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Docket: CI25-02-04452
CI25-02-04469
(Brandon Centre)
Indexed as: Thompson v. Red Kayak Flooring Company Ltd.
Cited as: 2026 MBKB 13

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# COURT OF KING'S BENCH OF MANITOBA

| | |
|---|---|
| **B E T W E E N:** | ) |
| | ) |
| ELEANOR THOMPSON, | ) Sundeep S. Dhillon |
| plaintiff, | ) for plaintiff |
| | ) |
| - and - | ) |
| | ) |
| RED KAYAK FLOORING COMPANY LTD., | ) Rhea P. Majewski |
| defendant. | ) for defendant |
| | ) |
| | ) |
| | ) Judgment delivered: |
| | ) January 20, 2026 |

## ASSOCIATE JUDGE PATTERSON

### BACKGROUND

[1] This matter involves a procedural motion to strike pleadings. Despite there being certain merit to the relief requested, as the sum sought for damages is not substantial, proportionality and practicality are equally material considerations in this case.

[2] Eleanor Thompson (the "Plaintiff") filed a statement of claim (the "Claim") against Red Kayak Flooring Company Ltd. (the "Defendant") on March 6, 2025.

[3] The Claim seeks general and special damages comprised of compensation for the installation costs charged by the Defendant company" as well as "additional reimbursement for installation and new materials which will be calculated based on the completion of the installation". Interest and costs are also requested.

[4] Shortly following service of the Claim, a motion was filed by the Defendant (the "Motion") on May 30, 2025. The Motion requests that the Claim be struck, without leave to amend, as well as costs.

[5] Both counsel filed a comprehensive Motion Brief with authorities (which was appreciated by the Court).

[6] The Plaintiff had previously filed a statement of claim (the "Initial Claim") against the Defendant on January 17, 2025. A motion to strike the Initial Claim was subsequently filed on behalf of the Defendant on January 30, 2025.

[7] Pursuant to the Order which I pronounced on March 17, 2025, the Initial Claim was discontinued by consent (on a without prejudice basis). The Plaintiff was also ordered to pay costs to the Defendant in an amount of $1,000.00, inclusive of disbursements and taxes, forthwith.

## APPLICABLE RULES

[8] The following provisions from the ***Court of King's Bench Rules***, M.R. 553/88 (the "***Rules***") are applicable with respect to motions to strike pleadings:

| **Material facts** | **Faits pertinents** |
|---|---|
| **25.06(1) Every pleading shall contain a concise statement of the material facts on which the party** | **25.06(1)** L'acte de procédure expose de façon concise les faits pertinents sur lesquels la |

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**relies for a claim** or defence, **but not the evidence** by which those facts are to be proved.

**Separate claims or defences**

**25.06(2)** Where a party seeks relief in respect of separate and distinct claims, or raises separate and distinct grounds of defence, **the material facts supporting each claim or ground of defence shall be stated separately as far as may be possible.**

**Pleading law**

**25.06(3)** A party may raise any point of law in a pleading, but **conclusions of law may be pleaded only if the material facts supporting them are pleaded.**

**Act or regulation**

**25.06(4)** Where a party's claim or defence is founded on an Act or Regulation, **the specific sections relied on shall be pleaded.**

…

**Contract or relation**

**25.06(10) Where a contract or relation**

partie fonde sa demande ou sa défense, mais non les éléments de preuve devant les établir.

**Demandes ou défenses séparées**

**25.06(2)** Si une partie sollicite des mesures de redressement pour des demandes séparées et distinctes ou soulève des moyens de défense séparés et distincts, les faits pertinents sur lesquels se fonde chaque demande ou moyen de défense sont indiqués séparément, dans la mesure du possible.

**Question de droit**

**25.06(3)** Une partie peut soulever une question de droit dans un acte de procédure, mais ne peut invoquer de conclusions de droit que si elle fait valoir les faits pertinents qui les fondent.

**Loi ou règlement**

**25.06(4)** La partie qui fonde sa demande ou sa défense sur une loi ou un règlement doit préciser les articles qu'elle invoque.

…

**Contrat ou relation**

**25.06(10)** Lorsqu'un contrat ou une relation

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**between persons does not arise from an express agreement, but is to be implied from** a series of letters, **communications, or conversations**, or otherwise from a number of circumstances, **it shall be sufficient to allege the contract or relation as a fact.**

...

entre des personnes ne résulte pas d'une convention expresse, mais découle implicitement d'une série de lettres, de communications ou de conversations, ou autrement d'un certain nombre de circonstances, il suffit d'alléguer le contrat ou la relation comme fait.

...

**STRIKING OUT OR EXPUNGING DOCUMENTS**

**25.11(1) The court may on motion strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,**

**(a)** may **prejudice or delay** the fair trial of the action;

**(b)** is **scandalous, frivolous or vexatious;**

**(c)** is **an abuse of the process** of the court; or

**(d) does not disclose a reasonable cause of action** or defence.

**(emphasis added)**

**RADIATION OU SUPPRESSION DE DOCUMENTS**

**25.11(1)** Le tribunal peut, sur motion, radier ou supprimer un acte de procédure ou un autre document, en tout ou en partie, avec ou sans autorisation de le modifier, parce que l'acte de procédure ou le document, selon le cas :

a) peut compromettre ou retarder l'instruction équitable de l'action;

b) est scandaleux, frivole ou vexatoire;

c) constitue un recours abusif au tribunal;

d) ne révèle pas une cause d'action ou une défense raisonnable.

