IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Westsea Construction Ltd. v. Taylor,* 2024 BCSC 210

Date: 20240209
Docket: S184015
Registry: Victoria

Between:

Westsea Construction Ltd.

Petitioner

And:

Andrew Scott Taylor, Douglas George Routley, Leanne Finlayson, Edith Wood, Gerald John Rotering, Helen Elisabeth Verwey, Hugh Alexander Trenchard, Iris Irene Hays,Jacalyn Gail Hays, Judith McNeil Sim, Martine Goddard, Patricia Anne Smith, Reiner Joachin Piehl, Doreen Greeta Piehl, Sandra Scott Jonsson also known as Sandra Scott Grove-Sager, Gordon William Grove, See-Lin Shum,

Respondents

Corrected Judgment: The text of the judgment was corrected at paragraph 72 on February 27, 2024 and March 4, 2024.

Before: The Honourable Mr. Justice G.R.J. Gaul

Reasons for Judgment

Counsel for the Petitioner:	M. C. Stacey L. Dinwoodie (Articled Student)
Counsel for the Respondents (except H. A. Trenchard):	A. Rafuse
The Respondent, appearing in person:	H. A. Trenchard
Place and Dates of Hearing:	Victoria, B.C. April 3, 4, 2023
Place and Date of Judgment:	Victoria, B.C. February 9, 2024

Introduction

[1] This litigation involves a 22-story, long-term leasehold building with 211 residential units in Victoria, British Columbia, known as “Orchard House”.

[2] The petitioner, Westsea Construction Ltd. (“Westsea”), is the registered owner and manager of Orchard House.

[3] The respondents are owners of leasehold interests in Orchard House units.

[4] The individual respondent, Hugh Trenchard purchased a leasehold interest in a unit at Orchard House in January 2011.

Background / Facts

The Lease

[5] The relationship between Westsea and the individual leaseholders at Orchard House is governed by a 99-year lease agreement, which expires in 2073 (the “Lease”).

[6] Under the terms of the Lease, Westsea is required to manage and operate the services and facilities at Orchard House. Specifically, in Article 5 of the Lease, Westsea, as the lessor, covenants with the lessees of units at Orchard House:

> 5.01 For quiet enjoyment
>
> 5.02 To provide heat to all common areas of [Orchard House] and to each of the Suites …
>
> 5.03 To keep in good repair and condition the foundations, outer walls, roofs, spouts and gutters of [Orchard House], all of the common areas therein and the plumbing, sewage and electrical systems therein.
>
> 5.04 To keep the entrance halls, staircases, corridors and other like areas in [Orchard House] clean and properly lighted and heated and the elevators properly lighted and in good working order.
>
> 5.05 The Lessor shall provide or engage the services of such staff as may be requisite for the proper care and servicing of [Orchard House].
>
> 5.06 To pay taxes.
>
> 5.07 To provide passenger elevator service except during the making of repairs.

> 5.08 To keep [Orchard House] insured against loss or damage by fire, lightning or tempest ...
>
> 5.09 To maintain a policy or policies of general public liability insurance against claims for bodily injury, death or property damage arising out of the use and occupancy of [Orchard House] ...
>
> 5.10 To the extent that the service is available to provide cablevision and front door intercommunications service to the Suites in [Orchard House].
>
> 5.11 To observe and perform all the terms, covenants, provisions and agreements contained in any prior charge and without restricting the generality of the foregoing, to make all payments of money required to be made thereunder on their due dates ...

[7] The expenses incurred by Westsea in the performance of its covenants under the lease are categorized as "Operating Expenses". Article 7.01 of the Lease defines these expenses as follows:

> 7.01 "Operating Expenses" in this Lease means the total amount paid or payable by the Lessor in the performance of its covenants herein contained (save and except those contained in Article 5.11) and includes but without restricting the generality of the foregoing the amount paid or payable by the Lessor in connection with the maintenance, operation and repair of [Orchard House], expenses in heating the common areas of [Orchard House] and each of the Suites therein ... and providing hot and cold water, elevator maintenance, electricity, window cleaning, fire, casualty liability and other insurance, utilities, service and maintenance contracts with independent contractors or property managers, water rates and taxes, business licences, janitorial service, building maintenance service, resident manager's salary (if applicable) and legal and accounting charges and all other expenses paid or payable by the Lessor in connection with [Orchard House], the common property therein or the Lands. "Operating Expenses" shall not include any amount directly chargeable by the Lessor to any Lessee or Lessees. The Lessor agrees to exercise prudent and reasonable discretion in incurring Operating Expenses, consistent with its duties hereunder.

[8] Article 7.02 of the Lease provides that Westsea is entitled to seek reimbursement from the leaseholders for the Orchard House Operating Expenses. This article reads:

> 7.02 Estimate of Operating Expenses – Prior to commencement of each calendar year during the Term other than the Base Year, the Lessor shall furnish to the Lessee an estimate of the Operating expenses for such calendar year based on prior years experience and the Lessee shall pay to the Lessor on the first day of each and every month during such calendar years, One-Twelfth (1/12th) of the Lessee's Share of such estimated Operating expenses.

