CITATION: Chu v. Parwell Investments Inc., 2025 ONSC 2140
COURT FILE NO.: CV-18-00604410-00CP
DATE: 20240407

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: CLEMENT CHU, NAHOM ABADI, and IDA FABRIGA-CHU, Plaintiffs

AND:

PARWELL INVESTMENTS INC., 650 PARLIAMENT RESIDENCES LIMITED, 650 PARLIAMENT (LHB) INVESTMENTS LIMITED, and the ELECTRICAL SAFETY AUTHORITY, Defendants

BEFORE: Glustein J.

COUNSEL: *Caleb Edwards and Sumaiya Akhter*, for the plaintiffs

Jeremy Martin and Ted Frankel, for the defendants Parwell Investments Inc., 650 Parliament Residences Limited, and 650 Parliament (LHB) Investments Limited

HEARD: April 1, 2025

REASONS FOR DECISION

NATURE OF MOTION AND OVERVIEW

[1] The plaintiffs bring this partial certification motion to certify additional proposed common issues ("PCIs") in the present class action. The plaintiffs propose 15 PCIs which I attach as Schedule "A" to these reasons.

[2] The defendants Parwell Investments Inc., 650 Parliament Residences Limited, and 650 Parliament (LHB) Investments Limited (collectively, the "Landlord Defendants") oppose certain of the proposed additional PCIs. The Landlord Defendants also ask the court to certify three additional PCIs. The plaintiffs oppose the additional PCIs proposed by the Landlord Defendants.

[3] The Landlord Defendants raise objections to PCIs 1 and 2, PCIs 5 to 7, PCI 10, and PCI 11 (only with respect to liability for nuisance under PCI 11(c)). The Landlord Defendants do not oppose PCIs 3, 4, 11 (except for nuisance under PCI 11(c)), 12, 13, 14, and 15.

[4] The parties also agree that PCIs 8 and 9 can proceed on consent under the modifications proposed by the Landlord Defendants.

[5] I address each of the objections below.

[6] The plaintiffs also seek an order granting leave to (i) file the reports of the Office of the Fire Marshall and (ii) file a fresh as amended statement of claim. The Landlord Defendants consent to the former relief, and do not oppose the latter relief, subject to deletion of any references to nuisance as the Landlord Defendants submit that such claim does not disclose a cause of action.

[7] The Landlord Defendants also raised objections to the plaintiffs' proposed evidence before the court, but resolved that issue with the plaintiffs on the agreement that the only evidence before the court on this motion would be Exhibits A to D from the affidavit of Mr. Edwards and the entire affidavit of Ms. Akhter.

[8] Finally, the Landlord Defendants do not challenge that (i) the PCIs disclose a cause of action under s. 5(1)(a) of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 (the "*CPA*") (except for the claim in nuisance), (ii) a class action is the preferable procedure under s. 5(1)(d) of the *CPA*, or (iii) the proposed representative plaintiffs can adequately represent the class under s. 5(1)(e) of the *CPA*.

FACTS

[9] I rely on the brief review of the facts and background as set out in my reasons in *Chu v. Parwell Investments Inc.*, 2024 ONSC 5903, in which I addressed a preliminary motion by the Landlord Defendants seeking to (i) enforce a purported agreement between the parties that the "Further Certification Order" of Justice Belobaba dated August 27, 2020 was a final certification order and (ii) in the alternative, require the plaintiffs to obtain leave under s. 8(3) of the *CPA* to bring the proposed certification motion.

[10] I dismissed that motion which resulted in the present partial certification motion before the court.

[11] The only additional evidence referred to at the hearing was from the expert report prepared by Mr. Rochon on behalf of the plaintiffs, in which he stated under the heading "Cause Determination" that:

> Evidence of water damage/staining was observed within the various electrical rooms belonging to this building. The presence of cat litter on the floor in multiple locations – at the base of the bus ducts – suggests that the building personnel were aware of this water issue. During our site inspection on September 10, 2018 (a rainy day) we observed that water was leaking from the building roof into the south building electrical rooms. Water entering electrical rooms is extremely hazardous because if [sic] can result in electrical failures and malfunctions. We also enclose [sic] the openings in the concrete floors through which the bus ducts fed, likely due to issues with water traveling down the electrical bus ducts.

