IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ming Sun Benevolent Society v. Philippine Women Centre of B.C.,* 2025 BCSC 1073

Date: 20250611
Docket: S136642
Registry: Vancouver

Between:

Ming Sun Benevolent Society

Plaintiff

And

Philippine Women Centre of B.C. and Wan Yao Chow and Double Happiness Holdings (2007) Ltd.

Defendants

Corrected Judgment: The text of the judgment was corrected at paras. 4, 207 and 242 on June 16, 2025.

Before: The Honourable Justice Hoffman

Reasons for Judgment

Counsel for the Plaintiff:	E.L. Hansen E. Chen
Counsel for the Defendants:	A. Soliman F. Mukasa, Articled Student
Place and Date of Trial:	Vancouver, B.C. September 23–27, 2024 October 1–4, 7–11, and 15–18, 2024 January 20–22, 24, and 27–30, 2025
Place and Date of Judgment:	Vancouver, B.C. June 11, 2025

Table of Contents

Overview

[1] This matter concerns two adjacent buildings located in the Downtown Eastside of Vancouver: 439 and 451 Powell Street. In July 2013, the brick veneer of the eastern exterior wall of 439 Powell failed and collapsed onto its neighbor, 451 Powell, causing substantial structural damage. I will refer to this event throughout this judgment as the collapse. Both buildings were ultimately demolished: 451 Powell shortly after the collapse in 2013 and 439 Powell 10 years later in 2023.

[2] This litigation involves a claim and a counterclaim, both of which are grounded in trespass, nuisance, and negligence. I must determine the extent to which the parties' conduct impacted the collapse and, if liability is established, the appropriate quantum of damages to be awarded.

[3] The cause of the collapse is the heart of this case. As set out below, my findings of fact regarding this issue make it unnecessary for me to consider the evidence and arguments as to many of the issues addressed in the parties' submissions.

[4] For the reasons that follow, I find that the plaintiff has established its claim in nuisance and negligence and award it damages in the amount of $1,537,740.26 less 15% for contributory negligence. The plaintiff's claim in trespass is dismissed. The findings of fact regarding the cause of the collapse dispose of the defendants' counterclaim, which is dismissed.

Background Facts

Ming Sun and 439 Powell

[5] The plaintiff, Ming Sun Benevolent Society ("Ming Sun"), is a non-profit society founded by members of the Wong family who immigrated to Canada from Kaiping, China almost 100 years ago. It is the owner of 439 Powell which bears three addresses on Powell Street: 437, 439, and 441 Powell Street. For ease of reference, I will refer to this property as 439 Powell.

[6] Powell Street in Vancouver runs east to west. Until the collapse in 2013, 439 Powell was comprised of two separate wood-framed structures: a north structure facing a back alley and a south structure facing Powell Street. Both structures were two-storeys tall.

[7] The south structure was built in or around the 1890s. It had a flat roof flanked by masonry parapets that extended up beyond the roof line on both the east and west walls. The parapets ran the full length of the east and west walls.

[8] 439 Powell had eight single room occupancy residences and two storefronts facing Powell Street. Ming Sun rented the residences to low-income tenants and the storefronts to artists and craftspeople. 439 Powell also had a meeting room and an office which Ming Sun used for its own purposes.

[9] The north structure was narrower than the south structure and had doors on its east and west sides. On the east side, the door led to a small, covered portico. This entrance could be accessed from the alley behind 439 Powell.

[10] Until at least July 24, 2013, the wood walls of the south structure were faced with masonry in the nature of a brick façade, which the parties referred to throughout trial as a "brick veneer". For consistency, I will do the same.

[11] In 1992 or 1993, the east wall of 439 Powell was repaired. The repair included replacing the top, exposed section of the brick veneer and the masonry

parapet. The repaired masonry was protected by a cap flashing for weather proofing at the top of the masonry wall.

[12] Many years after the collapse, on November 21, 2022, the City of Vancouver (the "City") ordered 439 Powell demolished. The demolition was carried out on February 28, 2023.

[13] The court heard evidence from two current directors of Ming Sun, Xi Yuan Huang and Kent Wong, as well as Richard Wong, a member of Ming Sun who became more heavily involved with Ming Sun in the aftermath of the collapse to identify Ming Sun's options for re-opening 439 Powell. Ming Sun also called Raymond Leung, the owner of a neighbouring business.

The Defendants and 451 Powell

[14] The Philippine Women's Centre of B.C. ("PWC") is a defendant and a plaintiff by counterclaim. It was an incorporated society but was administratively dissolved on April 20, 2015. The parties agree that, at all material times until sometime in 2013, PWC owned 451 Powell. However, a dispute remains as to the date at which PWC ceased to own 451 Powell.

[15] 451 Powell is 439 Powell's eastern neighbor, sitting directly adjacent to the east wall of 439 Powell.

[16] Double Happiness Holdings (2007) Ltd. ("Double Happiness") is a defendant and a plaintiff by counterclaim. It owned other properties on the same block of Powell Street, namely 421 and 427/429 Powell Street. This property is 439 Powell's western neighbor and sits directly adjacent to the west wall of 439 Powell. I will refer to it as the Double Happiness Building.

[17] The defendant Wan Yao Chow is a 50% owner of the shares of Double Happiness.

[18] Prior to its City-mandated demolition in June 2013, 451 Powell was comprised of two structures: a north structure facing a back alley and a south structure facing Powell Street. The north structure was a narrow one-storey plus basement wood-framed building. The south structure was a two-storey building with an attic.

[19] The south structures of 439 Powell and 451 Powell were separated by a gap of approximately two inches. Importantly, the south structure of 451 Powell had a pitched roof, the bottom edge of which intersected with the brick veneer of 439 Powell a few feet below the top of the parapet. A drawing of this intersection is included at Appendix 1 of this judgment. Since 439 Powell was taller than 451 Powell, a section of the brick veneer on the east wall of 439 Powell was exposed above the roof of 451 Powell. It is the portion of the brick veneer on 439 Powell below the roof line of 451 Powell that is at issue in this case.

[20] Due to the small gap between the buildings, 451 Powell did not have traditional gutters to catch and drain rainwater flowing down the western slope of its roof. Rather, a valley flashing—a “V” shaped metal covering—was installed to cover the gap between the buildings. It was attached to both buildings and functioned to collect and direct the water away from the structure of the buildings. In doing so, it sheltered the west wall of 451 Powell and the east wall of 439 Powell from the elements. I will refer to the two-inch gap between the two buildings underneath the valley flashing as the sheltered space.

[21] The space between the north structures of 439 Powell and 451 Powell was substantially wider, approximately four to six feet where they meet the alley.

[22] On behalf of the defendants, the court heard evidence from Wan Yao Chow and Cecilia Sayo, a former director of PWC.

The Collapse

[23] The parties agree that in or around July 2013, part of the brick veneer on the east wall of 439 Powell detached and collapsed onto part of the west wall of 451 Powell. It is also agreed that part of the west wall on the first floor of the south structure of the 451 Powell Building collapsed inwards.

[24] The exact date of the collapse was not the subject of any agreement between the parties.

[25] On July 24, 2013, Mr. Chow called the City to report the collapse. In response, various City officials and emergency services attended the scene.

[26] That same day, the City ordered that 451 Powell be demolished. A City official posted a notice on 439 Powell stating that the building was unsafe to

occupy. The residential and commercial tenants of 439 Powell were evacuated.

[27] On July 25, 2013, the City ordered Ming Sun to cease occupying 439 Powell and to retain an engineer to conduct a structural assessment of the repairs necessary for safe occupancy. The order indicated that someone had reported that the building had "structural instabilities including, but not limited to, bulging of the brick wall on the west side of the building and decay of the wood framing."

[28] Ming Sun retained Read Jones Christoffersen ("RJC") to complete the structural assessment. On August 27, 2013, RJC delivered a report setting out the results of its structural assessment and its recommendations for repair. This report was not tendered as an opinion report but was admitted into evidence as a business record.

[29] The author of the report observed no overt signs of structural distress in the main structural members or in the foundation. The author also observed that the brick veneer on the west and south walls appeared poorly tied back to the structure, which was consistent with what was observed on the east wall. The interior finishes were reported to be in good condition.

[30] The report stated that the brick veneer on the south wall appeared unstable and recommended that it be completely removed prior to occupancy. Other repairs were recommended that could be undertaken after the building was re-occupied. These repairs included removing the remaining brick veneer on the west wall and chimney, replacing any water-damaged framing elements, and installing new cladding. The report estimated the cost of these repairs at $585,000. It also estimated that it would cost $2,600,000 to replace the south structure.

[31] Over the remaining months of 2013, further to orders by the City, the rest of the brick veneer on 439 Powell was removed in several stages. The work was completed by the City because Ming Sun did not have the funds to carry it out.

[32] In November 2022, a fire broke out in the north structure of 439 Powell, causing serious damage to the building. As a result, the City issued a demolition order for 439 Powell, which was executed in February 2023.

[33] As of the date of trial, both 439 and 451 Powell are bare plots of land.

The Sale of 451 Powell

[34] Prior to the collapse, PWC and Mr. Chow entered into a contract of purchase and sale dated June 25, 2013, whereby PWC agreed to sell 451 Powell to Mr. Chow for a purchase price of $510,000 (the "Sale Contract"). The Sale Contract contemplated a $30,000 deposit, as well as a closing, possession and adjustment date of July 19, 2013.

[35] The Sale Contract was subsequently amended. On July 4, 2013, the closing, possession and adjustment date was pushed to September 5, 2013.

[36] On August 28, 2013, the closing, possession and adjustment date was pushed again to September 19, 2013.

[37] Further amendments on September 17, 2013, reduced the purchase price to $372,000 and obligated Mr. Chow to pay the costs associated with the demolition of 451 Powell. Paragraphs 4–5 of the addendum provided as follows:

> 4. the Vendor [PWC] acknowledges that the Purchaser [Mr. Chow] is entitled to damages equivalent to the cost of rebuilding a similar structure on the lands. In lieu of receiving a reduction of the purchase price equivalent to the cost of rebuilding, the Vendor agrees as follows:
>
> a. The Vendor shall assign its insurance and right to receive payment to the Purchaser and also the rights to sue the insurance company for bad faith/negligence or any other related cause of action for failure to pay to Vendor. Any net recovery after legal fees and costs by the Purchaser shall be shared 2/3 to the Vendor and 1/3 to the Purchaser;
>
> b. The next door neighbour that caused the collapse of the building legally owes the Vendor the cost of rebuilding the building. The Vendor agrees to an assignment to sue the next door neighbour and any assignment of all settlement proceeds or Court awards to the Purchaser. The Vendor will execute any further necessary documents for such an assignment and any net recovery after legal fees and costs shall be shared 2/3 to the Vendor and 1/3 to the Purchaser.
>
> …
>
> 5. … The Vendor will sign all further documents necessary to affect the assignment referred herein.

[38] On September 19, 2013, the transfer of title in 451 Powell from PWC to Double Happiness, as Mr. Chow's assignee, was submitted to the Land Title Office. The application for transfer was submitted on September 30, 2013.

[39] On September 5, 2013, Ming Sun filed a notice of civil claim naming PWC as a defendant and alleging that the damage to 439 Powell was due to PWC's negligence, nuisance, and trespass.

[40] On September 25, 2013, the Chair of PWC, Cora Cadiz, executed a letter of consent providing PWC's board of directors' authorization for Mr. Chow or his assignee to defend the civil claim.

Events After the Collapse

[41] Many of the events that took place surrounding the collapse, particularly as they relate to each parties' claim for damages, are in dispute.

[42] Witnesses for Ming Sun testified that after the City ordered 439 Powell closed and evacuated the tenants, Ming Sun no longer had any income coming in. Richard Wong testified that Ming Sun had approximately $55,000 in savings at the time of the collapse.

[43] There is evidence that Ming Sun made an insurance claim to cover the cost of the damage to 439 Powell caused by the collapse. However, this claim was denied because the collapse was not covered by Ming Sun's insurance policy. While Ming Sun received some assistance from the community for fencing and other measures to secure 439 Powell following the collapse, it did not fundraise for the money necessary to repair the building.

[44] Ming Sun initially took measures to protect the buildings at 439 Powell, such as hiring a security guard, boarding up windows and doors, and clearing garbage and debris. Unfortunately, within two to three months, Ming Sun had depleted its cash reserves. It ran community fundraisers to buy materials to secure and protect the property.

