CITATION: Gordon et al. v. 837690 Ontario and Tyco et al., 2022 ONSC 1028
COURT FILE NO.: CV-19-00028402-A1CP
DATE: 20220214

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Timothy Gordon, Angela Thomson, John Ng-Lun, John Sitter and Fadiya Shamasha, Plaintiffs

AND

837690 Ontario Limited, Defendant

AND

Tyco Integrated Fire & Security Canada, Inc. o/a Johnson Controls, Troy Life & Fire Safety Ltd. and MK Electric Ltd. and A.P.I. Alarm Inc., Third Parties

BEFORE: Justice S. Nicholson

COUNSEL: Harvey T. Strosberg, Q.C., Sharon Strosberg and Justin Smith for the Plaintiffs

Chris Stribopoulos, Mario Delgado, Christine Galea, Travis Walker and Balraj Sihota for the Defendant

Lindsay Lorimer, Rachel Cooper and Connor Campbell for the Third Party, Tyco Integrated Fire & Security Canada Inc. o/a Johnson Controls

Natasha O'Toole for the Third Party, Troy Life & Fire Safety Ltd.

M. Jennifer Cosentino for the Third Party, MK Electric Ltd.

Christina Calalang for the Third Party, A.P.I. Alarm Inc.

HEARD: November 22 and 23, 2021

Proceedings under the Class Proceedings Act, 1992

REASONS ON CERTIFICATION MOTION

NICHOLSON J.:

[1] On November 12, 2019, a fire broke out in the parking garage of the Westcourt Place, an apartment building in downtown Windsor, Ontario. The City of Windsor has declared the building structurally unsafe. Accordingly, the building's residential and commercial tenants were required to vacate and remain displaced to this day.

[2] In this proposed class action, the representative plaintiffs include residential tenants and commercial tenants. Timothy Gordon is a residential tenant and is also alleged to have sustained personal injuries as a result of the fire. Angela Thomson resided with Mr. Gordon and seeks to represent a proposed Family Class asserting claims under the *Family Law Act*, R.S.O. c. F. 3, ("*FLA*") for loss of care, guidance and companionship for his injuries. John Sitter is a criminal lawyer who leased commercial space at Westcourt Place.

[3] The Defendant 837690 Ontario Limited is the owner and property manager of Westcourt Place. I will hereinafter refer to the Defendant as "Westcourt".

[4] Westcourt has commenced third party claims against Tyco Integrated Fire and Security Canada ("Tyco"), Troy Life and Fire Safety Ltd. ("Troy"), MK Electric Ltd. ("MK") and A.P.I. Alarm Inc. ("API"). Tyco was hired to inspect and maintain the fire suppression and alarm system for the building. Troy was hired to provide monitoring support for the building's life and safety systems, MK was hired to repair the alarm and life and safety system, and API was a subcontractor of Troy. The Third Parties have all delivered statements of defence in the main action.

[5] The Plaintiffs seek to certify this class proceeding under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 ("*CPA*"). Westcourt opposes certification. The Third Parties do not oppose certification *per se*, but object to their inclusion in the common issues trial.

The Facts:

[6] I will recite the facts only briefly. These facts are only accepted for the purpose of the certification motion.

[7] Westcourt Place is a residential and commercial building located at 99 Chatham Street East and 251 Goyeau Street in Windsor, Ontario. There are 154 residential units and 22 commercial units, as well as underground parking and storage.

[8] On November 12, 2019, at approximately 6:35 am, Westcourt lost power. The representative plaintiff, Timothy Gordon, was trapped in an elevator. A fire started in the southwest corner of parking level B2. The fire was not contained until approximately 11 am. Six automobiles were destroyed by the fire. Smoke and other discharge were spread throughout the building, including into units.

[9] The Plaintiffs' expert, Roar Engineering, investigated and concluded that the fire originated along a section of electrical busway that ran along the ceiling of the parking garage, over a parked vehicle immediately below. Roar Engineering concluded that the probable cause of the fire was the failure of the main busway.

[10] The tenants were all required to evacuate the building. The City of Windsor has determined that substantial remedial work is required to be completed before the building is inhabitable again. That work has not yet been completed and the tenants remain displaced. Some tenants have cancelled their leases, others have not.

[11] Mr. Gordon was taken from the building to hospital. He alleges that he sustained personal injuries from severe smoke inhalation and near fatal levels of carbon monoxide in his blood.

[12] Although the tenants have been displaced, Westcourt has taken steps to assist them. They have now agreed to remove, clean and store, at its expense, personal property of the tenants.

[13] It is the position of Westcourt that the leases are now frustrated.

Preliminary Issue—Jurisdiction:

[14] The first issue is with respect to this court's jurisdiction--namely, whether the Ontario Superior Court of Justice has jurisdiction over this matter given the provisions of the *Residential Tenancies Act, 2006*, SO 2006, c 17 ("*RTA*"). The relevant sections of the *RTA* are as follows:

> 168(1) The Ontario Rental Housing Tribunal is continued under the name Landlord and Tenant Board in English and Commission de la location immobiliere in French.
>
> (2) The Board has exclusive jurisdiction to determine all applications under this Act and with respect to all matters in which jurisdiction is conferred on it by this Act.
>
> …
>
> 207 (1) The Board may, where it otherwise has the jurisdiction, order the payment to any given person of an amount of money up to the greater of $10,000 and the monetary jurisdiction of the Small Claims Court.
>
> (2) A person entitled to apply under this Act but whose claim exceeds the Board's monetary jurisdiction may commence a proceeding in any court of competent jurisdiction for an order requiring the payment of that sum and, if such a proceeding is commenced, the court may exercise any powers that the Board could have exercised if the proceeding had been before the Board and within its monetary jurisdiction.

[15] Accordingly, by operation of sections 168 and 207 of the *RTA*, the Landlord and Tenant Board ("LTB") has exclusive jurisdiction over landlord/tenant matters up to $35,000, the current jurisdiction of the small claims court. The Superior Court has jurisdiction with respect to claims over $35,000. The parties agree that this is only in respect of residential tenancies, not commercial tenancies.

[16] In *Bisaillon v. Concordia University*, [2006] 1 S.C.R., the Supreme Court of Canada, per Lebel J., described that a class action is a "procedural vehicle" whose use neither

modifies nor creates substantive rights. It cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so. He concluded at para. 22 that the class action procedure cannot have the effect of conferring jurisdiction on the Superior Court over a group of cases that would otherwise fall within the subject-matter jurisdiction of another court or tribunal.

[17] In *Dorman v. Economical Mutual Insurance Company* (2020), 151 O.R. (3d) 791, 2020 ONSC 4004, Belobaba J. dismissed a proposed class action against automobile insurers in relation to statutory accident benefits under the *Insurance Act*. He relied upon *Bisaillon* in holding that the Superior Court of Justice did not have jurisdiction to certify a class action given the exclusive jurisdiction of the Licence Appeal Tribunal. The Court of Appeal dismissed an appeal from this decision, seeing "no error in the motion judge's analysis" (*Dorman v. Economical Mutual Insurance Co*., 255 O.R. (3d) 338, 2021 ONCA 314 (ONCA)). Leave to appeal to the Supreme Court of Canada has now been granted (2022 CanLII 1933 (SCC)).

