver

Between:

George Abboud and Fady Abboud

Petitioners

And

Wan Hung Jung

Respondent

Before: The Honourable Madam Justice Forth

Reasons for Judgment

In Chambers

Plaintiff appearing in person:

G. Abboud

Counsel for the Respondent:

A. Choi

Place and Date of Hearing:

Vancouver, B.C.

December 12 and 13, 2019

Place and Date of Judgment:

Vancouver, B.C.

May 13, 2020

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Introduction

- [1] The petitioner, George Abboud, seeks damages for breach of a residential tenancy agreement with the respondent landlord, Wan Hung Jung, respecting a property located at 4179 Salish Drive, Vancouver (the "Property" or "Premises").
- [2] The petition includes the name of Fady Abboud as a petitioner, but I was informed at the hearing that this individual never moved into the Property. I will refer to George Abboud as Mr. Abboud throughout these reasons and also as the "tenant".
- [3] The respondent, Wan Hung Jung, passed away on February 26, 2019.
- [4] This petition was initially set for hearing on May 27, 2019 but was adjourned to allow for service on the Residential Tenancy Branch and to permit the parties to file further affidavit evidence.

Background Facts

- [5] During the material times, the landlord was represented by Anna Gamova, a licensed property manager with Century 21 In Town Realty.
- [6] On or about April 28, 2016, Mr. Abboud attended at the Property and conducted an inspection with Ms. Gamova. The Condition Inspection Report is signed by Mr. Abboud.
- [7] A Residential Tenancy Agreement was signed by the tenants on April 27, 2016 and by the landlord on April 28, 2016 (the "2016 Agreement"). The length of the tenancy was from May 1, 2016 for one year at a rent of \$7,800 monthly. A security deposit of \$3,900 was required with no pet damage deposit. The 2016 Agreement did not permit the assignment or subletting of the Property.
- [8] Mr. Abboud moved into the Property on or about May 1, 2016. At the hearing, Mr. Abboud informed me that his brother, Fady Abboud, decided not to move in.
- [9] On May 1, 2016, Steven Werbicki also moved into the Property in a self-contained unit on the main floor. He is a handyman and provided some painting and repair services. He deposes that the Property was "in really good shape and ready for someone to move into the place". His evidence is that Mr. Abboud started complaining about different items within six months of moving in.
- [10] The affidavit evidence supports that shortly after Mr. Abboud moved in, he began complaining about the condition of the Property. The landlord's position is that when complaints were made, repairs were carried out.
- [11] In April 2017, Mr. Abboud showed an interest in purchasing the Property, but terms could not be agreed to.

- [12] On April 13, 2017, the parties entered into another residential tenancy agreement (the "2017 Agreement") signed by the landlord on April 10, 2017 and the Abbouds on April 13, 2017. The length of the tenancy was from May 1, 2017, for one year at the same rental amount. Under the terms of the 2017 Agreement, the tenant was permitted to assign or sublet the Property with the written consent of the landlord.
- [13] On June 1 and July 1, 2017, Mr. Abboud issued a stop payment on both rent cheques. On June 24, 2017, Mr. Abboud paid \$6,209.34 towards the June rent payment, and on July 14, 2017, paid \$6,518.29 towards the July rent.
- [14] On July 23, 2017, Oleg Shcheglov rented a room in the Property and entered into a nine-month lease with Mr. Abboud. He found that the living arrangements did not meet his needs and moved out on August 22, 2017 after he found a new tenant, Ryan Leenstra. Mr. Shcheglov claims in his affidavit that Mr. Abboud owes him \$1,800 for a month's worth of rent and the security deposit.
- [15] Mr. Leenstra moved into the Property in the beginning of September 2017. On October 30, 2017, Mr. Abboud gave him notice that he had to leave the Property. Mr. Leenstra moved into a property located at 3136 Tolmie Street with Mr. Abboud.
- [16] Mr. Abboud did not pay the October 2017 rent and a stop payment was made on the cheque.
- [17] On October 12, 2017, the landlord served a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities.
- [18] On November 2, 2017, Ms. Gamova posted a notice on the door of the Property that an inspection would be carried out on November 3, 2017.
- [19] On November 3, 2017, Ms. Gamova attended at the Property and it had been abandoned, and a move out inspection was not completed. Ms. Gamova deposes that when she arrived at the Property it was empty, not properly cleaned, and the oven in the kitchen was left on full blast.
- [20] Ms. Gamova claims the petitioners abandoned the tenancy without notice on November 1, 2017 and they have not contacted her requesting the return of the security deposit and did not provide a forwarding address.
- [21] Ms. Gamova alleges that the Property walls had to be repaired and repainted in November 2017 due to damage caused by the petitioners. The cost of the repair and repainting was \$4,417.50. She further claims that the Property was left dirty and a cost of \$525 was incurred for professional cleaning.
- [22] The Property was put up for sale and Ms. Gamova arranged to have professional photographers come in and take pictures. The Property was placed on the market on March 12, 2018 and sold on March 24, 2018.

Litigation History

[23] On July 17, 2017, the Abbouds commenced a Provincial Court action against Mr. Jung as defendant alleging that:

- a. when they moved in the house was dirty, the windows and skylights were not clean, the pool was dirty, and there were ants everywhere;
- b. there was a flood in the dining room and master bedroom; and
- c. the gate did not lock and their tools were stolen.

[24] The claim advanced was for:

- a. a refund of the first month's rent of \$7,800;
- b. a reduction or refund of rent from the second month to present calculated at \$2,000 per month for a total of \$22,000;
- c. payment for cleaning of Persian rugs for \$5,200; and
- d. services supplied to the property - no amount claimed.

Total claimed: \$35,000 plus filing and service fees (the "Small Claims Action").

[25] On July 31, 2017, the defendant filed a reply to the Small Claims Action claiming a breach of contract on the basis that the claimant had failed to pay all rent due and for assigning or subletting the Property. A further claim was made that the defendant had delivered a Notice to End the Tenancy for Unpaid Rent or Utilities and a Notice to End Tenancy for Cause on July 11, 2017. The defendant asserted that the claimants remained in possession of the Property.

[26] The reply further stated at para. 13:

Jurisdiction

Due to the exclusive jurisdiction granted to the Residential Tenancy Branch pursuant to the Residential Tenancy Act, British Columbia, this Honourable Court lacks jurisdiction to determine issues arising between the parties respecting a residential tenancy.

[27] A settlement conference in the Small Claims Action was scheduled for November 1, 2017 at 11:45 a.m. The claimants did not appear and the presiding judge ordered a dismissal of the action pursuant to R. 7(17) of the Small Claims Rules, B.C. Reg. 261/93.

[28] On November 10, 2017, a Residential Tenancy Board hearing was held by conference call by Arbitrator D. Tangedal to hear the tenants' application to cancel the one-month notice and the landlord's application for possession for cause and to keep the tenants' security deposit and/or pet damage deposit.

