IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gray v. 1534 Harwood Street (St. Pierre) Ltd.,* 2025 BCSC 1758

Date: 20250909
Docket: S235251
Registry: Vancouver

Between:

Jon Scott Gray, Colin McTavish and Shirley Giggey

Plaintiffs

And

1534 Harwood Street (St. Pierre) Ltd.

Defendant

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Plaintiffs:	A.P.L. Moore M.J. McDonald
Counsel for the Defendant:	J.L. Carpick L.A. Buitendyk L.Y. Zhang
Place and Dates of Summary Trial:	Vancouver, B.C. July 30-31 and August 1, 2025
Place and Date of Judgment:	Vancouver, B.C. September 9, 2025

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I. Introduction

[1] This action arises from a dispute over the terms of a residential lease.

[2] The plaintiffs are three of 41 tenants in an 11-storey apartment building located at 1534 Harwood Street in Vancouver, known as the “St. Pierre”. They have brought this action as a representative proceeding, on their own behalf and on behalf of all those who are or have been tenants in the building since May 2017. 28 of those individuals have sworn affidavits in support of the plaintiffs’ claims in this action.

[3] All current tenants are parties to a 99-year lease that was created in 1974 and will expire in 2073. The original landlord and tenant were related companies. Both have since transferred their respective interests to others. The defendant, 1534 Harwood Street (St. Pierre) Ltd. (“Harwood”), acquired the landlord’s interest in 2008.

[4] The lease stipulates that each of the 41 units in the building is deemed to have been demised under a separate lease on the same terms. Those 41 leasehold interests can be bought and sold. Because the resulting tenancies are for terms exceeding 20 years, they are not subject to the *Residential Tenancy Act*, S.B.C. 2002, c. 78 (as per s. 4(i)).

[5] The base rent owing under the lease has been almost entirely prepaid. When a leasehold interest in a unit is transferred to a new tenant, the buyer reimburses the seller for the portion of the prepaid base rent attributable to that unit for the remainder of the term then outstanding. Having acquired their interest in that manner, the tenants have no significant obligation to pay base rent again during their tenancy.

[6] However, the lease requires the tenants, every month, to pay one twelfth of their *pro rata* share, by square footage, of the landlord’s estimated operating expenses for the building in that year. At the end of the year, the actual operating expenses are to be reconciled against the landlord’s prior estimate. Any

overpayment is to be credited to the tenants in the following year, and any underpayment covered by the tenants within 30 days of a demand by the landlord. The dispute that gives rise to this action is about how Harwood has been managing the building's operating expenses in recent years.

[7] In May 2017, following a change in ownership, Denise She became Harwood's principal. When she assumed control of its operations, she noted that several of the tenants were delinquent in paying their share of the operating expenses. This required her to lend Harwood funds so that it could meet its obligations, a loan which Harwood has since repaid. She tried not to increase the operating budget at first. She also discontinued Harwood's previous practice of providing the tenants with audited financial reports on the operating budget each year. Soon after that change was made, some of the tenants came to the believe that maintenance standards had deteriorated and that they were being charged for maintenance work that was never done. All of this led to mistrust and eventually litigation.

[8] The litigation began in early 2018, when nine of the tenants, including the plaintiffs, filed notices of dispute with the Civil Resolution Tribunal ("CRT"). After abandoning those proceedings in 2019, the plaintiffs commenced similar actions in the Small Claims Division of the Provincial Court. Those actions have since been consolidated and transferred to this court, to be heard along with a parallel action commenced by Harwood alleging that the claims advanced by the plaintiffs in these proceedings amount to an abuse of process. Along the way, there have also been numerous interlocutory applications, two petitions for judicial review and no fewer than three appeals or applications for leave to appeal to the Court of Appeal.

[9] Before the CRT, the amounts in issue were relatively modest. As the litigation has intensified, however, the stakes have multiplied beyond all proportion. That is because Harwood, without any other source of revenue to draw upon, has been allocating to the tenants its own legal fees on a solicitor/client basis, by treating them as operating expenses under the lease. Since the litigation began in 2018, Harwood

has charged the tenants over $530,000 in this way, with another $175,000 anticipated for 2025. Those charges represent about a third of the building's total operating budget. As a result, the main issue in the litigation has now become the cost of the litigation itself.

[10] The plaintiffs argue that the *status quo* is untenable and will only grow worse as time passes, unless this court intervenes. They say Harwood's interpretation of the lease is unconscionable and contrary to public policy. They accuse Harwood of intentionally and repeatedly delaying the litigation, failing to produce relevant accounting records in a timely manner or at all, breaching ethical obligations to self-represented litigants, violating privilege and the implied undertaking rule and commencing a separate action solely to silence them.

[11] To remedy the situation, they have applied for judgment on part of their claim by way of summary trial, seeking the following items of relief:

a) declarations that:

   i. the lease contains several implied terms; and

   ii. Harwood has breached the lease, including the proposed implied terms, in various ways;

b) an order for specific performance of the covenants that Harwood is alleged to have breached;

c) damages (initially, in their written notice of application, the plaintiffs sought regular damages "to be assessed", but at the hearing, they indicated that they now seek to have some of those damages quantified, with the remainder to be assessed in a subsequent hearing);

d) punitive damages; and

e) special costs.

[12] Harwood opposes the application, arguing that the matter does not lend itself to summary disposition. Instead, it seeks to have the application dismissed or alternatively, adjourned, on the basis that:

a) the requisite factual findings cannot be made at this time; and

b) the plaintiffs are improperly seeking to litigate in slices.

[13] Harwood says it is premature to adjudicate any of the plaintiffs' claims in this action on the merits when the issues are inextricably linked with those in the parallel action it has brought alleging that this action is an abuse of process. In Harwood's submission, the plaintiffs cannot properly seek a partial judgment by way of a summary trial in this action separately, when the two actions have previously been ordered to be tried together. Harwood also seeks to postpone the adjudication of the plaintiffs' claim on the merits until the appeals it has brought from previous interlocutory decisions of this court have been resolved.

[14] For the reasons that follow, I have concluded that the application should be allowed in part.

II. Background Facts

A. The Lease

[15] The parties have adduced almost no evidence to shed light on the circumstances in which the original lease was created in 1974, beyond the information appearing on the face of the document itself.

[16] The original landlord was a corporation known as "First Canadian Land Corporation" and the original tenant, a corporation known as "V.M. Prescott Ltd." It is apparent that they were related companies. For example, they had the same authorized signatories, namely, Victor M. Prescott (who was a director of both companies and signed the lease for both companies as their President) and another individual who appears to have been a relative of his, L.W. Prescott (who signed the lease for both companies as their secretary).

[17] Pursuant to s. 2.01, the term of the lease is stated to run from May 1, 1974 to December 31, 2073.

[18] The tenant is required by Article 4, among other things, to pay “rent”, although that term is not defined.

[19] The landlord’s covenants under the lease are set out in Article 5, which states as follows:

> ARTICLE 5 LESSOR'S COVENANTS
>
> The Lessor covenants with the Lessee:
>
> Quiet Enjoyment
>
> 5.01 For quiet enjoyment.
>
> Heat
>
> 5.02 To provide heat to all common areas of the Building and to each of the Suites (unless any of the Suites contain or are equipped with an independent heating system} to an extent sufficient to maintain a reasonable temperature therein at all times except during the making of repairs.
>
> To maintain the structure
>
> 5.03 To keep in good repair and condition the foundations, outer walls, roofs, spouts and gutters of the Building, all of the common areas therein and the plumbing, sewage and electrical systems therein.
>
> To Light, Heat & Clean
>
> 5.04 To keep the entrance balls, staircases, corridors and other like areas in the Building clean and properly lighted and heated and the elevators properly lighted and in good working order.
>
> To Provide staff
>
> 5.05 The Lessor shall provide or engage the services of such staff as may be requisite for the proper care and servicing of the building.
>
> Taxes
>
> 5.06 To pay taxes.
>
> Elevators
>
> 5.07 To provide passenger elevator service except during the making of repairs.
>
> Fire Insurance
>
> 5.08 To keep the Building insured against loss or damage by fire, lightning or tempest or any additional peril defined in standard fire insurance additional peril supplemental contract which insurance to the best of the ability of the

Lessor shall be to the full insurable value of the Building excluding foundations and excavations.

