IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *0790482 B.C. Ltd. v. KBK No. 11 Ventures Ltd.,* 2022 BCSC 226

Date: 20220201
Docket: S1510418
Registry: Vancouver

Between:

0790482 B.C. LTD.

Plaintiff

And

KBK No. 11 Ventures Ltd., 1100 Georgia Partnership, Peterson Investment (Georgia) Limited Partnership, Abbey Adelaide Holdings Inc., LJV Georgia Investments Inc. and No. 274 Cathedral Ventures Ltd.

Defendants

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Mr. Justice Walker
(via videoconference)

Oral Reasons for Judgment

Counsel for the Plaintiff:	J.K. McEwan, Q.C. E.N. Christian
Counsel for the Defendants:	S.D. Coblin D.P. Lucas
Counsel for Fenzi North America Inc.:	C. Calvert

Appearing at the oral reasons for judgment, counsel for the parties in related Vancouver actions, S1510419, S1510431, S117480 and S117461:

Counsel for the Owners, Strata Plan BCS 3165 and the Owners, Strata Plan BCS 3206:	E.N. Christian M. Hunt
Counsel for the Defendants herein and Ledcor Construction Limited, Ledcor Properties Inc., LJV Georgia Investments LP, Peterson Investment (Georgia) Inc. and Tidball Projects (2005) Ltd.:	D.P. Lucas
Counsel for IGA/AGS Joint Ventures Inc. and IGA/AGS Joint Venture Inc.:	D.H. Lehrer
Counsel for Garibaldi Glass Industries Inc.:	S.W. Abramson
Counsel for RDH Building Engineering Ltd. and RDH Building Science Inc.:	T. Rastin
Counsel for James KM Cheng Architects Inc.:	B.S. Dumanowski
Counsel for Guardian Glass LLC, Guardian Industries Corp., Guardian Glass Company:	K. Weslowski
Counsel for Dow Silicones Corporation:	D. Crimeni
Counsel for Fenzi North America Inc.:	M.G. Hearn C. Calvert
Counsel for Azon USA Inc.:	A.H. Howden-Duke
Counsel for Allstar Holdings Incorporated:	C.M. Mann
Counsel for National Home Warranty Group Inc. and Aviva Insurance Company of Canada:	M. Mehrabi
Counsel for Intertek Testing Services NA Ltd.:	E.P. Guevara
Counsel for Rowan Williams Davies & Irwin Inc.:	S. Coyle
Counsel for Honeywell UOP and Honeywell International Inc.:	M.D. Adlem
Counsel for Vitrum Industries Ltd.:	C. Manning

Counsel for XL Insurance Company:	A. Epstein
Place and Dates of Hearing:	Vancouver, B.C. January 4-7, 2022
Place and Date of Judgment:	Vancouver, B.C. February 1, 2022

Table of Contents

Introduction

[1] These reasons concern the plaintiff's further application to certify this action as a class action, and follow up on those I issued on September 3, 2021 ("September Reasons"). My September Reasons are indexed at 2021 BCSC 1761.

[2] The plaintiff filed its original notice of application seeking, amongst other relief, such as amendments to its notice of civil claim to add new parties, certification in April 2021; it was heard in June and July 2021.

[3] The key portions of my September Reasons which concern the plaintiff's original certification application are found at paras. 7, 40, 64–78, 90–102, 155–174, and 178.

[4] The plaintiff alleges that all of the windows (called insulated glass units or "IGUs") which form part of the curtain wall exterior of the Shangri-La Hotel building in Vancouver ("Building") are defective.

[5] The Building is a high-end, multi-use glazed tower, consisting of three air space parcels: the Shangri-La Hotel itself which occupies floors 1–15; live-work strata units on certain portions of floors 5 and 6 and on floors 16–43; and residential strata units on floors 44–62. The common property of the live-work units is owned by the Owners, Strata Plan 3165 ("SP 3165"), and for the residential units, the Owners, Strata Plan 3206 ("SP 3206") owns the common property.

[6] The Building is composed of a curtain-wall system consisting of pre-fabricated panels constructed as distinct four-sided insulated glass units ("IGUs") which are said to be integral to the proper functioning of the Building and separate the exterior and interior environments. IGUs include inner and outer glass (which are called "lites") separated by a metal spacer bar. The outer and inner lites have different structural attributes. The outer lite is heat-strengthened glass while the inner lite is tempered glass. The inner lite is twice as stiff as the outer lite and unlike the outer lite, it is supposed to break into small pieces when shattered. Both glass lites are sealed to the spacer using two types of sealant which are meant to provide an air-

and vapour-tight cavity between the glass panes. A chemical known as a "desiccant", designed to absorb moisture in the air between the two lites, is contained inside of the spacer bar. The curtain-wall system, including the IGUs, is common property.

[7] The plaintiff is a numbered company who took an assignment of a contract of purchase and sale from 1077 Holdings Ltd. for a strata lot in the Building.

[8] The defendants comprise the legal owner of the land, KBK No. 11 Ventures Ltd., the developer, 1100 Georgia Partnership (a general partnership), and the latter's four partners, Peterson Investment (Georgia) Limited Partnership, Abbey Adelaide Holdings Inc., LJV Georgia Investments Inc., and No. 274 Cathedral Ventures Ltd. The defendants are parties in related actions (defined below).

[9] The history of this litigation and four related actions (VA S1510431, VA S1510419, VA S117480, and VA S117461) are thoroughly canvassed in the September Reasons. For convenience, I will refer to those actions collectively as the "Related Actions". In the September Reasons, I referred to the defendants in this action as the "developer defendants" and I will do the same in these reasons for continuity and ease of reference.

[10] In two of the four Related Actions, SP 3165 and SP 3206 have sued multiple defendants, including the developer defendants, grounding their claims in breach of contract and negligence. The action brought by SP 3165 is VA S1510431 and the action brought by SP 3206 is VA S1510419. All of the parties refer to those two actions collectively as the "IGU Actions".

[11] The Related Actions are to be tried at the same time. The trial is scheduled to commence on September 28, 2022 and estimated to take approximately 130 days.

[12] At the heart of the IGU Actions is the strata corporations' assertion of systemic dangerous defects in the IGUs which require repair or replacement. The strata corporations claim in the Related Actions that the systemic defects, resulting from negligent design, manufacture, assembly, and installation, are manifesting in a

number of inner and outer lites fogging, leaking water, spontaneously breaking, cracking, and/or failing which have caused the IGUs and Building to be unsafe and hazardous. The strata corporations allege that the systemic dangerous defects pose a substantial risk of physical danger, including to the health and safety of any person in the vicinity of the Building. The plaintiff advances the same allegations in this proceeding concerning systemic defects.

[13] The claims made by SP 3165 and SP 3206 for the cost of repair or replacement are grounded on *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 and *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 (see September Reasons at para. 6).

[14] The defendants in the IGU Actions, which include the developer defendants, maintain that SP 3165 and SP 3206 lack standing to advance their other pleaded claims for individual losses suffered by unit owners and occupiers. According to those defendants, SP 3165 and SP 3206 can only succeed if they can prove defects to the common property, i.e., the IGUs, that are dangerous to persons or property requiring immediate repair or replacement, and in such event, recovery is limited to the cost of repair or replacement.

[15] Two potential consequences (at least) flow from this defence. First, if the strata corporations prove only non-dangerous defects, the IGU Actions will be dismissed. Second, whether SP 3165 and SP 3206 prove dangerous or non-dangerous defects, they lack standing to pursue recovery of individual losses allegedly suffered by owners and occupants of strata units.

[16] Moreover, the developer defendants' position in this action (as it was in the original certification application) is that it is only those claimants in privity with the developer defendants who have standing to sue them for individual losses.

[17] In light of the lack of standing defence, the plaintiff now seeks to certify this action on behalf of persons who stand in privity with the developer defendants. As I said in the September Reasons at para. 172, "the purpose of this proposed class

action is to capture the claims of those putative class members who have suffered losses that they are unable to claim in the IGU Actions, particularly in light of the developer defendants' lack of standing defences."

[18] In its notice of civil claim filed in this proceeding, the plaintiff pleads that the developer defendants were at all material times engaged in the development and sale of strata units in the Building. The remedies sought by the plaintiff against the developer defendants are grounded on allegations of breach of contract and breach of implied warranty. The proposed class comprises original purchasers who entered into pre-sale contracts with one or more of the developer defendants and currently own their units and purchasers who took an assignment from an original purchaser of a pre-sale contract with the written consent of one or more of the developer defendants (but not both). The plaintiff contends that all such putative class members stand in privity with one or more of the developer defendants.

[19] In the September Reasons, I determined that the plaintiff had established that its pleading disclosed a cause of action for breach of implied warranty and breach of contract for those persons in privity with any of the developer defendants, and had thus shown a "basis in fact" for the requirement found in s. 4(1)(a) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*].

