No. 16-3355
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

Hugh Trenchard

Plaintiff

And

Westsea Construction Ltd.

Defendant

PLAINTIFF'S CLOSING SUBMISSIONS

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These are my respectful submissions:

A. Summary

1. This case is about the proper interpretation of a Lease. In this sense it is a "construction" case – construction of contract – but it is not a building construction case. This case is about who pays under the Lease for the Phase 2 Project (subsequently defined and as earlier defined); it is not about whether or not Westsea's project was reasonable or if there was any wrongdoing among the project contractors during the Phase 2 Project.

2. In my respectful submission, the evidence and authorities establish on a balance of probabilities that Westsea has breached the Orchard House lease by seeking indemnity of its Phase 2 windows/doors/fans replacement from the leaseholders as Operating expenses under the May 1, 1974 Orchard House lease, as earlier described ("the "Lease"). It is not disputed that outer-wall repairs were properly charged as Operating expenses under the Lease.

3. There are two main interpretation issues involved:

    i. Whether the wear and tear exception under Article 4.03 shifts liability for replacement of windows, doors, and fans to Westsea;

    ii. Whether Operating Expenses are defined not to include costs of a capital nature or replacement reserves. I will define these subsequently.

    There are other subsidiary issues of contract interpretation which I will address these as we go.

4. You have heard that in 2010/2011 Westsea replaced corner and east/west wall windows as part of Phase 1 of a two-phase windows replacement project. Then, as part of Westsea's Phase 2 windows/doors replacement project in 2016-2017, Westsea replaced all the remaining sliding glass doors at Orchard House (the "Phase 2 Project"). The Phase 2 Project included replacing all the interior fans and installing angle-iron beams beneath windows. The Phase 2 Project also included exterior wall repairs.

5. Westsea recovered about $5.5 million Phase 2 Project from the leaseholders as Operating expenses under the Lease, most which was for the replacement windows and doors and fans. In general, the Orchard House leaseholders paid this amount to Westsea, and I paid my proportionate share under protest.

Agreed Statement of Facts, **para 27, 34**

6. I assert that the costs to replace windows/doors and fans are not properly Operating expenses under the Lease. Having paid these costs to Westsea I now seek to recover them, including interest and costs.

7. I do not dispute Westsea's costs for wall repointing and wall repair generally, a matter which I address under the section "Damages" subsequently.

8. My first main argument is that the windows and doors replacement costs fall within the wear and tear exception under Article 4.03 to the leaseholders' covenant to keep in good condition the windows and doors. The fans pose a slightly more difficult problem. While there is enough evidence for you to find these were old and worn as well and this was why they were replaced, the fans are more appropriately dealt with as a capital cost item for which Westsea has no authority under the Lease to recover as an Operating expense from the leaseholders.

9. My second main argument is that the Phase 2 Project involves costs of a capital nature, and there is no authority under the Lease to recover capital costs as Operating expenses; to be so recoverable, express words in the Lease to this effect are required.

B. The wear and tear exception

10. Article 4.03 of the Lease is clear that windows and doors are the leaseholders' responsibility to maintain and repair, except when they are old and worn. Article 4.03 is unambiguous. Clearly, the wear and tear exception means costs to replace old and worn windows and doors lies with Westsea. Westsea's liability in this respect is outside the definition of Operating expenses, and there is no mechanism within the Lease to export these costs to fit under the umbrella of Operating expenses. The Lease is silent as to whether Westsea is obligated to replace old and worn windows, and so they must be taken to have done so at their option, in this case.

11. The source of the wear and tear exception is found in Article 4.03 of the lease under the leaseholders' covenants:

> "4.03 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 or employees to enter and view the state of repair; to repair according to notice in writing except as aforesaid and to leave each of the Suites in good repair except as aforesaid"

12. The wear and tear exception is also identified in the *Short Form of Leases Act*, 1960, c. 357 (now the *Land Transfer Form Act*, RSBC, 1996, c. 252):

> 3. Where a lease of lands made according to the form in the First Schedule, or any other lease of lands expressed to be made in pursuance of this Act, or referring thereto, or expressed to be made in pursuance of the Leaseholds Act, or referring thereto, contains any of the forms or words contained in Column I of the Second Schedule, and distinguished by any number therein, such lease shall have the same effect and be construed as if it contained the form of words contained in Column II of the Second Schedule, and distinguished by the same number as is annexed to the form of words. [*underlining added*]

13. Item 13 of the Second Schedule ("Item 13"), states:

COLUMN I	**COLUMN II**
13. And that he will leave premises in good repair.	13. And, further, that the said lessee, his executors, administrators, and assigns, will, at the expiration or other sooner determination of the said term, peaceably surrender and yield up unto the lessor, his heirs, executors, administrators, or assigns, the said premises hereby demised, with the appurtenances, together with all buildings, erections, and fixtures now or hereafter to be built or erected thereon, in good and substantial repair and condition in all respects, reasonable wear and tear and damage by fire only excepted. [*underlining added*]

14. To see the connection between Item 13, and the Lease, we return to Article 4.03; which states:

> "The Lessee covenants with the Lessor:
>
> 4.03 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 or employees to enter and view the state of repair; to repair according to notice in writing except as aforesaid and to leave each of the Suites in good repair as aforesaid." [*underlining added*]

15. The phrase "to leave each of the Suites in good repair" thus incorporates the language of Item 13 as part of the Lease. The difference between the language of Item 13 and that of Article 4.03 is that Item 13 sets out the lessees' obligation when the lease term ends or when a lessee otherwise divests her lease interest. Article 4.03 is an ongoing obligation during the term. Both requirements involve a wear and tear exception, although Item 13 is broader in scope since it extends to the demise "in all respects". The combined effect of Article 4.03 and Item 13 is therefore that the lessee is never liable for costs to replace old and worn things that are part of the Suite as provided by Article 4.03, which must include the interior fans.

i. "Wear and tear" is a standalone concept, separate from "such damage as insured against"

16. Here I address a preliminary question of Lease interpretation. At paragraph 12 of Westsea's Response, Westsea has underlined the phrase "reasonable wear and tear and such damage as is insured against the Lessor only excepted". It is apparent Westsea argues that "wear and tear" and "such damage as is insured against by the Lessor" are mutually conditional; i.e. both elements must be present for the clause to apply.