Public Liability Insurance

5.09 To maintain a policy or policies of general public liability insurance against claims for bodily injury, death or property damage arising out of the use and occupancy of the Building in such amount as the Lessor may from time to time determine.

Cablevision

5.10 To the extent that the service is available to provide cablevision and front door intercommunication service to the Suites in the Building.

Prior Charge

5.11 To observe and perform all the terms, covenants, provisions and agreements contained in any prior charge and without restricting the generality of the foregoing, to make all payments of money required to be made thereunder on their due dates. Prior charge shall include any mortgage now constituting a charge upon the Lands and Building.

[20] Article 6 is entitled “Interruption of Services”, and states as follows:

6.01 The Lessor does not warrant that any service or facility provided by it in accordance with the provisions of this Lease will be free from interruption by reason of causes beyond the reasonable control of the Lessor including without limiting the generality of the foregoing, maintenance, repairs, renewals, modifications, strikes, riots, insurrections, labour disputes, accidents, fuel shortages, government intervention, force majeure and Acts of God. No such interruptions shall be deemed to be a disturbance of the Lessee's enjoyment of any of the Suites nor render the Lessor liable for injury to or in damages to the Lessee nor relieve the parties from their obligations under this Lease.

[21] Article 7 is entitled “Operating Expenses” and states as follows:

Definition of Operating Expenses

7.01 "Operating expenses" in this Lease means the total amount paid or payable by the Lessor in the performance of its covenants herein contained (save and except those contained in Article 5.11) and includes but without restricting the generality of the foregoing the amount paid or payable by the Lessor in connection with the maintenance, operation and repair of the Building and each of the Suites therein less any of the Suites are [sic] equipped with their own individual and independent heating system in which event they shall be payable by the Lessee of any such suite) and providing hot and cold water, elevator maintenance, electricity, window cleaning, fire. [sic] Casualty liability and other insurance, utilities, service and maintenance contracts with independent contractors or property managers, water rates and taxes, business licenses, janitorial service, building maintenance service, resident manager's salary (if applicable) and legal and accounting charges

> and all other expenses paid or payable by the Lessor in connection [sic] the Building, the common property therein or the Lands. "Operating expenses" shall not include any amount directly chargeable by the Lessor to any Lessee or Lessees. The Lessor agrees to exercise prudent and reasonable discretion in incurring Operating expenses, consistent with its duties hereunder.
>
> Estimate of Operating Expenses
>
> 7.02 Prior to the commencement of each calendar year during the term other than the Base Year, the Lessor shall furnish to the Lessee an estimate of the Operating expenses for such calendar year based on prior years [sic] experience and the Lessee shall pay to the lessor on the first day of each and every month during such calendar year, One-Twelfth (1/12th) of the Lessee's Share of such estimated Operating expenses.
>
> Actual Operating Expenses
>
> 7.03 In the event that the actual Operating expenses in any calendar year exceed the estimated Operating expenses for that calendar year, the Lessee agrees to pay, within Thirty (30) days of written demand by the Lessor the Lessee's Share of such excess and in the event that the actual Operating expenses in any calendar year is less than the estimated Operating expenses for that year the Lessee's share of operating expenses for the following year shall be reduced accordingly. The actual Operating expenses shall be calculated by the Lessor for each calendar year and shall be certified by the auditors of the Lessor in accordance with generally accepted accounting principles.
>
> Definition of Lessee's Share
>
> 7.04 "Lessee's Share" in this Lease means the ratio which the area of each of the suites bears to the total area of all suites in the Building, which ratio is hereby agreed to be in percentage terms and as applicable to each suite as set forth in Schedule "A" hereto.

B. Procedural History

i. Proceedings at the CRT

[22] In early 2018, the year after Ms. She assumed control of Harwood, several of the tenants, including the plaintiffs, filed notices of dispute against Harwood at the CRT. Three of those notices of dispute are in evidence.

[23] First, on May 2, 2018, one of the plaintiffs, Colin McTavish, filed a notice of dispute complaining that some of the expenses listed in the 2017 operating budget (such as security, plumbing, roof, interior, exterior, windows, caretaker fees) “were either not provided or were provided minimally”.

[24] Next, on May 16, 2018, another of the plaintiffs, Jon Gray, filed a notice of dispute on behalf of himself and three others, complaining that Harwood had failed to distribute home-owner grant information to the tenants.

[25] Mr. Gray filed another notice of dispute on May 23, 2018, this one solely for himself. That complaint echoed that of Mr. McTavish, asserting that certain items listed in Harwood's operating expense budget estimate for 2017, including "caretaker and benefits" ($29,568), "engineers" ($2,000), "roof" ($16,850), "windows" ($1,500), "exterior" ($5,000), "interior" ($24,000), "plumbing" ($16,000), "security" ($9,000), for a total of $103,918, did not translate into work that was done in that year.

[26] Mr. Gray raised another issue, as follows:

> No audited operating budget for 2017 was provided by the building owner as in previous years. Multiple requests to the building owner and management for audited statements were not responded to.

[27] On June 6, 2018, Harwood's counsel sent an email to the then unrepresented claimants to advise them of Harwood's intention to apply in the provincial court for an order to have their complaints moved from the CRT to the provincial court so they could all be heard there together, in one proceeding. He urged them to consent to that proposal, or better yet, to abandon their claims altogether because, he said, they were legally untenable and counter-productive, inasmuch as Harwood's legal costs have been and would continue to be paid as operating expenses by the tenants. He promised that any issues they had with the operating budget would be addressed in an upcoming review.

[28] Two days later, on June 8, 2018, Harwood's counsel wrote to the Registrar of the Provincial Court seeking to file exemption applications for each of the CRT disputes, noting that such an exemption was necessary because the CRT lacked a procedure for consolidating related disputes. A representative of the CRT responded with a letter of its own to the Registrar on June 26, 2018, noting that the CRT did indeed have a process for linking claims with common issues, claims and parties.

[29] The claimants hired counsel and opposed Harwood's application. At the hearing on August 10, 2018, Harwood argued that the exemption order should be granted also because, by sending that letter, the CRT had demonstrated a disqualifying bias. In his decision of August 28, 2018, Lee P.C.J. rejected that and Harwood's other arguments and dismissed the application.

[30] On March 5, 2019, Harwood's counsel sent another letter to the claimants. Once again, he urged them to withdraw their claims. His rationale for doing so this time was that Harwood had recently conducted an analysis of the operating expenses in 2017 and 2018 showing that the tenants had indeed overpaid operating expenses in 2017, but the overpayment had been credited back to them in 2018. He reiterated Harwood's position that Harwood had thereby satisfied its obligations under the lease and that it had no obligation to conduct an audit, let alone to provide any audited reports or backup materials to the tenants.

[31] On July 3, 2019, the claimants withdrew their disputes before the CRT. The plaintiffs have deposed that this was done in reliance on Harwood's letters and in the belief that they could not compel Harwood to produce documents before the CRT.

ii. Proceedings in the Provincial Court

[32] The withdrawal of the claims at the CRT did not end the controversy. Between September and December 2020, all three of the plaintiffs initiated fresh proceedings in the Provincial Court, Small Claims Division, advancing similar claims to those described above.