- [29] On December 4, 2017, Arbitrator Tangedal dismissed the tenants' application on the basis that the tenants had made the decision to vacate the Property on November 1, 2017, and therefore the issue was moot. The landlord's application was dismissed on the basis that it was premature as the landlord had applied for the return of the deposit(s) prior to the tenancy ending. The landlord's application was dismissed with leave to reapply.
- [30] On March 12, 2018, the tenants commenced an action in the BC Supreme Court against the landlord. The claim included everything claimed in the Small Claims Action and additional allegations of issues with the condition of the Property and the return of the damage deposit. The tenants claimed the following under Part 2 of the Notice of Civil Claim: (all sic)
1. Plaintiffs are seeking damages incurred as a result of the breach by Defendant as follows:
 2. \$3,900.00 for Damage deposit that was not returned by Defendant
 3. \$15,600.00 for two month,s Rent, as Property condition was unsuitable for Tenancy during first two months
 4. \$10,000.00 for the time and effort spent by the Plaintiff arranging, supervising and managing all the repairs
 5. \$23,400.00 for 3 months free rent that was promised by Defendant for hardship & inconvenience suffered by Plaintiff
 6. \$7,500.00 to replace damaged carpet, as per Appraisal.
 7. \$34,000.00 for reduction in rent from \$7,800.00 to \$5,800.00 as Property lacked heat in Winter, and the inability to use Pool during whole Tenancy period
 8. Plaintiffs had 1 month to vacate the Property but left immediately and claims \$4,250.00 rent reduction.
 9. \$128.00 for Shaw TV Box replacement
 10. Total Damages Sought: \$98,778.00
- [31] On April 26, 2018, the defendant landlord filed a response to civil claim denying the various claims, asserting res judicata on the basis the alleged damages had already been the subject of proceedings in the Provincial Court, and pleading that the action was statute barred pursuant to section 84.1 of the Residential Tenancy Act, S.B.C. 2002, c. 78 [RTA] on the basis that exclusive jurisdiction rested with the Director of the Residential Tenancy Branch.
- [32] On May 31, 2018, the defendant applied to have the action struck as an abuse of process. The application was heard by Justice Schultes on June 15, 2018. He made the following order (the "Schultes June Order"):
1. This application be adjourned generally to allow the plaintiff, Mr. George Abboud, to file an affidavit in support of his Application Response.

2. Mr. George Abboud is to provide an affidavit containing the evidence that he referred to in his oral submissions and should include evidence on the following matters:
 - a. The reason that he failed to attend the settlement conference in the Provincial Court, as well as any available medical evidence of his illness, such as a doctor's note;
 - b. The details of the advice he received that he should pursue his claim in the Supreme Court because of the amount claimed, rather than applying to reinstate the dismissed Provincial Court action, including whom he received this advice;
 - c. How the account of his damages for the initial Provincial Court action were calculated and the basis on which he re-calculated them in a higher amount for the purposes of the Supreme Court action;
 - d. Any steps that he took to pursue his tenancy issues through the Residential Tenancy Branch and why he pursued a court action instead;
 - e. Evidence dealing with the circumstances of the co-plaintiff, Fady Abboud, in relation to the above matters, if it differs from his own circumstances; and
 - f. If he was acting on Fady Abboud's behalf in taking any of these steps, he should make that clear.
 3. Mr. George Abboud must file his affidavit and serve a copy to Mr. Choi, Counsel for the Defendant, by June 29, 2018.
 4. Any response affidavit by the defendant should be filed and served by July 12, 2018.
 5. Mr. Choi, Counsel for the Defendant, is to arrange for a continuation date for the hearing with Supreme Court Scheduling.
 6. Once a hearing date has been set, Mr. Choi, Counsel for the Defendant, must file an amended application record containing the new affidavits.
- [33] As directed by the Schultes June Order, Mr. Abboud filed an affidavit on June 29, 2019 to address the items listed.
- [34] On October 16, 2018, the parties returned before Justice Schultes who made the following order (the "Schultes October Order"):
1. The Notice of Civil Claim is struck with liberty to the plaintiffs to file a petition pursuant to s. 58(2)(4)(a) of the Residential Tenancy Act (the "Petition") to have this Court hear the dispute in question.
 2. The Petition, if filed, must be done so within 60 days of this order and must be properly served on the current defendant, who will be the respondent, as well as the director of the Residential Tenancy Branch.

3. Costs of this application are deferred to the cause in the petition, except that if no petition is filed within 60 days of this order, the defendant may have the matter brought before Mr. Justice Schultes to deal with the issue of costs on this application.
- [35] On January 7, 2019, this petition was filed by the petitioners (the "Petition"). The Petition claimed the same relief as in the Notice of Civil Claim.
- [36] On January 10, 2019, the parties returned before Justice Schultes on the defendant's application to strike the Petition on the basis of non-compliance with the Schultes October Order. Justice Schultes made the following order:
1. The defendant's application to have the petition of the plaintiffs for failing to comply with Mr. Justice Schultes' order of October 16, 2018 is dismissed.
 2. The defendant's application to have costs assessed for the within application is dismissed.
 3. Mr. Abboud's signature for this order and the order of October 16, 2018 may be dispensed with on the condition that counsel for the defendant, Mr. Alex Choi, forthwith provides a copy of the entered order to Mr. Abboud.
 4. The costs of the hearing of January 10, 2019 will be in the cause of the plaintiff's petition.
- [37] On May 10, 2019, the petitioners served a notice to set the Petition down for hearing on May 28, 2019.
- [38] On May 27, 2019, I heard an application by the respondent seeking to have the hearing of the Petition adjourned on the basis that the petitioner had failed to serve a complete filed copy of the affidavit on Mr. Abboud.
- [39] On May 27, 2019, I made the following order:
1. The hearing of the petition scheduled for May 28, 2019 is adjourned generally;
 2. The petitioners shall serve the petition filed on January 7, 2019 on the director of the Residential Tenancy Branch;
 3. The petitioners are to file and serve the respondent an affidavit in support of the petition by June 27, 2019;
 4. The respondent shall file the response to petition and supporting affidavits by July 26, 2019;
 5. The petition shall be set down for a hearing for 2 days after July 26, 2019;
 6. Leave is granted to dispense with the petitioners' signature and counsel for the respondent is to serve the entered order on the petitioners;
 7. Cost is to be in the cause of the petition;
 8. Madam Justice Forth is seized of the matter; and

9. Case planning conference shall be scheduled after July 26, 2019 at 9:00 a.m. and prior to September 16, 2019. The counsel for the respondent is responsible for setting down the case planning conference.
- [40] On July 24, 2019, a Residential Tenancy Branch ("RTB") application was commenced on behalf of the respondent's estate claiming for past rent, replacement of locks, repairs to the Property, and for the security deposit.
- [41] On July 26, 2019, the respondent filed a response to the petition, disputing the allegations and submitting that the matter was not within the jurisdiction of the Supreme Court of British Columbia pursuant to s. 58(2)(a) and s. 58(4) of the RTA.
- [42] On August 22, 2019, a case planning conference ("CPC") was heard before me and I ordered the hearing of the Petition for December 12 and 13, 2019. During this CPC, I explained to Mr. Abboud that at the hearing of the Petition, only affidavit evidence would be used.
- [43] On November 14, 2019, the parties appeared before the RTB Dispute Resolution Services on the landlord's application for a monetary order for unpaid rent, authorization to retain the security deposit, and to recover filing fees.
- [44] During the hearing, the Arbitrator, J. Ceraldi, considered a preliminary issue of jurisdiction. Counsel for the landlord submitted that since any claims by Mr. Abboud in the Supreme Court would not exceed the \$35,000 monetary limit, matters must be resolved by the RTB. The tenant submitted a copy of the Petition seeking \$98,778 and advising that the hearing date was in December.
- [45] The Arbitrator under "Analysis" stated the following:

Section 58(2)(c) of the Act stipulates that I must resolve an Application for Dispute Resolution unless the dispute is linked substantially to a matter that is before the Supreme Court.