History of Repairs at Orchard House

[9] In or around February 2010, Westsea delivered a notice to all leaseholders informing them of repairs that needed to be made at Orchard House. This proposed work included tower restoration and window replacement (the "Phase 1 Repairs"). Those repairs were started in late February 2010.

[10] In 2013, Westsea retained an engineering firm to prepare a report regarding the physical condition of Orchard House, including its building envelope, roof and membrane. The resulting report recommended that the windows and sliding doors at Orchard House be replaced.

[11] In 2016, the engineering firm provided a more comprehensive report on the state of Orchard House that recommended additional repairs the building (the "Phase 2 Repairs").

[12] In early July 2016, Westsea notified all of the Orchard House leaseholders that the Phase 2 Repairs would be soon commencing and that they would each be responsible for their proportionate share of the costs of the repairs.

[13] The Phase 2 Repairs were started in July 2016.

History of the litigation

[14] The parties' legal dispute relates principally to how Westsea managed the Phase 1 Repairs and Phase 2 Repairs at Orchard House.

Mr. Trenchard's 2014 Petition

[15] In August 2014, Mr. Trenchard filed a petition naming Westsea as the respondent (the "2014 Petition"). The relief sought focused on having the Lease interpreted so that it included a term requiring Westsea to disclose information and documents relating to the Operating Expenses of Orchard House upon the request of a leaseholder.

[16] During the course of the hearing of the 2014 Petition, the parties reached an agreement which resulted in a consent order dismissing the petition, except for the issue of costs. On this latter issue, Westsea maintained that it was not seeking an order of costs against Mr. Trenchard pursuant to Rule 14-1 of the *Supreme Court Civil Rules* (the "*Rules*"). Instead, Westsea held the position that it was entitled to rely on the terms of the Lease and that the costs associated with responding to the 2014 Petition could be recovered from the leaseholders as Operating Expenses.

[17] Mr. Trenchard argued that the legal costs associated with Westsea responding to the 2014 Petition were unrelated to the Lease and therefore could not be categorized as Operating Expenses chargeable to all of the Orchard House leaseholders.

[18] In reasons for judgment indexed at 2016 BCSC 1752 (the "2016 Judgment"), Mr. Justice MacKenzie agreed with Mr. Trenchard's argument and rejected Westsea's position on costs. In doing so, Justice MacKenzie noted:

> [21] …if I were to accept Westsea's submission, Westsea could seek reimbursement from the leaseholders, including Mr. Trenchard, for its legal costs even if Mr. Trenchard had succeeded with his petition. This is not that different a scenario than what in essence occurred here. Westsea agreed to provide Mr. Trenchard with what he was seeking and in exchange the petition was dismissed by consent. As a result, I agree with Mr. Trenchard that it is contrary to common sense to conclude that Westsea would be entitled to costs against him and the other leaseholders in the present case.

[19] In the result, Justice MacKenzie ordered that the parties would bear their own costs.

Appeal from the 2016 Judgment

[20] Westsea appealed from the 2016 Judgment arguing that Justice MacKenzie had both incorrectly interpreted Westsea's obligations under the Lease and had incorrectly characterized Mr. Trenchard's success in the 2014 Petition.

[21] Westsea's appeal was allowed and the order resulting from the 2016 Judgment was set aside. In reasons indexed at 2017 BCCA 352, Mr. Justice Savage observed:

> [6] The primary issue on appeal is whether the judge erred by holding that the legal fees and expenses incurred as a result of the petition are recoverable as Operating Expenses under Article 7.01 of the Lease. I say the "primary issue" because Mr. Trenchard in his factum seeks various other remedies in the absence of any appeal by him. Clearly he is not entitled to the relief he seeks as he did not cross-appeal.
>
> [7] The issue raised was not properly before the Court below because the question of whether legal fees are Operating Expenses under the Lease is premature. It was wrong for Westsea to have urged the court to decide an issue prematurely, resulting in it incurring additional legal expenses here and in the court below.
>
> …
>
> [11] In this proceeding Westsea elected to seek indemnity under the Lease. Articles 7.02-7.04 of the Lease allow the lessor, *if the clause applies*, to charge back Operating Expenses against *all of the leaseholders* based on the ratio of the areas of their units to the total area of suites in the building. That has not been done and Westsea may yet decide that it should not attempt to charge the leaseholders for the legal fees and expenses related to the petition.
>
> [12] I would also add that in this case because the operation of the clause is as I have described, all of the leaseholders have an interest in the matter, and only Mr. Trenchard is before this court. It is only by proceeding in the manner described (providing a statement of the legal fees and expenses to the leaseholders setting out its claim under the clause) that the issue would properly be raised before all of the interested parties: all of Orchard House's 210 leaseholders. The issue was not properly before the court below.
>
> [13] In the result, I would set aside that part of the order below. As the appeal is allowed, but not for the reasons argued before us, I would not make any award as to costs in this court. Nothing in these reasons should be construed as impugning or supporting the interpretation of the Lease in the court below.