[45] When Ming Sun was no longer able to cover these costs, the City stepped in to maintain the fencing around the property. It also stepped in to remove the brick veneer and the resulting debris from 439 Powell. It invoiced Ming Sun for each of these costs.

[46] While 439 Powell sat vacant, it was seriously vandalized on several occasions despite efforts to secure it. As a result, the interior walls were damaged, electrical wiring was severed, copper piping was stolen and the toilets were

smashed. A flood occurred due to a burst pipe in the sprinkler system, causing serious flood damage to both floors. Richard Wong testified that Ming Sun had no funds to make the necessary repairs because it had no income.

[47] Richard Wong testified that Ming Sun relied on the RJC structural assessment report and particularly its finding that the structure of the building remained sound. However, Ming Sun did not have the funds on hand to undertake the $585,000 of repairs required to re-open the building.

[48] As a result, Ming Sun approached the City to explore obtaining assistance to either repair or redevelop the building. Discussions took place in late 2013 and early 2014. In April 2014, the City advised that it could not offer Ming Sun any financial support to restore the building. Ming Sun subsequently shifted its focus to partnering with another organization to explore the possibility of redevelopment. Ming Sun began discussions with BC Housing, who expressed interest in redeveloping the property into social housing.

[49] In May 2015, BC Housing made a commitment to loan Ming Sun funds to pursue the redevelopment. It ultimately granted Ming Sun a $386,500 loan secured by a mortgage registered against 439 Powell (the “BC Housing Mortgage”). Richard Wong testified that this amount was to cover planning costs for the redevelopment.

[50] Ming Sun retained the services of CPA Development Consultants (“CPA”), a consulting and project management service firm, who helped establish plans to redevelop 439 Powell into 55 units of low-cost social housing, plus two commercial units. Ming Sun financed CPA’s services and other development related costs through the BC Housing Mortgage.

[51] Ming Sun seriously pursued this re-development plan. In December 2018, the City approved its permit application for the development of a six-storey mixed-use building with retail at street level and housing units on the upper floors.

[52] In early April 2019, BC Housing discovered that the defendants had registered a default judgment against title for 439 Powell. The circumstances of how this default judgment was obtained are set out in the judgment of Justice Forth setting aside the default judgment: 2020 BCSC 423, upheld on appeal, 2021 BCCA 240. These circumstances are not germane to the issues before me. What is germane is the fact that BC Housing refused to advance any further funding until

the litigation with the defendants was fully resolved, even though the default judgment was set aside. Richard Wong testified that this halted all progress on the re-development project.

[53] As noted above, in November 2022, a fire broke out in the north structure of 439 Powell and caused significant structural damage to the building, burning through its roof. Richard Wong testified that the fire was caused by squatters that had broken into the building. The City subsequently issued a demolition order, and 439 Powell was demolished on February 28, 2023.

[54] There is no serious dispute between the parties that 439 Powell was never re-occupied after the tenants were evacuated on July 25, 2013, and that it remained vacant until its demolition on February 28, 2023.

Credibility and Reliability

[55] Both the plaintiff and the defendants have asked the court to either disregard or give little weight to certain testimony from witnesses because it was either unreliable or not credible, or both.

[56] Credibility and reliability are not the same. Credibility is an assessment of the truthfulness of a witness whereas reliability assesses the ability of the witness to accurately observe, recall and recount the events in question: *R. v. Plehanov*, 2019 BCCA 462 at para. 51.

[57] The frequently cited decision of *Bradshaw v. Stenner*, 2010 BCSC 1398, sets out the factors to be considered in the assessment of both reliability and credibility as follows:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.),* [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the

> probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
>
> [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

[58] I have been guided by this approach in assessing the evidence of the various witnesses in this matter.

[59] Based on my observations of the witnesses called on behalf of the plaintiff, together with my consideration of the totality of their evidence, I find that these witnesses were credible and straightforward in providing their evidence to the court. Richard Wong was the primary witness for the plaintiff. He did his best to answer the questions asked of him in a straightforward manner.

[60] I also found Ms. Sayo, called on behalf of the defendants, to be a credible and forthright witness.

[61] I cannot say the same with respect to Wan Yao Chow. Many times during his testimony, Mr. Chow stated that the passage of time made it challenging for him to recall certain details. While this is not surprising given that the events at issue took place over a decade ago, there were times when Mr. Chow utilized this qualification strategically to avoid answering questions directly or to downplay or resile from previous evidence given either during his direct evidence or at discovery. At other times during cross-examination, he provided answers that were not responsive to the questions posed. Many times after breaks, Mr. Chow returned to the stand and offered sometimes lengthy clarifications of his prior testimony. All of this causes me to conclude that Mr. Chow was not being entirely forthright but rather, at times, chose to be strategic by tailoring his evidence in his perceived best interest. Accordingly, I place less weight on the evidence of Mr. Chow.

Issues

[62] The issues before me in this case are as follows:

1. What was the factual cause of the collapse?
2. Did the defendants commit a nuisance?
3. Were the defendants negligent?
4. Did the defendants commit trespass?
5. Was the plaintiff contributorily negligent?
6. What damages, if any, are appropriate in this case?
7. Is the defendants' counterclaim made out?

Issue 1: Factual Cause of the Collapse

Legal Principles

[63] Causation in a case such as this has two aspects. First, a plaintiff must establish on a balance of probabilities that the damage was caused, as a matter of fact, by the conduct of a defendant. Second, the plaintiff must satisfy the legal test for causation, namely that the conduct of the defendant was a proximate cause of the plaintiff's loss: *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 54.

[64] Since the primary issue of fact in this case is the cause of the collapse and my conclusions on it will inform the rest of my analysis of the plaintiff's claims, I will address factual causation first.

[65] In both nuisance and negligence, the onus lies on the plaintiff to establish that the defendant caused the damage alleged. There is no distinct test for causation in nuisance: *R. v. Henderson* (2008), 292 D.L.R. (4th) 114 at paras. 16–23, 2008 CanLII 17305 (Ont. S.C.); see also Gregory S. Pun, Margaret I. Hall & Ian M. Knapp, The Law of Nuisance in Canada, 3rd ed. (Markham, ON: LexisNexis Canada, 2024) at §1.02.

[66] Except in exceptional circumstances, causation in fact is established by satisfying the "but-for" test: *Clements v. Clements*, 2012 SCC 32 at paras. 33–34. The plaintiff must prove that but for the defendant's negligent act or omission, the damage would not have occurred: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at para. 21. Scientific proof of causation is not required, as common-sense inferences from the facts may suffice: Clements at para. 38.

[67] There is no requirement for a plaintiff to establish that the defendant's negligence is the sole cause of their loss. As set out in *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 17, 1996 CanLII 183:

> … As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.
>
> [Emphasis in original].

[68] The material contribution test is used only "where it is 'impossible' for a plaintiff to prove causation on the 'but-for' test and where it is clear that the defendant breached its duty of care … in a way that exposed the plaintiff to an unreasonable risk of injury": *Clements* at para. 34; see also *Resurfice Corp.* at paras. 25–28. It only applies in situations where "but for" causation cannot be proven against any of multiple negligent defendants because each can point the finger at the other to preclude a finding of causation on a balance of probabilities: *Clements* at para. 43. It may also apply where a defendant tries to defeat "but for" causation by pointing to the hypothetical negligence of a third party that might have caused the loss: Clements at para. 45.

[69] In *Nelson (City) v. Mowat*, 2017 SCC 8 at para. 40, the Supreme Court of Canada commented on the quality of evidence sufficient to establish causation on a balance of probabilities:

> [40] … This Court said in *McDougall* (at para. 46) that "evidence must always be sufficiently clear, convincing and cogent". Those are relative, not absolute qualities. It follows that the quality of evidence necessary to meet that threshold so as to satisfy a trier of fact of a proposition on a balance of probabilities will depend upon the nature of the claim and of the evidence capable of being adduced (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 82; *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720, at para. 36). In the context of historical adverse possession claims, the quality of the supporting evidence must

> merely be “as satisfactory as could reasonably be expected, having regard to all the circumstances” (Anglin J., as he then was, in *Tweedie v. The King* (1915), 52 S.C.R. 197, at p. 220; see also Sir Arthur Wilson in *Attorney-General for British Columbia v. Canadian Pacific Railway*, [1906] A.C. 204 (P.C.), at pp. 209-10).

[70] In considering the quality of evidence sufficient to meet the burden of proof in this matter, is it necessary to remember that certain evidence is no longer available due to the demolition of 451 Powell, as well as the removal of the remaining brick veneer on 439 Powell, in 2013.

[71] Due to this gap in the evidence, I must consider whether it is appropriate to draw factual inferences on the basis of another proven fact or group of facts. In so doing, I am guided by the decision in *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2023 BCCA 70 at paras. 172–185, where the Court of Appeal provided the following guidance:

1. When deciding whether to draw an inference, a judge must rely on logic, common sense and experience, and take into account the totality of the evidence.

2. If a factual inference does not flow logically and reasonably from established facts, the inference cannot be drawn because there is no evidentiary basis for it.

3. The evidence may support more than one inference and may support a different inference from the one the court is being invited to make.

4. Where the evidence as a whole supports more than one factual inference, the trier of fact must determine whether the evidence establishes particular factual inferences on a balance of probabilities.

5. It is only in the case of inconsistency between available inferences, *i.e.*, where two inferences cannot both be true, that the trier of fact must determine which one is more probable.

6. Evidence need not conclusively prove the proposition of fact for which it is offered in order to be relevant.

7. Evidence is relevant if it can render the fact it is tendered to establish slightly more or less probable than would be the case without it.

Analysis of the Evidence

[72] The plaintiff says that, due to PWC's wrongful conduct, water from the sloped roof of 451 Powell entered the sheltered space. This wet eventually permeated the brick veneer of 439 Powell, causing it to collapse.

[73] While the defendants agree that water ingress played a role in the failure of the veneer, they deny that water from 451 Powell entered the sheltered space. In the alternative, they say that if water coming off the roof of 451 Powell did enter, it could not have moved horizontally through the brick veneer within the sheltered space. Rather, they say that this water would have fallen to the ground between the two buildings. They identify two sources of water ingress: 1) wind driven rain that entered into the exposed brick veneer above the roofline of 451 Powell, and 2) water that entered in through the top of the parapet on the eastern wall. The defendants say that this water ingress occurred solely due to the poorly maintained condition of 439 Powell.

[74] The onus is on the plaintiff to establish, on a balance of probabilities, that water draining from the roof of 451 Powell infiltrated the eastern wall of 439 Powell and that this water ingress, in turn, played a role in the collapse.

Engineering Evidence

[75] The plaintiff tendered two reports from Dr. Leslie Peer, who was qualified as an expert in structural and materials engineering as well as building science. Dr. Peer has particular expertise in the following areas:

a) design and assessment of building structures, roofing, and environmental separation;

b) assessment of structural design and the properties of wood-framed structures and secondary structures;

c) materials properties; and

d) mechanisms of failure in relation to building structural materials and building enclosure materials.

[76] Importantly, for the purposes of this case, Dr. Peer was also qualified with expertise in how moisture infiltrates and affects both building structures and materials. This has been a particular focus of his career, starting with his PhD thesis in 1990 which addressed how water is absorbed into concrete.

[77] Dr. Peer is a member of several provincial and national committees dealing with codes and professional standards development in respect to building envelopes and construction materials. In particular, he is the Chair of the Canadian Commission on Construction Materials and a member of a committee responsible for the Canadian standard that applies to the production and use of masonry in building construction.

[78] The defendants tendered two reports from Derek Smith, who was qualified as an expert in structural engineering. His areas of expertise include:

a) structural design and assessment of buildings;

b) assessment of the structural design and properties of existing wood-framed buildings and secondary structures, as well as their repairs and mechanisms of failure; and

c) moisture infiltration and its effect on building structures.

[79] Mr. Smith's current focus of work is on the design and renovation of high-end custom homes. However, he has past experience assessing damage to primary and secondary building structures (including heritage buildings) due to water ingress and specifying necessary repairs.

[80] In his testimony, Mr. Smith admitted on more than one occasion that he lacked expertise in materials engineering, particularly the impact of water on brick masonry and mortar. He also admitted that he did not have expertise in the deterioration of sealants used to seal metal flashings.

[81] Dr. Peer and Mr. Smith agreed on many matters. Most significantly, they agreed that long-term water infiltration into the eastern wall of 439 Powell contributed to the detachment of the brick veneer. The differences in their opinions relate to the most likely source of the water infiltration, as well as the extent to which wood rot compromised the overall structure of 439 Powell and contributed to

the failure of the veneer. I will consider the differing opinions of Dr. Peer and Mr. Smith below where they are relevant to the findings of fact I must make.