[20] I also determined that the plaintiff had adduced evidence of non-dangerous defects in the IGUs: September Reasons at para. 158.

[21] My discussion of the basis in fact requirement is found in the September Reasons at paras. 67, 77-78, 83-84, 96, 100, and 158–169, where I cited from the reasons in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 102–104; *Kirk v. Executive Flight Centre Fuel Services Ltd*., 2019 BCCA 111 (see also *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 16, 23–25; *Seidel v. Telus Communications Inc.*, 2016 BCSC 114 at para. 56; *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at paras. 13–20; *Toronto Community Housing Corporation v. Thyssenkrupp Elevator (Canada) Limited*, 2011 ONSC 4914 at paras. 102-103).

[22] To summarize from my September Reasons, the test is not merits-based. At the certification stage, the court performs a gate-keeping function. The threshold is low and falls below the balance of probabilities. An applicant need only establish a minimum evidentiary basis for a certification order. The court's role is not to determine at the certification stage whether the action is likely to succeed, and although it can consider defences, factual issues (such as those involved in limitation defences) are not considered at this point. The merits of the case are properly dealt with at trial after the evidence is weighed on the balance of probabilities: September Reasons at paras. 77-78. See also, *Seidel* at para. 56; *Finkel* at paras. 13–15; *Pro-Sys* at paras. 99–105; *Toronto Community Housing* at paras. 102-103; *Hollick* at paras. 16, 23–25; *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050 at para. 52, aff'd 2015 BCCA 252, leave to appeal ref'd [2015] S.C.C.A. No. 326; *Charmley v. Deltera Construction Limited*, 2010 ONSC 7153 at para. 11.

[23] I also agreed with the plaintiff that the proposed common questions regarding liability issues—is there a defect(s), if so, the nature and cause of the defect(s), and who is responsible—are the same issues that will be tried in the Related Actions: September Reasons at para. 157.

[24] Further, I determined that the scope of the proposed class is limited to putative class members in privity with one or more of the developer defendants who seek to recover loss based on breach of contract or breach of implied warranty separate from the claims advanced by SP 3165 and SP 3206: September Reasons at para. 155.

[25] At the previous hearing of the plaintiff's certification application, the developer defendants argued that the proposed class plaintiff and any other putative class members who took title to their units through assignments from original purchasers lacked privity (their related submission was that the plaintiff was therefore not a suitable representative plaintiff). At the same time, however, the developer defendants did not assert or ask that the plaintiff's claim be dismissed for failing to

disclose a cause of action: September Reasons at paras. 144–146. I did not decide the assignment issue given the dearth of case authority cited to me.

[26] I determined that there was insufficient evidence to establish a basis in fact that there are likely at least two or more putative class members in privity with standing to advance breach of implied warranty and breach of contract claims. I also agreed with the developer defendants and other parties opposing the application that evidence in respect of a methodology to assess damages on a class-wide basis for a proposed common issue concerning diminution in value was speculative. In the result, I adjourned the certification application to allow the plaintiff to reformulate the common issues and take such other steps necessary to attempt to satisfy the remaining requirements for certification set out in s. 4(1)(b)–(e) of the *CPA* since I was persuaded that the approach taken by Justice Blok in *Ewert v. Canada (Attorney General)*, 2016 BCSC 962 at paras. 121–124 should be taken in this case: September Reasons at paras. 166–171.

[27] The plaintiff has returned with a further notice of application (with revised proposed common issues where diminution in value is no longer proposed as a common issue) coupled with an amended notice of civil claim.

[28] The plaintiff contends that it has demonstrated a basis in fact for the remaining requirements prescribed by the *CPA* such that the action should be certified. The developer defendants continue to resist the application. The primary focus of their opposition centres on:

(a) the scope of the proposed class;

(b) inappropriate proposed common issues;

(c) absence of preferability; and

(d) what the developer defendants contend are:

(i) the plaintiff's failure to provide a methodology to assess damages for an aggregate award for the class as a whole in

respect of a proposed loss of amenity damages common issue; and

(ii) deficiencies in the proposed plan of proceeding that not only militate against certification but also mean that the plaintiff is, as a consequence, unsuitable to act as representative plaintiff for the proposed class.

[29] Before I turn to consider whether the plaintiff has met the remaining requirements of the *CPA* to warrant certification, it is important to highlight that the developer defendants' position concerning the assignment issue has changed. They have withdrawn their objection to standing insofar as it is a ground to deny certification (and inferentially, their objection to the plaintiff as a suitable representative plaintiff for the class on the basis that he took title through an assignment from an original pre-sale purchaser).

CPA

[30] Section 4(1) of the *CPA* requires that the court must certify an action as a class proceeding if the following criteria are met and there is no other reason to refuse to make such an order:

(a) the pleading discloses a cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise common issues, whether or not those issues predominate over issues affecting only individual class members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and

(e) there is a representative plaintiff who (i) would fairly and adequately represent the interests of the class, (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and (iii) does not have, on

> the common issues, an interest that conflicts with the interests of the other class members.

[31] The *CPA* is remedial, procedural legislation that should be interpreted liberally to give effect to its objects. The statute sets out very flexible procedures and provides the court with broad discretion to ensure that justice is done to all parties: *Endean v. Canadian Red Cross Society*, [1997] 148 D.L.R. (4th) 158 at para. 58 (B.C.S.C.), rev'd on other grounds [1998], 157 D.L.R. (4th) 465 (B.C.C.A.). In *Hollick*, the Court made it clear that class proceedings statutes are to be construed generously in respect of its objects of judicial economy, access to justice, and behaviour modification:

> [15] … First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.... In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.
>
> [Emphasis added]

[32] As the Court of Appeal explained in *Finkel*, the focus of the inquiry at the certification stage is procedural and concerns the form of the action, not its merits:

> [19] If the pleadings disclose a cause of action, the plaintiff must go on to demonstrate some basis in fact for each remaining s. 4(1) requirement. This involves the presentation of evidence, as contemplated by s. 5(1) of the *Class Proceedings Act*: *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 at para. 25. However, the focus of the inquiry is procedural; it concerns the appropriate form of the action, not its merits. The question is whether there is some basis in fact which establishes, to the requisite degree, an identifiable class, common issues, procedural preferability and a suitable representative plaintiff: *Microsoft* at paras. 99-100.
>
> [20] In *Microsoft*, the defendant argued that the plaintiff must lead evidence to show the case meets the certification requirements on a balance of probabilities, but the court rejected this proposition. In doing so, Justice Rothstein noted the "some basis in fact" standard does not require the court to weigh and resolve conflicting facts and evidence. That is a task for which the court is ill-equipped at the certification stage. He also emphasized that

> each inquiry is case-specific and declined to offer an abstract definition of the "some basis in fact" standard because such a definition would be of limited utility. He emphasized further that certification does not predict trial success, the complexities of establishing the case are not assessed extensively, and the action may be decertified if and when the s. 4(1) requirements are no longer met: at paras. 102-105.
>
> [Emphasis added]

See also *Hollick* at para. 16.

[33] The plaintiff has established that its pleading discloses a cause of action and has met the requirement in s. 4(1)(a). Following *Finkel*, the plaintiff must then demonstrate some basis in fact for each of the remaining s. 4(1) requirements.

[34] Assessing whether a putative representative plaintiff has demonstrated a basis in fact does not entail an assessment of the merits of the action. Justice Voith said in *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307 at para. 27 that something more than "superficial scrutiny of the sufficiency of the evidence is required":

> [27] The "some basis in fact" standard played a meaningful role in the judge's analysis of certain issues, and it is useful to understand the parameters of this standard. The leading authorities establish that although the standard does not entail an assessment of the merits of the action, there must also be more than superficial scrutiny of the sufficiency of the evidence. It is clear that "some basis in fact" must be demonstrated by the plaintiff on an evidentiary basis. Such evidence need not be conclusive or satisfy the civil standard of a balance of probabilities, and the particular level of evidence that will be sufficient is highly fact-specific. Where a basis in fact is intended to be established through an expert methodology, the methodology must be "sufficiently credible or plausible" to raise some "realistic prospect of establishing" the relevant factor. See *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 102–05, 118; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 61–73; *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 40–43; *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at paras. 19–20.
>
> [Emphasis added]

[35] Thus, expert evidence is not required to establish a basis in fact, but where it is adduced to do so, i.e., to establish a methodology to assess damages

on a class-wide basis, it must be sufficiently credible or plausible to raise a realistic prospect of success.