Although counsel submits that the tenant would not be successful in his application, the tenant is seeking an amount that far exceeds the \$35000.00 limit the Act addresses. On the basis of the testimony of the tenant and the copy of the Petition to the Court, which has been filed with the Supreme Court of British Columbia and scheduled to be heard on December 12 and 13, 2019, I find that this matter is substantially linked to a matter that is before the Supreme Court of British Columbia, I do not currently have authority to adjudicate this matter.

[Emphasis in original.]

- [46] Arbitrator Ceraldi declined to hear the matter for want of jurisdiction and the application was dismissed without liberty to reapply.
- [47] The Petition was heard on December 12 and 13, 2019.

Issue 1: Does the Supreme Court have jurisdiction to hear this dispute?

[48] The respondent has raised the issue of whether this Court has jurisdiction to hear the Petition on the basis that the claims made by the petitioners are under \$35,000 and, as such, s. 58(2)(a) and 58(4) of the RTA apply.

[49] Section 58 provides, in part:

- (1) Except as restricted under this Act, a person may make an application to the director for dispute resolution in relation to a dispute with the person's landlord or tenant in respect of any of the following:
 - (a) rights, obligations and prohibitions under this Act;
 - (b) rights and obligations under the terms of a tenancy agreement that
 - (i) are required or prohibited under this Act, or
 - (ii) relate to
 - (A) the tenant's use, occupation or maintenance of the rental unit, or
 - (B) the use of common areas or services or facilities.
- (2) Except as provided in subsection (4), if the director accepts an application under subsection (1), the director must resolve the dispute under this Part unless
 - (a) the claim is for an amount that is more than the monetary limit for claims under the Small Claims Act,
 - (b) the application was not made within the applicable period specified under this Act, or
 - (c) the dispute is linked substantially to a matter that is before the Supreme Court.
- (3) Except as provided in subsection (4), a court does not have and must not exercise any jurisdiction in respect of a matter that must be submitted to the director for dispute resolution under this Act.
- (4) The Supreme Court may
 - (a) on application, hear a dispute referred to in subsection (2) (a) or (c), and
 - (b) on hearing the dispute, make any order that the director may make under this Act.

[50] The statutory limit for claims under the Small Claims Act is \$35,000: Small Claims Court Monetary Limit Regulation, B.C. Reg. 179/2005, s. 1.

[51] If the claims made are within the \$35,000 threshold, then in accordance with s. 58, the director must resolve the dispute unless the dispute is linked substantially to a matter before the Supreme Court: s. 58(2)(c). There existed no other dispute before the Supreme Court when this claim was filed.

- [52] The issue, then, is whether the claim is below or above the monetary limit under the Small Claims Act.

Positions of the Parties

- [53] Mr. Abboud's position is that the total amount claimed is \$98,778, which is clearly above the \$35,000 limit. Accordingly, this Court has jurisdiction to decide the dispute.
- [54] The landlord's position is that when the legitimacy of the claims is examined, the actual value of Mr. Abboud's claims is within the \$35,000 limit. He submits that the claims that are frivolous and vexatious should not be counted within the total amount claimed for the purposes of establishing jurisdiction.

Analysis

- [55] The leading authority in B.C. on the interpretation of s. 58 of the RTA is *Gates v. Sahota*, 2018 BCCA 375. In that case, the Court considered the two circumstances, under s. 58(2)(a) and (c) of the RTA, in which a landlord/tenant dispute is adjudicated in this Court rather than by the RTB.
- [56] *Gates* involved a proposed class action against the owners of a single-room occupancy hotel in Vancouver. At first instance, leave was granted for the plaintiff to pursue his claim in the Supreme Court because the amount claimed in the proposed class proceeding exceeded the small claims limit and because it was substantially linked to claims regarding the hotel's conditions against the City of Vancouver. There was no dispute that the claim at issue was an RTA dispute within the director's jurisdiction unless it fell within the exceptions in s. 58(2)(a) or (c) of the RTA.
- [57] The Court of Appeal clarified that a leave application is not required when a landlord or tenant seeks to have an RTA dispute heard in the Supreme Court: para. 40. Instead, the Supreme Court is authorized to hear an RTA dispute "on application" started by way of a petition proceeding: para. 42. With respect to s. 58(2)(a), the Court explained:
- [44] When a party relies on s. 58(2)(a) of the RTA to invoke the Supreme Court's jurisdiction on the basis a dispute involves an amount in excess of the small claims limit, the applicant need only file a petition to initiate proceedings in that Court. However, it is open to the respondent to the petition or the Director to object on the basis that the Supreme Court's jurisdiction has not been properly invoked. It is also open to a judge of that Court to raise that issue.
- [58] In addition, where the party relies on s. 58(2)(c) to oppose jurisdiction on the basis that a dispute is substantially linked to a proceeding already before the Supreme Court, the applicant must file an application to consolidate those two proceedings in addition to filing their petition: paras. 45-46.

- [59] The Court of Appeal held that the chambers judge had erred in considering the petitioner's punitive damages claim advanced against the respondents because a Supreme Court judge hearing an RTA dispute does not have jurisdiction to order punitive damages: paras. 55-67. Further, it was an error to find that the small claims amount could be exceeded by aggregating the amounts being claimed on behalf of multiple tenants: para. 69. The Court explained:
- [71] When an RTA dispute involves a claim within the small claims limit, the Director has exclusive jurisdiction over that dispute unless it is linked substantially to a matter before the Supreme Court. This is clear not only from s. 58(2) of the RTA, but also from s. 84.1, which states:
- (1) The director has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in a dispute resolution proceeding or in a review under Division 2 of this Part and to make any order permitted to be made.
 - (2) A decision or order of the director on a matter in respect of which the director has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.
- [72] In the present case, Mr. Gates is personally claiming \$200 per month in compensation in his RTA dispute with the Sahotas. If that claim is allowed, then the monetary order in his favour will be within the small claims limit. Accordingly, on its face his claim falls within the Director's exclusive jurisdiction. Similarly, the claim of each tenant Mr. Gates hopes to represent falls within the Director's exclusive jurisdiction. That jurisdiction cannot be avoided merely by joining multiple claims, each of which falls within the Director's exclusive jurisdiction.
- [Emphasis added.]
- [60] The matter was remitted to the Supreme Court to determine whether it was sufficiently linked to the non-RTA matters the petitioner was claiming against the respondents/defendants to warrant consolidation and whether the Supreme Court should take jurisdiction on that basis.
- [61] Section 58 of the RTA and the Gates decision were considered in *Gil v. Lloyd*, 2019 BCSC 1455. In that decision, Justice Warren noted the limits to the Supreme Court's jurisdiction under s. 58, and its somewhat discretionary nature:
- [30] Section 58(3) provides that except as provided in ss. (4), a court does not have and must not exercise any jurisdiction in respect of a matter that must be submitted to the Director for dispute resolution under the Residential Tenancy Act. Subsection (4) then provides that this Court "may", on application, hear a dispute referred to in ss. (2)(a) or (c).

[Emphasis added by Warren J.]

