

CANADA / JUDGMENT

Siddoo v. OJJJ Enterprises Ltd.

2020 BCSC 297

COURT

Supreme Court of British Columbia

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2020 BCSC 297 Siddoo v. OJJJ Enterprises Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Siddoo v. OJJJ Enterprises Ltd.,

2020 BCSC 297

Date: 20200304

Docket: S1610047

Registry: Vancouver

Between:

Jagdis K. Siddoo

Plaintiff

And

OJJJ Enterprises Ltd. and Yanxia (Kathy) Su

Defendants

Before: The Honourable Madam Justice Ker

Reasons for Judgment

Counsel for Plaintiff:

A.J. Piercy

Counsel for Defendant:

A.M. Ross

Place and Date of Trial:

Vancouver, B.C.

September 10-14, 17-21, 2018

October 9-12, 2018

December 10-13, 2018

April 1-3, 2019

Written Submissions of Plaintiff:

May 31, 2019

Written Submissions of Defendant:

May 24, 2019

June 4, 2019

Place and Date of Judgment:

Vancouver, B.C.

March 4, 2020

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INTRODUCTION

- [1] This case concerns a commercial lease. The plaintiff landlord alleges that the defendant tenants breached the lease by vacating the premises prior to the expiry of the lease.
- [2] The defendants admit that they vacated the premises two-thirds of the way through the lease term. The defendants argue, however, that they were entitled to vacate the property before the expiry of the lease because of the cacophony of the disruptive and intolerable noises that emanated from the adjacent business, a Gym.
- [3] The defendants assert that the noises from the Gym were of such a nature in their frequency, volume, and character that they substantially interfered with their ordinary and lawful enjoyment of the premises, effectively depriving them of the whole benefit of the lease. They defend their decision to vacate the premises two years early on the basis that the landlord's failure to resolve their noise complaints amounted to a fundamental breach of the covenant of quiet enjoyment and a derogation from the landlord's grant of lease.

- [4] The defendants say they had a right to vacate the premises as the plaintiff had, in effect, repudiated the lease by failing to address or remedy the situation. The defendants maintain that they made reasonable efforts to have the landlord's agent address the noise problem, and his summary and disparaging rejection of their reasonable efforts amounted to a repudiation of the lease. According to the defendants, it was reasonable for them to vacate the premises when they did, and the landlord's repudiation of the lease entitled them to do so.
- [5] The defendants, OJJJ Enterprises Ltd. ("OJJJ") and Yanxia (Kathy) Su (OJJJ's principal), operated a dry-cleaning business, Good Morning Cleaners ("GMC"), in a commercial building owned by the plaintiff, Jagdis K. Siddoo. The commercial building consists of three separate units and is located on the south side of West 10th Avenue between Alma Street and Highbury Street in Vancouver, BC (the "West 10th Location"). The defendants leased 3744 West 10th Avenue, the centre unit (the "Premises"). Prior to January 2013, the businesses on either side of the Premises were relatively noise-free and did not interfere with the defendants' use of the Premises.
- [6] In January 2013, a CrossFit gym (the "Gym") leased the unit directly west of the defendants in the West 10th Location. A marked change in the soundscape immediately ensued.
- [7] The plaintiff, who is 92 years old, is a retired physician. The West 10th Location, as well as other properties owned by Dr. Siddoo, are managed by Carey Siddoo, her second cousin. Mr. Siddoo carried on this litigation as the Dr. Siddoo's personal representative and acted as the de facto landlord during the events that bring this matter before the Court.
- [8] On July 28, 2014, the defendants emailed Mr. Siddoo advising that they were vacating the Premises effective July 31, 2014, which was exactly two years before their lease expired. In late July, 2014, the defendants moved GMC to a new location at Jericho Village shopping centre at 285-2083 Alma Street in Vancouver, BC (the "Alma Street Location").
- [9] The defendants' purported reason for relocating was the noise emanating from the Gym next door. The noise issues that the defendants assert occurred in this case relate to weight-dropping events at the Gym. They assert that loud, heavy weights were frequently dropped by Gym members during workouts. The defendants contend that weight-dropping events occurred on an almost daily basis, at all hours of the workday. However, the noise from the dropped weights occurred at irregular and unpredictable intervals. Ms. Su asserts the noises were intolerable and caused her undue stress, anxiety, and negatively impacted her mental health. The time frame captured by the offending noise events was between January 2013 and July 2014.

- [10] The plaintiff has sued the defendants for breach of contract, asserting that the defendants breached the lease by leaving before it expired. The defendants assert the covenant of quiet enjoyment had been fundamentally breached and the plaintiff's failure to remedy the alleged noise issue amounted to a repudiation of the lease. Thus, the defendants assert that they were relieved of their obligations under the lease and entitled to vacate the Premises.
- [11] The governing legal principles are not seriously in dispute. This case turns on an assessment of credibility of the parties and whether the defendants' actions in vacating the Premises with little to no notice were justified in the circumstances.
- [12] As this case turns largely on my assessment of credibility, I will first address the principles that govern credibility assessments. I will then set out the facts that are not in dispute followed by my review of the evidence and the conclusions that I reach in respect of the evidence and the credibility of the witnesses. After summarizing the facts that I have found, I will address the governing legal principles and then apply those principles to the circumstances of this case.

PRINCIPLES GOVERNING THE ASSESSMENT OF CREDIBILITY

- [13] The factors to be considered when assessing credibility were summarized by Madam Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, leave to appeal *ref'd*, [2012] S.C.C.A. No. 392:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet* (Township) (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

- [14] In assessing credibility in the face of conflicting evidence, the Nova Scotia Supreme Court in *Novak Estate (Re)*, 2008 NSSC 283 noted the following:

- [36] There are many tools for assessing credibility:

- a) The ability to consider inconsistencies and weaknesses in the witness's evidence, which includes internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the testimony of other witnesses.

- b) The ability to review independent evidence that confirms or contradicts the witness' testimony.
 - c) The ability to assess whether the witness' testimony is plausible or, as stated by the British Columbia Court of Appeal in *Faryna v. Chorny*, 1951 CarswellBC 133, it is "in harmony with the preponderance of probabilities which a practical [and] informed person would readily recognize as reasonable in that place and in those conditions", but in doing so I am required not to rely on false or frail assumptions about human behavior.
 - d) It is possible to rely upon the demeanor of the witness, including their sincerity and use of language, but it should be done with caution (*R. v. Mah*, 2002 NSCA 99, paras. 70-75).
 - e) Special consideration must be given to the testimony of witnesses who are parties to proceedings; it is important to consider the motive that witnesses may have to fabricate evidence. *R. v. J.H.*, [2005] O.J. No. 39 (OCA), paras. 51-56).
- [37] There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See *R. v. D.R.* [1996] 2 S.C.R. 291 at para. 93 and *R. v. J.H.*, supra).
- [15] In deciding which facts are more likely than not, I have weighed competing evidence on several issues applying the words of Mr. Justice O'Halloran in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.S.C.) at 357:

In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

- [16] A number of facts are not in dispute in this case. I propose to summarize them first and then turn to an assessment of the salient features of the evidence adduced in this trial and an analysis of the issues grounding this litigation.

FACTS NOT IN DISPUTE

- [17] The defendants' business: Ms. Su owned and operated a dry-cleaning business, known as GMC. The business was incorporated as OJJJ.
- [18] The first lease: On July 15, 2008, the plaintiff and defendants entered into a three-year commercial lease for the Premises. Ms. Su signed the lease in her capacity as the owner and representative of OJJJ and on her own behalf as indemnifier. The lease commenced on August 1, 2008, and the defendants moved GMC into the Premises and started to operate their dry-cleaning business that month. This lease expired on July 31, 2011. During the first lease, the defendants had no issues with unacceptable noises from the neighbouring tenants, a sweater shop sharing the adjoining west wall and a small café sharing the adjoining east wall.

- [19] By the time the 2008 lease came up for renewal on July 31, 2011, Mr. Siddoo had assumed the role of landlord and negotiated the lease renewal on behalf of the plaintiff. On February 11, 2011, Mr. Siddoo wrote the defendants providing notice that the rents would increase under the new lease as, in their view, the rent for the previous lease was substantially below market rents for the area. Recognizing that this would create an adjustment for the defendants' business, he proposed a base rent increase for each year of the new five-year lease.
- [20] The defendants did not accept the landlord's proposed approach. A number of negotiations occurred between the parties, and both had lawyers involved in the process. Ongoing issues over the proposed rent increases, extra charges such as "additional rent", and annual rent adjustments incorporated into the terms of the new lease resulted in the lease not being signed until June 2012. Additionally, the defendants wanted a lease that was longer than the proposed five-year term, but the plaintiff was not prepared to grant a lease longer than five years.
- [21] Ms. Su's husband, Stewart Cheng, conducted all communications with Mr. Siddoo, on behalf of his wife and her business, as Mr. Cheng had better English. However, all communications Mr. Cheng had with Mr. Siddoo were done after consultation with Ms. Su and conducted with her authorization and consent.
- [22] Between August 1, 2011, and the time the new lease was signed in late June 2012, the defendants operated their dry-cleaning business at the West 10th Location on a month-to-month lease basis. As a result of this state of affairs, they decided they had to have a back-up plan in case the lease could not be renewed. During this time, Ms. Su and Mr. Cheng occasionally looked at alternate locations for GMC. Sometime in the fall of 2011, the defendants found a suitable potential location at the nearby Jericho Village shopping plaza located at Alma Street and West 4th Avenue in Vancouver, BC (the "Alma Street Location"). However, the Alma Street Location was not available by means of a commercial lease. Rather, it required them to purchase the Alma Street Location and the dry-cleaning business therein. The defendants did not want to purchase the Alma Street Location at that time. Once the lease for the West 10th Location Premises was renewed, the defendants dismissed the notion of moving GMC to the Alma Street Location.
- [23] GMC Hours of Operation: GMC was open to customers from 7:30 a.m. to 6:30 p.m. Monday to Friday and 9:00 a.m. to 5:00 p.m. on Saturdays. Ms. Su generally arrived at GMC before the opening time and left approximately 30 minutes after the closing time. Upon her arrival, Ms. Su would turn on the various pieces of equipment associated with the dry-cleaning operation. The machines remained on and operating until approximately 10:15 a.m. on the weekdays. Thus, for approximately the first three hours of the weekday mornings, dry-cleaning machines, washing and drying machines, a compressor, and a boiler in an adjoining shed were running, and so the noise of these machines formed part of the overall soundscape of the Premises. By approximately 10:15 a.m., the machines were no longer operating and the only sources of noise within the Premises were the automatic doorbell

and the day-to-day activities within GMC.

- [24] The second lease: The defendants' new lease, once signed in June 2012, was effective from August 1, 2011, for a five-year term, expiring on July 31, 2016.
- [25] In late 2012, the tenant in the space west of the defendants, a sweater shop, ended their lease with the plaintiff and moved out of the West 10th Location.
- [26] The new neighbouring business: In January 2013, the Gym leased the premises adjacent to the defendants. The Gym started operating almost immediately with a variety of cardio and weightlifting classes. Personal training sessions were available, but in the nascent stages of the business, they were not really a feature of the Gym's activities.
- [27] In early 2013, Ms. Su complained to the Gym on a number of occasions about the noise emanating from the Gym, but the defendants never raised the issue with the plaintiff in 2013. The number of times Ms. Su complained to the Gym is disputed and will be dealt with later in these reasons. The owners of the Gym never advised the plaintiff of Ms. Su's 2013 noise complaints.
- [28] On June 28, 2013, Ms. Su placed a 9-1-1 call to the Vancouver Police Department to complain about the noise emanating from the Gym. The dispatch operator said that a police officer would speak with someone at the Gym but pointed out that a gym would have noise associated with it.
- [29] The defendants made no complaints about the noise from the Gym to the plaintiff during the entirety of 2013. Indeed, no further complaints whatsoever occurred in 2013 after the 9-1-1 call. The Gym had been operating for just over one year when the defendants first complained to the plaintiff about the noise.
- [30] There were no issues over rent between the parties until June 2013 when Mr. Siddoo provided the rent adjustment for the coming year (July 2013 through June 2014). Mr. Cheng, on behalf of the defendants, sought clarification of what was included in other costs. A series of emails with questions by Mr. Cheng and demands by Mr. Siddoo were exchanged between them from August 2013 through December 2013. However, by December 4, 2013, the defendants had paid the plaintiff \$2,103.90 for the outstanding rent adjustment issues.
- [31] By January 23, 2014, Jason Ho, a businessman who owned the Alma Street Location, had begun negotiating with Ms. Su and Mr. Cheng about purchasing the Alma Street Location. The previous tenant of the Alma Street Location had been a dry-cleaning business.
- [32] On January 24, 2014, Mr. Ho emailed Mr. Cheng advising that he was "going to call the lawyer to draft the contract" and asked if "the buyer name is Kathy only or both of yours." Mr. Cheng replied later that day that it should be both.

[33] The first noise complaint to the landlord: On January 27, 2014, at 10:18 p.m., Mr. Cheng, on his wife's behalf, emailed Mr. Siddoo complaining about the noise from the neighbouring Gym stating that the "gym is very noisy and makes huge loud striking sound", that the noise had "greatly affected her health", and that "[s]he cannot bear this." This was the first time the defendants raised the issue of noise from the Gym with Mr. Siddoo.

[34] On January 28, 2014, at 10:09 a.m., Mr. Siddoo emailed Mr. Cheng querying how a "bit of noise at a gym" would materially affect Ms. Su's health. The email, dismissive in its tone, advised Mr. Cheng that:

Maybe she simply does not like it, but that is very different from what you have stated.

Best thing is to just nicely discuss your concerns with the neighbour and see if they can limit the noise.

This is not a Landlord issue and is a situation between two separate businesses.

[35] Mr. Cheng never responded to this email and did not seek to correct Mr. Siddoo's minimization of the noise or the impact it was having on his wife.

[36] On January 28, 2014, Ms. Su attended a medical appointment at her family doctor's office. She was seen by a locum tenens, Dr. Abu-Remaileh, and complained about the noises from the Gym. Medication for anxiety was prescribed at that time. The appointment with the doctor had been made sometime in mid-January although no specific date was provided. Dr. Abu-Remaileh made a note in Ms. Su's medical chart that included a reference to the fact that Ms. Su was trying to change her situation but that the "lease doesn't expire for 2.5 yrs, can't leave".

[37] On February 18, 2014, Ms. Su attended for a follow-up medical appointment at her family doctor's office. She was again seen by Dr. Abu-Remaileh and repeated her complaint about the noises from the Gym. Dr. Abu-Remaileh provided a "doctor's note" which stated:

To whom it may concern:

The above patient saw me in follow-up today. She has situational anxiety related to unpredicted loud sounds relating to the neighboring gym.

She is on 2 medications to try & control this, but ultimately the treatment is to remove the trigger (loud noises/unpredictable).

[38] Also during the February 18, 2014 medical appointment, Dr. Abu-Remaileh referred Ms. Su to a psychiatrist to assist with what was described as situational anxiety.

[39] On April 3, 2014, Ms. Su had a specialist appointment with Dr. D.J. Zhang, a consulting psychiatrist at the Cross-Cultural Psychiatry Outpatient Clinic at Vancouver General Hospital. Dr. Zhang re-prescribed the medications that Dr. Abu-Remaileh had prescribed. Dr. Zhang prepared a reporting letter and forwarded it to Ms. Su's family doctor.

- [40] On April 11, 2014, Ms. Su filled the prescription provided by Dr. Zhang.
- [41] On April 21, 2014, Mr. Cheng and Ms. Su completed a contract of purchase and sale with Mr. Ho for the Alma Street Location.
- [42] On May 21, 2014, Jeffy Enterprises Ltd. was incorporated with Ms. Su as the sole director. At some point in time, the defendant OJJJ's assets were transferred to Jeffy Enterprises Ltd.
- [43] On June 6, 2014, Boffy Holdings Ltd. was incorporated with Ms. Su as the sole director.
- [44] On June 16, 2014, Boffy Holdings Ltd. entered into a lease with Jeffy Enterprises Ltd. for the Alma Street Location.
- [45] In June 2014, GMC began advertising that it was relocating to the Alma Street Location.
- [46] On June 26, 2014, the purchase of the Alma Street Location closed.
- [47] On July 3, 2014, Mr. Siddoo emailed Mr. Cheng about a difference in rent amounts paid, advising that \$167.83 remained outstanding on the June 2014 rent. The defendants paid the outstanding amount by way of cheque to the plaintiff dated July 4, 2014.
- [48] The second noise complaint to the landlord: On July 9, 2014, at 8:08 a.m., Mr. Cheng emailed Mr. Siddoo objecting to the new adjusted rent cost including costs for roof repairs. He suggested that the landlord should absorb the cost. Mr. Cheng added:

Regarding the noise from the neighbor gym, my wife's health has been greatly affected, and she has been seeing the doctor for several times.