[82] At trial, both parties argue that the other's expert strayed into advocacy. I do not accept that either expert was tainted by bias or became an advocate.

[83] However, it was apparent that Mr. Smith lacked the requisite expertise in several matters. At times he candidly admitted his lack of expertise, but at other times he offered opinions that were plainly beyond the scope of his expertise. Given his training and expertise in materials engineering and the use of brick as a construction material, I prefer the opinions of Dr. Peer in relation to the impact of water on brick and mortar.

Construction of 439 and 451 Powell

[84] As noted above, the parties agreed that the south structure of 439 Powell was built sometime in the 1890s. Dr. Peer and Mr. Smith agreed that the south structure of 451 Powell was built after the south structure of 439 Powell was already in place. Although there was no direct evidence on this point, it can be reasonably inferred from the close proximity of the two structures that 439 Powell was constructed first. The two-inch gap separating the buildings would have presented significant difficulties for masons in erecting the brick veneer on the eastern wall of the south structure of 439 Powell had it been built second in time.

[85] The construction of the south structure of 451 Powell being so close to the south structure of 439 Powell rendered the sheltered space inaccessible. Both Dr. Peer and Mr. Smith agreed that standard building practice in such a situation is to ensure that an inaccessible space is fully enclosed to protect it from water entry.

[86] Dr. Peer opined that the near intersection of the edge of the roof of 451 Powell with the brick veneer would not be permitted under current building codes. Today, such codes mandate that buildings must discharge water to their own property. While Mr. Smith would not agree that it was unusual to build a sloped roof intersecting the adjacent building's masonry wall, he could not think of a single instance of such a construction in the several hundred jobs he had done over the course of his career.

[87] Dr. Peer's report included an aerial photo of the two buildings prior to the collapse. With reference to this photo, Dr. Peer notes that there is no drain visible

on the western slope of 451 Powell's roof. In his view, rain falling on the western slope of the roof of 451 Powell would flow down to the valley flashing, then along that flashing to the north edge of the roof where it was discharged either to the ground or sewer. Mr. Smith agreed. I find as a fact that all of the precipitation that hit the western slope of the roof of 451 Powell would flow down towards the valley flashing located at the intersection of the roof and the brick veneer.

Expert Theories about Why Brick Veneer Detached

[88] While the experts agree that long-term water ingress is the underlying cause of the collapse, they have different theories as to its specific impacts on 439 Powell.

[89] Dr. Peer opines that water ingress could have:

1) compromised the common nails that connected the brick veneer to the underlying wood structure, either by corroding them directly or by loosening their connection to the wooden wall as it became impacted by wood rot or weakened mortar bed joints;

2) caused the base plate of the eastern wall to decay, which, in turn, could have caused downward movement of the wood framing and that, in addition, the firm attachment of the 1992 repaired exposed veneer could have added building load to the older veneer below it; or

3) deteriorated the mortar in the veneer masonry bed joints, which would have allowed the bricks to rotate in place.

[90] In his direct examination, Dr. Peer clarified that, in his opinion, all three of these conditions occurred in 439 Powell and that each contributed to the detachment of the brick veneer. However, Dr. Peer was unable to conclude that any one of these causes was more likely than the others to have caused the detachment because evidence required to reach such a conclusion was removed from site shortly after the collapse, precluding his ability to study it.

[91] Mr. Smith opines that the east wall of 439 Powell sustained significant structural damage over a long period of time from wood rot due to the ongoing presence of water behind the brick veneer. He says that the wood rot caused the wall to settle as much as one and a half inches. This, in turn, resulted in the slow downward movement of the wooden frame of 439 Powell relative to the brick

veneer, creating a compressive force because the brick veneer could not move downward with the wooden frame. Eventually, increasing compressive force in the brick veneer made the veneer unstable, resulting in a buckling failure and the sudden collapse of the brick veneer.

[92] As evidence of significant wood rot and settlement, Mr. Smith points to past repairs to the base of the eastern wall where rotten studs and joists were replaced as well as deterioration within the base plate. Mr. Smith described being able to insert a key into the deteriorated wooden base plate during a site visit. There was no direct evidence before me as to when the studs and joists were replaced.

[93] Dr. Peer is of the opinion that the decay or movement of the wood joists described by Mr. Smith is not relevant to the movement of the wood frame behind the brick veneer on the east wall of the 439 Building. This is because the walls of 439 Powell were balloon-framed. This means that the wall studs bear directly on the base plate at the foundation and on separate foundations under the building. According to Dr. Peer, the decay and replacement of floor joist ends would not have affected the wall structure since they were not part of the load path of the wall structure. He also disagreed with Mr. Smith's conclusion that there was evidence of extensive crushing of the base plate that significantly reduced its capacity to bear the load of the wall studs.

Sources of Water Ingress

[94] The experts disagree on which sources of water ingress were responsible for the detachment of the brick veneer. Both opine that, prior to the 1992/1993 repair, a substantial source of water ingress was the significantly deteriorated masonry parapet on 439 Powell. Both also agree that wind-driven rainwater would have entered the east wall through the brick veneer exposed above the 451 Powell roofline. These two sources of water ingress have nothing to do with 451 Powell.

[95] Dr. Peer identifies the valley flashing as a third source of water ingress. As explained in his report, it would have been the most substantial source of water ingress compared to the other two:

> 5.01-1.b. … In my experience, level sheet metals gutters such as this one develop leaks due to failure of sealant at lap joints, and can be overtopped when loaded with leafy debris, or snow and ice. The lower roof edge of 451 was a likely source of water that entered the space between the two buildings, wetting the masonry of 439 and the wood structure of 451 or

> either side of the space. The water leakage into the space between the two buildings was sufficient to cause decay of the wood structure of 439, and likely 451, however not sufficient to cause structural collapse of either building due to more extensive material decay. The wood framing on the E wall of 439 shows signs lime streaking in MSB001670, and the masonry shows signs of extensive efflorescence such as in MSB001671, indicating that long term moisture movement was occurring into the brick veneer from the roof line, and transferring to the wood framing of 439. The wood sheathing of 439, exposed after demolition of 451, also showed signs of widespread deterioration due to rot, caused by long term wetting.
>
> …
>
> 5.6 … he flashing at the base of 451's sloped roof normally would have been replaced with each re-roofing of the 451 building. In my experience metal flashing is delivered in 10' lengths, and is joined or lapped, and sealed during installation on the site. Where it passed the bump outs in the veneer caused by the chimneys of 439, the flashing would also have been cut and joined to follow the masonry wall geometry. In my experience such metal flashings develop leaks when sealant in the joints deteriorates. This usually occurs between 5 and 15 years after installation, when the sealant loses flexibility and adhesion due to aging. The roof of 451 collects a substantial amount of water, and the water must flow over joints in the flashing on its way to draining to grade at the north end of the roof of 451. Unless it was scrupulously maintained, the flashing would, over time, have been the largest source of water entering the space between the 439 and 451 buildings. The amount of water entering the gap via the flashing would have increased if these was blockage of the drainage path due to accumulation of debris or snow that increased ponding in the valley flashing.
>
> [Emphasis added.]

[96] In direct, Dr. Peer clarified that because the valley flashing collected all of the water from the western slope of the roof of 451 Powell, it collected an enormous amount of water as compared to the other two pathways of water ingress.

[97] Dr. Peer further explained that the eastern wall of the 439 Powell after the collapse showed indications of substantial water ingress. One such indication was water staining and lime streaking on the wood wall structure. The mortar used at the time 439 Powell was constructed was a mixture of lime and cement, both of which contain calcium hydroxide, a soluble salt. Dr. Peer explained that the streaking evident on the exposed wooden structure of the east wall was the result of water moving through the masonry, picking up the salts and then depositing them in the places where the water dried.

[98] The remaining masonry on the east wall showed signs of extensive efflorescence. Dr. Peer says that this is a further indication of long-term moisture movement into the brick veneer from the 451 Powell roof line and its subsequent

transfer to the wood frame of 439 Powell. In the photos of the east wall following the collapse, there is significant amount of efflorescence on what remains of the bricks directly under the valley flashing. Above the valley flashing, there is no efflorescence and the bricks appear to be in reasonable condition.

[99] In Dr. Peer's opinion, bricks are vulnerable to water entry, both through the mortar and through the bricks themselves. Older brick, such as that used to construct the original brick veneer on 439 Powell, are more porous and, thus, more susceptible to moisture. Efflorescence can and, in fact, did appear on the surface where water entered the brick. As such, in Dr. Peer's opinion, any water that drained off the roof of 451 Powell and entered into the sheltered space could permeate the east wall of 439 Powell, causing the brick, mortar, connectors and wooden wall structure to deteriorate.

[100] It is important to note, however, that because Dr. Peer was unable to conduct a hands-on examination on the condition of the valley flashing, he is unable to definitively determine the relative contribution of each of the three sources of water ingress. That said, given the geometry of the two buildings, he opined that gaps in the valley flashing would have been the most substantial source of water ingress.

[101] In contrast, Mr. Smith maintains that the only sources of water ingress to the east wall of 439 Powell were the top of the east parapet and the exposed brick veneer above the roofline of 451 Powell. There is no mention in his primary report of the valley flashing as a possible source of water ingress. However, during cross-examination, Mr. Smith agreed that if the valley flashing developed discontinuities or leaks, water would have entered the sheltered space.

[102] In cross-examination, Mr. Smith refused to concede that blockages of snow, ice, dirt or leaves could cause water draining off the roof to flow over the top of the valley flashing and enter the wall of 439 Powell. At the same time, he resisted answering questions on this point saying that he did not know the exact dimensions of the valley flashing and that, in any event, the design of such a flashing was within the expertise of a building envelope engineer.

[103] Mr. Smith steadfastly maintains that there would be no mechanism for any water to permeate the bricks because the valley flashing protected the sheltered space from the elements, especially wind-driven rain. He opines that any moisture

entering the sheltered space would either fall to the ground or run down the face of the bricks without being absorbed.

[104] As to the ability of water entering the sheltered space to contribute to the presence of moisture in the east wall of 439 Powell, I prefer and accept the opinion evidence of Dr. Peer. I do so based on Dr. Peer's training in materials engineering and his substantial expertise dealing with the effects of water on masonry, which includes developing standards for the use of masonry in construction. Mr. Smith, as a structural engineer, admitted that he does not have expertise in mortar deterioration, the porosity of bricks, and the transfer of moisture by vapour diffusion between brick and wood. Accordingly, I do not find his insistence that there was no mechanism for water to permeate the veneer in the sheltered space persuasive.

[105] I will now consider the available evidence about the condition of the valley flashing.

1992/1993 Repair

[106] The parties agree that in 1992 or 1993, a repair was completed to replace the exposed portion of the brick veneer above the 451 Powell roofline. Documents relating to this repair were entered into evidence as business records.

[107] According to these records, in May 1992, the previous owner of 451 Powell contacted the City to report that the "top 8' portion" of the brick veneer was "leaning on my property and is also loose & shaky". The wall was inspected, and on June 25, 1992, the City sent a letter to Ming Sun advising that the brick veneer on the east wall of 439 Powell was in an "unsafe condition". It ordered Ming Sun to obtain a building permit and repair the brick veneer under the supervision of an engineer.

[108] The business records include a report from Eric Man, an engineer retained by Ming Sun, as well as repair detail drawings prepared by Mr. Man and an architect named Colin Sihoe. Mr. Man's report observed that there was a "horizontal curve detected along the length of the wall" which displaced the wall "approximately 2" from the worst spot".

[109] The report also noted that the "two chimneys above the parapet were listed in different directions." As well, "mortar joints between the bricks were so weak that bricks could be [pulled] off by hand" and that the "mortar had been reduced to sand." The erosion of the mortar joints is visible in a photo attached to the report.

Fortunately, the “badly deteriorated section was limited to the exposed section on the east side above the roof line”.

[110] The observation regarding the mortar joints is consistent with Dr. Peer’s opinion that the mortar used to construct buildings in the 1890s typically contained a high proportion of lime as a binder. According to Dr. Peer, long-term exposure to rain, a frequent event in Vancouver, dissolves the lime, leaving a weakened mortar bed that erodes the joints between bricks over time.