ANALYSIS

Objections to PCIs 1 and 2

[12] The Landlord Defendants ask the court to delete the references to "design, construction, operation" and "including the electrical systems" in both PCIs 1 and 2. I do not accept these objections.

[13] PCIs 1 and 2 were certified on consent by Justice Belobaba: *Chu v. Parwell Investments Inc.*, 2019 ONSC 3353, at para. 7. The text of those PCIs is identical to PCIs 1 and 2.

[14] The Landlord Defendants submit that PCIs 1 and 2 are "new" PCIs because they are contained on a new list of PCIs proposed by the plaintiffs. However, while the plaintiffs ask this court to certify additional PCIs to those certified by Justice Belobaba, PCIs 1 and 2 relating to negligence are not new. Having consented to the certification of those PCIs, the Landlord Defendants would need leave of the court under s. 8(3) of the *CPA*. No such motion is before the court.

[15] I addressed the applicable test for leave under s. 8(3) of the *CPA* in *Chu v. Parwell Investments Inc.*, 2024 ONSC 5903, at paras. 76-78. The Landlord Defendants do not submit that such a test would be met if they were to bring a motion.

[16] The Landlord Defendants further submit that PCIs 1 and 2 are "new" because they now relate to the defendant 650 Parliament Residences Limited, in addition to the two defendants Parwell Investments Inc. and 650 Parliament (LHD) Investments Limited who were the subject of the same PCIs before Justice Belobaba.

[17] However, that is a distinction without a difference. The Landlord Defendants do not submit that there is any distinction in the scope or effect of PCIs 1 or 2 on the additional corporate defendant. The plaintiffs have already satisfied Justice Belobaba that those PCIs are proper. Adding another corporate defendant does not result in a *de novo* hearing about the propriety of those PCIs.

[18] Finally, even if I accepted any of the above objections raised by the Landlord Defendants, I would still not order the proposed deletions. On a certification motion, the court makes no findings on the merits of the parties' positions. Consequently, I do not determine the cause of the fire. I only consider whether there is some basis in fact for the existence of the PCIs.

[19] In the present case, Mr. Rochon's findings could support a conclusion at a common issues trial that the water damage he observed could have arisen as a result of the "design, construction, [or] operation" of the buildings, "including the electrical systems."

[20] Consequently, even if I accepted the preliminary objections raised by the Landlord Defendants, PCIs 1 and 2 would be supported on the evidence before the court.

Objections to PCIs 5 to 7

[21] The Landlord Defendants ask the court to (i) require the plaintiffs to identify the "health, safety, housing and maintenance standards" upon which they will rely at trial for PCIs 5 to 7 and (ii) in any event, delete the reference to "including the rental units" under PCIs 5(a) and (b). I address each of these objections below.

Identification of standards

[22] I agree with the plaintiffs that they are not required to identify the specific standards upon which they will rely at trial.

[23] The Landlord Defendants submit PCIs 5 to 7 are so broad that the plaintiffs could raise any breach of "health, safety, housing and maintenance standards" at trial (*e.g.* pest infestation, lack of heating), raising matters which have nothing to do with the fire that took place causing the residents to evacuate the premises and find new housing. I do not agree.

[24] It is settled law that common issues are adjudicated on the pleadings: *Gilani v. BMO Investments Inc.*, 2021 ONSC 3589, at paras. 383-85, leave to appeal refused, 2021 ONSC 5906 (Div. Ct.).

[25] In the present case, it is clear from the statement of claim that the common issues concern the fire, resulting damages to the rental units, and the forced evacuation of the residential premises. Discoveries will address the factual basis for such claims, and after that evidence is considered by the parties and experts, they will then each be able to advise which standards are at issue. That is a matter for discovery and expert evidence prior to trial, and not to be set out as part of PCIs 5 to 7.