[33] In their respective notices of claim, the plaintiffs each sought a refund of overpaid maintenance fees attributable to their individual units for the years 2017-2020. They also alleged that Harwood was in breach of the lease for having failed to provide the tenants with audited reports on the operating budget in each of those years.

[34] In advancing those allegations, the plaintiffs relied on a report prepared by the St. Pierre Leaseholders Association ("SPLA"), an organisation comprised of a group

of like-minded tenants. The report compared the building's current operating budget with:

a) The operating budgets of two other buildings, said to be comparators; and

b) A three-year average of the building's operating budgets prior to the change in control at Harwood, when the operating budgets were still being audited.

[35] The litigation in the provincial court, while it was extant, focused on document production. Both sides brought applications seeking to compel the other side to produce additional documents. The plaintiffs sought to compel Harwood to produce the legal bills that it had charged to the tenants as operating expenses. Harwood opposed that application on the basis that the bills remained privileged. In addition, Harwood brought a cross-application seeking to compel the plaintiffs to produce minutes of the meetings of the SPLA.

[36] Those applications were heard together by Bond P.C.J. on April 28, 2022. In her reserved decision of June 27, 2022, she granted both applications and ordered the parties to produce those items (the "Production Order").

[37] The plaintiffs, who were without legal counsel at that time, complied with the Production Order and produced the SPLA minutes in unredacted form, even though they contained discussions of litigation strategy and legal advice received.

iii. Proceedings in this Court

[38] Harwood complied with the Production Order, but only in part – it produced its bills but with most of the details redacted. Then, on July 7, 2022, it commenced a new proceeding in this court by way of petition (Action No. S225494 – "JR Petition #1"), seeking judicial review of the Production Order and an interim stay.

[39] The stay was granted by Masuhara J. on July 20, 2022. In a reserved decision dated April 27, 2023 (indexed as *1534 Harwood Street (St. Pierre) Ltd. v. McTavish*, 2023 BCSC 675), Loo J. allowed JR Petition #1 and quashed the

Production Order, insofar as it required Harwood to produce the redacted portions of its bills immediately.

[40] In summary, Loo J. found that it was reasonable for Bond P.C.J. to conclude that Harwood had waived privilege in the legal bills when it passed them on to the tenants for payment. However, he was not persuaded that it was reasonable for her to order production of those items immediately. Rather, he accepted Harwood's argument that immediate production was unnecessary, for the following reason:

> [35] As stated above, the Petitioners' position in the underlying action is that the certification by the accountant is a complete answer to any challenges to the operating expenses and that the Respondents are not entitled to challenge them at all. Whether that argument is correct is not before me, but the point is that if it is correct, the reasonableness of the legal expenses will not be challengeable, and production of the legal time details and underlying documents will be unnecessary.

[41] In accepting that argument, Loo J. anticipated that the trial in the provincial court could proceed in two phases, as Harwood had suggested. He went on to explain how such a bifurcated trial might proceed, stating as follows:

> [39] The first part would involve a determination of the Entitlement Questions, among other things. If the Respondents are entitled to challenge the legal costs, there would be a continuation of the trial at which the law firm will have to justify its accounts. Under this scenario, if the Petitioner succeeds in the first part of the trial, the expense and cost of the second part would be avoided.

[42] In the result, having quashed the Production Order to that extent, he remitted the matter back to the provincial court so that it could consider how the claims should proceed in light of his decision.

[43] The hearing before Loo J. took place in March 2023. While the parties were exchanging their arguments and materials in anticipation of that hearing, Harwood reviewed the unredacted SPLA meeting minutes that the plaintiffs had produced pursuant to the Production Order. Informed by that review, Harwood concluded that those documents revealed that the plaintiffs had been advancing their claims knowing them to be at least partly without merit, and for an ulterior purpose, namely, to seize control of management from Harwood, contrary to the terms of the lease.

[44] Having arrived at that conclusion, Harwood commenced a new action in this court on January 27, 2023 (Vancouver Registry Action No. S230651, the "Abuse of Process Action"), alleging that the three small claims actions were an abuse of process. Harwood says that its goal in advancing the Abuse of Process Action is to transfer the cost of the litigation from the larger group of tenants, who are currently having to pay for it, to the named defendants in the Abuse of Process Action, namely, the plaintiffs and the SPLA. The latter have in turn responded to the Abuse of Process Action with a counterclaim alleging that the Abuse of Process Action is itself an abuse of process.

[45] The bifurcated trial in the provincial court envisioned by Loo J. did not proceed. Instead, on June 20, 2023, the parties agreed to consent orders in each of the three provincial court actions stipulating that they were to be consolidated and transferred to this court, to be heard together with the Abuse of Process Action. To that end, the plaintiffs commenced this action as a separate proceeding on July 24, 2023.

[46] On March 18, 2024, the parties attended a case planning conference in this action before Associate Judge Dick. She made a case plan order that day directing, among other things, that this action and the Abuse of Process action were to be heard together, subject to the directions of the trial judge.

[47] With two actions now underway in this court, the parties have been engaged over the last year and a half in what can only be described as a flurry of interlocutory applications and other related litigation.

[48] On December 12, 2023, Harwood brought an application seeking an order to strike the plaintiffs' pleading in this action purporting to advance the claim as a representative action on behalf of all affected tenants (the "Strike Application"). In support of the Strike Application, Harwood adduced an affidavit of Ms. She attaching the unredacted SPLA meeting minutes that had moved Harwood to commence the Abuse of Process Action. The plaintiffs responded with an application to strike those and other parts of Ms. She's affidavit, on the basis that, among other things,

Harwood was improperly making use of privileged information that had been inadvertently disclosed (the “Privilege Application”).

[49] The Strike Application and the Privilege Application came on for hearing before Gomery J., then of this court, on April 24, 2024. He concluded that he did not have sufficient time to address the former, but he did hear and resolve the latter. In his reserved decision of April 29, 2024 (indexed as *Gray v. 1534 Harwood Street (St. Pierre) Ltd*., 2024 BCSC 742), he sustained the plaintiffs’ objection and ordered several of the impugned portions of Ms. She’s affidavit to be struck.

[50] On May 9, 2024, the plaintiffs applied for a preservation order under Rule 10-1(2) of the *Supreme Court Civil Rules*, seeking to have the contested legal fees paid into court rather than to Harwood going forward (the “Preservation Application”). That application was eventually heard by Brongers J. on November 8, 2024. She later dismissed it in a reserved decision dated January 10, 2025 (indexed as *Gray v. 1534 Harwood Street (St. Pierre) Ltd*., 2025 BCSC 42).

[51] On May 28, 2024, Harwood applied for leave to cross-examine Mr. Gray on one of his affidavits (the “Cross-Examination Application”). That application was eventually dismissed by Associate Judge Bilawich on September 5, 2024.

[52] In the meantime, on June 10 and 11, 2024, the Strike Application, the Preservation Application and the Cross-Examination Application all came on for hearing before Sharma J. In the end, she had time to address only the Strike Application and adjourned the others. In her reserved decision of June 18, 2024 (indexed as *Gray v. 1534 Harwood Street (St. Pierre) Ltd.*, 2024 BCSC 1345), she dismissed the Strike Application.