[18] In *Mackie v. Toronto (City) and Toronto Community Housing Corporation*, 2010 ONSC 3801, Perell J. dealt with a motion to dismiss a proposed class action. The proposed plaintiffs, tenants in residences operated by the housing corporation, asserted a class action to require the housing corporation to repair the buildings in which they lived. Notably, the claims were quite modest, in the amount of $500 per claim for each of three separate claims (negligence and two separate *Charter* claims). Perell J. found that the claims were properly the subject matter of the *RTA* and that exclusive jurisdiction lay with the Board as the claims were under the small claims court jurisdiction of $10,000. He stated at paras. 43 and 44, as follows:

> [43] It is, therefore, my opinion that the Board has exclusive jurisdiction to resolve the Plaintiff's repair claims. Further, it is my opinion that characterizing the claims as a negligence claim or as an *Ontario Human Rights Code* or *Charter* claim does not infuse the Superior Court with jurisdiction. From a jurisdictional perspective, it is the substance and not the form of the claim that matters, and the substance of the Plaintiffs' claim is a repair claim between a landlord and tenant that is within the monetary jurisdiction of the Board. See *Politzer v. 170498 Canada Inc*., [2005] O.J. No. 5224 (S.C.J.) at para. 27; *Brown v. Bermax Capital Ltd*., [1999] M.J. No. 67 (C.A.); *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929.
>
> [44] The Plaintiffs' characterization of the repair problems as negligence or as discrimination in breach of the *Code* and the *Charter* does not assist them. If the essential character of the dispute, in its factual context, arises from the statutory scheme, it does not matter that the claim is asserted for a cause of action which is ordinarily within the jurisdiction of the courts and upon which the legislation may be silent. The characterization of the dispute is resolved by whether the subject matter of the dispute expressly or inferentially is governed by the statute: *Toronto Police Association v. Toronto Police Services Board*, [2007] O.J. No. 4156 (C.A.), leave to appeal to S.C.C. ref'd Sept. 25, 2008; *Regina Police Association v Regina (City) Board of Police Commissioners* [2000], 1 S.C.R. 360. In the case at

> bar, the dispute about repairs and complaints about compliance with housing standards is a repair claim for under $10,000 and comes within the Board's exclusive jurisdiction.

[19] Throughout oral argument, counsel for the Plaintiffs relied upon other certification motion decisions arising out of fires in residential apartment buildings. These include *Carillo v. Vinen Atlantic S.A.*, 2014 ONSC 5269, *Blair v. Toronto Community Housing Corporation*, 2011 ONSC 4395 and *Charmley v. Deltera Construction Limited*, 2010 ONSC 7153. These cases were described as similar cases in which the court certified the class proceedings using comparable procedural language as suggested by the Plaintiffs in the within case.

[20] In *Carillo*, another decision of Perell J., there had been a fire in an 82-unit apartment building and the proposed plaintiffs were residential tenants. The proposed defendants included the owner of the building, a property management company, the building superintendent, the actual property manager and Toronto Hydro. Importantly, all but Toronto Hydro consented to the certification of the action as a class proceeding and jurisdiction was never argued. Toronto Hydro would not be caught by the *RTA*. Accordingly, this case does not assist on this issue.

[21] In *Blair* the proposed class action before Perell J. also involved tenants in a residential apartment building against the housing corporation and property management company. The alleged cause of the fire was negligence. The defendants raised the availability of proceedings before the LTB as an argument for a class proceeding not being the preferable procedure. Jurisdiction was not directly discussed in the decision except with respect to the "preferable procedure" criterion. However, it is noteworthy that Ms. Blair advanced a significant individual claim of $103,000 for personal property damage and stolen/damaged goods, plus an unspecified amount for psychiatric injuries. This would arguably take at least her claim out of the jurisdiction of the LTB and may explain why it was unnecessary to consider jurisdiction.

[22] In *Charmley*, an explosion and fire in the electrical room of a condominium apartment and townhouse development rendered the premises uninhabitable. That claim was made in negligence against the contractor alleged to have been responsible for the design and construction of the building, as well as Toronto Hydro. I conclude that the *RTA* would have no application to that set of facts.

[23] In the within case, Westcourt argues that the individual claims must be "small" and urges me, in the absence of evidence to the contrary, to determine that they fall below $35,000 individually assessed. The tenants are not paying rent to Westcourt right now. Westcourt has accepted the responsibility to clean, remove and store the property located within the residential units. As a result, Westcourt has substantially mitigated the Plaintiffs' losses, further diminishing the actual damages that they have sustained. Further, both Mr. Gordon and Ms. Thomson describe the claims as "small" in their affidavits.

[24] In my view, *Letestu Estate v. Ritlyn Investments Limited*, 2017 ONCA 442 is determinative of the jurisdiction issue. *Letestu* was not a class proceeding but involved an elderly plaintiff who allegedly slipped and fell over a damaged carpet in his residential rental unit. The action claimed $500,000 in damages from the owner and manager of the apartment building. The defendants brought a motion to dismiss the claim on the basis that it fell within the exclusive jurisdiction of the LTB and was commenced outside the one-year limitation period under the *RTA*. The motions judge agreed and dismissed the action.

[25] The Court of Appeal reversed the decision. The court quoted sections 168 and 207 of the *RTA* and then stated at paras. 10 and 11, as follows:

> [10] Thus, the Act does not grant the Board exclusive jurisdiction over all claims of non-repair against a landlord. Rather, the Board has jurisdiction over a tenant's or former tenant's claim for damages (as well as other claims within the Board's authority) where the "essential character of the claim" is for non-repair and within its monetary jurisdiction: *Mackie v. Toronto (City) and Toronto Housing Corporation*, 2010 ONSC 3801, [2010] O.J. No. 2852. The Board's jurisdiction, however, is not exclusive by virtue of s. 207(2): *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130, at para. 15.
>
> [11] Because the estate claimed damages exceeding the monetary jurisdiction of the Small Claims Court, and therefore exceeded the jurisdiction of the Board, there was no question that the appellants were entitled to commence their proceeding in the Superior Court. And, through the operation of s. 207(2), the court would be able to make any order the Board could have made in addition to any relief it could grant in a court proceeding.

[26] The Court declined to determine whether other factors would have taken the claim outside the jurisdiction of the Board had the damages claimed been less than the monetary limit of the small claims court. Thus, "essential character" of the claim was not addressed. For similar reasons, I do not need to address the essential character argument in this case, at this stage.

[27] It is noteworthy that in *Letestu* there was no discussion by the Court of Appeal about the actual value of the plaintiff's damages. It was the amount *claimed* that was determinative. In my view, that is a sensible approach as it avoids the court, or LTB, from having to undertake an assessment of the actual value of a claim before determining whether or not it has jurisdiction. The impracticalities of that approach are obvious. The *RTA* employs the word "claim" in s. 207(2) as well.

[28] In *Mackie*, the amount claimed was, on its face, well within the jurisdiction of the small claims court and thus, there was no jurisdiction in the Superior Court to bring a class proceeding. In *Blair*, the claim, at least of the representative plaintiff, was well over the threshold amount.

[29] Despite the arguments of Westcourt, I have determined that it is not appropriate for me to assume that the tenants' claims will be under $35,000, although they well may be. The use of the word "small" here is meaningless without context. I cannot draw the conclusion that "small" necessarily means "less than $35,000". The amount claimed in the Class Proceeding is $23,000,000 for general damages and the costs of administering the plan of distribution and a further $10,000,000 for special damages, pecuniary damages, aggravated damages and punitive damages. Although the number of claimants is not yet precisely determined, dividing these figures by $35,000 results in nearly 1000 claimants. There are only 154 residential units. The affidavits indicate that 177 individuals from the residential units and 8 commercial tenants identified themselves as putative Class members. Accordingly, I am satisfied that the amount claimed exceeds the $35,000 threshold on a per claimant basis. I have not simply aggregated all of the claims together. I also have taken into account the fact that punitive damages may not be recoverable in Superior Court if the essential nature of the claim is a landlord-tenant dispute (see: *Campbell v. Maytown Inc*. (2005), 42 R.P.R. (4th) 304 (Ont.Div.Ct.)). The $35,000 threshold still appears to be surpassed per *claim*.

[30] As with many cases where parties may make a claim for damages which brings them within the jurisdiction of the Superior Court only to find that they are awarded a lesser amount, the remedy for being in the wrong forum would appear to be costs. For example, I refer to rule 57.05 of the *Rules of Civil Procedure*, where a plaintiff may not recover costs if the award is within the small claims court monetary jurisdiction but the action is brought in Superior Court.