[26] A plaintiff is not required to set out in a PCI the pleadings relied upon to support a cause of action: *Rooney v. ArcelorMittal*, 2018 ONSC 1878, at para. 87. Similarly, the applicable standards which may arise depending on discovery and expert evidence at trial need not be particularized in a PCI.

Reference to the rental units

[27] The Landlord Defendants submit that there is no basis in fact that any of the rental units were either not in a good state of repair (PCI 5(a)) or that the Landlord Defendants "substantially interfered[d] […] with the Class Members' reasonable enjoyment" of their rental units (PCI 5(b)). I do not agree.

[28] A court could conclude, based on the plaintiffs' expert evidence, that the alleged failure to properly protect the electrical system against persistent and recurring water damage resulted in the rental units not being in a good state of repair. The plaintiffs can submit (subject to the opposing interpretation of the Landlord Defendants), that it is not a "good state of repair" to allow rental units to be exposed to such a risk.

[29] Further, there is a basis in fact for the plaintiffs' submission that after the fire, the rental units were damaged by toxic soot, silica and greasy film such that (i) the rental units were not in a good state of repair and (ii) such conditions substantially interfered with the class members' reasonable enjoyment of their rental units.

[30] Consequently, I do not accept the objections by the Landlord Defendants on PCIs 5 to 7.

Objections to PCIs 10 and 11(c)

[31] I accept the Landlord Defendants' objection that the claim fails to disclose a cause of action in nuisance and, as such, I find that PCIs 10 and 11(c) cannot be certified.

[32] The test to determine whether a pleading discloses a cause of action is not in dispute. In *Gilani*, I reviewed the law as set out in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 SCR 420. I summarized the applicable principles at paras. 77-78:

> The court in *Atlantic Lottery* affirms the principles established throughout its jurisprudence (as the Court discusses at para. 19) that (i) a claim cannot be permitted to proceed merely because it is novel; (ii) a court may be able to resolve "complex issues of law and policy" based on the pleadings; and (iii) the court must review the existing law and the pleadings to determine whether a novel claim can proceed.
>
> However, the "plain and obvious" test remains the same. In *Atlantic Lottery*, Brown J. stated that a court should not permit a claim to proceed "simply because it is novel" (at para. 19). Nevertheless, Brown J. maintained the test that a claim (novel or not) should not be struck unless it is "hopeless" (at para. 18), consistent with the settled test in *Hunt* and recently affirmed in *Wright*.

[33] The plaintiffs plead a cause of action in both private and public nuisance. I address each below.

Private nuisance

[34] Nuisance requires a plaintiff to demonstrate that (i) the defendants' use of their land interfered with the enjoyment of the plaintiff's land and (ii) the interference was unreasonable: *Royal Anne Hotel Co v. Ashcroft* (1979), 95 DLR (3d) 756 (BC CA), at p. 760.

[35] In *Royal Anne Hotel*, the court set out the rationale for the law of nuisance at p. 760:

> In my opinion the *rationale* for the law of nuisance in modern times, whatever its historical origins may have been, is the provision of a means of reconciling certain conflicting interests in connection with the use of land, even where the conflict does not result from negligent conduct. It protects against the unreasonable invasion of interests in land. [Italics in original text.]

[36] Consequently, in *Cotter v. Levy*, [2000] O.J. No. 1086 (S.C.), the court dismissed the claim in nuisance arising from a fire since there was no "use" of the property "for fire purposes." The court held, at para. 23:

> I cannot find a cause of action in nuisance pleaded. Further in considering 1(e), I do not understand how the use of the property (as pleaded) is a nuisance. I do not understand that the defendants are alleged to have used the property for fire purposes.