[53] On October 9, 2024, Harwood applied in this action for an order to compel the Provincial Court to produce the DARS recording of the hearing before Bond P.C.J. on April 28, 2022, on the basis that the recording was said to evidence a waiver by the plaintiffs of any privilege they had in the portions of the SPLA meeting minutes that were the subject of Gomery J.’s order. Harwood wished to obtain that evidence,

it said, in furtherance of its appeal from that order. When the office of the Chief Judge of the Provincial Court refused to allow Harwood to access the recording without a court order, Harwood initiated a second application for judicial review, this time seeking to set aside that decision ("JR Petition #2"). JR Petition #2 came on for hearing before Baker J. on July 11, 2025 and was unopposed. The recording was subsequently made available to the parties by order of Baker J. but, in the end, it disclosed no relevant discussion about privilege in relation to the SPLA meeting minutes.

[54] The plaintiffs filed this application on May 28, 2025. Two applications by third parties seeking leave to intervene and participate in the hearing of this application were dismissed by Sharma J. on June 26, 2025. One of those proposed intervenors was a group of tenants in another building that is governed by a similar arrangement.

[55] On July 25, 2025, a few days before the commencement of the hearing of this application before me, which had been scheduled four months earlier, Harwood applied to adjourn it. That application was refused by Associate Judge Bilawich, who left the question of the costs of the hearing before him to be decided by me.

iv. Proceedings in the Court of Appeal

[56] Harwood filed both a notice of appeal (on May 21, 2024) and an application for leave to appeal (on June 20, 2024) in relation to the order of Gomery J. of April 29, 2024, striking parts of Ms. She's affidavit. On July 5, 2024, Harwood also filed a notice of appeal from the order of Sharma J. of June 18, 2024 dismissing the Strike Application.

[57] The application for leave came on for hearing before Harris J.A. on July 24, 2024, who dismissed it on the basis that the order of Gomery J. was subsumed within the order of Sharma J. Harwood's appeal from the order of Sharma J. remains extant and is scheduled to be heard in September 2025.

[58] On February 7, 2025, the plaintiffs filed a notice of appeal from the order of Brongers J. dismissing the Preservation Application, but the plaintiffs have since abandoned that appeal.

III. Discussion

A. Is the matter suitable for summary disposition?

[59] The plaintiffs apply for judgment by way of summary trial under Rule 9-7(2), which states that a party may apply for judgment under that rule on one or more issues or generally. The plaintiffs seek judgment on only part of their claim. Harwood argues that they are, by doing so, improperly seeking to litigate in slices.

[60] It is common ground that the test to be applied in determining whether one or more issues ought to be severed and tried separately in this manner was authoritatively summarised by Groberman J.A., writing for the Court in *Ferrer v. 589557 B.C. Ltd.,* 2020 BCCA 83, as follows:

> [27] In *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485, the court considered a large number of authorities (most of which emanated from the British Columbia Supreme Court) on when it is appropriate to hive off an issue in litigation for summary trial. It distilled from the cases a list of factors to be considered:
>
> > [110] In summary, the authorities in BC, including *Hryniak*, make clear that the factors the court must consider on applications to determine by summary trial only part of the issues in the lawsuit are:
> >
> > a) whether the court can find the facts necessary to decide the issues of fact or law;
> >
> > b) whether it would be unjust to decide the issues by way of summary trial, considering amongst other things:
> >
> > > i. the implications of determining only some of the issues in the litigation, which requires consideration of such things as:
> > >
> > > (1) the potential for duplication or inconsistent findings, which relates to whether the issues are intertwined with issues remaining for trial;
> > >
> > > (2) the potential for multiple appeals; and
> > >
> > > (3) the novelty of the issues to be determined;
> > >
> > > ii. the amount involved;

> iii. the complexity of the matter;
>
> iv. its urgency;
>
> v. any prejudice likely to arise by reason of delay; and
>
> vi. the cost of a conventional trial in relation to the amount involved.
>
> [28] This list is a good indication of the factors that are typically of concern when a court is asked to deal with a single issue on a summary trial. I would not, however, suggest that all of these factors will be relevant in every case, and I would discourage a checklist approach to the question.

[61] The Court of Appeal reiterated the dangers of permitting litigation in slices very recently in *Mac's Convenience Stores Inc. v. Basyal*, 2025 BCCA 284.

[62] However, as the plaintiffs point out, this court has, at Harwood's request, already ordered that the trial of this action be bifurcated. Harwood cannot properly be heard to argue now, after obtaining temporary relief from the Production Order on that basis, that the action must be heard in one sitting after all. It follows that, at a minimum, what Loo J. referred to as the "Entitlement Questions" – namely, whether the plaintiffs are entitled under the lease to challenge the amounts charged to them as legal fees – are appropriately adjudicated separately in advance, in phase 1.

[63] Although the case planning order of March 18, 2024, provides that this action is to be tried together with the Abuse of Process Action, that term was expressly made subject to the directions of the trial judge. It cannot be read to preclude the bifurcation of issues ordered by Loo J. less than one year earlier. The question that arises is whether the issues raised in the Abuse of Process Action belong in the first or the second phase of the trial envisaged by Loo J. It is clear to me that they belong in phase 2.

[64] Phase 1 should be restricted to the central questions of contractual interpretation, like the "Entitlement Questions" identified by Loo J. At the heart of this litigation is the question of whether Harwood is or has been in breach of the lease in one or more of the ways alleged by the plaintiffs. That question can be answered without having to wade into the parties' underlying motives in the litigation. There are

no disputed facts bearing on those issues, nor are they legally or factually complicated. There is no risk of duplication or inconsistent findings if they are decided now. Nor do I see any basis to conclude that doing so will lead to even more interlocutory applications and appeals. On the contrary, it will provide greater clarity for the parties, which is urgently needed.

[65] The factual issues that, according to Harwood, cannot be resolved at this time go almost entirely to the parties' respective motives, which, if relevant at all, is for phase 2.

[66] For example, Harwood argues that there are "fundamental conflicts in the evidence" relating to the plaintiffs' assertion "that Harwood collected operating costs for work that was not done, and that Harwood has defended the litigation in bad faith for an ulterior purpose". Harwood denies these accusations and says that, to find for the plaintiffs, the court must find Ms. She's evidence to be false in that respect. In addition, Harwood wishes to rely on the portions of the SPLA meeting minutes that Gomery J. ordered struck from Ms. She's affidavit. Harwood seeks to reverse that order on appeal so that it can make use of that evidence in this court.

[67] Harwood's other pending appeal concerns the question of whether the plaintiffs' claim is properly advanced as a representative action. Like Associate Judge Bilawich, who refused Harwood's application to adjourn the hearing of this application on that basis, I am unable to see how the outcome of that appeal could affect the analysis on this first phase of the trial.

[68] However, the plaintiffs have cast their net more broadly on this application. They also seek awards of punitive damages and special costs. Indeed, a significant part of their written and oral argument in support of the application was devoted to making the case for that relief. I agree with Harwood that those matters are not yet ripe for determination and ought to be decided only after the remaining issues, including those raised in the Abuse of Process Action, have been resolved in phase 2.

[69] For those reasons, I have concluded that the following issues are properly tried summarily on this application, as phase 1 of the trial of this action:

a) Whether the plaintiffs' proposed additional terms are implicit in the lease;

b) Whether Harwood is or has been in breach of the lease in one or more of the ways alleged;

c) Whether the plaintiffs' claims, to the extent they are otherwise meritorious, are barred in whole or in part by the doctrine of *res judicata* or the expiry of a limitation period; and

d) What relief, if any, is appropriately granted at this stage?

B. Are the plaintiffs entitled to the relief they seek in phase 1?

i. Are the plaintiffs' proposed additional terms implicit in the lease?

