Form 32 (Rule 8-1 (4))

No.16 3355
Victoria Registry

In the Supreme Court of British Columbia

Between

Hugh Trenchard

Plaintiff(s)

And

Westsea Construction Ltd.

Defendant(s)

NOTICE OF APPLICATION

Name(s) of applicant(s): **Hugh Trenchard**

To: **Westsea Construction Ltd.**

TAKE NOTICE that an application will be made by the applicant(s) to the presiding judge or master at the courthouse at 850 Burdett Street, Victoria, British Columbia for **October 10th 2018**, at 9:45 a.m. for the order(s) set out in Part 1 below.

Part 1: ORDER(S) SOUGHT

1. Pursuant to *Supreme Court Rule* 14(9), (13), and Rule 20-4, a declaration that the defendant is not permitted to charge litigation costs of this Supreme Court action, 16-3355 Victoria Registry, to the plaintiff and the leaseholders generally until the conclusion of the proceedings, if so entitled, when costs liabilities have been determined by the court, unless otherwise ordered by a court.

2. Further and alternatively, pursuant to *Supreme Court Rule* 10-4, an order for an interlocutory injunction prohibiting the defendant from charging litigation costs associated with the action herein, Supreme Court action, 16-3355 Victoria Registry, to the plaintiff and leaseholders generally as an operating expense under the lease until the conclusion of proceedings, unless otherwise ordered by a court.

Part 2: FACTUAL BASIS

3. The Plaintiff, Hugh Trenchard ("Mr. Trenchard") filed his original Notice of Civil Claim on August 9, 2016; he later amended it on October 14, 2016, and then by order of Madam Justice Power on August 2, 2017, Mr. Trenchard was permitted to further amend his Notice of Civil Clam which he subsequently filed on December 12, 2017 (the "Further Amended NOCC").

3. Mr. Trenchard is the lessee of suite 805 in a high-rise called Orchard House, at 647 Michigan Street, in Victoria, British Columbia ("Orchard House").

4. Pursuant to a lease re-assignment in January 2011, Mr. Trenchard entered into a lease agreement with Westsea in relation to suite 805.

5. Orchard House contains 211 units in 22-storeys. The same head lease that was re-assigned to Mr. Trenchard exists in relation to all the suites in Orchard House (the "Lease").

6. In or about 2010, prior to Mr. Trenchard's purchase of his lease interest, the Defendant, Westsea Construction Ltd. ("Westsea"), completed a partial windows replacement project for all the corner units of Orchard House ("Phase 1 Windows Project"). Westsea recovered the costs of the Phase 1 Windows Project from all the Orchard House lessees at the time as an operating expense under the Lease.

7. On or about November 20, 2013, Westsea notified all leaseholders of the second phase of the windows replacement project, which involved replacing all the remaining windows in Orchard House, adding steel reinforcement beams, and installing interior unit fans, among other things (the "Phase 2 Windows Project").

8. Original estimates of the Phase 2 Windows Project cost were between $2 million to $3 million depending on the number and location of windows.

9. Subsequent estimated costs were approximately $3.65 million for the Phase 2 Windows Project.

10. By letter of July 5, 2016, Westsea notified the lessees that costs for the Phase 2 Windows Project were about $5.5 million (the "July 5th Letter").

11. The July 5th letter informed Mr. Trenchard that his proportionate costs for the Phase 2 Windows Project was $37,155.92. Westsea demanded payment to be made by September 1, 2016, or in 12 equal monthly installments, which Mr. Trenchard paid.

The nature of the plaintiff's claims

12. Mr. Trenchard's principle claims, as set out in the Further Amended NOCC, are that the costs of the Phase 2 Windows Project do not comprise operating expenses under the lease because:

    a. Under the lease, responsibility for window repair and maintenance are the leaseholders' responsibility, subject to a wear and tear exception. The wear and tear exception means that the replacement costs of old and worn windows is Westsea's liability, and this is not captured as an operating expense.

b. The Phase 2 Windows Project is a cost of a capital nature which, under a proper interpretation of the Lease, is not an operating expense.

c. The Phase 2 Windows Project is a replacement cost which, under a proper interpretation of the lease, is not an operating expense.

d. Westsea's covenants include maintenance and repair of the outer walls, which are a separate responsibility from the windows and sliding doors, and there is insufficient evidence of damage to the outer walls that connects Westsea's covenant to repair and maintain the outer walls to the replacement of the windows.