[31] Westcourt relies upon *Gates v. Sahota*, 2018 BCCA 375 (CanLII), a case in which a resident attempted a class proceeding against his landlord in respect of the 153-room Regent Hotel. I do not see *Gates* as being inconsistent with anything I have described above. It does stand for the proposition that the claims cannot be considered in the aggregate, which I have expressly not done. I also concluded that the amount claimed, per claimant, exceeded the monetary jurisdiction without including the amount claimed for punitive damages. Otherwise, Gates was claiming $200 per month in compensation, which, given the timeframe involved, was less than the $25,000 monetary jurisdiction of the BC small claims court at that time. Thus, the *Gates* case is similar to *Mackie, supra*.

[32] Accordingly, I conclude that the Superior Court of Justice does have jurisdiction over this class proceeding based on the amount *claimed*.

[33] That does not mean that I cannot refuse to certify on the basis that the LTB may be the preferable forum for many of these claims, under s. 5 (1)(d) of the *CPA*.

Preliminary Issue--Admissibility of the Roar Engineering Report:

[34] The Plaintiffs commissioned a report on the origin and causes of the fire by Roar Engineering. The report is dated July 8, 2020. Westcourt objects to the consideration of this report on the certification motion. Westcourt asserts that the rules of evidence still apply to certification motions. I agree with that assertion.

[35] I note the comments of Perell J. in *Harris v. Bayerische Motoren Werke Aktiengesellschaft*, 2020 ONSC 1647, at para. 73:

> [73] On a certification motion, evidence directed at the merits may be admissible if it also bears on the requirements for certification but, in such cases, the issues are not decided on the basis of a balance of probabilities, but rather on the much less stringent test of some basis in fact. The evidence on a motion for certification must meet the usual standards of admissibility. While evidence on a certification motion must meet the usual standards of admissibility, the weighing and testing of the evidence is not meant to be extensive, and if the expert evidence is admissible, the scrutiny of it is modest. In a class proceeding, the close scrutiny of the evidence of experts should be reserved for the trial judge.

[36] The report has been introduced into evidence through an affidavit of Jason D'Ornellas, the "managing partner, fire/electrical investigations at Roar Engineering". From his affidavit, Mr. D'Ornellas indicates that he, Vincent Rochon and Dylan Rochon prepared the report. He also indicates that he believes the opinions contained in the report are true. He has acknowledged his duty as an expert.

[37] From the report itself, it is clear that Mr. D'Ornellas actually attended at the site to investigate the cause of the fire. The report is clearly a joint opinion of all three of the investigators. They use the words "we" and "our" throughout in describing their analysis and opinions. It is not possible to discern which individual is responsible for which portions of the report.

[38] This is not the same situation where, for example, a lawyer simply appends an expert report to his or her own affidavit and submits it to the court (see, for example, *Singer v. Schering-Plough Canada Inc*., 2010 ONSC 42 or *Ernewein v. General Motors of Canada Ltd*., 2005 BCCA 540). The real issue is the ability of the affiant to be cross-examined on the opinion provided by the report. Shielding an expert from cross-examination by attempting to tender the report through a non-expert intermediary is problematic and generally not permitted.

[39] That is not, however, what is transpiring here. Mr. D'Ornellas' qualifications are appended in a brief CV. He is clearly a qualified expert with respect to the opinions provided within the report. I reiterate that he was actually in attendance at the site. Mr. D'Ornellas has appended his own opinion to a brief affidavit of his own, thus making himself susceptible to being challenged on his findings and opinion via cross-examination should Westcourt have wished to do so. In my view, the report is properly admissible into evidence on this certification motion.

[40] Again, it must be remembered that all that is required for each of the four criteria (b) through (d) is "some basis in fact". I do not have to determine the validity of the expert opinion at this stage.

Preliminary Issue--The Third Parties:

[41] This certification motion was complicated by the involvement of the four Third Parties. I am aware of several cases in which Third Parties are not granted standing to make submissions on the issue of certification. See, for example, *Ward-Price v. Mariners Haven Inc*., 2002 CanLII 38058 (ON SC), a decision of Nordheimer J. (as he then was). In *Attis v. Canada (Minister of Health)*, 75 O.R. (3d) 302 (ONSC), Winkler R.S.J. (as he then was) stated at para. 14, as follows:

> [14] The third party has advised the court that it does not seek standing to participate in the certification hearing. This is entirely understandable because there is no compelling reason why the third party should participate in the certification motion. It is the certification motion which determines the nature of the proceeding to follow. Up to that point it is an intended class proceeding only. See: *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418, 36 C.P.C. (5th), 176 (S.C.J.), aff'd (2004), 2004 CanLII 184 (ON CA), 71 O.R. (3d) 451, [2004] O.J. No. 2769 (C.A.). Therefore, until such time as the action is certified, the nature of the proceeding is not yet crystallized so as to require the third party's participation. In consequence, the third party would have had no standing to participate in the certification motion in any event. See: *Ward-Price v. Mariners Haven Inc*., [2002] O. J. No. 4260, 36 C.P.C. (5th) 189 (S.C.J.). Indeed, the courts in British Columbia have on occasion stayed a third party claim until after the common issues trial where there is no valid reason for the third party to participate in the proceeding up to that time and where their involvement may turn out to be academic. See: *Campbell v. Flexwatt Corp*., 1996 CanLII 3539 (BCSC), [1996] B.C.J. No. 1487, 50 C.P.C. (3d) 290 (S.C.); *Cooper v. Hobart*, 1999 CanLII 1548 (BC SC), [1999] O.J. No. 1360, 35 C.P.C. (4th) 124 (S.C.).

[42] This issue was not raised on the certification motion by myself, or by any of the parties. I will note that in September of 2021, on the eve of the originally scheduled dates for the certification motion, the Third Parties complained, legitimately in my view, that the Plaintiffs had revised the common issues to widen their net in an effort to ensnare the Third Parties. I adjourned the motion and had erroneously expected that the statement of claim would be amended to assert causes of action directly against the Third Parties. Instead, the Plaintiffs simply amended the claim to assert that Westcourt is vicariously liable for the acts and omissions of, *inter alia*, its "contractors and subcontractors".

[43] One distinguishing factor in this case is that Westcourt filed a statement of defence and issued a third-party claim prior to the certification hearing. The Third Parties have all defended the third-party claim and pleaded into the main action. The consequence of defending the main action are described in Rule 29.05 (2). This provides the third party the same rights and obligations in the main action, including those in respect of discovery, trial and appeal, as a defendant in the main action. It also provides that the third party is bound by any determination made in the main action between the plaintiff and the defendant. However, as shown by Rule 29.05(5), a third party who does not

deliver a statement of defence in the main action is still bound by a determination made in the main action between the plaintiff and defendant, in any event.

[44] Accordingly, as a result of Rule 29.05, and the proposed common issues, I have concluded that it would be unfair to the Third Parties if they were not permitted to participate in the certification motion. I am satisfied that the Plaintiffs are attempting to force them to participate in the common issues trial without directly suing them and they should be entitled to oppose it. Again, no one raised any concern about this at the hearing.

[45] I should note that counsel for Tyco made representations on behalf of all Third Parties.

[46] The Third Parties do not take a position on certification. However, they do not concede that s. 5(1)(a) of the *CPA* is satisfied as it relates to them. They oppose the inclusion of the Third Parties in the Plaintiffs' revised proposed common issues 1, 2 and 9. Their opposition stems from the insertion of the words "contractor" and "subcontractor" in those proposed common issues.