17. It is clear, however, that the wear and tear exception is treated by courts as a standalone concept, separate from "such damage as insured against by the Lessor". This is clear from the court's analysis of the Orchard House Lease in *Westsea v. Billedeau*. This is evident from the bold text in the court decision which isolates the insurance element from "reasonable wear and tear".

> "[10] The Lease contains the following Articles [emphasis added in bold text] :
>
> **ARTICLE 4 – LESSEE'S COVENANTS**
>
> ….
>
> 4.03 To repair and maintain each of the Suites including all doors, windows, walls, floor 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 or employees to enter and view the state of repair; to repair according to notice in writing except as aforesaid and to leave each of the Suites in good repair except as aforesaid.
>
> *Westsea v. Billedeau* 2010 BCPC 109, para 10; Plaintiff's Authorities **Vol III Tab 100**

18. In *Billedeau*, the interpretation of the insurance portion of the phrase was in issue, and clearly the court did not hold that "such damage as insured against" must be read together "reasonable wear and tear" or say that the two clauses are mutually conditional.

19. In *Agnew-Surpass v. Cummer-Yonge* the Supreme Court of Canada similarly isolated the insurance component from of a broader phrase that included a wear and tear exception:

> "In the present case, the exculpatory clause is not in the form of the *Short Form of Leases Act* or an equivalent form as in the *Hutson* case. Here, the lessee's exoneration is defined by reference to the lessor's obligation to *insure the building*. The material part of the clause reads:

> except…damage to the Building cause by water damage and damage to the Building cause by perils against which the Lessor is obligated to insure hereunder." [*italics and ellipsis in original*]
>
> *Agnew-Surpass v. Cummer-Yonge* [1976] 2 SCR 221, p 248 per Pigeon J. for the majority Plaintiff's Authorities **Tab 12**

20. The full clause referred to by Pigeon J. was paragraph 8(10)(1) from the lease in question:

> "…except for reasonable wear and tear, repairs to the four side walls, roof skylights, foundation, floors and the bearing structure of the Building forming part thereof, damage to the Building caused by water damage and damage to the Building caused by perils against which the Lessor is obligated to insure hereunder." [*underlining added*]
>
> *Agnew-Surpass v. Cummer-Yonge* [1976] 2 SCR 221, p. 226 Plaintiff's Authorities **Tab 12**

21. As identified by the Supreme Court of Canada in *Agnew-Surpass*, it is useful to recognize that the wear and tear exception is an example of an exculpatory term which exonerates tenants from liability for worn and torn parts of their suites.

> *Agnew-Surpass v. Cummer-Yonge* [1976] 2 SCR 221, p 248 Plaintiff's Authorities **Vol I Tab 12**

22. Similarly, American courts have viewed the components of the noted two-part phrase independently, and the two distinct elements of the phrase are not contingent upon each other. For instance, in *Central Parking v. Tucker Parking*, the 2017 Missouri Appeal considered the phrase:

> "…keep the Premises in good and lawful order and condition (*normal wear and tear* and damage from fire or other casualty *excepted*)" [italics in the original]
>
> *Central Parking System of Missouri v. Tucker Parking Holdings* 2017 Missouri Ct App, Eastern District, Div. Five, No. ED104361, p.2, Plaintiff's Authorities **Vol I Tab 27**

23. With respect to the italicized phrase above as found in the original, clearly the court isolated the wear and tear from the insurance portion of that phrase. In this case, the obvious division of the two subordinate clauses also tells us no commas or other grammatical devices need be present to analyze the clauses independently. This is also the effect of the decision in *Westsea v. Billedeau*.

24. Similarly, the Australian Court of Appeal (Victoria) considered the effect of a clause that "… is also subject to a 'fair wear and tear' exception, among other exceptions that are not relevant at present." The court had no difficulty isolating the wear and tear exception from other accompanying ones.

> *Agtan Pty Ltd. v. Caltex Australia* [2018] VSCA 169, par 3; Plaintiff's Authorities **Vol I Tab 13**

25. In *Agtan Pty*, the complete relevant part of the clause read:

> "The Lessee shall…keep and maintain…in good and tenantable repair and good and efficient working order and condition… (fair wear and tear and damage by fire, storm, flood, earthquake, tempest, act of God, riots, civil commotion or act of war and without any neglect or default on the part of the Lessee alone excepted).[*ellipsis added*]
>
> *Agtan Pty Ltd. v. Caltex Australia* [2018] VSCA 169, p.7 par 31; Plaintiff's Authorities **Vol I Tab 13**

26. In the clause above there is no comma after "wear and tear" which one might argue is necessary to isolate "wear and tear" from the other exceptions, and the court readily and without controversy extracted the wear and tear exception from others for its independent analysis.

ii. What is a Suite?

27. Article 4.03 sets tenants' obligations over their Suite interiors. A Suite is defined in the Lease and according to the floor plan. In defining a "Suite", Article 1.01 of the Lease refers the Explanatory Plan filed at the Victoria Land Registry Office on May 17th , 1974:

> **Article 1.01** …the Lessor hereby demises and leases unto the Lessee subject to the terms, covenants and condition as hereinafter set forth, each of the Suites known by the suite numbers as more particularly set forth in Schedule "A" hereto and as each are shown on the Explanatory Plan as set for in Schedule "A" hereto and filed at the Victoria Land Registry Office on the 17th day of May, 1974 (hereinafter called the "Suites") [*emphasis added*]

28. In evidence I referred to the Explanatory Plan referred in Article 1.01 as the "Floor Plan". Below is the relevant part of the 8th Floor Plan, where Suite 805 is shown. The Legend defines the Suites:

> "Balconies are included in Suite areas. Suite dimensions are from centerline of inside walls to the outside of exterior Building walls."