[70] The parties agree on the legal test to be applied in determining whether one or more additional terms should be implied in a contract like the lease. That test is summarised in the decision of the Supreme Court of Canada in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.* [1999] 1 S.C.R. 619. There, Iacobucci J., writing for the Court, stated as follows:

> 27 The second argument of the appellant is that there is an implied term in Contract A such that the lowest compliant bid must be accepted. The general principles for finding an implied contractual term were outlined by this Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, 1987 CanLII 55 (SCC), [1987] 1 S.C.R. 711. Le Dain J., for the majority, held that terms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed" (p. 775). See also *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701, at para. 137, *per* McLachlin J., and *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, at p. 1008, *per* McLachlin J.

[71] Justice Iacobucci added this:

> 29 As mentioned, LeDain J. stated in *Canadian Pacific Hotels Ltd.*, *supra*, that a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the "officious bystander" test. It is unclear whether these are to be understood as two separate tests but I need not determine that here. What is important in both formulations is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. As G. H. L. Fridman states in *The Law of Contract in Canada* (3rd ed. 1994), at p. 476:
>
> > In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.
>
> [Emphasis in original.]

[72] In seeking to have additional terms implied in this case, the plaintiffs rely solely on the third option identified by Le Dain J. in *Canadian Pacific Hotels*, namely:

> … based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed" …

[73] The plaintiffs submit that the following proposed additional terms meet that test:

> (a) promptly following the end of each calendar year and before charging or reimbursing the Leaseholders for any shortfall or overpayment of Operating Expenses, the lessor shall provide the Leaseholders with a copy of its auditors' certification (the "Auditor's Report") of the actual Operating Expenses incurred for the prior calendar year (the "Actual Operating Expenses");
>
> (b) in conjunction with the Auditor's Report, the lessor shall provide the Leaseholders with copies of all contracts, receipts, invoices and documents relied on by it to calculate its Actual Operating Expenses, as well as an explanation for each expense (the "Supporting Documents"), such that it is possible for the Leaseholders to verify:
>
> > (i) the difference between the budgeted and Actual Operating Expenses; and
> >
> > (ii) that the lessor exercised prudent and reasonable discretion in incurring the Actual Operating Expenses, consistent with its duties under the Lease; and

> (c) the lessor will only be entitled to reimbursement for its Actual Operating Expenses, including Legal Expenses, to the extent that such expenses:
>
> (i) comply with s. 7.01 of the Lease, in that they are:
>
> (A) prudently and reasonably incurred;
>
> (B) incurred in connection with the maintenance of the St. Pierre building, the common property therein or the lands;
>
> (C) paid or payable by the Lessor in the performance of its covenants contained in the Lease, save and except those contained in Article 5.11; and
>
> (D) not directly chargeable to any Leaseholder or Leaseholders; and
>
> (ii) are supported and evidenced by the Supporting Documents and the Auditor's Report.

[74] Harwood disputes that any of those proposed additional terms are implicit in the lease. It submits that, on the contrary, they contradict the express terms of the lease, which leave the oversight and management of the operating budget exclusively to the landlord, while assigning no role in the process to the tenants.

[75] In answering this question, I am mindful of the need to look to the common intentions of the original parties to the lease, who appear to have been related companies. I have no direct evidence before me as to how the lease came to be finalised. It does not appear to have been the product of an arm’s-length negotiation between parties with different interests.

[76] However, it can safely be inferred that the original parties to the lease anticipated that the leasehold interest would be sold off in due course to individual third parties, leaving the original tenant with no future stake in how the operating budget would be overseen and managed each year. Instead, they apparently intended to provide some level of assurance to the prospective third-party purchasers of the leasehold interest that the landlord’s actions in that regard would not be entirely beyond scrutiny. To that end, they made express provision in s. 7.03 for the operating budget to be “certified by the auditors of the Lessor in accordance with generally accepted accounting principles.”

[77] Viewed in that context, the lease must be read as requiring more than just an unaudited accounting for the landlord's eyes only. The effect of such an interpretation would be to leave the tenants with no ability to satisfy themselves that the operating budget was being properly managed. By expressly requiring the landlord to have the accounting certified by its auditors, the lease demands more. What is also required, by necessary implication, is a transparent, comprehensive and independently certified accounting, which is to be shared with the tenants because it is their interest that needs to be protected in that way. They are the intended audience for the audit.

[78] I disagree with Harwood's submission that the plaintiffs' proposed implied terms are inconsistent with the express terms of the lease, in that they would have the effect of improperly transferring control of the operating budget to the tenants. Even if the lease is interpreted as the plaintiffs propose, the tenants' only recourse, if they disagree with something the landlord has done, is to the courts. Nowhere does the lease say that only the landlord should have access to the audited report and supporting documents.

[79] Turning then to the plaintiffs' proposed additional terms themselves, I have no difficulty in principle with paragraph (a).

[80] Harwood argues that the lease cannot reasonably be read to require the landlord to arrange for an audit of the operating budget, because it speaks only of the need for a certification. Harwood argues further that the plaintiffs' argument to the contrary conflates the distinction between the person doing the task (the auditor) with the task itself (an audit). According to Harwood, the lease only requires a certification, not an audit, and this can be done by any accountant. Had the original parties to the lease intended to require an audit, it is argued, they could have said so expressly.

[81] I am not persuaded by that argument. The original parties to the lease could just as easily have required that the requisite certification be provided by the landlord's "accountants", but they chose instead to require the landlord to engage its

auditors for that purpose. It is reasonable to infer that they did so because of the heightened degree of scrutiny that an auditor, and therefore by implication, an audit, would add for the tenants. In any event, that appears to be how the landlord interpreted its obligation for many years before the change in control of Harwood in 2017. I am therefore satisfied that an annual audit of the actual operating expenses is implicitly, if not expressly required, as the plaintiffs argue.

[82] On the other hand, I have reached the opposite conclusion with respect to paragraphs (b) and (c). The lease cannot reasonably be read to require the landlord to deliver to each tenant, within the proposed timeframe, not only the auditors' certification itself, but also every contract, receipt, invoice or other document evidencing every line item, accompanied by a narrative explanation in each case. Those proposed terms go well beyond what can reasonably be seen to be implicit in the existing language of s. 7.03 or the known circumstances in which the lease was created. The question is not whether it would have been reasonable for the original parties to the lease to include such terms when the lease was created in 1974, but whether they in fact did so, by necessary implication. I have concluded that they did not.

[83] I disagree with the plaintiffs' submission that without such implied terms, the landlord's covenants in Articles 5-7 are effectively rendered unenforceable. The lease can still be enforced through court action. If necessary, the supporting documents can be sought by way of discovery in any such action. That may be more expensive for the tenants than a term requiring the landlord to deliver those things to them each year as a matter of course, but the absence of such a term does not lead to an absurdity.

[84] In summary, I have concluded that the lease contains an implied term that the auditors' certification referred to in s. 7.03 must take the form of an audited report, which must be shared with the tenants promptly after the conclusion of each calendar year. The plaintiffs' application seeking to have the court recognise additional implied terms is otherwise refused.

ii. Has Harwood breached the lease?

[85] The plaintiffs allege that Harwood has breached the lease in the following five ways:

a) failing in 2021 and 2023 to ensure that the building was maintained in a manner that complied with municipal fire safety standards;

b) charging the tenants for exterior power washing and painting work in 2020 that was never done;

c) neglecting to maintain the building's sole elevator so that it had to be out of service for extended periods in 2018 and 2019, and then, once the necessary repairs were arranged, failing to provide adequate notice to the tenants, or to make alternative arrangements for them;

d) failing to provide the tenants with audited reports and supporting documents when calculating the actual operating expenses each year; and

e) improperly charging its legal fees in this action and the related proceedings as operating expenses.

[86] Harwood denies any breach.