[111] Mr. Man’s report noted that the condition of the exposed wall was “very unstable” and that it should be removed as soon as possible. It recommended that the brick veneer be “taken down 1’0” above the neighbour’s roof line” and that “existing brick should be properly fastened to the backing wall and a new skin … should be added to provide weather protection”.

[112] The repair details prepared by Mr. Man and Mr. Sihoe are appended to my reasons as Appendices 1 and 2. These drawings each depict the intersection of the western edge of the roof of 451 Powell with the brick veneer on the eastern wall of 439 Powell.

[113] In Appendix 2, Mr. Sihoe depicts the valley flashing as installed along the edge of the roof of 451 Powell and then up the outside brick veneer of 439 Powell, creating a “V” shape. It contains a specification that the repair should “restore the existing valley flashing” and that a new counter flashing should be installed into the masonry of 439 Powell at the top edge of the valley flashing.

[114] Appendix 1 also depicts this counter flashing (labelled as “new can strip”). It specifies that the brick veneer above it should be reconstructed and that new corrugated brick ties should be used to secure the brick veneer to the existing wood structure.

[115] It is important to note that neither of the two repair details specify replacement of the brick veneer below the valley flashing.

[116] The photos included in Mr. Man’s report provide further evidence about the existence and condition of the valley flashing. Based on these photos, I find that there was a valley flashing over the sheltered space in 1992 and further, that it had deteriorated as a waterproofing mechanism prior to the 1992 repair. However, the

extent of this deterioration cannot be determined due to the poor quality of the photos.

[117] It is not clear whether the 1992 repair included repairs to the valley flashing. Applications for building permits, inspection reports and assurance documents from Mr. Man and Mr. Sihoe were entered into evidence as business records. The building permit for the repair work provided that “exterior alterations to the east wall of [the] existing lodging house building, above the adjacent building roof line” be completed to the satisfaction of the district building inspector. Specifically, the brick veneer was to be repointed or rebuilt and tied back to the wall, and the existing finishes and flash were to be repaired.

[118] Mr. Man and Mr. Sihoe each issued an assurance that they had conducted field reviews to ensure that the work performed substantially conformed with their repair details. From this, I infer that the work performed included restoration of the existing valley flashing, as noted in Appendix 2. However, what work was actually done in this respect is not in evidence before me.

[119] Dr. Peer noted in cross-examination that while the sealant on flashings requires replacement every five to15 years, the flashing itself can often be reused as long as its anti-corrosion coating remains intact. Dr. Peer testified that he would not have expected the masonry contractors repairing 439 Powell to repair the valley flashing because it was part of the roof structure of 451 Powell. Specifically, he opined that the valley flashing would have been lapped underneath the shingles of the roof of 451 Powell so that water on top of the shingles flowed into the valley flashing. Based on the repair details, Dr. Peer opined that the contractors would have replaced the counterflashing on 439 Powell because it had to be set into the new brick veneer.

[120] As noted above, Mr. Smith did not address the valley flashing as a source of water ingress in his primary report. In his responsive report, he expressed the opinion that, if the lower roof edge of 451 Powell was a likely source of water ingress, then the owners of 439 Powell would have been responsible for retaining the contractor to complete the 1992 repair. In particular, they would have been responsible for the installation of a new counter flashing below the new section of veneer as well as the restoration of the existing valley flashing.

[121] I assign this opinion little weight for two reasons. First, this statement is, in essence, a legal opinion failing outside the scope of Mr. Smith's engineering expertise. Secondly, in my view, it is based on assumptions, not supported by the evidence. In cross-examination, Mr. Smith confirmed he based this opinion on the assumption that the contractors would have had to peel the valley flashing off the brick veneer and reinstall it. However, this assumption fails to account for the fact that the scope of the repair did not include replacement of the brick veneer underneath the valley flashing. The repair detail specifies that only the brick veneer above a new counter flashing was to be rebuilt: see Appendices 1 and 2.

[122] Nevertheless, on cross-examination, Mr. Smith agreed that it is a requirement of building design to ensure that stormwater from a building is collected and drained to the edge of the property or through a proper drain. He agreed that the purpose of the valley flashing was to drain the water flowing down the roof of 451 Powell away from the east wall of 439 Powell.

[123] Based on the evidence available, particularly the assurances from the professionals overseeing the repair that it was performed to specifications and the involvement of the City in supervising the repair, it is reasonable to infer that the valley flashing would not have been left in a significantly degraded condition following the 1992 repair. I find that the valley flashing was, at the very least, restored so that it could perform its intended function: draining the water away from the east wall of 439 Powell.

[124] The documents relating to the 1992 repair provide no direct evidence regarding the condition of the sheltered brick veneer on the east wall of 439 Powell, i.e., the portion of the brick veneer below the valley flashing. However, Mr. Man's report as to the results of his investigation noted as follows:

> Further investigation indicated that the deteriorated section was probably a 4" thick veneer and was not a bearing structure. It was expanded to a 8" parapet above the roof level. The badly deteriorated section was limited to the exposed section on the east side above the roof line.
>
> [Emphasis added.]

[125] Similarly, Dr. Peer opines that the repair masons would not have installed new veneer on top of the existing veneer unless the existing veneer was in adequate condition.

[126] Based on Mr. Man's report and Dr. Peer's opinion, I infer that in 1992, the sheltered portion of the brick veneer on the east wall of 439 Powell was at least in adequate condition. Further, based on Dr. Peer and Mr. Smith's agreement on this point, I find that the 1992 repair addressed any water ingress from the top of the parapet and from wind-driven rain against the vertical face of the exposed brick veneer.

Period between 1992 and 2013

[127] Given my findings that the valley flashing was restored in the 1992 repair, I turn now to the period between that repair and the collapse in 2013, and the available evidence regarding the condition of the valley flashing.

Expert Evidence re Maintenance of Valley Flashing After the 1992 Repair

[128] Dr. Peer opines that the valley flashing should be replaced with each re-roofing of 451 Powell. Further, to remain watertight, the joints in the valley flashing would need to be scrupulously maintained, given the tendency of the sealant to degrade over time and develop leaks.

[129] Mr. Smith was initially reluctant to agree to the proposition that maintenance of the valley flashing after 1992 would have fallen under the responsibility of the owner of 451 Powell. Mr. Smith was taken to the City of Vancouver *Standards of Maintenance By-law* in cross-examination. Although he was not familiar with it, he agreed that ss. 3, 9 and 9.1 required building owners to keep roofs and flashing weather tight and free of leaks and to keep eavestroughs and down pipes in good repair and watertight. Thereafter, Mr. Smith agreed that after the 1992 repair, the owner of 451 Powell had to maintain the valley flashing so that it was watertight and free from leaks.

Lay Witnesses from Ming Sun and PWC

[130] Both parties called witnesses to give evidence as to their observations of the conditions of 439 and 451 Powell and the extent to which each was maintained.

Observations of 451 Powell

[131] Mr. Xi Yuan Huang, called as a witness for Ming Sun, was one of its ten directors in 2013. As of the time of trial, he was 88 years old and a current Ming Sun member. He gave his evidence through a Cantonese interpreter.

[132] In direct, he testified that he became a member of Ming Sun in 1996. When he joined, he was still working and did not go 439 Powell very often. Once he retired in 2001, he became a director and attended more frequently for meetings once or twice a month.

[133] Both Mr. Huang and another former 2013 director of Ming Sun, Kent Wong, testified that the Ming Sun meeting room was located at the back of the south structure of 439 Powell. According to Mr. Huang, near this meeting space there were two side exits on both the left and right sides of the building. While attending 439 Powell, he would often go out of the side door near the meeting room to smoke. From there, he could see the wall and roof of 451 Powell. Although Mr. Huang did not explicitly identify the door he exited as the east side door, this is inferred from his ability to observe 451 Powell. Photographs in evidence show that there was a side door on the east side of 439 Powell leading to a small, covered portico.

[134] Mr. Huang observed that 451 Powell looked very old and dilapidated and that its roof was covered with moss. The “roof gutters” were damaged and in some places, non-existent. Specifically, on the part of the roof immediately adjacent to 439 Powell, the gutters were almost non-existent, with only a few sections still in place.

[135] Mr. Huang also testified that the space between the 451 Building and the Ming Sun Building was approximately a foot wide and that when it was raining, water from the roof of the 451 Building would fall to the ground in that gap. In heavy rains, he could see water pouring down toward the bricks of 439 Powell.

[136] The defendants argue that Mr. Huang’s evidence that he observed broken and missing gutters on the roofline of 451 Powell is unreliable and should not be accepted. However, much of the basis for this argument rests on counsel for the defendants’ misapprehension of where Mr. Huang usually stood to smoke.

[137] In cross-examination, the defendants’ counsel put to Mr. Huang that he stood to smoke either on Powell Street in front of 439 Powell or on the west side of 439 Powell facing the Double Happiness Building. From counsel’s line of questioning, it is apparent that he misunderstood Mr. Huang’s evidence on direct and believed Mr. Huang usually smoked in a spot from which he would have had an obstructed or limited view of 451 Powell. In other words, his questions were premised on the

assumption that Mr. Huang stood on Powell Street to smoke, when Mr. Huang's evidence on direct was actually that he habitually smoked on the portico on the east side of 439 Powell, a spot which gave him the opportunity to see the gap between the buildings.

[138] Further confusion ensued from counsel's use of a picture of the front of 439 Powell to question Mr. Huang as to where he was standing. The portico on the east side of 439 Powell was not visible in this picture. Mr. Huang responded to this line of question by stating that he was standing on the right or east side of 439 Powell and that "if you go through the front, it will be on your right side near Powell Street".

[139] When Mr. Huang's testimony is examined as a whole, he maintains that there were doors on both the east and west sides of 439 Powell meeting room and that he usually went out of the door on the right (east) side to smoke. Counsel for Ming Sun clarified this in re-direct.

[140] Mr. Huang's testimony that the space between the buildings where he saw water drain off the roof of 451 Powell was about a foot wide is not consistent with other evidence adduced in this case. The parties agree that the sheltered space was approximately two inches wide. However, I find that this inconsistency does not materially undermine the reliability of Mr. Huang's evidence regarding the gutters for three reasons. First, Mr. Huang testified that he did not measure the gap, so he was estimating the distance. Secondly, he was observing the gap from the portico, and it may have been difficult to accurately estimate the width of the gap from that vantage point. Finally, his evidence relates to observations going back to 2001. As such, a lack of precision or inaccuracy in his estimate is understandable.

[141] Having assessed Mr. Huang's testimony in the context of the evidence as a whole, I find his evidence that water flowed off the roof of 451 Powell and drained into the sheltered space is reliable.

[142] During direct examination, Mr. Huang was asked what led him to believe that the 451 Powell roof gutters were damaged. He responded that he understood buildings in Canada to generally have gutters to collect rainwater into a downpipe to drain it to the ground. While this observation may arguably amount to an opinion, to the extent that it is, I am satisfied it is one that a lay person of ordinary experience is able to give.

[143] Kent Wong, another director of Ming Sun in July 2013, also testified that he observed moss on the roof of 451 Powell and that its gutters were broken. This included the gutter on the west side of the roof of 451 Powell, which was immediately adjacent to 439 Powell. He described the gutter as a broken-up strip a few inches long. Kent Wong made no observations of this broken gutter while it was raining.

[144] I find as fact that what Mr. Huang and Mr. Kent Wong observed to be broken gutters were remnants of the valley flashing meant to re-direct the water off the roof of 451 Powell and away from 439 Powell.

[145] The only witness called from PWC by the defendants was Ms. Cecilia Sayo. Ms. Sayo was the founding chair of PWC in 1990. Several PWC members got together to purchase 451 Powell in 1996. Ms. Sayo was involved with PWC from 1990 until 2013 when 451 Powell was sold, but, in 2006, she moved to Montreal and, therefore, was no longer involved in day-to-day matters.

[146] Ms. Sayo returned to Vancouver in May 2013 and stayed for a month. During this time, she attended 451 Powell to assist with cleaning it up in preparation for sale. She returned in September 2013 and participated in some meetings regarding the sale of 451 Powell.

[147] Ms. Sayo was unable to recall whether PWC did any repairs to, or replaced, the roof of the southern structure of 451 Powell. Nor could she recall any maintenance or cleaning being performed on the gutters on the southern structure.