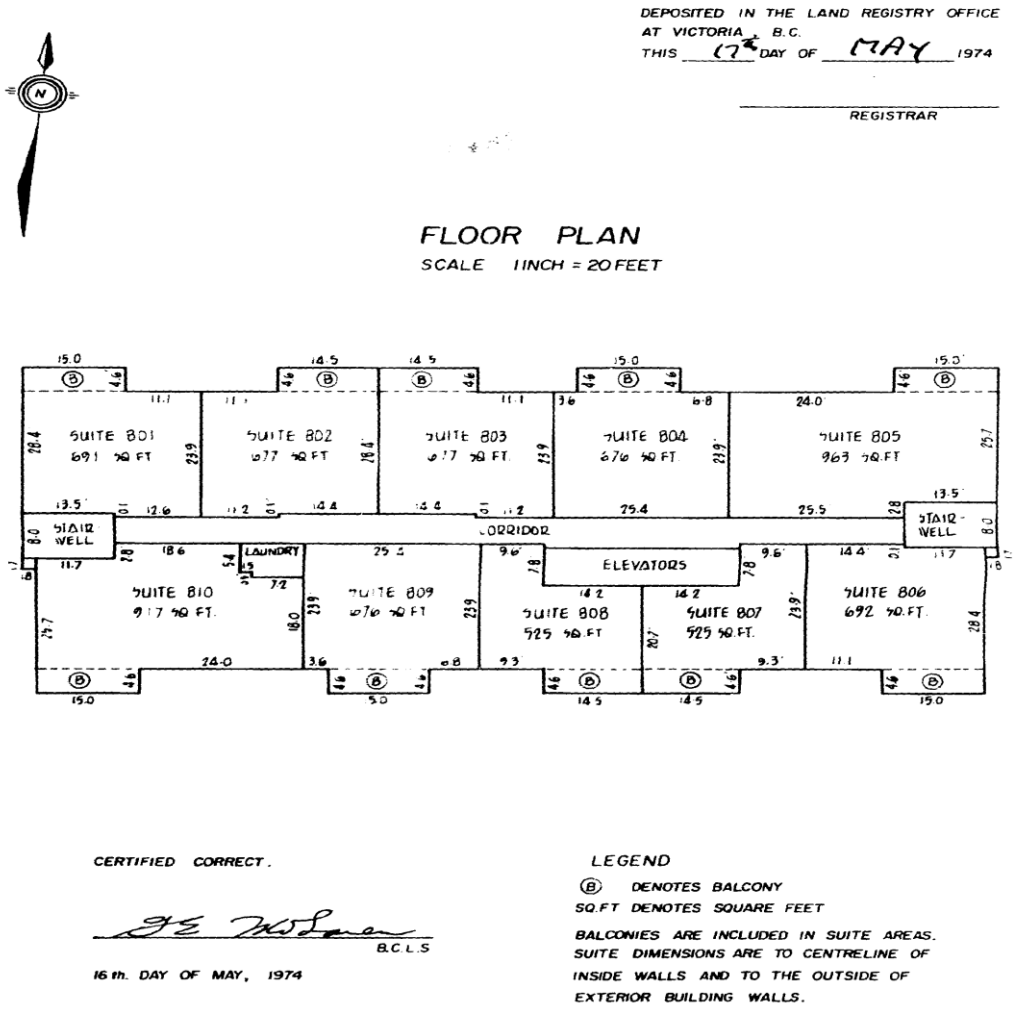


Figure 1. Floor Plan; **Exhibit 3**; Plaintiff's Docs **Vol I Doc #5**

29. Thus, the windows and doors facing the balcony are clearly interior to the Suites. Bathroom exhaust fans are clearly interior to the Suites since they are embedded into the ceilings (see Article 4.03 and the *Short Form of Leases Act*).

30. It is perhaps less clear that the windows along the non-balcony portion of the Suites are interior to the Suites. However, the evidence shows that the windows are inset by two to 2.5 inches from the outside exterior of the building walls, as confirmed by Sameer Hasham. As shown in the RJC drawing below:

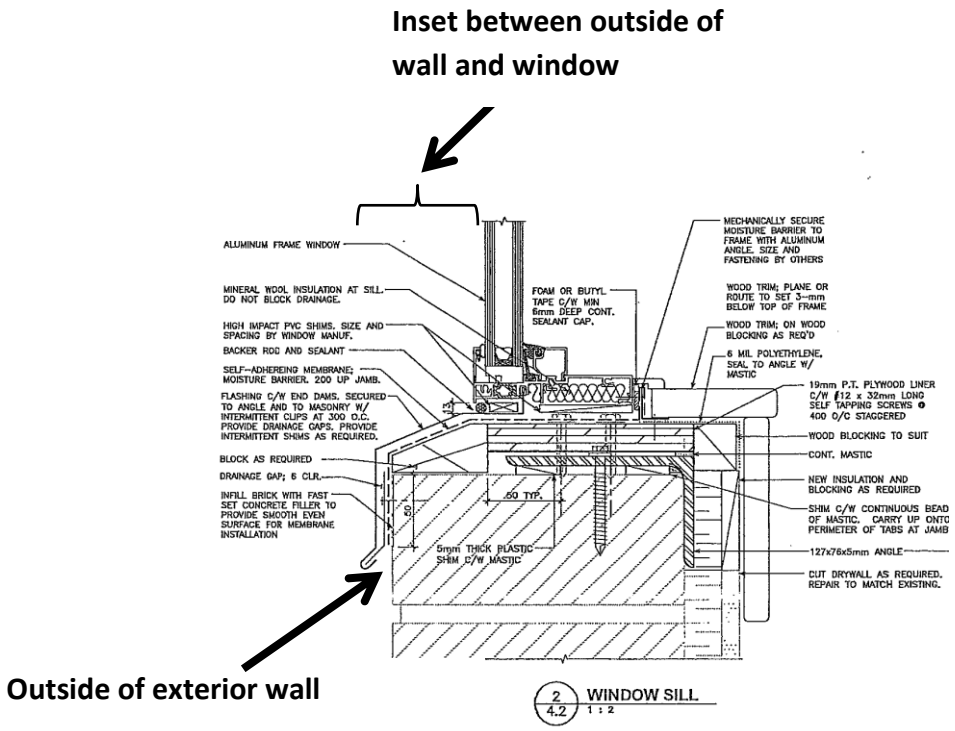


Figure 2. Windows details, drawing R-4.2 windows from Stipulated Price Contract; Plaintiff's doc #3 Vol. II

31. Also, photographs of Suite 805 windows clearly show the windows to be inset from the outside of the exterior building walls.