[36] In my September Reasons, I set out my determination that the plaintiff tendered evidence of non-dangerous defects in the IGUs. It followed upon submissions concerning a consultant's report authored by EXP Services Inc. ("EXP Report"):

> [138] To summarize, the claims for loss relating to dangerous defects concern common property and are currently advanced in the IGU Actions. Recovery is limited to the cost of removing the defects. The claims are properly brought by SP 3165 and SP 3206 on behalf of current owners. It would be an abuse of process to allow the same claim against the same parties to proceed in this action (and would engage the factors in s. 4(2)(b)-(e) militating against certification). Claims for recovery for pure economic individual losses grounded in negligence arising from either dangerous or non-dangerous defects in the IGUs (e.g., the latter being based on the EXP Report opining that the seals in the IGUs are failing) cannot succeed against those parties with whom putative class members are not in privity. As discussed in the next section, those claims would have to be based on breach of an implied warranty or breach of contract (e.g., in the case at bar, if the plaintiff pursues recovery for individual pure economic losses, it would have to establish that it is in contractual privity with one or more of the existing defendants as a result of its assignment from the original purchaser).
>
> …
>
> [158] The plaintiff has adduced evidence through the EXP Report of non-dangerous defects in the IGUs suggesting that they will have to be replaced, which in turn provides a basis in fact for claims brought by persons in privity for individual losses for non-dangerous defects. It has adduced some non-expert evidence of the potential dangerous defects, although some of the evidence is unattributed hearsay evidence and, in this respect, there is merit in the opposing parties' objection concerning admissibility of that evidence.
>
> …
>
> [174] The plaintiff has demonstrated an arguable valid cause of action for breach of contract and breach of implied warranty and met the first requirement for certification under s. 4(1)(a) of the *CPA*. It has also tendered evidence of non-dangerous defects in the IGUs. …
>
> [Emphasis added]

[37] The plaintiff also introduced certain admissible lay evidence showing inappropriate fogging and breakage of some of the lites in some of the IGUs (some but not all of the lay evidence was objected to by the opposing parties at the hearing of the original certification application because it was unattributed hearsay).

[38] On the instant application, the developer defendants took issue with the admissibility of the EXP Report to satisfy the basis in fact requirement. They argued that they were not served with notice that the plaintiff intended to rely on it as an expert report and that had they known of its intention to do so, they may have sought to cross-examine a representative at EXP involved in the writing of the report and may have responded with responsive expert evidence. As a result, they argued they are prejudiced.

[39] The developer defendants' position overlooks what transpired at the prior hearing of the certification application, as borne out by the transcripts. The developer defendants did not object to the admissibility of the EXP Report. To the contrary, they relied on it as part of their submission that the plaintiff had failed to show a basis in fact of a dangerous defect. The developer defendants were aware that one of the third-parties who had obtained leave to appear at the prior certification hearing to oppose it raised concerns regarding the admissibility of the EXP Report as an expert report. However, the developer defendants took a different stance. They pointed to the EXP Report as part of their overarching submission that the most the plaintiff had demonstrated on the whole of the evidence was some basis in fact for a non-dangerous defect, and as a result, only those in privity could seek a remedy for individual losses.

[40] The developer defendants did not subsequently seek reconsideration of any aspect of my September Reasons concerning the effect of the EXP Report.

[41] The developer defendants' contention of prejudice is also answered by their position on this application regarding preferability. One of their arguments is that certification should be denied because it is preferable for the instant action to stand as a precedential test case and should be heard at the same time as the trial of the Related Actions. Yet, the developer defendants acknowledged in oral submissions that if their position is accepted, they are aware they have to contend with the EXP Report should this action proceed to trial in September 2022 as a precedential action

and are thus obliged to deal with it in any event when meeting the timelines for delivery of expert reports ordered in the Related Actions.

[42] Lastly, the developer defendants raised as a concern, but not an objection, that the author of the EXP Report has passed away. They did not contest authenticity, necessity, or reliability to object to admissibility and no grounds were raised to suggest that any of those issues were engaged to preclude admissibility.

[43] I remain satisfied that the plaintiff has demonstrated some basis in fact for its claim that there is a systemic defect(s) in the IGUs. The plaintiff's claim for breach of contract and breach of implied warranty, and the legal questions of whether an award of damages for loss of amenity and pre- and post-judgment interest can be made, all arise from the alleged defect(s). Accordingly, I conclude that the plaintiff has met the burden of showing a basis in fact for those common issues.

[44] I will now turn to consider whether the plaintiff has met the remaining requirements of s. 4(1).

The Proposed Class

[45] I agree with the plaintiff's written submission (excerpted below from para. 38) that the principles governing this requirement are set out in *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 82 [*Jiang No. 1*]:

> (a) the purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment;
>
> (b) the class must be defined with reference to objective criteria that do not depend on the merits of the claim;
>
> (c) the class definition must bear a rational relationship to the common issues — it should not be unnecessarily broad, but nor should it arbitrarily exclude potential class members; and
>
> (d) the evidence adduced by the plaintiff must be such that it establishes some basis in fact that at least two persons could self-identify as class members and could later prove they are members of the class.
>
> [Emphasis in original]

[46] The class proposed by the plaintiff in its notice of application filed December 1, 2021 is described in Part 1: ORDERS SOUGHT:

> 2. An order defining the "class" and "class members" as:
>
> those persons, excluding the defendants and their senior officers and directors, who purchased a residential unit in the Shangri-La building, a residential tower in Vancouver, British Columbia, bounded by West Georgia, Thurlow and Alberni Streets and having a civic address of 111 Alberni Street or 1128 West Georgia Street (the "**Shangri-La**") by;
>
> (a) entering into a contract of purchase and sale with the Developer (a "**Pre-Sale Contract**"), and/or
>
> (b) taking an assignment of a Pre-Sale Contract with the written consent of the Developer.
>
> [Emphasis in original]

[47] The developer defendants contend that the definition is overbroad as it allows for recovery to both the assignors and assignees of the pre-sale contracts.

[48] However, the spectre of double recovery is clearly eliminated through the clarification of the proposed class in its amended notice of civil claim that the plaintiff subsequently filed on December 17, 2021. There, the plaintiff states in its statement of facts in Part 1 at para. 25:

> The plaintiff brings the within action on behalf of all original owners who purchased a pre-sale contract from the Developer for a unit ("**Pre-Sale Contract**"), and all purchasers who took an assignment of a Pre-Sale Contract with the written consent of the Developer (collectively, the "**Class**"). The Class excludes those original owners who assigned their Pre-Sale Contract to a purchaser who is a member of the Class.
>
> [Bold emphasis in original; underlining added]

[49] Any doubt the developer defendants might have had about the proposed class definition would have been dispelled upon review of the plaintiff's written submissions delivered prior to the hearing and most certainly from the outset of its oral argument. The developer defendants' ongoing position through the hearing that they were only required to answer the proposed class definition framed in the notice of application without regard to the amended notice of civil claim and the plaintiff's written and oral submissions is, in the circumstances, particularly where they cannot be said to have suffered any prejudice, unduly myopic, and without merit.

[50] The substantive issue to be determined is whether the plaintiff has met the requirement of s. 4(1)(b) and established a class of two or more persons capable of clear definition.

[51] Apart from the issue of overbreadth, the developer defendants did not raise any substantive objections to the question of whether the plaintiff has met the requirements set out in *Jiang No. 1* and s. 4(1)(b).

[52] In *Finkel*, when referring to the governing principles set out in *Jiang No. 1*, the Court of Appeal said at para. 21 that the identifiable class requirement was readily established: “As in this case, the identifiable class requirement is often, though not always, straightforward.”

[53] The class definition proposed by the plaintiff in the case at bar is likewise readily established. All class members are objectively defined by reference to common pre-sale contracts entered into with one or more of the developer defendants. The pre-sale contracts and assignments are readily identifiable from the records within the custody of the developer defendants and other sources such as SP 3165, SP 3206, and the Land Title Office.

[54] In terms of the requirement to show an identifiable class of two or more persons, it is clear from the holding in *Douez v. Facebook, Inc*., 2018 BCCA 186 at para. 53 (drawn to my attention during the present hearing) that specific evidence of numerosity is not a requirement where it is apparent from the claim that there are two or more persons who will comprise the proposed class:

> [53] While representative plaintiffs must show that there are two or more individuals who have a relevantly similar claim, it is not necessary that they show that any individual (other than themselves) is sufficiently motivated by their claim to bring the matter to court. Further, it is not generally necessary for a representative plaintiff to specifically demonstrate, through affidavit evidence, that a second person has a claim. As the Ontario Court of Appeal stated in *Keatley Surveying Ltd. v. Teranet Inc.*, 2015 ONCA 248 at para. 70: “Ordinarily, the existence of more than one claim will be apparent from the very nature of the claim being advanced.” See also *Hoy v. Medtronic Inc.*, 2003 BCCA 316 at paras. 56–58 and *Harrison v. Afexa Life Sciences Inc.*, 2018 BCCA 165 at paras. 26–32.

