

CANADA / JUDGMENT

Mason v. Mansion House Estates Ltd.

2021 BCSC 2465

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 2465 Mason v. Mansion House Estates Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mason v. Mansion House Estates Ltd.,

2021 BCSC 2465

Date: 20211220

Docket: S216918

Registry: New Westminster

Between:

Robert Mason

Plaintiff

And

Mansion House Estates Ltd., Carol Ciprut, Frank Eberlein, Nancy Higgs, Dorothy Keung, Louis Klessens also known as Lou Klessens, Patrick Le Cefr, Catherine Oi Ying So, Shiela Wenzel, John Doe I, John Doe II, John Doe III and John Doe IV

Defendants

- and -

Docket: S198446

Registry: Vancouver

Between:

The Mansion House Estates Ltd.

Petitioner

And

Robert C. Mason

Respondent

Corrected Judgment: The text of the judgment was corrected on July 4, 2022

Before: The Honourable Mr. Justice Schultes

Reasons for Judgment

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Ashleigh K. Hall

Place and Date of Hearing:

New Westminster, B.C.

February 21, 2020

January 29, 2021

Place and Date of Judgment:

New Westminster, B.C.

December 20, 2021

Introduction

- [1] These applications arise in the course of a dispute between Mansion House Estates Ltd., a business corporation that operates an apartment building in Vancouver in which its shareholders are entitled to reside, and Robert Mason, who is one of its shareholders and the leaseholder of a specific unit.
- [2] In New Westminster S216918, Mansion House is applying to strike Mr. Mason's most recent notice of civil claim against it and numerous personal defendants[1] who are involved in its operation. In turn, Mr. Mason is applying to have the action that was commenced by that notice of civil claim heard together with a petition that Mansion House has brought against

him as Vancouver S198446, with the petition being converted to an action and put on the trial list for that purpose. He also seeks a waiver of the implied undertaking with respect to the previous actions between the parties, which were settled.

Background

- [3] Although Mansion House resembles a strata corporation in its functioning, it is incorporated under the provincial Business Corporations Act ("BCA"), and is subject to the usual governance of a business corporation. Its shareholders are also leaseholders of particular units in the building. Occupancy is governed by an agreement among the shareholders known as the "House Rules", which are then enforced by the corporation. It is open to the shareholders and directors to vote to end the tenancy of a shareholder. That occurred with respect to Mr. Mason's tenancy in 2019.
- [4] Mr. Mason purchased his shares in Mansion House and entered into the lease for his unit in 2000. A dispute arose between him and Mansion House about a solarium and a shed on his unit's rooftop patio, which Mansion House wished to remove. This dispute led to several court actions, and to the imposition of fines and other sanctions on Mr. Mason by Mansion House.
- [5] In 2018, the parties entered into a settlement agreement that was intended to resolve the two previous actions brought by Mr. Mason and a previous petition that had been brought by Mansion House. There was also a consent dismissal of those proceedings. Mr. Mason says that he complied with his obligations under the agreement but that Mansion House, contrary to an implied term of it, continued to harass him. He filed the notice of civil claim that is in issue in this application in 2019. It was drafted by his previous counsel. Mansion House then filed its petition pursuant to s.19 of the Commercial Tenancy Act ["CTA"], seeking to end his tenancy.
- [6] Following an application on September 30, 2019, Justice Skolrood set a hearing pursuant to section 19 of the CTA "to determine whether [Mr. Mason] holds possession against the right of [Mansion House] and whether [Mr. Mason] has wrongfully refused to go out of possession, having no right to continue in possession ". Such an order is to be made under that section when "it appears to the court [on the basis of an affidavit filed by the petitioner] that the tenant wrongfully holds and the landlord is entitled to possession", at which point he will set a hearing to determine the matters referred to in the order.
- [7] During the hearing of the present applications, Mr. Mason's counsel provided a draft amended notice of civil claim. It removes the claims for defamation and abuse of process that are found in the existing notice, deletes certain passages and entire paragraphs, reorganizes order of the paragraphs, and adds additional facts in support of the claims. His counsel had not yet filed at the time of the applications because Mansion House's counsel still objected to it in its amended form, and he did not wish to waste his single opportunity under the Supreme Court Civil Rules to amend it without leave, when it was going to be subject

to an application to strike in any event.

- [8] Despite it not being filed, Mansion House's counsel agreed that I could consider this draft notice when deciding whether the objectionable portions of the current one are capable of being amended, and in particular whether Mr. Mason has still failed to plead some of the claims correctly in his second attempt.

Striking Parts of the Notice of Civil Claim

General Principles

- [9] The relevant portions of Rule 9-5 provide:

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
 - (a) it discloses no reasonable claim or defence, as the case may be,
 - (b) it is unnecessary, scandalous, frivolous or vexatious,
 - (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
 - (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

- (2) No evidence is admissible on an application under subrule (1) (a).

- [10] It is also worth noting that Rule 3-1(2) provides, in part:

- (2) A notice of civil claim must do the following:
 - (a) set out a concise statement of the material facts giving rise to the claim;
 - (b) set out the relief sought by the plaintiff against each named defendant;
 - (c) set out a concise summary of the legal basis for the relief sought

- [11] For the purposes of this application, there is no real dispute about the meaning of these provisions.

- [12] Dealing first with applications pursuant to 9-5(1)(a) Justice Fisher explained in *Willow v. Chong*, 2013 BCSC 1083 that:

- [18] The test for striking a claim as disclosing no reasonable claim under Rule 9-5(1)(a), set out in *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 and reiterated more recently in *R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, is whether it is "plain and obvious," assuming the facts pleaded are true, that the claim discloses no reasonable cause of action, has no reasonable prospect of success, or if the action is "certain to fail." If there is a chance that the plaintiffs might succeed, then they should not be "driven from the judgment seat."...