Plaintiff's Docs **Vol I Doc #6**

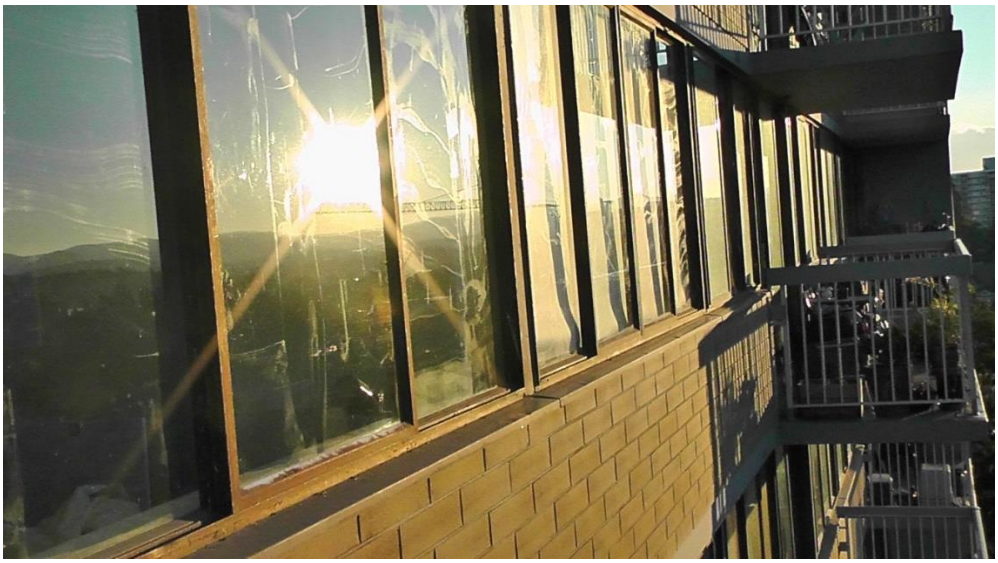


Figure 3. Plaintiff's Docs, **Ex. 3** Vol I. doc #6 (photo #3). Windows are clearly inset from exterior face of the outer walls.

32. Having established that the windows, doors, and fans are in Suite interiors, I now consider what evidence the law requires to prove that the wear and tear exception applies in the circumstances.

iii. The windows and doors were old and worn

33. There is abundant evidence windows were worn and torn (here referred to as "old and worn") and that Westsea did in fact replace them. Sameer Hasham, Westsea's engineering consultant, provided a comprehensive list of the deterioration to the old windows.

34. The evidence is also contained several documents:

a. Building Enclosure Condition Assessment Report March 24, 2016 (BECA), p. 10 - 12

> "Aluminum frame window assemblies are generally considered to have an expected service life of 25 to 35 years, dependent upon quality, installation, and maintenance. Notwithstanding the conditions observed, the original window assemblies at Orchard House have now been in service for significantly longer than this industry expectation. Further degradation of performance is to be expected at an ever increasing rate."
>
> Plaintiff's Docs, **Ex.5 Vol. III doc #1**

b. Project Prioritization Report, September 13, 2013

> "The windows and sliding balcony doors at Orchard House are not in immediate need of replacement, although they have surpassed their intended service life."
>
> Plaintiff's Docs **Ex 3. Vol. I doc #10**

35. Sameer Hasham, the RJC engineering consultant, confirmed the old and worn condition of the windows and doors in his written responses to questions I posed, prepared through his counsel, Beth Allard, on July 18, 2018, saying:

> "The window and door replacement was a service life replacement because of the age of the windows and doors, the observed failures and the observed damage. The window and door replacement will also serve to prevent future damage."
>
> Plaintiff's Docs **Ex 5. Vol III doc #32 (question 14)**

36. Mr. Hasham also confirmed the worn and torn condition of the windows in his response to my question 12:

> Question: "12. Generally, what was the actual observed condition of the old window glazing assemblies (glass frames and/or removable assemblies) when they were removed? Were they about as worn as the Report anticipated and as worn as you would have expected for windows of that age?
>
> *Answer*
> Generally, signs of condensation, corrosion and failure of frame finish, corrosion of fasteners, failed glazing seals, failure of window frame joints and failed sealants were observed. Generally, deterioration of wood trim was observed. Also, there were instances where window and door hardware was inoperable. The observations were consistent with the Report, and consistent with what RJC expected for windows and doors of that age."
>
> Letter from Beth Allard, counsel for Sameer Hasham, dated July 18, 2018; Plaintiff's Docs **Ex 5 Vol III, Tab 32**

37. Pierre Gallant, the Defendant's architectural expert also confirmed the condition of the windows and doors in his report dated February 11, 2019:

> "*13. What was the expected service life of the original window and sliding doors at Orchard House?*
>
> The expected service life of the original window and sliding doors at Orchard House was 25 to 35 years based on my experience and my interpretation from Guideline on Durability in Buildings S478-95. The Guideline on Durability in Buildings is a common guideline used to determine the expected service life of building components."
>
> Plaintiff's Docs **Ex 5 Vol III doc #32**