> [54] On the present appeal, the representative plaintiff applied to adduce fresh evidence to show the existence of a second person with a similar claim to hers. I would reject the application to adduce the fresh evidence, on the basis that it was unnecessary.
>
> [Emphasis added]

[55] It is clear from the claim advanced in the amended notice of civil claim and also from the evidence in the application record that the plaintiff has established that there are at least two or more class members with identical claims regarding the liability issues. This case concerns standard form pre-sale contracts, claims of a uniform breach, the same IGUs, and the same building. I also find it clear that some of the claims for damages will be similar (e.g., diminution in value or cost to repair certain non-common property, such as interior portions of strata units immediately adjacent to IGUs). There are approximately 307 original purchasers (including some who would fall within the language excluding the developer defendants and their senior officers from the class).

[56] The decision in *Lee v. Georgia Properties Partnership*, 2012 BCSC 1484 (cited by the developer defendants to oppose certification) is readily distinguishable because it was manifest on the evidence that only one pre-sale purchaser of a unit in the Hotel Georgia private residences had any intention of proceeding with a claim for declaratory relief (the defendant established that no other purchaser sought to rescind their contracts despite the defendant's alleged breach of the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41).

[57] Section 7(b) of the *CPA* mandates that certification must not be refused because the relief claimed relates to separate contracts involving different class members: see also *Dominguez v. Northland Properties Corporation*, 2012 BCSC 328 at paras. 109–120.

[58] The class definition is not overly broad, provides an objective and workable description of the proposed class, and excludes any prospect for double recovery. It is also rationally linked to the proposed common issues (which I discuss in the next section).

[59] Now that the developer defendants have withdrawn their objection (to certification) that those who took title through assignment from an original purchaser lack standing to sue, there is no basis to suggest that the plaintiff has not met the basis in fact requirement.

[60] Accordingly, I am satisfied that the proposed class definition as set out in the plaintiff's amended notice of civil claim is appropriately framed, the plaintiff has satisfied the requirements discussed in *Jiang No. 1*, and established a basis in fact that there is an identifiable class of two or more persons, meeting the requirement set out in s. 4(1)(b).

[61] The developer defendants acknowledged in oral submissions that I have the jurisdiction to permit the plaintiff to amend the notice of application to align the class definition with its amended notice of civil claim. In light of their continued objection to the manner in which the proposed class is described in the notice of application, I grant leave to the plaintiff to file an amended notice of application to reflect the definition set out in the amended notice of civil claim.

Common Issues

Introductory Remarks

[62] The object of the *CPA* is to provide a fair and efficient resolution of the common issues. In *Finkel*, the Court of Appeal said at para. 22 the resolution of common issues is "the heart of a class proceeding". At para. 23, it referred to its prior decision in *Charlton v. Abbott Laboratories, Ltd.*, 2015 BCCA 26 at para. 85. In that case, Justice Willcock cited with approval the reasons of Justice Strathy (as he then was) in *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para. 140 concerning the analytical approach to take to common issues:

> [85] Mr. Justice Strathy, as he then was, described an appropriate analysis of the common issues question in *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, a product claim brought against manufacturers. He provided a helpful description of the jurisprudence prior to the Supreme Court of Canada's recent restatement of the evidentiary requirements for certification:
>
> > [140] The following general propositions, which are by no means exhaustive, are supported by the authorities:

A: The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 39.

B: The common issue criterion is not a high legal hurdle, and an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General)*, above, at para. 53.

C: There must be a basis in the evidence before the court to establish the existence of common issues: *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce,* above, at para. 21. As Cullity J. stated in *Dumoulin v. Ontario*, at para. 27, the plaintiff is required to establish "a sufficient evidential basis for the existence of the common issues" in the sense that there is some factual basis for the claims made by the plaintiff and to which the common issues relate.

D: In considering whether there are common issues, the court must have in mind the proposed identifiable class. There must be a rational relationship between the class identified by the Plaintiff and the proposed common issues: *Cloud v. Canada (Attorney General)*, above at para. 48.

E: The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim: *Hollick v. Toronto (City),* above, at para. 18.

F: A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: *Harrington v. Dow Corning Corp.*, [1996] B.C.J. No. 734, 48 C.P.C. (3d) 28 (S.C.), aff'd 2000 BCCA 605,, [2000] B.C.J. No. 2237, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

G: With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 40, *Ernewein v. General Motors of Canada Ltd.*, above, at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43, [2009] S.J. No. 179 (C.A.), at paras. 145-146 and 160.

H: A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each

> individual claimant: *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54, [2000] O.J. No. 3821 (S.C.J.) at para. 39, aff'd [2001] O.J. No. 4952, 17 C.P.C. (5th) 103 (Div. Ct.), aff'd [2003] O.J. No. 1160 and 1161 (C.A.); *Fehringer v. Sun Media Corp*., [2002] O.J. No. 4110, 27 C.P.C. (5th) 155, (S.C.J.), aff'd [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Div. Ct.).
>
> I: Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis: *Chadha v. Bayer Inc.*, [2003] O.J. No. 27, 2003 CanLII 35843 (C.A.) at para. 52, leave to appeal dismissed [2003] S.C.C.A. No. 106, and *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575, [2008] B.C.J. No. 831 (S.C.) at para. 139.
>
> J: Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient": *Rumley v. British Columbia,* 2001 SCC 69, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39 at para. 29.
>
> [Emphasis in original]

[63] Common issues need only advance the litigation, and that requirement has been described as a "low bar". The common issues question should be approached purposively. That the common issue may be answered differently for different class members is not a bar to certification nor does it diminish the commonality of the proposed issue. An issue will be common if it is a substantial ingredient of each of the class members' claims. The underlying question is whether duplication of fact-finding or legal analysis will be avoided by a class proceeding: *Harrington v. Dow Corning Corp.*, 2000 BCCA 605; *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46 at para. 39; *Hollick* at para. 18; *Endean* at para. 40; *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 at paras. 40–42 (C.A.) [*Carom ONCA*], rev'g on other grounds (1999), 44 O.R. (3d) 173 (S.C.J.) [*Carom ONSCJ*]; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52-53 (C.A.), leave to appeal ref'd, [2005] S.C.C.A. No. 50; *Dominguez* at paras. 90–92; *Charmley* at paras. 21-22, 38.

[64] Whether individual issues predominate over the common issues is not a relevant consideration for s. 4(1)(c): *Endean* at para. 35; *Dominguez* at para. 94.

The Proposed Common Issues

[65] The plaintiff has reduced the proposed common issues to five (from 13 in its previous notice of application), as excerpted below:

> (a) Did the defendants, or any of them, breach the implied warranty owed to the class members because the IGUs that form the exterior curtain wall of the Shangri-La were not:
>
> (i) designed and/or built in a good and workmanlike manner;
>
> (ii) constructed with suitable materials;
>
> (iii) free from defects; and/or
>
> (iv) suitable for their purpose of habitation?
>
> (b) Did the defendants, or any of them, otherwise breach the terms of the Pre-Sale Contracts because of the alleged IGU defects?
>
> (c) Can an award of damages for loss of amenity be made without individual damages assessments?
>
> (d) Should the defendants, or any of them, pay pre- or post-judgment interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79? and
>
> (e) Should the defendants, or any of them, pay the costs of administering and distributing any monetary judgment and/or the costs of determining eligibility and/or the individual issues?

[66] Many if not most of the proposed liability common issues involve many if not most of the same factual and legal liability issues set to be tried in the Related Actions.

The Liability Issues: Common Issues A and B

Introductory Remarks

[67] Common issue A relates to the plaintiff's claim for breach of implied warranty, which is grounded on the "implied warranty owed at common law by the developer defendants to members of the proposed class to construct a building in a good and workmanlike manner, with suitable materials, free from defects, and suitable for habitation": September Reasons at para. 46; see also *Strata Plan NW 2294 v. Oak*

Tree Construction Inc., [1994] 8 W.W.R. 49 at para. 4 (B.C.C.A.), cited at paras. 140–142 of the September Reasons.

[68] I agree with the plaintiff's submission that proposed common issue A "tracks the language of th[o]se four assurances".

[69] Common issue B relates to the claim for breach of the pre-sale contracts.

Privity

[70] For either claim, the class members must have privity with the person in law obliged to provide the warranty or contractual promise: *Oak Tree* at para. 4; *Fraser-Reid v. Droumtsekas*, [1980] 1 S.C.R. 720.

[71] Issues concerning privity for those class members who took title by assignment from purchasers who signed pre-sale contracts are no longer a bar to certification in view of the developer defendants' change in position.

No Exclusionary Language Asserted

[72] The developer defendants did not argue, as they did at the original certification application, that the pre-sale contracts exclude claims for implied warranty or breach of contract: see September Reasons at paras. 147-148.

Missing Factual Common Question

[73] I disagree with the developer defendants' submission that both proposed liability common issues should not be certified because they capture only legal questions without an essential factual common issue, i.e., whether there are defects in IGUs. It is material facts that the plaintiff must prove, which are embedded in the proposed liability common issues.