- [13] This analysis includes a consideration of the pleadings as they might be amended: *Kripps v. Touche Ross & Co.*, (1992) 69 B.C.L.R. (2d) 62 at para.68.
- [14] In *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465, Justice Voith summarized some additional key points:
- [21] In *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 at 25, 1988 CanLII 3036 (C.A.), the Court said that in order to strike out a pleading on the ground that it discloses no reasonable cause of action the case must be "perfectly clear". In *Imperial Tobacco Canada* at paras. 19-20, the Court said that R. 9-5(1)(a), or its predecessor provision, served the "valuable housekeeping measure" of weeding out "hopeless claims" from those that have "some chance of success".
- [22] The authorities are also consistent in directing that a court, on an application to strike a statement of claim as disclosing no reasonable cause of action, is required to read the statement of claim generously and to accommodate inadequacies in form that are merely the result of drafting deficiencies: *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at para. 143; *British Columbia/Yukon Association of Drug War Survivors v. Abbotsford (City)*, 2015 BCCA 142 at para. 15; *Thompson v. Webber*, 2010 BCCA 308 at para. 41, leave to appeal to SCC ref'd, 33825 (23 December 2010).
- [15] As Voith J.A. further explained:
- [25] For a cause of action to be properly advanced, the elements of the cause of action must be set out, the material facts that ground those various elements of the cause of action must be concisely stated, and the relief that is sought must be available for the specific cause of action advanced.
- [16] Voith J.A. cited the explanation of what constitutes a material fact in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, in which Justice Binnie said that:
- 54 A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common
- [17] Pleadings may be struck on this basis with or without leave being given to amend them.
- [18] With respect to 9-5(1)(b), Fisher J. explained in *Willow* that:
- [20] a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] BCJ No. 2160 (SC (in chambers)); *Skender v. Farley*, 2007 BCCA 629. [at para. 20 (CanLII)]

[19] This reasoning was cited by the Supreme Court of Canada in *Nevsun* at para.65.

[20] As to 9-5(1)(c), Justice Forth set out the requirements for its application in *Grosz v. Royal Trust Corp. of Canada*, 2020 BCSC 128:

64 Under R. 9-5(1)(c), a pleading is "embarrassing" where it is so irrelevant that it will involve the parties in useless expense or where the pleadings are so confusing that it is difficult to understand what is being pleaded: *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress* (1999), 36 C.P.C. (4th) 266 (S.C.) at para. 47. A pleading is prejudicial where it fails to identify the cause of action, contains irrelevant material, or is intended to confuse: *Camp Development Corporation v. Greater Vancouver (Transportation Authority)*, 2009 BCSC 819 at para. 27, *aff'd* 2010 BCCA 284.

[21] Fisher J. also addressed the requirements for striking a claim for an abuse of process under 9-5(1)(d) in *Willow*:

[21] Abuse of process under Rule 9-(5)(1)(d) or the court's inherent discretion is a flexible doctrine. It allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice...A claim may be struck as an abuse of process where it is an attempt to re-litigate an issue that has already been decided

[22] Finally, *Mercantile Office Systems Private Ltd. v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 offers a helpful overview of the correct approach to drafting pleadings, which in turn assists in assessing their sufficiency. Addressing the chambers judge's assertion that a pleading is a "factual narrative", Voith J.A. explained:

[43] Once again, elements of the judge's assertions are accurate. Drafting a pleading is not a mathematical exercise. It involves the exercise of judgment and it requires some degree of flexibility. This is reflected, for example, in R. 22-3(1) [which allows the required forms for filing pleadings to contain "variations as the circumstances of the proceeding require"] and in the numerous decisions where judges have considered the adequacy of a pleading. In addition, R. 1-1(2) confirms that, unless a contrary intention appears, the Interpretation Act, R.S.B.C. 1996, c. 238, applies to the Rules. Section 8 of the Act confirms that every enactment is to be construed as remedial and be given such "fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[44] Nevertheless, none of a notice of claim, a response to civil claim, and a counterclaim is a story. Each pleading contemplates and requires a reasonably disciplined exercise that is governed, in many instances in mandatory terms, by the Rules and the relevant authorities. Each requires the drafting party to "concisely" set out the "material facts" that give rise to the claim or that relate to the matters raised by the claim. None of these pleadings are permitted to contain evidence or argument.

[Emphasis added]

Positions**Mansion House**

- [23] The first concern expressed by Mansion House is with respect to paragraphs 14 to 40 of the current notice of civil claim. Under the heading of "Procedural History" the notice sets out Mr. Mason's characterizations of the parties' disputes since 2001, ending with in the filing of a petition by Mansion House in 2017. Paragraph 41 then sets out the terms of the settlement agreement that resolved the outstanding proceedings.
- [24] Mansion House submits that these paragraphs leading up to the description of the settlement agreement are an abuse of process, because they seek to rely on events that are res judicata as a result of the settlement agreement and the consent dismissal of all of the proceedings. Even if, as Mr. Mason indicates in his application response, these events have been set out in the notice only for the purposes of providing context, and to show the measure of damages that should flow from a breach of the settlement agreement, and even if none of the causes of action currently being pursued depend on them, they are still irrelevant, embarrassing, scandalous, and vexatious as those terms have been defined in the authorities cited above, and should be struck. In the case of the damages for the breach, that is because the measure of damages will be the amount needed to put Mr. Mason in the same position as if the agreement had been complied with - an analysis that does not depend on the procedural history.
- [25] A further practical problem is that if the implied undertaking with respect to the previous actions is waived, as Mr. Mason seeks in the companion application, Mansion House could find itself having to produce 17 years' worth of documents that are irrelevant to the present claims.
- [26] Turning to the specific causes of action, Mansion House asks that the claims for defamation and abuse of process, which have been deleted from the amended notice, be struck from the current one. Counsel also notes that while there is a reference in the "Legal Basis" section of the notice to the "disparity of power" between the parties creating a fiduciary duty on Mansion House's part towards Mr. Mason, no material facts have been pleaded in support of such a duty, and in his application response Mr. Mason does not list it as one of the claims he is pursuing in the draft amended notice. As a result, Mansion House submits that it should be struck as well.
- [27] The claims that Mr. Mason says in the application response that he is still pursuing are for breach of the settlement agreement, oppression, trespass and conspiracy.
- [28] The problem with the breach allegation, according to Mansion House, is that two of the three breaches alleged in the "Statement of Facts" section are not based on actual terms of the settlement agreement. Mr. Mason alleges that Mansion House failed to complete repairs to the roof, whereas it was only required to use its "best efforts" to do so, by a specified date. What is worse, its alleged breach by failing to repair the patio "to the quality it was prior to

the commencement of the renovation work" is not supported by any term of the agreement. (Mansion House accepts that the third breach does relate to a specific term, and can remain.) Lastly under this heading, there is no mention of any damages flowing from the breaches, which is a required element.