- [49] Mr. Siddoo responded by email that same day at 10:16 a.m. advising that the roof repair was a rent cost included in the lease agreement and amortized over a long period of time such that the monthly cost was minimal. In respect of the noise complaint, Mr. Siddoo responded in a dismissive fashion, stating:

Sorry to hear your wife has issues with her health but trying to tie that to some minor gym noise made or not is ridiculous!

When your lease is up in 2 years, you may not wish to renew.

- [50] Mr. Cheng responded by email the following day at 10:43 p.m. seeking clarification as to what section of the lease included the cost of the roof repair. In response to Mr. Siddoo's dismissal of his complaint about the noise and his wife's health, Mr. Cheng wrote:

My wife's [health] is getting worse and worse, she went to see a [specialist]. I am not sure how long she can stand the noise under the current situation.

- [51] Mr. Siddoo responded to Mr. Cheng's email on July 11, 2014 at 10:23 a.m. The content of his response can be described as curt, patronizing, and dismissive:

I suggest you have a lawyer review the lease and relevant sections for questions you may or may not seem to not understand.

A lease document is read as a whole document not broken up into individual sections per se.

In general the relevant sections are under clause #7.

In addition, I have in the past spoken to the Crossfit people about your noise concerns and they say there is practically no noise and question your wife's accusations. Irrespective of I will pass on you concerns again.

[52] Mr. Cheng did not respond to Mr. Siddoo's characterization of Ms. Su's health issues.

[53] On July 13, 2014 at 3:19 p.m., Ali Tehrani, one of the owners of the Gym, emailed Mr. Siddoo to advise that it appeared that GMC was moving all its equipment out.

[54] On July 14, 2014 at 12:18 p.m., Mr. Siddoo emailed Mr. Cheng advising he had learned that GMC seemed to be moving its equipment from the Premises. Mr. Siddoo reminded the defendants of the lease and advised that the plaintiff would enforce the lease in its entirety.

[55] Still on July 14, 2014, at 1:02 p.m., Mr. Siddoo emailed Mr. Tehrani seeking clarification as to whether it was a move by GMC or whether GMC was simply replacing old machinery. Mr. Tehrani responded that it looked to be either a complete overhaul or a move. At 1:27 p.m. Mr. Tehrani emailed Mr. Siddoo, advising that he had learned that the defendants were moving to Jericho Village and had an opening date of July 23. On July 14, 2014, at 2:40 p.m., Mr. Tehrani sent Mr. Siddoo photographs documenting GMC's July 13 equipment move as well as a coupon from GMC advising customers of their move.

[56] On July 28, 2014 at 4:02 a.m., Mr. Cheng, still acting on behalf of the defendants, emailed Mr. Siddoo, advising him that July 31, 2014 would be the defendants' last day at the Premises. In the email, he provided four reasons for the termination of the lease:

1) My wife, Kathy Yanxia Su's health issue:

With the neighbor gym operating for more than one year, the sudden, random, unexpected, very loud sound of the dropping weight to the floor is making her health worse and worse. She has been seeing the doctor for about half year. She has symptoms of anxiousness, long-term insomnia, auditory hallucination, and headache. As her doctor's advice, she needs to leave this environment in order to have a chance of recovery and not to accumulate to permanent damage. Please refer to the attachment for the doctor's notes.

2) Quiet enjoyment term in the lease: At the time when we renewed the lease in 2011, the condition was not the same as the current condition. We have complained to neighboring gym many times. We also reported to the landlord but get only negligence.

3) My employees have also reported symptoms of anxiety.

- 4) Many of my clients complain of the noise. The vibrating of the dropping weight causes dust falling off, and we have to cover the clothes everyday.
- [57] In his July 28 email to Mr. Siddoo, Mr. Cheng attached the doctor's note from Dr. Abu-Remaileh, dated February 18, 2014, and a copy of the April 11, 2014, prescription for citalopram that Ms. Su had received from Dr. Zhang.
- [58] Mr. Siddoo did not accept the doctor's note, questioning its authenticity, and at some point, he intimated to Mr. Cheng that he believed it had been forged.
- [59] On August 13, 2014, lawyers for the plaintiff wrote to the defendants and confirmed the lease.
- [60] On August 29, 2014, lawyers for the defendants wrote the plaintiff's lawyers outlining the reasons the defendants vacated the Premises. Counsel for the defendants agreed with the suggestion by the plaintiff's counsel that the landlord should attempt to re-let the Premises but that the step should be taken without prejudice to the tenant's claims against the landlord or the landlord's right to enforce the lease.
- [61] Between August 14, 2014, and December 2014, Mr. Siddoo and Mr. Tehrani engaged in protracted discussions about the Gym leasing the Premises. A significant impediment to the discussions was the state the Premises had been left in by the defendants when they vacated. Although offers to lease were exchanged, the Gym did not end up leasing the vacated Premises.
- [62] Throughout 2015, Mr. Siddoo, on behalf of the plaintiff, retained Keystone Environmental Ltd. to undertake studies and remediation steps to clean the Premises of dry-cleaning solvents and any other contaminants remaining on the Premises.
- [63] A second set of negotiations between the plaintiff and the Gym occurred in March 2015 and September 2015, but no concrete lease agreement was reached between the plaintiff and the Gym for the Premises.
- [64] On March 21, 2016, the plaintiff entered into a new lease for the Premises. The lease became effective July 1, 2016 for the new tenant, "Pirate Joe's".

THE EVIDENCE AND THE FACTS

- [65] Although these reasons will refer to only the more salient features of the evidence adduced in this trial, I have had the benefit of detailed written and oral submissions on the evidence and have considered all of the evidence adduced in this trial in reaching my conclusions in this case.

The Plaintiff's Case

Carey Siddoo - Dr. Siddoo's personal representative for the litigation and the acting landlord

- [66] Mr. Carey Siddoo was the acting landlord during the time frame that this litigation covers. He did not negotiate the initial lease between the plaintiff and the defendants, but sometime before the first lease expired, he took over managing the lease for his cousin. He negotiated the second lease with Mr. Cheng, who was acting on behalf of the defendants. Both parties also had the assistance of lawyers in drafting and finalizing the second lease.
- [67] In cross-examination, Mr. Siddoo agreed that part of the difficulty in negotiating the renewal of the lease with the defendants in 2011 and 2012 involved the renewal rate he proposed to Mr. Cheng. After both sides consulted with counsel, the renewal rate agreed to was lower than what Mr. Siddoo had initially proposed. He confirmed that the defendants wanted to renew for longer than a five year term but that Mr. Siddoo was not prepared to grant a term longer than five years.
- [68] Mr. Siddoo also engaged in all the communications about the rent issues with Mr. Cheng when they arose in 2013 and 2014.
- [69] Mr. Siddoo negotiated the lease with the owners of the Gym when they leased the commercial unit adjacent to GMC's in January 2013. He also engaged in the protracted negotiations with the Gym when the Gym was considering taking over the Premises vacated by the defendants.
- [70] Prior to January 27, 2014, Mr. Siddoo was unaware of any noises emanating from the Gym's activities that were disturbing the defendants. His first notice of the issue came with Mr. Cheng's email of January 27, 2014. Mr. Siddoo was of the view, based on the difficulties over the lease negotiations through 2011 into 2012 as well as the rent disputes through the latter half of 2013, that the defendants were unhappy with the lease arrangements and were looking for an excuse to walk away from the lease.
- [71] Instead of attending at the West 10th Location to make his own observations and conclusions, Mr. Siddoo simply asked Mr. Tehrani about the noise issue and was advised that Ms. Su had attended a number of times--but no more than on six occasions--to complain about the noise. Mr. Siddoo asked Mr. Tehrani for his assessment of the noise complaints, and Mr. Tehrani advised that Ms. Su was exaggerating her claims about the noises. With this information in hand, Mr. Siddoo responded to Mr. Cheng on January 28, 2014, in the dismissive fashion outlined above, suggesting that it was not a landlord issue and that the two tenants ought to work the matter out. Mr. Siddoo conceded that his sole foundation for characterizing the complaint as relating to "a bit of noise" was Mr. Tehrani's information that Ms. Su was exaggerating. He also conceded that he never mentioned his suspicions about the real reason for the noise complaint to Mr. Cheng, nor did he ask Mr. Cheng to provide him with more details about the noise problems. Mr. Siddoo was of the view that the noise issue was not a landlord matter.

- [72] Mr. Cheng and the defendants never responded to Mr. Siddoo's January 28, 2014, email. In cross-examination, Mr. Siddoo was uncertain whether he had a telephone conversation with Mr. Cheng about the noise issue in the period between the email and the second noise complaint, but he conceded it was possible.
- [73] Mr. Siddoo heard nothing further from the defendants about noise issues with the Gym until the second complaint--Mr. Cheng's July 9, 2014 email. In addition to complaining in the email about the effect of the noises on his wife's health, Mr. Cheng objected to the additional rent costs for roof repairs, which were effective July 1, 2014.
- [74] On one occasion some time before the second complaint, Mr. Siddoo attended at the West 10th Location and listened to the sounds emanating from the Gym and GMC. He heard music and some clinking of weights from the Gym and heard the sound of the dry-cleaning machine and a loud exhaust fan running inside the defendants' Premises. To Mr. Siddoo's ear, the sounds emanating from GMC were much louder than the sounds emanating from the Gym.
- [75] At the time of Mr. Cheng's July 9, 2014 email, Mr. Siddoo remained of the belief that given their prior history as well as complaints about the new rent adjustments including roof repair costs, the defendants were simply looking for an excuse to terminate the lease prematurely. His response to Mr. Cheng's email, also dated July 9, 2014, can only be described as dismissive and contemptuous of Mr. Cheng's protestations about the Gym noises and their effect on Ms. Su. Further email exchanges between the two over the next two days were in a similar vein.
- [76] Mr. Siddoo explained in cross-examination that his skepticism about Ms. Su's health issues was based on Mr. Tehrani's information about the exaggerated nature of the noise complaint and his own past experience with tenants unhappy with rent increases. He made no further inquiries of Mr. Cheng about the state of Ms. Su's health after receiving the July 9, 2014 complaint.
- [77] Mr. Siddoo was "tipped off" by Mr. Tehrani that the defendants might be moving on July 13, 2014. Mr. Siddoo emailed Mr. Cheng on July 14, 2014, asserting the lease remained in existence. Mr. Cheng did not reply.
- [78] At no time before July 28, 2014, did the defendants advise Mr. Siddoo or the plaintiff that they considered the noises emanating from the Gym to be a fundamental breach of the terms of the lease.
- [79] When Mr. Siddoo received Mr. Cheng's July 28, 2014, email advising that GMC was vacating the Premises that included the attached doctor's note from Dr. Abu-Remaileh, Mr. Siddoo was of the belief that the note had been forged. He admits that he took no steps to verify its authenticity, in part because patient confidentiality would not permit him to make inquiries and also because the defendants had vacated the Premises

- [80] After the defendants had removed their equipment and vacated the Premises, Mr. Siddoo observed that the defendants left the Premises in a messy condition that required cleaning as well as electrical repairs to deal with exposed live wires and other issues resulting from the manner of their departure. Cleaning costs incurred by the plaintiff totalled \$322.88 and the electrical repairs totalled \$7,087.
- [81] Prior to January 2014, Mr. Siddoo was unfamiliar with the style of fitness workouts at CrossFit facilities. He testified that he did not have a full appreciation of the style of workouts and the heavy weight usage until October 2014 when he was in the midst of negotiations with Mr. Tehrani to have the Gym lease and take over the Premises vacated by GMC.
- [82] When it became clear to Mr. Siddoo that the Gym was not going to take over the Premises, he set about trying to find another tenant. Another tenant, a grocery store called Pirate Joe's, signed a lease effective July 1, 2016.

Evidence about the Operations of the Gym

The evidence of the two owner coaches

- [83] Along with Mr. Tehrani, Brian Coombe and Nancy Rankel-Allen were the co-owners of the Gym that shared a common wall with GMC. Mr. Coombe and Ms. Rankel-Allen were also coaches at the Gym, and Ms. Rankel-Allen was the manager. Both were involved in setting the class schedules and devising workouts for the classes. Both witnesses provided evidence about the nature of their operations including the schedule of classes offered, the workouts for the classes, the rules of the Gym with respect to weight dropping, the annual "CrossFit Open" competition, the noise complaints made by Ms. Su, and the efforts to rectify the complaints.
- [84] According to Mr. Coombe, CrossFit is a specific fitness genre and CrossFit facilities operate differently from traditional fitness facilities. At the West 10th Location Gym, there were one hour classes Monday through Saturday with one to eight clients, personal training sessions (although not too many at the initial start up of the business), and open gym times for two hours on Saturdays and Sundays.
- [85] The scheduled group classes were comprised of three components: cardio exercise, gymnastics (bodyweight exercises), and weightlifting. According to Mr. Coombe, the weightlifting performed in the classes included, but was not limited to, "Olympic lifts"-- the "clean", the "snatch", and the "deadlift". In theory, the Gym permitted intentional dropping of weights only for the Olympic lifts and only if the weights were 95 pounds or more. However, sometimes an adaptation of the "clean and jerk" lift, referred to as the "thruster", might also end with the intentional dropping of weights when the weight had been lifted from the floor as opposed to from a rack at approximately shoulder height.

- [86] As well, weights could be dropped for safety reasons such as being unable to complete a squat safely. In this instance, the weight would be dropped and considered a "fail". Both Mr. Coombe and Ms. Rankel-Allen suggested that this occurred only a handful of times between January 2013 and July 2014 but conceded in cross-examination that they were not always at the Gym and so could not say what happened when they were not present.
- [87] Between January 2013 and July 2014, the Gym offered a variety of hour-long classes Monday through Saturday. Usually there were between one and eight Gym members in a class. The one hour classes on Monday to Friday were scheduled at various times of the day but were generally from 6:00 a.m. through 8:00 a.m., 9:15 to 10:15 a.m., 12 noon to 1:00 p.m., and then 4:30 p.m. through 8:30 p.m. On Saturdays, there were scheduled classes at 9:00 a.m. and 10:00 a.m. that were cardio based boot camp-style classes that generally did not involve weight lifting, but Ms. Rankel-Allen did concede there could be weight lifting, it depended on the size of the class.
- [88] Exhibit 40 reflected the Gym's class schedule at the time of trial. Although most of the classes, such as the 6:00 a.m. class and the noon class remained the same since the Gym opened in 2013, one class, the Olympic lifting or "Oly Class" was not added to the gym's schedule until after GMC vacated the Premises. The Oly Class was on Saturdays from 10:30 a.m. to noon, and it was added when a coach with Olympic lifting training joined the Gym and wanted to offer a niche class to give some members a taste of it in their CrossFit training. Mr. Coombe acknowledged in cross-examination that they tried an Olympic lifting class before GMC left, but that it lasted only a short period of time and was held outside GMC's hours of operation--Wednesdays at 7:30 p.m.
- [89] Ms. Rankel-Allen provided a bit more detail on the origins of the Olympic lifting class, explaining that, in the beginning, they offered it as a foundational class on Wednesday evenings to teach people the basics of the movements. This was at the start of the business, and the weights were fairly light as the majority of the members were not experienced enough to deal with heavier weights. They also tried a Saturday class for a very short period of time early on in the Gym's operation, but ended up cancelling it. The Oly Class started in the fall of 2014 or the summer of 2015 and was for national-level athletes lifting very heavy weights. This class involved intentional weight-dropping events.
- [90] An examination of the work out schedules contained in Exhibits 70, 71, 80 and 81--schedules for October 2013 and June 2014 tendered by the defence--shows only one Oly class listed in those two time frames, on Wednesday, October 23, 2013. The video clips in Exhibit 102, referred to below, also provide evidence of an Oly class occurring on Tuesday, July 2, 2013, at 8:20 a.m., a time when the dry-cleaning machines at GMC were in operation (clip 4) and an Olympic lifting class occurring on Monday, August 19, 2013 at 5:10 p.m., a time during GMC's hours of operation when the machines were not operating.