[74] The developer defendants' objection overlooks, in part, their submission that not every defect constitutes a breach of implied warranty. Indeed, it is only those defects which render a class member's unit unsuitable for habitation that constitute a

breach of implied warranty. Thus, implicit in common issue A is the question of material fact as to whether such defect(s) as described in *Oak Tree* exist(s).

[75] The same analysis applies to the breach of contract issue. Not every defect will constitute a breach of contract. The outcome depends on whether the plaintiff proves the material fact of a defect that constitutes a breach of the pre-sale contracts.

[76] Through the course of their oral submissions, the defendant developers agreed that if I found there is a factual common issue implicit in the common issues concerning defect(s), which I find that there clearly is, I have the jurisdiction to permit the plaintiff to amend its notice of application to propose that additional common issue of fact. I view the amendment to be unnecessary since a common issue asking whether there is a defect(s) to the IGUs would be, on its face, overbroad and would not specifically address the material fact or facts the plaintiff must prove to establish liability for breach of implied warranty and breach of contract.

Certification of Liability Common Issues Standing Alone

[77] Part of the developer defendants' submissions opposing certification focused on what they said was the absence of any evidence to establish a loss arising from a breach of contract or implied warranty and the absence of any proposed methodology to establish aggregate damages on a class-wide basis. Their submissions suggested that I should not certify the liability common issues in the absence of such evidence.

[78] Issues can be certified in the absence of common issues relating to damages where they advance the proceeding: *Harrington* at para. 48; *Mueller v. Nissan Canada Inc*., 2021 BCSC 338 at pars. 209–211. In her reasons in *Harrington*, Justice Huddart said that the issue of fitness of breast implants from different manufacturers would move the litigation forward:

> [48] As must be apparent from this discussion, I agree with the case management judge that the issue of fitness is common to all members of the two subclasses that he described. The resolution of this issue will move the litigation forward, in the sense that it will determine a point of fact necessary

> to the cause of action, and the answer will be capable of extrapolation to all members of the class. The evidence which the case management judge adverted to in his reasons supports his conclusion that the fitness issue is not common to both silicone gel filled and saline filled implants. Thus, I would not vary the question to include the latter type of device.
>
> [Emphasis added]

[79] In the case at bar, if the plaintiff establishes a breach of contract or breach of implied warranty, it will establish liability. It does not, as it would if it advanced a tort claim, need to prove causation to loss or damage in order to establish liability. Proof of loss is not an essential element of an action for breach of contract.

[80] Liability for breach of contract is established upon proof of the breach: *Sharp* at para. 111. The same approach is taken for a claim for breach of implied warranty. An implied warranty of fitness is treated in law as an implied contractual term. Liability is established if a breach of the warranty is proven. The innocent party is entitled to damages for breach of contract. In *Oak Tree* at para. 4, Justice Lambert referred to *Miller v. Cannon Hill Estates, Limited*, [1931] 2 K.B. 113 at 122 as follows:

> Mr. Justice Swift says that where the parties agree that the house will be completed, then the law implies the **further agreement** that it shall be completed in an efficient and workmanlike manner, and that proper materials will be used.
>
> [Underlining in original; bold emphasis added]

[81] However, a nexus would have to be shown to recover damages beyond nominal damages. In *Sharp*, Voith J.A. explained that where a plaintiff has not suffered any loss, or where the breach of contract did not cause a loss, only nominal damages will be available. Causation, he said, is "considered more extensively as either a component of the issue of remoteness, or more precisely as a related principle that precedes the question of remoteness" for a claim for compensatory damages: at paras. 114-115, 124. Causation issues, he said, often arise in situations involving intervening acts by the plaintiff, third parties, or collateral forces (in *Sharp*, it included market performance): *Sharp* at para. 119.

[82] Although the plaintiff seeks to recover more than nominal damages on behalf of class members, it is not necessary for the plaintiff to establish that aggregate

damage awards are available and if they are, whether some or all of them can be certified as a common issue(s), as a precondition to certification of liability common issues. A putative plaintiff may seek damages that require individual assessments once the common issues are determined: *CPA*, s. 7(a); *Watson v. Bank of America Corporation*, 2015 BCCA 362 at para. 174 [*Watson BCCA*], rev'g on other grounds 2014 BCSC 532 [*Watson BCSC*]; *Seidel* at para. 182. A representative plaintiff may also seek different remedies for different class members: *CPA*, s. 7(c). Moreover, a representative plaintiff may seek an aggregate award of damages for all or some of the defendant's liability to class members, or present claims for individual assessments and an aggregate award: *Pioneer Corp. v. Godfrey*, 2019 SCC 42; *CPA*, s. 29(1).

[83] Certification may be granted even where only individual assessments are sought after common issues concerning liability are determined. That was the result in *Harrington*.

[84] Section 7 of the *CPA* states that the court must not refuse to certify a proceeding as a class proceeding merely because such relief is sought or remedies are sought for different class members:

> **Certain matters not bar to certification**
>
> **7** The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:
>
> (a)the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b)the relief claimed relates to separate contracts involving different class members;
>
> (c)different remedies are sought for different class members;
>
> (d)the number of class members or the identity of each class member is not known;
>
> (e)the class includes a subclass whose members have claims that raise common issues not shared by all class members.
>
> [Bold emphasis in original; underlining added]

Determination

[85] When discussing the requirements for common issues, in *Sharp*, Voith J.A. pointed out at para. 103 that the "threshold is low", citing from *Service v. University of Victoria*, 2019 BCCA 474 at para. 59, that "the plaintiff need only show there is a triable factual or legal issue that, once determined, will advance the litigation."

[86] In the case at bar, I am satisfied that the plaintiff has established a basis in fact for the common issues it proposes.

[87] Common issues A and B satisfy the requirements set out in the case authorities and of s. 4(1)(c). They concern an alleged systemic defect(s) and breaches. Allegations of systemic defects have been certified in the past.

[88] This case concerns a standard form pre-sale contract, claims of a uniform breach of contract and implied warranty at common law, the same IGUs in the same building, original purchasers or their assignees, and evidence common to all class members.

[89] The plaintiff has shown a basis in fact for each of the liability common issues. The proposed liability issues are common to all members of the class as they focus on defect(s) as opposed to conduct of individual class members.

[90] The liability issues in this case do not turn on the behaviour of the individual class members and thus stand in contrast to decisions heavily relied upon by the developer defendants such as *Sharp* (in *Sharp*, certification was denied in light of the highly individualized claims against a mutual fund dealer where "the existence of loss caused by a breach [of contract] was contingent on the hypothetical behaviour of individual class members", i.e., whether individual class members would have invested in different, better-performing funds but for the alleged breach: *Sharp* at paras. 133, 139, 180). Nor is it aligned with another case they relied upon—*Davis v. British Columbia Hydro and Power Authority*, 2016 BCSC 1287—where there was expert evidence suggesting the alleged harm caused to class members from smart meters was impossible to be determined on a class-wide basis.

[91] All class members will benefit from determination of the liability common issues, which are at the core of this litigation. The result will bind all class members and dispose of significant liability issues that will manifestly advance the litigation either for or against the class. And there is a rational relationship between the liability common issues and the proposed class.

[92] The liability common issues are not framed in overly broad terms but instead are specific to the issues that will advance the litigation: *Cloud* at paras. 54–58; *Magill v. Expedia, Inc.,* 2013 ONSC 683 at para. 140, citing *Rumley v. British Columbia*, 2001 SCC 69 at para. 29.

The Damages Issues: Common Issues C to E

Introductory Remarks

[93] Proposed common issues C and D concern the claims for damages for loss of amenity and pre- and post-judgment interest.

[94] Section 29 of the *CPA* provides that an award for an aggregate monetary award may be made in respect of all or any part of a defendant's liability to class members, if three requirements are met:

> **Aggregate awards of monetary relief**
>
> **29** (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if
>
> (a) monetary relief is claimed on behalf of some or all class members,
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.
>
> [Bold emphasis in original; underlining added]

[95] If a common issue concerning an aggregate damages award is proposed, then a putative plaintiff must establish that there is a methodology in which to

determine the award on a class-wide basis. Statistical information that is otherwise inadmissible may be admitted into evidence to determine issues relating to the amount or distribution of an aggregate monetary award if it was compiled in accordance with principles that are generally accepted by experts in the field of statistics: *CPA*, s. 30(1).

[96] It is not a bar to certification where no common issue concerning an aggregate monetary award is proposed or rejected for certification due to the absence of an appropriate methodology: *Watson BCCA* at para. 174; *Seidel* at para. 182, citing *Pro-Sys* at para. 134; *Harrington* at para. 48.