The Test for Certification:

[47] The test for certifying a proceeding as a class proceeding is set out in s. 5(1) of the *CPA*. The court *shall* certify a proceeding as a class proceeding if:

(a) The pleadings disclose a cause of action;
(b) There is an identifiable class of two or more persons;
(c) The claims of the class members raise common issues of fact or law;
(d) A class proceeding would be the preferable procedure; and
(e) There is a representative plaintiff who would adequately represent the interests of the class without a conflict of interest and who has presented a workable litigation plan.

[48] On a certification motion, whether or not the plaintiffs' claims are likely to succeed on the merits is not the question before the court. The issue is rather whether the claims can appropriately be prosecuted as a class proceeding (see: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at paras.16 and 28-29).

[49] In determining whether to certify a class proceeding, the court must recall that the goals of class actions are to provide access to justice for litigants, promote the efficient use of judicial resources and sanction wrongdoers to encourage positive behaviour modification (*Western Canadian Shopping Centres Inc. v. Dutton,* [2001] 2 S.C.R. 534 at paras. 26-29; *Hollick, supra*.)

[50] As noted by Belobaba J. in *Quinte v. Eastwood Mall*, 2014 ONSC 249, at para. 13, although the *CPA* requires the satisfaction of all five criteria, the bar for certification is "actually quite low". The plaintiff only has to plead a cause of action that will not plainly

and obviously fail and establish "some basis in fact" for each of the remaining four prerequisites.

[51] The concept of "some basis in fact" was discussed by the Supreme Court of Canada in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 (CanLII), [2013] 3 S.C.R. 477, at paras. 99-100 (per Rothstein J.):

> [99] The starting point in determining the standard of proof to be applied to the remaining certification requirements is the standard articulated in this Court's seminal decision in *Hollick*. In that case, McLachlin C.J. succinctly set out the standard: "…the class representative must show some basis in fact for each of the certification requirements set out in…the Act, other than the requirement that the pleadings disclose a cause of action" (para. 25 (emphasis added)). She noted, however, that "the certification stage is decidedly not meant to be a test of the merits of the action" (para. 16). Rather, this stage is concerned with form and with whether the action can properly proceed as a class action (see *Hollick*, at para. 16; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 ("*Infineon*"), at para. 65; *Cloud v. Canada (Attorney General)* (2004), 2004 CanLII 45444 (ONCA), 73 O.R. (3d) 401 (C.A).), at para. 50).
>
> [100] The *Hollick* standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements. McLachlin C.J. did, however, note in *Hollick* that evidence has a role to play in the certification process. She observed that "the Report of the Attorney General's Advisory Committee on Class Action Reform clearly contemplates that the class representative will have to establish an evidentiary basis for certification" (para 25).

[52] The *Hollick* standard does not require evidence on a balance of probabilities (see: *Pro-Sys, supra*, at para. 102).

[53] Westcourt reminds me that on a certification motion, the court is required to do more than simply "rubber stamp" a proceeding as a class proceeding. Certification is an important screening device. Therefore, there must be more than a superficial level of analysis into the sufficiency of the evidence that would amount to nothing more than symbolic scrutiny (*Pro-Sys, supra*, para. 103).

[54] Unsurprisingly, the Plaintiffs confidently assert that all the requirements for certification are met in this case. In their submission, this class action is on all fours with the previous condominium/apartment fire class actions noted above. In their submission, this fire is precisely the type of mass tort that the *CPA* is designed to address. The *CPA* was designed to address single incident mass torts.

Whether the Pleadings Disclose a Cause of Action:

[55] In a proposed class proceeding, no evidence is admissible and the material facts pleaded are accepted as true in determining whether the pleading discloses a cause of action. The pleading is to be read generously. It is only where it is plain, obvious and beyond a reasonable doubt that the plaintiff cannot succeed that this criterion is not met (see: *Hollick, supra*, at para. 25).

[56] The Plaintiffs' claims against Westcourt are framed in negligence, under the *Occupiers Liability Act* (*"OLA"*), breach of contract and nuisance.

[57] Westcourt concedes that the pleadings disclose a cause of action, without prejudice to its right to rely upon the terms of their contracts with some of the putative class members (i.e. clauses excluding liability for personal injury).

[58] The Third Parties do not concede that this issue is satisfied as it relates to them. They argue that the most recent amendments to the statement of claim do not name them as defendants, nor assert a recognizable cause of action against them. I agree.

[59] The recently Amended Fresh Statement of Claim does not refer to any of the Third Parties specifically. Indeed, it squarely blames the fire on the landlord, Westcourt.

[60] Paragraph 18 was amended to describe that the Landlord is vicariously liable for the acts and omissions of its employees, agents, contractors, subcontractors and servants. The Supreme Court of Canada, in *K.L.B. v. British Columbia*, 2003 SCC 51 (CanLII), [2003] 2 S.C.R. 403, described the parameters of vicarious liability in para. 19, as follows:

> [19] To make out a successful claim for vicarious liability, plaintiffs must demonstrate at least two things. First, they must show that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close as to make a claim for vicarious liability appropriate. This was the issue in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., [2001] 2 S.C.R. 983, 2001 SCC 59, where the defendant argued that the tortfeasor was an independent contractor rather than an employee connected to the tortfeasor's assigned tasks that the tort can be regarded as a materialization of the risks created by the enterprise. This was the issue in *Bazley, supra*, which concerned whether sexual assaults on children by employees of a residential care institution were sufficiently closely connected to the enterprise to justify imposing vicarious liability. These two issues are of course related. A tort will only be sufficiently connected to an enterprise to constitute a materialization of the risks introduced by it if the tortfeasor is sufficiently closely related to the employer.

[61] The most common relationship that gives rise to vicarious liability is employer-employee. Subject to certain limited exceptions, the employer is not vicariously liable for independent contractors. It does not make sense to make an employer liable for acts of an independent contractor because the latter is in business on her own account.

Furthermore, the employer does not have the same measure of control over the acts of an independent contractor (see: *Sagaz, supra*, paras. 33-35).

[62] Within the body of the Amended Fresh Statement of Claim, the words "servants" and "subcontractors" have been added to describe how Westcourt was negligent or breached its contractual duties to the Plaintiffs. None of those allegations disclose a cause of action as against the Third Parties.

[63] The Plaintiffs are required to plead the material facts that would constitute a cause of action and the pleadings must be drafted with sufficient clarity and precision to enable a defendant to know the case it will be required to meet. There are no allegations of negligence against any of the Third Parties. The Plaintiffs have not pled that the Third Parties owed them and the Class a duty of care, that they breached the standard of care or that damages were suffered as a result. The bar has not been met in respect of any of the Third Parties.

[64] Accordingly, I have concluded that there is no cause of action pleaded by the Plaintiffs as against the Third Parties. I note that this may be understandable since they have not sued them. This is not fatal to certification. However, this is relevant, in my view, to how common issues are defined below.

[65] That does not mean the Third Parties cannot be held to account by Westcourt. It just means that the determination will not occur during the Common Issues trial and will not enure to the benefit of the Plaintiffs. The timing of the trial in the Third-Party Claims is to be determined.

[66] I also agree with Mr. Strosberg that there are consequences to being a Third Party under Rule 29.05. The Third Parties are bound by orders and determinations made in the main action.

<u>An Identifiable Class of Two or More Persons:</u>

[67] In order to satisfy this requirement, the plaintiff must establish "some basis in fact" that two or more persons will be able to determine that they are in fact members of the proposed class. This serves the purposes of:

i) Identifying the persons who have a potential claim against the defendant;
ii) Defining the parameters of the lawsuit so as to identify those persons bound by the result of the action; and
iii) Describing who is entitled to notice.

(see: *Dutton*, supra, at para. 38 and *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58, at para. 57).

[68] In *Hollick*, McLachlin, C.J.C., at para. 20, described that this requirement is not an onerous one. There must be some showing that the class is not unnecessarily broad.