- [91] Mr. Coombe explained that the Olympic lifting class differed from a CrossFit class that has Olympic lifts. The former is designed to focus on the technique, form, and skill required to do Olympic lifts, which takes up the majority of the class time. Olympic lifts in a CrossFit class, however, are usually the metabolic workout component of the class and would involve doing faster movements with lighter weights for a series of reps instead of just one lift.
- [92] When classes were not scheduled, personal training might occur or some coaches might do their own workouts. In addition, on Saturdays during the time of GMC's tenancy, there was a two-hour open gym period when clients could attend the Gym and do their own workouts, including practicing the Olympic lifts.
- [93] In so far as the scheduled classes were concerned, daily class routines or workouts were uploaded to the Gym's website the day before the class. Exhibits 70, 71, 80, and 81 provide a sample of the workouts set for the Gym's various classes held in October 2013 and June 2014.
- [94] According to Mr. Coombe and Ms. Rankel-Allen, the classes have different components to them. Every class starts with a 10-minute introduction of the workout by the instructing coach. Members then begin the class with a 10-minute warm-up cardio component, which is followed by a strength (weightlifting) and skills (gymnastics) component of about 20 minutes in length. A workout of the day or "WOD" would follow, which would last between 3 and 20 minutes depending on the WOD, and finally, the class would conclude with a core workout or "midline piece" with body work at the end.
- [95] Heavy Olympic lifts did not occur throughout the class but only in the strength or the WOD components of the class. No weights were used in the Thursday CrossFit classes as Thursdays were always a "day off weights" that focused on skills and endurance. Saturday classes were generally cardio focused, according to Ms. Rankel-Allen, although there may have been some exceptions.
- [96] Both Mr. Coombe and Ms. Rankel-Allen were clear that weight-dropping activities were not scheduled into classes every day of the week, in fact they were usually only incorporated into one or two days of the week, depending on the week's schedule. Weightlifting activities, as distinct from exercises that had an intentional weight-dropping component, occurred approximately four days a week.
- [97] Based on an examination of the workout schedules contained in Exhibits 70, 71, 80 and 81, intentional weight-dropping events appear to have been incorporated into no more than 11 of the 25 scheduled days of classes in October 2013 and eight of the 23 scheduled days of classes in June 2014. These schedules confirm the evidence of both witnesses as to the infrequency of intentional weight dropping being included in the class routine and also confirm their evidence as to the Thursday classes being a weight-free class. I find these schedules accurately represent the frequency of weight-dropping events during scheduled classes in October 2013 and June 2014 and I am satisfied that these schedules generally reflect the schedules and activities during the relevant time frame.

- [98] As noted above, in addition to the scheduled classes, the Gym also had three types of non-scheduled activity--(i) open gym, (ii) personal training, and (iii) coaches working out.
- [99] In so far as the open gym component is concerned, that occurred on Saturdays and Sundays between noon and 2 p.m. According to Mr. Coombe, a coach was always present for open gym periods. While there may have been some weight-dropping activities during the open gym periods on Saturday, the evidence as to the frequency of this occurrence is close to non-existent.
- [100] When the Gym first opened, there were no personal training sessions. As time progressed, personal training sessions were not a frequent occurrence. The evidence establishes that during GMC's tenancy, there was only one coach who did personal training with clients and only two sets of clients who attended for regular personal training sessions. According to Ms. Rankel-Allen, one set of personal training clients was an older couple who did not lift heavy weights, and the other set was a mother and daughter who worked out in the evenings. The uncontradicted evidence from Mr. Coombe and Ms. Rankel-Allen on this activity establishes that the personal training clients were individuals who wanted a more conventional training routine, did not use heavy weights, and did not engage in the CrossFit style of workout. Accordingly, the evidence does not establish that weight-dropping events occurred with any frequency, if at all, during the personal training sessions.
- [101] Between January 2013 and July 2014, there were a total of six or seven coaches affiliated with the Gym, including Mr. Coombe and Ms. Rankel-Allen. According to both witnesses, at the start of business, the coaches were encouraged to join the scheduled classes to bolster the class size. In so far as coaches working out during the non-class times, Mr. Coombe explained that this was an infrequent occurrence between January 2013 and July 2014.
- [102] In addition to the above scheduled and non-scheduled activities, the head office for the Gym held an annual competition between all gyms connected to the CrossFit brand. This consisted of one workout per week for five weeks where clients competed with other gyms to post a best result. Ms. Rankel-Allen acknowledged that prior to the two competitions that occurred during GMC's tenancy at the West 10th Location, it was possible that coaches and members of the Gym filmed themselves conducting weight-dropping activities between scheduled classes in an attempt to qualify for the annual open competition.
- [103] Although in the first six months or so of operation either Mr. Coombe or Ms. Rankel-Allen or both were usually present at the Gym during operating hours, they were not present all the time, particularly once the business started to establish itself, and so it is likely that members participating in a class or during training sessions could have unintentionally dropped weights in an unsanctioned manner at the Gym. The evidence is not at all precise on the frequency of such incidents, but it is fair to conclude that accidental drops or one-off improper drops of weights occurred from time to time given the nature of the activity at the Gym.

Video Posted to the Internet of Gym Activities - Exhibit 102

[104] Exhibit 102 is a compilation of eight video clips (the "Website Clips") from the Gym's website that Mr. Cheng obtained. The Website Clips capture different activities in the Gym occurring between March 30, 2013, and March 29, 2014. When the Clips were put to Mr. Coombe on cross-examination, he was clear that while the clips show activities within the Gym, they were not representative of the usual activity performed during the scheduled classes. Indeed, the clips were posted for marketing purposes and were meant to portray the Gym and its clients in a positive light.

[105] While the Website Clips are interesting and do provide some information about weights being dropped, they are of no assistance in determining whether they are consistent with the nature of normal or regular activity being carried on in the Gym classes during GMC's operational hours. For instance:

- At least one video appears to have been from 8:20 a.m., a time when the machines at GMC would have been operating (clip 4);
- One video appears to have been filmed at 7:35 p.m. outside GMC's hours of operation (clip 7);
- Two videos are of a "CrossFit open challenge", an event that occurs only once a year (clip 1 from March 30, 2013, and clip 6 from March 29, 2014). Both clips occur during GMC's hours of operation--12:00 p.m. and 3:00 p.m. respectively. Clip 1 is one minute and 33 seconds duration and depicts four clients working out with heavy weights, repeatedly dropping them from shoulder height after completing a set of lifts. Clip 6 is of 33 seconds duration and depicts three clients working out with heavy weights, each dropping them from shoulder height after completing a set of lifts;
- Three videos (clips 2, 3 and 8) are of personal best single lifts. Only one of the three videos has a time stamp--clip 8 at 8:20--but there is no indication whether this was 8:20 a.m., when GMC's machinery would be operating, or 8:20 p.m., a time outside GMC's hours of operation; and
- One 43-second video (clip 5) depicts a class of weightlifters with moderately heavy weights, some of which are dropped at the end of a set. The time stamp on this video is 5:10 p.m., so during GMC's hours of operation.

[106] Four of the Website Clips are from a time period after August 2013, when the Gym installed a concrete slab floor that was to assist in absorbing and dampening some of the sound and vibrations from any weight dropping events.

[107] Significantly, the Website Clips are of no assistance in determining the nature of the frequency, volume, or character of the sounds as heard and experienced inside the GMC Premises as the Website Clips and accompanying sound are all recorded from inside the Gym. There is no evidence as to what equipment was used to record the videos, but given their grainy quality, it is reasonable to infer that cellphone cameras were used. This raises the issue of the accuracy and representativeness of the sound quality of the videos and the

likelihood of some sort of distortion of the sounds captured. Quite simply, it is not possible to discern whether the videos, as played during the trial through a computer, accurately represent the level of noise generated when weights are dropped. While I acknowledge that watching the Clips at least confirms that there were weight-dropping sounds inside the Gym, I am unable place any weight on the Website Clips as they do not assist in determining the issue at hand--whether the noises emanating from the Gym as heard in the defendants' Premises were of such a frequency, volume, and character as to be sufficiently disturbing to significantly interfere with a reasonable tenant's ability to operate a dry-cleaning business in the Premises.

Ms. Su's Complaints to the Gym about Noise

- [108] Mr. Coombe and Ms. Rankel-Allen both testified that when the Gym first opened and for a few months afterwards, they received noise complaints from Ms. Su in relation to the music and weighted balls being thrown against the shared wall. Other neighbours complained about the loudness of the music from the Gym. A city official attended one day, measured the sound levels and, as a result, the owners placed a strip of tape on the volume control for the stereo indicating the level that the sound was not to exceed. Neighbours also complained about members improperly parking in the alleyway behind the Gym.
- [109] Mr. Coombe recalled that Ms. Su made one or two noise complaints to him about the music and one complaint following his throwing a weighted medicine ball against the shared wall. She also complained to him on one occasion that someone had parked in the defendants' parking spot, but it turned out the offender was actually a customer from the café next door.
- [110] In respect of the incident where he threw the medicine ball against the wall, Mr. Coombe explained he threw it in frustration after some difficulty with his partner, Ms. Rankel-Allen. Ms. Su came over almost immediately after this, complaining to him about a slamming noise. He recognized that what he had done was "bad" and disturbing to Ms. Su, and he testified that he acknowledged this at the time by waving at Ms. Su and grunting that he was sorry.
- [111] Ms. Rankel-Allen recalled Ms. Su complaining to her on one occasion about the music being too loud, and Ms. Rankel-Allen was aware that Ms. Su had complained to Mr. Coombe about the volume on two other occasions. As Ms. Rankel-Allen was the manager of the Gym, the coaches would advise her of developments at the Gym and, as best she could recall, they did not advise her of any noise complaints from Ms. Su.
- [112] Ms. Rankel-Allen was present when one of the coaches had the class warm up by throwing medicine balls against the wall shared with GMC. She immediately came out of her office and directed the coach and members to stop. As Ms. Rankel-Allen explained, this was a one-off incident. Ms. Su came over immediately, remaining outside the Gym, and appeared to be flustered by it. Ms. Rankel-Allen went over to Ms. Su's Premises and apologized to her for

the incident as she understood how disturbing the incident was to Ms. Su. Thereafter, Ms. Rankel-Allen made sure no one threw equipment against the common wall.

- [113] Neither Mr. Coombe nor Ms. Rankel-Allen passed on Ms. Su's complaints to the landlord. The Gym endeavoured to remedy the problem and, after the first few months, believed it had been remedied because no further complaints were brought to their attention. As far as Ms. Rankel-Allen was concerned, the complaints were, to her knowledge, remedied when they were made.
- [114] Neither witness recalled the coaches conveying complaints by Ms. Su about the noise emanating from the Gym. Neither witness received complaints from Ms. Su about noise caused by the dropping of weights. Indeed, neither witness was aware at the time GMC vacated the Premises that GMC's move was purportedly due to the irregular, frequent, and unpredictable noises caused when weights were dropped in the Gym. They only learned that this was ostensibly the reason for GMC's departure when they were contacted by counsel in the summer of 2018 and asked to produce their class schedules and to testify. Ms. Rankel-Allen testified that had she been aware that there was a problem caused by the dropping of weights, she would have done something about it.
- [115] Mr. Coombe explained that when their business opened in January 2013, the old wood flooring was uneven with dips that caused the weights, when they were dropped, to bounce in an odd manner. In August 2013, mainly for safety reasons, the Gym replaced the floor with a concrete slab that did not extend to the walls. The effect was to provide a safer environment for the members. According to Mr. Coombe, the new floor also dampened the sound and reduced the vibration and noise transfer when weights were dropped.

The Defendants' Case

- [116] The defendants called six witnesses: two regular GMC customers, a GMC employee, Ms. Su, Mr. Cheng, and Dr. Abu-Remaileh. They also tendered and played a video recording made by Ms. Su.

Video by Ms. Su

- [117] In the afternoon of January 31, 2014, Ms. Su made video recordings inside GMC to capture the sound and vibrations made by the noises emanating from the Gym. She used a family camera recorder to make the video recordings. She placed the recorder on a shelf that was against the wall that GMC shared with the Gym. Ms. Su stated that, on the day she made the recordings, the Gym was very noisy. The recordings were made three days after Mr. Siddoo's January 28, 2014, email claiming the noises were not a landlord matter and of a different character than what she actually experienced. When asked by her counsel what her purpose was in making the recording she answered:

Actually, I did not think that much about it at the time. Because the landlord said the noise was quite small, I wanted to make a recording just in the case in the future there was any dispute, then I would have a proof. Because at that time we had an opportunity to consider of moving -- to move, yes.

- [118] In all, Ms. Su said she made two recordings from inside the Premises and about four recordings from outside the Premises, two or three from across the street and two from inside the shed at the back of the Premises. Cross-examination of Ms. Su on her list of documents describing a compilation of videos established that actually approximately 11 video clips had been taken on January 31, 2014, and that only one brief video clip of just under three minutes had been tendered in evidence by the defence--Exhibit 69. Exhibit 69 is two minutes and 49 seconds long. Ms. Su conceded that the beginning and end of Exhibit 69 appears to have been edited, as it does not depict Ms. Su starting or stopping the video camera. Exhibit 69 is said to contain the loudest iteration of the noises emanating from the Gym.
- [119] Mr. Cheng testified that he helped make the video recordings and that Exhibit 69 was created from a longer recording that had many portions with no noise. Mr. Cheng explained that he wanted to show the type of noise emanating from the Gym.
- [120] At the time Exhibit 69 was recorded, the dry-cleaning machines and vents were not operating. Several low thuds can be heard during the course of the video and, at various times, the thuds or bangs are of sufficient force to cause the camera to shake and the hangers of clothing on the metal clothing racks to rattle and shake.
- [121] Ms. Su described the character of the noises captured in this recording as being consistent with characteristics of the noises she experienced while in GMC--they were irregular, sudden, and had no pattern. They occurred almost every day, once or many times a day. In respect of the high, sharp sound in Exhibit 69 that sounded like metal things hitting each other, Ms. Su testified that those sounds were actually louder than what the video recording conveyed. With respect to the low frequency thuds or "bohm" sounds at the beginning of Exhibit 69, they were more obvious in real life and made people feel uncomfortable. The video recording of these low frequency sounds, she said, would not bother people. By that, I understood Ms. Su to mean that the low thud sounds in the video clip did not accurately represent the volume or disturbing nature of the sounds that she experienced.
- [122] Exhibit 78 consists of two video clips also taken by Ms. Su on the same camera recorder. She could not recall if they were filmed on the same date as Exhibit 69. These video recordings were introduced in Ms. Su's cross-examination and were not as significant in their loudness or intensity of noises. Indeed, the loudest noise in the longer video clip appeared to be GMC's doorbell ringing and, in the shorter video clip, GMC's telephone ringing. Ms. Su explained that she was not startled by these noises, whereas the noises from the Gym did startle her. There were several notable features of the longer nine minute, 51 second video (MAH03587.MP4) in Exhibit 78, including:

- Ms. Su can be seen starting and ending the video recording;
- Throughout the video clip, only low, distant, rumbling sounds can be heard in the recording save for a one minute period;
- Between 7:01 and 8:02 minutes, the noises consist of louder thuds and, on at least two occasions, there is an accompanying shaking of the hanging metal racks of clothes from the vibrations made by the thuds; and
- The automatic doorbell can be heard to ring approximately eight times between 5:08 and 9:23 minutes.

[123] Having watched both Exhibit 69 and the longer video in Exhibit 78 several times, I conclude they were taken on the same day but from slightly different angles and possibly at slightly different times in the afternoon. All of the hanging shirts are the same in the two video clips and the same number of empty jacket hangers (10) can be seen in the lower right-hand side of the screen. A comparison of the upper right-hand side of the screen provides the evidence that the camera has been moved slightly as the rollers at the top of the screen are not fully visible in Exhibit 69 whereas they are in Exhibit 78. The only noticeable difference between the two video clips is that in Exhibit 69 a black jacket and what appears to be a blue striped shirt are hanging on the right-hand side of the video screen near the empty jacket hangers whereas they are not in Exhibit 78.

[124] The second video clip in Exhibit 78 (MAH03590.MP4) is two minutes and 26 seconds in length and depicts Ms. Su starting the video camera and stopping it. This time, the camera is positioned on the floor near the common wall with the Gym. Throughout the video clip there are dull, low thuds and music playing in the background. The loudest sound in this clip is towards the end when GMC's telephone rings.

