CITATION: *Sunday Irving Holdings Inc. v. La Succession de Seymour Mender et al.*, 2025 ONSC 2745
COURT FILE NO.: CV-21-85532
DATE: 2025/06/03

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Sunday Irving Holdings Inc., Plaintiff

-and-

La Succession de Seymour Mender, Barnes Sammon LLP, Benoit James Investments Inc., Bernard Benoit, Coldwell Banker First Ottawa Realty, Siyamak Sasani, ~~Stewart Title Guaranty Company~~, Carleton Condominium Corporation No. 397, JP Aubrey, David Chow, Richard Newbury, Selami Shahin and Carol Suprenant, Defendants

BEFORE: Justice A. Doyle

COUNSEL: Ronald F. Caza, Albert Brunet, and Julie Daet, counsel for the Plaintiff

Christy J. Allen, counsel for the Defendants Carleton Condominium Corporation No. 397, JP Aubrey, David Chow, Richard Newbury, Selami Shahin and Carol Suprenant

Colin Dubeau, counsel for the Defendants La Succession de Seymour Mender and Barnes Sammon LLP

Martin Smith, counsel for the Defendants Siyamak Sasani and Coldwell Banker First Ottawa Realty

Tara Lemke, counsel for the Defendants Benoit James Investments Inc. and Bernard Benoit

Rodrigo Escayola, counsel for the third party Look Property Management Inc.

HEARD: April 29, 2025 at Ottawa

RULINGS ON MOTIONS

[1] The plaintiff, Sunday Irving Holdings Inc. (SIH), entered into a commercial real estate transaction where it believed it was purchasing two commercial condominium units that were divided horizontally, but was actually purchasing two commercial condominium units placed side by side.

[2] The plaintiff incurred significant remediation costs to comply with the *Building Code*, O. Reg. 332/12, and to make the condominium units suitable for their intended use.

[3] The plaintiff has brought claims against its real estate lawyers, real estate agent, the Carleton Condominium Corporation ("CCC397") and the individual directors of CCC397.

[4] The plaintiff's claim against CCC397 and its directors ("these defendants") arises from these defendants' position that the windows in the condominium units, purchased by the plaintiff, were not common elements and hence the windows were the financial responsibility of the plaintiff. Since there was water damage to the windows, the responsibility for the repair is at issue.

[5] CCC397 has added Look Property Management Inc. ("Look"), the property manager of CCC397, as a third party.

[6] The two following motions are before the court: a motion to strike by these defendants, and a motion for production by the plaintiff.

Defendant's Motion to Strike

[7] These defendants, JP Aubrey (he has passed away), David Chow, Richard Newbury, Selami Sahin, and Carol Suprenant (Personal Directors), who are the directors of CCC397, move to strike the claim as against them pursuant to rule 21.01(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, without leave to amend.

[8] The third party, Look, consents to the motion, and the defendants, La succession de Seymour Mender, Barnes Sammon LLP, Coldwell Banker First Ottawa Realty, and Siyamak Sasani do not oppose the motion.

[9] The issues for the court's determination are:

- Should the claim against the directors be struck?

- If so, should leave to amend the statement of claim be granted to the plaintiff?

[10] For the reasons that follow, the court strikes the pleadings as against the individual directors, but grants the plaintiff leave to amend.

Nature of the Claim

[11] The plaintiff's amended statement of claim against these defendants is grounded in breach of contract and negligence. The plaintiff alleges that the directors acted in an abusive manner.

[12] The plaintiff is also seeking a declaration requiring CCC397 and its directors to assume responsibility for changes to the common area at their condominium unit.

[13] The amended statement of claim makes following claims against the directors (set out verbatim):

> 114. Les Administrateurs de CCC397 ont agi de façon abusive envers Sunday Irving. En tant qu' « esprits directeurs » du CCC397, ils ont dirigé la conduite exposée dans les paragraphes ci-dessus.
>
> 115. En effet, CCC397 en sa qualité corporative et les Administrateurs de CCC397 à titre personnel sont allées jusqu'à adopter des règlements modifiant la définition d'une unité standard. Autrement dit, CCC397 et les Administrateurs de CCC397, en leur qualité personnelle, ont cherché à se soustraire illégalement à la responsabilité de toutes les parties de la copropriété (à l'exception d'un panneau de distribution de 100 ampères) qui sont, en droit, des éléments communs, et donc la responsabilité du CCC397.
>
> 116. De plus, les Administrateurs de CCC397 ~~ils~~ ont agi à titre personnel en ne réparant pas en temps opportun les Fenêtres, affirmant à tort que celles-ci étaient la responsabilité de Sunday Irving en l'absence d'une entente en vertu de l'article 98 enregistré sur le titre.
>
> 117. De fait, non seulement CCC397 n'a pas offert d'aide en temps utile pour réparer les fenêtres qui coulaient, mais elle a insisté pour que Sunday Irving prenne en charge les frais de réparation. Les frais de réparation des fenêtres comprennent, entre autres, les études techniques, les matériaux et la main-d'œuvre nécessaire.
>
> 118. Une telle conduite est inappropriée, étant donné que les Fenêtres sont présumées être des éléments communs, et sont donc la responsabilité de CCC397 et non les propriétaires d'unités.

> 119. À la date de cette déclaration, les Fenêtres n'ont toujours pas été réparées. De fait, CCC397 a même adopté des règlements ayant une application rétroactive qui visent effectivement à la soustraire de sa responsabilité pour ces éléments communs. Sunday Irving plaide qu'une telle conduite est illégale, malveillante, injuste et qu'elle se situe en dehors du cadre des responsabilités d'un administrateur ou d'un dirigeant d'une association de condominium. Sunday Irving plaide donc que les administrateurs de CCC397 sont responsables de ce comportement à titre personnel.