Determination

[97] The requirement in s. 29(1)(a) is met in respect of both issues because the plaintiff seeks a monetary relief on behalf of all of the class claimants.

[98] However, proposed common issues C and D raise threshold legal issues that tie into the requirements of s. 29(1)(b) and (c). Common issues include legal as well as factual issues: *CPA* s. 1(b); *Dominguez* at para. 87; *Charmley* at para. 20.

Common Issue C – Loss of Amenity

[99] Proposed common issue C asks whether as a matter of law damages for loss of amenity (which the developer defendants say is a claim for compensatory damages) resulting from breach of implied warranty or breach of contract can be calculated on a class-wide basis. Inherent in that question is assuming that it is available at law, then on what basis can that award be established, e.g., by a random sampling of class members as was proposed in *Dominguez* (see para. 183).

[100] The plaintiff cited cases decided in this province where proposed common issues asking whether aggregate damages can be assessed on the basis of sampling and statistics were certified: *Seidel* at paras. 203–210; *Dominguez* at paras. 180, 183, 187-188; *Knight v. Imperial Tobacco Canada Limited,* 2006 BCCA 235 at paras. 37–41. It also pointed out that the proposed common issue using random sampling as part of the methodology to assess an aggregate award of a loss

of amenity claim has not been decided in this province. As well, it drew my attention to the decision of the Ontario Court of Appeal in *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 at paras. 137–139, leave to appeal refused [2012] S.C.C.A. No. 326 rejecting assessment of such an award on that basis. The plaintiff also advised that the legal question regarding the admissibility of statistical and sampling evidence to prove an aggregate award is the subject of debate in Ontario and drew my attention to *Nolevaux v. King and John Festival Corporation*, 2013 ONSC 5451 at paras. 11–19 and *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 4288 at paras. 20–23 and at 2021 ONCA 46.

[101] *Nolevaux* concerned three certification motions involving falling glass from separate condominium towers in Toronto. The proposed common issue is set out in the reasons at para.11:

> Can damages for the loss of use and/or enjoyment of the balcony and/or the common elements be determined by using a generalized formula or some other measure that is not dependent on individual assessments?

[102] In that case, Justice Belobaba thought the question made sense as a common issue to be determined in part by a representative sample of class members, but determined that he was bound by *Fulawka*, even though the result in that case appeared to conflict with the Court of Appeal's prior decision in *Cloud* at para. 70. Portions from Justice Belobaba's reasons are excerpted below:

> [14] In my view, this is an approach that makes a lot of sense. Unfortunately, for the purposes of common issue certification, the proposed methodology – hearing evidence from a small sample of class member claimants – has been rejected by the Court of Appeal. In *Fulawka,* the Court of Appeal was asked to consider whether a random sampling of class members could provide the basis for a partial or aggregate assessment of damages. The Court concluded that the random sampling of class members was not permitted under s. 24(1)(c):
>
> > The plaintiff's proposed procedure for arriving at a global damages figure is antithetical to the requirement in s. 24(1)(c) that the aggregate amount of the defendant's liability "can reasonably be determined without proof by individual class members." In order to give effect to Professor Drogin's proposal, the language used by the legislature would have to be "can reasonably be determined without proof by *all of the* individual class members". But the qualifying words - "all of

> the" - are not present in the provision. While Professor Drogin's proposed method is based on proof from a limited subsection of the class, it still impermissibly requires proof from individual class members in order to arrive at an aggregate damages figure …
>
> [A]n aggregate assessment of monetary relief may only be certified as a common issue where resolving the other certifiable common issues could be determinative of monetary liability and where the quantum of damages could "reasonably" be calculated without proof by individual class members. The latter condition is not satisfied here.

[15] In other words, even if random sampling of a handful of class members is the very method that would be used by a trial judge in a parallel mass tort or contract action (to try to monetize the intangible “loss of use” claims), this same approach – the random sampling of the same handful of class member claimants - cannot be used by the common issues trial judge in a class action because this would be in breach of s. 24(1)(c).

[16] I frankly do not understand this interpretation of s. 24(1)(c). With respect, this is not a generous or purposive reading of the CPA. In my view, s. 24(1)(c) is legitimately concerned with situations where a large number of class members would be required to give evidence, thus defeating the very purpose of a class proceeding. In my view, s. 24(1)(c) was never intended to preclude the sensible use of random sampling involving just a handful of class members. Indeed, why would this even matter?

[17] Also, in my view, the analysis in *Fulawka,* cannot be squared with what the Court of Appeal said in *Cloud*:

> The trial judge should be able to make an aggregate assessment of the damages suffered by all class members due to the breaches found, if this can reasonably be done without proof of loss by *each* individual member. Indeed this is consistent with s. 24 of the CPA.

[18] I recognize that the Court of Appeal’s statement in *Cloud* was not based on a fully considered analysis of s. 24(1)(c). Nonetheless, it is interesting to note that *Cloud* interpreted s. 24(1)(c) as requiring proof of loss by “each” or every class member before aggregate damages are precluded, not “any” class member as was done in *Fulawka.*

[19] If there is any confusion about the sub-section’s correct interpretation (and I for one believe there is) it will no doubt be clarified by the Court of Appeal in the months ahead. Meanwhile, I am bound by *Fulawka* because it is the more fully considered and most recent pronouncement on this point. I must therefore conclude that it is not reasonably likely that the preconditions set out in s. 24(1), in particular s. 24(1)(c), can be satisfied. I therefore decline to certify the proposed “partial damages” issue because the suggested random sampling of even a handful of class members is (currently) not permitted.

[Emphasis added]

[103] *Fresco* involved a class action brought on behalf of a class of approximately 31,000 current and former bank employees and their asserted right to compensation for overtime worked in the period from 1993 to 2009. Certification was initially refused by the Superior Court and the Divisional Court, but upon appeal to the Ontario Court of Appeal, the action was ultimately certified (2012 ONCA 444). One of the proposed common issues asked whether the class was entitled to an award of aggravated, exemplary, or punitive damages. The representative plaintiff sought to rely on a survey of employee complaints about underpaid overtime work conducted by the bank. The Court of Appeal refused to certify that issue based on *Fulawka* (the decision of the Court was written by Chief Justice Winkler who also penned the decision in *Fulawka*, released concurrently).

[104] Following the hearing of competing summary judgment applications, the motions judge, Belobaba J., found in favour of the plaintiff class on the liability issues. He also determined that the Supreme Court of Canada's decision in *Pro-Sys* gave him the authority to add an issue concerning an award of aggregate damages to the list of common issues (2020 ONSC 4288). The plaintiff's application to quash the defendant's appeal from Belobaba J.'s order was dismissed. Insofar as the aggregate damages issue was concerned, the Court of Appeal did not comment on the merits; instead, the Court of Appeal said that Belobaba J.'s decision regarding the aggregate damages issue forms part of his judgment on the common issues and is therefore appealable to the Ontario Court of Appeal under Ontario class action legislation (2021 ONCA 46).

[105] In addition to arguing that I should apply the reasoning of the Court of Appeal in *Fulawka*, the developer defendants argued that the plaintiff has failed to provide any evidence demonstrating a methodology to assess damages for loss of amenity on a class-wide basis.

[106] They also cited *Sharp* as compelling authority to deny certification because the damages assessment issues in this case involve proof of causation.

[107] In *Sharp*, Voith J.A. explained that causation issues do not arise in most class proceedings that rely on breach of contract (e.g., where the existence of loss is not contingent on the hypothetical behaviour of individual class members):

> [131] In most proposed class proceedings that rely on a breach of contract, the issues I have raised do not arise. Pitch & Snyder at 16-27 to 16-28 explain:
>
> > The argument for certifying aggregate assessment is particularly strong in cases where damages necessarily flow from the breach of contract in question—for example, where the defendant is alleged to have breached class members' contracts by charging class members an impermissible fee or by improperly retaining class members' monies. In such cases, if the charging of impermissible fees or wrongful retention of monies is established on a class-wide basis, it will follow that all affected class members have suffered damages, with the only remaining question being quantum.
> >
> > [Emphasis added, footnotes omitted.]
>
> [132] This point is illustrated in *Cassano v. The Toronto-Dominion Bank*, 2007 ONCA 781— an authority relied on by the appellants. In *Cassano*, the plaintiffs contended that the defendant bank had charged its Visa cardholders fees for foreign currency transactions that were undisclosed and therefore unauthorized under the terms of their cardholder agreements. As every proposed plaintiff would have been charged the unauthorized fees, the fees would therefore be the quantum of loss suffered as a result of the breach of contract. Indeed, the remedy sought by the plaintiffs in *Cassano* was judgment for the total amount of the unauthorized fees collected by the defendant: at para. 5.
>
> [133] In cases such as *Cassano*, the existence of loss caused by a breach is not contingent on the hypothetical behaviour of individual class members, because the very act that gives rise to a breach of contract is the unauthorized collection of a monetary sum that directly represents the plaintiff's loss. The only remaining question, once a breach has been established, is quantifying the amount of that loss. This was also the case, for example, in *Finkel*.