- [29] The first difficulty with the oppression claim that Mansion house identifies is that Mr. Mason has set out particulars of what is described as Mansion House's "oppressive and wrongful conduct". It is not specified whether the wrongful aspect relates to the oppression claim, or one of the others. In view of the number of different participants that Mr. Mason has taken action against, his general lack of care in supporting his claims, and the fact that these paragraphs in the draft amended claim are used in the current notice to support the breach of the settlement agreement, this wording is said to introduce an unacceptable level of uncertainty.
- [30] A more basic problem is that s. 227 of the Business Corporations Act requires an oppression remedy to be sought by means of a petition (although there is provision in the Rules for a petition to be converted to an action in appropriate circumstances.) If the oppression claim is allowed to stand despite this procedural obstacle, Mansion House submits that it must then be pleaded "with some degree of precision".
- [31] The trespass claim is based on the allegation that a member of the Mansion House board "took steps to enter [Mr. Mason's unit], or otherwise spoof a call from the plaintiff's phone number and call the 9-1-1 emergency line", resulting in police attendance. Mansion House points out that it is not alleged that one of the defendants actually entered the unit, which is contrary to the requirements that a trespass be direct, intentional or negligent and physical (*Shaman v. Meek*, 2019 BCSC 9 at para.131, citing Philip H. Osborne, *The Law of Torts*, 4th ed. (Toronto: Irwin Law, 2011) at 296-298). Thus, this claim is unsupported by the required material facts.
- [32] The further difficulty created by this claim is with respect to the numerous named personal defendants in the current notice of civil claim.[2] Quite aside from being unable to assert that anyone actually entered his unit, there is no basis on which any of the named defendants can determine what they are supposed to have done. Adding to this confusion, the trespass is alleged to have been committed by "the Board of [Mansion House] or one of its agents". In this regard, counsel reminds me of the admonition of Chief Justice McLachlin at para. 22 of *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45 that, whether or not a plaintiff is in a position to prove the facts that give rise to liability at the time they file their notice of civil claim, it is still required to plead such facts.
- [33] The last claim is with respect to conspiracy. While here are no facts alleged to support it in the current notice, the draft amended notice contains two paragraphs under that heading. They allege that (1) Mansion House implemented house rules that it knew Mr. Mason would have difficulty complying with, because of conditions that Mansion House itself had created; and (2) "in particular" two named shareholders worked "in concert" to misrepresent facts to

other shareholders, so that the other shareholders would oppose Mr. Mason's application to the Vancouver Board of Variance for permission to build a new solarium, which failed as a result.

- [34] Mansion House submits that neither of the ways in which this tort can be established - the so-called "simple motive" and "unlawful conduct" conspiracies - are supported by these facts, including the requirement that damages were caused by the defendants' conduct. To demonstrate the required elements that are missing here, counsel relied on the summary of the law that was provided by Justice Williams in *Alexis v. Drury*, 2017 BCSC 674, which included this helpful passage from *Harris v. GlaxoSmithKline Inc.*, 2010 ONSC 2326,
- [74] In Canada, the tort of conspiracy can be committed in two discrete ways that may arise on the same set of facts; namely, (1) by two or more persons using some means (lawful or unlawful) for the predominate purpose of injuring the plaintiff; and (2) by two or more persons using unlawful means with knowledge that their acts were aimed at the plaintiff and knowing or constructively knowing that their acts would result in injury to the plaintiff. The other elements of the tort of conspiracy are: (a) an agreement to injure between two or more persons; (b) acts in furtherance of the agreement to injure; and (c) the plaintiff suffering damages as a result of the defendants' conduct.
- [35] In addition to these deficiencies in the specific causes of action, Mansion House argues that paragraphs 1-5 and 8-11 of the "Legal Basis" are essentially argument, and should be struck on that basis

Mr. Mason

- [36] In overview, he stresses the "generous and non-technical" approach that should be taken to amendments that "are necessary to determine the real question between the parties, considering always the interests of justice": *Century Services Inc. v. LeRoy*, 2015 BCCA 120 at para. 10. Any identified deficiencies in the pleadings should be addressed with those principles in mind.
- [37] He does not accept that there was no basis for the abuse of process and defamation that are omitted from the draft amended notice. He emphasizes that he has simply chosen not to maintain them.
- [38] As Mansion House's submissions anticipated, he argues that the paragraphs preceding the description of the settlement agreement provide necessary context, without which the terms of the settlement and the manner in which it was breached would not be comprehensible. With respect to any of his claims being *res judicata* because of the settlement and the consent dismissals, he stresses that all the actual claims in this notice arise from actions by Mansion House that post-date those events.

