CANADA / JUDGMENT

Rayner v. Dhaliwal

2025 BCSC 44

COURT
Supreme Court of British Columbia

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2025 BCSC 44 Rayner v. Dhaliwal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rayner v. Dhaliwal,

2025 BCSC 44

Date: 20250113

Docket: S02954

Registry: Abbotsford

Between:

Danielle Rayner

Plaintiff

And

Harjinder Singh Dhaliwal, John Doe #1,

Quantum Properties Tamarind Westside Inc.,

Quantum Properties Inc.,

Quay Pacific Property Management Ltd.,

Elite Fire Protection Ltd.,

City of Abbotsford, Abbotsford Fire Rescue Service,

ABC Co. #1, Stantec Consulting Ltd.,

ABC Co. #3, ABC Co. #4, Westley Friesen,

John Doe #3, John Doe #4 and John Doe #5

and Pamela Ramrup

Defendants

And

Harjinder Singh Dhaliwal, John Doe #1,

Quantum Properties Tamarind Westside Inc.,

Quantum Properties Inc.,

Quay Pacific Property Management Ltd.,

Elite Fire Protection Ltd.,

City of Abbotsford, Abbotsford Fire Rescue Service,

ABC Co. #1, Stantec Consulting Ltd.,

ABC Co. #3, ABC Co. #4, Westley Friesen,

John Doe #3, John Doe #4 and John Doe #5

and Pamela Ramrup

Third Parties

Before: The Honourable Justice Gibb-Carsley

Reasons for Judgment

Counsel for the Plaintiff:

I. Ashley

Counsel for the Defendants City of Abbotsford and Abbotsford Fire Rescue Services:

T. Stone

Counsel for the Defendants Quantum Properties Tamarind Westside Inc. and Quantum Properties Inc.:

A. Delmonico

Counsel for the Defendant P. Ramrup:

F. Cabanos

N. Moallem

Counsel for the Defendant W. Friesen:

J. MacDonald

Counsel for the Defendant Quay Pacific Property Management Ltd.:

Z. Klassen

Counsel for the Defendant Elite Fire Protection Ltd.:

I. Azhar

Counsel for the Defendant Stantec Consulting Ltd.:

R. Moore

Place and Date of Hearing:

Abbotsford, B.C.

November 7, 2024

Place and Date of Judgment:

Abbotsford, B.C.

January 13, 2025

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I. Introduction

[1] On May 3, 2022, a fire occurred at a residential apartment building located in Abbotsford, British Columbia (the "Fire"). The Fire caused extensive damage and destroyed many of the units in the apartment building. As a result of the Fire, the plaintiff, Danielle Rayner, filed an action against the defendants for their alleged cause or contribution to the plaintiff's loss. As I will describe below, there have been 16 other notices of civil claim filed by tenants or owners of units in the building. Each allege that their losses were caused, in whole or in part by the defendants.

[2] In the application before me, the plaintiff seeks to convert her conventional action to a class proceeding by amending the notice of civil claim to invoke the provisions of the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA]. She contends that it is in the interests of justice to convert the action to a class proceeding to allow potential class members who might not otherwise have access to justice to participate in the litigation. She also argues that converting the matter to a class proceeding would advance judicial economy and efficiency by consolidating the claims of several individuals into one class proceeding.

[3] The plaintiff further asserts that another goal of the CPA - behaviour modification - is better achieved if the application is granted. She argues that a class proceeding can be more effective at modifying undesirable behaviour that caused the plaintiff's loss. In this case, the plaintiff alleges that a number of defendants contributed to her loss and that a class proceeding would have a greater chance of improving the future actions of the defendants, including: (i) the strata boards to enforce bylaws, (ii) the engineers to better fireproof buildings or install fire suppression systems; (iii) the municipality to improve building standards; and, (iv) the fire department to improve its response to structure fires.

[4] The defendants oppose the conversion of the action to a class proceeding and assert that there would be no judicial economy achieved by a conversion of the action to a class proceeding when compared to having the action heard (along with the other claims currently filed by individual plaintiffs related to alleged losses due to the Fire) on common evidence through a joinder of the trials. The defendants argue that the plaintiff's true motivation for applying to have her action converted to a class action is a strategy of the plaintiff - and more particularly the plaintiff's lawyer - to avoid limitation periods that would now bar other individual plaintiffs from filing claims because the now lapsed two-year limitation periods for the individual claims would cease to apply if the action is converted to a class proceeding.

[5] The core issue before me is whether after considering factors that include: the history of the proceedings; the length and reason for the delay in seeking to convert the action; the expiry of any limitation periods; the presence or absence of other prejudice to either party; and whether conversion is the preferable procedure when considered through the lens of judicial economy, access to justice, and behavior modification, the plaintiff's action should be converted from a conventional action to a class proceeding.

[6] In these reasons for judgment, I will first provide some background on the Fire as well as the procedural history of the file. I will then set out the legal principles I must apply in determining whether a conventional action should be converted to a class proceeding. Finally, I will provide my analysis and determination regarding whether in the circumstances of this case, the plaintiff's action should be converted to a class proceeding.