[108] However, Voith J.A. also said at para. 124 that proof of causation is an essential requirement in a claim for compensatory damages for breach of contract. He cited the reasons of Justice Karakatsanis in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 where in her reasons, dissenting in part, she at para. 154 said the availability of aggregate damages should not be certified as a common issue due to the inability to prove causation for loss on a class-wide basis.

[109] Yet, insofar as issues arising in the case at bar are concerned, Voith J.A. also referred at para. 137 to the recent decision of the Court of Appeal in *676083 B.C. Ltd. v. Revolution Resource Recovery Inc*., 2021 BCCA 85 where the plaintiff was allowed to reapply to certify common questions relating to aggregate damages in light of the decision of the Supreme Court of Canada in *Pioneer*. The reasons in *Revolution*, written by Voith J.A., described the Court's view that the availability of aggregate damage awards could be determined later, after other common issues are decided:

> [155] In *Pioneer*, the certification judge had certified various common questions related to aggregate damages: see para. 114. An aspect of the claim that was advanced in *Pioneer* dealt with a provision of the *Competition Act*, R.S.C. 1985, c. C-34, that required proof of loss as essential to a finding of liability (see paras. 117−18), and parts of the judgment speak to this issue. I have explained why this is not the case for 676's breach of contract claim. Nevertheless, Brown J. confirmed at para. 118 that the aggregate damages provisions of the *CPA* are only available to a trial judge if, following the common issues trial, that judge is satisfied that all class members suffered some loss, or that those who have not suffered loss can be distinguished from those who have.
>
> [156] Justice Brown, at para. 120, in the context of the decision to certify aggregate damages as a common issue, then described the various options that might be available to a trial judge following the common issues trial. Those options include an award of aggregate damages to all class members, or if the trial judge finds that an identifiable subset of class members did not suffer a loss, the trial judge could exclude those members from participating in the award of damages. Still further, the trial judge might conclude that some class members had suffered a loss while some had not. In that case, individual issues trials would be required.
>
> [157] Importantly, Brown J. confirmed at paras. 120–21 that "[a]t the certification stage, no comment can or should be made about the potential conclusions that the trial judge may reach", and that "neither the range of possible findings of the trial judge following the common issues trial, nor the unavailability of aggregate damages for class members that suffered no loss, is relevant to the decision to certify aggregate damages as a common issue." See also *Markson v. MNBA Canada Bank*, 2007 ONCA 334 at paras. 48–49.
>
> [158] This guidance is directly relevant in this case. The concerns raised by Revolution do not form a basis to oppose common issues (c) or (r).
>
> [Emphasis added]

[110] In *Sharp*, Voith J.A. determined that the use of statistical information to assist with the quantification or distribution of aggregate monetary awards for a claim for

compensatory damages (in the context of the sale of mutual fund products by the defendant to certain members of the proposed class in a manner prohibited under Canadian securities laws) was not available prior to causation being established through an appropriate methodology. The claim for compensatory damages in that case was described by the putative class plaintiff as founded on the poor performance of the impugned funds when compared to other funds in which the class members did or could have invested: *Sharp* at para. 140.

[111] The factual context in the case at bar is different than *Sharp* in the sense that the claim for loss is premised on the breach of a contractual obligation or implied warranty to deliver goods free from defect and fit for habitation.

[112] In any event, I view the legal issue raised by common damages issue C—whether an aggregate award for loss of amenity can be made in this case and if so, on what basis (such as random sampling)—as it applies to the *CPA* to be undecided.

[113] Consequently, it cannot be said that the requirement in s. 29(1)(b), i.e., there are no questions of fact or law extant other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the developer defendants' monetary liability, has been met. In my opinion, the question as framed involving issues of law is an appropriate common issue that seeks to resolve an important threshold legal issue for the entire class. Determining the issue will significantly advance the litigation for all parties.

[114] That said, while I find this common issue is rationally connected to the proposed class and appropriate for certification, the issue does not arise for determination unless and until liability is found against any or all of the developer defendants. Thus, the hearing and determination of this issue should be deferred until after the liability common issues are determined.

[115] I will conclude this section with this observation. Even if the approach taken by the Ontario Court of Appeal in *Fulawka* is determined to apply to this case, so

that an aggregate award for loss of amenity is unavailable, assessments of claims for individual damages are nonetheless available per s. 27 of the *CPA*. In that event, appropriate procedures (referred to in the case authorities as "post-certification tools") will be addressed after the common issues are determined and will be structured in this proceeding to manage and simplify the determination of such assessments: *CPA*, ss. 12, 27; *Jiang v. Vancouver City Savings Credit Union*, 2019 BCCA 149 at paras. 37-38, 44, 60-61 [*Jiang No. 2*], leave to appeal ref'd [2019] S.C.C.A. No. 264.

Common Issue D – Obligation to Pay Interest

[116] The plaintiff pointed out that issues concerning a defendant's obligation to pay pre- and post-judgment interest have been certified as common issues in Ontario and said that there is no principled basis not to take the same approach in this case: see, e.g., *Cassano v. The Toronto-Dominion Bank*, 2007 ONCA 781 at para. 72; *Charmley* at para. 33; *Nolevaux* at Appendix, issue 9; *Paus v. Concord Adex Developments Corp*., 2015 ONSC 5122 at paras. 14-15; *LeFrancois v. Guidant Corp*., [2008] O.J. No. 1397 at paras. 70, 84 (S.C.J.).

[117] The developer defendants' objection to this issue is that even if I were to certify the liability common issues, it is premature to certify it before the liability common issues are determined. They did not contend that the proposed issue is overbroad, and I do not find it to be so long as it addresses interest payable on the specific types of monetary awards that might be made (e.g., cost of repair, diminution in value, special damages separate from cost of repair, and loss of amenity), assuming liability is established.

[118] In my opinion, the issue is rationally connected to the proposed class and raises legal questions common to all members of the proposed class, and their resolution will significantly advance the litigation for all members of the class. However, as is the case with common issue C, it should be addressed following the determination of the liability common issues.

Common Issue E – The Costs of Administering and Distributing a Monetary Judgment

[119] It is premature to consider certification of the proposed issue of whether the developer defendants should pay for the cost of administering and distributing any monetary judgment. The outcome depends on the determination of the liability common issues and the outcome of the legal question of common issue D concerning loss of amenity and determination of any individual awards. I would defer consideration of this issue until after the liability common issues and damages common issues C and D are determined.

Preferable Procedure

Introductory Remarks

[120] I turn now to consider whether the proposed class proceeding is the preferable procedure. Some of the factors to consider are set out in s. 4(2) of the *CPA*:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[121] All of the factors set out in s. 4(2) must be considered. No single factor is determinative. There is no hierarchy in terms of their importance: *Dominguez* at para. 199.

[122] Apposite to the present case is Winkler C.J.'s discussion of preferable procedure in *Carom ONSCJ* at 239 (referred to with approval by the Court of Appeal in *Elms v. Oliver Drabik Carruthers & Chalcraft*, 2001 BCCA 429 at para. 53, and cited in *Dominguez* at para. 196) excerpted below:

> ... A class proceeding is the preferable procedure where it presents a fair, efficient and manageable method of determining the common issues which arise from the claims of multiple plaintiffs and where such determination will advance the proceeding in accordance with the goals of judicial economy, access to justice and the modification of the behaviour of wrongdoers.

[123] In *Hollick*, Chief Justice McLachlin said at para. 27 that the preferability inquiry should be conducted through the lens of the three principal advantages of class actions – "judicial economy, access to justice, and behaviour modification." See also *Jiang No. 2* at paras. 32-33.

[124] The proposed class proceeding as framed by the putative class plaintiff clearly falls within the rubric of those remarks.

[125] I turn now to consider the factors in s. 4(2).

s. 4(2)(a) – Predominance

[126] The proposed common liability issues regarding alleged systemic defects to the IGUs concern the conduct of the developer defendants and whether it constitutes a breach of the implied warranty at law or breach of contract. Individual issues are not involved in determining those issues. If liability is found against any or all of the developer defendants, then the legal issues raised by common issues C and D will be determined. It is at that juncture that individual issues may arise. The extent of individual issues involved in assessing the quantum of an award depends upon the determination of the legal issues in damages common issues C and D.

[127] Class proceedings typically involve individual issues and their existence is not a reason to deny certification. Individual issues are typically dealt with through a procedure(s) determined at a later date once the common issues are determined:

Western Canadian Shopping Centres at para. 54; *Dominguez* at paras. 202-203; *CPA*, ss. 12, 27.