13. In the July 5th Letter, Westsea informed lessees that the Phase 2 Windows Project was commencing on July 11, 2016, and indicated that Farmer Construction Ltd. was the contractor for the Phase 2 Windows Project and that the project would take about 44 weeks.

14. The Phase 2 Windows Project was substantially completed in or about May 2017.

15. A trial has been set for 15 days starting June 3, 2019.

16. Westsea has indicated that it will call expert engineering evidence for the trial, but it is unknown to Mr. Trenchard if this includes Read Jones Christoffersen.

The relevant leaseholders' covenants

17. Article 4 of the Lease sets out "Lessees Covenants".

18. Article 4.03 of the Lease states that the lessee covenants…

> "To repair and maintain each of the Suites **including all doors, windows, walls, floors and ceilings** thereof and all sinks, tubs, and toilets therein and to keep the same in a state of good repair, **reasonable wear and tear** and such damage as is insured against by the Lessor only **excepted**; to permit the Lessor, its agents and employees to enter and view the state of repair; to repair according to notice in writing except as aforesaid…" [emphasis added]

The relevant lessor's covenants

19. Article 5 of the Lease sets out "Lessors Covenants".

20. Article 5.03 of the Lease requires the lessor

> "To keep in good repair and condition the foundations, **outer walls**, roofs, spouts and gutters of the Building, all of the common areas therein and the plumbing, sewage and electrical systems therein." [emphasis added]

21. Article 7 of the Lease permits Westsea to recover the costs of operating expenses from the lessees. Each lessee is obligated to pay according to their proportional unit size.

The Operating expenses

22. Article 7.01 defines "Operating expenses"

"...in this Lease means the total amount paid or payable by the Lessor **in the performance of its covenants herein contained**...and includes but without restricting the generality of the foregoing the amount paid or payable by the Lessor **in connection with the maintenance, operation and repair of the Building, expenses in heating...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 licenses, janitorial service, building maintenance services, resident manager's salary (if applicable) and legal and accounting charges all other expenses paid or payable by the Lessor in connection with the Building, the common property therein or the Lands**...The Lessor agrees to exercise prudent and reasonable discretion in incurring Operating expenses, consistent with its duties hereunder." [*emphasis added*]

Hereafter referred to as "Operating expenses".

23. Under Article 7.01, Westsea asserts that Operating expenses and the phrase "all other expenses" includes replacement of windows and doors, interior unit fans, installation of steel/iron beams and associated costs under the Phase 2 Windows Project.

24. Mr. Trenchard claims that common law principles of contract interpretation restrict the interpretation of "all" to the genus or category that contains the preceding list of items, which genus does not include the replacement of old and worn windows, interior fans, or the addition of angle-iron beams.

The defendant's charge of litigation costs to leaseholder before the conclusion of proceedings

25. In October 2017, the defendant notified all leaseholders, including Mr. Trenchard, that it was charging anticipated litigation costs of this action to leaseholders in 2018 as operating expenses under the lease. The trial is set for June 3, 2019 and there are no orders of any court that permits the defendant to charge its costs to any parties prior to the disposition of the court at the conclusion of the proceedings in this action.

26. In December 2018, counsel for the defendant reiterated its intention to charge litigation costs under this action under the lease. Counsel indicated that it had instructions to pursue termination of leases on non-payment of these costs.

27. Under protest, Mr. Trenchard paid his share of the demanded operating costs.

The costs issue

28. After a petition involving the parties in this action, heard in January 2015, Mr. Justice MacKenzie decided on September 23, 2015 that Operating expenses did not comprise Westsea's litigation costs for the petition.

29. On appeal, the B.C. Court of Appeal held that Mr. Justice MacKenzie's decision was premature; that Westsea must first charge its costs of the petition (as concluded) to leaseholders. Leaseholders could then dispute the costs, meaning that in effect the issues of whether the petition litigation costs were Operating expenses could be re-litigated. The Court of Appeal did not overturn Mr. Justice MacKenzie's interpretation of the lease.

30. Westsea has since charged not just the costs of the concluded petition hearing, but they have also charged pending costs of this action back to the leaseholders, before most of these costs have been incurred or any quantum has been decided by a court, and before a court has determined which party must pay them.