- [62] In *Gil*, the issue was whether one or both of two RTB disputes--one relating to rent and the other to quiet enjoyment--came within the ambit of s. 58(2)(a) or (c) to permit the Court to take jurisdiction. Justice Warren held that neither dispute was for an amount that was more than the small claims limit, explaining:
- [37] The RTB Quiet Enjoyment Dispute is, on its face, limited to \$35,000. There is no suggestion that it is for an amount that exceeds the threshold.
- [38] The more difficult question is whether the RTB Rent Dispute is for an amount that exceeds \$35,000. As noted, although the notice of dispute resolution and the worksheet claim the amount owed exceeds \$35,000, I have found that Ms. Gil expressly abandoned any claim over \$35,000.
- [39] The Director of the RTB and the Attorney General of British Columbia were represented at the hearing before me for the purpose of assisting the Court. Counsel for the provincial respondents raised the question of whether Ms. Gil's decision before the RTB to abandon any excess claim beyond \$35,000 is binding on her. I find that it is.
- [40] As is clear from the interim decisions issued by the arbitrator, the RTB hearing actually commenced. The arbitrator determined that no amendments would be permitted and no additional evidence could be submitted. In my view, it would be an abuse of process to now allow Ms. Gil to, in effect, abandon that already-commenced proceeding and the concessions made in it, and instead proceed in this Court with a larger claim. Allowing her to do so would be prejudicial to Ms. Lloyd in that she has already invested time in the RTB proceeding. In addition, s. 58(2)(a) applies where "the claim" before the RTB is for an amount that is more than the small claims limit. Given Ms. Gil's concession and the arbitrator's determination that no amendments be permitted, her "claim" in the RTB Rent Dispute has been fixed at \$35,000.
- [41] For these reasons, I conclude that neither of the RTB disputes falls within s. 58(2)(a) of the Residential Tenancy Act, because neither is for an amount that exceeds \$35,000.
- [63] Justice Warren went on to find that neither dispute was substantially linked to an action already before the Court, and the petition was dismissed.
- [64] Neither of these cases is directly on point to the circumstances before me. In *Gates*, the claim brought by the individual petitioner was below the \$35,000 limit on its face, and the petitioner also sought damages which were outside of the court's jurisdiction to award. In *Gil*, the petitioner had expressly waived any amount that exceeded the small claims jurisdiction.
- [65] In this case, the petitioner is claiming nearly \$100,000 in damages, which on its face is clearly over the small claims limit. There are no issues with respect to the Court's ability to award the damages claimed; the issue is whether the claims are made out on the evidence.

- [66] I understand the respondent's concern that the petitioners' claims are inflated and that their true value is within the small claims limit. In my view, the proper procedure to address these concerns would be to apply to strike the claims that the respondent says are frivolous, vexatious, and/or an abuse of process. Rule 9-5 was not invoked by the respondent and he has made no application to have any of the claims struck. It would be unfair to the petitioner to do so without notice to him.
- [67] For these reasons, I find that I have jurisdiction to decide this dispute under s. 58(4) of the RTA. Each of the claims raised in the petition are before me to be resolved on their merits.

Issue 2: Evidentiary Issues

- [68] During the oral submissions of Mr. Abboud, he made reference to a great many facts that were not part of any of his sworn affidavits. This was objected to by the respondent on the basis that there was no notice provided.
- [69] Although Mr. Abboud is self-represented, it does not mean he is exempt from the rules of procedure. The court must ensure that fairness is extended to all parties: *Murphy v. Szulinszky*, 2016 YKCA 16 at para. 16.
- [70] I am cognizant of the fact that the Court is sitting in the place of the director in resolution of an RTA dispute. Under s. 75 of the RTA, the usual rules of evidence do not apply, and any evidence that the director considers to be necessary and appropriate and relevant to the dispute resolution proceeding may be admitted. The rules of evidence that apply to dispute resolution through the RTB are more relaxed than the usual rules that apply to Supreme Court hearings. Nonetheless, Mr. Abboud has claimed for an amount that exceeds the limit of the RTB hearing process, and he was advised of the evidentiary requirements in this Court by the orders of Justice Schultes and myself.
- [71] In these reasons, I will not rely on any verbal unsworn statements made by Mr. Abboud at the hearing. Mr. Abboud was advised that he had to prepare affidavits to provide the evidence he wanted to rely upon. While the court may exercise its discretion to accept unsworn statements from self-represented litigants for matters that are of marginal relevance to the matters in issue or where they are uncontroversial, I find that it would not be fair to accept Mr. Abboud's unsworn evidence in the circumstances of this case as it went to the central issues to be resolved in this petition: *Brown v. Brown*, 2020 BCCA 53 at paras. 27-33.
- [72] There were some additional problems with the petition record that Mr. Abboud handed up to me. In that petition record, he included copies of affidavits that do not bear the filing stamp and materials that were not properly attached to affidavits. I will not put any weight on the materials that Mr. Abboud added to the back of affidavits and which were not properly attached as exhibits to the affidavits filed, as I find that it would not be fair to the respondent to do so in the circumstances.

[73] A further evidentiary issue arises out of the fact that the respondent has put into evidence several invoices, attached to the affidavit of Ms. Gamova, to support that certain work was done on the Property. Insofar as these invoices are proffered as evidence that the work was in fact done by those who prepared the invoices (when that person is not the affiant) or done to a particular standard, it is hearsay evidence and is presumptively inadmissible. I will deal with these invoices as necessary throughout my analysis of the issues that they are proffered to support.

Issue 3: Analysis of the merits of the claims

Return of the damage deposit

[74] Mr. Abboud claims the return of the damage deposit of \$3,900 he paid to the defendant.

[75] The landlord takes the position that Mr. Abboud is not entitled to the return of the security deposit as the landlord is claiming the damage deposit through the RTB. Alternatively, he says that Mr. Abboud is out of time to request a return of the damage deposit as the limitation period has passed, and in any event, he is not entitled to return of the damage deposit.

[76] I disagree that the matter of the damage deposit is before the RTB. The issue was addressed before Arbitrator Tangedal, who held that the landlord's application for return of the deposit was brought prematurely, and then before Arbitrator Ceraldi, who found that the RTB did not have jurisdiction and declined to hear the matter. I have no evidence before me of another matter that has yet to be decided by the RTB dealing with the damage deposit. Therefore, I find that the question of the damage deposit is properly before me.

[77] Under s. 38(1) of the RTA, the landlord must either repay the security deposit to the tenant or make an application for dispute resolution claiming against the security deposit within 15 days of the date the tenancy ends or the date the landlord receives the tenant's forwarding address in writing, whichever comes later. This is subject to the exceptions in s. 38(3) and 38(4)(a), neither of which apply here. It is also subject to s. 38(2), which provides that s. 38(1) does not apply if the tenant's right to return of the security deposit is extinguished under s. 24(1) for failing to participate in the start of tenancy inspection or s. 36(1) for failing to participate in the end of tenancy inspection.

[78] There is some question as to whether s. 36 applies here. Section 36(1) extinguishes the right of the tenant to return of the security deposit if the landlord has complied with s. 35(2), which requires the landlord to provide at least two opportunities to complete the end of tenancy inspection, and the tenant did not participate on either occasion. In this case, although Mr. Abboud failed to attend at the first opportunity for inspection on November 3, 2017, I have no evidence before me suggesting that the landlord attempted to provide a second opportunity for inspection with Mr. Abboud.