- [39] As to the alleges breaches themselves, he submits that Mansion House's failure to complete the roof repairs clearly includes the term of the agreement that it "use all best efforts" to complete them by a date that has since passed.
- [40] Mansion House's argument that his reference to "wrongful" conduct in conjunction with the oppression claim causes confusion is unsustainable, Mr. Mason points out, in light of the definition of oppressive conduct as that which is "burdensome, harsh or wrongful": Walker et al. v. Betts et al., 2006 BCSC 128 at para. 80. In other words, I took it, there could be no other possible type of conduct to which "wrongful" could be understood to refer to.
- [41] While acknowledging that oppression claims are "typically" brought by petition, Mr. Mason notes that if he had done that there would then be three outstanding proceedings, and the oppression claim actually overlaps with the trespass and conspiracy claims that are properly part of this action, in that they all arise from the undermining of efforts to build a new solarium. In those circumstances it would be impractical to require him to commence a petition, only to apply to have it consolidated with the other two. He refers to the decision in Madco Investments Ltd. v. Western Tank & Lining Ltd., 2017 BCSCC 219 at para. 53, where it was noted that "the Rules themselves expressly contemplate occasions on which matters raised in a petition may be more appropriately resolved by way of a trial (Rule 22-1(7)(d)) " and that it was not necessary in that case "to superimpose on the Claim the procedural requirements (and limitations) that are ordinarily attached to a petition." (However, I note that in that case the opposing parties had withdrawn their application to strike the oppression claim on the basis that it should have been brought as a petition.)
- [42] With respect to the trespass claim, Mr. Mason says that it is taking issue with "semantics" to focus on the words "took steps to" in relation to the entry of his property for the 911 call and argue that there are no facts pleaded that constitute the required physical entry. If necessary, those words could simply be deleted. And while the reference to spoofing might well support some other claim, the part of the relevant paragraph that alleges a trespass is complete as currently pleaded.
- [43] Turning to the conspiracy, Mr. Mason submits that all of the elements of the "lawful act" variety of conspiracy have been properly pleaded here, arising from the attempts of the two specific shareholders and the board of directors generally in opposing the new solarium. The very background facts that Mansion House says should be deleted show clearly the importance of the solarium to him, and that interference with his ability to build it would cause significant injury to him.
- [44] As to the failure to name other specific defendants and their roles, beyond the two named shareholders involved in the conspiracy, he explains that it is "not really practical" for him to name every individual defendant as a co-tortfeasor.

Discussion

- [45] First of all, I will base my consideration of the adequacy of Mr. Mason's pleadings on the draft amended notice, since it represents his most recent efforts to present his claims. I do not agree with Mansion House, however, that any remaining deficiencies should necessarily be struck without leave to amend because this is his second attempt at pleading them correctly. That question is still to be resolved based on whether the amended notice discloses claims that are capable of amendment, whether or not that has been attempted so far.
- [46] I agree with Mansion House that the majority of the "Procedural History" section serves no useful purpose in advancing the current claims. While it was necessary in order to understand the allegations arising from the settlement agreement to know that disputes between Mr. Mason and Mansion House about the solarium and the shed led to the three proceedings that were resolved by the agreement, these paragraphs go well beyond that necessary background, to revisit those disputes in considerable detail, and in language that would leave one with the impression that they relate to active claims. As a result, they are more than a harmless irrelevance - they are an active distraction from the essential focus on the material facts of the actual claims in issue. One could describe them as irrelevant, scandalous or embarrassing as those terms have been defined in the cases. Accordingly, paragraphs 14 to 40 are struck, with leave to amend by replacing them with a concise description of the existence of the dispute, its subject matter, and the fact that it resulted in the three proceedings.
- [47] On the breach of the settlement agreement itself, I cannot accept Mr. Mason's argument that the assertion that Mansion House failed to complete the roof repairs necessarily includes a failure to use its best efforts to do so. Therefore, sub-paragraph (43(a)) is struck with leave to amend to allege a breach that is based on the language of the agreement. His counsel did not address sub-paragraph 43(b) - the failure to repair the patio to its previous quality - in his submissions, which I took to be an acknowledgment that there was no term, express or implied, requiring Mansion House to do so. It will also be struck, but without leave to amend.
- [48] Finally under this heading, it is incorrect to assert, as Mansion House does, that the paragraphs alleging the breaches do not indicate that damages flowed from them. The consequences of each breach are described in their respective paragraphs, which link clearly enough with the claim for damages arising from them under "Relief Sought". I would not have struck any of them on that basis.
- [49] The inclusion of "wrongful" in the heading of the oppression section is unnecessary - the wrong in question does not have to be defined legally in the "Statement of Facts" - and given the rather vague manner in which some of the claims are raised it could well cause confusion in framing an appropriate response. It will be struck, without leave to amend.

- [50] More fundamentally, Mr. Mason has advanced no real basis other than convenience to include the oppression claim in this action. If that were sufficient, there would be little need for Rule 22-1(7). In fact, an application to have a trial of a petition pursuant to the Rule is not a foregone conclusion, depending as it does on the identification of "bona fide triable issues" of fact or law, unless the applicant is "bound to lose": *British Columbia (Milk Marketing Board) v Saputo Products Canada G.P./ Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247 at paras. 45-46. It is not appropriate to anticipate the outcome of such an application in the course of deciding the present one, and proportionality, important as it is, is not a licence to circumvent legislative requirements. Accordingly, paras. 44-47 are struck, with leave to bring them in the form of a petition, except for subparagraphs 44.f.-j., which are relied on in support of the trespass claim.
- [51] Those trespass allegations are sufficient as pleaded. To say that a board member or one of their agents "took steps" to enter Mr. Mason's unit is not as direct a description as one might prefer, but it does not undermine the basic assertion that one of them physically entered. Mr. Mason has chosen to add the alternative that his phone number was "spoofed" (which I take notice refers to a practice of using one phone number to imitate a call from another), an allegation that is not currently grounded in any recognized tort, but that is a self-regulating deficiency, in the sense that if he fails to prove physical entry as a conventional trespass the claim will not be made out[3]. I do not see how its inclusion could confuse Mansion House in its response.
- [52] The conspiracy claims are also adequate in their present form. It would be preferable to amend paragraph 48 - in which "the [d]efendants" are said to have "proposed and implemented" House Rules that Mr. Mason could not comply with - to explicitly assert that they agreed to carry out that action against him, but I think that is sufficiently implied by the role the personal defendants in Mansion House's governance, which necessarily operates by means of the directors' and shareholders' actions. I would not strike it on that basis.
- [53] The allegation of the two particular named defendants working in concert to thwart approval of the solarium in paragraph 49. is also sufficiently clear as pleaded.
- [54] Further, the damages alleged to have resulted to Mr. Mason from each agreement seem obvious, and clearly arise from the language used in their respective paragraphs: being set up for needless rule violations in para. 48, and being unable to rebuild his solarium in para. 49.
- [55] As to Mansion House's confusion about which personal defendants are alleged to have committed each of the relevant acts, I think that this is a function of a larger problem in the draft amended notice. It specifically names only the two shareholders who are said to have engaged in the second conspiracy as parties, along with "the Board of Directors" of Mansion House, which is not a separate legal entity. Within the notice itself it lists the members of the "present board of directors" (who are named individually as parties in the current notice) without making it clear whether they were its members at the material times. It then