[87] In each case, the issue turns in part on the proper interpretation of the lease. The parties agree on the applicable principles of interpretation, which were conveniently and authoritatively set out by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53. There, Rothstein J., writing for the Court, summarized those principles in the following terms:

> [47] … the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" … To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding

> circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
> >
> > …
>
> [48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement …. As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]
>
> [Citations omitted.]

[88] With those principles in mind, I will deal with each of the plaintiffs' allegations in turn.

Fire Safety Standards

[89] The plaintiffs have adduced evidence showing that on May 25, 2021, municipal officials inspected the building and issued a violation notice because the building was found to have unsatisfactory emergency lighting, unsatisfactory exit and corridors facilities, an unsatisfactory fire safety plan, and unsatisfactory sprinkler systems. That same month, a group of tenants noticed that a great deal of the fire safety equipment (including fire extinguishers, hoses and emergency lighting) had expired at least a year earlier. During a power outage that occurred on May 28, 2021, the emergency lighting in the hallways and stairwells failed to function.

[90] Municipal officials conducted another inspection on August 26, 2021. On that occasion, Harwood received another violation notice after the inspectors found that

the emergency lighting power unit was past its service date and was in need of servicing by a qualified service contractor, that there were unsatisfactory exit and corridors facilities, that there was an unsatisfactory fire service plan, and that the building had unsatisfactory sprinkler systems that were past their service date and in need of servicing by a qualified service contractor.

[91] On December 4, 2023, municipal officials warned Harwood that the boiler room continued to be in an unacceptable state because flammable materials had been left for many months piled up against the furnace.

[92] In its written application response, Harwood argued that this claim should be dismissed on the basis that the building is old and requires repairs, which in this case were eventually done. It says it acted reasonably and prudently in all the circumstances and that, in any event, this claim is now moot because the deficiencies that were the subject of these violation notices have since been addressed.

[93] In addition, in an affidavit filed and delivered on August 1, 2025, during the hearing before me, Ms. She has deposed that Harwood “completed regular inspection and maintenance of the fire safety equipment and systems” in the building. In support of that assertion, she has attached three invoices from a contractor called City Fire Prevention Services Ltd., issued to Harwood in 2018, 2019 and 2020, respectively. After identifying those invoices, Ms. She added that “Harwood completed the inspections and replaced the equipment noted in these invoices.” The affidavit is otherwise silent as to the deficiencies reported one year later, in 2021 and three years later, in 2023.

[94] Even if I were to accept Ms. She’s most recent affidavit into evidence despite its late delivery, Harwood has not adequately responded to this allegation. In particular, I agree with the plaintiffs that by allowing the fire safety facilities and equipment and furnace room to fall into that state of disrepair in 2021 and 2023, despite repeated warnings from municipal officials, Harwood breached its obligation

under s. 5.03 of the lease "[t]o keep in good repair and condition … all of the common areas" in the building.

Exterior Power Washing and Painting

[95] The plaintiffs allege that the tenants were charged $86,927 in 2020 for budgeted exterior power washing and painting, but the receipts produced by Harwood for that year show that only $15,656.44 was actually spent on that work. They now seek damages measured as the difference between those two figures, or $71,270.56, ostensibly to compensate the tenants for maintenance work that Harwood promised to complete in that year but never did.

[96] In its written application response, Harwood asserted that this claim rests on a misapprehension of the lease. Harwood says it created a budget in 2019 that included provision for power washing and painting in 2020 and then collected operating funds from the tenants during that year based on that budget. It says it has no obligation under the lease to spend that money as budgeted. Its only obligation, it says, is to spend it reasonably and prudently and then, at the end of the year, to reconcile the prior estimate against the actual amount spent and account to the tenants for the difference.

[97] To this, the plaintiffs responded at the hearing by noting that Harwood's audited year-end report on the actual expenses for that year shows a line item of $71,467.33, labelled only as "exterior". According to the plaintiffs, this means that Harwood not only budgeted in advance for the power washing and painting but also claimed at year end to have actually carried out that work, which was untrue, or at least unsubstantiated in the evidence it has adduced in response to this application.

[98] Although the plaintiffs stated in their written notice of application that they were seeking damages to be assessed in phase 2, that position changed at the hearing before me. At the outset of the hearing, plaintiffs' counsel advised me that they were now seeking to have the damages for this particular claim quantified now, in phase 1. This prompted yet another application by Harwood for an adjournment, which I refused. Then, in response to the plaintiffs' quantification of those damages,

Harwood adduced two new affidavits during the hearing before me, including the latest affidavit of Ms. She that I mentioned earlier.

[99] Among other things, Ms. She's affidavit attaches invoices showing Harwood's actual operating expenses on the exterior in 2020. I was told that the accompanying affidavit, made by one of Harwood's lawyers, shows that all, or nearly all, of the attachments to Ms. She's affidavit had already been disclosed to the plaintiffs at an earlier stage of the litigation.

[100] I do not need to consider that late filed evidence in order to resolve this question. I agree with Harwood that the plaintiffs have not established that any part of the 2020 operating budget was misspent, nor do they even advance such an allegation. The plaintiffs' only complaint in relation to power washing and painting is that $71,270.56 was spent other than as originally budgeted, or perhaps that Harwood should have spent $71,270.56 more in 2020 than it actually did. Neither allegation gives rise to a viable claim in damages. I am therefore dismissing this claim.

[101] The plaintiffs' real complaint in this category is that Harwood's belated disclosure of the supporting documents left them in the position where they could only speculate about how the operating budget was spent. Having since received an audited report on the actual operating expenses for 2020, as well as the supporting documents, their only remaining complaint is about the timing of that disclosure. That complaint is more properly addressed as a factor to be considered in relation to costs, in phase 2.

Elevator Service

[102] The St. Pierre was built in 1974. It has 11 storeys. The occupants of its 41 units share only one elevator. When Harwood's management changed in 2017, the elevator was showing its age and badly in need of refurbishing. That work was finally completed two years later, in 2019. The plaintiffs complain about how it was done.

[103] The work began in the spring of 2018, when Harwood approved a refurbishing project in relation to the generator. The contractor hired to do the work indicated that the elevator was unsafe and needed to be fully modernized.

[104] On June 4, 2018, Harwood notified the tenants of the upcoming generator work. Initially, they were told that the elevator would be out of service for that work between June 11 and June 22, 2018, a total of 11 days. As it turned out, it remained out of service for twice as long, until July 3, 2018, for a total of 22 days.

[105] The larger modernisation project was carried out over a 12-week period in 2019. The elevator remained out of service throughout that time. Once again, the tenants were not told in advance how long that work would take.

[106] The plaintiffs acknowledge that the elevator had to be out of service for a considerable amount of time. However, they say that in addition to the landlord's covenant in s. 5.07 of the lease to maintain elevator service except during repairs, s. 5.01 entitles the tenants to quiet enjoyment. They say that by failing to:

a) provide adequate notice of the repairs;

b) ensure that the repairs were carried out within the estimated timeframe;

c) notify tenants that the repairs would take longer than expected; and

d) mitigate the detrimental effect of the repairs on the tenants,

Harwood was in breach of its covenant of quiet enjoyment, insofar as those failures interfered with the very purpose for which the lease was granted.

[107] For this proposition, the plaintiffs rely on *0824606 B.C. Ltd. v. Plain Jane Boutique Ltd*., 2018 BCSC 1887. In that case, Brundrett J. found the landlord of a shopping mall liable in damages to the tenant, a clothing retailer, for breach of the landlord's covenant of quiet enjoyment. The repairs at issue there involved exterior scaffolding and construction work that interfered with the visibility of the tenant's store and parking access to it on the adjacent street. Had the tenant received more

timely notice of that work, it was found, it could have taken steps to reduce the impact of the loss of business that eventually occurred. For example, the court found that the tenant had overstocked its inventory for the season in anticipation of the normally high traffic volumes expected in the mall at that time of year and would not have done so had it received timely notice of the repair work when it was planned. The court also found that the landlord could have erected signage and better lighting to limit the impact of the repair work on the tenant.