[14] The plaintiff pleads that windows are common elements in the absence of an executed and registered s. 98(1)(b) agreement pursuant to the *Condominium Act*, 1998, S.O. 1998, c. 19 (*Condo Act)*. An addition, alteration, or improvement to the common elements must have been the subject of an agreement and formed part of the status certificate issued by CCC397. In the pleadings, these defendants allege that the windows were added to the unit without notice to them.

[15] CCC397 subsequently passed bylaws 8 and 9 that retroactively displaced the responsibility for the windows to the individual unit owners. The plaintiff alleges that this was done so that CCC397 would avoid financial responsibility for the windows and that these by-laws were passed when CCC397 learned of the water damage suffered by the plaintiff, that a dispute had arisen, and that litigation was imminent. This conduct was illegal, malicious, unfair, and outside the scope of the responsibility of the directors, and hence the directors are personally responsible.

[16] Since the status certificate failed to advise the plaintiff of any modifications to the common elements of the units (including the windows), the plaintiff relies on s. 76(6) of the *Condo Act* which states that:

> (6) The status certificate binds the corporation, as of the date it is given or deemed to have been given, with respect to the information that it contains or is deemed to contain, as against a purchaser or mortgagee of a unit who relies on the certificate.

[17] The plaintiff alleges that CCC397 also did not offer timely assistance in repairing the leaky windows and insisted that the plaintiff bear the cost of repair.

1.Should the claim against the directors be struck?

These Defendants' Position

[18] These defendants submit the following:

a. The claims against the directors are undifferentiated and consist of the pleading of the same facts as against CCC397;

b. The claims against the directors do not demonstrate a separate identity or interest, or any separate tortious activity from the allegations as against CCC397; and

c. There are insufficient facts to support the causes of action alleged.

[19] The plaintiff has not shown how the actions taken by the directors expose and establish a separate interest from that of CCC397.

Plaintiff's Position

[20] The plaintiff submits that these defendants should have requested particulars rather than having brought this motion, particularly as it is premature since discoveries of these defendants has not yet taken place.

[21] The plaintiff alleges that the directors received a personal benefit and that they acted negligently.

[22] The plaintiff submits that the statement of claim must be read generously. The test involves a low threshold, that is, not whether the claim will succeed but whether it is plain and obvious that it will not succeed. The claims against the directors are separate and distinct from the claims against CCC397.

[23] Alternatively, the plaintiff submits that the court can grant leave to amend.

Legal Framework

[24] Rule 25 of the *Rules* sets out the requirements of pleadings.

[25] In *Cerqueira v. Ontario*, 2010 ONSC 3954, at para. 11, Strathy J., (as he then was) confirmed that pleadings give notice of the case to be met and identify the material facts that support the cause of action. A pleading may be struck with or without leave to amend in accordance with rule 25.11:

(a) it may prejudice or delay the trial of an action,

(b) it is scandalous, frivolous or vexatious, or

(c) it is an abuse of the process of the court.

[26] At para. 16 of *Burns v. RBC Life Insurance Company*, 2020 ONCA 347, 151 O.R. (3d) 209, the Court of Appeal for Ontario succinctly stated:

> Each defendant named in a statement of claim should be able to look at the pleading and find an answer to a simple question: What do you say I did that has caused you, the plaintiff, harm, and when did I do it?

[27] In *Cottage Advisors of Canada v. Prince Edward Vacant Land,* 2020 ONSC 6445, at para. 16, the court confirmed that the defendant must show that it is plain and obvious and beyond doubt that the plaintiff could not succeed in the claim and that the claim must be read as generously as possible with a view to accommodating any inadequacies in the allegations due to drafting deficiencies. At para. 17, the court confirmed that leave to amend will only be denied in the clearest of cases when it is plain and obvious that no tenable cause of action is possible on the facts as alleged and there is no reason to suppose that the party could improve his or her case by any amendment. See also *Mitchell v. Lewis*, 2016 ONCA 903.

[28] In *Cottage Advisors of Canada*, the plaintiff, who was a developer and owner of condominiums, brought a claim against the condominium corporation and its directors alleging a breach of the duty of care under the *Condo Act*, oppressive conduct, and the tort of intentional interference with economic relations. The plaintiff alleged a failure to repair construction deficiencies, including issues with the water distribution, sewer systems leading to the pool, roadways, the fitness center, and parking.

[29] The court struck the causes of action alleged against the individual directors, without leave to amend. At para. 37, the court held that the individual directors breached their duty by their conduct which involved making board decisions on day to day operations. The court held that errors in the day-to-day management of the affairs of the corporation should not result in a claim against them if they do not personally benefit.

[30] The court's findings have a public policy aspect to it, that is, permitting volunteer directors of condominium corporations to take on these positions without fear of meritless claims.

[31] In *Matlock v. Ottawa-Carleton Standard Condominium Corporation*, 2021 ONSC 390, at para. 12, the court held that pleadings against directors require higher scrutiny, and at para. 19, stated that it is not uncommon that condo unit owners are unsuccessful in extending their claims to board members/directors in relation to undisclosed deficiencies.

[32] In that case, the court found that the plain reading of the allegations set out in the amended statement of claim revealed that the complaints directed against the individual board members were with respect to their role as the directing minds of the condominium corporation. The complaints related to how the directors conducted the condominium corporation's affairs. The court also found that it was plain and obvious that the plaintiff could not succeed against the individual board members as there was no distinction in the claim between complaints against the condominium corporation and against the individual directors.

[33] The court stated, at para. 33, that "[t]he pleadings lump the Defendants together without differentiating material facts that could support a claim against each individual and these claims are struck on that basis alone."

Analysis

[34] In order to give rise to personal liability to directors, the factual underpinnings to the claim must be specifically and sufficiently pleaded.

