COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Trenchard v. Westsea Construction Ltd.,* 2024 BCCA 273

Date: 20240723
Docket: CA49673

Between:

Hugh Alexander Trenchard

Appellant
(Respondent)

And

Westsea Construction Ltd.

Respondent
(Petitioner)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated February 9, 2024 (*Westsea Construction Ltd. v. Taylor*, 2024 BCSC 210, Victoria Docket S184015).

The Appellant, appearing in person:	H.A. Trenchard
Counsel for the Respondent:	M.C. Stacey L. Dinwoodie
Place and Date of Hearing:	Vancouver, British Columbia June 13, 2024
Place and Date of Judgment:	Vancouver, British Columbia July 23, 2024

Written Reasons by:
The Honourable Mr. Justice Butler

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice Fenlon

Summary:

The appellant appeals from the order of a case management judge striking portions of his further amended response to the respondent's further amended petition. The appellant contends the judge erred in selecting and applying the correct legal test and in misapprehending his arguments. Held: Appeal dismissed. The judge was correct in applying the test articulated in R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42 in considering whether to strike the impugned pleadings. The pleadings in issue were struck pursuant to R. 9-5(1)(b) and (c) of the Supreme Court Civil Rules. The standard of review applicable to discretionary decisions made under those sub-rules is deferential. The appellant has not shown that the judge gave insufficient weight to a relevant consideration, made a palpable and overriding error, or that the decision results in an injustice. Finally, the judge did not misapprehend the appellant's arguments.

Reasons for Judgment of the Honourable Mr. Justice Butler:

[1] This appeal arises from a longstanding dispute between the appellant, Hugh Trenchard, and the respondent, Westsea Construction Ltd. ("Westsea"). Mr. Trenchard has a leasehold interest in a unit in "Orchard House"—a 22-storey residential building in Victoria, British Columbia. Pursuant to a 99-year lease (the "Lease") that governs the relationship between Westsea, as lessor, and the individual leaseholders, Westsea is required to manage and operate the services and facilities at Orchard House. The current dispute concerns Westsea's claims to recover legal expenses it says it incurred for the management of Orchard House. It commenced the underlying proceeding by petition in 2018 (the "2018 Petition"), seeking a declaration that the leaseholders were in default of the Lease for failing to pay the legal expenses. In this appeal, Mr. Trenchard applies to set aside the February 9, 2024 order of Justice Gaul, the case management judge, striking portions of his further amended response to Westsea's further amended petition (the "Order").

[2] After a two-day hearing, the judge found that the struck pleadings were frivolous, unnecessary, irrelevant, and unrelated to the parties' litigation. He concluded that the pleadings should be struck in order for the litigation to proceed in a fair, efficient, and focused manner. Having arrived at those conclusions, he struck a limited number of paragraphs of Mr. Trenchard's lengthy further amended

response, without leave to amend. His reasons for judgment are indexed as 2024 BCSC 210 (the "Reasons").

[3] The resolution of this appeal turns largely on the standard of review applicable to the issues raised. Although some of the pleadings were found to have no possibility of success, it is evident that the pleadings in issue were struck pursuant to R. 9-5(1)(b) and (c) of the *Supreme Court Civil Rules* [*Rules*]. The standard of review applicable to discretionary decisions made under those sub-rules is deferential.

[4] In my view, there is no merit to the appeal and I would dismiss it, substantially for the reasons of the judge.

Background

[5] The judge's description of the background to the application is comprehensive: Reasons at paras. 1–45. Additional background is found in two decisions of this Court: 2017 BCCA 352, leave to appeal to SCC ref'd, 37936 (9 August 2018), and 2020 BCCA 152 (the "Building Envelope Litigation"). Accordingly, I will summarize the relevant background only briefly.

[6] Article 7.01 of the Lease defines "Operating Expenses" to include amounts paid or payable by Westsea in connection with the maintenance, operation, and repair of Orchard House. It includes "legal and accounting charges and all other expenses". Article 7.02 requires Westsea to provide the leaseholders with an estimate of the operating expenses for the coming calendar year based on prior years experience and to seek reimbursement of those expenses by way of monthly payments from the leaseholders. Article 7.03 contains a mechanism for the recovery or payment of the amounts by which the audited actual expenses exceed, or are less than, the estimate.

[7] The principal issue raised by the 2018 Petition is whether legal expenses, including those arising from defending against litigation initiated or pursued by Mr. Trenchard, are chargeable to and recoverable from leaseholders as

Operating Expenses pursuant to article 7.01 and 7.02 of the Lease. Most of the leaseholders have resolved Westsea's claims against them.