II. Background

[7] For context, I will now provide background of the events leading to the claim as well as the procedural history of the action.

A. The Apartment Building and the Fire

[8] As referenced above, the Fire occurred at an apartment building known as the Tamarind located at 30515 Cardinal Avenue, Abbotsford, British Columbia (the "Apartment Building"). The plaintiff asserts that the Apartment Building has 124 units. The units are individually owned and are occupied by either the owners or by individuals to whom the owners have rented.

[9] At the time of the Fire, the plaintiff was a tenant residing in Unit 407. She alleges that the Fire was caused by a cigarette and/or a propane tank on the balcony of Unit 306 or 406 of the Apartment Building. As I will describe in a moment, the plaintiff further alleges that all of the defendants, collectively, or each individually, were negligent and thus have some liability for her loss.

[10] The plaintiff alleges that as a result of the Fire, the Apartment Building was severely damaged and the residents of the Apartment Building suffered loss or damage to most or all of their possessions. Further, the tenants, including the plaintiff, were required to relocate from the Apartment Building, thus, incurring expenses.

B. The Contemplation of Legal Action

[11] On May 14, 2022, an email invitation was sent from the law firm of Bronson, Jones Gray & Company, LLP of Abbotsford, British Columbia, who is now retained as plaintiff's counsel (the "Plaintiff's Counsel") to 30 email addresses for a video call meeting scheduled for May 17, 2022. The email was sent from the address "Tamarind Class Action, tamarindlawsuit@gmail.com."

[12] The subject line of the email was, "Zoom meeting invitation - Tamarind Class Action - Lawyer intro with Jason Jones". Mr. Jones is a partner at Bronson Jones Gray & Company, LLP. The email indicated that the recipients were invited to the video meeting and that the email should be forwarded only to those who would like to be involved in the lawsuit.

[13] On May 17, 2022, 14 days after the Fire, the video meeting occurred.

[14] On June 6, 2022, the Plaintiff's Counsel wrote a letter to at least one individual potentially impacted by the Fire, Ms. Pamela Ramrup, asking if she wished to participate in a class proceeding. I note that Ms. Ramrup was subsequently added as a defendant to the action. The letter included the following passages:

If you are an owner who had either no insurance or insufficient insurance to fully compensate you for your losses, your participation in this lawsuit may enable you to recover most of your shortfall. Even those with full insurance coverage may benefit from participating.

Should you wish to receive more information with regard to the class action process, please feel free to contact our office at [phone number] to arrange a call with Jason Jones.

C. Procedural History and Filings of Notices of Civil Claim

[15] The plaintiff filed the Notice of Civil Claim on October 3, 2022 (the "NOCC" and the "Tenant Action"). On November 22, 2023, the NOCC was amended by order of Associate Judge Krentz to add and substitute parties (the "Amended Claim"). Both the NOCC and the Amended Claim were filed by the Plaintiff's Counsel.

[16] In the Amended Claim, the plaintiff alleges that she suffered sustained loss, damage, and expense as a result of the Fire. The plaintiff asserts that the defendants caused or contributed to her loss. While I need not go into detail about the allegations in the Amended Claim, the plaintiff contends that the following defendants caused or contributed to her loss in the following manner:

a) The defendants Harjinder Singh Dhaliwal, Ms. Ramrup, and/or John Doe 1 were negligent in smoking cigarettes or other smokable products and/or using a propane tank on the balcony of Units 306 or 406, both of which are prohibited by the strata bylaws;

b) The defendants Quantum Properties, ABC Co #1, Stantec, Friesen, and John Doe #3 were negligent in failing to construct the Apartment Building in a manner so as to prevent or reduce the spread of fire in the Apartment Building;

c) The defendants Elite, ABC Co #3, ABC Co #4, John Doe #4, and John Doe #5 were negligent in failing to perform inspections adequately or at all, representing that inspections had been completed when they had not, failing to identify the hazards posed by propane tanks on the balcony, and taking steps to ensure the hazard was addressed;

d) The defendants Quay, ABC Co #3, ABC Co #4, John Doe #4, and John Doe #5 were negligent in failing to perform their duties to manage the Apartment Building including, but not limited to enforcing the strata bylaws prohibiting smoking on the balcony and the use or storage of propane tanks on balconies of the Apartment Building;

e) The defendants the City of Abbotsford, ABC Co #1, ABC Co #4, Friesen, and John Doe #5 were negligent in failing to ensure that the Apartment Building could be provided with adequate fire suppression in the event of a fire before approving the construction of the Apartment Building, and failing to inform the residents, tenants, owners or visitors to the Apartment Building that the City did not have fire suppression tools or equipment that could battle fires originating from or involving the balconies of the Apartment Building; and

f) The defendant fire department was negligent in failing to respond in a timely way and to take all reasonable steps to extinguish or limit the spread of the Fire.

[17] On October 28, 2022, an action was commenced in the Supreme Court of British Columbia by Albert Abeeku Forson and Hanna Ama Amissah, owners of a unit at the Apartment Building (the "Owner Action").