[9] I am also mindful of the following further provisions from the ***Rules*** for purposes of considering the Motion:

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**General principle**

**1.04(1) These rules shall be liberally construed** to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

**Proportionality**

**1.04(1.1)** In applying these rules in a proceeding**, the court is to make orders and give directions** that are proportionate to the following:

(a) the **nature** of the proceeding;

(b) the **amount** that is probably at issue in the proceeding;

(c) the **complexity** of the issues involved in the proceeding;

(d) the likely **expense** of the proceeding to the parties.

…

**Not a nullity**

**2.01(1)** A **failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity**, and the court,

(a) may grant all necessary amendments or other relief, on such terms as are just, to

**Principe général**

**1.04(1)** Les présentes règles doivent recevoir une interprétation large afin que soit assurée la résolution équitable sur le fond de chaque instance civile, de la façon la plus expéditive et la moins onéreuse.

**Proportionnalité**

**1.04(1.1)** Lorsqu'il applique les présentes règles dans le cadre d'une instance, le tribunal rend des ordonnances et donne des directives qui sont proportionnées :

a) à la nature de l'instance;

b) au montant probablement en litige;

c) au degré de complexité des questions en litige; d) au coût probable de l'instance pour les parties.

**Procédure ou document non entaché de nullité**

**2.01(1)** L'inobservation des présentes règles constitue une irrégularité et n'est pas cause de nullité de l'instance ni d'une mesure prise, d'un document donné ou d'une ordonnance rendue dans le cadre de celle-ci. Le tribunal peut :

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| secure the just determination of the real matters in dispute; or<br><br>(b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.<br><br>…<br><br>**(emphasis added)** | a) soit autoriser les modifications ou accorder les mesures de redressement nécessaires, à des conditions justes, afin d'assurer une résolution équitable des véritables questions en litige;<br><br>b) soit annuler l'instance ou une mesure prise, un document donné ou une ordonnance rendue dans le cadre de celle-ci, en tout ou en partie, seulement si cela est nécessaire dans l'intérêt de la justice.<br><br>… |

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## RELEVANT CASE LAW

[10] Within the Motion Brief filed on behalf of the Defendant, there is reference to the decision of the Honourable Justice Martin in ***Olfman v University of Manitoba et al***, 2014 MBQB 128 ("***Olfman***"). I have included the following pertinent portion of paragraph 13 from ***Olfman***, which confirms the parameters to follow when preparing pleadings to commence an action:

> [13] Dewar J. recently expounded on the rules of pleadings in ***Peguis First Nation et al v. Canada (Attorney General)***, 2014 MBQB 98. Respecting Rule 25.06, at para. 6 he noted the following comments of Holmested and Watson, *Ontario Civil Procedure*, looseleaf (Toronto: Carswell, 1993):
>
> > **This is the master rule of pleading**: all of the other pleading rules are essentially corollaries or qualifications to this basic rule that the pleader must state the material facts relied upon for his or her claim or defence. **The rule involves four separate elements: (1) every pleading must state facts, not mere conclusions of law; (2) it must state material facts and not include facts which are immaterial; (3) it must state facts and not the evidence by which they are to be proved; (4) it must state facts concisely in a summary form.** See Odgers, *Principles of Pleading and Practice* (21st ed.) p. 94. As Master Haberman stated in *Pineau v. Ontario Lottery & Gaming Corp.*, 2011 CarswellOnt 11375

> (Master), "**A pleading is meant to give all parties fair notice of what the others plan to prove at trial, but not necessarily of how they intend to prove it**." **Thus, a party should avoid pleading (a) bald conclusory statements or arguments, (b) irrelevant matters, (c) evidence and (d) prolix descriptions of factual detail.**

**(emphasis added)**

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[11] Subsequent to ***Olfman***, the Manitoba Court of Appeal in ***Grant v. Winnipeg Regional Health Authority et al.***, 2015 MBCA 44 ("***Grant***") articulated the fundamental principles to apply with respect to motions to strike pleadings (at paras 35 to 37):

> **[35] The purpose of Queen's Bench Rule 25.11(d) is to ensure the effectiveness and fairness of the litigation process by the weeding out of hopeless claims or defences, without the necessity and cost of the full civil process** (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 19, [2011] 3 S.C.R. 45). Protracted proceedings are unnecessary if a pleading is substantively inadequate to make out a claim or answer one (*Dawson et al. v. Rexcraft Storage and Warehouse Inc. et al.* (1998), 1998 CanLII 4831 (ON CA), 111 O.A.C. 201 at paras. 8-10, 12 (C.A.)).
>
> **[36] The remedy of striking out a pleading, however, is to be used sparingly. It is reserved only for the "clearest of cases"** (*Ellett and Kyte v. Qualico Securities (Winnipeg) Ltd. et al.* (1990), 1990 CanLII 11333 (MB CA), 64 Man.R. (2d) 318 at para. 6 (C.A.)). **A claim or defence, or part thereof, should not be struck out unless the moving party demonstrates that it is "plain and obvious" that the cause of action or defence, as pleaded, is certain to fail** (*Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15, [2003] 3 S.C.R. 263).
>
> **[37] On a motion to strike, the claim or defence should be read generously notwithstanding any imprecision in the language used in it. Factors such as the novelty of a claim or defence, the length or complexity of the issues raised by it, or the likelihood that the opposing party has a strong position that will likely defeat the claim or defence are not reasons alone to strike out the pleading (*Hunt* at p. 980).** If a claim or defence has a reasonable prospect of success, it should not be struck out (*Imperial Tobacco Canada Ltd.* at para. 17; *Driskell v. Dangerfield et al.*, 2008 MBCA 60 at paras. 11-13, 228 Man.R. (2d) 116).