[8] The remaining 11 respondents, ten of whom are represented by the same legal counsel, filed responses to the 2018 Petition. Mr. Trenchard is self-represented. He filed an initial response to petition in October 2018. Multiple case planning conferences were held in 2021. These conferences resulted in both parties filing amendments to their pleadings, and Westsea ultimately filing a further amended petition on June 18, 2021. In early 2022, the judge, as case management judge, ordered Westsea to provide Mr. Trenchard with a list of issues it submitted should be removed from his amended response, and that Mr. Trenchard file a further amended response, which he did on March 11, 2022. The judge also granted Westsea leave to bring an application to strike the respondents' amended response. On June 1, 2022, Westsea filed that application, which led to the Order.

[9] On the first day of the hearing of the application, Westsea and the respondents, other than Mr. Trenchard, reached an agreement regarding the status of their pleadings. As a result, the remaining respondents took no part in the hearing of Westsea's application to strike portions of Mr. Trenchard's pleading.

Reasons for Judgment

[10] After describing the background, the judge set out Westsea's application for an order that: Paragraphs 26.8, 41.17–41.24, 50.8–50.9, and 95–95.4, and any pleadings relating to

a) obligations outside of the Lease;

b) betterment; and

c) contracting out of legislation

be struck from Mr. Trenchard's further amended response and that the said response be amended accordingly: Reasons at para. 44.

[11] The judge commenced his analysis by referring to R. 9-5(1) and the test for striking pleadings in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42. He rejected Mr. Trenchard's argument that the test in *Imperial Tobacco* should not be applied because the pleadings in question were contained in a response to a petition: Reasons at paras. 45–50. The judge also rejected Mr. Trenchard's submission that the application was an abuse of process because it was a waste of time and was intended to disadvantage him as a self-represented litigant. In doing so, he noted that the power to strike pleadings is an essential case management tool designed to ensure fair and effective litigation: Reasons at paras. 52–54.

[12] The judge then turned to the specific pleadings in question. He dealt first with Mr. Trenchard's allegation at paras. 26.8 and 41.17 to 41.24 of his further amended response that Westsea had obligations outside of those stated in the Lease. The obligations in question were alleged to arise under the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337 and in the common law of negligence: Reasons at paras. 55–56.

[13] Referring to *Westsea Construction Ltd. v. Mathers*, 2014 BCSC 143, the judge concluded that Mr. Trenchard's position was ill-founded because the relationship between the parties is governed by the terms of the Lease. The judge observed that the *Occupiers Liability Act* and negligence law are engaged only when a tort is alleged, and none was alleged in these proceedings. He also noted that Mr. Trenchard had agreed in the Building Envelope Litigation that there is no legislation governing the Lease. The judge found that the sole question raised by the 2018 Petition was whether legal expenses incurred by Westsea are chargeable to the leaseholders pursuant to the terms of the Lease. The judge rejected Mr. Trenchard's contention that the issue of whether Westsea had legal obligations to the leaseholders had not been considered or addressed in the Building Envelope Litigation. He found that both the trial judge and this Court had addressed that issue: Reasons at paras. 57–65.

[14] The judge concluded:

> [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.
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> [Emphasis added.]

[15] The judge next dealt with Mr. Trenchard's pleadings related to "betterment" at paras. 50.8 to 50.9 of his further amended response. The judge noted that in the Building Envelope Litigation, this Court had found that the repairs in question did not amount to betterment of the Orchard House: Reasons at paras. 67–69. The judge concluded:

> [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*.
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> [Emphasis added.]

[16] The judge next dealt with Mr. Trenchard's pleadings at paras. 95 to 95.4 of his further amended response concerning what he characterized as an attempt to "contract out" of legislation. Mr. Trenchard alleges that Westsea's efforts to claim legal expenses as Operating Expenses under the Lease is inconsistent with R. 14-1(9) and (13) of the *Rules* regarding costs. Accordingly, he says Westsea's efforts to rely on contractual rights to claim costs amount to an attempt to contract out of legislation: Reasons at paras. 71–73.

[17] The judge rejected Mr. Trenchard's position, noting that in *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329, this Court held that where parties enter into a contract in which one party reimburses the other for actual legal fees and expenses incurred, the right to recover those fees and expenses is derived from the terms of the contract, not from the statutory costs regime: Reasons at para. 74.