describes the four John Doe defendants as "members of [Mansion House], agents of these members or other people who have contributed to the wrongful conduct against the plaintiff "

- [56] This is not a correct approach. There is nothing wrong with being unable to say which members of a group of named defendants participated in a specific act, as long as there is some basis to connect each of them with it. There is also nothing wrong with naming a John Doe defendant to represent a person who engaged in tortious acts but whose identity is not known. However, this pleading conflates these two distinct kinds of defendant. Further compounding this problem, the pleading uses "the Defendants" "MHE" (Mansion House), "the Board" seemingly interchangeably, in addition to the "member of the Board of MHE or one of its agents" who are alleged to have committed the trespass, and the two named shareholders who are alleged to have fomented opposition to the new solarium.
- [57] I will not strike the balance of the notice on this basis however, because the existing one naming the board members individually at least leaves open the possibility that they are being held liable in their personal capacities, and that their actions also underlie the liability of Mansion House. Mr. Mason would be well advised to address the lack of clarity surrounding this issue in whatever amended notice is eventually filed.
- [58] Next, while the draft amended notice has removed some of the impugned paragraphs from the "Legal Basis" section, paragraphs 1-3 and 11 remain. They seek to persuade the reader that Mansion House should not:

- Have its petition remedy before Mr. Mason's claims have been adjudicated;
- Be able to shield itself behind the implied undertaking;
- Take advantage of its status as a business corporation; or
- Rely on a settlement agreement that it intentionally breached.

These paragraphs are pure argument, and do nothing to fulfil the intended purpose of the section. They are struck, with leave to file replacement paragraphs that properly address the legal basis of the remedies that are being sought.

- [59] Finally, I would not strike the abuse of process and defamation claims that Mr. Mason says he is not proceeding with and has deleted from the draft notice, or the breach of fiduciary duty claim that is referred to in the amended notice but was not addressed in the application response or in submissions. I think it is appropriate to accept his counsel's submissions that he does not intend to rely on them. If they resurface in any future applications to amend they can be dealt with on their merits at that point.

Converting Mansion's House's Petition to an Action and Hearing it with Mr. Mason's Action

General Principles

Ordering a Petition to the Trial List

- [60] As I have indicated in relation to the previous application, the governing authority on this issue is the decision of the Court of Appeal in Saputo, which held:
- [44] In Robertson [v. Dhillon, 2015 BCCA 469], the Court set out the test to determine whether a petition should be converted to a trial:
- [55] On the hearing of a petition, a judge must be satisfied that there is no dispute as to the facts or law which raises a reasonable doubt or which suggests that there is a defence that deserves to be tried: Douglas Lake Cattle Co. v. Smith (1991), 54 B.C.L.R. (2d) 52 (C.A.) at 59. If such a dispute exists, the judge may refer the matter to the trial list, pursuant to R. 22-1(7) (former R. 52(11)(d)).
- [56] The test is not that used to determine a summary trial. Rather it is akin to that on an application for summary judgment under R. 9-6. Mr. Justice Lambert summarized the task in Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd. (1984), 55 B.C.L.R. 137 (C.A.) at 138-39:

We were referred by counsel for T & A Holdings Ltd. to the judgment of Esson J. (as he then was) in Progressive Const. Ltd. v. Newton, 25 B.C.L.R. 330, [1981] 2 W.W.R. 741, 117 D.L.R. (3d) 591 (S.C.), and particularly at p. 334. There Esson J. summarizes, in my opinion, accurately, the law in relation to establishing a defence on an application for summary judgment in these words [pp. 334-35]:

The cases do not establish an invariable rule as to what steps must be taken to resist a R. 18 application for summary judgment. On all such applications the issue is whether, on the relevant facts and applicable law, there is a bona fide triable issue. The onus of establishing that there is not such an issue rests upon the applicant, and must be carried to the point of making it "manifestly clear", which I take to mean much the same as beyond a reasonable doubt. If the judge hearing the application is left in doubt as to whether there is a triable issue, the application should be dismissed.

In essence, if the defendant is bound to lose, the application should be granted, but if he is not bound to lose, then the application should be dismissed.

[Emphasis added.]

- [46] [A]s noted in Robertson, the test for determining whether a matter should be converted into an action is not that used to determine suitability for a summary trial, but rather is akin to that on application for summary judgment under Rule 9-6. The suggestion in Boffo [Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc., 2009 BCSC 1701] that the mere existence of a bona fide triable issue is not in itself sufficient to warrant conversion to the trial list is, with respect, contrary to the test for converting a matter to an action established in this Court.

- [47] I would note the fact that a matter is converted to an action does not necessarily mean that a full trial will be required. It still remains open to the parties to bring a summary trial application under Rule 9-7.