[18] Between April 30, 2024, and May 1, 2024, 15 additional actions were filed in the BCSC Abbotsford Registry as a result of the Fire. Accordingly, there are currently 17 filed actions resulting from the Fire, consisting of the Tenant Action, the Owner Action, and the 15 additional actions filed. Plaintiff's Counsel is the counsel of record for all 17 of these actions.

III. Discussion and Analysis

[19] The parties accept that the Court has discretion to convert an action to a class proceeding. I agree. In Great Canadian Gaming Corporation v. British Columbia Lottery Corporation, 2017 BCSC 574 [Canadian Gaming], Justice Skolrood (as he then was) held that to prohibit, in any circumstance, the conversion of an action to a class proceeding by way of an amendment to the notice of civil claim would "run counter to the principles of flexibility and efficiency underlying class proceedings": para. 47. As such, it is settled law that this Court has the jurisdiction to grant the relief sought by the plaintiff in this case. The question then is whether I should exercise that discretion.

[20] In Canadian Gaming, at paras. 51 and 52, Skolrood J. helpfully articulated the factors a court should consider when determining if a regular action should be converted to a class proceeding. The non-exhaustive list of relevant factors includes:

a) the history of the proceedings;

b) the length and reason for the delay in seeking to convert the action;

c) the expiry of any limitation periods;

d) the presence or absence of other prejudice to either party;

e) the likelihood or otherwise of a proper class eventually being defined;

f) the conduct of the parties; and

g) whether conversion is consistent with, or would advance, the overriding objectives of a class proceeding, namely judicial economy, access to justice and behavior modification.

[21] Justice Skolrood also held that the significance of any one factor will vary depending upon the circumstances of each case: Canadian Gaming at para. 52.

[22] Before considering these factors, I acknowledge that while at its core this is an application to amend pleadings, which often requires an applicant only to meet a low threshold to be successful, in the case at bar, given the plaintiff seeks an amendment of the pleadings to convert the action to a class action, different considerations apply. These different considerations result in an additional and, therefore a more onerous, hurdle to be met for the Court to grant the amendment: Lou v. London Life Insurance Company, 2017 ONSC 4188 at para. 26.

[23] In my opinion, in the circumstances of this application, all of the factors set out in Canadian Gaming are relevant to my decision. However, I note that no one factor need be determinative and that the Court has discretion to examine the totality of circumstances when considering if a conversion from an action to a class proceeding is warranted. I will deal with each of the considerations now.

A. History of the Proceedings

[24] In respect of the history of the proceedings, despite the initial emails and meetings with potential individuals impacted by the Fire that indicated an inclination towards pursuing the claims as a class proceeding, the plaintiff's claim and the other 16 claims were filed as regular actions.

[25] While the plaintiff argues on the filed NOCC and the Amended Claim that they "ticked" a box indicating that the matter would be by class proceeding, in my view, this does not amount to a sufficient indication that the matter would proceed in that manner. Rule 22-3(6) of the Supreme Court Civil Rules requires that the style of proceeding for a class proceeding include language that indicates that it is intended to be a class proceeding or, in other circumstances, when a certification order is subsequently granted:

(6)The style of proceeding for a proceeding must include the words "Brought under the Class Proceedings Act" immediately below the listed parties if

(a) it is intended, at the start of the proceeding, that a certification order will be sought in respect of the proceeding under the Class Proceedings Act, or

(b) in any other case, a certification order is subsequently granted in respect of the proceeding,

unless and until a certification order is refused in respect of the proceeding or the proceeding is decertified.

[26] I reject the plaintiff's argument that it clearly indicated to the defendants through the marking of that box on the NOCC and the Amended Claim that the plaintiff's intention was to proceed as a class proceeding. While it may have indicated a potential intention of the plaintiff to proceed eventually by a class action, I understand the purpose of the "ticked" box is for Court Registry administration purposes and not to provide notice to defendants that the proceeding is a class action. To conclude that making that indication in this manner would be sufficient would render irrelevant the requirements of Rule 22-3(6)(a) of the Rules. In short, I reject the plaintiff's argument that significant weight should be given to converting the action to a class proceeding on the basis of her ticking the box on the NOCC.

[27] In respect of the other aspects of the history of these proceedings, I note that no trial date is scheduled and examinations for discoveries have not occurred. As such, there have been few steps that have been conducted that would result in additional and wasted expenses should the matter be converted to a class proceeding.

B. Length and Reason for Delay and Conduct of the Parties

[28] In respect of considering the length and reason for the delay in applying to convert the action to a class proceeding, while the delay is not inordinately lengthy, there is no evidence before me explaining the reason for the delay. To the contrary, the evidence before me on this application is that Plaintiff's Counsel communicated with individuals who were potentially affected by the Fire on May 17, 2022 within 14 days of the Fire and had a meeting with individuals impacted by the Fire on May 22, 2022, about pursuing a class proceeding. The plaintiff did not provide a reason for waiting from the initial meetings to this notice of application to pursue a class proceeding. Moreover, 22 months elapsed from the date the plaintiff filed the NOCC, on October 3, 2022, and the bringing of this application.