**(emphasis added)**

[12] Another concept to be employed in connection with motions to strike pleadings was confirmed by the Supreme Court of Canada in ***R. v. Imperial Tobacco Canada Ltd.,*** 2011 SCC 42 (at para 22):

> [22] A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that **the facts pleaded are true, unless they are manifestly incapable of being proven…**
>
> **(emphasis added)**

[13] The aforementioned principles were reviewed comprehensively by the Honourable Chief Justice Joyal in ***Winnipeg (City) v. Caspian Projects Inc. et al***, 2020 MBQB 129 ("***Caspian***"), and as summarized last year by the Honourable Associate Judge Goldenberg, when referring to ***Caspian*** in ***Futros et al. v. Futros and Deighton***, 2025 MBKB 24 (at para 33), "the law relating to striking a pleading for failure to disclose a reasonable cause of action is well settled".

[14] More recently, in ***Farmers Edge Inc. v. Precision Weather Solutions Inc.,*** 2025 MBKB 113 ("***Farmers***"), Martin J succinctly summarized the considerations which the Court must balance when determining motions to strike pleadings (at para 35):

> **[35] I start by recognizing what is trite: striking a pleading wholly or partially, as in this situation, deprives the defaulting party of their day in court. It is an exceptional remedy, to be used cautiously. On the flipside, increasingly courts and the public recognize that the justice system is strained to do justice; the non-defaulting party, or access to justice more generally, cannot be straitjacketed by disinterested or distracted or disorganized or disingenuous litigants.** Collectively, systemic issues including the high cost of litigation, the effort on parties and witnesses required to marshal a case, and psychological toll on them, demands no less.
>
> **(emphasis added)**

[15] ***Dowd et al v Skip the Dishes Restaurant Services Inc. et al***, 2019 MBQB 63 ("***Skip the Dishes***") is a decision of the Honourable Senior Associate Judge Clearwater

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(then Master Clearwater) which provides further context as it identifies three specific instances when a court may determine that pleadings ought to be struck (at para 52):

> **[52] A finding that the pleading fails to disclose a reasonable cause of action may be made for various reasons. It is often because the court has determined there is a complete failure to plead the material facts supporting a particular cause of action. Alternatively, the court may determine the cause of action being pled is not one recognized by law. Finally, the court may strike the claim because it has found the pleadings are so incomprehensible, or fatally flawed, that it is clear the defendant cannot reasonably be expected to understand the case it must meet (see *Ebb and Flow*).**
>
> **(emphasis added)**

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[16] With respect to the alleged cause of action for breach of contract contained within the Claim, and even though the required elements are well known, Associate Judge Goldenberg provided the following succinct summary (at para 25) in ***Contera Construction Inc. v. Radka Inc., et al,*** 2024 MBKB 34 ("***Contera***"):

> [25] There are six elements that must be pled with sufficient material facts in order to plead breach of contract properly: (1) the nature of the contract, (2) the parties to the contract, (3) privity of contract between the plaintiff and defendant, (4) the relevant terms of the contract, (5) which term was breached; and (6) the damages that flow from the breach. (See ***Fasteners*** at para. 91.)

[17] As to the other alleged cause of action set forth within the Claim based upon negligence, and while the relevant elements to be established are also well known, Senior Associate Judge Clearwater (then Master Clearwater) commented as follows in ***Skip the Dishes*** (at para 79):

> [79] The next tort pled in this case is the tort of negligence. It is trite law that a claim in negligence requires the plaintiff to plead material facts upon which one can infer there existed a special relationship such that a duty of care was owed. The pleadings must also include facts sufficient to show a breach of that duty occurred, and that damages to the plaintiffs resulted.

## SUMMARY OF DEFENDANT'S POSITION

[18] Counsel for the Defendant commenced her submissions by advising that there are three primary "complaints" which the Defendant has concerning the Claim:

a. the Claim does not provide material facts to establish a contractual relationship between the parties (for breach of contract), nor are there material facts included to establish that the Defendant owed a duty of care to the Plaintiff (negligence);
b. the Claim contains considerable evidence and irrelevant allegations which ought not to have been included; and
c. the Claim should have been filed as an expedited action pursuant to Rule 20A in consideration of the sum sought for damages by the Plaintiff.

[19] In accordance with the remaining submissions made by counsel for the Defendant, and the detailed positions contained within the Motion Brief filed on behalf of the Defendant, the following further concerns of the Defendant in connection with the Claim can be summarized as follows:

a. the Claim offends the rules of pleadings;
b. the Claim is scandalous, frivolous and vexatious;
c. the Claim represents an abuse of the process; and
d. the Claim does not disclose a reasonable cause of action against the Defendant.

[the latter three issues being specific grounds for striking all or a portion of a pleading pursuant to Rule 25.11(1)(b), (c) and (d)].

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## SUMMARY OF PLAINTIFF'S POSITION

[20] Pursuant to the arguments outlined within the Motion Brief filed on behalf of the Plaintiff, and the submissions made by counsel for the Plaintiff in response to the issues raised by the Defendant, the Plaintiff's position can be summarized as follows:

a. the Claim should only be struck if it is "plain and obvious" that there is no cause is disclosed, which is not the situation in this case as reasonable causes of action have been disclosed for breach of contract and negligence;
b. the content of the Claim is not scandalous, frivolous or vexatious;
c. the Claim does not represent an abuse of process (the Initial Claim was discontinued by consent, with costs paid by the Plaintiff, following which the content of the Claim was amended and filed in good faith); and
d. if the Court determines that the Claim (or portions thereof) should be struck, leave to amend is respectfully requested.