[148] Ms. Sayo testified that PWC decided to offer its services from a different location sometime in 2009. Ms. Sayo recalled being interviewed for a news article in 2013, shortly after the collapse. The article states that 451 Powell had been closed for a number of years as it was in dire need of renovation and repair. Ms. Sayo was quoted as saying that mould began to grow in the building due to a leak in the roof. Ms. Sayo did not recall telling the reporter this specific detail but did not deny that she had done so. She also testified that she had understood from other PWC members the presence of mould was one of the reasons that PWC relocated. The defendants did not call any evidence as to whether PWC undertook any repairs to address this issue.

[149] A City of Vancouver property use inspection report in May 2010 indicates that the 451 Powell was vacant at that time. Ms. Sayo testified that the utilities were disconnected for 451 Powell for some period of time after the relocation which also suggests that the property was unoccupied.

[150] When Ms. Sayo attended in May 2013 to clean out the building, she observed that the interior west wall of 451 Powell was bulging inwards. Her estimate of the size of the bulge was a half a metre to a metre. She did not take any steps in respect of this observation.

[151] The evidence suggesting 451 Powell was vacant for a period between 2009 and 2013 is consistent with the evidence of Raymond Leung. Mr. Leung was called by the plaintiff to testify about observations he made of 451 Powell in the time leading up to the collapse.

[152] Mr. Leung is the President of Hon's Wong Ton House ("Hon's"), a producer of Asian food products. Hon's has a factory on Alexander Street, which runs east to west and is located one block north of Powell Street in Vancouver. The Hon's factory backs onto the alley between Alexander Street and Powell Street and sits directly across the alley from the back of 451 Powell.

[153] Mr. Leung acquired Hon's in 2011. As the business was new, he often came into work on the weekends. Most of Hon's commerce occurred in the alley because that was where its inventory and supplies are loaded and unloaded.

[154] Mr. Leung testified that from the time he acquired the business, he observed no activity in 451 Powell and had the impression that the building was vacant. Some of Hon's employees parked behind 451 Powell because the building appeared to be unoccupied.

[155] It is also relevant to consider the evidence of Mr. Chow, who inspected 451 Powell before entering into the contract to purchase the building. He testified on direct that he observed the building to be in good condition. He observed only that the northern structure of 451 Powell had a "little leaking on the roof" and a "bit of mould" on the inside. Mr. Chow testified that there was also a plastic cover on the roof of the north structure. This cover, which looks like plastic sheeting, is depicted in some of the photos in evidence.

[156] Mr. Chow maintains that he only intended to repair the roof of the northern structure. During cross-examination, he was confronted with evidence from his discovery in which he stated he intended to replace the roof of both the north and south structures. Mr. Chow attempted to minimize this admission by saying that at the time he gave his evidence in October 2022, it was based on his own opinion and that he may have received a different opinion had he consulted with a roofer. As discussed above, this is one of many examples where Mr. Chow sought to resile from or qualify evidence he had previously given when he perceived it was in his interest to do so.

[157] Mr. Chow testified that he had replaced the roof on the Double Happiness Building on more than one occasion. This evidence causes me to doubt that Mr. Chow would be content to take over the property for the purposes of his food manufacturing business without replacing the entire roof. Given my findings regarding Mr. Chow's credibility, I do not accept his evidence that he only intended to repair the northern structure's roof. In any event, although Mr. Chow gave evidence that he inspected 451 Powell in connection with his plan to purchase it, there is no evidence that he went on the roof or inspected the valley flashing between the two buildings.

[158] Mr. Chow agreed that according to the contract of purchase and sale, he was in the building on June 18, 2013, to conduct an inspection. Mr. Chow testified that a few days after entering into the agreement to purchase 451 Powell on June 25, 2013, he asked representatives of PWC for keys to the building so that he could go in and do some measurements. He testified that this was the first time that he noticed any bulging in the western wall. This does not accord with the evidence of Ms. Sayo, who noticed a bulge in this wall in May 2013. Accordingly, I do not accept Mr. Chow's evidence that there was no bulging in the west wall of 451 Powell when he first inspected the building in June 2013.

[159] Based on all the evidence, I find that:

a) Mr. Chow intended to repair the roof of both the north and south structures of 451 Powell once he purchased the property;

b) 451 Powell was unoccupied for a significant period of time prior to the collapse;

c) PWC did not repair or maintain the roof of the south structure of 451 Powell from at least 1996—when the building was acquired by PWC—until the collapse in 2013; and

d) no repairs were made to the valley flashing, which was attached to the brick veneer on the east wall of 439 Powell and the western edge of the roof of 451 Powell, between 1996 and the collapse.

Evidence of State of Repair of 439 Powell

[160] Mr. Kent Wong and Mr. Huang gave evidence about several repairs to aspects of 439 Powell in the period leading up to July 2013. This included repairs necessitated by fire damage in 1999 and the early 2000s, replacement of the main floor flooring in 2009, replacement of wood siding on the north and east exterior walls of the northern structure with vinyl and repairs to some bricks on the north wall of the south structure.

[161] Due to its status as a single room occupancy rental, 439 Powell was subject to regular inspections. The records of those inspections consistently show that the building was being maintained in satisfactory condition.

[162] After the collapse, various engineers—including Mr. Smith and other engineers from Dr. Peer's engineering firm—attended the site and made observations about the brick veneer on the exterior walls of 439 Powell which were not involved in the collapse. Dr. Peer summarizes these observations as follows in his report:

> The Rockingham report… and RJC's site observations of the other veneer walls at 439 indicate that they were in poor condition with out of plane displacement visible…The west wall showed bulging out of plane which has been a precursor to collapse of veneers on several other buildings in Vancouver in my experience. The bulging occurs when the connectors providing later restraint to the veneer masonry have failed or corroded, allowing the wall to deflect out of plane. Excessive eccentricity in a veneer structure is a cause of instability which allows dramatic collapse to occur.

[163] While the brick veneer on the other exterior walls of the south structure of 439 Powell showed signs of displacement, all three remained in place after the collapse.

Impact of Alleged Construction Work in 451 Powell Prior to the Collapse

[164] The plaintiff alleged in the pleadings that their damages were, in part, caused by the negligence of PWC by altering or removing structural components of 451 Powell or permitting same to occur.

[165] Mr. Leung was familiar with the defendant Mr. Chow. Mr. Leung testified that on July 13, 2013, he witnessed several men enter the back of 451 Powell. On July 17, 2013, he had a discussion with Mr. Chow about the fact that Hon's employees were parking behind 451 Powell. Mr. Leung told Mr. Chow that he had tried unsuccessfully to contact PWC to arrange to lease the space for parking. Mr. Chow told Mr. Leung that he had purchased 451 Powell.

[166] On July 22, 2013, Mr. Leung saw Mr. Chow by the back fence of 451 Powell. He also heard hammering noises coming from 451 Powell, which sounded "as if you were taking down a wall or hammering into a wall". He did not see what was being done to produce these sounds.

[167] Mr. Chow denied that he carried out any construction work inside 451 Powell in the days before the collapse.

[168] There is insufficient evidence for me to conclude that there was any construction work done inside 451 Powell in July 2013, let alone whether it played any role in the collapse.

Conclusion on the Cause of the Collapse

[169] I find that the plaintiff has proven on a balance of probabilities that the brick veneer detached as a result of damage caused by water ingress. I accept the opinion of Dr. Peer that this water ingress caused the connectors attaching the veneer to the wooden wall structure to corrode and pull out of the weakened mortar. It further caused the downward movement of the wooden framing due to decay at the base plate at the bottom of the eastern wall. The water also deteriorated the mortar in the veneer masonry bed joints which allowed the bricks to rotate in place.

[170] I reject the evidence of Mr. Smith that the decay and replacement of the floor joists of 439 Powell at some unknown point in the past played a significant role in the downward movement of the wooden wall structure. I accept the evidence of Dr. Peer that this could not occur in a balloon-framed structure. Based on the

photographs in evidence and Dr. Peer's opinion, I also find that there was sufficient capacity remaining in the base plate to bear the load of the wall studs.

[171] Many of the defendants' arguments on causation point to other causes for the collapse. However, it must be remembered that there is no onus on the plaintiff to establish that the water ingress from the roof of 451 Powell was the sole cause of the collapse.

[172] I am satisfied on a balance of probabilities that the brick veneer would not have detached but for water entering between the buildings through either discontinuities and leaks in the valley flashing or overflow of the valley flashing due to blockages of snow, ice or debris. I find that water ingress occurred because PWC failed to adequately maintain the valley flashing.

[173] Some of the water damage to the east wall likely occurred prior to the 1992 repair. This early damage was likely caused by water ingress from degraded flashing on the eastern parapet and through the weathered and degraded exposed brick veneer above the 451 Powell roofline. However, it is not possible to determine what portion of the damage was caused by these two sources.

[174] Given the comparatively large amount of water that would have been collected on the western slope of the roof of 451 Powell, I find that the amount of water entering through the parapet and exposed brick veneer was substantially less than the amount that entered through the valley flashing.

[175] In any event, both these sources of water ingress were eliminated by the 1992 repair. At that time, the brick veneer below the 451 Powell roof line was in reasonable condition. Accordingly, I find that water entering the sheltered space through the valley flashing after 1992 played a greater role in the damage which led to the collapse. Water would not have been able to enter this way had PWC properly maintained the valley flashing.

Issue 2: Nuisance

Legal Principles

[176] There is no dispute between the parties as to the test to establish nuisance. To succeed, the plaintiff must establish that the defendants substantially and

unreasonably interfered with its use or enjoyment of land: *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 [*Antrim*] at para. 19.

[177] In *Allison v. Radtke*, 2014 BCSC 1832 at paras. 160–162, Justice Ker helpfully reviewed the salient passages from *Antrim.* A substantial interference with property is one that is beyond trivial or trifling. Only interferences that substantially alter the nature of the plaintiff's property itself, or which interfere to a significant extent with the actual use being made of the property, are sufficient to ground a claim in nuisance: *Antrim* at para. 22; *St. Pierre v. Ontario (Minister of Transportation and Communications)*, [1987] 1. S.C.R. 906 at 915, 1987 CanLII 60.

[178] If the interference is found to be substantial, the inquiry turns to whether it was also unreasonable in all the circumstances. As Justice Cromwell stated in *Antrim* at para. 25, the focus is on whether "the interference is such that it would be unreasonable all of the circumstances to require the claimant to suffer it without compensation". Traditionally, the court will assess unreasonableness by balancing the gravity of the harm against the utility, or purpose, of the defendant's conduct in all the circumstances. Factors that the court may consider in this analysis include the severity of the interference, the character of the neighborhood, the sensitivity of the plaintiff, and the frequency and duration of the interference: *Antrim* at para. 26.

[179] Where the interference has caused significant and permanent harm, such as actual physical damage, the reasonableness analysis may be very brief: *Antrim* at para. 50, citing with approval *Royal Anne Hotel Co. v. Village of Ashcroft,* 95 D.L.R. (3d) 756 at 760, 1979 CanLII 2776 (B.C.C.A.).

[180] Conduct which causes water, snow or ice from a building or property to be misdirected towards a neighbouring property has been found to constitute nuisance: see *Allison* at paras. 163–165; *Meredith v. Peer*, 35 D.L.R 592 at 600–601, 1917 CanLII 519 (O.N.C.A.); *Friedel v. Vavrek,* 2012 ABQB 703 at para. 22; *Berry v. Trinidad Leaseholds (Canada) Ltd*., [1953] 4 D.L.R. 504 at 506, 1953 CanLII 378 (O.N.C.A.).

Analysis

[181] Regarding the first part of the test, the water flowing from the roof of 451 Powell was misdirected as a result of the deteriorated valley flashing into the sheltered space. This resulted in the substantial alteration of, and damage to, the

east wall of 439 Powell. Given that Ming Sun was required to vacate 439 Powell and has been unable to re-occupy it, there is little question that is a significant interference with the enjoyment of Ming Sun's land. The water ingress substantially altered the integrity of the eastern wall of the Ming Sun building and thereby, contributed to its collapse and rendering the Ming Sun building unusable by the plaintiff until it could be repaired to the satisfaction of the City.

[182] As to the second part of the test, there was no legitimate purpose for the flow of water onto 439 Powell. The purpose of the valley flashing was to direct water away from the sheltered space, and due to the failure of PWC to maintain the valley flashing, it did not fulfill this purpose. It was reasonable for Ming Sun to expect that water from the roof of 451 Powell would not be discharged onto 439 Powell and that the valley flashing designed to ensure the safe discharge of water was maintained by PWC. Balancing all of the circumstances of the case, I find that the defendants' interference with 439 Powell was unreasonable.