[22] Leave to appeal from the Court of Appeal's judgment to the Supreme Court of Canada was refused: leave to appeal to SCC ref'd, 37936 (8 August 2018).

Mr. Trenchard's 2016 Civil Action

[23] In August 2016, Mr. Trenchard commenced a civil action against Westsea. In his notice of civil claim, Mr. Trenchard alleged, amongst other things, that Westsea

had breached the Lease with regards to remediation work, including the replacement of failing windows and sliding doors as well as exhaust fans, that had been completed at Orchard House (the "2016 Action").

[24] The 2016 Action was initially commenced as a class action suit; however, Mr. Trenchard took no steps to have the action certified as such. Instead, he proceeded to file four additional amended notices of civil claim, the last of which was dated 1 May 2019, and went to trial before Madam Justice Douglas in June 2019.

[25] Mr. Trenchard maintained that Westsea was not obliged under the Lease to undertake the remedial work in question and that by seeking to recover from leaseholders like himself the costs associated with that work, Westsea had breached the terms of the Lease.

[26] For its part, Westsea argued that the remedial work performed at Orchard House fell within the scope of its obligations under the Lease and, therefore, the costs associated with that work were recoverable as Operating Expenses on a proportionate basis from the Orchard House leaseholders, including Mr. Trenchard.

[27] In her reasons for judgment dismissing the 2016 Action, indexed at 2019 BCSC 1675, Madam Justice Douglas concluded that the terms of the Lease were clear and unambiguous. Moreover, she found that pursuant to the Lease, Westsea was legally required to undertake the remedial work in question and, consequently, the costs associated with that work were recoverable from Mr. Trenchard and the rest of the Orchard House leaseholders (the "2019 Judgment").

Appeal from the 2019 Judgment

[28] Mr. Trenchard's appeal from the 2019 Judgment was dismissed (the "Appeal Decision"). In reasons indexed at 2020 BCCA 152, Mr. Justice Hunter explained:

> [74] In the result, it is my view that the appellant has not established that the trial judge erred in concluding that the Phase 2 costs were Operating expenses within the meaning of Article 7.01. I would dismiss the appeal.
>
> [75] The respondent has advised that it is not seeking an order as to costs from this Court, as it intends to rely on its contractual rights. Accordingly, I

> would order that the appeal be dismissed, without costs to any party. Whether the respondent has the contractual rights it asserts is not before us, and I express no opinion on that matter.

Westsea's 2018 Petition

[29] In September 2018, Westsea filed the petition naming 27 Orchard House leaseholders as respondents (the "2018 Petition"). The fundamental purpose of the 2018 Petition was to address the outstanding issue of costs relating to the Court of Appeal's concern in 2017 that only Mr. Trenchard was a respondent before the court.

[30] The principal relief Westsea sought in the 2018 Petition is a declaration that the respondents are in default of article 7.02 of the Lease.

[31] Many of the respondents have resolved Westsea's claim against them and consequently are no longer involved in this litigation.

[32] The remaining 11 respondents have filed responses to the 2018 Petition. Ten of those respondents are represented by the same legal counsel. The 11th respondent, Mr. Trenchard, is a self-represented litigant.

[33] Mr. Trenchard filed a response to petition on 19 October 2018. The response to petition of the remaining ten respondents was filed on 30 November 2018.

[34] A Case Planning Conference before Madam Justice Power was held on 23 September 2019. The resulting order directed that Westsea amend its 2018 Petition. That amended Petition was filed on 13 January 2021.

[35] On 3 March 2021, Mr. Trenchard filed an amended response to petition.

[36] Further Case Planning Conferences were held in May and June of 2021. One result of these conferences was a further amended petition filed by Westsea on 18 June 2021.

[37] In January 2022, I conducted a Case Planning Conference with the aim of settling the status of the parties' respective pleadings. The resulting order directed

Westsea to provide Mr. Trenchard with a list of the issues or items that it maintains should be removed or amended from his amended response to petition. I also granted leave to the respondents, including Mr. Trenchard, to file amended responses and leave to Westsea to apply to strike the respondents' pleadings.

[38] On 11 March 2022, Mr. Trenchard filed a further amended response to petition. The remaining respondents filed their amended response on 21 March 2022.

Nature of the present application

[39] On 1 June 2022, Westsea filed the notice of application currently before the court.