38. It is less clear the fans were old and worn. While the BECA indicates the fans were past their service life of 25 years, the evidence shows Westsea's engineers, Read Jones Christoffersen ("RJC") believed the fans were old and below capacity, but not that they were "worn". As stated in the BECA:

> Use of the bathroom exhaust fans to help limit interior moisture load is recommended. Given the age and impaired function of the fans, the most effective means of achieving this goal in existing buildings of this vintage is to install new fans and utilize timers or automatic humidistats to control the fans. These devices can be calibrated or set to limit the interior RH to desired levels. [*my underlining*]
>
> BECA, p. 7, 20 (Table 3.2) Plaintiff's Docs **Vol. III, doc #1**;

39. In his July 18, 2018 response to my question 22, Mr. Hasham stated:

> "Some of the old fans were not working at all, and some were not working efficiently. The window and door replacement project reduced the air leakage through the building envelope, and it was necessary to install new fans to achieve the required air circulation in the suites to meet the air quality requirements under the 2012 BC Building Code."
>
> Plaintiff's Docs, **Ex 5. Vol III doc #32**

40. This was inconsistent with his oral testimony in which he said that one fan among six that were tested was not working. Regardless, the evidence shows that the new fans were simply installed to increase the capacity over the old ones.

> Testimony of Sameer Hasham; Testimony of Perry Caris

41. This description of the fans is consistent with their being old and worn. However, the evidence is also consistent with replacing the old fans for the dominant purpose of upgrading them. I submit that the preponderance of evidence shows the fans were old *but not* worn; i.e. the fans were functional but were upgraded to accommodate increased air removal capacity, which renders them a capital cost upgrade – an issue which I address subsequently.

iv. Windows are separate from the walls (*and why it does not matter*)

42. Westsea asserts that windows fall under its obligation to maintain the building and outer walls, thus entitling Westsea to recover the costs of replacing the windows, doors and fans as Operating expenses. This is implied by Westsea's Response at paragraph 13(Part 1):

> "13. …Westsea has several obligations in respect of the Building, including an obligation to keep in good repair and condition the foundation, outer walls and roofs pursuant to Article 5.03."

and 10.2 (Part 3):

> "(a) to the extent the condition of the windows and sliding doors had deteriorated due to reasonable use and the ordinary operation of natural forces, the obligation to undertake repairs thereof belongs to Westsea as a covenant pursuant to Article 4, 5 and 7 of the Lease"

43. In my opening I stressed that given the Supreme Court decision in *BG Checo* and the Privy Council decision in *Forbes v. Git*, it makes no difference whether the walls or the building envelope includes or subsumes the windows. It only matters that the building envelope is a *general* description of a building component, within which windows are a more *specific* component, thus engaging the law expressed in *BG Checo* and *Forbes v. Git*. Per LaForest, J. and McLachlin JJ, at p. 23-24:

> "It is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evidence from the contract as a whole…Where there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective…In this process, the terms will, if reasonably possible, be reconciled by construing one term as a qualification of the other term…A frequent result of this is kind of analysis will be that general terms of a contract will be seen to be qualified by specific terms—or, to put it another way, where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general terms to not extend to the subject-matter of the specific term." [*underlining added*]
>
> *BG Checo International Ltd. v. British Columbia Hydro and Power Authority,* [1993] 1 SCR 12, **p. 23 – 24**
> Plaintiff's Authorities **Tab 18**

44. Thus, windows and doors are *more specific* than "outer-walls" and "building and the principle in *B.G. Checo* applies such that "outer-walls" do not include windows and doors; nor does the building include windows doors and fans.

45. Further, Article 4.03 precedes Article 5.03 and Article 7.01 sequentially in the lease. In effect, Westsea argues that Articles 5.03 and Article 7.01 override, or destroy, the wear and tear exception under the Lease which puts upon Westsea the responsibility to pay for the costs to replace old and worn windows. This does not mean Westsea is in fact obligated to physically replace the windows, since the Lease is silent as to an actual obligation to replace the old windows, but it does obligate Westsea to pay for the costs if it *chooses* to replace the windows. This is exactly what they've done.

46. In *Forbes v. Git* (1921), the Privy Council said,

> "The principle of law to be applied may be stated in a few words. If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails."
>
> *Forbes v. Git* [1921] 61 DLR 353 (P.C.)
> Plaintiff's Authorities **Tab 36;** p. 355, last par

47. *BG Checo* and *Forbes v. Git* have been applied in the context of conflicting assignment terms in a lease in *550 Capital Corp v. David S. Cheetham*, referring to *Zurich Canadian Holdings Ltd. v. Questar Exploration Inc*, in which a landlord could not rely on the terms of a head lead lease inconsistent with the prevailing specific terms of a sublease.

550 Capital Corp v. David S. Cheetham 2009 ABCA 219, 28, **52**; Plaintiff's Authorities **Vol I Tab 9**

48. *BG Checo* and *Forbes v. Git* also rebut Westsea's pleading at paragraph 10.2(a), Part 3, of its Response, where Westsea states:

> "10.2 (a) to the extent that the condition of the windows and sliding doors had deteriorated due to reasonable use by the lessees and the ordinary operation of natural forces, the obligation to undertake repairs thereof belongs to Westsea as a covenant pursuant to Articles 4, 5 and 7 of the Lease and the amount paid or payable in connection with such repairs is chargeable to the lessees as Operating Expenses".

49. Under the logic of *BG Checo*, Westsea's general covenant to maintain and repair the outer-walls and building do not include the windows, which fall to the leaseholders to maintain and repair, subject to the wear and tear exception. The exception thus shifts the burden upon Westsea to cover the costs, outside the ambit of an operating expense. Westsea's obligation to pay for the cost to replace the old windows is thus freestanding and cannot be transformed into one of its covenants under which it can charge the costs to leaseholders as an Operating expense.