[18] The judge concluded 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": Reasons at para. 75. He also concluded that para. 95.4, which advances Mr. Trenchard's main proposition on this issue—that the *Rules* regarding costs apply to Westsea's claim for legal charges and that Westsea's actions are inconsistent with the *Rules*—should be struck:

> [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.
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> [Emphasis added.]

[19] After dealing with the specific pleadings, the judge summarized his conclusions:

> [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.
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> [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.

[20] The judge found that "for this litigation to proceed in a fair, efficient, and focused manner", the impugned paragraphs from Mr. Trenchard's pleadings must be struck. Further, and finally, the judge was not convinced that the arguments advanced had any bearing on the issues raised in the 2018 Petition. Consequently, he saw no reason to grant Mr. Trenchard leave to further amend his pleadings: Reasons at paras. 79–80.

On Appeal

The Parties' Positions

[21] Mr. Trenchard identifies several errors on the judge's part that he asserts are errors of law to be reviewed on a standard of correctness. He submits that the judge erred in applying the *Imperial Tobacco* test as the correct legal test for striking petition responses. He also asserts that the judge erred, when identifying the appropriate legal test, in failing to consider the effect of the instructions in Form 67, an argument which he made in the court below but which was not dealt with in the Reasons. In the alternative, he submits the judge misapplied the test for striking pleadings by failing to assume the facts pleaded in his response were true and by failing to consider the effect of his novel argument regarding Rule 14-1(9) and (13).

[22] Mr. Trenchard also argues the judge erred in law by making a sweeping order pertaining to "any related pleadings", instead of just striking the specific paragraphs in issue. He also submits that the judge erred in confining his analysis to the "principal issue" of interpretation of the Lease while ignoring the principle that courts retain a residual discretion when determining appropriate costs as set out in *Peace River Partnership v. Cardero Coal Ltd.*, 2023 BCCA 351.

[23] Finally, Mr. Trenchard advances two arguments based on his contention that the judge made palpable and overriding errors of mixed fact and law:

1) by misapprehending his arguments "leading to an unreasonable determination that the impugned paragraphs ought to be struck"; and

2) by concluding that Mr. Trenchard was seeking to re-litigate matters already decided, a conclusion rooted in a misapprehension of his argument relating to betterment.

[24] Westsea submits in response that the judge applied the correct test for striking the impugned pleadings and that there is no basis for a new or restated test for striking pleadings contained in a petition response, as argued by Mr. Trenchard. In Westsea's submission, the appropriate standard of review is deferential because

the decision to strike the pleadings was discretionary; made on the basis of R. 9-1(5)(b) and (c). It emphasizes that the impugned pleadings were struck in order to facilitate a fair and efficient hearing of the 2018 Petition. As the Order was made by the judge in his capacity as case management judge, Westsea submits that greater deference is owed to his discretionary decision.

[25] In addition, Westsea notes that it is unclear whether Mr. Trenchard is appealing the order striking paras. 26.8 and 41.17 to 41.24. This is because Mr. Trenchard says he "accepts [the judge's] order on the issue of 'obligations outside the lease' and agrees to strike those paragraphs, but also appeals this order on principle as stated herein": Appellant's Factum at para. 1.

Analysis

[26] In my view, the alleged errors, and Mr. Trenchard's position on appeal, can be addressed by considering three questions:

a) Did the judge apply the correct test for striking portions of the further amended response?

b) What is the standard of review applicable to the judge's decision to strike the pleadings?

c) Did the judge err in applying the test for striking pleadings?

Did the judge apply the correct test for striking portions of the further amended response?

[27] Mr. Trenchard's argument that the judge applied the wrong legal test to determine whether to strike the impugned pleadings raises a question of law subject to a correctness standard of review: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 43; *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

[28] The judge applied the test articulated in *Imperial Tobacco*:

> [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.

[29] Rule 9-5(1) 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
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> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
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> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
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> (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.

[30] Mr. Trenchard argues that there is a fundamental difference between the test for striking pleadings relating to causes of action in a notice of civil claim and the test for striking pleadings in petition responses. He says the appropriate test for the latter is what he describes as the "irrelevant to the issues" test articulated in *L'Association des parents de l'école Rose-des-Vents v. Conseil scolaire francophone de la Colmbie-Britannique*, 2011 BCSC 1495 at para. 37, aff'd *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21.