[69] Furthermore, there must be objective criteria by which members of the class can be identified. The criteria should bear a rational relationship to the common issues asserted by all class members, but the criteria should not be dependent upon the ultimate outcome of the litigation. It is not necessary that every class member be named or known (see: *Dutton, supra,* at para. 38).

[70] The proposed Class includes all persons, excluding the defendant and its employees, officers or directors, who on November 12, 2019:

(i) Rented an apartment and/or unit at Westcourt Place; or
(ii) Was ordinarily resident in an apartment at Westcourt Place; or
(iii) Was present in an apartment and/or a unit at Westcourt Place when the fire occurred; or
(iv) Owned property in an apartment and/or in a unity and/or on the roof at the Westcourt Place; or
(v) Had an interest in property located in an apartment and/or a unit and/or on the roof at Westcourt Place; or
(vi) Was an employee, partner, associate, officer, director or an independent contractor whose business was located in the commercial units at 251 Goyeau Street in Westcourt Place.

[71] The proposed Family Class includes the living partner, spouse, child, grandchild, parent, grandparent or sibling of a Class Member who suffered personal injuries. This class seeks to recover their pecuniary loss resulting from injury to Class Members, including damages described in s. 61(2) of the *FLA*.

[72] The Plaintiff's evidentiary record contains ample evidence that more than one residential tenant was displaced owing to the fire and suffered damage to the contents of their apartments. Similarly, there is sufficient evidence to show some basis in fact that there is more than one commercial tenant adversely impacted by the fire.

[73] Westcourt takes issue with definitions (iii), (iv), (v) describing them as overly broad. In its submission, people that fall within those descriptions, already are subsumed by (i) and (ii). Westcourt points out that in *Blair, supra,* only the residents were found to be the identifiable class.

[74] I disagree with Westcourt with respect to (iii) and (iv). Individuals within these proposed descriptors may have an actual loss from the fire and are objectively discernable. They also do not necessarily fall within the first two categories. I conclude that there is some basis in fact that such individuals exist. The units were not bare of property. The responses from the tenants appended to Mr. Smith's affidavit establish damage to property owned by tenants. Furthermore, this is a large building that would necessarily have persons present within it, that do not fit within the category of tenant, or ordinarily resident. These individuals may also have claims in negligence, nuisance or under the *OLA*, for example.

[75] Westcourt takes issue with the position that the use of the phrase "interest in property" in item (v) is too vague. The Plaintiffs point out that this was certified in *Charmley*, *supra*, which was unopposed, and in *Kennedy v. Toronto Hydro-Electric System Ltd*. (unreported CV-08-361906) two cases involving fires in residential buildings. I cannot know whether *Kennedy* was argued or on consent. I agree with Westcourt that the use of the phrase "interest in property" in item (v) is legally vague. In my view, this creates a risk of over-inclusivity and does not permit an objective basis in which to determine whether a person is within the class.

[76] Otherwise, the proposed class definition uses objective criteria. It is not dependent upon the outcome of the merits of the claim. It permits, in my view, a person to easily ascertain whether or not he or she falls within the class.

[77] In *McGee v. Farazli*, 2020 ONSC 7066, the Divisional Court allowed an appeal from a motion judge's refusal to certify a class proceeding on the basis that the evidence did not establish that there was some basis in fact that two or more people suffered any harm as a result of the allegations against the defendant. The Divisional Court held that it is not required for the Plaintiffs to demonstrate that two or more persons have actually suffered harm but only that the members of the class are identifiable and thereby capable of showing that they suffered harm.

[78] I agree with the Plaintiffs that it is unnecessary to establish that there is someone in addition to the representative plaintiff, Timothy Gordon, that sustained personal injuries from the fire. He did testify on cross-examination that he was aware of other tenants that were hospitalized. Mr. Sitter's assistant was also hospitalized. However, simply, the Class is not defined in a manner such that sustaining personal injuries is necessary to fit within the class.

[79] During the oral submissions it became apparent that Angela Thomson had not been in a relationship with Mr. Gordon for long enough to qualify as a "spouse" under the *FLA*. That does not foreclose that there are two or more persons who will qualify under the *FLA*. Mr. Gordon's affidavit indicated that he moved in with his parents following the fire. His parents can assert an FLA claim and therefore there is some basis in fact for the proposed Family Class. As noted below, I suggest that Ms. Thomson be replaced as the representative plaintiff.

[80] Therefore, I find that the second criterion for certification is satisfied by the proposed class definitions, omitting paragraph (v).

Common Issues:

[81] The third criterion for certification is that the claims of the class members must raise common issues. The *CPA* dictates in s.6 that the court shall not refuse to certify a proceeding as a class proceeding solely on the grounds that:

(1) The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
(2) The relief claimed relates to separate contracts involving different class members; or
(3) Different remedies are sought for different class members.

[82] As noted in *Dutton, supra*, at paras. 39-40, the commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. An issue will be "common" if its resolution is necessary to the resolution of each class members' claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. What is necessary is that the class members' claims must share a substantial common ingredient to justify a class action. Finally, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[83] As noted by Perell J. in *Harris, supra,* at para. 127:

> [127] The common issue criterion presents a low bar. An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. Even a significant level of individuality does not preclude a finding of commonality. A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation.

[84] The Plaintiffs propose thirteen common issues. I have appended them to these reasons.

[85] Westcourt is unopposed to common issues 1, 2, 3, 4, 8 and 13. It is Westcourt's submission that #5, 6 and 7, ought to be combined in some fashion. Westcourt argues against certifying the balance of the common issues.

[86] The Third Parties do not agree that common issues 1, 2 or 9 should be certified to include "contractors" or "subcontractors". I will discuss this at greater detail below. I agree.

[87] Common issues 1-8 all have at their root the shared element of trying to determine the question of liability. As noted by Belobaba J., in the case of a mall collapse, in *Quinte, supra*, at para. 44:

> [44] There is certainly some basis in fact for a finding that these issues are common to all of the class members. The Mall Collapse was a single incident, mass tort event that killed, injured, and/or harmed several hundred individuals or businesses. Cases arising from a mass, single event disaster—for example, a plane crash, train derailment, or in this case, a building collapse—are text-book examples of the type of cases ideally suited to being litigated as class actions precisely because the question of liability, including general causation, (i.e.

> questions such as "how did it happen?" and "who is to blame?") can be commonly resolved.

[88] I agree with the characterization by Plaintiffs' counsel that the fire in this case is akin to a single incident mass tort. I also note the comment of Belobaba J. in *Dine v. Biomet*, 2015 ONSC 7050, at para. 17:

> [17] The case law generally falls into three categories: cases where there is evidence that the proposed common issue exists but no evidence of class-wide commonality; cases where there is evidence of commonality but no evidence that the proposed issue actually exists; and of course, cases where there is some evidence of both. *This last category includes cases such as the collapse of a shopping mall or other mass tort events, where both the existence of the proposed common issue and its class-wide commonality is often self-evident and requires nothing more than a common sense analysis.* (emphasis added)

[89] Here, the evidentiary record clearly establishes, and it is admitted, that a fire occurred at Westcourt Place. The issue to be determined on its merits is the cause of the fire. The Plaintiffs have adduced an expert report that provides some basis in fact on how the fire originated. The certification motion is not the time nor place to determine the validity of the opinion in that report. It is sufficient that such an opinion exists for the some basis in fact test to be satisfied. The commonality is established by the clear evidence that all of the tenants, residential and commercial, have been displaced from the building since the fire occurred.

[90] Common issues 1 through 8 inquire as to whether the defendant owed a duty of care to the class, did it breach the standard of care, is Westcourt liable under the *OLA* and whether, as landlord, Westcourt failed to meets its statutory and contractual obligations. These common issues are rationally connected to the class members and to the causes of action asserted. The focus of these common issues is Westcourt's conduct. They are proper common issues, as conceded by Westcourt.