50. In my Opening Statement, I illustrated the narrowing progression of general-to-specific items in the Lease with a Venn diagram – akin to a set of nested Russian dolls – to show that the *lands* broadly contain the *building*; the *building* contains the *walls*, the *roofs*, and other things; and the *walls* contain the *windows*. This is much like how a bicycle (the general description) contains wheels, brakes, and pedals (more specific components of the bicycle); and the wheels contain spokes and hubs (yet more specific components of the wheels, all of which are ultimately parts of the bicycle). Below is that diagram.

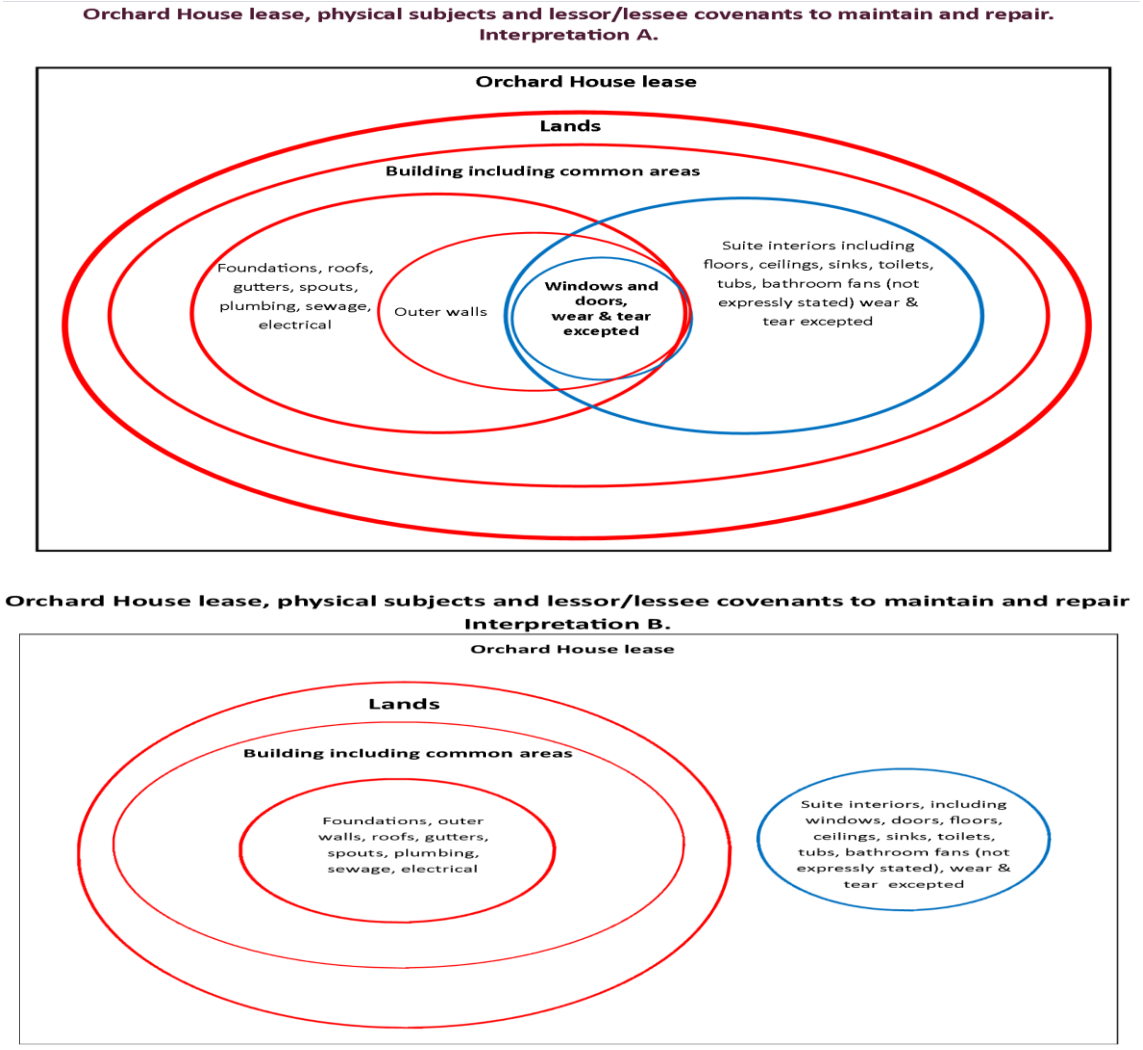


Figure 1. Venn diagrams of Orchard House physical subjects. The "universe" is the Orchard House lease and all its terms. Inside the universe, oval size represents relative specificity of the physical subjects of the Orchard House lease; i.e. larger shapes represent more general physical lease subjects, within which smaller ovals represent more specific physical lease subjects. Thus, the lands contain the building; the building contains the foundations, roofs and outer walls. Oval color indicates the party under the lease; i.e. red represents Westsea's covenants under 5.03; blue represents leaseholders' covenants under 4.03. **Fig. 2A** depicts Westsea's apparent interpretation in which Westsea has overarching responsibility to maintain and repair the building and outer walls, subsuming responsibility over the windows and doors. **Fig. 2B** depicts Mr. Trenchard's interpretation in which windows and doors are separate from the walls, and lessees' responsibility to maintain windows/doors/fans (reasonable wear and tear excepted) is disconnected from Westsea's covenants to maintain and repair. The SCC's reasons in *B.G. Checo v. B.C. Hydro* (1993) confirm this interpretation: where a general term and a specific term are in conflict, the general term is taken not to include the subject matter of the specific terms. Also, the Privy Council, in *Git v. Forbes* (1921), says that where terms are in conflict, the earlier term overrides the latter, which is repugnant to the first.

51. In Figure 1A, each step inward reflects a more specific sub-component of the lands, which is the most general physical element of the Lease, which I submit reflects Westsea's understanding of the Lease.

52. Indeed, Westsea appears to stress that windows are part of the building envelope, not so much that windows are part of the walls. This follows from the report by Pierre Gallant, an architect, dated February 11, 2019. Mr. Gallant does not suggest that the windows form part of the walls, but instead says that the windows form part of the building.