[128] In all, I am satisfied that the questions of fact and law raised in the common issues are common to members of the proposed class and predominate over any questions affecting only individual members.

s. 4(2)(b) – Individual Interests in Prosecution

[129] There is no evidence that a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions.

s. 4(2)(c) – Claims in Other Proceedings

[130] As mentioned at the outset of these reasons, the developer defendants and the other defendants in the IGU Actions assert that SP 3165 and SP 3206 only have standing to pursue claims for dangerous defects to common property.

[131] In the September Reasons (at paras. 172-173), I agreed with those defendants' position that SP 3165 and SP 3206 lacked standing to pursue claims for losses separate from common property regardless of whether the systemic defects are proven to be dangerous or non-dangerous. As a result, those class members in privity with the developer defendants seek to pursue claims for loss separate from common property in this proceeding.

[132] The proposed liability common issues involve many if not nearly all of the same factual issues, many of the legal issues, and a substantial body of evidence that will be tried in the Related Actions.

[133] Significant judicial economy and economy for all parties to the case at bar are promoted through certification of the liability common issues and having them tried at the same time as the trial of the Related Actions.

[134] Lastly, the developer defendants did not raise as they did at the prior hearing that certification would foreclose their right to advance limitation defences. The case authorities cited by the plaintiff at that hearing hold that merits (including limitation

issues) are not assessed at the certification stage: September Reasons, paras. 68, 78.

s. 4(2)(d) – Other Means of Resolving the Claims

[135] In *Jiang No. 2*, at para. 47, the Court of Appeal said the "availability of other practical means for resolving claims lies at the heart of the preferability analysis." It also cited from the reasons of Justice Cromwell in *AIC Limited v. Fischer*, 2013 SCC 69:

> In *Fischer*, the preferability process was described by Justice Cromwell as a comparative exercise:
>
> > [23] This is a comparative exercise. The court has to consider the extent to which the proposed class action may achieve the three goals of the *CPA*, but the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals. This point is well expressed in one U.S. Federal Court of Appeals judgment and it applies equally to *CPA* proceedings: "Our focus is not on the convenience or burden of a class action suit per se, but on the relative advantages of a class action suit over whatever other forms of litigation [and, I would add, dispute resolution] might be realistically available to the plaintiffs": [citations omitted].
>
> [Emphasis added]

See also *Finkel* at paras. 24-25.

[136] Resolving the liability common issues and common damages issues C and D is the most practical and efficient means to resolve the claims of the proposed class members. Judicial economy and access to justice are served if the liability common issues are tried, as the plaintiff proposes in its plan, at the same time as the trial of the Related Actions. Determining them through this action as a test case or through a representative action as the developer defendants propose would be far less practical and efficient.

[137] Determining common issues A to D would bind all class members: *CPA*, s. 26. Absent an agreement from other putative class claimants to be bound by the outcome of a test case, the result would not bind the determination of their claims.

Multiple separate proceedings in this Court could result, with much of the same evidence being called. The spectre of inconsistent results is also raised. A representative action would prolong interlocutory proceedings and trial. The developer defendants' submission envisions discovery of each plaintiff and each plaintiff's attendance at trial to prove their claim.

[138] In these respects, judicial economy is not served.

[139] Moreover, putative class members with smaller claims may be dissuaded from bringing suits which in turn would not promote access to justice and the goal of behaviour modification. Determining liability issues in the Related Actions would not fully promote the objective of behaviour modification. The IGU Actions will fail if SP 3165 and SP 3206 do not establish dangerous defects. In that event, owners in privity who could establish non-dangerous defects constituting breach of the implied warranty or breach of contract would be left without redress.

s. 4(2)(e) – Administering the Class Proceeding

[140] The flexibility provided in the *CPA* (e.g., ss. 12, 27–33) to fashion efficient procedures to determine the issues and claims, particularly individual issues, means that the proposed class proceeding would not create greater difficulties than those likely to be experienced if relief were sought by other means. To the contrary, and to cite from the reasons in *Fakhri v. Alfalfa's Canada Inc.*, 2003 BCSC 1717 at paras. 95-96 (cited in *Dominguez* at para. 239), resolving the claims in this case through a class proceeding is the preferable procedure because it will allow them to be managed in a "controlled procedural environment".

Summary

[141] Upon considering the factors in s. 4(2) of the *CPA*, I conclude that the plaintiff has established overall, a basis in fact that certification of common issues A to D is the preferable procedure.

Suitable Representative Plaintiff Presenting a Workable Plan

[142] The proposed representative plaintiff presented what I am satisfied at this juncture is a workable 11-page litigation plan which sets out procedures for notifying class members, and identifies the procedural issues to be addressed at the trial of the common issues. Further, the plan specifically addresses judicial economy and access to justice with its proposal to align interlocutory procedures concerning liability issues with those already established through case management orders issued in the Related Actions (e.g., as the impending delivery of its expert reports by mid-February 2022) in order to have the liability common issues tried at the same time as the Related Actions. The plaintiff assured me in its submissions that it will meet all pre-trial deadlines ordered in the Related Actions. The plan also addresses the resolution of individual issues following the trial of common issues.

[143] The developer defendants' objections are two-fold. The plan is deficient because it does not address the manner in which individual issues are to be dealt with following the determination of the common issues and hence, the plaintiff is an inappropriate representative plaintiff for presenting a deficient plan. They did not argue that it is in a conflict or is otherwise inappropriate for the proposed representative plaintiff to represent the interests of the class.

[144] For their first objection, they argued that the plan is deficient because it does not detail the manner in which s. 27 of the *CPA* will be applied to the assessment of individual damages issues (such as the claim for loss of amenity). They also argued that the evidence adduced by the plaintiff suggesting a means of determining diminution in value on an aggregate basis (through a comparison of sales data for strata units in the Building compared to a benchmark housing price index) is irrelevant since the plaintiff does not seek to certify common issues concerning diminution in value.

[145] The lack of relevance of such evidence has no bearing on the relevance of common issues A to D to all members of the class and the significance their determination has on advancing this proceeding in either direction.

[146] The developer defendants' other objection is that the plaintiff failed to meet the requirement discussed at para. 74 in *Watson BCSC* that the plan must deal with individual issues that will be left over after the common issues are resolved.

[147] However, the proposed plan appropriately deals with the resolution of all outstanding issues once the common issues are determined. The plaintiff proposes that within 30 days of the issuance of judgment for the plaintiff on any of the common issues, the parties will convene for argument under s. 27 of the *CPA* to determine the appropriate course for outstanding issues. The plaintiff also suggests that assuming the common issues are resolved in favour of the class, it may be necessary for the Court to establish and supervise a claims and assessment procedure (the precise nature will depend on the conclusions reached by the judge at the common issues trial). This comports squarely with the approach approved of in ss. 12 and 27 of the *CPA* and in the case authorities: see, e.g., *Jiang No. 2* at paras. 37-38, 44, 60-61; *Dominguez* at para. 182; *Cassano* at paras. 50-52.

[148] The developer defendants did not pursue their objection advanced at the prior hearing that the plaintiff's principal (Mr. Michelson) is in conflict in part because he is president of the strata council of one of the plaintiff strata corporations in the Related Actions.

[149] I will conclude this section with these remarks. Litigation plans are necessarily preliminary at the certification stage and are anticipated to require amendment as the case proceeds: *Jiang No. 2* at paras, 58–62; *Charmley* at para. 43. The Court of Appeal said at para. 62 in *Jiang No. 2* that even if "the plaintiff's litigation plan concerning the resolution of the individual issues will likely need revisions … [T]he judge was correct to view the adequacy of the plan through the lens of the case management tools available to a judge post-certification." I agree with the plaintiff that its plan more than adequately addresses individual issues at this stage of the proceeding.

Conclusion

[150] The extract below taken from the plaintiff's written submission below aptly summarizes why certification is the preferable procedure:

> This case concerns a standard form pre-sale contract, claims of a uniform breach, the same IGUs, and the same building. The question of whether the IGUs are defective, and whether the Defendants have breached the pre-sale contracts and implied warranty, will require reference to substantially the same body of evidence raised by the liability issues in the Related Actions. Because the class action does not require and leaves for another day assessments of damages, the class action can be efficiently determined together at the trial in the Related Actions. It will not expand upon the scope of discovery or trial.

[151] The entire class will benefit from the determination of the liability common issues and the legal issues raised by damages common issues C and D, which comports with the approach taken in analogous cases such as *Harrington* and *Mueller*.

[152] Liability common issues A and B and damages common issues C and D (insofar as they raise legal issues) are appropriate common issues that will advance this proceeding.

[153] The representative plaintiff will fairly and adequately represent the interests of the class. It has submitted a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding.

[154] The requirements for certification of common issues A to D have been met. Certification of those issues promotes the objectives of the *CPA* of judicial economy, access to justice, and behaviour modification.

[155] In the result, this proceeding is certified as a class proceeding.

"Walker J."