[125] Notwithstanding her recording of the noises from inside the Premises, in cross-examination Ms. Su could not recall whether she shared the recordings with Mr. Siddoo. More specifically, she was unable to say she did not share them with Mr. Siddoo and simply indicated she could not remember when she shared them with him or if she did. Given Mr. Siddoo's evidence, I find as a fact that the videos were never shared with him during the remainder of GMC's tenancy.

[126] Ms. Su conceded that no recordings were taken from the middle of the Premises, and no recordings were made while the dry-cleaning machines were running, in part because she was too busy and also because when the machines were running, the noises from the Gym were not as loud or disturbing.

[127] Given the limitations of the video recordings, including the placement of the camera recorder next to the common wall, which likely distorted and maximized the vibrations recorded, the purpose for which the recordings were made, the edits made to Exhibit 69, the fact that no recordings were made when the dry-cleaning equipment was operating, and the fact that the recordings were not made by an acoustic engineer or sound technician

using accurately calibrated equipment, I am unable to place any weight on the recordings in so far as them being accurate and representative depictions of the emerging sound scape within GMC vis-à-vis the noises emanating from the Gym.[1] The only thing I take from the video recordings made by Ms. Su is that the noises emanating from the Gym were no doubt irritating, inconvenient and likely a source of frustration to her but that is the extent of their usefulness to determining the issues in this case.

The Perspective of Two Customers

- [128] Kelly Kerr and Greg Oryall, two long time, regular customers at GMC's West 10th Location Premises, both confirmed that the video clip in Exhibit 69 was very consistent with the banging and crashing noises they heard coming from the Gym when they were inside the Premises at the front counter to pick up or drop off clothing for dry cleaning. Both were more than satisfied with the quality of Ms. Su's work and followed GMC to the Alma Street Location.
- [129] Ms. Kerr testified that between January 2013 and July 2014 she was at GMC at least 39 times based on her Visa receipts from that time frame and that the days she attended and paid for dry cleaning were Saturdays, Mondays, Tuesdays and Wednesdays at various times. Ms. Kerr described the noise as a sudden, sharp bang that was very startling. She estimated she heard it about 50% of the time she was at GMC. Ms. Kerr indicated that sometimes she did not hear any startling noises, sometimes the noises were louder, and sometimes they were not as loud, and on one occasion the noise was particularly loud.
- [130] Ms. Kerr described the noises captured in Exhibit 69 as very consistent with what she heard when she attended the Premises, and she testified that a couple of the noises in the video were startling to her. Ms. Kerr agreed that it was not so much the volume of the noises as the unpredictability and the reaction that the noises evoked in her. Of her attendances at the Premises when she heard noises, some of the noises were at the same level as what she heard in Exhibit 69 and sometimes they were louder.
- [131] Mr. Oryall testified that during the period of January 2013 to July 2014 he attended GMC weekly for approximately two-thirds of that time frame. He usually attended on Saturdays, to drop off and pick up his work clothing, but may have attended on weekdays too. Mr. Oryall said that when the Gym moved into the commercial premises adjacent to GMC's Premises, there was a change in the atmosphere of the neighbourhood and that it became quite raucous, with people running up and down the street and through people's gardens. In so far as the environment inside the Premises was concerned, he explained that after the Gym started operating next to GMC, the noise of the weights and the Gym were frequent, loud, and disturbing. He found the noises disruptive to any conversation he was having with Ms. Su. She was startled by the noises and, over time, her lighthearted and joking demeanour became less visible.

- [132] Mr. Oryall indicated that Exhibit 69 was a good representation of the noises he heard inside GMC but that it was not nearly as severe an impact as what he would feel in person when he attended GMC. Mr. Oryall stated he felt "jarred" when the large weights hit the floor. He conceded in cross-examination that there would have been times when he attended GMC and did not hear any noises but could not estimate the frequency of noise vs. no noise attendances. He agreed the volume of the noises varied and stated he only reacted to the most severe ones. Mr. Oryall stated that he felt all the noises were bothersome but that it really was a matter of degree, with some more severe than others.
- [133] I find the evidence of Mr. Oryall and Ms. Kerr is also of very limited assistance. They provide some evidence of the irritating, disturbing, and even startling nature of the sounds emanating from the Gym, but these were brief, limited observations, which impacts the reliability of the evidence. Moreover, their lay opinions on what they recalled hearing four years prior to the trial remain subjective interpretations of what the sounds were like at a point in the past, augmented by the sounds as heard through Ms. Su's video recording.

Vivian Lu

- [134] Jingyun (Vivian) Lu is an employee with GMC and has been so since sometime in 2011. She stated that her usual work schedule at GMC is from 7:30 a.m. to 2:30 p.m. In 2013 through July 2014, Ms. Lu worked approximately 35 hours per week.
- [135] Ms. Lu explained that Ms. Su always arrived at the Premises in the morning before she did and had already started a load of washing. When Ms. Lu arrived, she would remove the wash and sort it. Ms. Lu would clean, sort the wash, and do other piece work. When Ms. Lu and Ms. Su finished the cleaning work, Ms. Su would turn off the boiler in the shed. The equipment was usually turned off around 10:00 a.m. Prior to the Gym moving in next door, once the dry-cleaning equipment and the boiler were turned off, the Premises was very quiet for the rest of Ms. Lu's work day, save for when customers came in to drop off or pick up their dry cleaning. When the equipment was running in the morning, the noises from the Gym did not bother her as she could not hear them.
- [136] Ms. Lu testified that once the Gym started operating next to GMC, she started to hear loud irregular, noises every day until GMC moved to the Alma Street Location. She described them as banging sounds--like an earthquake--that would shake the building or room. The noises made her uncomfortable because they were irregular, random, and she could not predict when they were going to occur. Ms. Lu said that she thought that if the noises lasted, she would consider quitting her job.
- [137] Ms. Lu said that she was bothered by all the noises from the Gym, including the low bass of the music, which was loud. She said the non-music noises came from things being dropped on the floor or thrown against the wall. She could not tell the difference between something being dropped on the floor and something being thrown against the wall. The thrust of her evidence was that the noises occurred at all times of her workday, and their random and

unpredictable nature was more disturbing than the volume of the noises. When the schedule of the classes was put to her and she was asked about whether there were periods of no noises from 1 p.m. to her departure at 2:30 p.m., Ms. Su was unable to answer the question and kept repeating that she did not calculate the times of silence and that there were definitely noises in the afternoon.

- [138] Ms. Lu watched the video clip in Exhibit 69 and stated that the sounds of the video were pretty much the sounds she heard while in the Premises; however, what was experienced in the store was worse than what was depicted in the video. Ms. Lu saw Ms. Su make a video recording and understood from Ms. Su that she wanted to make a recording about the sound as evidence because Ms. Su told her that when she complained to the people next door, they did nothing about it.
- [139] Ms. Lu talked to Ms. Su a bit about the noise but never complained to anyone else, apart from maybe her husband, and did not go next door to the Gym to complain as "it had nothing to do with" her.

Kathy Su - Owner of GMC and Director of OJJJ Enterprises

- [140] Kathy Su owned and operated GMC at both the Premises and then the Alma Street Location. Ms. Su, who has a degree in electrical engineering, immigrated to Canada in 1999 with her husband, Stewart Cheng. They lived in Toronto from 1999 until they moved to Vancouver in 2008. Once settled in Vancouver, she started her dry-cleaning business and entered into a three-year lease with the plaintiff effective August 1, 2008.
- [141] The first lease expired on July 31, 2011. Mr. Cheng negotiated with Mr. Siddoo for the lease renewal but did so in consultation with Ms. Su. As there were difficulties in reaching an agreement, GMC operated on a month-to-month lease basis from August 2011 until the lease was signed in mid-2012. During that time, Ms. Su looked at other locations in case the lease could not be renewed on terms satisfactory to both parties. One of the locations she looked at was the Alma Street Location. However, the lease for the Premises was eventually renewed, and Ms. Su and Mr. Cheng did not pursue the Alma Street Location any further. The renewed lease was for a five-year period effective August 1, 2011.
- [142] Ms. Su testified that her usual hours of work were from 7:00 a.m. to 6:30 p.m. on Monday to Friday and then 9:30 a.m. to 5:00 p.m. on Saturday. Monday to Friday, she commenced her work day when she arrived at GMC by starting the washing machine, followed by a compressor and boiler in a shed behind the Premises, and the dry-cleaning machines and other equipment. The equipment would be on and running until around 10:00 a.m. each weekday. The equipment was not used on Saturdays.
- [143] Ms. Su testified that when customers attended to pick up or drop off dry cleaning, she was the person who attended at the front of the store in the customer area to serve them. She estimated that she spent about an hour of her day in the customer area; the rest of her day was spent in the working space at the back part of the Premises. Ms. Su testified that her

employee, Vivian Lu, did most of her work in the working space of the Premises, save for the tagging of laundry, which was done in the customer area. Ms. Su estimated this latter task probably took about 30 minutes of Ms. Lu's workday.

- [144] Ms. Su had no issues with noises in the Premises until January 2013 when the Gym commenced operations. Ms. Su testified she was disturbed by the loud music and banging sounds from the Gym. She testified that it had a significant impact on her health, including her psychological health. She testified that almost every day there were a huge amount of noises that were unpredictable, unexpected, and startling.
- [145] In respect of the banging sounds, Ms. Su repeatedly described the characteristics of the noise as irregular, no pattern, and sudden noises that occurred "basically every day once--almost every day once or many times." Ms. Su explained that the high, sharp sound, that seemed like metal things hitting each other, were louder in person than what was portrayed in Exhibit 69. She also explained the low frequency "bohm" sound at the start of the video was more pronounced on site and that it would make people feel uncomfortable.
- [146] Ms. Su explained that had she known at the time she renewed the lease in 2012 that she would have to deal with the noises emanating from the Gym, she would not have renewed the lease.
- [147] Ms. Su testified that after the Gym moved into the adjacent commercial unit and the noises started, she repeatedly complained to the Gym. Ms. Su explained that she would go to the front door of the Gym and complain to the first person she saw that it was too noisy. She did not know if the person she complained to was the person in charge. Ms. Su estimated she made about 20 noise complaints to the Gym over the first half of 2013. She received no response, and the noises did not abate, so she gave up. She never asked her husband to attend at the Gym and lodge a complaint with the owners.
- [148] Ms. Su testified that the noises made her nervous and anxious and eventually affected her ability to sleep, causing her to feel tired and exhausted. Ms. Su explained that she tried to tolerate it, but at one point, she called 9-1-1 saying she could not stand the noise anymore, it was driving her crazy.
- [149] Ms. Su testified that through the second half of 2013, her health continued to deteriorate and she started to look around for other spaces to rent. In December 2013, she closed the business over Christmas for one week to 10 days for a holiday. Ms. Su explained she felt better after the holiday. GMC was re-opened in the new year. She testified she returned to her tense state when she was re-exposed to the noises from the Gym. In mid-January 2014, she made an appointment to see her family doctor and attended her doctor's office on January 28, 2014.
- [150] Mr. Cheng accompanied her to her medical appointment on January 28, 2014, to act as a translator. She advised Dr. Abu-Remaileh that she was anxious, had very low energy, and was not able to sleep. She explained to the doctor that the very loud and unpredictable

noises emanating from the Gym were making her tense and anxious. The doctor asked her if she could move, but Ms. Su explained she had a lease for another two and a half years. The doctor prescribed medications to assist with sleeping and depression and directed her to return in three weeks for a follow-up appointment.

- [151] Ms. Su said she only took the anti-depressant medication once because it made her feel nauseated and slow, and she did not want to become dependent on it. Similarly, she did not take the sleeping medication every day as she was concerned about becoming dependent upon it, and it did not feel good.
- [152] Ms. Su returned to see Dr. Abu-Remaileh on February 18, 2014, this time without her husband. She did not tell the doctor that she was not taking the anti-depressant medication, as she thought the doctor would be unhappy with her. She did advise that her sleeping had improved a bit but that everything else remained unchanged.
- [153] Dr. Abu-Remaileh recommended that Ms. Su continue the medication and try to remove the trigger of the symptoms, and she referred Ms. Su to a specialist. The doctor also provided her with a doctor's note.
- [154] Between her two appointments with Dr. Abu-Remaileh, Ms. Su learned of Mr. Siddoo's response to her husband's noise complaint, which is what prompted her to make the video recordings referred to earlier. She testified that she did not think much about the recording apart from having proof if there was a future dispute with the landlord, adding that, at that time, they had an opportunity to consider moving GMC.
- [155] Ms. Su explained that Mr. Ho had been urging them to purchase the Alma Street Location from late-January 2014, but she resisted until after her April appointment with the specialist, Dr. Zhang, as she hoped for a resolution that would not involve moving her business. It was not until after her April 3, 2014, appointment with Dr. Zhang that she decided to move. Dr. Zhang was unable to provide her with any relief to the situation, so she felt she had to move.
- [156] Ms. Su was cross-examined for several days. Unfortunately, her evidence did not withstand the rigours of that process. Her testimony was confusing and contradictory. Numerous inconsistencies were put to her, including inconsistencies in her evidence from her examination for discovery, some of which are noted below.
- [157] While not the most significant inconsistency on its own, in her examination for discovery, Ms. Su testified she typically arrived at work at 7:20 a.m. on weekdays, but at trial, she maintained that she started at 7:00 a.m. When considered in the context of many other inconsistencies that arose in her evidence, the difference in start time takes on more significance, particularly when the schedule of the Gym is considered. The schedule provided as the closest estimate to the circumstances in January 2013 through July 2014 had a class that started at 7:00 a.m. every weekday and ran for an hour. Considered in this context, Ms. Su's insistence that she was at GMC by 7:00 a.m. appears contrived to expand

the time she was exposed to noises from the Gym.

- [158] Counsel endeavoured to contrast the loudness of the noises from the machinery, compressor, and boiler, and doorbell at the Premises with the noises emanating from the Gym. Ms. Su was steadfast on the point that those sounds from the dry-cleaning operation, even though some were loud, did not bother her, as she was used to them--a point that I do accept. Ms. Su did concede that when the machines were running inside the Premises, only really loud noises from the Gym would bother her.
- [159] When pressed for specifics about the frequency of the intolerable noises and the possibility that there were days she did not hear any intolerable noises from the Gym, Ms. Su maintained that she heard intolerable noises almost every day and that there were only short periods of time, between half an hour and an hour, that she did not hear noises coming from the Gym. She was unable to acknowledge or agree that there were times in the day when there were no loud noises; nor was she able to agree that there were no intolerable noises on Thursdays, the weights-free day. Contrasting Ms. Su's evidence with Ms. Rankel-Allen's evidence about the schedules for the classes and the schedule provided by counsel for the Gym, which establishes there were periods of time when there were no classes and therefore no loud noises, I am unable to accept Ms. Su's evidence on this point.
- [160] My conclusion on this point is reinforced by the inconsistency in Ms. Su's evidence between her examination for discovery and her evidence at trial. At her examination for discovery, Ms. Su maintained she heard noises coming from the Gym that sounded like bombs being deployed every day, every hour and that there was never a day that she hardly heard the noises. At trial, she modified her evidence to "almost every day" and said her evidence at the examination for discovery was not accurate.
- [161] Another example of what I would characterize as inflation on Ms. Su's part relates to the level or type of noise from balls being thrown against the shared wall by people in the Gym. Ms. Su's evidence from her examination for discovery was put to her. There, she testified that she recalled hearing the sound of balls banging against the wall roughly one or two times per day for about a five to 10-minute interval. At trial, Ms. Su denied that this was an exaggeration, but I am unable to accept that denial, particularly in light of the fact that she conceded at trial that it only happened once, right at the very beginning of the Gym's tenancy. When it happened, she immediately complained, and that noise stopped. This latter version is consistent with the evidence of Ms. Rankel-Allen.
- [162] Another material inconsistency between Ms. Su's evidence at trial and her examination for discovery arose around the timing of when she started to look for a new location for GMC. At her examination for discovery, she indicated that she started to look for a new location in March, April, or May 2014. When this evidence was put to her at trial, she endeavoured to explain that the question and answer had been misinterpreted by the interpreter. Given the further examination for discovery questions put to her, I am unable to accept that explanation. Moreover, at trial, she testified that she started looking for a new location in

November or December 2013. It is important to note here that the documentation around the January 24, 2014, discussion with Mr. Ho about signing the contract of purchase and sale for the Alma Street Location did not come to light until well after Ms. Su's examination for discovery.