Hearing Trials Together

- [61] These principles were summarized by Justice MacDonald in *Raymond James Investment Counsel Ltd. v. Clyne*, 2018 BCSC 720:
- [36] In *Hui v. Hoa*, 2012 BCSC 1045 (B.C. S.C.) [Hui], Master MacNaughton (as she then was) outlined the law regarding joinders:
- [33] The law with respect to when two proceedings should be tried together was helpfully summarized by Master Shaw in *Egan v. ICBC*, 2010 BCSC 1042. Briefly, there are two questions which must be answered. The first involves considering whether the two proceedings involve common claims, disputes and relationships. As set out in *Merritt v. Imasco Enterprises Inc.*, (1992) 2 C.P.C. (3d) 275, that determination is made on a review of the pleadings.
- [34] The second question is whether the two proceedings are so interwoven as to make separate trials at different times before different judges undesirable and fraught with problems and expense. This question involves considering a number of factors including whether trial together will:
- a) create a saving in pre-trial procedures;
 - b) reduce the number of trial days;
 - c) seriously inconvenience a party by being required to attend part of a joined proceeding in which they may have little or no interest;
- [35] Other factors to be considered are whether:
- a) one of the proceedings is at a more advanced stage than the other;
 - b) trial together will result in a delay of the trial of one of the proceedings and the prejudice of that delay outweighing the potential benefits of trial together;
 - c) there is a risk of inconsistent findings on identical issues; and
 - d) one party might be deprived of their right to a jury trial.
- [38] When considering joining actions, the court must determine whether the degree of commonality and intertwining of issues outweighs the prejudicial factors raised by the party opposing the order: *Simmonds v. Victoria (City)*, 2016 BCSC 951 (B.C.S.C.) at para. 25; *Liu* at para. 4.

- [39] An order for joinder does not require the applicant to prove that the commonality in issues and parties means that the disposition of one action will necessarily dispose of the issues in the other: Liu at para. 3; Peel Financial Holdings Ltd. v. Western Delta Lands Partnership, 2003 BCSC 784 (B.C. S.C.) [Peel] at paras. 27-32.
- [40] Master Keighley has described the test as "will the order make sense in the circumstances": Sohal Estate v. Argitos, 2010 BCSC 916 (B.C. S.C.) at para. 22.

Waiver of the Implied Undertaking

- [62] Justice Barrow concisely the essential elements of this undertaking in Insurance Corp. of British Columbia v. Titanich, 2010 BCSC 403:
- [13] In Juman v. Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc., [2008] 1 S.C.R. 157, 2008 SCC 8 (S.C.C.) [hereinafter Juman], Binnie J. addressed the scope of the implied undertaking and its underlying rationale. At para. 4, he wrote:
- [4] Thus the rule is that both documentary and oral information obtained on discovery, including information thought by one of the parties to disclose some sort of criminal conduct, is subject to the implied undertaking. It is not to be used by the other parties except for the purpose of that litigation, unless and until the scope of the undertaking is varied by a court order or other judicial order or a situation of immediate and serious danger emerges.
- [14] The rationale for the rule is, in part, to promote complete and candid oral and documentary discovery which, in turn, advances the orderly and effective administration of justice. It does that by providing the litigant making discovery with some confidence that the material produced will be used only for the purpose of securing justice in that proceeding.
- [63] Juman itself provides further practical guidance on the circumstances under which it will be waived:
- [35] For example, where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually non-existent and leave will generally be granted
- [36] On the other hand, courts have generally not favoured attempts to use the discovered material for an extraneous purpose, or for an action wholly unrelated to the purposes of the proceeding in which discovery was obtained in the absence of some compelling public interest
- [38] As stated, the onus in each case will be on the applicant to demonstrate a superior public interest in disclosure, and the court will be mindful that an undertaking should only be set aside in exceptional circumstances

[Emphasis added]

Mr. Mason

- [64] He focused his submissions on the suitability of these two matters being heard together, treating the conversion of the Mansion House petition to an action simply as a procedural step that is necessary to accomplish that goal.
- [65] He argues that his action and Mansion House's petition are so factually interwoven that a joint trial is appropriate. Crucially, the parties are the same in both, despite the naming of the directors in the action, and the punitive fines and contraventions of the House Rules that form the basis of the oppression remedy he seeks (which I have ordered must be dealt with by a petition) are also the basis of Mansion House's petition to end his tenancy. Further, if the oppression remedy is successful, the court will have a wide discretion to address the conduct, including by varying or setting aside resolutions that Mansion House is seeking to enforce.
- [66] Maintaining separate hearings creates a real danger that Mansion House could succeed in having Mr. Mason give up possession and forfeit his shares, only for him to demonstrate in a subsequent proceeding that its actions in doing so were improper.
- [67] Mr. Mason also points out that the minimal prejudice cause by delaying the hearing of Mansion House's petition to schedule a joint trial would be more than compensated for by being able to pursue joint pre-trial discovery procedures, and ultimately only having to hold one hearing for both proceedings.
- [68] Assuming his action proceeds together with the converted petition, he also seeks waiver of the implied undertaking with respect to the examinations for discovery, documents and admissions in the previous actions between the parties, as well as in the converted petition action. In essence he requires these materials to show the past actions of Mansion House, including previous admissions of improper actions by board members, to advance his oppression claim. For example, there was an admission on behalf of Mansion House in his previous actions that the House Rules were changed in 2016 solely in order to obtain a set of keys to Mr. Mason's unit from him, which is an element of his subsequent alleged breaches of those rules.
- [69] He points out, as I have previously summarized, that the Supreme Court of Canada held in *Juman* that the prejudice arising from a waiver when the same parties are involved in both actions is virtually non-existent. On the other hand, if the waiver is not granted in this case, Mansion House will essentially hide behind it to shield its conduct from appropriate review.