[40] On the first day of the hearing, the parties reached an agreement dispensing with the need for an order requiring the respondents to provide further and better particulars to the items identified in Westsea's Demand for Particulars. The resulting order, dated 3 April 2023, permitted the respondents to file further amended responses removing any references to legal expenses not related to the proceedings initiated or pursued by Mr. Trenchard.

[41] In accordance with my order of 3 April 2023, Mr. Trenchard filed a further amended response to petition on 11 April 2023. For the purposes of the present application, there are no material differences between Mr. Trenchard's Further Amended Response dated 11 March 2022 and the latest one filed in April of 2023.

[42] The remaining respondents filed their Further Amended Response to Petition on 12 April 2023.

[43] As a result of the developments on the first day of the hearing, the remainder of the hearing focused strictly upon the relief Westsea sought solely against Mr. Trenchard. Consequently, the remaining respondents and their counsel took no further part in the hearing.

[44] Specifically, Westsea seeks an order that:

a) Paragraphs 26.8, 41-7 to 41.24, 50.8 -50.9, and 95 to 95.4 and any pleadings relating to:

i. Obligations outside of the Lease;

ii. Betterment; and

iii. Contracting out of legislation

be struck from Mr. Trenchard's Further Amended Response and that the said Response be amended accordingly.

Law

Striking pleadings pursuant to Rule 9-5

[45] Rule 9-5(1) governs the current application. That rule reads:

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[46] The test for striking pleadings pursuant to R. 9-5(1)(a) was described by Chief Justice McLachlin in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 as follows:

> [17] …A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

[47] Mr. Trenchard submits that the test articulated in *Imperial Tobacco* should not be applied in the present circumstances because the pleadings sought to be struck are portions of a response to a petition. In support of this proposition, Mr. Trenchard cites the Mr. Justice Willcock's decision in *L'Association des parents de l'école Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique*, 2011 BCSC 1495. At paragraph 3 of his reasons, Justice Willcock explained:

> [3] The second application, which is brought by the petitioners, is for an order striking portions of the pleadings filed by the respondents. That application is brought with a view toward removing particular issues from the table at the hearing of the petition. The petitioners say the respondents, principally the Minister of Education of British Columbia and the Attorney General of British Columbia (collectively referred to as the "Province"), are unnecessarily complicating the issues in this litigation and the effect of this complication is to delay and frustrate the petitioners. …

[48] In addressing the scope of Rule 9-5, Justice Willcock observed:

> [37] In applying that Rule the province urges upon the court the standard described in *Keddie v. Dumas Hotels Ltd. (c.o.b. Cariboo Trail Hotel)* (1985), 62 B.C.L.R. 145 (C.A.), where at p. 147 the court adopted the following definition of "embarrassing" pleadings:
>
> > In *Mahoney v. Coca Cola Ltd.*, B.C.S.C., No. 1612/64, 21st February 1967, and *Maddison v. Donald H. Bain Ltd.*, 39 B.C.L.R. 460, [1928] 3 D.L.R. 33 (C.A.), the courts adopted this definition of "embarrassing" pleadings from *Mayor of London v. Horner* (1914) 111 L.T. 512 at 514 (C.A.):
> >
> > > ... ["embarrassing" means] that the allegations are so irrelevant that to allow them to stand would involve useless expense, and would also prejudice the trial of the action by involving the parties in a dispute that is wholly apart from the issues. In order that allegations should be struck out from a defence upon that ground ... their irrelevancy must be quite clear and, so to speak, apparent at the first glance. It is not enough that on considerable argument it may appear that they do not afford a defence.
>
> [38] I accept the Province's submission that only pleadings that are clearly irrelevant to the remaining case should be struck.

[49] Although overturned by the British Columbia Court of Appeal in reasons indexed at 2013 BCCA 407, Justice Wilcox's decision striking a portion of the respondent's pleadings was reinstated by the Supreme Court of Canada in reasons

indexed at 2015 SCC 21. Writing for a unanimous court, Justice Karakatsanis explained:

> [74] Given the phasing of the petition, the portions of the Province's pleadings struck by the judge were not relevant to the first-phase inquiry into equivalence. In the circumstances, it was open to the judge to strike those portions of the Province's pleadings. Further, the judge was entitled to decline to hear evidence on the question of responsibility for any inadequacies at RDV. While the judge's communication of the phasing of the petition was perhaps not as clear as it might have been, this did not result in any prejudice to the parties. It was clear throughout the proceedings that the judge would not assign responsibility for any s. 23 breach or fashion any remedy as part of the first phase.
>
> …
>
> [79] Some or all of the Province's struck pleadings may be relevant to a subsequent phase of the litigation. However, based on the judge's organization of the proceedings, they do not assist in the first phase at issue in this appeal. Of course, his decision is without prejudice to any motions on the part of one or more of the parties to amend their pleadings at subsequent phases of the litigation.