[183] The plaintiff has proven a substantial and unreasonable interference with their use and enjoyment of 439 Powell as a result of the flow of water from 451 Powell onto 438 Powell. As such, I conclude that the defendants are liable to the plaintiff in nuisance.

Issue 3: Negligence

Duty of Care

[184] The test for negligence is well known. First, the defendant must owe the plaintiff a duty of care: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3. In this case, the parties agree that adjacent property owners owe each other a duty of care with respect to the foreseeable risks of activities carried out on their property: *Mineault v. Kamloops (City),* 2017 BCSC 316 at para. 67.

Standard of Care

[185] The next step in the analysis is to determine whether the defendants breached the applicable standard of care: *Mustapha* at para. 3. In *Mineault,* a case involving water damage to a neighbouring property, the standard of care was described as follows:

> [72] The standard of care is not one of perfection. Rather, the standard of care must be one that would be expected of an ordinary, reasonable, and

> prudent person in the same circumstances. What is “reasonable” is fact specific, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which will be incurred to prevent the injury. One may also look to external indicators of reasonable conduct, such as custom, industry practice and statutory or regulatory standards: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at 28.

[186] The plaintiff points to the building and maintenance standards set out in the Vancouver *Building By-law* and the Vancouver *Standards of Maintenance By-law No. 5462* as instructive regarding of the standard of care. In *Borgfjord v. Boizard*, 2016 BCCA 317 at para. 31, the Court of Appeal held that the standard of care should take into account applicable statutory provisions.

[187] The 2007 and 2014 versions of the *Vancouver Building By-law* state at Division B:

> **9.26.4. FLASHING AT INTERSECTIONS**
>
> **9.26.4.1. Required Flashing at Intersections**
>
> (See Appendix A: A-9.26.4.1. and A-9.26.1.1.(2) in Appendix A.)
>
> **1)** Except where the omission of flashing will not adversely affect adjacent supported or supporting *constructions*, flashing shall be installed at junctions between roofs and
>
> a) walls that rise above the roof, and
>
> b) *guards* that are connected to the roof by more than pickets or posts.
>
> **2)** For the purpose of Sentence (1), roofs shall include platforms that effectively serve as roofs with respect to the accumulation or drainage of precipitation.
>
> …
>
> **9.26.4.4. Intersection of Shingle Roofs and Masonry**
>
> **1)** The intersection of shingle roofs and masonry walls or chimneys shall be protected with flashing.
>
> **2)** Counter flashing required in Sentence (1) shall be embedded not less than 25 mm in the masonry and shall extend not less than 150 mm down the masonry and lap the lower flashing not less than 100 mm.
>
> **3)** Flashing along the slopes of a roof described in Sentence (1) shall be stepped so that there is not less than a 75 mm head lap in both the lower flashing and counter flashing.
>
> **4)** Where the roof described in Sentence (1) slopes upwards from the masonry, the flashing shall extend up the roof slope to a point equal in height to the flashing on the masonry, but not less than 1.5 times the shingle exposure.

See City of Vancouver, repealed by-law No. 10908, *Vancouver Building By-law* (1 April 2014), s. 9.26.4; City of Vancouver, repealed by-law No. 9419, *Vancouver Building By-law* (30 January 2007).

[188] The same provisions appear in the 2006 and 2012 BC Building Code.

[189] The Vancouver *Standards of Maintenance By-law No. 5462* was originally enacted in 1981. The following provisions have been in force since that time and currently provide that the owner of a building shall be responsible for the following maintenance:

> 3. APPLICATION
>
> 3.1 The provisions of this By-law apply to all land and all buildings in the City, and, unless otherwise specified, the owner of said land and/or buildings shall be responsible for carrying out the work or having the work carried out in accordance with the requirements of this By-law.
>
> …
>
> 9. ROOFING
>
> 9.1 (1) The roof, including the flashing, shall be kept weather-tight and free from leaks.
>
> (2) Where a rain water collector system is not provided, roof drainage shall be provided in such a manner so as not to create a concentrated flow of water which may penetrate the building or structure, or spill in an uncontrolled manner upon sidewalks, driveways, stairways or landings.
>
> (3) Eavestroughs and downpipes shall be kept:
>
> (a) in good repair,
>
> (b) in good working order, and
>
> (c) water-tight and free from leaks.
>
> (4) Roofs shall be kept free from:
>
> (a) loose or unsecured objects and materials, and
>
> (b) unused sign structures or antennae.

[190] Having considered these legislative provisions as well as the expert engineering opinions in this matter, I am satisfied that the standard of care expected of an adjacent property owner in the same circumstances required PWC to install mechanisms to ensure that the rainwater draining off its sloped roof did not create deleterious flows onto a neighbouring property, but rather was discharged from the roof on to its own property into a sewer or other rainwater collecting device. The standard of care also required this mechanism to be periodically

inspected and adequately maintained so that it remained free of significant leaks and accumulated debris. When repairs were no longer sufficient to allow it to drain water safely, the standard of care required this mechanism to be replaced.

[191] Given my findings that PWC undertook no roof repairs or maintenance on the south structure of 451 Powell, nor any repairs to the valley flashing, I find that PWC breached the standard of care.

Damage

[192] The third step is for the plaintiff to establish that it suffered damage: *Mustapha* at para. 3. I am satisfied that the plaintiff has established, on a balance of probabilities, that it sustained loss as a result of the collapse. The plaintiff adduced both documentary and *viva voce* evidence that it suffered physical loss, in the form of the collapse and the subsequent deterioration and ultimate demolition of 439 Powell, as well as associated pecuniary loss.

Causation

[193] The final step in the analysis is causation: *Mustapha* at para. 3. I have already concluded that PWC's conduct was a cause-in-fact of the plaintiff's loss under the "but for" test. I must now determine whether this breach was a legal cause of the damages suffered by the plaintiff or whether the damage is too remote to warrant recovery: *Mustapha* at para. 11. The test is whether the actual injury suffered was the reasonably foreseeable result of the breach of the defendant's duty: *Nelson (City)* at para. 96. As the Supreme Court of Canada stated in *Mustapha*:

> [12] The remoteness inquiry asks whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable" (Linden and Feldthusen, at p. 360). Since *The Wagon Mound (No. 1)*, the principle has been that "it is the foresight of the reasonable man which alone can determine responsibility" (*Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.*, [1961] A.C. 388 (P.C.), at p. 424).
>
> [13] … The degree of probability that would satisfy the reasonable foreseeability requirement was described in *The Wagon Mound (No. 2)* as a "real risk", i.e. "one which would occur to the mind of a reasonable man in the position of the defendan[t] . . . and which he would not brush aside as far-fetched" (*Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] A.C. 617 (P.C.), at p. 643).

[194] In *Borgfjord* at para. 57, the Court of Appeal emphasized that it is not necessary for a plaintiff to show that the precise injury or the full extent of the injury that occurred was reasonably foreseeable. Rather, it is only necessary to establish that the type or kind of injury that occurred was reasonably foreseeable.

[195] The damage caused to the brick veneer by the long-term water ingress into the sheltered space was directly related to the failure of PWC to maintain and replace the valley flashing. The defendants maintain that it was not reasonably foreseeable that this would cause the collapse of the brick veneer. I cannot accept this argument. Given the unusual geometry of 451 Powell's sloped roof and its intersection with the eastern wall of 439 Powell, as well as the close proximity of the buildings, it was foreseeable that allowing a substantial volume of water to enter the sheltered space through discontinuities in the valley flashing would cause damage and deterioration to the brick veneer. It was foreseeable that continued deterioration over time would cause the brick veneer to detach.

Conclusion

[196] The plaintiff has established all four of the essential elements of negligence on a balance of probabilities. I conclude that PWC was negligent in failing to ensure that water draining off its roof drained onto its own property. In particular, it was negligent for failing to maintain, and later replace, the valley flashing as it was reasonably required to do. This failure caused the collapse and the plaintiff's subsequent loss, all of which was reasonably foreseeable.

Issue 4: Trespass

[197] The plaintiff also submits that the water ingress from the valley flashing constitutes a trespass on their property. However, counsel conceded in final submissions that nuisance provides the more natural framing for the plaintiff's claim.

[198] In *Allison,* Justice Ker described the distinction between nuisance and trespass as follows:

> [171] The jurisprudence which discusses the distinction between nuisance and trespass is instructive with respect to the validity of the Plaintiffs' trespass claim. In *Plaunt v. Renfrew Power Generation Inc*., 2011 ONSC 4087, R. Smith J. reviewed this jurisprudence, a portion of which is particularly helpful:

> [52] In *Smith v. Inco Ltd.*, 2010 ONSC 3790, (trial decision of original case of *Pearson v. Inco Limited* (2005), 78 O.R. (3d) 641, Henderson J. adopted the following quote setting out the difference between trespass and nuisance from R.V.F. Heuston & R.A. Buckley, *Salmond and Heuston on the Law of Torts*, 21sted., (London: Sweet & Maxwell, 1996) at page 44.
>
> > It is a trespass, and therefore actionable per se, to directly place material objects upon another's land; it is not a trespass, but at the most a nuisance or other wrong actionable only on proof of damage, to do an act which consequentially results in the entry of such objects. To throw stones upon one's neighbour's premises is the wrong of trespass; to allow stones from a ruinous chimney to fall upon those premises is the wrong of nuisance.
>
> [53] In The Law of Torts, 9th ed., John G. Fleming (Sydney: LBC Information Services, 1998), at page 48, the author states that:
>
> > Trespass may be committed not only by an entry in person, but equally by propelling an object or a third person onto the plaintiff's land. Indeed, most cases of trespass involving actual damage deal with situations where there has been no personal entry but the defendant has initiated a force which directly causes rubbish, stones or other projectiles to be cast on or over another's property. Here again, the old distinction between direct and indirect invasion looms large. The discharge of water may be trespass or case according to whether it is immediately poured upon or only ultimately flows onto the plaintiff's property, as being first discharged on somebody else's land and later carried down to the plaintiff's. In many American blasting cases it has been held that damage from flying rocks is trespass, but from vibration or concussion at most nuisance.

[199] In *Allison*, Justice Ker found the requirement for a direct invasion lacking in that case. Water entered the plaintiff's property because of a drainage structure and a deposit of fill on the defendant's property. As the water was first discharged onto the defendant's property before it entered the plaintiff's property, Justice Ker found that there was an indirect invasion.

[200] In *Peter Ballantyne Cree Nation v. Canada (Attorney General)*, 2016 SKCA 124, the Court reviewed previous cases where the intrusion was not sufficiently direct to constitute trespass:

> [133] These elements that the interference must be direct, intentional and physical are significant. For example, if time and weathering caused a fence to marginally lean over a boundary line, there is no direct intrusion: see *Mann*. Relatedly, an explosion off the plaintiff's property that causes damage to his or her property by the resulting vibration is not a physical intrusion nor is it sufficiently direct to constitute a trespass: see *Philips v California Standard Co.* (1960), 1960 CanLII 525 (AB KB), 31 WWR 331 (Alta SC). In the classic case of *Fletcher v Rylands* (1865), 159 ER 737 at 792, it was found that the building of a reservoir on one's own land but having an escape through an old shaft and damaging a neighbour's property was not sufficiently direct to be trespassing.

[201] In this case, the evidence shows that the water in issue was precipitation that hit the western slope of the roof of 451 Powell, made its way through deficiencies in the valley flashing—which worsened over time—and finally entered the east wall of 439 Powell. This is not a sufficiently direct discharge to constitute trespass.

[202] Accordingly, I dismiss the claim in trespass.

Issue 5: Contributory Negligence

[203] In reliance on s. 1(1) of the *Negligence Act,* R.S.B.C. 1996, c. 333, the defendants argue that if they are liable to Ming Sun, Ming Sun was contributorily negligent and should bear 99% of the fault.

[204] In their amended response to the civil claim, the defendants plead particulars of negligence on the part of Ming Sun which they say caused or contributed to the harm to 451 Powell. Paragraph 13, Part III alleges:

> The Defendants say the damage to 451 Powell was caused or contributed to by the negligence of the Plaintiff, particulars of which include failing to make any adequate provision for upkeep of [439] Powell:
>
> (a) exposing the neighbours of [439] Powell to risk of damage or injury of which the Plaintiff ought to have known or knew;
>
> (b) altering or removing structural components of [439] Powell;
>
> (c) failing to maintain [439] Powell properly;
>
> (d) failing to take remedial action after becoming aware of the encroachment by [439] Powell onto 451 Powell;
>
> (e) failing to warn the owners of 451 Powell that [439] Powell was encroaching upon it.