## ANALYSIS

[21] With respect to the content of the Claim, I find that the Defendant has satisfied its onus, on a balance of probabilities, and established that there are substantial portions of the Claim which ought to be struck. I am not prepared, however, to strike the Claim in its entirety. My review of the Claim is contained within the paragraphs to follow.

### <u>Expedited Action (Rule 20A)</u>

[22] I agree with counsel for the Defendant in that given the amount sought for damages, the Claim should have been filed as an expedited action pursuant to Rule 20A (which has been acknowledged by counsel for the Plaintiff).

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[23] As I have determined that leave to amend shall be granted (pursuant to the terms set forth within the balance of this decision), the Plaintiff shall amend the Claim so that it is clearly described to be an expedited action pursuant to Rule 20A.

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**Paragraphs 1, 2 and 3**

[24] Paragraphs 1, 2 and 3 of the Claim shall not be struck (paragraph 1 contains details with respect to the relief sought by the Plaintiff while paragraphs 2 and 3 provide a general description of both parties).

[25] While the primary focus of counsel for the Defendant was upon other portions of the Claim, I note in passing that paragraph 1 a) as drafted contains a request for special damages (the sum paid by the Plaintiff to the Defendant to install the flooring as well as an additional amount related to materials and labour for installation of new flooring), without providing any details of what serves as the basis for requesting general damages.

**Paragraph 4**

[26] Even though paragraph 4 of the Claim states that the Defendant completed installation of flooring at the Plaintiff's residence (in Souris, Manitoba) on January 25, 2023, it simply reads that this work was "pursuant to a verbal contract between the parties." The Court has the following concerns with respect to this paragraph (which are consistent with the issues raised by counsel for the Defendant):

a. No material facts are pled as to when the alleged verbal contract with the Defendant was made. During submissions, counsel for the Plaintiff advised (by way of argument, not in reliance upon the evidence) that the Plaintiff does not remember the exact date when the alleged verbal contract was

reached with the Defendant. Nonetheless, the Claim could have stated an approximate date(s) with reference to the one date that is known to the Plaintiff, namely, the date when the flooring was installed (January 25, 2023).

b. There are no material facts specifying what were the terms (express and/or or implied) of the alleged verbal contract between the parties.

c. Rule 25.06(11) stipulates that where a contract does not arise from an express agreement, and instead is to be implied from communications or correspondence between the parties, it can be alleged that there was a contractual relationship as a material fact. Paragraph 4 does not, however, include any material facts with respect to conversations or exchange of documentation between the parties, which would serve as a foundation from which the Plaintiff may allege, as a material fact, that there was a verbal contract entered into with the Defendant.

[27] Despite the above noted deficiencies identified with paragraph 4, I have revisited the comments of Martin J. at paragraph 35 in ***Farmers*** ("striking a pleading, wholly or partially … deprives the defaulting party of their day in court" and is "an exceptional remedy, to be used cautiously"). I have also returned to the guidance provided by the Court of Appeal at paragraphs 36 and 37 in ***Grant*** (a claim should not be struck unless it is "plain and obvious" that it is certain to fail as pled, and that pleadings "should be read generously notwithstanding any imprecision in the language used in it").

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[28] In addition, the following statements made by the Honourable Justice Edmond (then of this Court) in ***Rebillard v. Manitoba (A.G.) et al.***, 2014 MBQB 181 ("***Rebillard***") are of relevance when assessing potential prejudice to not only the Defendant, but the Plaintiff as well (at para 45):

> **[45] If the plaintiff is not granted an opportunity to amend the statement of claim, one of my concerns is that the plaintiff may be prejudiced.** If a new statement of claim is filed, **she may have other legal issues to contend with, including limitations arguments advanced by the defendants. That prejudice should be taken into account in determining whether leave should be granted to amend the statement of claim.**
>
> **(emphasis added)**

[29] While the plaintiff in ***Rebillard*** was self-represented (unlike the Plaintiff in this case), it does not change the reality that the Plaintiff may (or may not) be faced with a limitations challenge from the Defendant if the Claim was to be struck in its entirety, without leave to amend (the date of the flooring installation occurred more than two years ago).

[30] Upon weighing the foregoing considerations, and with recognition of Rule 1.04(1), 1.04(1.1) and 2.01(1), I have decided to exercise my discretion and grant leave for the Plaintiff to amend the Claim in order to address the deficiencies with paragraph 4 (and elsewhere within the Claim as further detailed). The Claim as amended (the "Amended Claim") shall be completed in compliance with the terms set forth within the balance of this decision.

[31] For clarification, the second sentence within paragraph 4 may remain as it confirms the sum paid by the Plaintiff to the Defendant for installation the flooring (it is the first sentence of this paragraph which requires amendment as reviewed).

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[32] With leave being granted to the Plaintiff for amendment to paragraph 4 of the Claim, the Defendant should be in a better position to respond to the material facts that are pled in connection with the breach of contract and negligence alleged by the Plaintiff (one of the objectives of pleadings being to provide fair notice to the other party of what is intended to be proved, as discussed at paragraph 13 in ***Olfman***).

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**Paragraph 5**

[33] The portion of the third sentence within paragraph 5 that reads "leaving her uncertain about when and where another gap may appear" shall be struck. These details represent evidence of the Plaintiff, not material facts, which is contrary to Rule 25.06(1) as well as what is summarized at paragraph 13 in ***Olfman*** (the Claim is to "state facts and not the evidence by which they are to be proved").