[35] The court makes the following findings with respect to the pleadings as drafted:

- The identity or interests of the directors are, for the most part, not separate from CCC397;

- The allegations against CCC397 and the directors are not discernable, as they complain about the same conduct, that is, making the windows the responsibility of the condo owners rather than defining them as a common element;

- The plaintiff alleges that both CCC397 and the directors did not offer any financial assistance in the repair of the windows;

- The pleading lumps the defendants together, without providing the necessary differentiating material facts that could support a claim against the directors independently from CCC397;

- The passing of bylaws 8 and 9 required a majority of the votes of the condominium owners and there are no facts pleaded to indicate how the directors benefited from the bylaws; and

- The plaintiff has failed to provide sufficient particulars as to what each individual director is alleged to have done.

[36] The courts are directed to apply a heightened scrutiny and that the minimum level of material facts against a director is "very high". See *Ontario Consumers Home Services v. Enercare Inc.*, 2014 ONSC 4154, at para. 67.

[37] Also, in passing the bylaws, the directors were acting for CCC397 in its day to day operations. There are no facts pleaded that specify the conduct of the directors from that of CCC397.

[38] Therefore, the court finds that claims in the amended statement of claim against the directors do not demonstrate a separate identity or interest, or any separate tortious activity from the allegations as against CCC397, and also that there are insufficient facts to support the causes of action alleged. The pleadings should be struck.

Should leave to amend be granted to the plaintiff?

[39] Leave to amend should only be denied in clear cases, particularly where deficiencies can be cured by an appropriate amendment and the other party would not suffer any prejudice if leave were granted. *Burns v. RBC Life Insurance Company*, at para. 22.

[40] As stated by Kimmel J. in *ACTRA Performers' Rights Society v. Re:Sound*, 2023 ONSC 3533, at para. 21" If the pleading does not provide a sufficient level of particularity, the court must still consider whether any defect in the statement of claim that is identified can be addressed through a pleading amendment". See *Tran v. University of Western Ontario*, 2015 ONCA 295, at para. at 27: "Leave to amend should be denied only in the clearest of cases"

[41] Here, the proposed amendments found in the factum are as follows:

> a. That the Personal Directors personally benefited, to the detriment of the Unit Owners (who continue to pay CCC397 condo fees), by passing the impugned bylaws 8 and 9;
>
> > i. in other words, bylaws 8 and 9 were expressly created as a "vehicle" to conceal their own negligence (when a dispute had commenced with SIH, and litigation was nigh);
>
> b. That the Personal Directors engaged in conduct outside what is considered usual conduct for a Director of a Corporation (notwithstanding the fact that SIH's position is that this is pleaded at paras 52, 53, 84 & 114-120 of its Amended Statement of Claim);
>
> c. That the Personal Directors engaged in conduct which serves an interest beyond that of a Corporation, such that the conduct must be considered their own (notwithstanding the fact that SIH's position is that this is pleaded at paras 116, 118 & 119 of its Amended Statement of Claim);
>
> d. That the personal Directors acted outside the interest and scope of duty of a Director of a Corporation by passing the impugned bylaws 8 & 9, with the goal of
>
> > i. Seeking to conceal their own negligence, in failing to set aside sufficient funds in the reserve fund (or insure accordingly), to cover the repair, maintenance, and/or replacement of certain common elements (here, windows) after damage;
> >
> > ii. On the eve of litigation, when it was clear that a dispute had arisen as between SIH and CCC397/Personal Directors, sought to avoid liability for their negligence and breach of the Condo Act by seeking to bar SIH from relief (through the impugned bylaws 8 & 9);
> >
> > iii. Favouring their own economic interests, while continuing to collect condo fees from each and every Unit Owner in the Gladwin Complex; and

> iv. [B]reaching their duty to act honestly and in good faith under ss. 37(1) & 38(2) of the *Condo Act*.

[42] The court will permit the above amendments to the claim. As will be further elaborated below, these pleadings directly allege that the directors failed to act honestly and in good faith, contrary to their statutory duties under the *Condo Act*.

[43] In essence, the plaintiff pleads that the directors acted in an abusive manner as they, along with CCC397, incorporated bylaws that modified the standard unit definition and by doing so, the defendants avoided responsibility for the common elements of the condominium.

[44] Specifically, the plaintiff pleads that these defendants did not repair the windows in a timely manner as they believed that the windows were the responsibility of the plaintiff.

[45] The trial judge will ultimately have to decide whether the directors breached their duty to act honestly and in good faith under ss. 37(1) and 38(2) of the *Condo A*ct and whether to pierce the corporate veil.

Breach of directors' duties and piercing the corporate veil

[46] The plaintiff proposed pleadings allege that by passing the bylaws, CCC397 and the directors were acting unlawfully by attempting to circumvent the effect of s. 76(6) of the *Condo Act*, which sets out the requirements of a status certificate. By doing so, the directors put their own interests first to avoid liability for the deficient windows, which should be a common element.

[47] The plaintiff argues that this is an "improper purpose" within the meaning of *Shoppers* and constitutes a breach of the duty to act honestly and in good faith in accordance with ss. 37(1) and 38(2) of the *Condo Act*, attracting personal liability. The relevant provisions state as follows:

> Standard of care
>
> 37 (1) Every director and every officer of a corporation in exercising the powers and discharging the duties of office shall,
>
> (a) act honestly and in good faith; and

> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
>
> Validity of acts
>
> (2) The acts of a director or officer are valid despite any defect that may afterwards be discovered in the person's election, appointment or qualifications.
>
> Liability of directors
>
> (3) A director shall not be found liable for a breach of a duty mentioned in subsection (1) if the breach arises as a result of the director's relying in good faith upon,
>
> (a) financial statements of the corporation that the auditor in a written report, an officer of the corporation or a condominium manager who provides condominium management services to the corporation under an agreement between the corporation and either the manager or a condominium management provider represents to the director as presenting fairly the financial position of the corporation in accordance with generally accepted accounting principles; or
>
> (a.1) a report or opinion of a reserve fund study provider with respect to a reserve fund or a reserve fund study, as determined by the regulations, if any; or
>
> (b) a report or opinion of a lawyer, public accountant, engineer, appraiser or other person whose profession lends credibility to the report or opinion.
>
> s. 38
>
> (2) No director or officer of a corporation shall be indemnified by the corporation in respect of any liability, costs, charges or expenses that the person sustains or incurs in or about an action, suit or other proceeding as a result of which the person is adjudged to be in breach of the duty to act honestly and in good faith. 1998, c. 19, s. 38 (2).