- [79] I note that while other provisions dealing with end of tenancy inspections contemplate different procedures applying where the tenant has abandoned the unit, as Mr. Abboud appears to have done, such language does not appear in s. 36(1). For example, under s. 36(2), unless the tenant has abandoned the rental unit, the right of the landlord to claim against the security deposit is extinguished if the landlord does not offer the tenant at least two opportunities for inspection, does not participate in the inspection, or does not complete the inspection report and provide a copy to the tenant. Similarly, under s. 35(5)(b), the landlord is permitted to complete the inspection without the tenant if the tenant has abandoned the unit. The abandonment exception is noticeably missing from s. 36(1). Accordingly, while the landlord's right to claim against the deposit is not extinguished for failing to comply with s. 35(2) where the unit is abandoned, abandonment does not mean that the tenant's right to return of the security deposit is automatically extinguished.
- [80] For these reasons, I find that the exception in s. 36(1) is not met and the landlord was required to comply with s. 38(1) by repaying the security deposit within 15 days of the end of tenancy or receiving the tenant's forwarding address in writing, whichever came later. Section 39 provides that, despite any other provision of the RTA, a landlord may retain the security deposit if the tenant does not provide a forwarding address in writing within a year after the end of the tenancy, which in this case would be November 2018. At that time, the right of the tenant to the return of the security deposit is extinguished.
- [81] The primary issue between the parties in this regard is when, if at all, Mr. Abboud provided his forwarding address in writing to the landlord.
- [82] Mr. Abboud submits that he did not have the landlord's information to provide him with a forwarding address. However, he was clearly in contact with Ms. Gamova, and she was acting as the landlord's property manager throughout the relevant time. Mr. Abboud does not appear to have dealt personally with Mr. Jung during the course of his tenancy in resolving the disputes. It accords with common sense that Mr. Abboud should have at least attempted to provide the forwarding address to Ms. Gamova at the end of his tenancy in order to receive his security deposit back. I have no evidence of him attempting to do so.
- [83] I also note that Mr. Abboud started an action against Mr. Jung in March 2018, approximately five months after the end of the tenancy, which listed Mr. Jung's address in the Notice of Civil Claim. Clearly, he did have the landlord's information in March 2018, at the latest.
- [84] At the same time, Mr. Abboud's new address was also included in the Notice of Civil Claim. This raises the question of whether the Notice of Civil Claim counts as providing the landlord with Mr. Abboud's forwarding address in writing for the purposes of s. 38 and 39 of the RTA.

- [85] In my view, the provision of Mr. Abboud's new address in the Notice of Civil Claim, which was served on the landlord, met the requirement s. 39 of providing his forwarding address to the landlord within a year of the end of the tenancy. It is not clear exactly when the Notice of Civil Claim was served on Mr. Jung, but he filed a Response to Civil Claim on April 26, 2018, so clearly he was served before that date.
- [86] Once the landlord had the forwarding address, he had the option to apply for dispute resolution or return the deposit within 15 days. It is not clear exactly when the landlord first applied to the RTB for return of the security deposit, but it is clear from Arbitrator Tangedal's reasons issued December 4, 2017 following a hearing on November 10, 2017, that the application was made prior to the tenancy ending on November 1, as it was dismissed for being brought prematurely. Another application was brought on July 24, 2019, that was heard by Arbitrator Ceraldi on November 14, 2019.
- [87] Even taking April 26, 2018 as being the date on which Mr. Jung received the Notice of Civil Claim providing him with Mr. Abboud's new address, his July 2019 application was not made within 15 days of the receiving the new address. Although Mr. Jung initially applied to have the security deposit returned at some time in 2017, it must not have been within 15 days of the end of the tenancy given Arbitrator Tangedal's finding that it was brought before the tenancy ended.
- [88] I find that the landlord has not met the requirements under the RTA and, as such, the security deposit must be returned. Under s. 38(1) of the RTA, if the landlord fails to comply by returning the security deposit within the 15-day period, the landlord is required to pay the tenant double the amount of the security deposit. The language of the section is non-discretionary and as such must be complied with. Any interest on the original (non-doubled) deposit amount is also payable to the tenant in accordance with the Residential Tenancy Regulations, B.C. Reg. 477/2003, s. 4.

Return of first two months' rent

- [89] Mr. Abboud claims that the Property was uninhabitable during the first two months of the tenancy and, as such, he is entitled to the return of the first two months' rent in the amount of \$15,600. He claims that the Property was unusable when it was poison-treated three times for ants. He further claims that he was unable to use the pool due to its decrepit condition at the start of the tenancy, and he complained about the conditions of the locks and the deck.
- [90] The landlord disputes that Mr. Abboud is entitled to have his rent returned to him for the first two months of the tenancy. He submits that prior to Mr. Abboud taking possession on May 1, 2016, a cleaner was hired to clean the Property. Ms. Gamova deposed that she hired the cleaner and an invoice was attached to her affidavit in support, which states that seven hours were spent cleaning the Property.

- [91] On April 28, 2016, Mr. Abboud attended the Property with Ms. Gamova and a Condition Inspection Report was conducted. The Condition Inspection Report, which was signed by Mr. Abboud, indicated that the only repairs to be completed at the start of the tenancy were to wash the windows and fix the stove fan. The only comments noted in the Report were some marks on the walls, trim, and floor of the entry; the stove fan not working; and some marks/scratches on the floor/carpet of the master bedroom. The rest of the inspection notes the condition as "F", meaning "fair".
- [92] The landlord had the pool cleaned on a monthly basis and produced invoices supporting the monthly cleaning, including for April, May, June, July, August, and September, 2016. Mr. Abboud does not appear to dispute that these cleanings occurred, but he submits that the pool was not kept to a reasonable standard of cleanliness.
- [93] Mr. Werbicki's evidence was that some of the tiles of the pool were chipped or loose. The landlord paid to have the pool resurfaced and the tiles put back in. The repairs were completed around the fall of 2016 and took about one week.
- [94] Mr. Shcheglov's evidence was that in July and August, 2017 he used the pool and observed it to be clean and not dirty. Although this was not during the initial two-month period for which Mr. Abboud claims a return of rent, it casts doubt on the credibility of Mr. Abboud's evidence as a whole because he claims that the pool was dirty and unusable throughout the entire duration of the tenancy. Where his evidence conflicts with that of Mr. Shcheglov and Mr. Werbicki, who are third parties to this dispute, I prefer their evidence over that of Mr. Abboud. I find that Mr. Abboud exaggerated the condition of the pool and that his complaints were not credible.
- [95] Overall, I find that the pool was kept in a reasonably clean condition throughout the course of the tenancy. Cleaning the pool on a monthly basis was a reasonable response to Mr. Abboud's complaints. While the photographs that Mr. Abboud submitted showed that there was some dirt and leaves in the pool at times, this is a normal occurrence to expect in an outdoor pool, and it is impractical to suggest that the pool must be spotlessly clean at all times. I find that the landlord met his obligations with respect to the condition of the pool throughout Mr. Abboud's tenancy.
- [96] The landlord concedes that Mr. Abboud complained about an ant infestation and on May 7, 2016 Westside Pest Control Ltd. attended to address the issue. According to the invoice, the interior and exterior of the Property were treated at a cost of \$288.75 paid by the landlord. On May 8, 2016, the same company returned to treat carpenter ants at a cost of \$1,500 to the landlord. Again, Mr. Abboud does not dispute that these treatments occurred, but he says that it made the premises uninhabitable and that the problem was not resolved by the treatments, and he should therefore have his rent returned. There is no evidence to support that Mr. Abboud or Mr. Werbicki had to move out of the Property or adjust their living conditions while the ant treatment took place.