[34] I am not prepared to strike the balance of paragraph 5. The first sentence includes alleged material facts (March 15, 2023 was the date when the Plaintiff states that she discovered significant gaps in the flooring installed by the Defendant) as does the second sentence (the alleged issues with the flooring have caused discomfort to the Plaintiff and disrupted her daily life). In addition, the initial portion of the last sentence within paragraph 5 contains alleged material facts (there are "constant creaking and cracking sounds" with the flooring) while the remainder of this sentence sets forth alleged material facts which, if proven at trial, may (or may not) support the claim of the Plaintiff for specific and/or general damages (the Plaintiff contends that the installation by the Defendant flooring has made "her home environment stressful and uncomfortable").

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**Paragraph 6**

[35] The initial portion of paragraph 6 which reads "The plaintiff states on March 16, 2023, she informed the defendant about the gaps in the flooring …" may remain although the balance of this paragraph shall be struck. The latter portion of this sentence represents evidence or immaterial facts (the Defendant was advised by the Plaintiff of the alleged issues with the flooring in an effort to mitigate her losses and with hope that the Defendant would provide a remedy).

**Paragraph 7**

[36] As to the first sentence of paragraph 7, it confirms the date of the Defendant's inspection of the flooring, and in conjunction with such inspection, an allegation that the Defendant made an admission with respect to the flooring (it was improperly installed and needed to be repaired).

[37] The Defendant contends that the alleged admission, if made, was in the context of without prejudice settlement conversations, and as such, should be covered by settlement privilege.

[38] The Plaintiff disagrees and asserts that the alleged admission is a material fact to be included within the Claim.

[39] In ***Ahrens-Townsend v. Kane Biotech Inc.,*** 2020 MBQB 8 ("***Ahrens***"), the Honourable Associate Chief Justice Perlmutter referred to the decision of the Supreme Court of Canada in ***Sable Offshore Energy Inc. v. Ameron International Corp.***, 2013 SCC 37 and confirmed that there are three elements to be established for settlement privilege (at para 10):

> [10] Courts protect from disclosure communications made with a view to reconciliation or settlement. **It is undisputed that three conditions must be present for settlement privilege to be recognized:**
>
> (i) A litigious dispute must be in existence or within contemplation;
>
> (ii) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and
>
> (iii) The purpose of the communication must be to attempt to effect a settlement.
>
> (Bryant, Lederman & Fuerst, The Law of Evidence in Canada, 3d ed. (LexisNexis Canada Inc., 2009) at ss. 14.315 and 14.322)
>
> **(emphasis added)**

[40] Upon considering the competing arguments in ***Ahrens***, Perlmutter ACJ decided that "determination of whether these communications are protected by settlement privilege is best left to the trier of fact" (para 18).

[41] In the circumstances, I do not have sufficient evidence to conclude if settlement privilege ought to attach to the above noted admission allegedly made by the Defendant. As a result, I have decided to adopt the approach taken in ***Ahrens***, such that the alleged admission of the Defendant shall not be struck; the Defendant can respond when preparing its defence and the Justice who eventually assumes conduct of this matter can make a determination of whether settlement privilege attaches to the alleged comments of the Defendant.

[42] The second and third sentences of paragraph 7 shall be struck. These details represent evidence and are not material facts (suggestions made by the Defendant as options for a possible solution and the Plaintiff stressing the urgent need for repair).

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**Paragraph 8**

[43] As to the first sentence of paragraph 8, it shall be struck as it contains evidence and not material facts (concern on the part of the Plaintiff that the Defendant did not take photographs or measurements and only conducted a visual inspection of the flooring).

[44] The remaining sentence in paragraph 8 may remain as it is consistent with the admission which the Plaintiff alleges was made by the Defendant (described at paragraph 7 of the Claim) to which the Defendant can respond accordingly.

**Paragraph 9**

[45] Paragraph 9 as a whole offends Rule 25.06(1) and shall be struck in its entirety (it contains nothing more than evidence and no allegations of material facts).

**Paragraphs 10 and 11**

[46] I am prepared to permit the first sentence of paragraph 10 to remain, as it has been pled as an alleged material fact that the Defendant arranged for an inspection by a representative of the flooring manufacturer (at the request of the Plaintiff). The date of the inspection may also remain (May 25, 2023) although the balance of the second sentence shall be struck (identifying who conducted the inspection).

[47] As to paragraph 11, it shall be struck in its entirety (alleged remedial options recommended to the Plaintiff by the inspector who viewed the flooring in accordance with arrangements made by the Defendant is evidence). In addition, these alleged remedial options have not been specifically relied upon by the Plaintiff in relation to the deficiencies

with the flooring which are alleged as material facts (contained within the balance of the Claim).

**Paragraph 12**

[48] The initial portion of the first sentence within paragraph 12 which reads "The Plaintiff further states that she only chose this particular flooring because the Defendant consistently recommended it" shall not be struck. While the drafting could have been more precise, it is nonetheless being alleged as a material fact by the Plaintiff that she relied upon the recommendation of the Defendant when selecting the flooring product to be installed within her residence (which is relevant to the alleged causes of action for breach of contract and negligence). The balance of the first sentence, however, shall be struck (it provides evidence as to the Plaintiff's "knowledge of the industry").

[49] As to the second sentence within paragraph 12, I am prepared to allow it to remain as it alleges as a material fact that there was an admission made by the Defendant when she had demanded that the issues she perceived with the flooring be repaired (the Defendant allegedly stating that it "couldn't meet all conditions required for this flooring when installing the floors"). The Defendant can respond accordingly if it is asserted that any such admission, if made, was in the context of without prejudice settlement discussions such that settlement privilege ought to apply.