[91] However, the inclusion of the words "contractor" and "subcontractor", a clear reference to the Third Parties, is inappropriate given the fact that no cause of action is pleaded as against the Third Parties in the most recent iteration of the Plaintiffs' Statement of Claim. Accordingly, the inclusion of the Third Parties, by the use of the descriptors "contractors" and "subcontractors" has no factual basis within the pleadings or evidentiary record to merit the common issues being broadened as found in revised common issues 1, 2 or 9. Accordingly, I will not certify those common issues as presented, but will instead strike out the words "contractors" and "subcontractors".

[92] Mr. Strosberg argues in reply that whether or not any of the Third Parties owed a duty of care to the Plaintiffs is precisely the issue that needs to be determined in this case. However, if the Plaintiffs had wanted to pursue the contractors and/or subcontractors, they ought to have commenced an action against them directly instead of now attempting to assert such a claim through Westcourt. Whether the Third Parties are liable to

Westcourt is an entirely separate issue. As the claim is currently constituted, the Third Parties cannot be held liable to the Plaintiffs. Any liability by the Third Parties will be to Westcourt such that a Third Party could be required to pay some amount to Westcourt at the conclusion of the trial in the Third-Party Claim.

[93] If this common issue were to proceed as drafted, and the Third Party is determined to owe a duty to the Plaintiffs, then the Plaintiffs' failure to sue the Third Party makes that finding irrelevant to the Plaintiffs. While this would not necessarily relieve Westcourt of liability to the Plaintiffs, the inclusion of the Third Parties in common issues 1 and 2 does not, therefore, advance the litigation.

[94] I am satisfied that the words "contractors" and "subcontractors" should be removed from common issues 1 and 2.

[95] I agree with Westcourt that Revised Commons Issues 5, 6 and 7 are duplicative. I believe that this can be cured by simply removing #6 and having #7 read as follows:

> 7. If the answer to question 5 (a) is yes, how did the Defendant, as a landlord, breach the Contracts?

[96] With respect to #9 (vicarious liability of Westcourt for others), Westcourt opposes this common issue in its entirety. In its submission, there is no basis in fact that there is vicarious liability in this case. It relies upon the Supreme Court of Canada, in *K.L.B.*, *supra.*

[97] I have considerable concerns with this common issue. I had understood at one point in case managing this matter that the Plaintiffs were going to amend the claim to add the Third Parties as defendants, frankly adjourning the certification motion to allow that to occur. However, the Plaintiffs simply amended the language used in the Statement of Claim and then revised the common issues. Accordingly, there is no direct action against the Third Parties.

[98] I agree that there is no basis in fact in the evidentiary record that establishes vicarious liability of Westcourt in respect of the actions/inactions of the Third Parties. The Third Parties were all contractually obligated to Westcourt, but that does not establish vicarious liability at law such that Westcourt would be liable to the Plaintiffs for any negligence on the part of the Third Parties. However, Westcourt is also pursued as landlord, and under the *RTA* there may be a mechanism by which landlords can be held responsible for their "agents'" interference with a tenant's reasonable enjoyment of the premises (see: TET-64613-15-RV (Re), 2017 CanLII 48853 (ON LTB)). It is an open question, in my view, whether Westcourt can be responsible under the *RTA* for acts of "agents". Furthermore, a corporation can only act through people, including its employees. I would accordingly allow common issue #9 to proceed, minus the words "contractors" and "subcontractors".

[99] Despite the able arguments of counsel, and the uncertainty in the cases about whether the one step or two step procedure is applicable, I am persuaded that the appropriate inquiry,

as set out in *Pro-Sys, supra*, at paras. 110 and 114, is whether there is "some assurance that the questions are capable of resolution on a common basis". The trial judge is free to answer the question in common issue #9 with "no". However, the question itself is common to all Plaintiffs and can be determined without reference to individual claimants.

[100] Westcourt also takes issue with #11, whether the Defendant's conduct with respect to the fire was sufficiently reprehensible or high-handed to warrant an award of punitive damages?

[101] Again, Westcourt's position is that there is no "basis in fact" that would support a finding that its conduct has been so reprehensible as to warrant an award of punitive damages. Westcourt has agreed to remove, clean and store property. They have abated rent. Furthermore, to the extent that the essential element of these claims is landlord/tenant, an award of punitive damages is not available.

[102] In *Blair, supra,* Perell J. found that the proposed question concerning punitive damages was too broad and had to be narrowed to focus on the question whether the Defendants' conduct would warrant an award of punitive damages. He did allow a question to proceed regarding punitive damages, but not the quantum. He stated at para. 49, as follows:

> [49] For the Reasons I expressed in *Robinson v. Medtronic Inc*., [2009] O.J. No. 4366 (S.C.J.), aff'd [2010] O.J. no. 3056 (Div.Ct.), a claim for punitive damages will not be suitable for a common issue when the court cannot make a rational assessment about the appropriateness of punitive damages until after individual assessments of the compensatory losses of class members has been completed. However, where the ultimate determination of the entitlement and quantification of punitive damages must be deferred until the conclusion of the individual trials, the question of whether the defendants' conduct was sufficiently reprehensible or high-handed to warrant punishment is capable of being determined as a common issue at the common issues trial: *Chalmers (Litigation guardian of) v. AMO Canada Co*., 2010 BCCA 560.

[103] Thus, the issue is whether individual assessments of the claims are required to determine the appropriateness of punitive damages. In the within case, the tenants are similarly situated such that individual assessments are not required to determine whether Westcourt's conduct merits an award of punitive damages. However, the amount of such an award is not an appropriate issue in this case to constitute part of the common issue. Accordingly, I would certify Common Issue #11, as follows:

> 11. Was the Defendant's conduct with respect to the fire sufficiently reprehensible or high-handed to warrant punishment by an award of punitive damages?

[104] I have omitted "If yes, to whom and in what amount?" as that question individualizes the process.

[105] Westcourt objects to the certification of proposed Common Issue #10, concerning determining damages on an aggregate basis.

[106] The determination of whether to certify questions about an aggregate assessment of damages depends upon the likelihood that the preconditions set out in s. 24 (1) of the *CPA* will be satisfied at trial. If there is a "reasonable likelihood" of this, then aggregate assessment of damages may be certified as a common issue. An assessment of aggregate damages allows the court to dispense with the need to calculate the quantum of damages for each individual class member. Instead, the court may determine the aggregate or part of a defendant's liability to class members and give judgment accordingly where,

> (a) Monetary relief is claimed on behalf of some or all class members;
> (b) No questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
> (c) The aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[107] Thus, s. 24(1) applies if (a) monetary relief is claimed on behalf of some or all class members; (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and (c) the aggregate or a part of the defendant's liability to some or all class members can be reasonably determined without proof of individual claims (see: *Markson v. MBNA Canada Bank*, 2007 ONCA 334).

[108] It is important to recognize that regardless of whether an aggregate assessment is certified as a common issue, whether such damages are ultimately awarded is for the trial judge to determine (*Charmley, supra*).

[109] In this instance, I agree with Westcourt. While (a) is clearly met, (b) and (c) are not. There remains questions of fact or law other than those relating to the assessment of monetary relief, such as exclusion of liability clauses of various wordings. It is not clear to me that all class members have suffered a recoverable loss. This is not a case such as *Markson* where statistical sampling will be appropriate--at least no methodology has been offered by the Plaintiffs. The proposed class action advances claims for personal injury, property damage, economic losses from being displaced and *FLA* claims. There will have to be proof from individual class members as to the quantum of monetary relief owed to them. Thus, I am not satisfied that conditions (b) and/or (c) are satisfied in this case and would not certify proposed common issue #10.

[110] I note that Perell J. did not certify as common issues an assessment of aggregate damages in *Blair* or *Carillo*. I decline to do so as well.