Mansion House

- [70] In contrast, Mansion House's submissions focus on the inappropriateness of converting its petition. It stresses that the petition seeks orders that Mr. Mason wrongfully holds possession because his lease was validly terminated in July of 2019. The only relevant time frame for that purpose is between October 2018 and June 2019, when he is said to have breached the House Rules and the terms of his lease - the alleged grounds for the termination.
- [71] Most importantly, Mansion House says that the validity of the termination has been partly determined by Skolrood J.'s order setting its petition for the hearing pursuant to s.19 of the CTA.
- [72] Relying on *The Owners, Strata Plan VIS2030 v. Ocean Park Towers Ltd.*, 2014 BCSC 264, at paras. 14 and 21, Mansion House says that by succeeding in having the petition ordered to a hearing, it has established a *prima facie* case, and that Mr. Mason now bears the onus of showing why he should not be compelled to vacate. What is particularly significant for our purposes is that the judge in *Ocean Park* declined to order the matter to the trial list even though the respondent had also brought an action alleging that the termination of the lease was invalid:
- [21] The petitioner contends that the whole point of the summary proceedings under the Commercial Tenancy Act is to avoid the extensive costs associated with a trial. At a hearing of the petition the burden is upon the tenant to show cause why it ought not to be compelled to vacate the premises. The landlord is seeking to uphold the termination. The civil claim advanced by the tenant seeks a declaration that the termination was invalid.
- [22] A hearing of the petition will resolve the basic issue. It will determine whether the tenant is in breach of the lease or not. If it is, then that is the end of the matter. If it is not, then that is also the end of the matter. If the latter determination is made, the tenant could bring action for damages but that would be a discrete issue fairly easily resolved.
- [73] That was also the outcome in *Broadway-Herb Property Inc. v. Renegade Productions Inc.*, 2019 BCSC 1693, in which it was held that:
- [37] I do not consider that this matter, which relates solely to the possession of the Premises, should be referred to the trial list. None of the case law provided to me by Renegade relates to the conversion of a petition for a writ of possession brought under the CTA. The decision of our Court of Appeal in *Robertson* does not say that all petitions are required to be converted to trials when there is any arguable factual or legal defence raised. While the rules provide for discretion in that regard, it is by no means a requirement. Many legal and factual matters are determined by petition, and this Court has discretion in considering what, if any, trial processes ought to apply to a petition proceeding.

- [38] In this case, I am able to resolve the possession issue as between the parties on the basis of the materials before me in a way that does not require the resolution of disputed facts. I am satisfied that the CTA sets out a deliberate summary process for determination of possession of a commercial premises, and that this matter should proceed summarily. A determination of damages under the lease as between the parties may well require a trial, but at this point, no such action has been filed. If an action is filed, it may proceed regardless of whether the Landlord or Renegade has possession of the Premises.
- [74] Mansion House argues that there should be a similar result here. In particular, there are no bona fide triable issues that would require a trial, as opposed to the summary proceedings envisioned under the CTA. The existing affidavits provide an ample evidentiary basis to resolve the evidentiary issues and it is also unnecessary to resolve the credibility of any witnesses in a trial setting. Mr. Mason's defence is that the directors did not have the authority to terminate his lease for breaches of the House Rules, but he does not contest the subsequent termination of his lease by a vote of the shareholders. As a result, there is no real conflict in the essential evidence, only a dispute about the legal effect of the facts surrounding the termination.
- [75] In addition, Mansion House notes that Mr. Mason's affidavits do not actually identify additional evidence that would be required if the petition were heard as a trial, only his wish to engage in the available pre-trial procedures that would accompany one. It says this amounts to a fishing expedition. In any event, it will be possible for Mr. Mason to obtain such procedures by an application pursuant to s. 22-1(4) without the petition being converted, and Rule 16-1(18) establishes that any other of the Rules may be applied to a petition.
- [76] On the question of a joint trial of both matters, Mansion House questions whether there are actually any common or interwoven claims here. In the petition it seeks the narrow remedies of vacant possession of the unit, forfeiture of Mr. Mason's shares, the right to sell them, and a lien on any proceeds of the sale. This is in stark contrast to the various broad claims advanced in his action. It is also highly relevant that Mansion House's petition is at a much more advanced stage than the action. It was set for a hearing in March of 2020 (which could not be held because these applications had not been concluded), while the action has not even had its pleadings finalized yet, as the first application demonstrated.
- [77] Should it become necessary to consider it, Mansion House submits that the required public interest in the exceptional measure of waiving the implied undertaking has not yet been shown. There have only been general assertions, supported by a single example, that he wishes to rely on admissions made on behalf of Mansion House in previous actions. As a further technical (but not insignificant) consideration, it points out that he has not sought the position or consent of the individuals whose discovery evidence would actually be accessed by such a measure.

Discussion

- [78] I agree with Mansion House that the question of whether its petition should be put on the trial list is a discrete issue that must be determined before the question of hearing it together with Mr. Mason's action arises, and that the former question is not subsumed in the latter.
- [79] Fundamentally, the question is whether Mr. Mason has raised a bona fide triable issue on the petition, as it was defined in Saputo. As in the case of an application for summary judgment, I must conduct a limited review of the evidence, without weighing it (*Richter Estate v. Richter*, 2018 BCCA 238, at para. 29), and determine whether he is "bound to lose" on the issue that he seeks to raise.
- [80] When engaging in this determination, it is important to keep in mind that the question of whether the matter can be decided on the basis of affidavit evidence, with respect to issues such as credibility, only arises in the context of a summary trial - the relevant question on whether a petition goes to the trial list is the presence a triable issue: *C.M.R. v. L.F.R.*, 2019 BCCA 371 at para.11.
- [81] I should say that I do not find *Ocean Park* and *Broadway-Herb*, the cases relied on by Mansion house to be determinative of this question, as Mansion House suggests. *Ocean Park* was resolved on the question of whether a prima facie case of overholding had been made out by the landlord - the petitioner's counsel conceded that the matter should go on the trial list if it had not. *Broadway-Herb* did not directly apply the test in Saputo, only the general statement in the underlying authority of Robertson that a petition does not have to go on the trial list whenever an arguable factual or legal defence has been advanced.
- [82] However, *Ocean Park* does make the useful point that there can be situations in which a petition will resolve an issue that is common to another proceeding that the opposing party wishes to have joined.
- [83] Mansion House's petition seeks to uphold the termination of Mr. Mason's lease pursuant to directors' resolution in May of 2019, followed by a shareholders' resolution to the same effect that June. These were based on his frequent violations of the House Rules (which were found to be a breach of a material term of the lease), his failure to correct the conduct that had resulted in fines for the violations, and to pay those fines. The question is whether Mr. Mason's claim that these procedures were carried out in a manner that was unfair to him are "bound to lose"
- [84] In answering this question, one must keep additional two points in mind.
- [85] First, what is a triable issue is defined by the issues in the petition itself, not in any related proceeding. This is not Mr. Mason's application pursuant to the BCA for a finding that Mansion House's actions towards him were significantly unfair. The directors' actions are relevant to this petition to the extent that they could undermine the basis on which his lease was terminated. If he were successful in proving his oppression claims, a court might well