**Paragraphs 13 and 14**

[50] Paragraph 13 shall be struck in its entirety. Reference to the alleged comments made by a contractor, other than the Defendant, who was working at the Plaintiff's residence (about what ought to have been done to prepare the floor prior to installation

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of the flooring product, and that the only proper solution was to remove and replace the flooring) represents evidence. In addition, this alleged advice has not been specifically relied upon by the Plaintiff in relation to the deficiencies with the flooring which are alleged as material facts (appearing later within the Claim).

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[51] Similar to paragraph 13, I am striking paragraph 14 as a whole (details as to the alleged opinion of another contractor that the flooring flaws could have been avoided had correct industry policies been followed amounts to evidence).

**Paragraph 15**

[52] The initial portion of the first sentence within paragraph 15 may remain which reads that "The Plaintiff states that on March 6, 2024, an inspection was completed" (it clarifies the date when the inspection of the flooring arranged by the Plaintiff occurred).

[53] While the name of the inspector retained by the Plaintiff is evidence and shall be struck, I am prepared to permit the balance of paragraph 15 to remain (it alleges that as a result of the Plaintiff having the flooring inspected, three specific deficiencies were identified, which the Plaintiff is relying upon as described within subparagraphs a), b) and c) of paragraph 15).

[54] Upon this basis, paragraph 15 (when revised by the Plaintiff) may allege as material facts that there are three deficiencies with the flooring that was recommended and installed by the Defendant (which is relevant to the alleged causes of action for breach of contract and negligence). In particular:

a. it is alleged as a material fact at subparagraph a) that there is "insufficient expansion space" with the flooring; there are no details included, however,

as to what were the measurements for expansion space or to what extent the expansion space deviates from the proper standard for this flooring product (which would be evidence).

b. within subparagraph b), it is alleged as a material fact that the "subfloor flatness does not meet the manufacturer's recommendation"; there are no details provided though as to what the manufacturer of this flooring product recommends for flatness of a subfloor, or to what extent the subfloor installed deviates from this standard (which would represent evidence).

c. subparagraph c) alleges as a material fact that there is "visible gapping" in the flooring; there are no details included, however, as to what is the recommended or appropriate extent of gapping within the flooring, nor are there any measurements to confirm the extent to which the flooring installed deviates from this standard (which would be evidence).

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**Paragraph 16**

[55] As to paragraph 16, the initial portion thereof which reads "The Plaintiff further state(s) that the inspector stated" shall be struck. The remainder of this paragraph, however, may be amended by the Plaintiff to allege as material facts that a different flooring product ought to have been utilized, and that the flooring installed by the Defendant needs to be replaced.

**Paragraph 17**

[56] Consistent with what I have already determined in connection with paragraph 7 (upon consideration of ***Ahrens***), the initial portion of the first sentence within

paragraph 17 may remain (which alleges as material facts that the Defendant was prepared to consider compensating the Plaintiff if a third-party installer was willing to become involved to rectify the situation with the flooring). The Defendant can respond to this alleged admission within its defence, with a determination to be made as to whether settlement privilege ought to attach to these comments, if made by the Defendant.

[57] The second sentence of paragraph 17 shall be struck though as it provides evidence and not alleged material facts (the Plaintiff alleging that repair to the flooring did not occur due to scheduling conflicts with certain contractors and other contractors not wishing to become involved).

**Paragraph 18**

[58] As to the initial portion of paragraph 18 which reads "The Plaintiff states that based on the recommendations of people in the industry and the inspector", it shall be struck (this wording is not only vague but it is also evidence).

[59] I am not striking the remainder of paragraph 18 as it alleges as material facts that "The flooring [will] need to be replaced, and based on the cost she has incurred for the work already completed, the total cost was $28,267.57."

**Paragraph 19**

[60] Paragraph 19 shall not be struck as it confirms the amount being sought from the Defendant as damages and alleges as material facts that there was "negligent workmanship and breach of contract".

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**Paragraph 20**

[61] I am not prepared to strike paragraph 20. It alleges as material facts that the Defendant breached the verbal contract between the parties by failing to recommend proper flooring for the Plaintiff's residence, and by failing to install the chosen flooring incorrectly. As addressed in connection with paragraph 4 of the Claim, the above noted issues (recommending proper flooring and installing the flooring correctly) may be alleged by the Plaintiff within the Amended Claim to represent implied terms of the verbal contract with the Defendant.

**Paragraph 21**

[62] With respect to paragraph 21, I do not disagree with counsel for the Defendant as this portion of the Claim ought to have been more precisely drafted. The Claim should have set forth as alleged material facts the manner by which a duty of care was established (due to the special relationship created between the parties pursuant to the alleged verbal contract) and provided material facts insofar as what should have been reasonably expected of the Defendant pursuant to such duty of care (such as the standard of care reasonably required from a vendor and installer of flooring such as the Defendant).