[48] The court can pierce the corporate veil if the directors breached the duty to act honestly and in good faith in accordance with the *Condo Act*, and personal liability may therefore fall upon them.

[49] Specifically, the plaintiff alleges bad faith personally against the directors for their participation in passing bylaws 8 and 9 which declared that the windows were not common elements of condominium and consequently, the financial responsibility of the condo owners.

[50] In addition, by doing so, the plaintiff submits that the directors, who are also condo owners, derived a personal benefit from this alleged improper conduct, as they would be spared the financial responsibility of paying for repairs done to or work completed on the windows.

[51] Normally, the repair and replacement of common elements, including windows, would be considered part of the responsibility of CCC397. The plaintiff alleges that there were insufficient funds in the reserve funds for the cost of repair, as required pursuant to s. 93 of the *Condo Ac*t, and as a result, CCC397 and the directors were negligent in failing to preserve such funds and therefore passed the bylaws to conceal their negligence. This led to a loss suffered by the plaintiff and it incurred costs in repairing the damage to the faulty windows.

[52] The allegation of passing bylaws to circumvent the binding effects of s. 76 of the *Condo Act* is unlawful and is not necessarily the case of a "day-to-day" error in the management of the affairs of the corporation. The allegation is that the directors put their personal economic interests ahead of those of the condo unit owners, including the plaintiff, rather than allowing this financial burden to be paid through the condominium's reserve fund.

[53] The amendments pleaded go beyond the directors' conduct as it relates to the management of the affairs of CCC397. Also, of concern is that the status certificate did not disclose any agreements to change the common elements as required pursuant to the *Condo Act*. There was no record of any agreements made under s. 98 of the *Condo Act* which would have provided that the responsibility for the windows had been assumed by former owners. CCC397 was not able to produce such a record. CCC397 took the position that the plaintiff had to maintain and repair the windows.

[54] The plaintiff's allegations against CCC397 include that they acted negligently by not advising the plaintiff that the windows had become the responsibility of previous owners and for failing to enter into an agreement with previous owners or failing to produce said agreements.

[55] As stated earlier, in their statement of defence, CCC397 and the directors state that the windows were added by previous owners without notice to them and without obtaining approval of the board of directors.

[56] These defendants do not have a record of the installation of the windows and they submit that the windows do not comply with the statutory requirements set out in s. 98 of the *Condo Act*. These defendants plead that the windows are unauthorized modifications to the common elements. In its statement of defence, these defendants allege that the plaintiff should have taken all reasonable steps to satisfy itself that no unauthorized modifications to the common elements had been made by any predecessors in title.

[57] After the closing, the plaintiff discovered that water had seeped through the windows on the upper floor of the condo units. CCC397 refused to repair them, stating that previous owners had added the windows and they therefore constituted a modification of the common elements for which CCC397 was not responsible.

[58] As in *ACTRA*, the directors were motivated by external interests and, as the court stated at para. 66: "[t]hey are not just alleged to be cogs in a wheel, they are alleged to be turning the wheel or influencing the direction it takes for purposes that suit their objectives".

[59] I find that this is a case as in *ACTRA* where Kimmel J. said at para. 64: "A claim based on a course of conduct perpetuated over a period of time by different individuals along the way, who all are alleged to have had personal incentives for doing so, may have some hurdles to overcome but I am not convinced at this stage of the action that it is plain and obvious that it has no chance of success".

[60] In *PMC York Properties Inc. v. Siudak,* 2022 ONCA 635, leave to appeal refused, [2022] S.C.C.A. No. 407, the Court of Appeal for Ontario mandates courts to exhaust all possible avenues prior to striking a pleading, and to ensure a plaintiff has an opportunity to amend prior to ruling that there is no reasonable cause of action.

[61] These allegations could constitute negligence on the part of CCC397, and could bring the directors directly into the fray if the directors attempted to cover this error.

[62] The directors were directly involved in the running of CCC397 and their actions could constitute bad faith which could make them personally responsible as they could have acted outside their scope.

[63] At trial, it could be found that the actions of the directors took them beyond their role as directors and into activities that exposed them and established a separate interest from that of CCC397.

Conclusion

[64] Accordingly, the court strikes the amended statement of claim as against the named directors and grants leave in accordance with the draft amendments set out in the plaintiff's factum.

Plaintiff's Motion for Production

[65] The plaintiff moves for an order compelling CCC397 and the directors to produce the following:

- (1) Unredacted versions of documents produced in Schedule A to their affidavit of documents ("AOD") at tabs 35, 38 39, 45, 51, and 54;

- (2) Copies of CCC397's insurance policy with Royal & Sun Alliance Insurance Company of Canada ("Royal & Sun") bearing policy numbers #COM051991137 and #COM801740586 (and the subject of court file no.: CV-23-00092695-0000);

- (3) Copies of CCC397's exchanges to and from Royal & Sun, which includes the basis for denial of coverage and any other findings of negligence by the insurer which forms the basis for its refusal of coverage.

- (4) Copies of all exchanges between CCC397 and Look, including with Look's Property Manager Jean Lacroix with respect to SIH, the second-floor windows, and the passing of bylaws . 8 and 9; and

- (5) Copies of all exchanges between CCC397's counsel, Ms. Nancy Houle and Ms. Christy Allen (both of Davidson Houle Allen LLP) and Look. Lacroix, given no privilege attaches as Look/Mr. Lacroix are parties adverse in interest to CCC397.