[31] Contrary to Mr. Trenchard's submission, there is no authority for the proposition that there are different tests applicable to applications to strike pleadings depending on the type of pleading. The "plain and obvious" test for striking pleadings as articulated in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 1990 CanLII 90, and reiterated in *Imperial Tobacco*, is well settled and has stood the test of time. It applies to notices of civil claim, petitions, and responses to those initiating documents. By its terms, the Rule applies to applications to strike or amend "the whole or any part of a pleading, petition or other document…". While the

application of the test differs depending on the circumstances (including whether the pleading in question is found in an initiating document or a response) and on the particular subsection of the rule under consideration, that does not change the test itself.

[32] I would reject Mr. Trenchard's argument on this ground and endorse the judge's conclusion:

> [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)?

[33] Mr. Trenchard also submits that the judge failed to have regard to instructions in Form 67—the form of response to petition prescribed by R. 16-1(5)—when considering the test applicable to striking his response. Under "Part 5: Legal Basis" that form reads:

> [*Using paragraphs numbered sequentially from Part 4 above, specify any rule or other enactment relied on and provide a brief summary of any other legal bases on which the petition respondent(s) intend(s) to rely in opposing the orders sought in the petition. In addition, a written argument may be provided to the court in opposition to the petition.*]
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> [Underline emphasis added.]

[34] Mr. Trenchard argues that the underlined portion of that instruction serves to expand the nature and extent of allegations and arguments that can be included in petition responses. He reasons that because a petition response can contain written argument, a different test must be applied for applications to strike petition responses. He suggests the following test:

> … [I]f the impugned pleadings constitute arguments that address assertions made by the petitioner and are relevant to matters raised by the petition, are disproportionately prejudicial to the respondent if struck, or discharge a respondent's burden to prove some matter… then the pleadings and arguments should not be struck.

[35] Respectfully, this argument is specious. The instruction in Form 67—which merely indicates that a petition respondent may, at the hearing of the petition, provide a written argument to the court—does not alter the requirement in R. 16-1(5)(b)(i) that a petition response "must … briefly summarize the factual and legal bases on which the orders sought should not be granted" (emphasis added). Similarly, the instructions in the form do not modify the language of R. 9-5, nor expand on the jurisprudence interpreting that rule.

[36] In summary, the judge was correct to apply the *Imperial Tobacco* test in considering whether to strike the impugned pleadings.

What is the standard of review applicable to the judge's decision to strike the pleadings?

[37] In its notice of application, Westsea relied on all four subparagraphs of R. 9-5(1) as a basis for striking the pleadings. The standard of review to be applied to an order made pursuant to R. 9-5(1) depends on the subparagraph relied on to strike the pleading. In *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465, leave to appeal to SCC ref'd, 40051 (30 June 2022), Justice Voith summarized the proper approach to determining the standard of review:

> [14] The different parts of R. 9-5(1) attract different standards of review. The question of whether a pleading discloses a reasonable claim or defence under R. 9-5(1)(a) is generally considered to be a question of law that is reviewed on a correctness standard: *E.B. v. British Columbia (Child, Family and Community Services)*, 2021 BCCA 47 at para. 31; *Kindylides v. Does*, 2020 BCCA 330 at paras. 18–20, leave to appeal to SCC ref'd, 39728 (14 October 2021). See also the discussion in *Scott v. Canada (Attorney General)*, 2017 BCCA 422 at paras. 38–44, leave to appeal to SCC ref'd, 37930 (30 August 2018), which acknowledges some inconsistency in the relevant authorities.
>
> [15] Conversely, applications brought under R. 9-5(1)(b), (c) or (d) are discretionary and determined by contextual and factual considerations: *Krist v. British Columbia*, 2017 BCCA 78 at para. 24. A decision involving the exercise of judicial discretion is owed deference on appeal unless it is clear that insufficient weight was given to relevant considerations, the decision involves a palpable and overriding error, or it appears that the decision may result in injustice: *Timberwolf Log Trading Ltd. v. British Columbia (Forests, Lands and Natural Resources Operations)*, 2013 BCCA 24 at para. 19, citing *Stone v. Ellerman*, 2009 BCCA 294 at para. 94, leave to appeal to SCC ref'd, 33333 (17 December 2009); *Hirji v. The Owners Strata Corporation Plan*

> *VR 44*, 2020 BCCA 285 at para. 23; *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 at para. 6.
>
> [16] The question of whether to permit an amendment, rather than strike the pleading, also involves the exercise of judicial discretion: *Jones v. Bank of Nova Scotia*, 2018 BCCA 381 at para. 35.

[38] Applying that approach, it is necessary to determine the basis relied on by the judge to strike the impugned pleadings. It is evident from the Reasons that for each of the three categories in question—obligations outside the Lease, betterment, and contracting out of legislation—the judge struck the pleadings because it offended more than one of the four strictures in R. 9–5(1).