31. Mr. Trenchard and other leaseholders have paid these costs.

Part 3: LEGAL BASIS

32. Rule 14-1(13) states:

> **When costs payable**
> (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. [emphasis added]

Supreme Court Rules, Rule 14-1(13)

33. Further, Rule 14-1(9) states:

> **Costs to follow event**
> (9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

34. The Rules of Court were validated by the legislature under the *Court Rules Act*. Under the *Court Rules Act* the legislature may enact rules governing "costs and their review."

Court Rules Act, RSBC, c. 80, s. 2(c)

35. The *Rules of Court* have the force of statute.

Robitaille v. Vancouver Hockey Club Limited, 1981CanLII 532 (BCCA), paras 40-44

36. Having the force of statute, the *Rules of Court* override common law and contract.

37. Parties cannot contract out of legislation.

Norfolk Trust v. Wolcoski 1982 CanLII 467 (BCCA), para 10

38. Unless the legislation expressly permits parties to contract out of the legislative provision, parties cannot do so.

Health Care Developers Inv. v. Newfoundland 1996 CanLII 11074 (NLCA), para 63

39. So long as the legislative provision is clear and unambiguous, it overrides the common law.

> *Duong et al. v. Waterloo North Hydro Inc.* [2004] CanLII 6241 (ONSC), paras 28-32

40. Rule 14-1(13) is irresistibly clear that costs are not payable by any party until the conclusion of proceedings, unless otherwise ordered by a court. Rule 14-1(9) is irresistibly clear that costs are awarded to the successful party, and it is impossible at this time to know who will be the successful party.

41. None of the common law authority relied upon by Westsea overrides the express statutory provision of Rule 14-1(13) and 14-1 (9). Further, in the cases cited by Westsea, the costs issue arose at the conclusion of the proceedings.

> *P & T Shopping Centre Holdings Ltd. v. Cineplex Odeon Corp.*, 1995 CanLII 448 (BC CA),
>
> *B.U.K. Investments Ltd. v. Pappas*, 2002 BCSC 161 (CanLII),
>
> *Aspen Enterprises v. Quiding*, 2009 BCSC 50 (CanLII)

42. In *Trenchard v. Westsea Construction Ltd.*, the B.C. Court of Appeal did not consider the issue of whether Westsea's election to pursue costs under the contract applied only in the case of it being successful at the petition hearing. However, the lower court held, at the conclusion of the proceedings, that since success was divided, each party was to bear their own costs. The Court of Appeal did not consider this aspect of the lower court decision, and so there should be no suggestion that the Court of Appeal decision overrides Rule 14-9(9) that costs are awarded to the successful party. Indeed, all the cases referred to by the Court of Appeal involved elections by the successful party at their respective trials.

> *Trenchard v. Westsea Construction Ltd.* 2017 BCCA 352

43. Regardless, the Court of Appeal decision in *Trenchard v. Westsea* does not impact the application of Rule 14-9(13) that costs are payable at the conclusion of the proceedings.

44. Moreover, the B.C. Court of Appeal, in *P & T Shopping Centre Holdings v. Cineplex Odeon Corp*, looked to the Rules of Court for guidance on the appropriate order as to costs. Finding none, it relied on judicial discretion.

> *P & T Shopping Centre Holdings Ltd. v. Cineplex Odeon Corp.*, 1995 CanLII 448 (BC CA), **paras 9, 13-14**

45. Judicial discretion is not required in this case, because the Rules of Court are crystal clear as to when costs are payable, and to whom.

46. Westsea argues that since the issue of the when costs are payable was not pleaded, the plaintiff's argument on costs should not be considered. However, the plaintiff has pleaded in his Further Amended NOCC, at paragraph 81 for "appropriate interest and costs", and at paragraph 80 for "further remedies as this court may deem appropriate". The plaintiff has also applied for appropriate amendments.

47. The *Rules of Court* authorize the award of costs in various circumstances, but words of authorization in this connection should not be read as words limiting the court's inherent jurisdiction to do what is essential to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner. [*emphasis added*].

R. v. Caron, [2011] 1 SCR 78, 2011 SCC 5 (CanLII), **para 34**

48. So, although Rules 14-1(9) and (13) authorize orders as to costs, this does not limit the power of the court to make orders that give effect to those Rules, including to order that costs are not payable until the conditions of the Rule exist, namely the conclusion of the proceedings, or an order of the court, and the winning party has been determined.