[97] On or around May 6, 2016, Mr. Abboud requested additional keys and Ms. Gamova arranged to have Fast Locksmith 24/7 replace the lock on the front door at a cost of \$513.45 to the landlord.

[98] On May 12, 2016, Mr. Abboud complained about the exterior of the house and Vlad Construction Corp. was retained by the landlord to power wash the exterior of the house. The cost of the power washing was \$756.00, which was paid by the landlord.

[99] On June 19, 2016, Maple Leaf Appliance Repair ordered a hood fan part for the Property and carried out repairs on July 8, 2016 at a cost of \$661.45 to the landlord.

[100] In August 2016, the landlord arranged for the repair of the front gate at a cost of \$3,060.75 and the repair of four other gates at a cost of \$413.75 to the landlord.

[101] On September 2, 2016, the landlord arranged the repair of a deck on the Property at a cost of \$7,896.

[102] The evidence of Mr. Werbicki on the condition of the Property when Mr. Abboud moved in is as follows:

Before George and I moved into the Property, I did the paint job for the entire house and Wan Hung Jung had replaced all the carpets in the house. There were portions of the house that had hardwood floors. The house was clean and was not dirty at all.

The house was equipped with radiant heating. There was an issue with the heating system before I moved in. I worked with BC Furnace to fix the heating issue and flushed the bubbles out of the pipes. The heating was working just fine when George moved in. Attached to my affidavit as Exhibit "A" is a true copy of invoice of SPW Building Services dated April 23, 2016, which I prepared.

Overall, the Property was in really good shape and ready for someone to move into the place. It needed a dining room fixture and Wan put one in.

[103] There is no evidence that supports the Property was uninhabitable such that Mr. Abboud had to move out during May and June, 2016. When Mr. Abboud complained about the condition of the Property, the landlord promptly hired contractors to remedy the problems. I see no basis to order the landlord to reimburse Mr. Abboud the full amount of the May and June 2016 rents.

\$10,000 for services rendered

[104] Mr. Abboud claims he should be entitled to \$10,000 for arranging, supervising, and managing all the repairs he says he undertook. There is no evidence on how Mr. Abboud came to this amount, aside from some invoices he prepared, which I will consider below. There is no evidence that the landlord agreed to hire Mr. Abboud to do repairs or that any agreement was reached on an hourly rate.

[105] Based on the terms of the 2016 Agreement, maintaining the Property was an obligation of the landlord. Under clause 10, the landlord was required to make any repairs in order to comply with this obligation and the tenant was to discuss any necessary repairs with the landlord. If the landlord refused to make the repairs, the tenant was to seek an arbitrator's order. The clause in the 2016 Agreement specifically provided:

Landlord's obligations:

- a) The landlord must provide and maintain the residential property in a reasonable state of decoration and repair, suitable for occupation by a tenant. The landlord must comply with health, safety and housing standards required by law.
- b) If the landlord is required to make a repair to comply with the above obligations, the tenant may discuss it with the landlord. If the landlord refuses to make the repair, the tenant may seek an arbitrator's order under the Residential Tenancy Act for the completion and costs of the repair.

[106] There are many text messages between Mr. Abboud and Ms. Gamova attached to their affidavits that support that Mr. Abboud made many complaints to Ms. Gamova, but as discussed above, she hired contractors to do the work requested whenever Mr. Abboud complained. There is no evidence of Mr. Abboud pursuing an arbitrator's order for completion and costs of repairs.

[107] The 2016 Agreement provides the following under the heading Emergency Repairs at clause 10:

3) Emergency Repairs:

- a. The landlord must post and maintain in a conspicuous place on the residential property, or give to the tenant in writing, the name and telephone number of the designated contact person for emergency repairs.
- b. If emergency repairs are required, the tenant must make at least two attempts to telephone the designated contact person, and then give the landlord reasonable time to complete the repairs.
- c. If the emergency repairs are still required, the tenant may undertake the repairs, and claim reimbursement from the landlord, provided a statement of account and receipts are given to the landlord. If the landlord does not reimburse the tenant as required, the tenant may deduct the cost from rent. The landlord may take over completion of the emergency repairs at any time.
- d. Emergency repairs must be urgent and necessary for the health and safety of persons or preservation or use of the residential property and are limited to repairing
 - i. major leaks in pipes or the roof,

- ii. damaged or blocked water or sewer pipes or plumbing fixtures,
- iii. the primary heating system,
- iv. damaged or defective locks that give access to a rental unit, or
- v. the electrical systems.

[108] It may be if the leaks that are alleged to have occurred in the Premises met the definition of "major leaks" such that emergency repairs could be taken by the tenant in compliance with these sections. It is not clear on the evidence before me if the leaks that Mr. Abboud claimed he fixed would come within the Emergency Repair clause. In addition, there is no sworn evidence that compliance was made with clause 10(3)(b).

[109] In his fourth affidavit, Mr. Abboud deposes that the toilet flooded and he complained, but neither Ms. Gamova nor Mr. Jung came out to inspect the problem. He says that Ms. Gamova asked him to get it fixed, which he did. He says that they never called emergency repair workers to take care of the situation and it fell on him to make the arrangements to resolve the issue.

[110] Mr. Abboud attached to some of his affidavits a series of invoices he says were prepared and provided to Ms. Gamova, the landlord's agent. The invoices were not attached to any letters serving them, and some of them make little sense.

[111] The first invoice is dated June 30, 2016 and claims to be a list of management fees owed to Mr. Abboud in the amount of \$1,350. There is no evidence on how this invoice was provided to Ms. Gamova and it does not appear that Mr. Abboud followed up on the non-payment of this invoice. The fees listed include:

- a) \$850 to "find someone to make copies then we had all the locks changed my cost per time 17 hrs at \$50.00"
- b) \$200 to "take down drapes and take to cleaner 4 hrs x \$50.00"
- c) \$25 for "gas and car use"
- d) \$250 to "pick up drapes [and] hang them up 5 hrs x \$50.00"
- e) \$25 for "gas and car cost"

[112] Mr. Abboud was in constant communication with Ms. Gamova through text messaging and there is no reference to the June 30, 2016 invoice and the non-payment of it at the time it was allegedly sent. There are text messages referring to invoices Mr. Abboud says he provided to Ms. Gamova in June and October 2017, but Ms. Gamova replies to the texts saying that she had not received any copies of the invoices and asserting that Mr. Abboud cannot invoice the landlord for work without approval.