[66] This production motion arises, in part, from these defendants' sworn AOD, dated March 23, 2025. CCC397 had made redactions to portions of the documents consisting of minutes of board meetings found at tabs 35, 38, 39, 45, 51, and 54, which it says were made in relation to information that is subject to solicitor-client privilege and litigation privilege.

[67] These defendants have recently provided unredacted copies of the board meeting minutes (requested documents (1)) and a copy of its insurance policy with Royal & Sun (requested documents (2)).

[68] Therefore, the requested documents set out in (3), (4), and (5) above are at issue on this motion.

Plaintiff's Position

[69] Regarding the requested documents (3), the plaintiff submits that, pursuant to Rule 31.06(4) of the *Rules*, it is entitled to know why coverage was denied by Royal & Sun and the basis for the denial. This information is necessary for them to make decisions regarding the litigation.

[70] Rule 31.06(4) reads:

> **Insurance Policies**
>
> (4) A party may on an examination for discovery obtain disclosure of,
>
> (a) the existence and contents of any insurance policy under which an insurer may be liable to satisfy all or part of a judgment in the action or to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment; and
>
> (b) the amount of money available under the policy, and any conditions affecting its availability.

> (5) No information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action.

[71] Regarding the requested documents (4), the plaintiff submits that it is entitled to communications between CCC397 and the third party regarding the issues before the court as they are no longer protected by litigation privilege.

[72] The plaintiff relies on *Sakab Saudi Holding Company v. Saad Khalid S. Al. Jabri*, 2024 ONSC 6659, at para. 63, (leave granted by the Ontario Court of Appeal on May 1, 2025) where the court stated that privilege is deemed waived if there is no common interest between parties. A person adverse in interest, as Look is here, does not have a common interest with CCC397. The burden of proof is on CCC397 to show that privilege is established on the balance of probabilities.

[73] With respect to the requested documents (5), the plaintiff submits that, by making a claim against Look, CCC397 has waived solicitor-client privilege with respect to their communications as there is no longer a common interest.

[74] The plaintiff submits it is entitled to communications with counsel where Mr. Lacroix was present before the commencement of the litigation and during this litigation.

These defendants' position

[75] With respect to the requested documents (3), these defendants submit that the framing of the motion was problematic. These defendants suggest that the plaintiff should instead submit a written interrogatory with questions, as permitted by rule 31.06(4) (a) and (b).

[76] These defendants submit that the plaintiff is not entitled to what they are seeking, namely, that if the insurer has denied coverage, the basis by which the coverage for damages was denied and any findings of negligence by the insurer forming the basis for its refusal of or limitations on coverage. The plaintiff has not established relevance of these documents.

[77] With respect to the requested documents (4), these defendants submit that the two exchanges between CCC397 and Look that deal with the issues regarding the windows have been produced.

[78] With respect to the requested documents (5), the discussions with CCC397's lawyers were for the benefit of CCC397, and Mr. Lacroix (as representative of Look) was present at the meetings as an agent who owed a duty to CCC397. These defendants submit that there is only one email that is relevant to the plaintiff, and that it is privileged.

[79] CCC397 did not waive its privilege and privilege is only waived if it is clearly done. Discussion with CCC397's counsel in preparation for discoveries is protected by privilege.

[80] There is no law directly on point that states that once an agent is added in as a third party, privilege is deemed to be waived.

Analysis

#3 Should the defendants produce copies of these defendants' exchanges to and from Royal & Sun?

[81] Rule 30.02(1) of the Rules requires parties to disclose all relevant documents, whether privilege attaches or not. Relevance is determined in relation to the pleadings (see *Premform Limited v. Heights Rental Construction Inc.*, 2023 ONSC 955, at para. 9).

[82] The policy has been produced.

[83] The plaintiff wishes to know the basis for the denial of coverage and any other findings of negligence by the insurer, as the plaintiff asserts that they were negligent.

[84] The amended statement of claim does not make any allegations that make the communications between the defendants and its insurer relevant. However, it is the subject of another court action between the defendants and their insurer.

[85] This case can be distinguished from *Antony v. Bakthavachalu*, 2017 ONSC 4943, which dealt with a motor vehicle insurance policy where a party refused to permit production of the reasons for refusal of coverage when the insurer had been added as a statutory third party in a personal injury action. The insurer was ordered to provide the reasons for denial of coverage, but not the details of their investigation.

[86] The court in *Antony v. Bakthavachalu* found that the intent of the rule is not to open "the whole file between insurer and insured", citing *Seaway Trust v. Markle* [1992] O.J. 1602 (Gen. Div.), at p. 4. The court therefore found that there was no claim or pleading against any underinsured motorist insurer based on the statutory third party's denial of coverage.

[87] The plaintiff has not established the relevance of these communications or the reasons for which the insurer denied coverage. By ordering production, the court be allowing a "fishing expedition" which was described at para. 31 in *Martynenko v. Peel Standard Condominium Corporation No.935*, 2021 ONCAT 125, as follows: "a search or investigation, including demands for records or information, undertaken for the purpose of discovering facts that might be disparaging to the other party or form the basis for some legal claim against them, that the seeker merely hopes or imagines exist."

[88] In conclusion, the defendants' communications with its insurer have no relevance as to the defendants' liability issues, nor are they relevant from the pleadings. This request is dismissed.

#4 Copies of all exchanges between these defendants and Look and Jean Lacroix (Look's representative) with respect to the second-floor windows and passing of the impugned bylaws No. 8 and 9

[89] On this record, the court finds that these defendants have already produced all documents that are relevant between themselves and Look (Mr. Lacroix) that are relevant to the action that they have in their possession, control, or power.

[90] The court finds that discussions between these defendants and the third party relating to the windows at issue are relevant and producible. Privilege is not asserted by any party.

[91] The plaintiff has not demonstrated that these defendants have not produced communications between them that deal with the issues before the court.

[92] Accordingly, the court will not grant this aspect of the relief requested, but reserves the right for the plaintiff to renew the motion if it discovers other documents have not been produced.