49. Moreover, the powers conferred by *Rules of Court* are additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative, and not mutually exclusive, so that in any given case, the court is able to proceed under either both heads of jurisdiction. [*emphasis added*]

Burton Canada Company v. Coady, 2013 NSCA 95, **paras 175-176**

50. There is no reason for the defendant to be awarded costs forthwith of this interlocutory application and, even if there were, the defendant would still need to separate the costs of this action from any other costs pertaining to action 16-3355.

Application for declaration

51. Rule 20-4 applies:

> (1) A proceeding is not open to objection on the ground that only a declaratory order is sought, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

Supreme Court Rule 20-4, Declaratory relief

52. Mr. Trenchard seeks a declaration that the requirements of the Supreme Court Rules have been breached and must be adhered to. The principle relied on is stated in *Fraser v. Houston*, whereby a litigant seeking declaratory relief must demonstrate that he or she has a right which has been infringed by, or requires protection from, the other party. The plaintiff

must demonstrate a right which gives him standing, that is, a right under a contract or statute or in equity. Further, it must serve a useful purpose.

Fraser v. Houston, 1996 CanLII 2525 (BC SC)

53. Clearly a statutory right has been infringed: the right not to be charged litigation costs until the conclusion of the proceedings under the *Rules of Court*.

54. Generally, declarations cannot be made on interlocutory applications because they are perpetual in their application and must therefore be pleaded in the initiating documents.

Armstrong v. The West Vancouver Police Board, 2007 BCSC 164

55. However, this is an unusual case in which Westsea's breach of the *Supreme Court Rules* affects the leaseholders presently only up until the trial itself and the date of the decision itself. The breach is not perpetual and the declaratory remedy must, by necessity, be made in an interlocutory fashion.

56. The circumstance of the case at bar are closer on point to those in *B.C Ferry v. T&N Plc*, where the BC Court of Appeal made a declaration affecting procedural rights under the Rules of Court that permitted the defendants the opportunity to conduct third party examinations for discovery and discovery of documents. The Court of Appeal stated,

> While I am of the view that the general rule against sanctioning actions brought for purely procedural relief will always be an important consideration governing the exercise of the court's discretion to grant declaratory relief, I do not accept the proposition that it must be regarded as a controlling consideration in all cases. There will be instances, albeit rarely, where the declaratory relief should be granted notwithstanding the fact it is needed for only such a purpose.

B.C Ferry v. T&N Plc et al. 1995 CanLII 1810 (BCCA)

57. Declaratory orders are in the absolute discretion of the court. A declaratory order must be made in the context of existing breaches, but incorrect form that refers to past conduct may be corrected. So, if there is language in the form of "has breached" when the breach in continuing, that can be corrected in the order.

Regional District of East Kootenay v. Augustine, 2017 BCSC 322

58. The effect of such a declaration can achieve the following:

- Leaseholders' who have sent cheques to Westsea for all remaining months in 2018 for the 38% increase in operating costs for 2018 can be cancelled by leaseholders, and re-issued, minus an amount attributable to the defendant's forecast litigation costs;

- Costs attributable to action 16-3355 included in the defendant's most recent demand are not payable (while costs attributable to petition action 14-2941 are not part of this case). If the defendant does not

account for the specific costs attributable to action 16-3355, leaseholders should be entitled to estimate that.

Interlocutory injunction – proof not required if statute breached

59. Where there has been a clear and deliberate breach of a duty imposed by statute, an injunction will follow as a matter of course.

Saskatchewan (Minister of The Environment) v. Redberry Development Corp. 1987 CanLII 4588, para 21; aff'd Sask CA, 1992 CanLII 8229

60. The court does not necessarily require proof of irreparable harm where an injunction is sought to prevent a party from violating a negative covenant.

Ipsos S.A. et al. v. Angus Reid et al. 2005 BCSC 1114, para 83;
Gulf Islands Navigation Ltd. v. Seafarers Intl Union of North America, 1959 CanLII 291 (BSCC)

61. In this case Rule 14-1(13) and Rules 14-1(9) are, in the first place, statutory; a breach of these statutory requirements is occurring and has occurred. Similarly, these Rules are equivalent to a negative covenant since they effectively proscribe the charging of litigation costs before the conclusion of proceedings and before the successful party on the proceedings is determined. Westsea is in violation of these requirements.