[63] All of this being stated, after considering the factors that I have previously reviewed herein, I have decided not to strike this paragraph. In particular:

a. While the words "was negligent within the first sentence of paragraph 21 can be considered a legal conclusion, it is an alleged material fact as well (due to the alleged breach by the Defendant of the duty of care as well as

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standard of care in favour of the Plaintiff). As a result, this wording shall not be struck.

b. The balance of the first sentence may also remain, although within the Amended Claim, this sentence ought to be expanded to include alleged material facts as to how a duty of care was created (pursuant to the contractual relationship of the parties) and clarify what standard of care should have been reasonably expected of the Defendant (in accordance with industry standards as a vendor and contractor of residential flooring).

c. Within the second sentence of paragraph 21, it alleges as material facts that "the Defendant breached that duty of care by providing inappropriate flooring and installing the flooring incorrectly." I am not prepared to strike this sentence as, at a minimum, it alleges as material facts that the Defendant breached the duty of care to the Plaintiff, with the specific breach(es) of that duty of care (and standard of care) being the recommendation of inappropriate flooring for the Plaintiff's residence as well improper installation of such flooring.

d. In making the foregoing determinations, I agree with counsel for the Defendant in that no material facts were specifically pled which allege that breach of the duty of care (and standard of care) by the Defendant is causally linked to the damages sought by the Plaintiff. That being stated, the circumstances involved with the Claim are not complex, and the alleged damages of the Plaintiff are confirmed elsewhere within the Claim (the

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Plaintiff incurred costs of $28,267.57 for purchase of the flooring from the Defendant, and to have the Defendant install the flooring).

**Paragraph 22**

[64] The specific section being relied upon pursuant to ***The Sale of Goods Act***, RSM 1987, c. S10 (the "***SGA***") ought to have been pled pursuant to Rule 25.06(4). I am not, however, going to strike the general reference to the ***SGA***. My rationale for not doing so is in reliance upon Rule 1.04(1) (the Court is to liberally interpret the Rules) as well as Rule 2.01 (non-compliance with the Rules is an irregularity which does not result in a nullity).

**Other grounds for striking the Claim**

[65] The failure on the part of the Plaintiff to comply with Rule 25.06(1)(d), by provision of evidence instead of material facts within multiple paragraphs, is the predominant basis for my decision to strike a considerable portion of the Claim. For proportionality reasons, I have not engaged in a detailed alternative analysis although I could have reached the same or a similar outcome in consideration of subparagraphs (a), (b) and (c) of Rule 25.11(1).

**Rule 25.11(1)(a)**

[66] Provision of evidence, not material facts, within numerous paragraphs of the Claim offends Rule 25.11(1)(a), as well as Rule 25.06(1). Had the Plaintiff included only material facts within the Claim, it would have minimized the potential for any prejudice or delay to the Defendant (focus could have been directed towards filing a statement of defence instead of devoting time and expense to the Motion).

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**Rule 25.11(1)(b)**

[67] Rule 25.11(1)(b) stipulates that a statement of claim (or portion thereof) may be struck if it is determined to be scandalous, frivolous and/or vexatious, for which Edmond J. (as he then was) provided a detailed explanation in ***Rebillard*** (commencing at para 29):

> **[29] A pleading is scandalous where it contains "anything which is unbecoming of the court to hear", including "any unnecessary allegation**, bearing cruelly on the moral character of an individual". **Pleadings made "without any probable justification at law**, mala fide **with a clear intent only to annoy or embarrass the opposing party" are frivolous and vexatious and ought to be struck. See *Kreiner v. Auditor General (Man.)***, 2007 MBQB 61, 213 Man. R. (2d) 252 at paras. 8 and 9.
>
> [30] In ***Bellan v. Curtis et al.***, 2007 MBQB 221, 219 Man. R. (2d) 175 at para. 37, the court considered the meaning of "scandalous", "frivolous" and "vexatious" in light of Queen's Bench Rule 25.11 as follows:
>
>> [37] Queen's Bench Rule 25.11 allows a court to strike a pleading that is "scandalous, frivolous or vexatious". Epstein, J., dealt with the meaning of "scandalous, frivolous or vexatious" in ***George Estate v. Harris et al.***, [2000] O.T.C. Uned. 404 (Sup. Ct.); [2000] O.J. No. 1762. At para. 20, he stated:
>>
>>> "The next step is to consider the meaning of 'scandalous', 'frivolous' or 'vexatious'. There have been a number of descriptions provided in the multitude of authorities decided under this or similar rules. **It is clear that a document that demonstrates a complete absence of material facts will be declared to be frivolous and vexatious. Similarly, portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations should be struck out as scandalous**. **The same applies to a document that contains only argument and includes unfounded and inflammatory attacks on the integrity of a party, and speculative, unsupported allegations of defamation. In such a case the offending statements will be struck out as being scandalous and vexatious**. **In addition, documents that are replete with conclusions, expressions of opinion, provide no indication whether information is based on personal knowledge or information and belief, and contain many irrelevant matters, will be rejected in their entirety."**
>>
>> **(emphasis added)**

[68] Edmond J. (as he then was) concluded at paragraph 31 in ***Rebillard*** that the statement of claim in that case was "… replete with conclusions, expressions of opinion, and evidence" such that the pleading was struck.

[69] In the circumstances, I do not find that there has been anything included within the Claim by the Plaintiff that is "unbecoming to hear". There are, however, various portions of the Claim which could have been struck for reasons other than there being an absence of material facts and improper inclusion of evidence. For instance, the initial portion of paragraph 18 of the Claim refers to the alleged recommendations for repair of the flooring from "people in the industry"; such content could be categorized as being scandalous, frivolous or vexatious based upon the analysis within paragraph 31 of ***Rebillard***.

**Rule 25.11(1)(c)**

[70] Edmond J. (as he then was) confirmed at paragraph 39 in ***Rebillard*** that a pleading which "makes bare assertions and does not plead material facts on which to base those assertions" amounts to an abuse of process (and is grounds for striking a pleading). On a similar note, in ***Peguis First Nation et al v. Canada (Attorney General)***, 2014 MBQB 98 ("***Peguis***"), the Honourable Justice Jewar commented that "a claim that does not contain a concise statement of material facts … is an abuse of process" (para 48).