#5. Communications involving Mr. Lacroix (on behalf of Look, Third Party) and counsel

Introduction

[93] The plaintiff is seeking:

1. First tranche: Production of communications between CCC397 and its counsel when Look was copied or present before this litigation; and

2. Second tranche: Production of the advice that counsel for CCC397 gave Mr. Lacroix in the context of this litigation.

[94] A record is producible if it is relevant and material. I have not been asked to determine relevancy and materiality and therefore the only issues are whether privilege applies and if so, was it waived?

[95] The arguments of the parties give rise to the following sub-issues:

1.Are the disputed records subject to solicitor-client privilege and common interest privilege?

2.Has Look or CCC397 waived any privilege they would otherwise have over communication between them and counsel by the fact that CCC397 has brought in Look as a Third Party?

[96] The third party claim against Look includes the following:

- Look was retained by CCC397 in 2015 to act as their property manager;

- Look had a common law duty of care to CCC397;

- Look owed statutory duties to CCC397 pursuant to the *Condominium Management Services Act*, 2015, S.O. 2015, c. 28, Sched. 2;

- If these defendants are found to be liable to the plaintiff, then this liability is due in part or in whole due to the negligence of Look; and

- Look owed a common law, contractual, and statutory duty to these defendants.

[97] The documents have not been provided to the court for review and no one has sought an order for an inspection.

[98] This issue of production turns on whether, by adding Look as a third party, any communications involving counsel for these defendants is no longer privileged.

Legal Framework

[99] Below is a summary of the law of privilege.

Solicitor-client and litigation

[100] Solicitor-client privilege is fundamental to the functioning of the legal system. The privilege ensures that clients are represented effectively. Without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers. This could compromise the quality of the legal advice received. See *Blank v. Canada (Department of Justice)*, 2006 SCC 39, at 330.

[101] Whether a solicitor-client relationship exists is a fact-driven and multifaceted analysis. The court must take a holistic approach, considering the evidence in its totality: *Trillium Motor World Ltd. v. General Motors of Canada Limited*, 2015 ONSC 3824, at para. 41.

[102] When two or more persons jointly consult a solicitor, their confidential communications with the solicitor are privileged against the outside world. However, as between those persons, each party may demand disclosure of the communications and the privilege is inapplicable: *R. v. Dunbar* (1982), 1982 CanLII 3324 (ON CA), 138 D.L.R. (3d) 221 (Ont. C.A.), at para. 56.

[103] Solicitor-client privilege should be deemed waived only in the clearest of cases. Any conflict with respect to waiving this privilege should be resolved in favour of maintaining the confidentiality: *SNC-Lavalin Engineers & Constructors Inc. v. Citadel General Assurance Co.* (2003), 2003 CanLII 64289 (ON SC), 63 O.R. (3d) 226 (S.C.), at para. 51;

[104] In *Pritchard v. Ontario (Human Rights Commission*), 2004 SCC 31, [2004] 1 S.C.R. 809, at p. 817, the court held that "solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship" and that privilege must be "jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction."

[105] In *St. Elizabeth Society v. The Regional Municipality of Hamilton-Wentworth* (unreported), at para. 5, the court reiterated that "[t]o claim privilege in communications passing between a solicitor and client, the communication must arise out of an occasion in which the client is seeking legal advice with the intention that said advice remain confidential *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 837."

[106] The court additionally found, at para. 14, that the discussions with counsel at the meetings were not for the purpose of obtaining legal advice and were not privileged. The court further ruled that in the event the discussions were privileged, the privilege had been lost, as there was a presence of third parties at the meeting.

[107] In *General Accident Assurance Co. v. Chrusz*, 1999 CanLII 7320 (ON CA), 45 O.R. (3d) 321 (C.A.), at pp. 353-56, the Court of Appeal stated that there are two situations in which communications by a third party to a solicitor will be protected by solicitor-client privilege:

> 1) Solicitor-client privilege extends to communications by or to a third party who serves as a line of communication between the client and solicitor. In these cases, the third party simply carries information from the client to the lawyer or the lawyer to the client. It also extends to communications and circumstances where the third party employs an expertise in assembling information provided by the client and in explaining that information to the solicitor.
>
> 2) If a client authorizes a third party to direct a solicitor to act on behalf of the client, or if the client authorizes the third party to seek legal advice from the solicitor on behalf of the client, the third party is performing a function which is central to the client-solicitor relationship. In such circumstances, the third party should be seen as standing in the shoes of the client for the purpose of communications referable to those parts of the third party's retainer.

[108] Further, if the court finds that the third party's retainer extends to a function which is essential to the existence of operation of the solicitor-client relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for solicitor-client privilege. See *Weinmann Electric Ltd. Niagara Falls Bridge Commission* 2013 ONSC 2805 at para. 21.

[109] Where a third party works “hand in hand” with the solicitor, within their respective areas of expertise, on an ongoing basis to advance the interests of the client, it is likely that such relationship will be considered essential to the solicitor-client relationship and the third-party communications will be privileged *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority* 2011 BCSC 88 at paras. 60-65.

[110] When the third party works “intimately” with the client on a matter and communicates with counsel on the client’s behalf regarding that matter, the third party is likely to be found essential to the solicitor-client relationship and the communications will be privileged. *Bank of Montreal v. Tortora* 2010 BCSC 1430.

[111] Litigation privilege protects documents and communications created for the dominant purpose of existing or reasonably anticipated litigation. This privilege aims to create a "zone of privacy" to allow parties to prepare their case without premature disclosure. It applies even without a solicitor-client relationship and extends to information from third parties.

[112] In *General Accident Assurance Company v. Chrusz* at p. 336, the Court stated that “[w]hile solicitor-client privilege stands against the world, litigation privilege is a protection only against the adversary, and only until termination of the litigation. It may not be inconsistent with litigation privilege vis-à-vis the adversary to communicate with an outsider, without creating a waiver, but a document in the hand of an outsider will only be protected by a privilege if there is a common interest in litigation or its prospect.”