Further and alternatively, the tests are met for an interlocutory injunction

62. Rule 10-4 generally applies, and ss. (1) states,

> An application for a pre-trial injunction may be made by a party whether or not a claim for an injunction is included in the relief claimed.
> *Supreme Court Rule* 10-4(1)

63. The test is met for an interlocutory injunction to enjoin and restrain Westsea from continuing to charge litigation costs as operating costs until a determination is made by the court whether or not Westsea is entitled to do so under the lease. There is a serious question to be tried, there is irreparable harm to Mr. Trenchard and the leaseholders, and the balance of convenience favors the granting of an injunction.

64. The question of whether Westsea can charge its litigation costs as an operating cost, as demonstrated through past litigation up to the Court of Appeal, is obviously a serious question to be tried.

Trenchard v. Westsea Construction Ltd. 2016 BCSC 1752,
Trenchard v. Westsea Construction Ltd. 2017 BCCA 352

Irreparable harm

65. The criterion of irreparable harm does not require clear proof of such harm. Doubt as to the adequacy of damages as a remedy may be sufficient to support an injunction.

Ipsos S.A. et al. v. Angus Reid et al. 2005 BCSC 1114, para 82

Harms not compensable by damages

66.

- There is real fear and anxiety created by escalating operating costs that leaseholders will be forced to sell their suites. Fear and anxiety are not quantifiable.

  Trenchard Affidavit #4, para 30

- Leaseholders face increasing inability to obtain financing for these costs. This is a natural and common consequence of increased debt: lending institutions will not indefinitely lend to leaseholders.

  Trenchard Affidavit #4, para 30

- Leaseholders face the threat of lease termination or court ordered sale for refusal to pay costs, despite that the Court of Appeal expressly indicated refusal was an option for leaseholders. Leaseholders are naturally left confused as to their options in the circumstances, and are afraid to refuse payment.

  Trenchard Affidavit #3, para 31, Ex "J"
  Trenchard v. Westsea Construction Ltd. 2017 BCCA 352

- Leaseholders have paid a 38% increase in operating expenses for 2018. Regarding Mr. Trenchard's litigation and the proportion of the 38% attributable to Mr. Trenchard's litigation, Westsea said "This litigation is projected to continue into 2018 and the estimate of legal costs in the Budget is based upon Westsea's prior experience". If the total of 2018 costs are about $426K as they were for 2017, then leaseholders can expect to be in a shortfall position again in 2019, and then again in 2020. Potentially these costs are compensable, but because they are compounding incrementally over time, leaseholders are accordingly incrementally extended beyond their ability to finance Westsea's litigation costs. This kind of slow "death by a thousand cuts" is difficult to quantify as it progresses.

  Trenchard Affidavit #3, Ex "H"
  Trenchard Affidavit #4, para 11, Ex "E"

- The inability for Mr. Trenchard and the leaseholders to obtain detailed information that might allow leaseholders to evaluate whether certain litigation costs are otherwise being improperly charged, such as $2800 costs that were paid to Mr. Trenchard by court order, and costs that were subject to a "no orders as to costs" order, means that leaseholders cannot determine what costs to challenge and on what grounds. In the face of confusion, they are less likely to advance uncertain claims.

  Trenchard Affidavit# 4, para 30 ref Nick Loenen

Trenchard Affidavit #4, paras 15, 16, 17

- Further there are now multiple streams of litigation costs, primarily as between Mr. Trenchard's action 14-2941, and 16-3355, but also now in relation to several small claims actions that have been and are being commenced. These will increase litigation costs that Westsea will charge as operating costs. The costs will certainly be far less than for Mr. Trenchard's actions, but they are nonetheless unknown, as are the total costs of Mr. Trenchard's actions as they are being pre-charged to leaseholders, and then sought to be recovered as short-falls from leaseholders later. In all instances, the costs are largely unknown. Any uncertain quantities further increase leaseholders' anxiety and fears. The capacity for financial lenders to evaluate debt financing is reduced, further compounding leaseholder fears.

- These costs are causing increasing polarization among leaseholders. Mr. Trenchard faces increasing blame from leaseholders for escalating operating costs. This cannot be compensated by damages.

  Trenchard Affidavit #4, para 30 (*Carolyn Mandrusiak, Sally Walker, Judy Sim*)

- The erosion of support for Mr. Trenchard's actions plays directly into Westsea's hands: Mr. Trenchard loses credibility in the eyes of leaseholders; leaseholders with legitimate claims may perceive Mr. Trenchard not only to be a liability but also to be "crying wolf" to the extent they will lose the motivation to commence their own legitimate actions. Similarly, leaseholders who are increasingly strained to their financial limits have no extra resources to commence their own actions.