[37] Further, nuisance can only arise out of a continuous use and not from an individual incident. In *Hutson v. United Motor Services Ltd.*, [1936] O.R. 225 (C.A.), at pp. 228-229, affirmed [1937] SCR 294, Middleton J.A. held:

> A private nuisance must specially affect the welfare of an individual and moreover, a nuisance, whether public or private, must have some element of continuity. Here, the thing done was an isolated act done upon the defendant's own premises and done with proper precautions not calculated to interfere with the public weal or the individual comfort of the plaintiff. It does not differ in essence from the careless handling of a gun. If a gun goes off and injures the plaintiff, there is liability, but not because the gun is a nuisance.

[38] The above passage has been relied upon by courts to deny relief in nuisance for accidental fire damage: *Ledcor Industries Inc. v. Mountain View County*, 2004 ABPC 161, at paras. 20-23.

[39] Based on the above law, the plaintiffs' claim in nuisance cannot stand. The Landlord Defendants did not use the property for the purposes of creating a fire and no continuous conduct is at issue.

[40] The plaintiffs rely on a recent certification decision in *Gordon v. 837690 Ontario and Tyco et al.*, 2022 ONSC 1028, at para. 56, where a PCI was certified based on a claim in nuisance arising from an accidental fire. However, that claim was certified on consent and as such the court did not consider the legal issues discussed above. Consequently, the decision cannot serve as the basis for the nuisance claim to proceed.

[41] The plaintiffs also rely on the decision in *Kinsmen Club of Kingston (c.o.b. The Summerhill Apartments) v. Walker Estate*, [2005] O.J. No. 4622 (S.C.), in which the court found liability in nuisance arising from the deceased's smoking in bed. Power J. held, at para. 30:

> In my opinion, a tenant of an apartment building who smokes in bed actively creates a nuisance given the notorious risks attached to this activity. Injury to others is very foreseeable and this risk was, according to the evidence, appreciated by Ms. Walker.

[42] This is the only authority before the court in which a court accepted a claim in private nuisance arising from non-continuous conduct. However, while the court in *Kinsmen* at para. 29 purports to rely on the decision in *Cotter*, the court makes no reference to the finding in *Cotter* that an accidental fire does not constitute a "use" of the premises. Further, the court in *Kinsmen* at para.

29(f) relies on passages cited at paras. 26 to 28 of *Cotter* that do not address the continuous use requirement.

[43] Consequently, I find that the *Kinsmen* decision[1] cannot serve as the basis for the nuisance claim to proceed.

[44] In any event, even if *Kinsmen* could be relied upon by the plaintiffs, this decision falls outside the settled law of appellate courts and would not support a cause of action in private nuisance.

Public nuisance

[45] A claim in public nuisance requires a nuisance which affects a "public" and not a "private" interest. In *Cicconi v. Van Idour*, [1985] B.C.J. No. 903 (S.C.), the court dismissed a public nuisance claim on the basis that the alleged damage was to the interests of members at a private yacht club. The court held, at para. 17:

> The key elements of this tort are three: a nuisance occurred, the public was affected by it, and the plaintiff suffered "particular damage other than and beyond the general inconvenience and injury suffered by the public". Thus, at the outset an action here in public nuisance must fail, as the "public" at no time were inconvenienced or endangered or otherwise affected. The number of persons affected by the fire on Van Idour's boat was not sufficiently large to bring it within the range of "public", and in addition all damage occurred within the confines of a private yacht club. Counsel have referred me to a number of cases discussing public nuisance but none are of assistance to the plaintiffs on this point.

[46] Consequently, "[a] public nuisance has been defined as any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience" such as "unreasonable interference with a public right of way, such as a street or highway" or configuration of railway tracks across a street: *Ryan v. Victoria (City)*, [1999] 1 SCR 201, at paras. 52-53.

[47] In the present case, there can be no claim for public nuisance. 650 Parliament is a private residence inaccessible to the public. It remains private property regardless of the number of individuals located at the property. It is not a public space.