[205] The Court of Appeal in *Waterway Houseboats Ltd. v. British Columbia*, 2020 BCCA 378, outlined the principles of contributory negligence as follows:

[372] It is often said that contributory negligence differs in that it does not depend on a duty of care to others: *Bow Valley* at para. 76. This means that the plaintiff need not owe a duty of care to the defendant, but only to themselves to take reasonable care for their own safety: *Bradley v. Bath*, 2010 BCCA 10 at para. 27 [*Bradley*].

[373] As was stated by this Court in *Wormald v. Chiarot*, 2016 BCCA 415 [*Wormald*]:

> [14] The analysis for contributory negligence involves two considerations: (1) whether the plaintiff failed to take reasonable care in her own interests; and (2) if so, whether that failure was causally connected to the loss she sustained: *Enviro West Inc. v. Copper Mountain Mining Corporation*, 2012 BCCA 23 at para. 37.

[374] The standard of care is one of reasonableness, not perfection: *Fullowka* at para. 80. It is not so onerous as to require the plaintiff to avoid a risk that she would not reasonably have expected in the circumstances: *Maddex v. Sigouin*, 2014 BCCA 213 at para. 26, leave to appeal ref'd [2014] S.C.C.A. No. 360.

[375] As in negligence *simpliciter,* the causation element requires that the plaintiff's breach of the standard of care was both (i) a factual cause of their loss (the "but for" test); and (ii) a legal cause of their loss (the proximity and reasonably foreseeability tests): *Ackley v. Audette*, 2017 BCCA 283 at para. 24 [*Ackley*]. The defendant bears the burden of proving each of the elements of contributory negligence on a balance of probabilities: *British Columbia Electric Railway Co. v. Dunphy*, (1919) 59 S.C.R. 263 at 268; and *Vedan v. Stevens*, 2011 BCCA 386 at para. 10 [*Vedan*].

[376] Turning to the apportionment of liability, s. 1 of the Negligence Act provides for an apportionment of damages between the plaintiff and defendants where there is contributory negligence, "in proportion to the degree to which each person was at fault". The degree to which each party was at fault must be ascertained and expressed as a percentage, and the plaintiff has the right to recover from each defendant the percentage of their loss that corresponds to that party's degree of fault: Negligence Act, ss. 2(b), (c). In practice, this means that the plaintiff's right to recover damages is reduced in proportion to the degree to which their losses were caused by their own negligence.

[377] As Lambert J.A. observed in *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219 (C.A.) [*Cempel*]:

> [18] I believe the trial judge's choice of words and the syntax of the last two sentences indicate that the reason that the plaintiff was required to pay 75% of her own loss was that she was "primarily the author of her own misfortune". I consider that the trial judge reached his conclusion on apportionment by deciding that the apportionment should be based on an assessment of relative degrees of causation as between the plaintiff as an active causative force at the moment of the injury and the defendant as a passive causative force at the moment of the injury.
>
> [19] I think that such an approach to apportionment is wrong in law. The *Negligence Act* requires that the apportionment must be made on the basis of "*the degree* to which each person was *at fault*". It does not say that the apportionment should be on the

> > basis of the degree to which each person's fault *caused* the damage. So we are not assessing degrees of causation, we are assessing degrees of fault. In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances.
>
> See also *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 38 [*Aberdeen*].
>
> [Italic emphasis in *Cempel*; underline emphasis added in *Waterway Houseboats Ltd.*]

[206] The defendants' argument that the plaintiff should be found to be 99% at fault appears to be premised on an assessment of degrees of causation, rather on the extent to which the plaintiff's conduct fell short of the standard of care. This is contrary to the principles laid out in *Waterway Houseboats Ltd.*

[207] In their submissions at trial, the defendants raise two grounds on which Ming Sun should be found to be contributorily at fault. First, the defendants say that the plaintiff had a duty to ensure that the repairs to the wooden structure were done properly to avoid the collapse of the building and that the rotting base plate should have been replaced. As part of this first argument, the defendants also say that the plaintiff had a duty to either replace the tiebacks for the brick veneer in the sheltered space or to ensure that the right tiebacks were used. Second, the defendants argue that in doing the 1992 repairs, Ming Sun had a duty to ensure that the restoration of both the counter flashing and the valley flashing was done properly.

[208] I regard both these arguments as falling within the pleading that Ming Sun failed to properly maintain 439 Powell.

[209] In addressing these arguments, the first step is to ascertain whether the plaintiff failed to take reasonable care for its own interests. With respect to the first argument, it is important to consider that the construction of 451 Powell rendered the east wall of 439 Powell inaccessible and the valley flashing was intended to render the space between the buildings weathertight.

[210] As discussed above, with respect to the joist repairs of an unknown date, I prefer Dr. Peer's evidence that these repairs would not have affected the wall structure. I have also accepted Dr. Peer's evidence that the base plate was not so deteriorated as to be unable to bear the load of the wall studs. As such, I find that these alleged omissions are not a factual cause of the plaintiff's loss.

[211] With respect to the alleged omission to replace the tiebacks, my finding that at the time of the 1992 repair, there was nothing in the condition of the brick veneer in the sheltered space to alert anyone to the fact that the tiebacks were inadequate disposes of this argument. As discussed above, Dr. Peer was of the opinion that the masons conducting the 1992 repair would not have installed new brick veneer on top of unstable veneer. Further, it would be unreasonable to expect Ming Sun to have any concerns about inadequate connectors in a space that was supposed to be weathertight and, thus, minimizing the risk of water ingress and associated deterioration of the brick veneer.

[212] I turn now to the second argument that Ming Sun had a duty to ensure that the valley flashing was properly installed as part of the 1992 repair and that it did not fail within “a few years.” I have found that when it was restored, the valley flashing would not have been put back in a deteriorated condition. To the extent that Ming Sun had any duty to restore the valley flashing as part of the repair, the evidence is that it was done properly.

[213] However, this repair occurred some 21 years prior to the collapse. Dr. Peer’s evidence is that the valley flashing would have had to be scrupulously maintained to ensure that it remained free of leaks given that sealant breaks down 5 to 15 years after installation. As set out above, the valley flashing was part of the roof structure of 451 Powell. It was PWC’s duty to carry out this maintenance and it failed to do so.

[214] The question to be answered is whether Ming Sun failed to take reasonable care in respect of its own interest in ensuring that the condition of the valley flashing did not pose a risk to 439 Powell, particularly in light of the fact that the valley flashing was attached to both buildings and that is purpose was to protect 439 Powell from water ingress. The evidence of Mr. Huang and Mr. Kent Wong establishes that the directors of Ming Sun were aware that the valley flashing had deteriorated. Mr. Huang observed that water was flowing through it and onto the bricks of 439 Powell. It was reasonably foreseeable that water entering the sheltered space could cause damage to 439 Powell. I find that Ming Sun failed to take reasonable steps to address the ingress of water through the valley flashing by either contacting PWC and asking it to fix the valley flashing, or by taking matters into its own hands to ensure that the valley flashing was not a source of water ingress.

[215] In assessing the Ming Sun's degree of contributory fault, I take into account that the valley flashing was part of the roof structure of the 451 Powell and that its installation was required due to the geometry of 451 Powell's roof. Accordingly, the obligation for ongoing maintenance of the valley flashing fell to PWC. In terms of relative blameworthiness, Ming Sun's failure to take steps to address the observed water ingress is substantially less than that of PWC. Accordingly, I assess the contributory fault of Ming Sun at 15%. The damages discussed in the next section are to be reduced accordingly.

Issue 6: Damages

The Plaintiff's Alleged Losses

[216] Ming Sun claims a total of $1,590,942.83 in damages. This includes $536,270.67 for loss of rental income due to its inability to rent out the eight residential units and the ground floor studio spaces between July 24, 2013 (when 439 Powell was declared unsafe to occupy) and the date of trial.

[217] Ming Sun also claims the cost of efforts made to secure and preserve the property following the collapse. Since 439 Powell was unoccupied, it was the target of vandalism and squatting. The installation of fences and other security measures were required to deter this activity. A total of $39,961.10 is sought to recover these expenses.

[218] Damages are sought to cover the cost of the City ordered structural assessment of 439 Powell following the collapse and the demolition of 451 Powell, as well as for the removal of bricks from 439 Powell as ordered by the City. These costs amount to $32,616.71.

[219] At first, Ming Sun made efforts to try to effect repairs to 439 Powell so that it could be reopened. It incurred costs of $23,304.92 in doing so, which it seeks to recover. Eventually, Ming Sun shifted its focus to redevelop, in collaboration with BC Housing, 439 Powell into 55 units of social housing plus two commercial units. It seeks to recover various professional fees and disbursements arising from these efforts, as well as the costs of obtaining a development permit, in the total amount of $309,721.43.

[220] Finally, when the City demolished 439 Powell, it invoiced Ming Sun for $649,068.00. Ming Sun seeks to recover these costs.

[221] The defendants take the position that the categories of damages connected to the closure of 439 Powell, such as lost rent, are not recoverable. It says that it was not foreseeable that damage to a portion of the east wall of 439 Powell would lead the City to close the building on the basis that it was structurally unsound, given that the south and west walls were not directly damaged in the collapse.

Legal Framework for the Assessment of Damages

As a starting point, causation as an element of a finding of liability must be distinguished from the assessment of losses flowing from the tortious conduct. This distinction was explained by the Court in *Blackwater v. Plint*, 2005 SCC 58 as follows:

> [78] It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*. Mr. Barney's submissions that injury from traumas other than the sexual assault should not be excluded amount to the contention that once a tortious act has been found to be a material cause of injury, the defendant becomes liable for all damages complained of after, whether or not the defendant was responsible for those damages.
>
> [Emphasis added.]

[222] Both parties rely on the British Columbia Court of Appeal decision in *Nan v. Black Pine Manufacturing Ltd.* (1991), 80 D.L.R. (4th) 153, 1991 CanLII 1144 (B.C.C.A.), as setting out the governing principles for the assessment of damages arising from the loss of, or damage to, property in a tort case. The Court reaffirmed that damages should put the plaintiff in the same position as they would have occupied had the tort not occurred and must be reasonable to both the plaintiff and the defendant: *Nan* at para. 20. By operation of these principles, in most cases involving the tortious loss of or damage to property, replacement costs will be the starting point for the assessment of damages. Whether or not deductions for betterment or pre-loss depreciation should be made depends on the facts of the case: *Nan* at para. 21.

[223] The onus to prove the value of any deduction based on betterment lies with the party seeking the deduction: *Kramer v. Ballantyne-Gaska*, 2025 ONCA 1 at para. 42.

[224] The Ontario Court of Appeal in *James Street Hardware and Furniture Co. v. Spizziri* (1987), 62 O.R. (2d) 385 at 401, 1987 CanLII 4172 (C.A.) held that there are two approaches to the measure of damages for torts affecting land: (a) the amount by which the damage has diminished the value of the land, or (b) the cost of replacement or repair. The determination of the applicable approach depends upon “the reasonableness of the plaintiff's desire to reinstate the property; this will be judged in part by the advantages to him of reinstatement in relation to the extra cost to the defendant in having to pay damages for reinstatement”: *James Street* at 401.

[225] The plaintiffs submit that the appropriate damage award in a nuisance claim, as in a negligence action, is for damages that are a reasonably foreseeable consequence of the tortious act. However, the authors of *The Law of Nuisance in Canada*, 3rd ed., have pointed out that the role of foreseeability in damages for nuisance is not clearly delineated in Canadian jurisprudence: Pun, Hall & Knapp at §1.02.

[226] An award of damages is an assessment, based on all of the evidence available, rather that a precise mathematical calculation: *Sott v. PDF Training Inc. et al*, 2004 BCSC 1646 at para. 207, aff’d 2008 BCCA 35.

[227] A plaintiff who takes reasonable steps to mitigate loss and incurs expense in doing so is entitled to recover those costs as damages: *McMorran's Cordova Bay Ltd. v. Harman & Co*. (1979), 106 D.L.R. (3d) 495 at 499, 1979 CanLII 767 (B.C.C.A.).

Findings Regarding the Chain of Causation for Damages

[228] The defendants submit that Ming Sun has an obligation to prove what portion of the damage to 439 Powell is directly attributable to the collapse. As noted above, they further submit that many of the categories of damages claimed are too remote and unforeseeable. I reject these arguments on the basis that they are inconsistent with the principle from *Blackwater* that the defendant’s tortious act need be only a cause of the plaintiff’s damage for the defendant to be liable for the entirety of the

damage sustained. The focus in the assessment of damages is on restoring the plaintiff to the position it would have been in had the loss not occurred.