[29] The burden is on the plaintiff to provide sufficient evidence to explain the delay in bringing the application to convert: Ramirez Carbantes v. Ivanhoe Cambridge Inc./Ivanhoe Cambridge I. Inc., 2024 BCSC 520 at para. 39. As there has been no explanation for the delay. This factor weighs against converting the action to a class proceeding.

[30] In respect to the conduct of the parties specifically, I find that the initial actions by the Plaintiff's Counsel in May 2022, attempting to secure support for the class proceeding underscores the absence of an explanation for the delay. Given the communications of Plaintiff's Counsel with individuals thought to have an interest in a class proceeding within weeks of the Fire and in a follow-up letter in June 2022, it is an available inference that there was little appetite to pursue a class proceeding by other potential members in the class. Further evidence supporting that inference is that 15 additional individual notices of civil claim were filed in the days immediately prior to the expiry of the two-year limitation period from the date of the Fire. However, I also acknowledge that Plaintiff's Counsel may have

strategically taken the step to file individual claims to preserve individual plaintiff's rights to file a claim in the case that a class action did not proceed.

[31] There is no evidence before the Court identifying why class proceedings were not commenced at that time (before the expiration of the limitation period) or why an application for a conversion of the plaintiff's action to a class proceeding was not brought before the expiration of the limitation period. Indeed, from the evidence before the Court, it appears that the Plaintiff's Counsel, on behalf of interested individuals, made a strategic choice to pursue their claims as regular actions as opposed to class actions and now, with the limitation period having expired wishes to convert the nature of the proceedings to potentially open up the lawsuit to more individuals by adding them as class members.

[32] As I will discuss in a moment, while missing the limitation period weighs against conversion, I also accept that it is but one factor for my consideration. Further, in my view, it does not advance the administration of justice to punish potential class members with legitimate claims on the basis of the actions of legal counsel. In other words, I must consider the overarching principles regarding class proceedings and not focus myopically on one factor of the test, as articulated by the Court in Canadian Gaming. As such, I find that the delay, even without a reason provided, is not determinative to my decision as to whether the action should be converted.

C. Expiry of Limitation Periods and Prejudice

[33] One of the factors the Court is to consider when determining whether an action should be converted to a class proceeding is the expiry of limitation periods. While I have just referenced the expiration of the limitation period in this case in relation to the conduct of the parties and reason for delay, I find that the fact that the limitation period of two years since the Fire has passed is significant and favours not converting the action to a class proceeding.

[34] The defendants assert that the plaintiff, and more specifically, the Plaintiff's Counsel, seeks a conversion to a class proceeding in an attempt to manoeuvre around the limitation period to allow additional individuals to participate in the lawsuit. I tend to agree that, objectively, this application could reasonably be interpreted how it is perceived by the defendants.

[35] The limitation period for individuals to file a claim for losses in the Fire expired in May 2024 -- two years after the knowledge of the loss was discoverable. Immediately before that expiration, the Plaintiff's Counsel filed 15 additional notices of civil claim. If the action were converted to a class proceeding, it would effectively allow more plaintiff's to join in the proceeding, despite missing the limitation period. This is because s. 38.1 of the CPA provides, among other things, that if a person has a cause of action, the limitation period applicable to that cause of action is suspended for a period of time if an application is made for an order certifying a proceeding as a class proceeding.

[36] In my view, it is not the expiration of the limitation period in and of itself that must be considered, it is that the delay causes prejudice to the defendants. The loss of a limitation defence has been accepted by our Court of Appeal as a serious, presumed prejudice: Madadi v. Nichols, 2021 BCCA 10 at para. 86.

[37] That said, in this case, because the defendants have been served with notices of civil claims from a number of plaintiffs, it cannot be said that they would be taken by surprise by the proceeding, not have preserved evidence, or be less able to mount a defence to the claims. Indeed, given that the defendants will almost certainly mount the same defence against each of the individual claims, the expiration of the limitation period, in my view, is not a significant prejudice to the defendants. Further, and importantly, the NOCC (as well as the additional 16 actions) were filed before the expiration of the limitation period. While having the limitation period expire prior to seeking conversion to a class proceeding weighs against converting the proceeding, as I will explain below, I conclude that the prejudice against the potential members of a class by not converting the proceeding outweighs the prejudice to the defendants.

D. The Likelihood of a Proper Class Eventually Being Defined

[38] If the matter is converted to a class proceeding there would need to be a certification hearing. This engages another consideration set out in Canadian Gaming, which is the likelihood of a proper class being defined. The plaintiff asserts that there would be two subclasses that are easily defined should this matter be converted to a class proceeding. One subclass would consist of tenants of the Apartment Building when the Fire occurred and the other would consist of the owners of units in the Apartment Building when the Fire occurred.