consider reviewing the resolutions and/or the underlying house rules and purported violations. But the fact that he is pursuing those remedies in another proceeding does not in itself create a triable issue on the petition.

- [86] With one exception, Mr. Mason's extensive allegations of wrongdoing by the board in his notice of civil claim and affidavits - including its campaign against him, its violation of the spirit of the settlement agreement and its creation of House Rules intended to create more violations - do not address the actual validity of those resolutions, in terms of how they were proposed and enacted. The exception is found in paragraph 46 of the notice of civil claim:

On June 20, 2019, the meeting was held. In this meeting, the Board falsely stated that the Plaintiff owed strata fines, was in breach of a number of rules and was uncooperative with respect to "his violations". The Board did not inform the shareholders that the Board had, since around 2002, engaged in a protracted and litigious campaign of harassment against the Plaintiff or that the alleged "house rules" had been passed only for the purpose of imposing fines on the Plaintiff, and, it seems, facilitating a means by which the Board would purport to eject the Plaintiff from his home.

- [87] While this assertion does address the process by which the shareholders' resolution was obtained, it is not clear to me that it actually raises a triable issue of fact. Based on the PowerPoint slides in the application material, which were apparently shown to the attendees at the extraordinary general meeting, and the accompanying resolution, it seems apparent that the directors did not inform the shareholders of any campaign by them against Mr. Mason. In other words, that fact is not disputed, and to the extent that it could undermine the validity of the termination his lease, a trial is not necessary to resolve that issue.

- [88] The second point is that the existence of a triable issue is based on a limited review of the evidence, not the pleadings. As Mansion House points out, there is currently no evidence beyond Mr. Mason's bare assertions (and the one excerpt from a previous examination for discovery in which a representative of Mansion House says the House Rules regarding keys was directed at him, which is not necessarily improper) that the rules that led to the accumulated fines were improperly motivated. I agree that it would not be appropriate to put the matter on the trial list only so that he can seek to obtain such evidence. As Mansion House also points out, he could seek to employ pre-trial discovery procedures to that end in the context of the existing petition.

- [89] His affidavits do contain some factual disputes about the circumstances underlying the incidents for which he was fined, but the affidavits are mainly focused on the legitimacy of the board having fined him for things that he acknowledges occurred, based on his general assertion of an improper purpose. It is not clear that any of the factual disputes that have been put forward at this point would be capable in themselves of undermining the validity of the termination resolutions, by showing an improper motivation for the underlying disciplinary action. In other words, the available evidence does not provide a basis on which a judge could go behind those disciplinary actions. As Justice Griffin explained in *Ghag v.*

Ghag, 2021 BCCA 106:

44 [E]ach side must put its best foot forward at the hearing. [A] self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 31

[90] Thus, I find that on the current record that Mr. Mason is bound to lose on his general assertion that he has been dealt with in a substantially unfair manner by Mansion House, which is the issue that relates to the relief that Mansion House seeks in its petition, and that therefore there is no triable issue that would require the petition to be transferred to the trial list. He is certainly entitled to raise the conduct of Mansion House and the directors towards him in the context of resisting its petition, as was found in *Ocean Park*, but there is currently no proper basis on which to convert it into an action.

[91] This conclusion makes it strictly unnecessary to consider whether the petition and the action should be heard together. Had it been necessary to do so, and leaving aside the fact that I have already decided that the oppression claims need to be heard as a petition, I would have concluded that while there are common parties and issues, at least in relation to the oppression claim and Mansion House's petition, it would be inappropriate to delay the hearing of the petition, which is at a much more advanced stage, when Mr. Mason can raise any concerns about the board's actions in the hearing of the Mansion House petition that he could have raised when seeking the oppression remedy. Given the relevance of the same alleged conduct that would underlie his oppression proceeding, I find the possibility of inconsistent decisions between the two proceedings to be minimal.

[92] In view of these conclusions, it is also unnecessary to consider the issue of waiving the implied undertaking.

Costs

[93] If counsel wish to address costs, they may make written submissions according to whatever schedule they find most convenient. In the absence of such submissions, my tentative view is that Mansion House should receive its costs in any event of the cause, since the issues on which it succeeded in these applications are unlikely to be moderated by the eventual outcome of any of the proceedings.

"Schultes, J."

[1] For the sake of clarity, except where specific reference to a personal defendant is required, I will refer to all of the defendants collectively as "Mansion House".

[2] The draft amended notice specifically names only the two shareholders who are alleged to have engaged in the conspiracy, and otherwise refers collectively to the board of directors of Mansion House as the remaining personal defendant, as well as four "John Doe" defendants, whose alleged actions are not specified.

- [3] In *Crema v. Apple Inc.*, 2020 BCSC 1767, Justice Matthews permitted the plaintiff to amend the notice of civil claim to make reference to the Criminal Code provisions relating to unauthorized use of a computer and mischief to data, in a case in which a form of electronic trespass was being alleged. Matthews J. found that the provisions "may provide a useful reference by which to assess the lawfulness of his allegations of common law trespass to personal property" (para.23). This suggests that the law may develop further in relation to what is currently a novel claim.
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