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[1] The decision in *Mohammed v. Banville* (2009), 94 OR (3d) 709 (S.C.), at para. 44 refers to the decision in *Kinsmen* but is not decided on that basis as the court relies (at para. 47) on s. 76 of the *Fire Protection and Prevention Act, 1997*, S.O. 1997, c. 4 (the "*FPPA*").

[48] For the above reasons, the plaintiffs' nuisance claim discloses no cause of action. Consequently, PCIs 10 and 11(c) cannot be certified.

Proposed PCIs by the Landlord Defendants

[49] The Landlord Defendants propose three additional PCIs. I address each below.

Causation PCI

[50] The Landlord Defendants propose the following PCI:

> Was any act or omission of the Defendants, or any of them, the but-for cause of the Fire?

[51] I agree with the Landlord Defendants that a causation PCI is appropriate. The PCIs as proposed by the plaintiffs include whether the Landlord Defendants owed a duty of care and breached that duty of care to the plaintiffs (PCIs 1 and 2). However, those questions do not address any causation for damages that would be at issue upon a finding of such a breach.

[52] Further, while PCI 11 asks the court to determine whether individual trials would be appropriate, it does not ask the court to determine causation issues.

[53] Consequently, I accept the position of the Landlord Defendants that a causation PCI is appropriate. However, I agree with the plaintiffs that each party should be able to argue its own views as to the appropriate test for causation, so that the causation PCI should not be restricted to a "but-for" test. I therefore amend the causation PCI as follows:

> Was any act or omission of the Defendants, or any of them, a cause of the Fire?

[54] Both parties agreed at the hearing that the above modification was acceptable (if a causation PCI was required).

FPPA PCI

[55] The Landlord Defendants propose the following PCI:

> Are the Defendants precluded from liability pursuant to Section 76 of the *Fire Protection and Prevention Act, 1997*, S.O. 1997, c. 4?

[56] I agree with the Landlord Defendants that the *FPPA* PCI is appropriate.

[57] On a certification motion, the court does not determine the merits of a claim or defence. The Landlord Defendants are entitled to plead the positive defence under s. 76 and resolving that issue on a class-wide basis is critical to the resolution of the class members' claims since it may determine whether any liability for other PCIs lawfully attach to the Landlord Defendants.

[58] Both parties are entitled at trial to submit whether s. 76 applies. I cannot find at this stage that there is no basis in fact or law for such a defence. Consequently, it should be decided as a common issue. While the Landlord Defendants will have to amend their defence to plead s. 76, they can do so without bringing a further motion given these reasons.

Novus actus interveniens PCI

[59] The Landlord Defendants propose the following PCI:

> Was any act or omission of the Third, Fourth, or Fifth Parties *novus actus interveniens* breaking the chain of causation? If so, which, to what extent, and by whom?

[60] This issue could not be resolved at the hearing, as the written submissions of the parties in their factums were not sufficient for the court to determine this important issue.

[61] In particular, the plaintiffs assert that the statement of defence did not properly raise the *novus actus interveniens* defence and as such the plaintiffs would be significantly prejudiced if they cannot pursue the third, fourth, or fifth parties in the litigation.

[62] Conversely, the Landlord Defendants submit that the statement of defence properly raised the *novus actus interveniens* defence and as such the Landlord Defendants would be significantly prejudiced if they cannot pursue that defence to avoid liability on their part if the conduct of any third, fourth, or fifth party constituted a *novus actus interveniens*.

[63] Full submissions relating to this issue are required. The court will consider the *novus actus interveniens* PCI at a subsequent hearing to be scheduled by the parties.

ORDER AND COSTS

[64] I certify the PCIs proposed by the plaintiffs as set out at Schedule "A" to these reasons, except for PCIs 10 and 11(c) and with the modifications as accepted by the parties to PCIs 8 and 9. I also certify the Causation and *FPPA* PCIs proposed by the Landlord Defendants, subject to the modification to the text of the Causation PCI as set out in these reasons.

[65] I also grant the plaintiffs leave to (i) file the reports of the Office of the Fire Marshall and (ii) file a fresh as amended statement of claim subject to deletion of any references to nuisance.