- [163] These are but a few examples of numerous inconsistencies in her evidence; however, they are significant enough that, together with the numerous other inconsistencies, I am unable to place any reliance on Ms. Su's evidence that it was solely the noises from the Gym and the plaintiff's failure to remedy the situation that precipitated the decision to vacate the Premises and move to the Alma Street Location.

Stewart Cheng

- [164] Stewart Cheng is Ms. Su's husband. In 2008, he received his PhD in mechanical engineering from the University of Toronto and moved to Vancouver with Ms. Su. For five years, Mr. Cheng held a research position at the University of British Columbia. In 2013, he bought a small business in Vancouver, which he continued to operate at the time of this trial.
- [165] Mr. Cheng described his involvement in his wife's business while it was located at the Premises as being the "doer"--implementing and facilitating Ms. Su's business decisions. He explained that his English was better than Ms. Su's, so he conducted the communications in negotiations for the lease, dealt with lawyers, government agencies, etc., but all such dealings were based on the decisions made by Ms. Su. As part of his assistance to his wife, Mr. Cheng wrote all the rent cheques for GMC and conducted all the email communications with Mr. Siddoo over rent and tenancy issues.
- [166] Mr. Cheng outlined the course of lease renewal negotiations with Mr. Siddoo in 2011 and 2012. He explained that the renewal lease was simply presented to them but that he and Ms. Su felt the increase in rent was too much and the length of the lease was not long enough. As the lease negotiations dragged on through 2011, Mr. Cheng and Ms. Su started to look for other locations in case an agreement could not be reached. One such location was the Alma Street Location.
- [167] Once the lease was renewed in mid-2012, Mr. Cheng and Ms. Su did not pursue the Alma Street Location further.
- [168] In early 2013, Ms. Su advised Mr. Cheng about the noises coming from the Gym and that they worried and disturbed her. Mr. Cheng recalled that he first heard about the noises from the Gym bothering his wife sometime in February or March 2013. Mr. Cheng, himself, never raised the issue of noises with the Gym owners or operators. As the year progressed, Ms. Su became more irritable, stressed, upset, and unable to sleep. Mr. Cheng did not do anything about this at the time as he was too busy with his own new business.

- [169] In so far as the rent issues that arose after July 1, 2013, were concerned, Mr. Cheng explained that part of the delay in remedying the disagreement, at least in August 2013, related to Mr. Cheng and Ms. Su being out of the country on a holiday. The further delays in remedying the issue related to Mr. Cheng awaiting a clarification on the rent cost adjustment issue from Mr. Siddoo and were in part because the emails were going to his old University of Toronto email address, which he checked less frequently in 2013. Mr. Siddoo's threat of involving a bailiff in his December 4, 2013, email caused Mr. Cheng to pay the outstanding rent amount notwithstanding the fact that he had received no clarification on his queries about the adjusted cost issues.
- [170] By the end of 2013, Ms. Su started to express a desire to relocate GMC and started to again look for locations to move. Mr. Cheng explained that their businesses were closed over the 2013 Christmas period for about 10 days. In that time, Ms. Su appeared to relax and get better. Once they returned from their family vacation and reopened their businesses in early 2014, Mr. Cheng noticed Ms. Su's health start to deteriorate again. Mr. Cheng urged his wife to see her doctor.
- [171] In mid-January 2014, Mr. Cheng received a telephone call from Jason Ho, the owner of the Alma Street Location. Mr. Cheng explained that it was Mr. Ho who pushed the sale and that Mr. Cheng endeavoured to slow the process down as Ms. Su wanted to see what the doctors advised. He explained that in April 2014, he received instructions from Ms. Su to pursue the purchase of the Alma Street Location. Although he had not communicated with Mr. Ho for about two months before renewing the purchase and sale discussions, it was Mr. Cheng's evidence that Mr. Ho was urging the sale, advising that there were other interested purchasers and opportunities. Mr. Cheng and Ms. Su signed the contract of purchase and sale on April 21, 2014, after her visit to the psychiatrist.
- [172] Mr. Cheng sent the emails to Mr. Siddoo complaining of the noises from the Gym affecting his wife's health. Mr. Siddoo's dismissive reactions in January 2014 and again on July 9, 2014 caused Mr. Cheng to feel disappointed and to conclude that he could not deal with Mr. Siddoo in respect of that issue. Mr. Siddoo's follow-up email of July 11, 2014, caused Mr. Cheng to conclude that Mr. Siddoo would not admit that there was noise and that the defendants would not be able to get any help from him.
- [173] Mr. Cheng recalled that as part of the effort to deal with the noise issue created by the Gym, he went to City Hall in approximately March or April 2014, but they were of no assistance.
- [174] Mr. Cheng assisted the defendants in moving GMC from the Premises to the Alma Street Location in mid-July by disassembling the equipment, moving it, and reassembling it.

- [175] Mr. Cheng was also subjected to a lengthy cross-examination, albeit not as protracted as this wife's. Unfortunately, his evidence did not withstand the rigours of that process. Indeed, in at least one critical area, the issue of whether he telephoned Mr. Siddoo in response to the dismissive email of January 28, 2014, raises considerable concerns about Mr. Cheng's credibility.
- [176] Mr. Cheng agreed he did not respond by email to Mr. Siddoo's January 28, 2014, email. In response to requests from Ms. Su's examination for discovery, the plaintiff was advised that Mr. Cheng did not have any telephone calls with Mr. Siddoo. In cross-examination, however, Mr. Cheng could only say he could not recall if he had done so. While lapses of memory might be understandable on peripheral details, the resort to "I cannot recall" in reference to speaking to Mr. Siddoo on the telephone to discuss the issue of noise immediately after the initial complaint had been made is not plausible. Either Mr. Cheng spoke to Mr. Siddoo or he did not. Mr. Siddoo was clear that he heard nothing further from Mr. Cheng about noises emanating from the Gym until the July 9, 2014, email. Had Mr. Cheng telephoned Mr. Siddoo and discussed the matter, I have no doubt that would have formed part of the evidence in this case. Consequently, in the totality of the circumstances, the only reasonable inference that can be drawn is that Mr. Cheng did not respond to Mr. Siddoo's dismissive email on January 28, 2014, by email or a telephone call. His efforts to obfuscate this point cause me to approach all of his evidence with caution.
- [177] Another perplexing feature of the circumstances surrounding the first noise complaint to Mr. Siddoo on January 27, 2014, and Mr. Siddoo's dismissive response the next day is Mr. Cheng's failure to correct Mr. Siddoo's perception that the noise was only "a bit of noise from the gym". While Mr. Cheng did not agree with Mr. Siddoo's characterization of the noise, he did nothing to correct him on that point, notwithstanding the purported distress it was causing his wife. Mr. Cheng never suggested that Mr. Siddoo come and listen to the noises emanating from the Gym. Nor did Mr. Cheng or Ms. Su try to discuss the matter further with the Gym as Mr. Siddoo suggested in his email. Mr. Cheng explained that because Mr. Siddoo said it was not a landlord issue, Mr. Cheng did not see the point in approaching him for help on the issue, particularly after Mr. Siddoo's later reiteration that it was not his issue in his July 9, 2014 email.
- [178] Furthermore, Mr. Cheng did not seek legal assistance in relation to the noise complaint even though he was dealing with a lawyer in January and February 2014 regarding the Alma Street Location purchase, and he clearly felt it was the landlord's obligation to address the noise issue. Nor did Mr. Cheng provide the February 18, 2014, doctor's note to Mr. Siddoo once Ms. Su received it from Dr. Abu-Remaileh to demonstrate that the noise was impacting Ms. Su's health. In fact, that note was not provided until July 28, 2014, when Mr. Cheng gave Mr. Siddoo notice that the defendants were vacating the Premises.
- [179] Mr. Cheng was also cross-examined on why he sent Mr. Siddoo the July 9 and 10, 2014, emails that included a further complaint about the impact the noise from the Gym was having on Ms. Su's health. Again, Mr. Cheng's responses to this line of cross-examination

appeared contrived. He could not say what his thoughts were at the time but was unwilling to concede that he had not raised the noise issue with the intention of having Mr. Siddoo resolve it. Mr. Cheng's evidence on this point is inconsistent with the import of his evidence from direct examination where he appears to suggest that, even in July 2014, he was hoping Mr. Siddoo might resolve the noise issue but by the tenor of the July 11, 2014, email from Mr. Siddoo, it became apparent that he would not.

- [180] There were many other examples of the implausible nature of his evidence. For instance, notwithstanding that the issue of the noises from the Gym were important to his wife, Mr. Cheng did not bother to phone, email, or meet with the owners of the Gym, claiming he was too busy with his own business that he could not stop in to speak to people at the Gym to ask them to address the issue of the noises. His explanations for not doing anything to try to ameliorate the situation were utterly unconvincing.
- [181] When pressed on the email exchanges over the rent cost adjustment issue between July and December 2013, Mr. Cheng became unresponsive and argumentative. He would not admit to being frustrated with Mr. Siddoo, notwithstanding that he had received no clarification on the cost issue, an issue that he felt was part of Mr. Siddoo's obligation to explain.
- [182] On the issue of the change in Ms. Su's description of the frequency of the noises emanating from the Gym from "every day" to "almost every day", Mr. Cheng made efforts to generalize and say that he could not recall Ms. Su describing it as "every day" to him. When confronted with the January 27, 2014, email he sent to Mr. Siddoo, Mr. Cheng had to concede that he wrote that Ms. Su said the Gym was very noisy every day, and that was how she described the frequency of the noises to him. He was unable to remember the specifics of Ms. Su's descriptions about the duration of the noises during the day, and he could not remember if she said anything about long periods of silence between the occurrences of the noises.
- [183] On the issue of the purchase of the Alma Street Location and when those discussions arose, Mr. Cheng agreed that he spoke to Mr. Ho on the phone prior to the January 23, 2014, email, but Mr. Cheng was not forthcoming on whether he and Ms. Su had viewed the Alma Street Location prior to January 23, 2014. He was unable to explain why he would provide his driver's licence and Ms. Su's licence to Mr. Ho on January 23, 2014, and did not know if they were required for the purchase agreement that Mr. Ho then referenced in his email of January 24, 2014. Mr. Cheng's explanations that they were only interested in the Alma Street Location but not intending to buy it defy credulity in light of the overall email exchange between Mr. Ho and Mr. Cheng between January 23 and January 27, 2014. These emails include discussions about shutting off the water main and gas valve, moving in, having both names added to the contract of purchase and sale, and other general discussions related to the sale of the Alma Street Location. Significantly, all of this correspondence with Mr. Ho occurred prior to Mr. Cheng's first complaint to Mr. Siddoo about the noise emanating from the Gym.

[184] The defendants' suggestion that Mr. Cheng and Ms. Su only decided to buy the Alma Street Location after Ms. Su's appointment with Dr. Zhang is completely implausible, particularly in light of Mr. Cheng's email exchanges with Mr. Ho. The emails put to Mr. Cheng in cross-examination established there were ongoing contract discussions with Mr. Ho between January 23, 2014, and February 21, 2014, whereby each side had lawyers involved in drafting the contract of purchase and sale. Their discussions culminated, on February 21, 2014, in Mr. Cheng emailing Mr. Ho a revised purchase agreement from his lawyer. Moreover, during that time frame and up to April 4, 2014, Mr. Ho was sending Mr. Cheng various documents related to the Alma Street Location such as appraisals, minutes of Strata meetings, budget documents, and the like. The documentary trail established by the emails between Mr. Ho and Mr. Cheng completely undermines the defence assertion that they were trying to hold Mr. Ho off on the purchase and that they did not decide to move forward with the purchase until after Ms. Su's consultation with Dr. Zhang. To the contrary, I find that Mr. Cheng and Ms. Su embarked upon the path to purchase the Alma Street Location in January 2014 and did so before any noise complaint was made to Mr. Siddoo.

Dr. Hannen Abu-Remaileh

[185] Dr. Hannen Abu-Remaileh saw Ms. Su on two occasions in 2014: January 28 and February 18. Her treating physician's report dated June 9, 2018, was marked as an exhibit in the trial. She corrected one aspect of it: Although Mr. Cheng attended the first appointment with Ms. Su, Dr. Abu-Remaileh was uncertain whether he had in fact attended the second appointment in February as stated in her report.

[186] Ms. Su advised Dr. Abu-Remaileh that she operated a dry-cleaning business and that the Gym next door to her business frequently generated sudden and loud noises that were causing her to feel nervous as she could not anticipate when the sounds would occur. She also advised that small sounds at night were causing her to wake up in a startled state and so she was not getting a good night's sleep.

[187] Dr. Abu-Remaileh accepted Ms. Su's account at face value and accepted the symptoms that Ms. Su described as well as the cause of them. She noted that Ms. Su told her she had experienced generalized anxiety in the past, but she did not review Ms. Su's medical chart.

[188] As a result of her two brief, 15-minute consultations, Dr. Abu-Remaileh made a preliminary diagnosis that Ms. Su was suffering from situational anxiety caused by the noise emanating from the Gym. She provided her with a doctor's note at the end of the February 2014 appointment and referred her to see a psychiatrist who could spend more time to fully investigate the patient's condition and the preliminary diagnosis she had made.

[189] Dr. Abu-Remaileh testified that based on Ms. Su's account of her circumstances and the two brief consultations, it was her medical opinion that the noises emanating from the Gym were interfering with Ms. Su's daily functioning, causing her anxiety and thus interfering with her ability to sleep, work, and do day-to-day functions. Continued exposure to the

trigger--the loud noises--would likely result in ongoing anxiety and possible escalation of the symptoms but not permanent damage. While medication might help alleviate the symptoms, the best way to alleviate the symptoms, in Dr. Abu-Remaileh's view, was to remove what was triggering the anxious feeling.

- [190] Dr. Abu-Remaileh agreed that genetic and environmental factors contribute to anxiety disorders. She explained that for some people, such as soldiers, noise alone can be a very direct trigger of anxiety. Sometimes, noise can be the predominant factor, and other times, it simply is a contributing factor. Dr. Abu-Remaileh agreed that she had not undertaken the more detailed steps that are usually required for a diagnosis of an anxiety disorder or the causes of it. Rather, she did what any family physician does in limited circumstances--the "essentials".
- [191] Dr. Abu-Remaileh's diagnosis and referral to Dr. Zhang indicated that Ms. Su was hypersensitive to sound and not sleeping well. She conceded in cross-examination that an episode of depression in 2008 was a psychiatric condition that should have been reported to Dr. Zhang by Ms. Su (it was not). Dr. Abu-Remaileh also agreed with Dr. Zhang's assessment that the severe anxiety and depressive symptoms he observed in Ms. Su were largely due to the stress of running her business and a problem with a neighbouring unit. She further agreed that the stress of running the business could have been a contributing factor to the anxiety Ms. Su was experiencing.
- [192] Dr. Abu-Remaileh conceded that in order to conclude as an expert that Ms. Su was suffering from anxiety as a result of the noises she complained about, the doctor would need to do further research to determine when noises result in anxiety. She was clear that her assessment of Ms. Su was based solely on what Ms. Su told her in the two appointments. She was unaware that Ms. Su had made complaints to her family doctor about hearing issues and buzzing noises in her ear.
- [193] While Dr. Abu-Remaileh presented as a careful witness, I am unable to place much weight on her evidence. Certainly Dr. Abu-Remaileh did what she could to assist Ms. Su in the circumstances of the two brief visits she had with her, but her opinion of situational anxiety was reached solely on the information Ms. Su provided and did not include a review of Ms. Su's prior medical history. The best that can be said is that Dr. Abu-Remaileh made a preliminary diagnosis that Ms. Su suffered from situational anxiety possibly brought on by noises from the Gym but further assessment and information was necessary to reach a full and complete diagnosis of the problem.
- [194] Given Dr. Abu-Remaileh's very limited involvement with Ms. Su and what she did not explore with Ms. Su, coupled with the fact that she did not review Ms. Su's prior medical history, including her prior history of depression, Dr. Abu-Remaileh's evidence and preliminary opinion on Ms. Su's medical state is not that helpful. On the totality of the evidence, I am unable to find that Ms. Su did suffer from situational anxiety that was caused solely or even largely by irregular, loud noises emanating from the Gym.