[108] In this case, the plaintiffs have not alleged how the hardship and inconvenience flowing from the gap in elevator service during the repair periods could have been ameliorated had the tenants received earlier notice of it. Nor have they identified any specific measures that Harwood could have taken at the time to reduce the impact of that work on them.

[109] I agree with Harwood that in the absence of any such allegation, the claim is barred by the terms of ss. 5.07 and 6.01 of the lease.

Audit Report and Supporting Documents

[110] I have already addressed the plaintiffs' claim in relation to the proposed implied terms. My conclusion was that the certification referred to in s. 7.03 of the lease must take the form of an audited report, which must be shared with the tenants promptly after the conclusion of each calendar year.

[111] Prior to Harwood's change in management in 2017, it had been delivering audited reports of the actual operating expenses to the tenants each year, as the lease requires. The last such report was delivered in 2016. Although Harwood has since produced audited reports for the years 2020-2023 inclusive, it has done so in the context of this litigation and not in conjunction with the year-end accounting. Moreover, no such reports have ever been delivered for the years 2017, 2018 and 2019.

[112] I therefore find Harwood to be in breach of the lease for its failure to deliver those reports to the tenants in a timely manner, or at all.

[113] In view of my other conclusions on the proposed implied terms, Harwood's failure to produce the associated supporting documents at each year end is not a breach of the lease. The question of whether, in the context of Harwood's discovery obligations in this litigation, the supporting documents should have been produced, or produced earlier than they were, is for phase 2.

Legal Fees

[114] Since 2016, Harwood has budgeted and charged the tenants with the following amounts as operating expenses under Article 7 of the lease:

Year	Budgeted Operating Expenses	Actual Operating Expenses	Actual Legal Expenses
2016	$264,503.00	$207,062.28	$0
2017	$264,503.00	$125,244.42	$2,000.00
2018	$269,503.00	$324,885.26 (including $49,286.75 for elevator modernization)	$39,137.57
2019	$269,503.00	$443,767.95 (including $213,213.25 for elevator modernization)	$4,147.40
2020	$269,503.00	$388,410.00	$13,124.00
2021	$269,503.00	$388,651	$77,407.63
2022	$370,253.00	$461,231.09	$98,252.58
2023	$453,495.07	$485,332.19	$117,133
2024	$474,170.00	$557,941.74	$181,563.91
2025	$576,513.00	N/A	N/A ($175,000 budgeted)

[115] The main issue in dispute between the parties in this litigation has become the propriety of Harwood's practice of passing its legal bills to the tenants for payment as operating expenses under the lease. Pursuant to the definition of "operating expenses" in s. 7.01 of the lease, to qualify for reimbursement, operating expenses must be:

a) "… paid or payable by the Lessor in the performance of its covenants herein contained …"

b) exclusive of "… any amount directly chargeable by the Lessor to any Lessee or Lessees … "; and

c) incurred prudently and reasonably.

[116] The plaintiffs argue that the legal fees that Harwood has charged and continues to charge as operating expenses do not meet any of these criteria. Harwood responds that they meet all of them. The plaintiffs argue in reply that Harwood's interpretation of the lease cannot prevail because it yields a result that is unconscionable and contrary to public policy. Although Harwood objects to that reply on the basis that it has not been expressly pleaded, it is unnecessary to resolve that objection because I have concluded, on other grounds, that the plaintiffs' interpretation of the lease is the correct one.

[117] First, I am satisfied that the legal fees in issue here were not paid or payable in the performance of Harwood's covenants under the lease. By defending itself in this action, or advancing the Abuse of Process Action, Harwood is not *performing* any of those covenants. The most that can be said is that those legal fees are amounts paid or payable *because of the manner in which those covenants were (or were not) performed*. The distinction is a material one because the covenants that are set out in Article 5 for the landlord to perform are solely for the benefit of the tenants, which is why the tenants are required to reimburse the landlord for its costs in performing them.

[118] Although s. 7.01 goes on to list as chargeable operating expenses included within that definition any "… amount paid or payable by the Lessor in connection with the maintenance, operation and repair of the Building … " and amounts "… paid or payable by the Lessor in connection [*sic*] the Building … ", those clarifications are presented as examples of the "… total amount paid or payable by the Lessor in the performance of its covenants herein contained … ". The touchstone for inclusion in

the list must therefore be the performance of the landlord's covenants as enumerated in Article 5.

[119] Harwood argues that it has been defending itself in this action, the small claims actions and the CRT complaints, and advancing the Abuse of Process Action, not for its own benefit, but for the benefit of the other tenants. Had it not done so, it says, then the plaintiffs would have obtained a default judgment, which would have yielded a debt that could only have been paid from the operating budget, leaving the entire cost to be borne by the tenants.

[120] I do not find that argument persuasive. Leaving aside the fact that any default judgment the plaintiffs would have obtained at the outset of the litigation is now dwarfed by the size of the legal bills Harwood has since run up in its defence, the argument confuses Harwood's own interests with those of the tenants and its obligations under the lease. Harwood incorrectly assumes that because it has no other source of revenue to draw upon, the tenants must inevitably pay not just the litigation costs (on both sides), but also the cost of complying with any order that might be made by the court, regardless of the nature of the claim, as long as it relates in some way to the building.

[121] That assumption finds no support in the language of the lease. The landlord's covenants, enumerated in Article 5, do not include an obligation to defend itself in litigation brought against it by one or more of the tenants with a view to enforcing the lease, let alone to initiate its own action against those tenants for bringing that claim. That may be because the original parties to the lease could not have anticipated in 1974 how expensive, in relative terms, litigation was to become half a century later. They appear to have expected that the building manager would receive a modest management fee from which it would pay its own expenses, such as any litigation costs it might have to incur other than in the performance of the landlord's covenants. To the extent those original parties to the lease failed to make adequate provision for present circumstances in drafting the lease, that failure cannot change the obligations of the current parties as set out in the lease.

[122] There is no doubt that the landlord can incur legal fees that are properly chargeable to the tenants as operating expenses. A good example is the one Harwood cites in relation to its duty to maintain insurance coverage. The premiums that the landlord must pay to do so are expressly included as operating expenses in s. 7.01 because the landlord is expressly required by Article 5 to arrange for and maintain certain kinds of insurance. If a coverage issue were to arise, any legal fees incurred by the landlord in enforcing the insurance contract against the insurer would likely be operating expenses as well. But that is not the same as what Harwood has been doing here.

[123] I appreciate that the tenants will have to pay for any additional operating expenses, such as the cost of an annual audit of the operating expenses, that Harwood is ordered in these proceedings to incur. However, the plaintiffs' claims in this litigation are not directed at adding superfluous or unnecessary expenses to the operating budget so much as ensuring that Harwood complies with the lease.

[124] I have already found some of the plaintiffs' complaints to be well-founded, at least in part. The cost of mounting an unsuccessful defence to those claims is not one that should be borne by the tenants as an operating expense. Not only was that cost not incurred in the performance of the landlord's covenants set out in Article 5, it cannot be seen, in the light of my earlier findings in favour of the plaintiffs, to have been incurred prudently and reasonably.