[229] Based on the evidence, I find that the defendants' failure to maintain the valley flashing caused a chain of events which altered Ming Sun's position. Specifically, it led to the closure of 439 Powell, the evacuation of Ming Sun's tenants and with that, the loss of its most substantial source of revenue. Deprivation of this income substantially hindered Ming Sun's ability to take steps to repair the building. Further, the fact that the building remained permanently unoccupied after the collapse led to a series of vandalism events which caused further damage to the building and, ultimately, its demolition. I find that the defendants are liable to compensate Ming Sun for these losses.

[230] I find that Ming Sun had a reasonable desire to reinstate 439 Powell. This first took the form of attempting to get funding to repair and re-open it, but when these efforts failed, Ming Sun took steps to work with BC Housing to replace the building with a larger social housing project. As such, it is appropriate to compensate Ming Sun on the basis of reinstatement.

[231] I now turn to an assessment of each category of loss claimed by Ming Sun.

Loss of Rental Income

[232] I find that the loss of rental income Ming Sun sustained is compensable in the amount of $483,446.

[233] Ming Sun claims lost rental income from August 2013 to the date of trial in the amount of $536,270.67. This amount is based on a monthly rental income of $4,010, which was the amount Ming Sun received in July 2013. However, the rental income Ming Sun earned in 2013 fluctuated every month. Accordingly, I find that it is more reasonable to calculate the loss of rental income based on the average monthly rent it earned in 2013, which is $3,615.

Cost of Structural Assessment and Brick Removal

[234] As a result of the collapse, Ming Sun incurred the cost of retaining RJC to prepare the structural assessment ordered by the City. Ming Sun is entitled to be compensated $6,204.71 for this expense.

[235] Ming Sun paid $26,140 for the removal of the remaining brick walls and brick debris from the collapse, and for work done to secure the building. After the collapse, bricks were removed in stages from the east, west and south walls of the 439 Powell. While the bricks on the west wall were not directly damaged by the collapse, they were deemed to be unsafe by the City and were ordered removed. The RJC structural assessment concluded that the brick veneer on the west wall was “poorly tied back to the structure”, a condition which pre-dated the failure of the brick veneer on the east wall. Nevertheless, I find that because the collapse contributed to the circumstances which led the City to order the removal of the bricks on the west wall, Ming Sun is entitled to be compensated for this expense in the amount of $26,140.

Costs to Secure and Preserve the Property

[236] Based on the invoices entered into evidence for costs associated with security measures, I find that Ming Sun is entitled to be compensated in the amount of $39,585.20. I have deducted $375.90 from the total amount claimed as I was unable to locate in evidence an invoice or cheque in this amount demonstrating that it was incurred on April 1, 2019, as set out in Table 4 of Ming Sun’s final written submissions.

Re-opening Costs

[237] I find that Ming Sun reasonably incurred expenses to re-open 439 Powell. It is entitled to be compensated for this loss in the amount of $23,304.92.

Redevelopment Costs

[238] Ming Sun has limited its claim to redevelopment costs to $309,721.43, representing the amount of such costs incurred up to March 2019. This is a small fraction of the estimated $9.5 million cost to build the 55 units of social housing. I also note that this amount is less than RJC’s $585,000 estimate to repair the building. Given this, and the fact that the re-development has been halted due to the ongoing litigation, I find that issues of betterment do not arise. In any event, the defendants, who bear the onus on this issue, did not contend that this claim amounted to betterment. I award Ming Sun $309,721.43 for redevelopment costs.

Demolition Costs

[239] The City ordered 439 Powell demolished in 2013 and invoiced Ming Sun for the cost of doing so, when Ming Sun could not afford to pay. I find that Ming Sun is entitled to be compensated in the amount of $649,068 for the cost of demolishing 439 Powell.

Failure to Mitigate Not Plead by the Defendants

[240] The defendants argue that the plaintiff failed to take steps to mitigate its damages. I reject this argument because failure to mitigate was not plead in the amended response to civil claim. The law is well-established that pleading the defence expressly is required to put a plaintiff on notice that it must address the defence when making its case: *Volovsek v. Boisvenu Alter-Ego Trust #1,* 2021 BCCA 179 at para. 46.

Issue 7: The Defendants' Counterclaim

[241] The counterclaim of PWC, Double Happiness Holdings and Wan Yao Chow in negligence, nuisance and trespass is premised upon the allegation that the collapse was due solely to a lack of maintenance and repair on the part of the plaintiff. Given my findings above that the collapse would not have occurred but for water ingress from the deteriorated valley flashing which PWC had a duty to maintain, the counterclaim for damages cannot succeed and is dismissed.

Disposition

[242] PWC is liable to Ming Sun for nuisance and negligence, and PWC shall pay to Ming Sun the sum of $1,537,470.26 less 15% account for the contributory fault of Ming Sun.

Costs

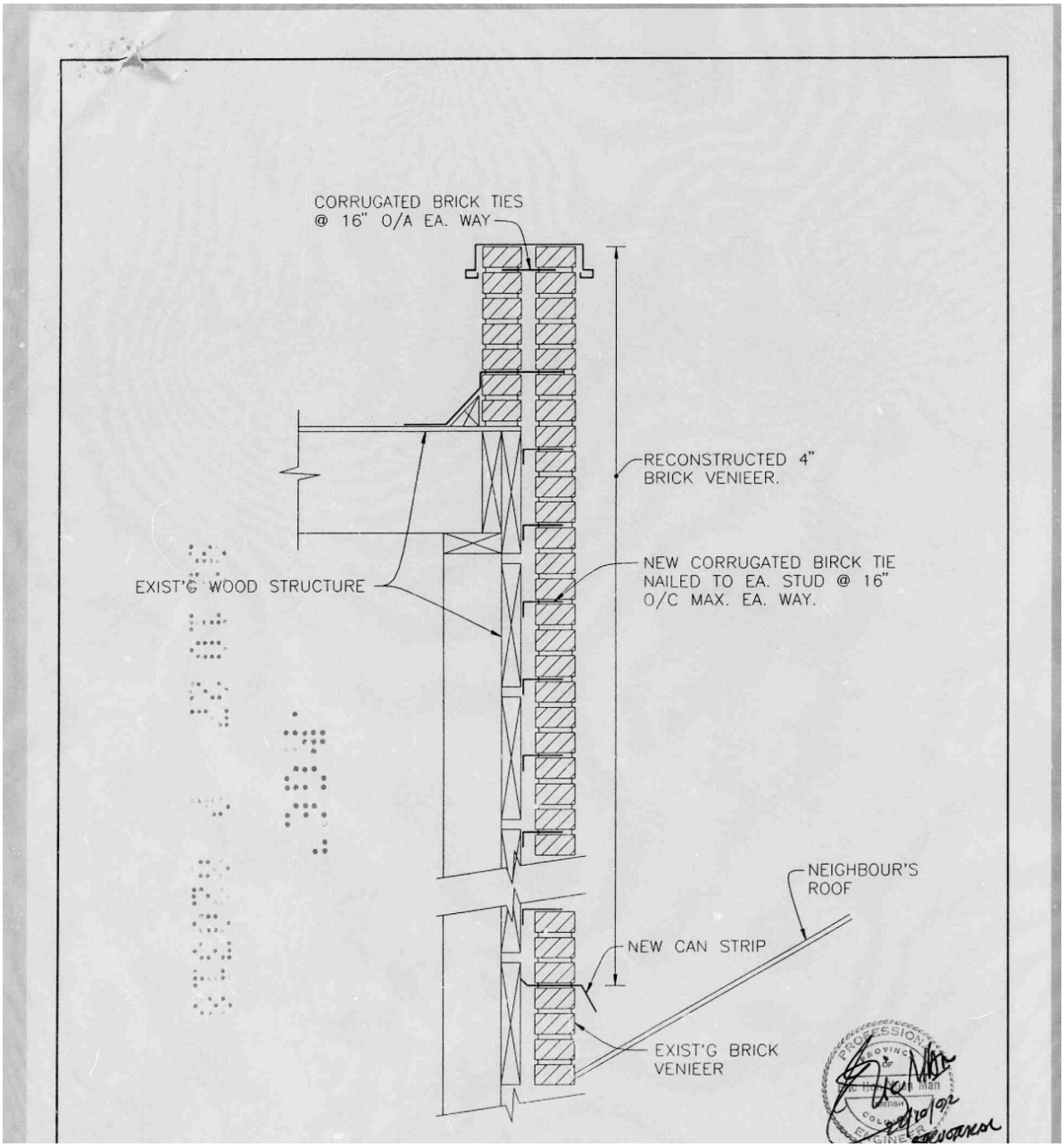
[243] The parties requested that submissions on costs be deferred until after the release of my decision in this matter. Such submissions are to be provided in writing limited to ten pages. The plaintiff's submission should be delivered by July 4, 2025, with the defendants' response to be delivered by July 18, 2025. If necessary, the plaintiff may file a reply limited to five pages by July 25, 2025.

[244] If the parties believe a further hearing to address costs is required, they may address the necessity for an oral hearing in their submissions and I will make a

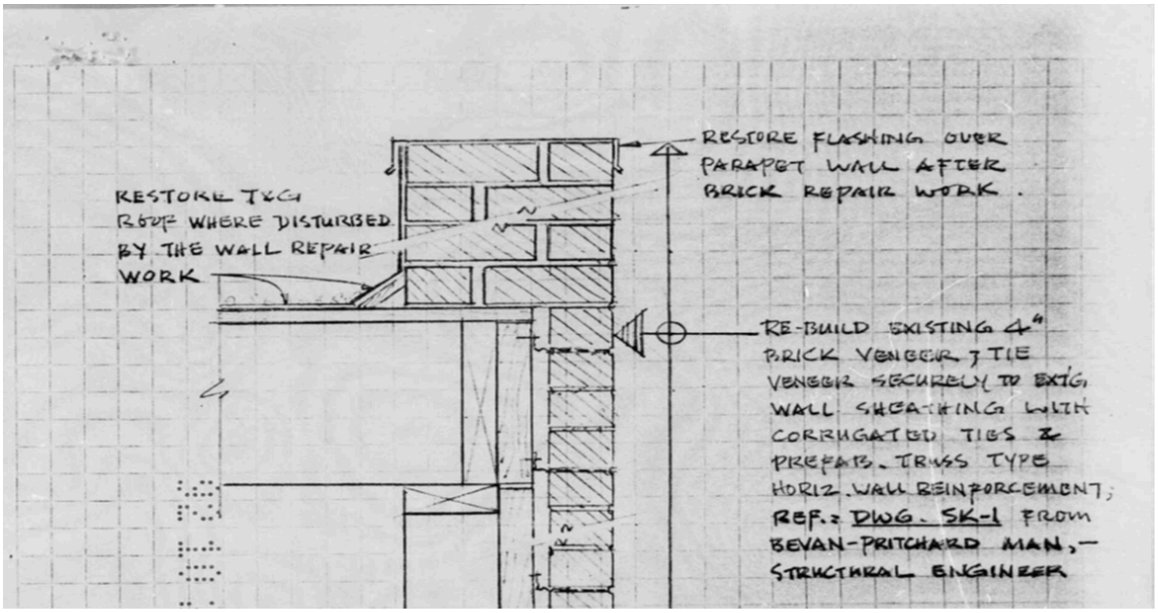
determination in that regard.

“Hoffman J.”

Appendix 1


CORRUGATED BRICK TIES
@ 16" O/A EA. WAY
RECONSTRUCTED 4"
BRICK VENEER.
NEW CORRUGATED BIRCK TIE
NAILED TO EA. STUD @ 16"
O/C MAX. EA. WAY.
EXIST'G WOOD STRUCTURE
NEIGHBOUR'S
ROOF
NEW CAN STRIP
EXIST'G BRICK
VENEER

Appendix 2


RESTORE FLASHING OVER PARAPET WALL AFTER BRICK REPAIR WORK.
RESTORE T&G ROOF WHERE DISTURBED BY THE WALL REPAIR WORK
RE-BUILD EXISTING 4" BRICK VENEER; TIE VENEER SECURELY TO EXIG. WALL SHEATHING WITH CORRUGATED TIES & PREFAB. TRUSS TYPE HORIZ. WALL REINFORCEMENT; REF.: DWG. SK-1 FROM BEVAN-PRITCHARD MAN,— STRUCTURAL ENGINEER