The Expert Evidence on Acoustics and Sound Emergence

- [195] Both parties called expert opinion evidence from acoustic engineers who were retained to assist in the case. Mr. Mark Gaudet of BAP Acoustics provided expert evidence for the plaintiff in the form of two reports--the "Gaudet Report" and "Gaudet Supplementary Report". Mr. Mark Bliss of BKL Consultants provided expert evidence for the defendants--the "Bliss Report" and the "BKL Data".
- [196] Neither expert was able to assess the true soundscape that existed during the conjoining tenancies of GMC and the Gym. By the time each was retained, conducted testing, and prepared their opinions, GMC had long since relocated to the Alma Street Location. Moreover, the interior of the Premises formerly occupied by GMC had been renovated.
- [197] The plaintiff's expert did not do any sound testing from the Premises at the West 10th Location, rather, he tested for noise events at the Alma Street Location and also prepared a supplementary report analyzing the BKL Data obtained by the defence expert.
- [198] Mr. Bliss had sound equipment set up in the Premises, and the equipment continuously measured and recorded sound events between Thursday, June 14, 2018, and Monday, June 18, 2018. The BKL Data captured noises and events coming from the Gym during that time frame. Initially, Mr. Bliss's assistant set up the recording equipment in the middle of the space that GMC had occupied. However, at the insistence of Mr. Cheng, a sensor to record the noises was attached to the demising wall of the Premises.
- [199] The Bliss Report, dated July 4, 2018, contains the conclusion that "the measured sound emergence of the weight-dropping events, which were impulsive and occurred frequently but at irregular intervals, could significantly disturb persons working at the Premises."
- [200] I will address the Bliss Report and defence expert evidence first as it is the evidence proffered to assist the defendants in their contention that the noises from the Gym were of a frequency, volume, and character as to be sufficiently disturbing as to substantially interfere with the defendants' ordinary and lawful enjoyment of the Premises, thereby depriving them of substantially the whole of the benefit of their right of occupancy. Respectfully, the Bliss Report and Mr. Bliss's evidence does not assist in that regard given several limitations, which I shall outline below.
- [201] In the Bliss Report and BKL Data, sound loudness or magnitude is measured in A-weighted decibels ("dBA"). The Bliss Report contains Table 1, which outlines (i) the maximum noise levels for sound emanating from the Gym, (ii) the typical background noise level (such as street noise), and (iii) the "sound emergence", which is arrived at by deducting the typical background noise figure from the maximum noise levels for the sound emanating from the Gym. According to the Bliss Report, the highest dBA measurement for sound emanating from the Gym was 74 dBA and occurred on Saturday, June 16, 2018. One other high dBA level (69 dBA) was recorded on the morning of Friday, June 15, 2018, at 10:11 a.m. when a class was held in which clean and jerk lifts were scheduled for the classes that day. Notably,

that noise level occurred at time when the sound might have been "masked" by the operation of dry-cleaning machines had they been in the Premises and running at the time of the testing.

- [202] Significantly, on Saturdays in 2018 there was an Olympic lifting class at the Gym, which, on the evidence of the owners of the Gym, began after GMC left the Premises. This class included national-level athletes lifting very heavy weights. Moreover, on Ms. Rankel-Allen's evidence, on that particular Saturday, the Gym permitted athletes and coaches to come in before and after the classes to train for an online qualifier to be ranked for an annual weightlifting competition. These sessions would have involved more lifting of heavy weights than was usual for most classes during the week.
- [203] The most significant dBA noise levels captured by the BKL Data were on two different occasions on Saturday, June 16, 2018. The first occurred between 8:29 and 8:49 a.m., a time when coaches and athletes were permitted on that date a one-time opportunity to train for an online qualifier competition. The noise levels varied between 67 and 74 dBA and occurred before the 9:00 a.m. CrossFit Bootcamp class. The second period of time that the noise levels exceeded 65 dBA on Saturday June 16, 2018, was during the Olympic Lifting class and shortly after it.
- [204] These two points about the noises from June 16, 2018, are of significance as the Bliss Report is based on the erroneous assumption that the Gym had "not changed their vibration-generating activities, i.e., dropping of weights onto the floor." However, the evidence of Ms. Rankel-Allen, which I do accept, clearly establishes that the Olympic Lifting class on Saturday morning, June 16, 2018, was not fully introduced until after GMC had vacated the Premises at the West 10th Location. I also accept her evidence that the qualifier training that took place that day was confined to that specific Saturday and was not a regular occurrence. Accordingly, the significant sound events contained in Table 1 of the Bliss Report, which Mr. Bliss relies upon for his opinion, are not representative of the activities that were regularly carried out inside the Gym while GMC occupied the adjoining Premises.
- [205] Adding to the significance of the flaw in the Bliss Report is Figure 2 in the Bliss Report. Figure 2 is entitled "Time History of Noise Measurement Data", which
- plots the maximum noise level against time over an example 10-minute period on June 16 to illustrate how the ambient sound compared to CrossFit weight-dropping noise events. The yellow highlighted events correspond to weight-dropping events, which were significantly louder and more impulsive than the other noise levels, which were generally attributed to road traffic.
- [206] The flaw in Figure 2 is that it represents a 10-minute sample of noise events between 12:10 and 12:20 p.m. on Saturday June 16, 2018. Accordingly, it is a 10-minute sample of sound captured when the Olympic lifting class was being conducted. As noted earlier, this class was not offered during GMC's tenancy at the West 10th Location, save for a short period of time early on in the Gym's tenancy. Accordingly, the picture that emerges from that sound

measurement clip cannot be described as accurate or representative of the frequency or character of the activity that was being carried on regularly while GMC operated in the Premises. In fact, it does not represent the noise environment that would have been typically experienced over the course of a workday. Indeed, as Mr. Gaudet noted in his first report, "it is atypical because it reflects a period of high density CrossFit related noise events exhibiting higher than typical maximum noise levels" captured from a class that did not operate during GMC's tenancy.

[207] A further limitation of the BKL Data and Bliss Report stems from the fact that the Premises that GMC had occupied was not in the same state as it had been when GMC occupied it. Firstly, the space had been renovated after GMC left. More significantly, however, is the fact that the West 10th Location was empty--there was no dry-cleaning equipment or clothing in it--when the defence expert recorded the sounds emanating from the Gym, a factor that would have increased reverberation time. Mr. Bliss had to concede in cross-examination that the presence of clothing and dry-cleaning equipment would have decreased the reverberation time and ultimately the dBA level of noise by between approximately 3 and 5 dBA, thus lowering the level of the sound emergence. Accordingly, there is no baseline data that replicates the circumstances as they existed when GMC occupied the Premises.

[208] Mr. Bliss concluded in his report that the noises occurred "frequently". However, as counsel for the plaintiff pointed out, the Bliss Report documents only 36 instances of noise events over the four day recording period. Two of those events occurred on a Sunday when GMC did not operate; two others occurred at times outside GMC's hours of operation; and three more occurred at a time when dry-cleaning equipment would likely have been operating.

[209] In contrast to this picture, the Gaudet Report and Gaudet Supplementary Report from the plaintiff's expert describes a number of loud, impulsive noise events[2] that were recorded from inside the GMC dry-cleaning operation at the Alma Street Location. These noise events had dBA levels between 58 and 76 dBA:

- Movement of hangers on the dry-cleaning racks - 72 dBA
- Ironing compressor - 64-69 dBA
- Doorbell - 72-76 dBA
- Dry-cleaning machine impact noises - 58-75 dBA

[210] While the quality of the impulsive noises associated with the dry-cleaning business would be different to the noises from dropped weights at the Gym, the dBA levels were similar.

[211] The final area that causes me concern and further underscores the limitations of the defence expert evidence arises from what plaintiff's counsel established in cross-examination of Mr. Bliss. First, while Mr. Bliss did conduct sound measurements at GMC's Alma Street Location, he did not include any reference to that soundscape or noises generated by the dry-cleaning equipment in the Bliss Report.

[212] More significantly, however, are the edits made to the draft report originally submitted by Mr. Bliss to the defence and the final report produced as an exhibit in the proceedings. Plaintiff's counsel established the following in cross-examination of Mr. Bliss:

- A draft report was provided to the defence on July 3, 2018 at 6:35 p.m. which contained
 - o reference to the noise caused by the dry-cleaning operation at Alma Street, including an average noise level of 59 dBA approximately 1.5 metres from the dry-cleaning equipment when it was running;
 - o that the sound emergence would have been minimal near the dry-cleaning equipment when it was operating;
 - o a description of the sounds made by the weight-dropping noise events as "thuds and bangs"; and,
 - o no reference to the frequency of the weight-dropping noise events in his conclusion.

[213] After speaking with counsel, a revised draft report was provided the following day, July 4, 2018. In that report, Mr. Bliss had removed all reference to noise events related to the operation of the dry-cleaning equipment as well as the characterization of the weight-dropping noise events as "thuds". As well, the final report included an assertion that the noises occurred "frequently" but fails to tie that assertion to any evidence supporting it.

[214] In addition, Mr. Bliss seemingly focussed his attention on the noises emanating from the Gym and discounted the interplay of other environmental noises and factors, such as dry-cleaning machines, the doorbell, clothes etc., contributing to the overall soundscape.

[215] When these concerns are considered in context with the next point below, the totality of the circumstances gives me pause as to the reliability of Mr. Bliss's opinion.

[216] During cross-examination, Mr. Bliss agreed that, for the purposes of his first draft report, he had assumed that the CrossFit weight-dropping noises did result in a significant disturbance to the occupants. While that assumption was deleted from the final report, it is concerning in light of another aspect of his evidence. On two or three occasions, Mr. Bliss offered that he had been involved in other projects measuring the noises from other CrossFit facilities. More particularly he was asked the following questions and gave the following answers:

Q So the assumption in this report is that the noise events captured by the BKL equipment between June 14th and 18th, 2018, were representative of the noises occurring in 2013 and 2014?

A That's right.

Q And if the noise events occurring in the West 10th premises in 2013 and 2014 were fewer in number and had a lower maximum sound level, your opinion might be that noise events were unlikely to significantly disturb persons working at the premises; correct?

A In my experience in every CrossFit project that I've been involved on, every project was a problem. So I would be surprised if -- if that would change my opinion. I'm not aware of - of any CrossFit adjacency that -- to, like, a commercial or residential adjacency that is not creating problems.

[217] In my view, this area of his evidence raises the spectre of an element of advocacy on his part. His stated experience with problem CrossFit adjacency issues appears to have coloured his perspective on a reasonable hypothetical that he was unwilling or unable to concede.

[218] For the foregoing reasons that outline a number of limitations and concerns about the evidence from Mr. Bliss and the Bliss Report, I find the defence expert evidence to be of so little assistance to determining the issues in this case that I accord it no weight.

[219] In light of my conclusions in respect of the defence expert evidence, it is not necessary to address the expert evidence adduced by the plaintiff. Suffice to say, Mr. Gaudet's expert evidence did not assist the defence in establishing that the frequency or character of the weight-dropping noises they asserted were emanating from the Gym were of such a nature as to significantly disturb individuals occupying the adjoining Premises.

FINDINGS OF FACT

[220] Many of the facts in this case are undisputed, as outlined above.

[221] At the outset of these reasons, I set out the principles that govern the assessment of credibility. They have been particularly helpful in determining the sequence and nature of events as between the plaintiff and the defendants and the impact of the overall context of the lease negotiations and rent issues on the relationship between the parties.

[222] Overall, the plaintiff's witnesses presented as reliable and careful in their accounts of what occurred and their memory of the events between January 2013 and July 2014. Cross-examination did not uncover significant faults or frailties in their recollections. On occasion, Mr. Coombe and Ms. Rankel-Allen were confronted with either video or documentary evidence that refreshed the accuracy of their memory as to some events, but when this happened, they conceded the failing in their memory. Significantly, in my view, neither Mr. Coombe nor Ms. Rankel-Allen had anything to gain by testifying in these proceedings. They were neutral to the extent that they had no underlying agenda or stake in the proceedings and were candid in the evidence that they provided. Moreover, when they were made aware of the nature of the noises and difficulties associated with their facility, they attempted to remediate what they could and appeared genuinely surprised that the noises from their business were of such force and disruption that they caused the defendants' departure from the Premises. In essence, they had no warning or inkling that the noises emanating from their Gym caused the defendants to leave the Premises. After the initial handful of complaints by the defendants about loud music, parking (once), and the medicine ball being thrown against the shared wall on two occasions, they received no

complaints from the defendants.

- [223] On Ms. Su's evidence, if I was able to accept it, she stopped complaining to the Gym about the noises about half a year after the Gym moved in. No further complaints were made to the Gym by Ms. Su or anyone else related to the defendants. However, I prefer the evidence of Ms. Rankel-Allen on this point and find that the complaints to the Gym did not go on for half a year. After having made a handful of complaints, Ms. Su stopped complaining to them and did not initiate any complaints to the landlord until January 2014, a year after the Gym started operations at the West 10th Location.
- [224] Both Mr. Cheng and Ms. Su carefully avoided giving direct answers to simple and straightforward questions, particularly in cross-examination, and took every available opportunity to fill in details unrelated to the question. More importantly, there were significant contradictions and inconsistencies in their evidence. The contradictions were on fundamental aspects of the case, most significantly, the frequency of the noises emanating from the Gym. It is reasonable to infer that the evolution of their evidence on this point was, in part, a product of the evolving discovery of Gym schedules after Ms. Su's examination for discovery had been conducted and the Gym schedules had been provided by the plaintiff.
- [225] Where the evidence of the defendants conflicts with the evidence of the other witnesses, in particular Mr. Siddoo, Ms. Rankel-Allen, and Mr. Coombe, I prefer the evidence of those witnesses over the evidence of Mr. Cheng and Ms. Su.
- [226] I accept Ms. Lu's acknowledgement that she was not bothered by noises when the dry-cleaning machines were running in GMC in the morning. And, while I accept Ms. Lu's evidence that the noises, when she heard them, were uncomfortable and disturbing to her because of their irregularity, I reject her evidence that the noises occurred throughout the day until her departure at 2:30 p.m. Exhibit 40, while a schedule for the Gym from September 2014, was also said to be representative of the schedule during the relevant time of GMC's tenancy, which I accept. That schedule, as well as the evidence from Ms. Rankel-Allen and to a lesser extent Mr. Coombe, establishes that there were no classes between 10:15 a.m. and noon and 1:00 p.m. and 4:30 p.m. on weekdays. For the initial months of the Gym's operation, it did not have many members and personal training was not a big part of its business when they started out. Moreover, self-initiated work outs by the coaches were not common, especially in the initial months of the Gym's operation. Accordingly, I find Ms. Lu's evidence that the banging noises and the noises of things being thrown against the wall throughout the day to represent a fairly significant exaggeration of the likely true state of affairs inside the Premises.
- [227] Clearly, Mr. Siddoo was dismissive and cavalier in his treatment of the defendants, particularly in respect of Ms. Su's purported stress, as evidenced in his email communications with Mr. Cheng in January and July 2014. Indeed, the overall tenor of most of his email communications with Mr. Cheng over rent issues and the terms of the lease are

dismissive and rude. I have no doubt that this feature of Mr. Siddoo's treatment of Mr. Cheng and the defendants figured prominently in informing the course of action the defendants adopted.

- [228] Significantly, the defendants never advised Mr. Siddoo of the noise complaints they had made to the Gym, nor did they make any noise complaints directly to the Mr. Siddoo at the time that they were lodging noise complaints with the occupants of the Gym, in early 2013. Moreover, I find the noise complaints Ms. Su made to those people she encountered at the doorway area of the Gym were not specifically related to weight-dropping events. Rather, her complaints were generalized to it being too noisy due to the music being too loud and the two incidents of medicine balls being thrown against the common wall. These complaints occurred in the initial months of the Gym's operation. Of further significance is Ms. Su's failure to take any steps to ensure that the complaints she did make were actually made to someone in charge of the Gym's operations.
- [229] The actual complaints about noise by the defendants to the landlord did not occur until just over a year after the Gym began its operations. The first complaint to the landlord was made on January 27, 2014, and the second complaint on July 9 through 11, 2014. The July 28, 2014 email from Mr. Cheng to Mr. Siddoo is the third time there was any complaint to the landlord about the noise, but this was done as part of the termination notice. None of the complaints made asked Mr. Siddoo to resolve it. Moreover, the defendants never endeavoured to correct Mr. Siddoo on his characterization of the noises as minimal.
- [230] Significantly, the timing of the first noise complaint to the Mr. Siddoo did not occur until four days after the known start of the discussions with Mr. Ho about purchasing the Alma Street Location. Moreover, the first noise complaint did not come until approximately three days after discussions about the drafting of a contract of purchase and sale for the Alma Street Location. Furthermore, the first noise complaint immediately preceded Ms. Su's first attendance at the doctor's office, where she complained about her anxiousness and the perceived cause being the noise from the Gym. The July 2014 complaints to Mr. Siddoo were not made until after the Alma Street Location had been purchased.
- [231] The foregoing facts, when considered collectively and within the overall context of this case, leads to the reasonable inference and inexorable conclusion that while the noise from the Gym was an irritant to the defendants, it was not the sole reason, or even the main reason, that they vacated the Premises two years before the expiry of the lease. Indeed, to the contrary, I find that the objective facts establish the defendants left the Premises prior to the expiry of the lease because of their dissatisfaction with the way Mr. Siddoo was treating them. By mid-January 2014, the defendants had found a satisfactory location to move to and had embarked upon the path of purchasing the Alma Street Location before complaining to the landlord about the noises emanating from the Gym.