- [113] The second invoice is dated July 5, 2016 and it claims that the "house not prepared to move in and no move in check list was never done by Anna". This statement is not accurate and is contradicted by the Condition Inspection Report that Mr. Abboud signed on April 28, 2016.
- [114] During the oral submissions and in his affidavit sworn August 22, 2019, Mr. Abboud suggested that his signature was forged on the Condition Inspection Report. However, when shown that the signature on the Residential Tenancy Agreement matched with the signature on the Condition Inspection Report he conceded he might have signed it, but if he did, then he did not remember doing so.
- [115] The July invoice seeks the return of the May 1 and June 1, 2016 rent in the amount of \$7,800 each. It also seeks the cost of attending Home Depot for a new sink and installing it for \$325. The total invoice claims for \$17,275. There is no reference to the July invoice in any of the texted messages with Ms. Gamova at the time it was allegedly prepared. There is no follow-up on this invoice until it is mentioned for the first time a year later.
- [116] If Mr. Abboud was of the view that the landlord owed him \$17,275 as of July 5, 2016, it is difficult to understand why he did not follow up with the landlord about the payment of this invoice. Mr. Abboud paid the rent of \$7,800 for every month up until June 2017. In addition, Mr. Abboud agreed to renew the tenancy in April 2017 and there was no reference to any outstanding invoices owed at that time.
- [117] It is my conclusion that all of the invoices that are attached to Mr. Abboud's affidavits were not provided to Ms. Gamova during the tenancy but were created by Mr. Abboud as part of his efforts to sue the landlord.
- [118] Further evidence to support this is the invoice dated 2017-05-01, being either January 5 or May 1, 2017, is clearly not accurate. This invoice is dated either prior to the second tenancy, if January 5, or the first day of the tenancy term if it is May 1, 2017. The invoice provides as follows:

Damage Deposit \$3,900.00

Invoice \$1,350.00

Invoice 2b \$17,275.00

Invoice 100 \$2,732.18

Invoice 103 \$9,550.00

carpet appraisal carpet destroyed \$7,500.00

invoice 104 \$28,500.00

Invoice 105 \$5,400.00

Invoice 107 \$6,538.00

pain & suffering bad health \$75,000.00

TOTAL \$157,745.18

- [119] The appraisal that Mr. Abboud obtained for the carpets for \$7,500 is dated October 25, 2017. Mr. Abboud would not have had the appraisal in January or May 2017 when this invoice was allegedly prepared.
- [120] If the invoice is dated January 5, 2017 and Mr. Abboud believed the landlord owed him in excess of \$150,000 it makes no sense that he would have renewed the tenancy for the same rental amount. If the invoice is dated May 1, 2017, that is the same day that the new tenancy started.
- [121] Clearly, this invoice is something that Mr. Abboud created at some time later and the document is incorrectly dated.
- [122] There is a reference on October 7, 2017 in text messages to Ms. Gamova "i have sent u 2 invoices for the trouble that was caused by him and his house i demand payment within 24 hrs or he is in more trouble then he is already in and i am making plans to vacate next month u have bean sent a copy". Ms. Gamova immediately texted a reply: "I haven't received any copies of that please send it to me. You can't just send the invoice without a landlords approval." It is not clear to me which invoices Mr. Abboud is referring to, but it appears Ms. Gamova claims she did not receive them.
- [123] I put no weight on any of the invoices that Mr. Abboud attached to his affidavits to support any of the allegations he has made. I am uncertain as to when they were created and if they were ever provided to the landlord or his agent during the course of the tenancy. In any event, as Ms. Gamova noted in her text messages to Mr. Abboud, he required the approval of the landlord or his agent before contracting to do work on the Property, which was not obtained.
- [124] For these reasons, Mr. Abboud's claim for \$10,000 for services provided is denied.

Three months rent-free

- [125] Mr. Abboud claims that the landlord, through his agent, promised three months rent-free for the hardship and inconvenience he suffered and in lieu of paying him in cash for the work he did on the Property. There was no evidence of when this promise was made or by whom. In his oral submissions at the hearing of the Petition, Mr. Abboud advised me that it was a promise made by Ms. Gamova in August 2017. He claims that this was a verbal agreement and there was nothing in writing to support it.

- [126] If such an agreement was reached in August 2017, then it makes no sense that Mr. Abboud would pay \$7,800 rent in August and again in September 2017. According to his evidence, both of those months should have been rent-free in accordance with the alleged verbal agreement he says he reached.
- [127] Ms. Gamova denies that she promised Mr. Abboud that he would be provided with three months of free rent.
- [128] I do not find it credible that such a verbal agreement was entered into, and Mr. Abboud's subsequent actions do not support that such an agreement had been reached. I find that no agreement for three months of free rent was reached, and I deny Mr. Abboud's claim for \$23,400 for three months of free rent based on this alleged agreement.

Damage to the Persian carpets and Shaw cable box

- [129] Mr. Abboud claims that two of his silk Persian carpets were damaged as a result of water that leaked in through a fireplace during a rain storm. He produced an appraisal from P.C.C. Carpet Services Limited dated October 25, 2017 setting out the replacement value for the two carpets at \$7,500. He claims at Item 5 of the Petition for \$7,500 to replace the damaged carpets. He also claims \$128 to replace a Shaw TV box that was damaged due to water leakage.
- [130] The landlord claims that the water damage to the Persian carpets cannot be claimed since clause 26 of the 2016 Agreement, which was operative when the alleged water damage occurred, provides, in part:

the Landlord shall not be liable for any damages to any property caused by stain, water rain or snow which may leak into, issue or flow from any part of the Premises or residential property or from water, steam, sprinkler or damage pipes or plumbing works of the same or from any place or quarter or for any damage caused by or attributable to the condition or arrangement

- [131] In addition, the landlord submits that he is not responsible for the damaged carpets because it should be covered by Mr. Abboud's tenant insurance. Clause 36 of the lease requires the tenant to "carry sufficient insurance coverage for his personal property, together with sufficient insurance coverage including fire, smoke, water damage, theft and third party liability". This clause, and clause 26 excerpted above, was present in both the 2016 and the 2017 Agreements.
- [132] I accept that Clauses 26 and 36 are an answer to the petitioner's claims for reimbursement for his Persian carpets and his Shaw TV box. The 2016 Agreement is clear that the landlord is not responsible for water damage arising from the Property or from outside the Property, and the tenant is responsible for insurance to cover claims for water damage to his property. Mr. Abboud's recourse for his Persian carpets is to claim against his tenant insurance. I therefore decline to award the \$7,500 claimed for the Persian carpets and the \$128 claimed for the Shaw TV box.

Reduction of rent from \$7,800 to \$5,800 for whole tenancy period

- [133] Mr. Abboud claims that since the Property lacked heat in the winter and he was unable to use the pool during the whole tenancy period, the rent should be reduced from \$7,800 to \$5,800. He calculates a sum of \$34,000. This appears to be calculated based on 17 months. This would include the entirety of the first 12 month tenancy and for five months of the second tenancy (May - September 2017).
- [134] With respect to the allegation of a lack of heat, the evidence of Mr. Werbecki was that the house was equipped with radiant heating. There was an issue with the heating system before he moved in. He states that he worked with BC Furnace to fix the heating problem and flush the bubbles out of the system. He produced an invoice from SPW Building Services, which is his company, dated April 23, 2016 respecting the services he provided. He claims that the heating was working fine when Mr. Abboud moved in.
- [135] If the house was without heat during the winter months of 2016/2017 it is hard to understand why Mr. Abboud then entered into the second tenancy in a house without heat. There are no text messages produced between Mr. Abboud and Ms. Gamova during this time period complaining of a lack of heat, which is significant because Mr. Abboud produced text messages of the other complaints that he made, which were many. Ms. Gamova denies that Mr. Abboud complained to her about heating issues during the tenancy. There is one text from June 2017 in which Ms. Gamova asks Mr. Abboud if there is a number on the boiler for service, although it is not clear whether this servicing was because of lack of heat, noise, or just a regular maintenance check-up. Ms. Gamova sent Mr. Abboud the number of the service company to arrange for the maintenance of the boiler in June 2017.
- [136] In October 2017, there were text messages between Mr. Abboud and Ms. Gamova about the boiler in the basement being "soooo loud". Ms. Gamova agreed that Mr. Abboud could call someone to arrange for servicing of the boiler.
- [137] Mr. Abboud did, in May 2017, complain that the pool was dirty and that the "pool guys" had not attended for three weeks. He took a photo of the pool to send to Ms. Gamova. The photos he has provided do not show a pool that was unusable, but in need of cleaning. The pool invoices confirm that the pool was cleaned on May 31, 2017. In addition, Mr. Shcheglov noted the pool was clean and not dirty during his tenancy, which was during the summer of 2017. As I have noted above, I did not find Mr. Abboud's complaints regarding the state of the pool to be reasonable or credible.
- [138] I do not find Mr. Abboud's complaints with respect to the heating or the pool to be credible, and I decline to award him damages on that basis.