[39] The defendants argue that the plaintiff's proposal for two distinct subclasses runs contrary to the requirement that a class proceeding have one "identifiable class". I disagree with the defendants' characterization that there is not one identifiable class with a common issue. While there are two proposed sub-classes, being renters and owners, I find that they share a common issue, which is the negligence of the defendants resulting in damages arising from the Fire.

[40] In my view, the defendants' argument conflates the common, or core shared issues, which would be common to both renters and owners, with the damages each sub-class might claim. The shared common issue between the subclasses are whether the defendants were negligent. While the subclasses of renters and owner may have different damages, they share the common issue. In Merck Frosst Canada Ltd. v. Wuttunee, 2009 SKCA 43 at para. 125, the Court discussed the need for a single over-riding class with issues common amongst all members, emphasizing that the subclasses with common issues separate from the main class must still share this common link with the main class:

[125] What the statutory provisions would appear to envision, however, is not that the identifiable class should be entirely composed of an array of subclasses, each with its own distinct set of claims and common issues, but, rather, that there should be a single, over-riding class, with its set of issues common to all members of a class, some of whom might form a subclass with a distinct additional set of issues common to its members but not other members of the class as a whole. This seems to be required by the statutory definition of "class" in s. 2 of the Act as "two or more persons with common issues respecting a cause of action or a potential cause of action," together with the certification requirement in s. 6(1)(b) that there be an identifiable class. Clearly, the more the subclasses are seen to have in common only issues distinct from one another, the less likely it is that a single class, or, indeed, a single class action, has been identified.

[41] Further, with regard to the common issue "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent": Fleming v. British Columbia (Ministry of Forests, Lands, Natural Resource Operations and Rural Development), 2023 BCSC 296 at para. 182, citing Charlton v. Abbott Laboratories Ltd., 2015 BCCA 26 at para. 85.

[42] Success in finding negligence in the actions of some or all of the defendants, is success for both the renters and the owners of units in the Apartment Building. In this regard, I do not accede to the defendants' argument that there would be issues in certifying the class. That said, that issue will be decided at a certification hearing, and my conclusion now is not binding on the Court hearing that application.

[43] The defendants also argue that the plaintiffs will have difficulty in certifying a class because it is a well accepted principle that a class action should not be certified if class members have conflicting interests: Western Canadian Shopping Centres Inc v. Dutton, 2001 SCC 46 at para. 40, cited with approval in Vivendi Canada Inc. v. Dell'Aniello, 2014 SCC 1 at para. 43. The defendants assert that there are members of the putative class that have competing interests and are thus in conflict. The defendants point to two of the defendants, Mr. Dhaliwal and Ms. Ramrup, who are also members of the proposed sub-classes. Ms. Ramrup is an owner of a unit in the Apartment Building and is alleged by the plaintiff to have been the one smoking or allowing others to smoke on the balcony of Unit 406. Mr. Dhaliwal, is allegedly the tenant of Unit 306 where the Fire is thought to have started.

[44] While I acknowledge that Ms. Ramrup and Mr. Dhaliwal would initially be included in the class, in my view, they could be "carved-out" or excluded as members from the class during the certification process. In Hansma v. Atira Property Management Inc., 2024 BCSC 2023, a case which considered the certification of a class proceeding with a potential conflict within a class in the context of a single room occupancy building fire, the Court determined that the class should be certified but excluded one of the individuals who resided in the unit in which the fire started. The same could be done in certifying the case at bar.

[45] In considering the likelihood of certification, I have also reviewed s. 4(2) of the CPA which sets out a non-exhaustive list of factors that a court must consider in deciding this question. As held by our Court of Appeal in Finkel v. Coast Capital Savings Credit Union, 2017 BCCA 361 at para. 25, the two questions central to the preferability assessment under section 4(2) of the CPA are:

[25] (a) whether a class proceeding would be a fair, efficient and manageable method of advancing the claims and (b) whether a class proceeding would be preferable compared with other realistically available means for their resolution, which may include court processes or non-judicial alternatives.

[46] When considering if a matter is preferable as a class proceeding, the analysis is to be conducted through the lens of the objectives of class proceedings: judicial economy, behaviour modification, and access to justice: Hansma at para. 96, citing AIC Limited v. Fischer, 2013 SCC 69 at para. 22, citing Hollick v. Toronto (City), 2001 SCC 68 at para. 27.

[47] In summary, on this factor set out in Canadian Gaming, I do not accept the defendants' assertion that there are significant bars to certification should I determine that the action be converted. Further, I accept that the certification consideration also engages whether a proposed class action furthers the overriding objectives of a class proceeding, which is a distinct factor raised in Canadian Gaming: para. 52. I will now turn to an analysis of the considerations under that factor.

E. Whether Conversion is Consistent With, or Would Advance, the Overriding Objectives of a Class Proceeding

[48] The plaintiff contends that converting the action to a class proceeding would further the policy objectives of the CPA. Additionally, the plaintiff asserts that having the matter proceed as a class proceeding would facilitate access to justice for individuals who might otherwise not bring a claim and obtain redress for their loss and do so in an efficient manner, thus furthering judicial economy. The plaintiff also argues that there could be important behavioural modification for the defendants if the action continues as a class proceeding. This, argues the plaintiff, could result in safer buildings, better building and fire regulations, and improved responses by municipalities to structure fires.