[232] The noise issue, and how Mr. Siddoo handled it, was simply used as an excuse by the defendants to try and justify their early departure. I find that the most salient points of dissatisfaction with Mr. Siddoo included:

- Increasing the rent by what the defendants perceived to be an unfair and significant amount at the end of the first lease in June 2011;
- Refusing to agree to a second lease with a term longer than five years;
- An annual rent adjustment that they took issue with;
- Additional rent charges;
- Charging the defendants for roof repairs to the Premises; and
- Most significantly, Mr. Siddoo's dismissive, contemptuous attitude when the defendants finally made complaints to him about the noise from the adjacent Gym.

[233] No doubt Mr. Siddoo's after-the-fact insinuation that the defendants had forged the doctor's note only added gasoline to the already burning fire of indignation that the defendants harboured in respect of how Mr. Siddoo was treating them.

THE ISSUES

[234] There are six issues for my determination:

- i. the plaintiff's claim that the defendants breached the terms of the lease by vacating the Premises before the lease expired;
- ii. the defendants' claim that the plaintiff's actions breached their right of quiet enjoyment from January 2013 onward;
- iii. the defendants' claim that the plaintiff's actions amounted to a fundamental breach and repudiation of the lease in the circumstances;
- iv. the plaintiff's claim for amounts owing under the lease;
- v. the plaintiff's claim for mitigation of damages; and
- vi. the plaintiff's claim for indemnification of her legal fees on a solicitor-client basis pursuant to the terms of the lease.

[235] I will deal with them in the order outlined above.

ANALYSIS

The Plaintiff's Claim of Breach of Contract in that the Defendants Breached the Terms of the Lease

[236] I have little difficulty in concluding that the defendants are in default under their lease by vacating the Premises two years before the expiry of the lease. The defendants admit they left before the lease expired. Moreover, they did so without any notice. The defendants assert, however, that they were entitled to do so given the unremediated complaints about the noises emanating from the Gym that interfered with their ability to enjoy their tenancy in the Premises--a commercial space leased to run a dry-cleaning business. The defendants rely upon two closely-related principles to ground their claim:

- a. The landlord's covenant of quiet enjoyment, which is an implied term of every lease (and an included term of the lease in issue pursuant to clause 9 of that lease); and
- b. The landlord's obligation not to derogate from the grant.

[237] More specifically, the defendants defend their actions alleging that after July 31, 2014, the defendants were discharged from any obligation under the lease by their acceptance of the plaintiff's repudiation of the lease. They assert that repudiation resulted from the failure of the plaintiff to remedy the noise problem created by the conduct of the plaintiff's adjacent tenant, a Gym. The defendants say that the noises emanating from the Gym constituted a breach of the covenant of quiet enjoyment under the lease and a derogation from the grant of the lease, and the landlord's failure to remedy the situation amounted to a repudiation of the lease.

[238] Accordingly, I turn now to an examination of the defence advanced by the defendants. The two issues, as I see it, are interrelated.

The Defendants' Assertion of Breach of the Covenant of Quiet Enjoyment

The Lease Term

[239] The lease signed by the parties provided an express term for quiet enjoyment as follows:

9. The Landlord covenants and agrees with the Tenant for quiet enjoyment.

The Governing Legal Principles

[240] The law concerning the covenant of quiet enjoyment is well settled. In *Stearman v. Powers*, 2014 BCCA 206 [Stearman] at para. 18, the Court of Appeal endorsed the succinct statement of law outlined in *Firth v. B.D. Management Ltd.* (1990), 73 D.L.R. (4th) 375 (B.C.C.A.):

To establish a breach of the covenant of quiet enjoyment the appellant [tenant] must show that the ordinary and lawful enjoyment of the demised premises is substantially interfered with by the acts of the lessor. It is conceded by counsel that the question of whether there has been a

substantial interference is a question of fact. Mere temporary inconvenience is not enough -- the interference must be of a grave and permanent nature. It must be a serious interference with the tenant's proper freedom of action in exercising its right of possession: see *Kenny v. Preen* [1963] 1 Q.B. 499 (C.A.).

Similarly, when one considers whether a landlord's acts can be construed as a derogation from its grant, the appellant must demonstrate that there has been some act which renders the premises substantially less fit for the purposes for which they were let. [At 379-380.]

[241] More recently, in *0824606 v. Plain Jane Boutique Ltd.*, 2018 BCSC 1887 [Plain Jane Boutique], Mr. Justice Brundrett summarized the applicable legal principles:

[99] At common law, the implied covenant of quiet enjoyment protects against the landlord derogating from his or her own grant: *Stearman v. Powers*, 2014 BCCA 206 at para. 18; *Shun Cheong Holdings B.C. Ltd. v. Gold Ocean City Supermarket Ltd.*, 2002 BCCA 451 at para. 9 [Shun Cheong]. Few, if any, of the other rights of tenants are more fundamental than the right to quiet enjoyment: *Sundberg v. J.E.D. Holdings Ltd.*, (1984) 36 R.P.R. 103 (B.C.S.C. Chambers) at 103.

[100] Several decisions have discussed the common law implied right to "quiet enjoyment". I distill the following principles from those decisions applicable to the existence of a cause of action for breach of quiet enjoyment:

- a) whether a covenant has been breached is a question of fact depending upon the facts of each particular case: *Firth v. B.D. Management Ltd.*, (1990), 73 D.L.R. (4th) 375 (B.C.C.A.) at 379;
- b) a mere "temporary inconvenience" will not amount to a breach of quiet enjoyment. The interference must be of a grave and permanent nature such that it constitutes a serious interference with the tenant's proper freedom of action in exercising its right of possession: *Firth* at 379-380; *Stearman* at para. 18; *Evergreen Building Ltd. v. IBI Leaseholds Ltd.*, 2008 BCSC 235 (Chambers) at para. 55, rev'd on costs: 2009 BCCA 275 [Evergreen];
- c) the implied covenant for quiet enjoyment is a qualified one protecting the tenant against interference by the landlord or persons claiming through or under the landlord: *Stearman* at para. 19 citing *Kenny v. Preen* [1963] 1 Q.B. 499 (Eng. C.A.);
- d) a breach of quiet enjoyment may occur even when there is no direct physical interference with the tenant's possession and enjoyment: *Heckert v. 5470 Investments Ltd.*, 2008 BCSC 1298 at paras. 103-108; and
- e) the fact that a landlord may have acted reasonably is not relevant to whether the tenant's right to quiet enjoyment has been breached: *Heckert* at para 109; *Watchcraft Shop Ltd. v. L & A Development (Canada) Ltd.* (1996), 49 C.P.C. (3d) 17 (Ont. Gen. Div.) at para. 32, citing *Owen v. Gadd*, [1956] 2 All E.R. 28, [1956] 2 Q.B. 99 at 108 (C.A.), and *Pellatt v. Monarch Investments Ltd.* (1981), 23 R.P.R. 8 at 16 (Ont. Co. Ct.).

[101] Mr. Justice Kelleher in *Evergreen* at para. 57 provided some examples of conduct which has been found to constitute a substantial interference with the tenant's right of use and possession of a premises:

[57] Conduct which has been found to constitute a substantial interference with the right of possession of a tenant and the tenant's use of the premises includes: the seepage of greasy, smelly fluid into the leased premises to such an extent that it prevents a tenant from carrying on business; putting a tenant out of possession; and interfering with the power and water supply to leased premises. See *Shun Cheong Buildings B.C. Ltd. v. Gold Ocean Supermarket Ltd.*, 2002 BCCA 451, 4 B.C.L.R. (4th) 234; *Selaive v. Meyer*, [1998] B.C.J. No. 2629 (C.A.) (QL); *Canadian Pacific Hotels Corp. v. Van Raniga Jewelers and Designers Inc.*, [1995] B.C.J. No. 2759 (S.C.) (QL); *Eagles Hall Association of Swift Current Ltd. v. Bertin*, [1922] 1 W.W.R. 374, 65 D.L.R. 232 (S.K.C.A.); *Pedwell v. Wright*, [1972] 1 W.W.R. 645, 23 D.L.R. (3d) 198 (B.C.S.C.).

[102] To this list of examples provided by Kelleher J., I would add the following examples where the covenant of quiet enjoyment was breached:

- a landlord's repeated threats to evict a tenant along with shouting at her and knocking at her door: *Kenny*;
- sexually harassing a tenant in and about her apartment: *Friedmann v. MacGarvie*, 2012 BCCA 445;
- dust and dirt from construction invading a commercial tenant's premises, where they operated a wholesale business designing, manufacturing and selling women's clothing, over a period of two months: *Amadon Properties Ltd. v. Pacific Apparel Inc.* (1990), 13 R.P.R. (2d) 186 (B.C.S.C.); and
- construction noise from building repairs that interfered with a tenant's tutorial service: *Mary Enterprises Ltd. v. Conway Richmond Ltd.*, 2001 BCPC 172.

[103] On the other hand, in the following cases the landlord's actions were not found to be an interference with a tenant's quiet enjoyment in the following circumstances:

- a creosote-like unpleasant odour, varying in intensity, affecting a retail clothing business whose origin could not be traced and which worsened when the air conditioning system was operating. There was no finding that the odour was caused by an act or omission of the landlord, or someone acting for him. Further, the Court of Appeal held that it could not be said that the odour was necessarily of a "grave and permanent" nature, and the tenant agreed that the landlord would not be responsible for any defect in or changes of condition affecting the premises, howsoever caused: *Stearman*.
- an inoperative HVAC unit in a restaurant where the tenant had responsibility to maintain the system and where it was not shown that the lack of air conditioning caused a reduction in sales and income to the tenant: *He v. Yeung*, 2010 BCSC 571; and

· repeated sewer backups in a pizza restaurant where a lease provided that the tenant was responsible to maintain and repair the sewer pipe and where the problems resulted in only minimal consequences to operations: *Freshslice Properties Ltd. v. R.T.M. Holdings*, 2013 BCSC 135.

[242] The various cases referred to in *Plain Jane Boutique* demonstrate that whether there has been breach of the covenant of quiet enjoyment of the tenancy is largely a factual determination made from an assessment of the totality of the circumstances and a determination as to whether conduct in issue constituted a substantial interference with the tenant's right of use and possession of a premises.

[243] The defendants bear the onus of proof on this issue on a balance of probabilities.

Application of the Principles on the Covenant of Quiet Enjoyment to this Case

[244] The plaintiff argues that the defendants have not made out a breach of either the express or implied term of quiet enjoyment. The term was express in this case, but it is implied in any lease: *Stearman* at para. 18.

[245] In the circumstances of this case, the issue distills to what the term quiet enjoyment means in the context of a commercial lease. This requires a contextual assessment, including a determination of the purpose of the lease.

[246] Here, the Premises were leased by the defendants to run a dry-cleaning business. The plaintiff asserts that quiet enjoyment in the commercial lease context means a right to occupancy and tenure. The plaintiff argues that the noises or vibrations alleged by the defendants did not constitute a substantial interference with the purpose of the lease. In response, the defendants maintain that the lease entitled them to occupancy and enjoyment of the Premises such that the dry-cleaning business could be carried on without significant adverse effect on its operators. The defendants say that the noises from the Gym rendered the Premises substantially less fit for its purpose, and the landlord derogated from its grant and breached the covenant of quiet enjoyment by failing to resolve the disturbances.

[247] In this case, Mr. Siddoo, on behalf of the landlord, engaged in little to no investigation of the defendants' claim of significant noise from the Gym. Rather than attending to check out the actual nature and frequency of the noise, he accepted Mr. Tehrani's opinion that the noise was not a significant issue and that Ms. Su was simply exaggerating.

[248] Mr. Siddoo's indifference to the defendants' concerns about the noise issue are confirmed in the dismissive tenor of the email exchanges reproduced earlier in these reasons.

- [249] As previously discussed, two customers of the defendants testified that they found the noises emanating from the Gym to be disturbing and startling. While I have accepted their evidence as credible, it is of little assistance in determining the nature or quality of the noises. It is clear that the noises did not stop the business from operating, the customers from attending, or Ms. Su and Ms. Lu from working there. Ms. Su was always present when the customers attended.
- [250] The defendants tendered video clips taken by Ms. Su to demonstrate the disturbing nature of the noises emanating from the Gym. However, I do not consider the video clips to be of assistance in assessing the noises. The limitations of the camera recorder and its location during the filming process likely distorted the sound. Further, the video clips are of an extremely brief duration and the time of filming is unknown. The video clips are not a reliable, accurate, or representative sampling of the soundscape in GMC during the Gym's various times of operation.
- [251] I have already dismissed the expert evidence on the sound levels as being of no assistance to determining this issue. The recordings were made in entirely different circumstances than the true state of affairs at the time of the tenancy.
- [252] Given the previously noted limitations of the expert evidence, the video evidence, and the problems with the credibility and reliability of the defendants' witnesses in this case, I am left to determine the issue largely on the basis of the timeline of events and the documentary evidence. In that respect, the totality of the circumstances does not satisfy me that the defendants have established a breach of the covenant of quiet enjoyment by the landlord, for the reasons set out below.
- [253] The Gym moved into the adjacent suite in January 2013. There were initial problems with noise from the Gym such as overly loud music and weighted balls being thrown against the adjoining wall shared with GMC, but those problems were rectified immediately by the owners of the Gym when Ms. Su complained directly to them.
- [254] Ms. Su's other complaints to people at the Gym about noise were not of a nature that alerted the operators that there was a significant problem. Moreover, Ms. Su's only real effort to make a complaint to a source other than the Gym operators came in the form of a 9-1-1 call and complaint to the police on June 28, 2013.
- [255] More importantly, no complaints were made to the landlord about the issue until more than a year had elapsed following the Gym moving into the adjoining unit and commencing operations.
- [256] A further contextual factor that is important to recall is that the defendants and Mr. Cheng were not unfamiliar with the process of dealing with the landlord or unsophisticated in their business negotiations. They had been through a lengthy and somewhat contentious lease re-negotiation between July 2011 and June 2012. Disputes over adjusted rent issues continued through the end of 2013.