53. In Mr. Gallant's Report, Mr. Gallant says the

> "building envelope system comprised the following major parts:
>
> i. Wall Assemblies …
> ii. Windows & Balcony Doors …
> iii. Roofs …
> iv. Balconies …
> v. Podium Waterproofing Assembly"

54. Thus, according to Mr. Gallant, windows and doors are distinct from the walls, but each are distinct parts of the building envelope.

55. Further, the term building "envelope" does not appear in the Lease. Since the Building is described in the Lease, while the building envelope is not, what Westsea really asserts is that the windows are part of the Building such that windows fall within Westsea's general domain of responsibilities, recoverable as an Operating expense.

56. But Westsea's implied assertion that windows are part of the Building refers to a description that is <u>even more general</u> than the walls. Again, I hearken back to the Venn diagram in my opening statement showing the progression of general-to-specific items identified in the Lease. Again, I refer to the law stated by the Supreme Court of Canada in *B.G. Checo* and the Privy Council in *Forbes v. Git*.

57. Figure 1B reflects my interpretation of how the leaseholders' respective obligations are divided, which I submit is also reflected in the reasons of the Supreme Court of Canada in *BG Checo*. Thus, as argued, the specific reference to leaseholders' covenants to maintain and repair windows and doors subject to wear and tear – being in conflict with the more general landlord's covenant to repair the outer walls and building – is excluded from the subject matter of the general term.

52. I submit the prevailing effect of Article 4.03 over Article 5.03 and 7.01 is not only established by *BG Checo* and *Forbes v. Git*, but that windows are also physically and factually distinct (i.e. not merely legally distinct as *BG Checo* tells us) from the outer walls and building. This is well-supported by the decision of the English Court of Appeal in *The Holiday Fellowship v. Viscount Hereford*.

The Holliday Fellowship v. Viscount Hereford [1959]1 All ER 433 (CA) 434, 436-437, Plaintiff's Authorities **Vol III Tab 95**

53. The main issue in *Holiday Fellowship* was whether windows were part of the walls. In the reverse circumstance of the case before you, in *Holiday Fellowship* it was the tenant who took the position that windows were in fact part of the walls; this would have absolved the tenant of responsibility for painting the windows and put the obligation on the landlord. The English Court of Appeal found that the windows were separate from the walls.

51. The same conclusion follows in the Orchard House case, although the liability consequences are reversed. Since windows and doors are separate from the walls, Westsea cannot, in fulfilling their covenant to maintain the walls, recover the cost of replacing the windows from leaseholders as an Operating expense.

52. In finding windows were distinct from the walls, the Court of Appeal in the *Holliday Fellowship* identified some criteria for determining if windows are part of the walls.

Per Lord Evershed (p.435)

> "For the purpose of this case and of the question raised in the originating summons, I take "windows" to mean, and to be confined to, the glass panels and the wooden framework and apparatus in which the glass is placed; and the question is whether, for the purpose of the lease, "main walls" ought to be treated as including the windows as I have attempted to define them…
>
> If I looked at this matter without any guidance from authority, I should unhesitatingly say, in ordinary language, that the windows as I have defined them are distinct from the walls. No doubt they are *in* the walls. Walls may have eyes as well as ears. But I would say that they are, as physical things, distinct from the walls in which they are inserted…it is plain that, apart (again) from the effect of any authority, the windows in the walls would be treated as something different from the walls themselves." [*italics in original*]
>
> *The Holliday Fellowship v. Viscount Hereford* [1959]1 All ER 433 (CA) p. 435, Plaintiff's Authorities **Vol III Tab 95**

53. Lord Evershed then reviewed some relevant authority, which did not change his view. He said at p. 436:

> "If I am right so far as thinking that the matter is not concluded by these authorities, then the question comes back to that part of the construction of the lease and of asking and answering the question: Are the windows illustrated in this photograph, and limited by my definition, part of the main walls, within the meaning of cl.2(3) and cl.3(1)? Applying the ordinary standards of common sense and interpretation of language, I conclude, unhesitatingly, that they are not…I reach the conclusion that the windows which are the subject of the application are not part of the main walls and are, therefore, outside the scope of the landlord's obligation to repair." [emphasis added]

54. Lord Romer agreed, saying (at 436-437):

> "…it would not be a misuse of language to describe, for example, the walls and roof of the old Crystal Palace as made of glass, and if they were regarded as a series of windows the latter would form the walls, because the whole structure is made of glass. On the other hand, in the case of a small house with ordinary windows, it does not appear to me to be possible to say that the windows form part of the walls of the house, still less that they form part of the "main walls" of the house, "which", as the learned judge said, "support the structure of the building or having directly to do with its stability." [*underlining added*]

55. Orchard House is obviously not a small house, as was the case *The Holiday Fellowship*. But we can apply the factors considered by the court to Orchard House. If, as Lord Romer observes, the entire face of Orchard House was made of glass that would tend toward the windows being walls. But the Orchard House windows clearly do not comprise the entire face of the building, nor is whole structure made of glass; nor do the windows support the structure of the building, as confirmed by the evidence of Sameer Hasham in testimony about the deflection heads above the sliding doors and the windows.

56. Lord Omerod agreed with Lords Romer and Evershed (p. 437):

> "The issue is whether the windows in the walls of this house—a photographs of which we have before us—can be regarded as part of the "main walls" as "those which support the structure of the building or have directly to do with its stability"; and I suppose that, in addition, they go further than that in that they are a necessary part of the building as they inclose, or help to inclose, the area on which the building or structure is erected. But they may well perform another function. In a building it is necessary to have means of ingress and egress, and, of course, some means of admitting light: therefore, the walls form the setting for the necessary doors and windows which certainly a dwelling-house and a very large number of other buildings must have. But to say that those doors and windows, inserted in those settings, are part of the main walls of the building seems to me to be going very much further than the ordinary use of language would allow. It is, as Romer, L.J., has said, a matter of degree. There may be cases where the walls are built so much of glass that it would be impossible to say whether they are walls or windows. In the sense that they admit light they are windows, and in the sense that they inclose the premises they are walls. In the case of a house of this kind, however, an ordinary house with walls and the normal amount of windows, that position of course cannot apply."