[49] I will now consider whether converting this action to a class proceeding advances these objectives.

1. Judicial Economy

[50] In Soldier v. Canada (Attorney General), 2009 MBCA 12, Justice Steel, writing for the Court, outlined the considerations involved with respect to judicial economy:

70 The first purpose, judicial economy, refers to the efficient handling of potentially complex cases of alleged mass wrongs. The analysis involves an assessment of whether a class proceeding would advance the claims in any meaningful way. If resolution of the common issues would not put the plaintiffs in any better position than if they simply pursued individual claims, it is clear that there is little, if any, benefit to proceeding by way of a class action. See Hoy, at para. 54.

[51] In the case at bar, I find that there is significant judicial economy in converting the action to a class proceeding.

[52] While each case is to be determined on its merits, the reasoning in Hay v. Mundi 910 Victoria Enterprises Ltd., 2022 BCSC 2127, a certification application for individuals that allegedly suffered losses as a result of a fire that occurred at a hotel, is, in my view, applicable to the case at bar. In Hay, Justice Church explained at para. 108:

[108] Certification of this action as a class proceeding would limit the necessary fact finding and legal argument on the common issues to one proceeding rather than multiple individual proceedings, which would save judicial resources and minimize delay. As the court noted in Griffiths SC at para. 41:

[T]o require each individual to separately address the common issues when a class action can resolve the issues for all class members in one proceeding would be a waste of resources and would unnecessarily prolong this matter.

[53] I accept that expert and common fact evidence could be heard together if the matters proceed to trial and the actions are heard jointly. However, in my view, the mechanisms of a class proceeding are more efficient and improve judicial economy in the case at bar. Pre-trial procedures such as discoveries could be streamlined and efficiencies relating to expert and fact evidence could be reduced and simplified through a class proceeding. Currently, there are 17 actions. Even if agreements were made to join the claims and consolidate evidence, this presents a cumbersome and inefficient process.

[54] In addition, in my view, the defendants will be able defend the claim more conveniently and with less expense than defending the individual actions.

[55] I acknowledge the defendants' argument that a benefit of not converting the action to a class proceeding is that the plaintiffs of the individual actions would be free to settle their matters without court approval, as is required in class proceedings: s. 35(1) of the CPA. However, this benefit does not outweigh the other benefits to converting the proceeding including judicial economy and access to justice. In this regard, I find that Skolrood J.'s conclusion in Great Canadian is instructive and illustrates a distinguishable feature of that case with the case at bar. Specifically, in Great Canadian there were no other proceedings extant at the time conversion was sought. At para. 58, Skolrood J. held:

[58] In the circumstances, the proposed class proceeding does not advance the goal of judicial economy in that there are no other proceedings extant. Arguably, to permit the matter to proceed by way of a class proceeding would be inconsistent with the principles of judicial economy and efficiency by complicating what is currently a relatively straight-forward contractual dispute between Great Canadian and BCLC.

[56] To reiterate, in the case at bar, there are 17 actions currently filed that would need to be either heard separately, or be consolidated. Both, in my view are less efficient than conversion to a class proceeding. I conclude that the administration of the class proceeding would improve judicial economy as opposed to if the actions were heard as conventional actions even if consolidated and heard on common evidence.

2. Access to Justice

[57] In respect of the consideration of whether access to justice is better achieved through class proceedings, the Court in Soldier found that it weighs in favour of a class action if a class action would "provide improved access to the courts for those whose actions might not be asserted without the economy of scale afforded by class actions": at para. 71.

[58] As described by the Supreme Court, an "important benefit of class actions is that they divide fixed litigation costs over the entire class, making it economically feasible to prosecute claims that might otherwise not be brought at all": Hollick at para. 33. Put another way, courts have considered that class proceedings serve a purpose in circumstances in which an individual may not pursue litigation because the individual loss is too insignificant to make litigation worthwhile.

[59] In my view, the potential for increased access to justice for individuals impacted by the Fire weighs heavily in favour of converting the action to a class proceeding.

[60] There are 124 units in the Apartment Building, yet there have only been 17 notices of civil claim filed. Additionally, as the proposed sub-classes include both owners and tenants, there is a reasonable possibility that there are multiple plaintiffs impacted by the Fire in each unit. This suggests that there is a large number of potential class members who could benefit from access to the litigation. I accept that Plaintiff's Counsel sent out 30 emails which asked for an expression of interest in a class proceeding. However, this leaves potentially dozens of other tenants or owners who may have an interest in a class proceedings and were not contacted.