[50] Contrary to what Mr. Trenchard submits, there is no conflict between what the Supreme Court of Canada said in *Imperial Tobacco* and what it indicated in *L'Association*. In my opinion, the general question to ask and answer remains the one articulated in *Imperial Tobacco*: is it plain and obvious that the impugned pleading offends one or more of the sub-sections of Rule 9-5(1)?

Discussion

[51] Prior to commencing my analysis, I note that the present application relates only to Mr. Trenchard and his pleadings. While the remaining respondents filed a response and their counsel was present and made brief submissions at the outset of the hearing, he absented himself for the remainder of the hearing, with the court's permission, given that the relief being sought by Westsea, if granted, would only impact Mr. Trenchard's pleadings and not those of any of the remaining respondents.

Abuse of Process

[52] Mr. Trenchard argues that Westsea's application is a "colossal waste of time and court resources". Pointing to the fact that Westsea has made similar applications the 2014 Petition and the 2016 Action, Mr. Trenchard submits that Westsea is exploiting the court's rules and proceedings in order to make it prohibitively difficult for him to continue, given his status as a self-represented litigant.

[53] The power to strike pleadings is an essential case management tool designed to ensure fair and effective litigation: *Imperial Tobacco*, para. 19.

[54] I am not convinced that Westsea is abusing the court's process or exploiting the *Rules* in order to force Mr. Trenchard to capitulate. The fact that Westsea sought to have Mr. Trenchard's pleadings in other proceedings struck does not make the present application inappropriate or improper.

Pleadings alleging duties beyond the Lease (paras. 26.8 & 41.17 to 41.24)

[55] At para. 26.8 of his Further Amended Response, Mr. Trenchard pleads:

> …the matter of whether Westsea has obligations outside those stated in the Head Lease under the *Occupier's Liability Act* and in negligence law to maintain the Orchard House building, as pled herein at paragraphs 41-17 to 41.24, was never considered or decided upon by the court of Appeal or Madam Justice Douglas. These matters speak to Mr. Trenchard's pleading that Westsea defended itself fundamentally in its own interest so that Westsea would not have to pay for the windows and door project, and that Westsea was not incurring litigation costs in the leaseholders' interests, as Westsea has pleaded.

[56] With more specificity, paras 41.17 to 41.24 of the Further Amended Response reads:

> 41.17. Secondly, absent repair and maintenance covenants under the Head Lease, negligence law and the *Occupier's Liability Act* operate to hold Westsea liable if the building condition falls below a certain safety standard.
>
> 41.18. Absent the repair covenants under the Head Lease, it is negligent and irresponsible for Westsea to allow Orchard House, a building it owns, to become unsafe and uninhabitable.

> 41.19. The test for negligence under the Occupiers Liability Act is discussed in *Agar v. Weber*, 2014 BCCA 297 (para 48-58).
>
> …
>
> 41.21. Similarly, for repairs and maintenance necessitated under negligence law and the *Occupiers Liability Act*, Westsea must conform to construction standards under the BC Building Code and other regulations, just as it was obliged to do when Westsea undertook the windows project.
>
> 41.22. Westsea implies that it was willing to ignore the law so that it could avoid paying to replace failing windows and doors in the event the building became unsafe.
>
> 41.23. The difference between requirements imposed by law and those imposed by the Head Lease is in who pays for the project: under negligence law and the *Occupiers Liability Act*, Westsea is liable; under the Head Lease, Westsea recovers project costs from the lessees. It was 100% in Westsea's interest to prove it was obliged under the Head Lease to undertake the windows project so Westsea did not have to pay for it.
>
> 41.24. Mr. Trenchard argued this point on appeal, but it was not addressed in the decision.

[57] In my opinion, Mr. Trenchard's position is ill-founded. As I have stated previously, the relationship between Westsea and the Orchard House leaseholders is governed by the terms of the Lease. It is not governed by any statutory instrument, such as the *Occupier's Liability Act* (the "*OLA*"). In *Westsea v. Mathers*, 2014 BCSC 143, Madam Justice Gropper addressed this point, noting:

> [32] In respect of the application of the *Commercial Tenancy Act*, I agree with the petitioners that their relationship with Ms. Mathers is governed by the contracts between them, and not the provisions of the *Commercial Tenancy Act*. I do note that in any event, the petitioners have complied with the provisions of that *Act*, particularly ss. 18-22.
>
> [33] Similarly, the provisions of the *Residential Tenancy Act*, S.B.C. 2002 c. 78 do not apply. The *Residential Tenancy Act* does not apply to tenancy agreements having a term of longer than 20 years.

[58] Although Justice Gropper does not reference the *OLA,* in my opinion the legal principle to be derived from the *Mathers* decision remains applicable to the present case. That is, the entire relationship between Westsea and the leaseholders at Orchard House is governed by the terms of the Lease they agreed to.