[125] To the extent that Harwood has succeeded or may succeed on other issues in the next phase of the trial so as to be entitled to recover some of its own costs, it may do so against the plaintiffs directly. The fact that this action is now advanced as a representative claim would not immunise the plaintiffs from a costs award in those circumstances. Costs of that kind, that can be claimed directly against one or more individual tenants, are expressly excluded from the definition of operating expenses.

[126] In either case, Harwood had no right under the lease to charge its legal fees in this and related litigation to the tenants as operating expenses. I therefore find Harwood to be in breach of the lease for having done so.

iii. Harwood's Defences

[127] I have found that Harwood is or has been in breach of the lease in the following ways:

a) failing to ensure that municipal fire safety standards were met in 2021 and 2023;

b) failing, in each year since 2017, to deliver audited reports of the actual operating expenses in a timely manner or at all; and

c) improperly charging its own legal fees in this and related litigation to the tenants as operating expenses.

[128] Harwood raises two additional defences to those claims.

[129] The first defence is that the plaintiffs' claims in this action are barred by the doctrine of *res judicata* because they withdrew their earlier complaints before the CRT. That defence was not seriously pressed by Harwood's counsel at the hearing before me, although it has not been expressly abandoned. It should have been. The defence could only have been available to Harwood had there been an adjudication of those claims on the merits before the CRT: *Khan v. Shore*, 2015 BCSC 830. That clearly did not occur.

[130] The second defence raised is that the plaintiffs' claims are barred because of the expiry of the two-year limitation period under the *Limitation Act*, S.B.C. 2012, c. 13, to the extent they were aware of those claims prior to March 25, 2018. Harwood argues that because the plaintiffs have effectively acknowledged in the notice of application, and Mr. Gray's supporting affidavit, that those breaches began in May 2017, they must be deemed to have discovered them by that date. At the very least, Harwood argues, the Court cannot make the necessary findings of fact to resolve its limitation defence on this application.

[131] The plaintiffs respond that the claim alleging Harwood's failure to adhere to fire safety standards was brought in time. The claims relating to the audit reports and

legal fees flow, in the plaintiffs' submission, from obligations that are continuing. Those claims are therefore not time-barred, it is argued, for the reasons set out in *Singh v. Minhas*, 2023 BCCA 7.

[132] I agree with the plaintiffs that their claim alleging a breach in relation to the fire safety standards was brought in time. I have found that those breaches occurred in 2021 and 2023. This action was commenced on July 24, 2023, less than two years later, except for the events that occurred in May 2021. Mr. Gray has deposed that the plaintiffs only learned of those events through documents received on July 25, 2022 from the City of Vancouver, after one of the tenants made a request for those documents under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165. Harwood has not challenged that evidence. It follows that the plaintiffs discovered the relevant facts less than two years before advancing that claim.

[133] However, I disagree with the plaintiffs' submission that the other breaches that I have found (namely, the failure to deliver audited reports and the wrongful charging of legal fees as operating expenses) are continuing, like the one at issue in *Pickering Square Inc. v. Trillium College Inc*., 2016 ONCA 179, the case cited by Groberman JA in *Singh*.

[134] In *Pickering Square*, Huscroft J.A., writing for the Court, described three different kinds of breach, as follows:

> [21] For purposes of s. 5(1) of the *Limitations Act,* a claim is discovered once a plaintiff knew or ought to have known of sufficient facts on which to base the claim. Under s. 5(2), a claimant is presumed to discover his or her claim on the day the act or omission giving rise to the claim occurs, unless the contrary is proven.
>
> [22] In order to determine the discovery date for the claim, the nature of the breach must first be determined.
>
> [23] Breaches of contract commonly involve a failure to perform a single obligation due at a specific time. This sort of breach is sometimes called a "once-and-for-all" breach: it occurs once and ordinarily gives rise to a claim from the date of the breach – the date performance of the obligation was due. Trillium's breach of s. 16.08 does not fall into this category because its obligation to operate its business was ongoing rather than single and time-specific.

> [24] A second form of breach of contract involves a failure to perform an obligation scheduled to be performed periodically – for example, a requirement to make quarterly deliveries or payments. A failure to perform any such obligation ordinarily gives rise to a breach and a claim as from the date of each individual breach: see e.g. *Smith v. Empire Life Insurance Co. (1996), 1996 CanLII 8134 (ON SC)*, 19 CCEL (2d) 171 (Ont. Gen. Div.), leave to appeal refused, [1996] O.J. No. 3113 (C.A.). That is not this case.
>
> [25] As the motion judge found, this case falls into a third category of breach: breach of a continuing obligation under a contract. Trillium breached its covenant to operate its business continuously – "at all times" – for the duration of the lease.

[135] Harwood's failure to deliver audited reports and its wrongful charging of legal expenses both fall into the second, rather than the third, category described by Huscroft J.A. That is because they are separate breaches that recur each year when the expenses for the coming year are estimated and the actual expenses for the previous year are reconciled with the previous year's estimate.

[136] The plaintiffs' claim arising from Harwood's failure to provide an audited report of actual operating expenses was first raised in Mr. Gray's complaint of May 23, 2018 before the CRT. The parties did not address in their submissions whether that proceeding had the effect of interrupting the running of the limitation period. If it did, then there is no limitation issue. If it did not, then the claim was first brought when the plaintiffs filed their small claims actions in the fall of 2020. The plaintiffs could only have become aware of that first failure to provide an audited report (for 2017) in early 2018. It is therefore possible that the two-year limitation period applicable to that first breach may have expired in early 2020, before all limitation periods were suspended pursuant to pandemic relief legislation on March 25, 2020. Should the plaintiffs still wish to pursue this claim in relation to that first year, the limitation issue would have to be addressed with more focused evidence and submissions in phase 2. However, the claim pertaining to the same failure in all subsequent years, from 2018 forward, is clearly not time-barred.

[137] The plaintiffs did not advance their present claim in relation to legal fees until they commenced this action on July 24, 2023. Their allegation in the provincial court was merely that the amount of legal fees charged in 2019 differed from the earlier

budget estimate and could not be verified without an audit. It follows that part of the plaintiffs' claim for damages in this category may likewise be time-barred. The extent to which the plaintiffs' recoverable damages may be limited in that manner is best left to phase 2 of the trial, when those damages are to be assessed. It is sufficient for present purposes to conclude, as I do, that the claim is clearly not time-barred as it relates to legal fees charged as operating expenses after July 24, 2021.

iv. What remedies are appropriately granted at this stage?

[138] To remedy Harwood's breaches of contract, the plaintiffs seek, in phase 1, declarations of breach and an order for specific performance to compel Harwood to comply with the lease prospectively. For those claims that I have found to be meritorious, the plaintiffs seek to have the damages quantified in phase 2.

[139] I am satisfied that the plaintiffs are presently entitled to a declaration that Harwood has breached the lease in the manner set out in para. 127. I am also satisfied that the plaintiffs are presently entitled to an order requiring Harwood to comply with the lease by:

a) producing audited reports of the actual operating expenses for each year from 2018 forward, to the extent it has not already done so; and

b) ceasing from henceforward to charge its legal fees in this and related litigation to the tenants as operating expenses.

IV. Summary and Conclusion

[140] With phase 1 of the trial now complete, I am granting the plaintiffs the declarations and orders set out in the previous paragraph. I am deferring to phase 2 the following matters:

a) the damages to be awarded to remedy the breaches of contract I have found;

b) the question of punitive damages;

c) the fate of the Abuse of Process Action; and

d) the question of costs, including special costs.

[141] In view of my conclusion that Harwood had no right under the lease to charge its legal fees in this and related litigation to the tenants as operating expenses, it is unnecessary to consider the “Entitlement Questions” identified by Loo J. that would otherwise have been addressed in phase 1.

“Milman J.”