[111] Finally, I would not certify proposed common issue #12 concerning pre and post judgment interest. I agree with Westcourt that, on the evidence, there appears to be too much variableness to the interest rates applicable to the residential and commercial leases for this to be considered an appropriate common issue.

[112] Accordingly, I will certify the following proposed common issues, as common issues—modified 1, modified 2, 3, 4, 5, modified 7, 8, modified 9, modified 11 and 13.

Preferable Procedure:

[113] The Ontario Court of Appeal in *Cloud v. Canada (Attorney General)*, 2004 CanLII 45444 ON CA), described how to approach the preferable procedure requirement, at para. 73. It has two concepts at its core. The first is whether the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members. In conducting the analysis, the court must keep in mind the three principal advantages of class actions, namely judicial economy, access to justice and behaviour modification, and must consider the degree to which each would be achieved by certification.

[114] In this particular case, preferable procedure presented the greatest hurdle to certification for the Plaintiffs. The individual tenants residing in the 154 residential units have access to the LTB.

[115] Many of Westcourt's arguments with respect to jurisdiction apply to this part of the certification analysis as well. While I have concluded that this court does have jurisdiction given the amount *claimed*, that does not preclude me from determining that the majority of the claims are likely to fall within the jurisdiction of the LTB such that a class action is not the preferable procedure. However, for the reasons set out above in my jurisdiction analysis, I reject Westcourt's argument that the LTB has exclusive jurisdiction in this case. The Superior Court of Justice's jurisdiction is not ousted.

[116] Despite the able arguments of Westcourt, it does not follow that the *RTA* governs all disputes between a landlord and tenant. I am not persuaded that all of the claims advanced by the residential tenants would fall within the subject matter jurisdiction of the *RTA* (see, for example, *Janus v. The Central Park Citizen Society*, 2019 BCCA 173). In my view, the complaints made in *Mackie*, *supra*, about non-repair in general are fundamentally different than the claim in negligence asserted by the tenants of Westcourt Place, that the negligence of the Defendant caused a fire. This is not a claim solely about maintenance and failure to repair.

[117] In my view, this is a textbook case regarding access to justice that favours a class action.

[118] Even if I accept that the LTB offers a remedy, I have reservations that most tenants would pursue such a proceeding. I accept the evidence in the material of the backlog facing the LTB, aggravated by the pandemic. While there is a significant backlog in the

Superior Court of Justice as well, a class proceeding permits individual class members to obtain justice without "carrying the ball". Faced with delays in front of the LTB, would most residential tenants pursue what is likely a modest sum of damages (I recognize that this argument did not persuade me with respect to jurisdiction, but again, it was the amount of the claim, not the damages which was determinative)?

[119] In *RTA* proceedings, most residential tenants would be self-represented. I do not accept Westcourt's argument that contingency fee agreements would be entered into by legal counsel with respect to *RTA* proceedings. Having experienced counsel itself promotes access to justice. Absent a class proceeding, many, if not most, of the tenants would be unrepresented.

[120] I also accept that there is some basis in fact within the chart appended to Mr. Smith's affidavit that the tenants do not have the financial means to pursue litigation individually. The material discloses many complaints of being unable to afford moving costs, for example.

[121] Furthermore, the commercial tenants cannot access the LTB. Their claims would have to be pursued through the court system. This raises the spectre of inconsistent findings with respect to liability between cases involving the commercial tenants and residential tenants appearing before the LTB.

[122] There is clearly utility to having one court make the necessary findings of fact and law with respect to the common issues that exist in this case.

[123] I note that Perell J., in *Blair, supra*, at paras. 57-58 described, in the context of recognizing the availability of *RTA* proceedings, small claims court proceedings and Superior Court proceedings:

> [57] But for the availability of TCHC's Compensation Plan combined with the availability of: (a) proceedings under the *Residential Tenancies Act*, before the Landlord and Tenant Board, which has a monetary jurisdiction of up to $25,000; (b) proceedings in the Small Claims Court, which also has a $25,000 monetary jurisdiction; or (c) proceedings in the Superior Court, which has an unlimited monetary jurisdiction for those residents who were dissatisfied by the TCHC's offer, there is little doubt that the preferable procedure for Ms. Blair's action is a class action.
>
> [58] The procedure provided by the Act is precisely designed for the type and circumstances of Ms. Blair's action.

[124] Although I accept Westcourt's submission that if certification is refused, the tenants are not prevented from seeking justice, there is no question that the entire opposition to certification arises from Westcourt's justifiable belief that most litigants will not pursue a remedy on their own.

[125] From the Roar Engineering Report, this does not *appear* (I use that word intentionally to signify that I am not prejudging the issue) to be a case in which Westcourt needs to be deterred from repeating the actions/inactions that led to this fire. Presumably, they will have learned a lesson from what transpired. However, class proceedings in the context of apartment fires do provide a strong incentive to *other* property owners/property managers to ensure the safety of their premises. Behaviour modification plays a large role in these cases. I do not see how defending a handful of LTB matters would have any beneficial effect on the behaviour of the owners and managers of apartment complexes. The failures of property owners and managers of high-rise apartment buildings to properly maintain the buildings can have catastrophic effect, as we have seen recently in Florida.

[126] Westcourt argues that the individual leases, both commercial and residential, result in individual issues outweighing common issues. I disagree.

[127] First of all, it is not at all clear that Westcourt can rely upon any of the exclusion/limited liability clauses in the residential leases. The Plaintiffs respond with *Taylor v. Allen*, 2010 ONCA 596 (CanLII). In that case a landlord sought to rely upon a rental agreement that excluded liability to avoid liability to its tenant and their guests. Goudge J.A. noted ss. 94(1) and 80(1) of the *Landlord and Tenant Act*, which precluded a landlord from contracting out of its responsibility to maintain the premises in a good state of repair and fit for habitation during the tenancy. This prohibition continues under s. 3(1) of the *RTA*.

[128] I also note the affidavit evidence filed on behalf of Westcourt describing all of the examinations for discovery that are envisioned to reach individual determinations of damages. First of all, s. 6 of the *CPA* speaks to that issue and is a direct admonition to the court not to let individual assessments stand in the way of certification. Additionally, the Plaintiffs have been able to communicate with many of the putative Class Members for the purpose of assembling information. I am satisfied that this can occur such that the many threatened examinations for discovery can be avoided. There are ways to gather the requisite information short of examinations for discovery.

[129] I also note that Westcourt seeks a declaration that the leases have been frustrated. I agree that the *RTA* explicitly permits the LTB to make such a determination under s. 19. However, under the *RTA*, this would only be in respect of residential tenancies. It also presupposes that either all residential tenants commence *RTA* proceedings or that Westcourt commences proceedings against all the residential tenants. The LTB cannot declare leases frustrated if the parties are not before them. However, the frustration of leases is an issue that a class proceeding can address, if appropriate. By accepting that this court has jurisdiction, a finding I was not yet prepared to make in May of 2021 on the record before me then, frustration is potentially available to bind all tenants.

[130] Finally, I accept that the LTB does not have jurisdiction to award punitive damages and that the Superior Court, in relation to proper landlord/tenant matters, would have no greater jurisdiction. However, that does not necessarily mean that the Superior Court is precluded from awarding punitive damages in respect of matters that are not in pith and

substance landlord/tenant disputes. Thus, the ability of the Superior Court to redress reprehensible conduct is another reason why a class proceeding is a preferable procedure in this case. It may turn out that this is exactly the type of case where punitive damages are merited.

[131] Accordingly, a class proceeding is a preferable procedure to a myriad of LTB hearings. I find that this criterion is met.

Adequate Representative Plaintiff/Litigation Plan:

[132] The final criterion for certification is whether there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[133] The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all the class members as against the defendant (see: *Blair, supra*, paras. 72).

[134] Factors to be considered are the representative plaintiff's motivation to prosecute the claim, his or her ability to bear the costs of the litigation and the competence of his or her counsel to prosecute the claim (see: *Blair, supra*, para. 74).