[59] When, at the trial of the 2016 Action before Justice Douglas, counsel for Westsea suggested to Mr. Trenchard in cross-examination that there is no

legislation that governs 99-year leases such as the one in place at Orchard House, Mr. Trenchard agreed and remarked:

> As I indicated, I guess it must have been in my opening, there are some references to 99-year leases, but I agree with you that there's no legislation that directly governs or regulates 99-year leases, yes.

[60] I agree with counsel for Westsea's submission that the *OLA* and the common law of negligence are a consideration and become engaged only when a tort has been alleged in the litigation. Counsel is also correct when he submits that not only is there no tort alleged in the 2018 Petition, no tort has been alleged in any of the other proceedings connected to the 2018 Petition.

[61] The principal issue to be determined in the 2018 Petition is whether legal charges, including those arising out of defending against litigation initiated or pursued by Mr. Trenchard, are chargeable to the leaseholders at Orchard House as Operating Expenses pursuant to the terms of the Lease.

[62] In my opinion, Westsea is correct when it submits that there is no connection between Mr. Trenchard's pleadings relating to the *OLA* and tort law and any material issue in the 2018 Petition.

[63] Beyond the fact that the question of whether Westsea's duty of care in negligence law or under the *OLA* is extraneous to the issues raised in the 2018 Petition, I find the impugned pleadings exhibit an obvious effort by Mr. Trenchard to relitigate an issue that has already been decided.

[64] In the impugned pleadings, Mr. Trenchard contends that Westsea had legal obligations to the Orchard House leaseholders beyond the terms of the Lease and that this issue was never considered or addressed at trial by Justice Douglas or at the subsequent appeal. In my view, that contention is factually incorrect. In the 2016 Action, Mr. Trenchard specifically argued that Westsea's obligation to ensure the Phase 2 Repairs were completed was a "freestanding" one that fell outside of the terms of the Lease. Having done so, I find Mr. Trenchard cannot now argue that the issue of whether Westsea had obligations beyond the Lease was not before Justice

Douglas. In my opinion, Justice Douglas rejected the argument when she concluded that the covenants in the Lease mandated that Westsea undertake the Phase 2 Repairs. At paras. 108 to 110 of her decision, Justice Douglas explained:

> [108] I am not persuaded by the plaintiff's argument the Lease obliges neither leaseholders nor the lessor to undertake the repair or replacement of deteriorated Building components damaged due to reasonable wear and tear. I conclude such an interpretation would lead to an absurd result which the parties could not reasonably have contemplated when they entered into the Lease. If neither party was obliged to undertake the Project and this work was not completed, the evidence confirms the Building would have fallen into disrepair and may not have survived the term of the Lease.
>
> [109] On a plain reading of Article 5.03, considered in the context of the Lease as a whole and the relevant authorities including, notably, *JEKE*, and a review of all the evidence, I conclude as follows:
>
> a) By 2016, the windows, sliding doors, and fans replaced during the Project had deteriorated due to reasonable wear and tear occasioned by the passage of time and were not functioning at the expected level;
>
> b) The windows, doors and fans could not be repaired and required replacement;
>
> c) Leaseholders were not obliged under the Lease to replace windows, sliding doors, or fans in their suites damaged due to reasonable wear and tear;
>
> d) Requiring individual leaseholders to do so would be impractical, inefficient, and expensive, assuming that were possible and permitted by the City of Victoria;
>
> e) Article 5.03 is reasonably construed in the context of the Lease as a whole as obliging Westsea, as lessor, to replace failing Building components, as contemplated by the Project; and
>
> f) To conclude otherwise would result in an absurdity, which would be inconsistent with the notion of commercial efficacy and what the parties could reasonably have contemplated when they entered into the Lease.
>
> [110] For these reasons, I conclude Westsea was required to undertake the Project pursuant to its lessor covenants in the Lease.

[65] Mr. Trenchard is also mistaken when he maintains that the issue was not addressed or decided when Justice Douglas' decision was before the Court of Appeal. Aside from the fact that at para. 41.24 of the impugned pleadings Mr. Trenchard clearly acknowledges that he argued the issue before the Court of

Appeal, I am satisfied that the Court of Appeal did address and decide the issue when it upheld Justice Douglas' findings and dismissed the appeal. At paras. 53 to 55 of the Appeal Decision, Justice Hunter concluded:

> [53] The effect of this interpretation would be to create a gap, whereby no one would have the responsibility to repair doors and windows that have failed, but the appellant submits that this is the only interpretation that protects the exception for reasonable wear and tear in Article 4.03.
>
> [54] The trial judge did not consider that there was an inconsistency between Articles 4.03 and 5.03. She was of the view that the Lessor's responsibility to keep the outer walls and the building in good repair could include replacing the windows, sliding doors and exhaust fans, depending on the circumstances. The judge referenced the judgment of *Holiday Fellowship v. Viscount Hereford*, [1959] 1 All E.R. 433 (Eng. C.A.) for the proposition that "whether windows form part of the outer walls of a building is a matter of degree, to be determined on the facts." Thus she rejected the assertion of the appellant that the effect of Articles 4.03 and 5.03 necessarily excluded any obligation of the Lessor to replace windows and doors of the building.
>
> [55] This can be an erroneous interpretation only if the Lease provides that the Lessor can never have an obligation to replace the windows, doors and exhaust fans, no matter what impact their obsolescence had on the building. I do not consider that the wear and tear provisions of Article 4.03 compel such a categorical result.
>
> …