Common Interest Privilege

[113] In *Power v RGMP*, 2021 ABQB 877 (CanLII) Justice Grosse (as she then was) provided an excellent summary at para. 20 when she indicated that this privilege is not a “stand-alone” privilege but rather protects records that are otherwise protected by another privilege. She stated:

> [20] …..Because confidentiality is an essential element of solicitor-client privilege, if a party knowingly shares communication that would otherwise meet the test for solicitor-client privilege with a third party, the privilege is often waived: see the summary of waiver in Dodek, *supra* at §7.4. Common interest privilege acknowledges that in some circumstances, the holder of the privilege and the third party may have sufficient common

> interest in the subject matter of the privileged communication, including an interest in maintaining confidence, that disclosure to the third party does not interfere with the communication's privileged status.

[10] Other relevant legal principles were summarized by Gluestein J. in *Wintercorn v. Global Learning Group Inc 2022 ONSC 4576*, at para. 160.

> (i) Common interest privilege is established where a lawyer's communication or advice is shared, on a confidential basis, with a non-client or other "with a sufficient common interest in the same transactions": *Iggillis Holdings Inc. v. Canada (National Revenue)*, 2018 FCA 51, 420 D.L.R. (4th) 477, at para. 41;
>
> (ii) The concept of common interest privilege originated in the broad context of "parties sharing a goal or seeking a common outcome": *Pritchard*, at para. 24;
>
> (iii) "Because the existence of this privilege is so fact-dependent, there can be no hard and fast rules as to when it will or will not arise": *Trillium Motor World*, at para. 130;
>
> (iv) Common interest privilege applies when there is an "ongoing interest in completing the transaction which the disclosure was designed to facilitate". Such an interest may exist through contractual arrangements, including when there is an "ongoing economic relationship", or when the parties have a "direct pecuniary interest in the transaction": *Maximum Ventures Inc v. De Graaf*, 2007 BCCA 510 at paras. 11 and 16; *Iggillis Holdings*, at paras. 32-34.

The first tranche deals with communications that involved Mr. Lacroix before the litigation commenced where he was present or copied.

[114] For the reasons that follow, these documents are not producible, as there has not been a waiver of solicitor-client privilege. Mr. Lacroix's presence as an agent of CCC397 and a member of its property management company during communications between counsel and these defendants does not mean that the privilege is waived.

[115] I infer that the presence of Mr. Lacroix, as property manager, was essential and of assistance to CCC397 to the consultation.

[116] Mr. Lacroix was in an agency relationship with CCC397, and his task was to manage the condominium's day-to-day operations and to take care of CCC397's responsibilities under the *Condo Act*. He was not adverse in interest at the time those communications were made.

[117] CCC397 seeks to assert privilege over the communications between their lawyer and them while Mr. Lacroix was present.

[118] As stated in *SNC-Lavalin Engineers & Constructors Inc. v. Citadel General Assurance* Co., 63 O.R. (3d) 226, (Ont. S.C.), at para. 54, solicitor-client privilege "should be deemed waived only in the clearest of cases in order to maintain the public confidence in a client's right to communicate in confidence with [their] solicitor."

[119] I have considered the factors set out in *SNC-Lavalin* at para. 54 and make the following findings:

- The defendant did not intend to waive privilege when Mr. Lacroix was involved in communications, as this was his duty as property manager.

- The defendant intended that Mr. Lacroix maintain confidentiality over the exchanges.

- In his communications with legal counsel, Mr. Lacroix was fulfilling his duties to his employer and advancing the interests of CCC397.

- At the time of the communications, Mr. Lacroix and CCC397 had a common interest, which was to look after the condominium and ensure that it complied with the *Condo Act.*

- The interest of fairness is considered, and the court is loath to find privilege has been waived by the simple fact that their agent was present or was part of these communications. This would be very disruptive to working relationships and commercial transactions where agents are present or part of communications with counsel with or without their principals.

[120] The fact that these defendants and Look are now adverse in interest, does not mean that both privileges are automatically waived, now requiring the defendants to produce documents that are otherwise covered by privilege

[121] To the extent that they strategized together and communications ensued with respect to the litigation and have litigation as a dominant purpose, those communications are privileged.

[122] Therefore, the court concludes that privilege has not been waived or simply eliminated by the fact that CCC397 has made a third party claim against Look.

The second tranche are communications between Mr. Lacroix and CCC397 counsel (Christy Allen and Nancy Houle) after the litigation commenced

[123] For the reasons elaborated below, the court finds that the communications between CCC397 counsel and Mr. Lacroix in this litigation is protected by solicitor-client privilege and that privilege has not been waived or eliminated by the fact that Look is a Third Party.

[124] The plaintiff indicates that during the discovery of David Chow on behalf of CCC397, it was revealed that Mr. Lacroix:

- Directly corresponded with the lawyer for the defendants to prepare for discoveries;
- Directly corresponded with counsel for the defendants to provide documents for inclusion in the defendants AOD;
- Directly drafted the unredacted documents for which privilege is being claimed; and
- Was present at all CCC397 board meetings.

[125] I infer that the communications between CCC397 counsel and Mr. Lacroix were made in confidence in the sense that neither expected the other to be broadcasting those communications to parties outside these communications.

[126] Litigation privilege is not applicable here. These documents were not written, prepared or obtained solely for the purpose of, or in connection with, litigation then pending or anticipated.

[127] Where communications are made with a third party, the court is required to scrutinize whether the communication meets all of the elements of solicitor-client privilege in the first place, and if so, then determine whether common interest privilege applies.

[128] The court finds that the requirements of solicitor-client privilege as articulated in *R. v. Unnamed Respondents*, 2008 BCSC 815, at para. 28 have been met, that is:

> 1) the communication is between solicitor and client (its agent);
>
> 2) the communication entails the seeking or giving of legal advice; and
>
> 3) the communication is intended to be confidential by the client and their lawyer.