- There is a reasonable apprehension of conflict of interest between Westsea's counsel and Westsea's auditors, and for Westsea's counsel appearing to be acting in their own interests in this case. The result is a reasonable perception that there is no incentive for Westsea to economize litigation costs, and no incentive for Westsea's legal counsel to advise settlements or economical courses of action when all the mostly alternatives are being charged to the leaseholders.

- There is a real and credible risk that if the courts reinstate Mr. Justice MacKenzie's original finding that Westsea cannot charge its litigation costs as operating costs, many leaseholders will either not be in a position to recover those costs, or simply will abandon them. The totality of these litigation costs is distributed among all the leaseholders, and many leaseholders will not seek recovery of what, for each individual leaseholder, is a relatively small amount.

  This means that should Westsea lose—and given the existing decision of Mr. Justice MacKenzie, there is a reasonably high likelihood that they will lose their argument on the costs interpretation issue—Westsea stands to escape without

having to repay those costs, and without having to pay their own legal counsel to defend it. This is simply unjust.

If Westsea escapes compensating leaseholders, then those losses to leaseholders are, by definition, non-compensable. Given that there are only at present perhaps 10 leaseholders commencing small claims actions, there is a high probability that Westsea stands to benefit substantially by pre-charging costs even if it eventually loses its argument on costs. This by itself is sufficiently egregious to warrant an interim injunction.

Trenchard affidavit#4, para 23

- Further, as suites change hands under ongoing purchases and sales, new leaseholders have little knowledge of historical circumstances and may not recognize that they may have claims against Westsea either for cost over-runs that are billed to them on one-time basis, or that are billed as annual increases. This is yet another way for Westsea to escape fully compensating leaseholders.

- There is no mechanism under the lease for leaseholders to obtain contact information for each other, and Westsea has even resisted permitting leaseholders to meet in the lobby of the building, or to post notices of off-site leaseholders' meetings. By inhibiting communication among leaseholders, many of whom do not reside at Orchard House, Westsea prevents leaseholders from sharing legitimate grievances, so that many are not aware of claims they may have against Westsea. On the other hand, all leaseholders receive letters directly from Westsea's legal counsel that contain, for example, threats to terminate leases if leaseholders refuse to pay operating costs. Here again, Westsea stands to escape fully compensating leaseholders if they lose on the costs issue (let alone other matters for which they may liable) because information is not shared among leaseholders, or portrayed one-sidedly from Westsea to the leaseholders.

Trenchard affidavit#3, para 31
Trenchard affidavit #4 p. 63-64 (Gerald Rotering)
Lee affidavit #1 Exhibit H

Balance of convenience

67. The balance of convenience is in favor of Mr. Trenchard and the leaseholders in granting this injunction. It is common and expected that litigants will bankroll their own claims initially before the outcome of a trial. This is the well-understood consequence of Rule 14-1(13). Westsea seeks to be an exception to this at the expense of leaseholders, some of whom may be forced to sell their homes as a result. Westsea is a large corporation that should not be using the leaseholders to bankroll its litigation costs, and ought to use its own independent resources just like everyone else would. The absurdity of leaseholders paying these costs is sufficient on its face to establish the balance of convenience.

68. Mr. Trenchard personally faces increasing strain in his capacity to carry on his end of the litigation under mounting costs that he is paying Westsea to fight him. It would be perverse, absurd and contrary to all semblance of common sense if Mr. Trenchard was forced to sell his home because he is paying Westsea to fight him.

Trenchard affidavit #2
Trenchard affidavit #4, para 20

69. This reasoning applies similarly to all the other leaseholders, whose interests are in effect being represented by Mr. Trenchard in these proceedings.

Reasonable apprehension of conflict of interest

70. The question of conflict of interest has not been pleaded nor has Mr. Trenchard applied for orders in respect of conflict of interest. However, the issue relates directly to the propriety of the costs that Westsea is charging to the leaseholders, and magnifies the reasons for a declaration or injunction preventing the defendant from charging its litigation costs to leaseholders before the end of the proceedings, if it can at all.

71. On or about February 7, 2018, Mr. Trenchard faxed a letter to the defendant's auditors, BDO Canada LLP ("BDO") that included references to case-law explaining why a "no costs award" means that each party bears their own costs. This means that the defendant must personally bear that cost and it cannot form part of Westsea's operating expenses under the lease and be charged back to the leaseholders. A no-costs award is therefore completely independent of the terms of the lease, and the defendant would be wrong to charge its litigation costs on a no-cost award to the leaseholders regardless of whether the lease allows for "winning" costs to be charged under the lease.