[66] Counsel shall provide me with a draft order including all approved PCIs as a schedule for my review and signature.

[67] Both parties provided the court with costs outlines prior to the hearing, which addressed the costs of both the preliminary motion (see my reasons at 2024 ONSC 5903, at para. 88) and the present motion. Given that the parties must return to address the *novus actus interveniens* PCI, I reserve costs to that attendance, following which the parties can make submissions as to costs for this series of motions, if they cannot reach an agreement.

GLUSTEIN J.

Date: 20250407

Schedule A – PCI's as Proposed by the Plaintiffs

1. Did one or more the defendants other than the ESA owe a duty of care to the Class in relation to the design, construction, operation, maintenance and monitoring of the Buildings, including the electrical systems? If so, which defendants?

2. If the answer to question 1 is "yes", did one or more of those defendants breach the standard of care expected of them in relation to the design, construction, operation, maintenance and monitoring of the Buildings, including the electrical systems? If yes, which defendants, when and how?

3. Are one or more the defendants an occupier of the Buildings within the meaning of s. 1 of the *Occupiers' Liability Act*, RSO. 1990, c. 0.2? If so, which defendants?

4. Did one or more of the defendants breach their duties under the *Occupiers' Liability Act*? If so, how, and which duties?

5. At the time of the fire of August 21, 20218 (the "Fire"), was the defendant, 650 Parliament Residences Limited (the "Landlord"), in breach of its obligations:

    a. Pursuant to s. 20(1) of the *Residential Tenancies Act*, 2006, S.O. 2006, c. 17, to maintain the Buildings, including the rental units in it, in a good state of repair, fit for habitation and in compliance with health, safety, housing and maintenance standards?

    b. Pursuant to s. 22 of the *Residential Tenancies Act*, not to substantially interfere at any time with the Class Members' reasona*ble* enjoyment of the Buildings, including their rental units in it, for all usual purposes?

6. Was it an express or implied term of the rental contracts/tenancy agreements (the "Contracts") that the Landlord had with Class Members that the Landlord would maintain the Buildings in a good state of repair and fit for habitation and in compliance with health, safety, housing and maintenance standards?

7. If the answer to question 7 is "yes", did the Landlord breach the Contracts? If so, how?

8. Can the defendants rely on s. 22 of the tenancy agreement to disclaim liability "for any damage, however, caused, to any property … belonging to or owned by Tenant or members of his family or to any other person while such property is located upon the rented premises or anywhere else on the property of the Landlord" given the circumstances in which the tenants entered into the leases and the *Residential Tenancies Act*?

9. What legal effect, if any, does the language of s. 21 of Schedule "A" to the Rental Agreement, Rules & Regulations, which states that "The Tenant is hereby required to provide the Landlord with either proof of adequate insurance coverage, or, in the

alternative, prior to the commencement of the next renewal term, apply and pay for the Tenant's Legal Liability Coverage as arranged by Landlord in the amount of not less then $50,000.00" on claims for loss of personal property in the building?

10. Did the Fire constitute a nuisance? If so, are one or more of the defendants liable for the resulting damages suffered by the Class?

11. If the Court finds answers to any of common issues 2, 4, 5A, 5B, 7, or 10 in the affirmative, should there be individual issues trials to determine whether the defendants are liable to class members for damages for

    a. Negligence;

    b. Breach of Contract;

    c. Nuisance;

    d. Breach of the *Residential Tenancies Act*; and/or

    e. Breach of the *Occupiers Liability Act*?

12. Can the damages of the Class be determined, in part, on an aggregate basis? If yes, what amount should the defendants pay, to whom and why?

13. Should the defendants pay punitive damages to the Class? If so, in what amount?

14. Should the defendants pay prejudgment and post-judgment interest, and at what annual interest rate?

15. Should the defendants pay the costs of the notice program, 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 the costs, why, and in what amount?

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Plaintiffs

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Defendants

REASONS FOR DECISION

Glustein J.

Released: April 7, 2025