Rent reduction for vacating the Property

[139] Mr. Abboud claims \$4,250 in rent reduction on the basis that he vacated the Property immediately in October 2017 after he was provided with one-month notice to end the tenancy for cause, rather than staying for the duration of the month.

[140] I find that Mr. Abboud is not entitled to return of rent for his decision to vacate the Property early. The notice to end tenancy was for cause as Mr. Abboud had not paid rent for October and November 2017. It does not make sense that Mr. Abboud would have rent that he never paid returned to him. I deny Mr. Abboud's claim for \$4,250 for his abandonment of the Property.

Conclusion

[141] The petitioners have failed to prove any of the claims advanced in this Petition except the return of the damage deposit.

[142] On that issue, the respondent claims that he incurred expenses to clean the Property and repaint the house. Mr. Abboud did provide a picture of the kitchen showing its condition when he vacated the Property. The photos support that the house was not left in a dirty state. I am also not convinced that the landlord had to repaint the entire house as a result of the actions of Mr. Abboud. In all likelihood, the repair and repainting was done because the intent was to sell this Property and in order to maximize the profit on the sale of the Property. I am not convinced that Mr. Abboud should pay for these costs. In any event, s. 38(6) precludes a landlord from making a claim against the security deposit when they have not complied with s. 38(1), as I have found to be the case here. As such, I order that the security deposit should be returned to Mr. Abboud. Mr. Abboud is entitled to double the amount of the security deposit as required by s. 38(6)(b). The amount that Mr. Abboud is entitled to is \$7,800 plus accrued interest on the original deposit of \$3,900.

Costs

[143] The respondent seeks special costs on the basis that Mr. Abboud deliberately inflated his claims for the sole purpose of filing in the Supreme Court.

[144] In *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11, Justice Walker summarized the circumstances where special costs may be ordered:

Special costs may be ordered in the following circumstances:

- (a) where a party pursues a meritless claim and is reckless with regard to the truth;
- (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;

- (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
- (d) where a party made the resolution of an issue far more difficult than it should have been;
- (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
- (f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
- (g) where a party brings a proceeding for an improper motive;
- (h) where a party maintains unfounded allegations of fraud or dishonesty; and
- (i) where a party pursues claims frivolously or without foundation.

[Citations omitted.]

[145] In the circumstances of this case, although some of Mr. Abboud's claims were of questionable merit, I am not satisfied that Mr. Abboud's conduct meets the standard of reprehensible conduct that would warrant a special costs order.

[146] The law with respect to costs generally was recently summarized in *Urbanczyk v. 1128 Enterprises Ltd.*, 2019 BCSC 649:

[12] Costs of a proceeding must be awarded to the successful party unless the court otherwise orders: *R. 14-1(9)*. At its most basic, the successful party is the plaintiff who establishes liability under a cause of action and obtains a remedy, or the defendant who obtains a dismissal of the plaintiff's case: *Loft v. Nat*, 2014 BCCA 108 at para. 46, leave to appeal ref'd [2014] S.C.C.A. No. 211. In cases where there are multiple causes of action, a more flexible "substantial success" test may be applied: *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2017 BCCA 346 at para. 92. Determining substantial success depends on the relative importance of the matters in dispute: *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45, leave to appeal ref'd 2002 BCCA 454 (Chambers).

[13] This Court should award costs to the successful party unless there is a principled reason to deprive that party of its costs: *Staley v. Squirrel Systems of Canada, Ltd.*, 2012 BCSC 954 at para. 17. The fact the successful party obtained a judgment in an amount less than the amount sought is not, by itself, a proper reason for depriving them of costs: *3464920 Canada Inc. v. Strother*, 2010 BCCA 328 at para. 43. Mr. Justice Goepel explained when trial judges can depart from the general rule of costs to the successful party at para. 49 of *Loft*:

The fact that a party has been successful at trial does not however necessarily mean that the trial judge must award costs in its favour. The rule empowers the court to otherwise order. The court may make a contrary order for many reasons. One example is misconduct in the course of the litigation: *Brown v. Lowe*, 2002 BCCA 7, 97 B.C.L.R. (3d) 246. Another is a failure to accept an offer

to settle under Rule 9-1. A third arises when the court rules against the successful party on one or more issues that took a discrete amount of time at trial. In such a case the judge may award costs in respect to those issues to the other party under Rule 14-1(15): *Lee v. Jarvie*, 2013 BCCA 515. Such an order is not a regular part of litigation and should be confined to relatively rare cases: *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27, 77 B.C.L.R. (4th) 142; *Lewis v. Lehigh Northwest Cement Ltd.*, 2009 BCCA 424, 97 B.C.L.R. (4th) 256. Whether a judge will order otherwise in any particular case will be dependent upon the circumstances of that individual action.

- [14] A plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the Small Claims Act, R.S.B.C. 1996, c. 430, is not entitled to costs, other than disbursements, unless the court finds there was sufficient reason for bringing the proceeding in the Supreme Court and so orders: R. 14-1(10). The words "sufficient reason" should be interpreted with restraint and not in an expansive manner: *Gradek v. DaimlerChrysler Financial Services Canada Inc. and Fletcher*, 2011 BCCA 136 at para. 20. However courts may exercise discretion to consider factors other than likely quantum in considering what is "sufficient" in the circumstances: *Gradek* at para. 20.
- [15] The burden is on the plaintiff to establish sufficient reason by showing proof of persuasive and compelling circumstances for bringing the action in Supreme Court, measured on an objective standard: *Gehlen v. Rana*, 2011 BCCA 219 at paras. 32 and 37. Sufficient reason has been found where it was not plain and obvious that the cause of action would fail at the time the action was initiated and the plaintiff's claim could have reasonably resulted in an award exceeding small claims jurisdiction: *Rothberger v. Concord Excavating & Contracting Ltd.*, 2015 BCSC 729 at para. 92.
- [147] The only item that Mr. Abboud was successful on was the return of the security deposit with interest. He was unsuccessful on every other claim.
- [148] Since the return of the security deposit was well within the small claims jurisdiction and he was unsuccessful on every other item claim, I decline to make any order of costs to Mr. Abboud. In respect to the respondent, he was successful on every one of the items except the return of the security deposit. I would order that the respondent recover 90% of his costs at tariff B of the petition and of the Supreme Court action.
- [149] The respondent is entitled to setoff his costs award against the award to Mr. Abboud.

"Forth J."

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