Trenchard affidavit #4, par 16, Exhibit "F"

72. In that same faxed letter to BDO, Mr. Trenchard also expressed the view that Westsea's legal counsel would be in a conflict of interest to provide legal advice to BDO. There is no evidence that the defendants counsel has in fact provided such legal advice, but there is clearly a reasonable apprehension of conflict of interest.

Trenchard affidavit #4, par 16, Exhibit "F"

73. Furthermore, there is reasonable apprehension of conflict of interest for the defendant's legal counsel to be litigating this particular issue on behalf of the defendant. Defendant's counsel has charged $426,337 of solicitor-and-client costs (usually awarded at the end of litigation to punish a litigant) back to the leaseholders as operating costs for the year 2017. We can expect a similar amount chargeable for 2018, much of which has already been charged to leaseholders under a 38% increase in operating costs for 2018, and at least that much in 2019 when the 15-day trial is scheduled.

Trenchard affidavit #4, para 11
Trenchard affidavit #1, para 28, Exhibit "G"

74. Because defendant's counsel stands to be paid from a third party source, the Orchard House leaseholders, Westsea itself has no incentive to economize the use of its legal

services, while counsel is reasonably perceived to be motivated to maximize its time spent litigating the file with no incentive to settle issues or economize services. Sending two lawyers, for example to a second case planning conference in Victoria when counsel's office is in Vancouver and telephone conferencing is permitted, is an example. This is exactly what Westsea's counsel did in this case.

Further reply to Westsea's assertions regarding interlocutory injunctions

75. Westsea may argue that the orders sought seek to restrain Westsea from exercising its rights under the Lease until the conclusion of the trial of this action and to compel Westsea to repay leaseholders at the Building for all litigation costs to date pursuant to its rights under the Lease.

76. As argued, even if the defendant can recover its litigation costs under the lease, which is expressly denied, there is simply no *right* to charge those costs before the conclusion of the proceedings. Even if such a right is contemplated by the lease, that right can only apply in the absence of over-riding legislation.

77. It is simply incorrect to say that Mr. Trenchard is seeking to restrain the defendant from exercising any rights under the lease. The right to charge its costs before the conclusion of the proceedings, simply does not exist.

78. Westsea's demand that leaseholders pay litigation costs prior to a determination by the court as to whether the costs are properly chargeable, including the most recent bill for $426,377, is simply an outrage. Basic principles of justice and fairness ought to prevail in these circumstances. It is wrong in law and policy that the leaseholders should be paying for the defendant's litigation costs to fight Mr. Trenchard, and other leaseholders. Even if the lease allows for litigation costs to be recoverable as operating costs, which is expressly denied, the defendant contravenes the clear provisions of the Supreme Court Rules which prevents the defendant from charging those costs before the outcome of the trial is known.

79. This interim issue has wide-reaching precedential effect for all litigation initiated in the future by leaseholders in the context of Orchard House and of other identical or similar 99-year leases.

80. Overall, as a matter of principle and policy no leaseholder's right to make legitimate claims should be chilled by the prospect that even if they win their claim, the costs to pay the defendant's litigation bills before the claims are adjudicated may be greater than the leaseholders' potential claims. This is simply wrong and unjust.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Hugh Trenchard made 10/Dec/2016.
2. Affidavit #3 of Hugh Trenchard made 8/May/2018.
3. Affidavit #4 of Hugh Trenchard made 12/June/2018

The applicant(s) estimate(s) that the application will take **2 hours or less.**

[ ] This matter is within the jurisdiction of a master.
[X] This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,
(b) file the original of every affidavit, and of every other document, that
(i) you intend to refer to at the hearing of this application, and
(ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed application response;
(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: 29/June/2018

Signature of
[X] applicant [ ] lawyer for applicant(s)

Hugh Trenchard

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs ..... of Part 1 of this notice of application

[ ] with the following variations and additional terms:

.....

.....

Date: .....[*dd/mmm/yyyy*].....

.....
Signature of [ ] Judge [ ] Master

Appendix

[*The following information is provided for data collection purposes only and is of no legal effect.*]

THIS APPLICATION INVOLVES THE FOLLOWING:

[*Check the box(es) below for the application type(s) included in this application.*]

[X] proceedings at trial