[129] Here the third party, Mr. Lacroix, worked "intimately" with CCC397 and communicated with counsel who are working on behalf of CCC37 and Mr. Lacroix is essential to the solicitor-client relationship. Therefore, the communications are privileged. See *Bank of Montreal v. Tortora* 2010 BCSC 1430.

[130] In these circumstances, Mr. Lacroix is an agent of CCC397 who was brought in the litigation in the event that CCC397 is held responsible for damages to the plaintiff. It would be important and efficient to seek advice from counsel that has been hired to defend CCC397 and ensure that their common interest of defending the plaintiff's claim is advanced.

[131] Therefore, the next question for the court's determination is whether privilege is waived implicitly when a third party speaks to counsel who represents a party adverse in interest?

[132] Mr. Lacroix spoke to CCC397's counsel for assistance in a particular aspect of the litigation.

[133] In *Jetport v. Global Aerospace* , 2013 ONSC 235, 45 C.P.C. (7th) 436, the court upheld the decision of the Associate Justice that litigation privilege had been dissolved by reason of the claim against another party.

[134] Jetport brought actions against Global (insurer) over the loss of an airplane. Global brought a separate action against Jones Brown (insurance broker). Jetport then sued Jones Brown and the three actions were consolidated.

[135] In communication with the representative of Jones Brown, an insurance broker (Mr. Robinson) the plaintiff was told by him that Jetport that may be denied coverage because the pilot

had insufficient training to meet the terms of the insurance contract. The communications between Jetport's lawyer and Mr. Robinson were not produced on the basis of litigation privilege.

[136] The court held said that as between Jetport and Jones Brown, there was no common interest. The court upheld the Master's decision and the documents of communications between these two parties were ordered to be produced.

[137] This case is distinguishable from *Jetport*. Mr. Robinson was not an agent of Jetport as in the case at bar.

[138] Sharing privileged information with third parties will constitute a waiver of privileged, unless sufficient grounds are proven to establish that privilege has not been waived, including sufficient common interest.

[139] Here the third-party claim is requesting contribution and indemnity for any damages awarded against CCC397 on the basis of the plaintiff's claim for deficiencies in the units or in title to the units. The plaintiff alleges that CCC397 negligently failed to properly record common element modifications regarding the units and failed to include reference to the modifications in the status certificate issued to the plaintiff.

[140] The third party claim alleges that Look failed to carry out its common law duty of care to CCC397 and owed statutory duties to CCC397 and that if CCC397 is liable to the plaintiff or the co-defendants in the cross-claims they have brought, then it seeks contribution and indemnity from Look.

[141] In its third-party defence, Look pleads that it has acted according to a standard of a reasonable and diligent condominium manager and denies having acting negligently. It did not defend the plaintiff's claim.

[142] In *Maximum Ventures Inc. v. de Graaf* 2007 BCCA 510, which was affirmed on appeal, the discussions between multiple solicitors for multiple parties to the claim and additional third parties were at issue. The discussions revealed that the interests of all the parties, although not identical were common enough to the extent that the claimed matters were beneficial to them all.

They would also have benefited from successfully defending against the claim. The court found this sufficient to support the extension of privilege, as the parties were sufficiently allied in interest (at paras. 16 -17)

[143] Also, in *Hopkins (Committee of) v Wellington* 68 B.C.L.R. (3d) 152 BCSC, it was found that the two parties who were sharing documents between sets of counsel for the plaintiff and defendant in two separate actions arising from the same motor vehicle accident, were so "common" in interest that sharing the documents would be protected by privilege and it was not waived.

[144] The interest of fairness is also a factor. The court is loath to find privilege has been waived by the simple fact that Mr. Lacroix, as agent for CCC397, communicated with their counsel. This would be very disruptive to working relationships and commercial transactions where agents are involved in litigation as a third party as in this case.

[145] Accordingly, the court declines to order production of the communications involving counsel and Look/Mr. Lacroix.

Conclusion and Costs

[146] Accordingly, the court orders the following:

1. The plaintiff is granted leave to amend their amended statement of claim as set out in their factum; and

2. The plaintiff's motion for production is dismissed.

[147] There has been divided success. Each party has been successful on some of the issues. All issues were important to the parties. The issues were not complex but certainly various legal principles were engaged and the parties were required to file extensive materials and case law in support of their respective positions. I have also reviewed the bill of costs filed.

[148] As a result, I decline to order costs.

Justice A. Doyle

Date: June 3, 2025

CITATION: *Sunday Irving Holdings Inc. v. La Succession de Seymour Mender et al.*, 2025 ONSC 2745
COURT FILE NO.: CV-21-85532
DATE: 2025/06/03

ONTARIO

SUPERIOR COURT OF JUSTICE

RE: Sunday Irving Holdings Inc., Plaintiff

-and-

La Succession de Seymour Mender, Barnes Sammon LLP, Benoit James Investments Inc., Bernard Benoit, Coldwell Banker First Ottawa Realty, Siyamak Sasani, ~~Stewart Title Guaranty Company~~, Carleton Condominium Corporation NO. 397, JP Aubrey, David Chow, Richard Newbury, Selami Shahin and Carol Suprenant, Defendants

COUNSEL: Ronald F. Caza, Albert Brunet, and Julie Daet, counsel for the Plaintiff

Christy J. Allen , counsel for the Defendants Carleton Condominium Corporation No. 397, JP Aubrey, David Chow, Richard Newbury, Selami Shahin and Carol Suprenant

Colin Dubeau, counsel for the Defendants La Succession de Seymour Mender and Barnes Sammon LLP

Martin Smith, counsel for the Defendants Siyamak Sasani and Coldwell Banker First Ottawa Realty

Tara Lemke, counsel for the Defendants Benoit James Investments Inc. and Bernard Benoit

Rodrigo Escayola for third party, Look Property Management

RULING ON MOTIONS

Doyle J.

Released: June 3, 2025