[66] I am not persuaded that the above-noted paragraphs of Mr. Trenchard's pleadings have any likelihood of succeeding at the hearing of the petition. In fact, I find the points raised in the pleadings are irrelevant to the material issues in dispute and have been previously argued and rejected. Consequently, to allow them to remain as part of the litigation would, in my view, unnecessarily complicate the proceedings, to the detriment of an efficient resolution of the parties' dispute.

Pleadings relating to betterment (paras. 50.8 – 50.9)

[67] Mr. Trenchard pleads at paras. 50.8 and 50.9 of in his Further Amended Response:

> 50.8 The Court of Appeal also clarified that under the Head Lease, betterments cannot be charged as Operating costs. This settles an important issue because it overrules Mr. Justice Romilly's finding in his 2012 Provincial Court decision *Steers v Sheridan* that under a 99-year lease in Vancouver,

> the lessor was allowed to charge betterments as Operating costs under the lease.
>
> 50.9. In cases of public importance, the court has discretion to award no costs to a successful litigant. Given that "many multiples of leaseholders" are affected (Court of Appeal in *Trenchard V. Westsea* 2020 BCCA 152, para 47), the litigation in this case transcends the immediate issues of the parties involved, and have not been previously resolved.

[68] In my opinion, Mr. Trenchard has failed to demonstrate how these pleadings are materially relevant or necessary to the present litigation. At para. 17 of this Application Response he explains under the heading “Cases of public importance and the betterment question”:

> [17] At paragraph 39 of its notice of application Part 3: Legal Basis, Westsea argues that it is not clear what Mr. Trenchard proposes to argue in relation to betterments at paragraph 50.8 of his Further Amended Response. Mr. Trenchard responds that the context provides sufficient clarity. Paragraph 50.8 was framed under the heading “Other factors that limit an award of costs to Westsea". It is plain therefore that Mr. Trenchard is not seeking to argue whether or not Westsea's legal charges constitute a betterment as Westsea suggests in its paragraph 36 Part 3 Legal Basis (if such a notion is even rational!). Paragraph 50.8 connects with 50.9 of Mr. Trenchard's Further Amended Response, in which he argues that this case involves a public interest dimension. The public interest element arguably reduces Mr. Trenchard's cost liability, a matter that ought to be before the court at the hearing on its merits.

[69] Mr. Trenchard seems to acknowledge that legal charges, such as those in dispute in this litigation, do not constitute betterment and that he does not mean to pursue that argument. In any event, I find counsel for Westsea is correct in that the Appeal Decision already addressed the issue of whether the Phase 2 Repairs constituted a betterment and had concluded they were not. In his reasons for judgment, Justice Hunter explained:

> [71] The second constraint identified by the judge is that the project must be one of maintenance, operation and repair of the building, not of betterment. The term Operating expenses is a defined term, and a proper construction of that term must hew to the definition contained in the Lease. Maintenance is not, however, a defined term, and I agree with the trial judge that it is implicit in the term “maintenance” that the expenditure must be directed to maintaining, not improving, the building. The distinction can be subtle, but in this case the judge concluded that the Phase 2 project returned the building to its original condition, and did not amount to betterment. This is a finding of mixed fact and law to which I would defer.

> [72] In coming to this conclusion, the judge accepted the evidence that the windows, sliding doors and exhaust fans would require further replacement in another 25–35 years. As this will be well before the end of the term of the Lease, the judge commented that the only parties who will benefit from the Project are the leaseholders. The appellant takes issue with this comment, since the Lessor as owner of the Building presumably obtains some benefit from the continued upkeep of the building, but the judge's comment was made in contradistinction to the facts in *Parsons*, where the lessee in question had only 14 months left on its lease.
>
> [73] The appellant cited a large number of authorities to us which I have not found it necessary to address. Some involve short-term leases and most appear to have sparsely worded lease agreements. Each decision relates to the particular factual context before the court. None of these cases, so far as I can determine, contains operating cost chargebacks as detailed and specific as Article 7.01. Any contractual provision must be interpreted in the context of the entire document. That is what the trial judge did in this case and I can see no error in her approach or her conclusions.

[70] I accept Westsea's argument that the impugned pleadings ought to be struck. Mr. Trenchard's pleadings fail to explain how an argument founded on betterment relates in any material way to the issues of public interest or how betterment relates to Westsea's charging its legal expenses to Orchard House leaseholders pursuant to the terms of the Lease. Furthermore, the issue itself is *res judicata*.