- [257] Most significantly, however, the first complaint to the landlord was not made until January 27, 2014--at least four days after Ms. Su and Mr. Cheng started speaking with Mr. Ho about purchasing the Alma Street Location and three days after Mr. Ho contacted them about drafting a contract to purchase the Alma Street Location.
- [258] While Mr. Siddoo's response to the first noise complaint was dismissive, the defendants did nothing to further their noise complaint with him following Ms. Su's two attendances at Dr. Abu-Remaileh in January and February 2014. The defendants did not provide the doctor's note to Mr. Siddoo contemporaneous to when it was written, nor did they do anything else to correct his assertion that it was only a "bit of noise at a gym" that could not affect Ms. Su's health.
- [259] In addition to the very delayed timing of the initial noise complaint to the landlord, the fact that the defendants negotiated the purchase of and actually purchased the Alma Street Location between January 23 and April 21, 2014, provides the real context for what was going on between the parties.
- [260] I have concluded that the defendants were frustrated with how Mr. Siddoo was treating them in re-negotiating the lease, the annual rent adjustments, and the additional rent items included in the second lease for the Premises. Their frustrations had reached a boiling point by January 2014 and, with the renewed availability of the Alma Street Location, they saw an opportunity to relocate and rid themselves of a frustrating landlord. Mr. Siddoo's dismissive and contemptuous treatment of their January 27, 2014, complaint no doubt solidified their resentment.
- [261] Consequently, my view of the circumstances, taken in their totality, is that the noise emanating from the Gym was used as an excuse for breaching the lease and vacating the Premises two years before the lease expired but was not the real or only cause of the defendants vacating the Premises.
- [262] Although they sought to rely upon the noise emanating from the Gym as an excuse to vacate the Premises prior to the expiry of the lease, the defendants made only one general complaint on January 27, 2014, more than a year after the Gym had commenced its tenancy and operation.
- [263] Between January 28, 2014, and July 9, 2014, the defendants did nothing further to pursue their noise complaint with Mr. Siddoo or the owners of the Gym. They did not respond to contradict Mr. Siddoo's dismissive January 28, 2014, email reply that it was only a "bit of noise at a gym". They did not update Mr. Siddoo about the two attendances at Dr. Abu-Remaileh in January and February 2014 or the visit with Dr. Zhang in April 2014. They did not immediately provide the February 2014 doctor's note to try to demonstrate to Mr. Siddoo that his suggestion that the noise could not affect Ms. Su's health was inaccurate. Nor did they provide him with the video recordings taken inside GMC on January 31, 2014, to contradict his assertion that it was only a bit of noise. They did nothing further to draw to the attention of the landlord that they believed they had a legitimate complaint about

noise emanating from the Gym disrupting their own tenancy to such a level that it amounted to a breach of the covenant of quiet enjoyment. Instead, in January 2014, they pursued the purchase of the Alma Street Location for GMC and started to initiate the move in late June 2014 by advertising the upcoming relocation to GMC's customers.

- [264] Moreover, despite Ms. Su's evidence that the noises from the Gym were intolerable and adversely affecting her health, there were only two noise complaints to the landlord-- January 27, 2014, and July 9, 2014. And, more importantly, notwithstanding the 18-month time frame in which the noises purportedly affected her, there is little to no evidence that GMC experienced a decline in business due to the noises or that Ms. Su was unable to run her business during this time frame. To the contrary, customers continued to attend. Ms. Su continued to work and run the business, the employees continued to work at GMC, and the defendants were able to purchase another location to move GMC's business.
- [265] Notwithstanding the dismissive and acrimonious email exchanges between Mr. Siddoo and Mr. Cheng between July 9 and July 11, 2014, and Mr. Cheng's opining that he did not know how much longer Ms. Su could stand the situation, Mr. Cheng did not provide the doctor's note from Dr. Abu-Remaileh until he gave notice on July 28, 2014 that the defendants were terminating the lease effective July 31, 2014.
- [266] In my view, while the weight-dropping noises emanating from the Gym were no doubt inconvenient, irritating, sometimes disturbing, and definitely not of a temporary nature, I am unable to find that the defendants have established that the noise was of such a grave and permanent nature as to amount to an interference with the defendants' "proper freedom of action" in exercising their right of possession. Nothing in the evidence establishes that the noises emanating from the Gym were of such a degree that they prevented the defendants from carrying on their business or put them out of possession of the leased Premises. I am not satisfied that the defendants have established to the requisite level that the noises emanating from the Gym constituted a substantial interference with the tenant's right of use and possession of a premises: Plain Jane Boutique.
- [267] Accordingly, the defendants have failed to establish that the plaintiff breached the covenant of quiet enjoyment and that there was a derogation from the grant by the landlord in the circumstances of this case.

Fundamental Breach and Repudiation of the Lease

- [268] To succeed in their defence, the defendants must establish that the noises emanating from the Gym and the landlord's failure to do anything to remediate the matter constituted not just a breach of the covenant of quiet enjoyment (or a derogation from grant) but that it constituted a fundamental breach amounting to repudiation of the lease by the landlord.

- [269] The consequence of a landlord repudiating the lease would entitle the tenants to accept the repudiation and treat the agreement as at an end, thereby releasing both parties from further performance: *Bul River Mineral Corporation (Re)*, 2014 BCSC 645 at paras. 98-99, citing *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. - Canada*, 2007 BCCA 88 at para. 88 and *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 40.
- [270] The defendants argue that the plaintiff's summary and disparaging rejection of their reasonable efforts to cause the plaintiff to address the noise problem amounted to a fundamental breach and repudiation of the lease. The reasonable efforts, they argue, were their email communications with Mr. Siddoo in January and July 2014. A further feature of the disparaging conduct, say the defendants, was Mr. Siddoo's original belief that the note from Dr. Abu-Remaileh had been forged. Consequently, argue the defendants, it was reasonable for them to vacate the Premises and they were entitled to do so as the plaintiff's conduct resulted in a fundamental breach amounting to repudiation of the lease.
- [271] In light of my conclusion that the plaintiff did not breach the covenant of quiet enjoyment or derogate from her grant in the circumstances of this case, it is unnecessary to address the issue of whether the landlord's failure to address or eliminate the noises from the neighbouring Gym constituted a fundamental breach of the lease amounting to a repudiation of the lease, which the defendants accepted.
- [272] In my view, two emails that were sent approximately 13 and 18 months after the soundscape changed and that failed to demand that the landlord do something to remediate the circumstances do not constitute reasonable efforts to cause the plaintiff to address the noise problem. While I have no hesitation in saying Mr. Siddoo's conclusion that the doctor's note was forged is reprehensible, that does not turn it into conduct that amounts to a fundamental breach and repudiation of the lease. Mr. Siddoo did not reach that conclusion until after he received the note from Mr. Cheng in the July 28, 2014, email advising that the defendants were vacating the Premises three days later.
- [273] As I have found no breach of the covenant of quiet enjoyment or derogation from grant by the plaintiff, it follows that the conduct of the plaintiff in this case cannot constitute a fundamental breach entitling the defendants to treat the lease as repudiated by the plaintiff, thereby permitting them to vacate the Premises two years prior to the expiry of the lease.
- [274] In my view, neither the January 27 or July 9, 2014 emails from Mr. Cheng to Mr. Siddoo can be read as a tenant demanding that the landlord do something about rectifying the situation and the landlord refusing to do so. To hold otherwise would invite commercial chaos and result in tenants and landlords engaging in a cat and mouse game of wordsmithing when one side wanted to end a lease prior to its expiry.

[275] Accordingly, the defendants have failed to discharge their burden of establishing a breach of the covenant of quiet enjoyment or derogation from grant and that the plaintiff's conduct in failing to remedy the situation amounted to a fundamental breach of the lease entitling the defendants to treat the lease as repudiated by the plaintiff. I conclude that the defendants defaulted on their lease obligations when they vacated the Premises two years before the lease expired. As the plaintiff has established a breach of contract by the defendants for their failure to fulfill the full term of their lease, she is entitled to have her damages assessed.

Damages

[276] Counsel for the plaintiff provided a chart of the amounts owing under the lease. Only four items in that chart were contested by the defendants--items relating to the roof and to plumbing issues as well as to cleaning costs and electrical repairs. The remaining items--base rent, 5% admin fee, property taxes, and insurance--were agreed as owed if the defendants did not succeed in establishing an entitlement to treat the lease as repudiated by the landlord. Accordingly, I will only address the contested items from the chart.

[277] The plaintiff includes in the amounts owing under the lease claims for the roof (\$125.48 a month for 20 months from November 2014 through June 2016 = \$2,509.60) and plumbing (\$52.70 for eight months from November 2014 through June 2015 = \$421.60). The total amount for these two items is \$2,931.20. The plaintiff argues these amounts are captured by the terms of the lease, in particular clause 7(b)(vi) which provides:

(vi) depreciation or amortization (computed by the Landlord in accordance with generally accepted accounting principles in the province of British Columbia) of the maintenance, repair or replacement costs of a capital nature in relation to the Lands (including the walkways and parking areas), Building (including, but not limited to, the cost of repair or replacement of the non-structural components of the roof of the Building and the surface of the exterior walls of the Building including windows, window frames and glass, and Building downspouts and drains), Building systems (including without limitation heating, mechanical and electrical systems), other Building components but excluding Building structural repair or replacement.

[278] The defence asserts these items are not fairly encompassed within the amounts owing under the lease as no evidence was adduced to establish that any roof-related issues were non-structural and there was no evidence adduced addressing issues of plumbing. I agree with the defence on this point. There was no evidence adduced to address the nature of the roof repair nor was there any evidence adduced about plumbing issues in the relevant time period.

[279] Accordingly, the plaintiff is entitled to recover the amounts owing under the lease, save for the monthly claim for the roof and plumbing amounts, there being an evidentiary gap establishing that any of the roof-related matters were non-structural and no evidence of any sort of plumbing expenses that necessitated compensation for these items.

[280] The plaintiff also seeks two further amounts as owing under the lease:

- cleaning costs in the amount of \$322.88 (pursuant to clause 8(c)(i)(a) and (k) of the lease); and
- electrical repairs in the amount of \$7,087 (pursuant to clause 7(b)(vi) and (vii) of the lease) incurred as a result of the condition the defendants left the Premises in when they quit the lease and removed their dry-cleaning equipment.

[281] The modest cleaning cost is clearly recoverable under the terms of the lease. The state of the Premises after the defendants vacated it was, on the evidence, untidy.

[282] In so far as the claim for the electrical repair is concerned, Mr. Siddoo's evidence is that the electrical repair cost was incurred to restore the Premises to a safe condition for occupancy by another tenant. This too is also clearly recoverable under the lease as provided for in clause 7(b)(vi) of the lease. Ms. Su conceded in cross-examination that they did not hire a professional electrician to assist in disconnecting the dry-cleaning equipment when they vacated the Premises. The defendants appeared to have cut some of the wires related to the where their equipment was connected and left some of the overhead lights dangling from the ceiling.

[283] Thus, the plaintiff is entitled to damages representing the amount owing under the lease as follows:

- \$34,271.68 as rent for the period of November 2014 through June 2015;
- \$52,564.44 as rent for the period of July 2015 through June 2016;
- \$322.88 for the cleaning cost; and
- \$7,807.00 for the electrical repair the plaintiff incurred in restoring the Premises to an occupiable condition.

[284] The total amount owing by the defendants, on a joint and several basis, under the lease is \$94,966. Pursuant to clause 6 of the lease, this amount is past rent due to the landlord and therefore bears interest at the rate of 2% per month, compounded annually to the date of judgment.

[285] The plaintiff also claims for mitigation damages in the amount of \$13,299.05 for environmental testing undertaken to ensure the Premises were suitable for occupancy by another tenant. I would not accede to this claim for two reasons. First, the environmental testing was undertaken as part of the offer to the Gym for it taking over the Premises. However, it was to be done to the satisfaction of the plaintiff. There is no evidence that this was something necessary from the perspective of the Gym as a condition of the proposed tenancy. Second, and perhaps more significantly, there remains an outstanding environmental claim by the plaintiff wherein the defendants are but one group of defendants the plaintiff is suing for remediation steps undertaken and costs incurred due to the Premises being a dry-cleaning location, not only during the defendants' tenancy but

for many years prior with a previous dry-cleaning operation. In my view, this claim for mitigation damages is more appropriately dealt with in that action.

[286] Finally, the plaintiff seeks full indemnification for the legal fees incurred on a solicitor-client basis pursuant to clauses 8(t)(i), 12 and 25 of the lease. Those clauses provide as follows:

8. (t) that the Tenant shall indemnify and save harmless the Landlord from any and all liabilities, damages, costs, claims, suits or actions growing out of this Lease and the demising of the Premises and, without limited the generality of the foregoing, growing out of:
 - (i) any breach, violation, or non-performance of any covenant, condition or agreement in this Lease set forth and contained on the part of the Tenant to be fulfilled, kept, observed and performed;
12. If the Tenant from time to time fails to observe or perform any of the covenants on its part herein contained or to make any payments required to be made by it or carry out any repairs according to notice given by the Landlord, the Landlord may perform such covenants or make such payments in whole or in part together with interest charged thereon at the rate referred to previously or may enter and make or cause to be made such repairs, as the case may be, but the giving of any such notice or the making of any such payment or performing of such covenants or the undertaking of any such repairs by the Landlord shall not be deemed an acknowledgement or admission of any liability or responsibility on the part of the Landlord. Any payment so made and the costs of performing any of such covenants or of any repairs so made or caused to be made and any damage, loss or expense suffered or incurred by the Landlord (including all legal fees on a solicitor and client basis) by reason of any failure of the Tenant to observe and comply with any of the covenants of the Tenant herein contained shall immediately become payable by the Tenant to the Landlord as Additional Rent hereunder and shall be recoverable in the manner provided by law for the recovery of rent in arrears.
25. In consideration of the Landlord granting this Lease to the Tenant and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Indemnifiers unconditionally agree with the Landlord that on written demand from the Landlord, the Indemnifiers will:
 - (a) pay any rent and other amounts payable by the Tenant under this Lease;
 - (b) perform all the obligations of the Tenant under this Lease; and
 - (c) indemnify and save harmless the Landlord from any loss, cost or damage including consequential loss and cost on a solicitor and own client basis suffered by the Landlord arising out of any failure by the Tenant to pay any rent or other amounts payable or perform any of the obligations of the Tenant under this Lease.

The obligations of the Indemnifiers under this Lease are joint and several. If there is any default by the Tenant under this Lease, the Indemnifiers waive any obligation of the Landlord to proceed against the Tenant or pursue any right or remedy of the Landlord under this Lease or to pursue any other remedy available to the Landlord.

[287] While the clauses may, on their face, support the plaintiff's interpretation and contention, I am not prepared to order full indemnification for the legal fees incurred on a solicitor-client basis pursuant to the terms of the lease in the circumstances of this case, for the reasons outlined below.

[288] First, the plaintiff will be entitled to her costs for succeeding in this action pursuant to the Supreme Court Civil Rules, R. 14-1(9).

[289] However, the more fundamental issue from a fairness and equity perspective is that Mr. Siddoo as the plaintiff's personal representative and the defendants' acting landlord does not come to this Court with entirely "clean hands". In my view, much of the difficulty in this case would likely have been avoided had Mr. Siddoo taken steps to thoroughly and fully investigate the initial noise claim in January 2014. By dismissing the complaint out of hand as "not a landlord issue" and simply accepting the word of one of the owners of the Gym that Ms. Su was exaggerating about the noise, in my view, Mr. Siddoo exacerbated the situation. No doubt his dismissive attitude about the noise complaint when it was repeated again on July 9, 2014, served to only polarize the situation further. Finally, his initial stance that the defendants had forged or faked the doctor's note from Dr. Abu-Remaileh further reinforces my view that Mr. Siddoo had a contemptuous and cavalier attitude towards Ms. Su's circumstances. A bit of compassion, common-sense, diplomacy, and attention to Ms. Su's circumstances as conveyed by Mr. Cheng may well have avoided the entire problem. The plaintiff ought not to be able to rely on this term of the lease to the significant financial detriment of the defendants where her personal representative as the acting landlord is, in part, the cause of the situation. I decline to enforce this term of the lease as it is unconscionable in the particular circumstances of this case. Accordingly, I decline to order that the defendants indemnify the plaintiff for the legal costs on a solicitor-client basis pursuant to the terms of the lease.

CONCLUSION

[290] The plaintiff's action is allowed. The defendants breached the term of their lease by vacating the Premises two years before the lease expired. The defendants have failed to establish that the noise from the Gym and the landlord's failure to resolve and ameliorate amounted to a fundamental breach of the covenant of quiet enjoyment or derogation from grant, entitling them to treat the lease as repudiated such that they could vacate the Premises two years before the lease expired.

- [291] The defendants are liable, on a joint and several basis, to the plaintiff for the amounts owing under the lease which, as calculated by the court is \$94,966 with interest at the rate of 2% per month, compounded annually to the date of judgment.
- [292] The plaintiff's claim for the roof and plumbing expenses as part of the damages under the lease are dismissed. The plaintiff's claim for the mitigation damages for environmental testing is dismissed. The plaintiff's claim for indemnification of her legal fees on a solicitor-client basis pursuant to the terms of the lease is also dismissed.
- [293] Finally, there is the issue of costs. The defendants have failed in establishing their defence. Accordingly, costs should follow the event and be awarded to the plaintiff at Scale B.

"Ker J."

- [1] Exhibit 69 was played a number of times during the trial. I would describe the sounds in the clip as intermittent muffled, dull thudding noises interspersed with not so dull louder clanging noises. All of it sounded like weights being dropped and clanged in the Gym.
- [2] Impulsive sounds are defined as "sounds characterized by brief bursts of sound pressure" according to the ISO addendum to the Bliss Report.
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