[135] In this case, there is no real issue that Mr. Gordon and Mr. Sitter fulfill the criteria for a representative plaintiff. However, as noted above, Ms. Thomson does not qualify as a "spouse" under the *FLA*. Does this disqualify her from acting as a representative plaintiff?

[136] Perell J. in *Blair, supra*, at para. 73, stated as follows:

> [73] Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact: *Boulanger v. Johnson & Johnson Corp*., [2002] O.J. No. 1075 (S.C.J.) at para. 22, leave to appeal granted, [2002] O.J. No. 2135 (S.C.J.), varied (2003), 64 O.R. (3d) 208 (Div.Ct.) at paras. 41, 48, varied [2003] O.J. No. 2218 (C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc*., [2008] O.J. No. 197 (S.C.J.); *LeFrancois v. Guidant Corp*., [2008] O.J. No. 1397 (S.C.J.) at para. 55.

[137] In the *Boulanger* case, it was ultimately found that an Ontario based *FLA* claimant could assert such causes of action on behalf of similarly situated class members in other jurisdictions in respect of their own province's Family Law legislation. That is not so wide a net as would have to be cast in this case. All those claims would be similar to one another.

[138] In *Matoni*, it was held that the proposed representative plaintiff did not personally have claims under the only legislation that grounded the certified claim. Hoy J., however, found that it was appropriate to certify the class proceeding given that all other criteria were met and permit the Plaintiffs to locate and substitute a replacement who did have a claim under that statute.

[139] This issue was recently discussed at length by Perell J. in *Vecchio Longo Consulting Services Inc. v. Aphria Inc*., 2021 ONSC 5405 (CanLII). Therein, he described the ratio of *Boulanger*, at para. 159, as follows:

> [159] The *Boulanger* line of cases stands for the proposition that if a plaintiff has a cause of action against a defendant, then the plaintiff qualifies to be a Representative Plaintiff for the Class Members who have the same or different causes of action against the defendant. In other words, a Representative Plaintiff need not have the same causes of action as the Class Members he or she represents, and their different causes of action can be joined to the Representative Plaintiff's causes of action against the common defendant. In short, the *Ragoonanan Principle* does not apply to this circumstance which involves differences amongst Class Members *vis a vis* the same target defendant.

[140] Accordingly, that line of thinking would appear to support that Ms. Thomson, who was a tenant and thus, has a valid cause of action as against Westcourt on that basis, may continue as the Representative Plaintiff on behalf of the Family Class. However, if I am incorrect, then I would grant leave to replace Ms. Thomson as Representative Plaintiff with someone who does have a valid *FLA* claim, rather than refuse to certify this class proceeding. The Plaintiffs may wish to do so to avoid any further controversy on this issue.

[141] After all, an *FLA* claim is a derivative claim in any event, that requires the underlying claim for personal injury or death in order to exist.

[142] I have reviewed the affidavits of the three proposed Representative Plaintiffs, Mr. Gordon, Ms. Thomson and Mr. Sitter. Those affidavits satisfy the requirements of demonstrating that they are motivated, understand at an acceptable level the procedures involved and have retained experienced class counsel. There is no indication of any conflicts of interest.

[143] I have reviewed the proposed Litigation Plan. Class counsel has created a website for Class Members. Notices and court documents will be posted thereon. There has already been a demonstration of how information can be collected from Class Members. The plan addresses all of the salient aspects of the proceeding before and after certification. It is true that there will be a need to have individual issue "mini-trials" but that is not a reason for refusing to certify. I am satisfied that Class Counsel and the Representative Plaintiffs have set forth a Litigation Plan that supports a class action as the preferable

procedure. It also must be recognized that a Litigation Plan is necessarily a work in progress. It does not need to be perfect, it needs to be "workable".

Conclusion:

[144] For the reasons provided, I disagree with Westcourt that exclusive jurisdiction over the claims of the residential tenants lies with the Landlord and Tenant Board. The amounts claimed herein exceed the monetary jurisdiction of the small claims court, which is determinative.

[145] Further, section 5 (1) of the *Class Proceedings Act* is mandatory. The court *shall* certify a class proceeding if the pre-conditions from (a) through (e) are met. Although in my respectful view, some modifications were required to the class definitions and the commons issues as described, I hold that the criteria are met. Accordingly, I certify the proposed class action as a class proceeding.

[146] Counsel are to prepare a draft order. If there are any issues that need clarification, communication with me can be arranged through the Windsor trial coordinator.

[147] If the parties cannot agree on the issue of costs of this motion, the Plaintiffs may provide written submissions on or before March 18, 2022, the Third Parties, on or before March 30, 2022 and Westcourt on or before April 11, 2022. The submissions should be no longer than four pages in length. There should be Bills of Costs appended.

"Justice S. Nicholson"
Justice Spencer Nicholson

Date: February 14, 2022

APPENDIX A

PROPOSED REVISED COMMON ISSUES

1. Did the Defendant or the Defendant and any of its agent(s), servant(s), contractor(s) and subcontractor(s) owe a duty of care to the Class and Family Class when they operated, maintained and/or monitored Westcourt Place, including the electrical systems and the fire prevention system? If so, who owed a duty of care to the Class and Family Class?

2. If the answer to question 1 is yes, did the Defendant and any of its agent(s), servant(s), contractor(s) and subcontractor(s) breach the standard of care expected of them in relation to the operation, maintenance and/or monitoring of Westcourt Place, including the electrical systems and the fire prevention system? If so, who breached the standard of care and how?

3. Is the Defendant an occupier of Westcourt Place within the meaning of s. 1 of the *Occupiers' Liability Act,* R.S.O. 1990, c. O.2 ("*OLA*")?

4. If the answer to question 3 is yes, did the Defendant breach the duty, pursuant to s. 3 of the *OLA*, to take such care as in all the circumstances of this case is reasonable to see that persons entering Westcourt Place, and the property brought into Westcourt Place, was reasonably safe while in Westcourt Place?

5. Did the Defendant, as a landlord, fail to comply with its express or implied obligations under any rental contracts, tenancy agreements or leases that the Defendant, as a landlord, had with Class Members (the "Contracts"):

    (a) to maintain Westcourt Place, including the rental apartments, commercial units and underground parking levels, in a good state of repair and fit for habitation and occupation and in compliance with health, safety, housing and maintenance standards? And

    (b) not to substantially interfere at any time with the Class Members' reasonable use and enjoyment of Westcourt Place, including its rental apartments, commercial units and underground parking levels, for all usual purposes?

6. Was it an express or implied term of the Contracts that the Defendant, as a landlord, would maintain Westcourt Place in a good state of repair and fit for habitation for residential and commercial use and in compliance with health, safety, housing and maintenance standards?

7. If the answer to question 6 is yes, did the Defendant, as a landlord, breach the Contracts? If so, how?

8. Did the fire at Westcourt Place on November 12, 2019, constitute a nuisance? If yes, is the Defendant liable for the resulting damages suffered by the Class and the Family Class and why?

9. Is the Defendant vicariously liable or otherwise responsible for the acts and/or omissions of its officers, directors, employees, agent(s), servant(s), contractor(s) and subcontractor(s)? If so, who was vicariously liable or other responsible and why?

10. Can the damages of the Class and/or Family Class be determined, in part, on an aggregate basis? If yes, what amount should be paid by the Defendant, to whom and why?

11. Was the Defendant's conduct with respect to the Fire sufficiently reprehensible or high-handed to warrant punishment by an award of punitive damages? If yes, to whom and in what amount?

12. Should the Defendant pay prejudgment and post judgment interest at the rate of twenty-four percent (24%) per annum or such other rate specified in the Contracts?

13. Should the Defendant pay the costs of administering and distributing any monetary judgment and/or the costs of determining eligibility and/or the individual issues? If yes, who should pay what costs, why, and in what amount?