[71] Upon applying the above noted guidance to the Claim, I find that the initial portion of paragraph 18 of the Claim also serves as an example of where the court could conclude that the content as drafted represents an abuse of process (reference to opinions of

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"people in the industry" being tantamount to a "bare assertion" without supporting material facts).

**Rule 25.11(1)(d)**

[72] With respect to Rule 25.11(1)(d), however, and even though a significant portion of the Claim is being struck, I do not find that the Claim fails to disclose any reasonable cause of action against the Defendant (for breach of contract and negligence).

## LEAVE TO AMEND

[73] As referenced earlier, I have decided to exercise my discretion and grant leave to the Plaintiff for amendment of the Claim. One of the reasons for doing so is because even though this would be the second occasion for the Claim to be amended, the statement of claim in ***Contera*** had already been amended once prior to the motion to strike being filed. Nevertheless, Associate Judge Goldenberg granted leave to amend (at para 65):

> **[65] While it is true that the plaintiff has already amended its claim once, I do not find that as sufficient justification in this case to strike the pleadings without leave to amend.**

[74] In contrast, Associate Judge Goldenberg (then Master Goldenberg) decided to strike the statement of claim, without leave to amend, in ***Fenton Group Investment Ltd. et al v. Riverbend Realty Ltd. et al***, 2021 MBQB 150 (CanLII) ("***Fenton***"), as she determined the originating pleading in that case was so deficient that it could not be rectified by an amendment (para 18).

[75] ***Garang v. Grimolfson***, 2021 MBQB 234 ("***Garang***") is a further decision of Associate Judge Goldenberg (then Master Goldenberg), wherein she decided to strike the

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statement of claim, without leave to amend, because she found the pleading to be "fundamentally flawed" as it included deficiencies which could not be adequately addressed by a request for particulars or amendments of specific sections (para 23).

[76] Unlike the situation in ***Fenton***, however, I do not find the Claim to be so deficient that it cannot be remedied. Similarly, in contrast to the circumstances in ***Garang***, I do not find the Claim to be fundamentally flawed to such an extent that it cannot be resuscitated with focussed amendments.

[77] While counsel for the Defendant asserts that the content of the Claim did not represent a significant improvement over what was set forth within the Initial Claim, it was acknowledged during submissions that the Claim could likely be saved but only if the Court was so inclined.

[78] I am concerned that should the Claim be struck, without leave to amend, the Plaintiff could still attempt to file a new statement of claim (subject to issues such as applicable limitation dates). Striking a pleading in accordance with Rule 25.11(1) is distinct from dismissal of an action for delay where the Court can stipulate, pursuant to Rule 24.06(1), that dismissal shall serve as a defence to any subsequent action.

[79] Should a new statement of claim be filed, and if the Defendant had similar concerns with respect to the content thereof, the Court could be faced with yet another motion to strike pleadings (a further procedural aspect which must be addressed before determining the substantive issues in dispute, resulting in even more time and expense for the parties to this litigation).

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[80] In the circumstances, I direct that the Claim shall be amended in accordance with the following terms (which must be strictly adhered to by the Plaintiff, failing which the Claim will be struck).

a. A copy of the proposed form of amended Claim (the "Draft Amended Claim") shall be attached as an exhibit to an affidavit from the Plaintiff and be filed with the Court (as well as served upon counsel for the Defendant) on or before Monday, February 23, 2026.

b. Should the Draft Amended Claim not be filed and served in the above noted manner on or before February 23, 2026, leave for the Plaintiff to amend the Claim shall be terminated.

c. In the event that the Draft Amended Claim has been filed and served on or before February 23, 2026 as directed, and should the Defendant be opposed to the Draft Amended Claim being filed as a formal amendment to the Claim, counsel shall contact the Trial Co-ordinator promptly to schedule a further hearing (one hour), at which time the Court will determine if the Draft Amended Claim shall be permitted to be filed as a formal amendment to the Claim.

d. Even if the Court approves the content of the Draft Amended Claim, it shall not be filed as a formal amendment to the Claim unless and until the Plaintiff has made arrangements that are agreeable to the Defendant, or in the alternative, which are satisfactory to the Court in connection with any costs awarded to the Defendant arising from the Motion (such as payment in full

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of the costs award, or if not, some payment being made towards the costs award). For such purposes, the Court may consider whether security for costs should also be provided by the Plaintiff.

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[81] Ultimately, I find that exercising my discretion to grant leave to amend the Claim (pursuant to the foregoing terms) is proportionate and promotes the objectives of achieving fair, focused, cost-effective and timely proceedings before this Court. In addition, it is also consistent with the objectives to be achieved in such circumstances as outlined by Martin J. at paragraph 35 in ***Farmers*** (striking a pleading is an extraordinary remedy although the justice system is "strained to do justice"); there must be proactive management of litigation to minimize delay and additional efforts from issues such as improperly drafted pleadings.

## COSTS

[82] While I have decided not to strike the Claim in its entirety, I did accept many of the Defendant's arguments, resulting in a significant portion of the Claim being struck, with leave to amend being granted pursuant to strict terms with which the Plaintiff must comply fully. Accordingly, the Defendant is entitled to an award of costs for the Motion (which should, at a minimum, consider Tariffs A and B to the ***Rules***).

[83] If the parties are unable to resolve the issue of costs (the quantum payable and upon what terms), a further brief hearing may be scheduled.

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