Pleadings relating to contracting out of legislation [paras. 95 to 95.4]

[71] Rule 14-1 of the *Rules* governs the issues of court ordered costs. In particular, Rules 14-1(9) and (13) provide:

> (9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.
>
> …
>
> (13) If an entitlement to costs arises during a proceeding, whether as a result of an order or otherwise, those costs are payable on the conclusion of the proceeding unless the court otherwise orders.

[72] Pointing to what he maintains is the inequality in bargaining positions between the Orchard House leaseholders and Westsea, Mr. Trenchard maintains that Westsea's efforts to claim legal expenses as Operating Expenses amount to an illegal attempt to contract out of legislation, particularly Rule 14-1(13). Consequently, says Mr. Trenchard, Westsea's actions in this regard are prohibited because they

are contrary to public policy. Specifically, Mr. Trenchard contends at paras. 95 to 95.4, of his pleadings:

> 95. Unless the legislation expressly permits parties to contract out of the legislative provision, parties cannot do so.
>
> 95.1. It is permissible to contract out of legislation only if the contractual provision increases protections to the vulnerable party. Parties cannot contract for less than minimum protections under statute. In situations where parties may not possess equal bargaining power, there is a prohibition on contracting out of statute.
>
> 95.2. Further and alternatively, any waiver of or contracting out of Supreme Court Civil Rule 14-1(13) is contrary to public policy, especially because the parties to the standard form Head Lease do no possess equal bargaining power.
>
> 95.3. Article 7.02 of the Head Lease which permits Westsea to furnish lessees with an estimate of Operating costs for a year ahead and demand payment, cannot be used as evidence of the parties' intention. If the intention of the parties is to make an unlawful contract, no contractual term can be derived from that intention.
>
> 95.4. As noted, Rules of Court 14-1(9) and (13) apply. No court decisions (see 96.5 – 96.6 herein) that resolved whether a party could rely on contract to charge litigation costs are inconsistent with these Rules, including *JEKE*; only Westsea's actions are.

[73] In support of his position, Mr. Trenchard relies on the legal principles articulated *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202 and *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3. Both of these decisions address the very specific issue of contracting out of human rights legislation, which, in my view, is something entirely different from the circumstances existing between the Orchard House leaseholders and Westsea.

[74] Our Court of Appeal has decided this issue, and in my opinion it has done so in favour of Westsea's position. In *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329, Justice Dickson observed:

> [52] … As for contractual costs, in entering into a contract parties may agree that one party will reimburse the other for actual legal fees and other expenses incurred in certain circumstances. When those circumstances arise, entitlement to recovery of legal fees and expenses is derived from the

> terms of the contract, not from the statutory costs regime: *Canadian Petcetera* at para. 42.

[75] I accept Westsea's argument that Rule 14-1 has no bearing on the present situation because the Rule does not apply to Westsea's claim for costs pursuant to the terms of the Lease. In this regard, I find Westsea is correct when it submits that paras. 95 to 95.3 ought to be struck as it is plain and obvious that they have no foundation in fact or law nor any reasonable prospect of success.

[76] I am equally of the opinion that para 95.4 of Mr. Trenchard's pleadings ought to be struck as it is frivolous, unnecessary and unrelated to the parties' litigation. The principal issue before the court on Westsea's petition will be the contractual interpretation of the Lease and more particularly whether its terms provide an avenue for Westsea to have the leaseholders of Orchard House pay its litigation related costs. In my view, to embark upon an analysis and determination of whether the Westsea's efforts to claim its litigation costs under the terms of the Lease is an attempt to contract out or circumvent the *Rules*, would be a pointless and wasteful judicial exercise.

Conclusion

[77] Mr. Trenchard is, in my view, attempting to re-litigate or re-argue points that have been addressed and adjudicated in previous proceedings. This is especially so with respect to his pleadings relating to freestanding obligations that he says Westsea has towards leaseholders at Orchard House like himself.

[78] In my opinion the impugned portions of Mr. Trenchard's Further Amended Response to Petition have no reasonable prospect of success as they are unrelated and irrelevant to the principal issue raised in the 2018 Petition. That issue is whether the leaseholders at Orchard House are obligated to indemnify Westsea for the legal charges it has incurred and have been charged as Operating Expenses pursuant to the terms of the Lease.

[79] I am further of the view that for this litigation to proceed in a fair, efficient, and focused manner, the relief sought by Westsea ought to be granted. That is, the impugned paragraphs from Mr. Trenchard's pleadings ought to be struck.

[80] I am not convinced that the issues raised by these paragraphs have any bearing on the issues raised in the 2018 Petition and consequently I see no reason to grant Mr. Trenchard leave to further amend his pleadings.

Order

[81] For the foregoing reasons, the relief sought by Westsea is granted.

"G.R.J. Gaul, J."