[61] In my view, the defendants down-play the reasonable potential that individuals who may wish to participate in a class proceeding would be reluctant to file a conventional action related to losses resulting from the Fire. I accept that there was no direct evidence before me regarding the interest in a class proceeding from the 30 individuals initially contacted by the plaintiff's counsel by email. However, it strikes me as a reasonable inference that given the Plaintiff's counsel represents all 17 plaintiff's in the conventional actions, and Plaintiff's Counsel has brought this application for conversion, that there is consensus that those

individuals are interested in proceeding as a class proceeding. Again, given the number of potential members of the class, I find that there would likely be more support for a class proceeding than simply the 17 plaintiff's who currently have filed conventional actions. Indeed, for the reasons I will set out, there may be legitimate reasons why an individual did not want to pursue a conventional action but may be willing to proceed with a class proceeding.

[62] Unlike in a class proceeding, an unsuccessful litigant in a conventional proceeding may be responsible for costs. Additionally, even if the claims were to proceed through a joinder of the trials, it would create the "possibility of exposure to costs and other monetary obstacles that are not present in class proceedings and that work against the goal of access to justice": Kirk v. Executive Flight Centre Fuel Services, 2021 BCSC 987 at para. 46, aff'd in LaSante v. Kirk, 2023 BCCA 28. The Court in Jastram Properties Ltd v. HSBC Bank Canada, 2021 BCSC 2204, further outlined this issue:

[94] One of the purposes of class proceedings is to facilitate access to justice. An unfortunate reality of the joinder option is that it burdens the plaintiffs with extensive and expensive discovery prior to trial. The defendant has the right to obtain full discovery of documents and examine each plaintiff for discovery. If there are dozens of plaintiffs, the defendant may conduct dozens of examinations for discovery. A deep-pocketed defendant in a case with "monumental implications" may be expected to exercise these rights to the fullest.

[63] Further, while there is no evidence before me of the details of the specific arrangements between the plaintiffs and the Plaintiff's Counsel, if an individual impacted by a loss allegedly caused by the Fire is relatively small, he or she may have concerns of retaining counsel for a conventual proceeding when performing the cost-benefit analysis.

[64] In sum, I reject the defendants' argument that the fact that some individuals potentially impacted by the Fire did not file a conventional claim is determinative that there is no further interested tenants or owners of units in the Apartment Building who may wish to participate in a class proceeding or that it can be an indication that those individuals are disinterested or reluctant to participate in a class proceeding.

[65] In coming to my conclusion, I have also considered our Court of Appeal's decision in Harrison v. Afexa Life Sciences Inc., 2018 BCCA 165 at para. 32, that it is not necessary for certification to show that more than one person within the class is motivated to bring a class proceeding. The Court clarified that, while the consideration of whether there is a lack of interest by class members is unimportant to whether there is an identifiable class of two or more persons under s. 4(1)(b) of the CPA, interest of the class members is, however, an important factor to consider in assessing if a class proceeding would be the preferable procedure for the fair and efficient resolution of common issues under s. 4(1)(d) of the CPA: Harrison at para. 32.

[66] In the case at bar, I conclude that there is simply no evidence that there is a lack of interest by the class members. Indeed, based on the filing of 17 separate actions, all filed by the same counsel who now makes the application for conversion, there is evidence that there are at least 17 individuals with sincere interest in pursuing a class proceeding. In this regard, I further note that some of the conventional actions have more than one plaintiff.

[67] In Hay, Justice Church addressed some of the issues now before me. Similar to the arguments raised in the application before me, in opposing the certification, the defendants in Hay argued that a class proceeding would limit access to justice because the plaintiffs would not be able to bring separate actions. Justice Church rejected that argument:

[106] The defendants submit that there are other preferable means of achieving justice for individuals impacted by the Fire, including separate actions, consolidation of separate actions, or multiple actions being heard together. They argue that the individuals' particular circumstances are crucial to establishing their causes of action and therefore "they ought to have the ability to individually control the prosecution of their action". The defendants submit that proceeding by way of a class proceeding would erode individuals' access to justice rather than uphold it.

[107] With respect, I cannot accept this submission. The defendants acknowledge that the claims of Mr. Hay, Mr. Klein, and Ms. Brophy are "not economically insignificant claims" and can therefore be pursued individually. However, there is evidence from both Mr. Hay and Mr. Klein that they wish their claims to be part of a class proceeding. As of August 10, 2021, no other action has been started against the defendants relating to the Fire. There is no evidence that any of the class members have any interest in individually controlling separate actions. As the court noted in Rumley v. British Columbia, 2001 SCC 69 at para. 37:

The second factor is "whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions", and the third is "whether the class proceeding would involve claims that are or have been the subject of any other proceedings": s. 4(2)(b), (c). On these factors I would note again that no class member will be able to prevail without making an individual showing of injury and causation. Thus, it cannot be said that allowing this suit to proceed as a class action will force complainants into a passive role. Each class member will retain control over his or her individual action, and his or her ultimate recovery will be determined by the outcome of the individual proceedings on injury and causation (assuming, again, that the common issue is resolved in favour of the class). Further there is little evidence here to suggest that any significant number of class members would prefer to proceed individually.