[39] With regard to pleadings alleging obligations outside the Lease, the judge found that they had no likelihood of success, were irrelevant, and had been previously argued and rejected. He concluded that to allow the pleadings to remain would "unnecessarily complicate the proceedings, to the detriment of an efficient resolution of the parties' dispute": Reasons at para. 66.

[40] With regard to pleadings relating to betterment, the judge found that the issue raised was irrelevant and had previously been determined in the Building Envelope Litigation.

[41] Finally, on the pleadings relating to contracting out of legislation, the judge first determined that R. 14-1 had "no bearing on the present situation". He also found that the pleadings "had no foundation in fact or law nor any reasonable prospect of success", and ought to be struck as he found them "frivolous, unnecessary and unrelated to the parties' litigation". He further concluded that to consider the issue "would be a pointless and wasteful judicial exercise": Reasons at para. 75–76.

[42] Although the judge relied on R. 9-5(1)(a)—applicable where no reasonable defence is disclosed—as one basis upon which to strike some of the pleadings, for each of the categories, his decision also relied on one or more of the other subparagraphs of the rule. His final conclusion, which I repeat for convenience, is expressed in terms that clearly refer to subparagraphs (b)—that the pleading is

unnecessary, scandalous, frivolous or vexatious—and (c)—that it may prejudice, embarrass or delay the fair trial or hearing—of the rule:

> [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.
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> [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.

[43] Accordingly, I conclude that the standard of review applicable to the judge's decision to strike the pleadings—his application of the legal test to the pleadings—is deferential, meaning appellate review is limited. His decision was based on contextual and factual considerations and is discretionary. As the case management judge, the judge's discretionary decision in striking the pleadings is entitled to even greater deference: *Strohmaier v. K.S.*, 2019 BCCA 388 at para. 22.

Did the judge err in applying the test for striking pleadings?

[44] With one exception dealt with below, Mr. Trenchard's remaining arguments challenge the judge's application of the test to his pleadings. I have reviewed the bases on which the judge arrived at his conclusions. I am not persuaded that Mr. Trenchard has shown that the judge gave insufficient weight to a relevant consideration, made a palpable and overriding error, or that the decision results in an injustice: *FORCOMP* at para. 15.

[45] With regard to the latter consideration, after removing the impugned paragraphs, Mr. Trenchard's further amended response to petition continues to exceed 50 pages in length and contain in excess of 100 paragraphs. He puts forward numerous novel positions in response to Westsea's claims, and expresses those positions by way of detailed arguments. It cannot be said that the Order results in an injustice by limiting his ability to defend against the relief claimed by Westsea or in any other way.

[46] Mr. Trenchard's argument that the judge made palpable and overriding errors of mixed fact and law is premised upon his assertion that the judge misapprehended his arguments. I am not persuaded that the judge misapprehended any of his submissions and would dismiss his arguments for the reasons of the judge.

[47] Mr. Trenchard's submission that the judge confined his analysis to the "'Principal Issue' of Lease interpretation" while ignoring the residual discretion a court retains when determining costs, is without merit. The judge correctly observed that Westsea's right to recover legal charges from the leaseholders is a question of contractual interpretation. The judge, as he was required to do on the application to strike, considered Mr. Trenchard's pleading about the relevance of the *Rules* regarding costs contextually in light of the relevant facts and circumstances and determined that it had no foundation in fact or law nor any reasonable prospect of success, and "ought to be struck as it is frivolous, unnecessary and unrelated to the parties' litigation". I see no error in the judge's reasoning or conclusion.

[48] Mr. Trenchard's final argument is that the judge erred in ordering not only that the specified paragraphs be struck, but also that "any pleadings relating to" the three identified allegations be struck. He argues that he had no opportunity to make submissions on that term of the Order and that he was "ambushed" by its inclusion. He also says the term is vague.

[49] While I agree that in many circumstances it would not be necessary to include such a term in an order striking pleadings, I see no error in the judge's doing so here. As case management judge, he was familiar with the procedural background and the filing of multiple amended pleadings by the parties. The number of amendments to the lengthy pleadings was, by any standard, unusual. The possibility of further amendments remained. I am satisfied that the judge included the term for added clarity. There is no suggestion that the term applies to other existing allegations contained in the March 11, 2022 further amended response. The judge included the term in support of his unchallenged order that the impugned pleadings were struck without a right to amend.

Disposition

[50] I would dismiss the appeal.

"The Honourable Mr. Justice Butler"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Madam Justice Fenlon"