[68] While each case stands on its own facts, recently Justice Marzari in Hansma, certified a class in a litigation involving a fire at an apartment building. Justice Marzari concluded that a class action was the preferable procedure because it would promote the objectives of class proceedings, and most pressingly, the objective of access to justice: Hansma at para. 97. While I do not have evidence before me, as Marzari J. had in Hansma that the proposed class

members represent a "segment of society with minimal social or economic power", I nonetheless find that on the facts of this case, it would increase access to justice for those impacted by the Fire to convert the proceeding to a class proceeding as it makes the process more economically feasible.

3. Behaviour Modification

[69] The Court in Soldier describes the third objective of class action litigation, behavioural modification, as follows:

72 ... Behaviour modification in this context has both specific and general deterrence objectives. McLachlin C.J., in Western Canadian Shopping Centres Inc. v. Dutton, 2001 SCC 46, [2001] 2 S.C.R. 534, indicated that (at para. 29):

... [c]lass actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. ....

[70] In this case, I am persuaded that converting the action to a class proceeding would better accomplish the goals of behaviour modification than would a conventional action.

[71] The proceeding would provide more focus on the alleged wrongs claimed by the plaintiffs. Of course, the ultimate determination of whether some or all of the defendants were negligent will be a matter for trial, and my conclusions are irrelevant to the ultimate finding. However, requiring the defendants to defend their actions in a single class proceeding as opposed to in several distinct smaller lawsuits would better achieve the goal of behaviour modification, should any be required.

IV. Determination and Order

[72] I have considered the factors set out in Canadian Gaming and applied those factors to the circumstances of this case. I have concluded that the Court should exercise its jurisdiction to allow the plaintiff to amend the pleadings to convert the action to a class proceeding.

[73] While some factors are less persuasive than others, as I have described above, I find that the potential increased access to justice of those impacted by the Fire is an important and significant factor for my determination. Further, I find that when considering the prejudice to the parties, the increased prejudice to potential class members of not being able to participate outweighs the prejudice to the defendants of the passing of the limitation period. In this regard, I note that the defendants were aware of the action, albeit in conventional form, well in advance of the expiration of the limitation period and the NOCC now sought to be converted was filed in advance of the expiry of the limitation period. As such, the litigation has not taken them by surprise.

[74] Finally, and importantly, judicial economy of an overly taxed judicial system favours having one class proceeding as opposed to 17 separate actions. Even if the actions were consolidated and heard on common evidence, the efficiencies of the class proceeding structure favours conversion.

[75] Given the foregoing, I grant the plaintiff's application for an order to convert the action to a class proceeding. I am also satisfied that the requirements of Rule 4-4(1) of the Supreme Court Civil Rules are satisfied such that alternative service of Mr. Dhaliwal is warranted. Accordingly, I order:

a) The herein proceeding be converted to a class action proceeding pursuant to the Class Proceedings Act, R.S.B.C. 1996, c. 50;

b) The plaintiff is granted leave to file a Further Amended Notice of Civil Claim in the form attached as Schedule "A" to the Notice of Application with any modifications referenced during the oral hearing;

c) The plaintiff is granted leave to bring an application for an order certifying the proceeding as a class proceeding pursuant to the Class Proceedings Act, R.S.B.C. 1996, c. 50;

d) The defendants may file and serve an amended Response to Civil Claim within 30 days of being served with the filed Further Amended Notice of Civil Claim;

e) The plaintiff is granted leave to alternatively serve the defendant, Harjinder Singh Dhaliwal, with the Further Amended Notice of Civil Claim by:

i. posting a copy of the Order and Further Amended Notice of Civil Claim to the door of Unit 306 - 30515 Cardinal Avenue, Abbotsford, BC V2T 0A8;

ii. mailing a copy of the Order and Further Amended Notice of Civil Claim to the Defendant, Harjinder Singh Dhaliwal at Unit 306 - 30515 Cardinal Avenue, Abbotsford, BC V2T 0A8; and

iii. mailing a copy of the Order and Further Amended Notice of Civil Claim to the defendant, Harjinder Singh Dhaliwal at PO Box 2333 Stn A, Abbotsford, BC V2T 4X2; and

f) The Further Amended Notice of Civil Claim will be deemed to be served on the defendant, Harjinder Singh Dhaliwal, 10 days after the posting and mailing of the Further Amended Notice of Civil Claim.

V. Costs

[76] It is settled law that prior to certification, the ordinary costs rules apply to applications brought in a proposed class proceeding: Fairhurst v. Anglo American PLC, 2012 BCSC 45 at para. 6, aff'd 2012 BCCA 257. In respect of class proceedings, British Columbia is a "no costs" jurisdiction, but the Court has jurisdiction to award costs pursuant to s. 37 of the CPA.

[77] Costs follow substantial success. The plaintiff has been entirely successful in this application. As such, barring further submissions from the parties, the plaintiff is entitled to her costs of the application at Scale B. However, the ultimate success in a certification application, the class proceeding, or conventional proceeding, if certification is unsuccessful, is yet to be determined. As such, I order that the costs payable by the defendants to the plaintiff will be payable at the conclusion of the proceeding.

VI. Conclusion

[78] I thank counsel for their well-argued submissions in this application.

"Gibb-Carsley J."

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