57. Lord Omerod identified two features that *could* bring windows within the description of walls: if the windows support the structure of the building, and if they inclose the building face. Lord Omerod then identified features of windows that distinguish them from walls, namely that windows admit light and permit ingress and egress. He did observe that in some circumstances, it may difficult to distinguish between walls and windows "where walls are built of so much glass".

58. In Orchard House, while the windows do comprise a significant proportion of the building face, the windows do not comprise the entire face of the building, nor do they support the building structure, circumstances which the English Court of Appeal said tends toward describing a window as a wall.

59. That the Orchard House windows are not structural is supported by comments from Perry Caris that the windows have a "deflection" space; this was also confirmed by Sameer Hasham.

60. It is useful to stress that Westsea's expert, Pierre Gallant, an architect, acknowledged that he is not qualified to comment on structural elements of the building[1], and the best evidence we have that the windows are non-structural is from Perry Caris and Sameer Hasham.

61. Indeed, Westsea seems to stress that windows are part of the building envelope, not so much that windows are part of the walls. This follows from the report by Pierre Gallant, an architect, dated February 11, 2019 ("Mr. Gallant's Report") in which Mr. Gallant makes no suggestion that the windows form part of the walls.

62. In Mr. Gallant's Report, Mr. Gallant says the

> "building envelope system comprised the following major parts:
>
> i. Wall Assemblies …
> ii. Windows & Balcony Doors …
> iii. Roofs …
> iv. Balconies …
> v. Podium Waterproofing Assembly"

1. Mr. Gallant stated this at p. 7 of his report dated February 11, 2019:

> "I am not a structural engineer so cannot comment on structural supports. A prudent envelope consultant will retain a structural engineer to conduct a structural review."

64. Thus, according to Mr. Gallant, windows and doors are distinct from the walls, but each comprise parts of the building envelope.

65. Further, the term building "envelope" does not appear in the Lease. Since the Building is described in the Lease, while the building envelope is not, what Westsea really asserts is that the windows are part of the Building such that windows fall within Westsea's general domain of responsibilities, recoverable as an Operating expense.

67. But Westsea's assertion that windows are part of the Building refers to a description that is <u>even more general</u> than the walls.

68. So, according to Westsea's reliance on its description of the building envelope as containing the windows alongside the walls, we do not even need to consider whether windows and doors are distinct from the walls, but rather whether windows are distinct from the whole Orchard House building.

69. There are many obvious features of windows that distinguish windows and doors (and fans) from the *Building*. First, we can identify many of the same features of windows that distinguish windows from walls:

- they admit light into a building space

  The Holliday Fellowship v. Viscount Hereford [1959]; Plaintiff's Authorities **Vol III Tab 95**

- they may be opened and allow ventilation (but not always)

  Fairhome Inspection Report, Jan 12, 2011 attachment "Interior" p. 29, Plaintiff's Docs **Vol I Tab 8**

- they are made of glazing and a frame and made to fit into an opening <u>in</u> a wall

  BECA report, definition "Window", Plaintiff's Docs **Vol III doc #1**, Key Docs **Tab 2**

  Report of Doug Kolot, P.Eng. March 1, 2019, p. 6

- they have a deflection space and are structurally non-load bearing

  Perry Caris testimony; Sameer Hasham testimony

- in terms of sliding glass doors, they permit egress and ingress between spaces

- they typically provide far less insulation than walls

  Fairhome Inspection Report, attachment "Interior" p. 29 "*windows let more heat escape than even an uninsulated wall*" Plaintiff's Docs **Vol I Tab 8**

70. A building may contain many things, including walls, roofs, floors, windows, hallways, suites, boilers, furnaces, underground parking, various fixtures, cement pillars, garbage chutes, laundry facilities, to name a few. The term "building" is highly general, and indeed a building can come in countless shapes and sizes and be made of virtually any imaginable combination of materials. It is plain and obvious that windows are a *specific* item within the *general* description of a building.

v. Mr. Trenchard did not cause damage to the original windows, doors, and fans

71. The burden of proof rests with the tenant to show the damage in question falls within the wear and tear exception. As stated by the B.C. Supreme Court in *Griffin Holding Corp. v. Raydon Rentals*, 2016:

> "Once a plaintiff has adduced evidence of the condition of the premises, the burden shifts to a defendant to show, on a balance of probabilities, that the deterioration in condition falls within the "reasonable wear and tear" exception in a lease: *Kreeft v. Pioneer Steel Ltd*., 1978 CarswellBC 167 (B.C. Co. Ct.), at para. 6 and *Stellarbridge Management Inc. v. Magna International (Canada) Inc*., 2004 CanLII 9852 (O.N.C.A.), at paras 61-64."

Griffin Holding Corporation v. Raydon Rentals Ltd., 2016 BCSC 2013, **pars 28(b), 29**; Plaintiff's Authorities **Vol I Tab 40**

72. In *Griffin Holdings*, at paragraph 28(d), the court refers to circumstances in which damages are *beyond* wear and tear; this concept that should be clarified. Damage that is "beyond" wear and tear is damage caused by the tenant, who must repair that damage. A good example is if the tenant throws a ball through the window, he or she is obligated to repair it. *Within* wear and tear is as it falls upon the continuum I have presented in my Opening and will show again.

72. In *Warren v. Keen*, Lord Denning described a tenant's obligation to prevent damage to his or her suite:

> "In addition, he must not, of course, damage the house wilfully or negligently; and he must see that his family and guests to not damage it—if they do, he must repair it. But, apart from such things, <u>if the house falls into disrepair through wear and tear or lapse of time or for any reason not caused by him, the tenant is not liable to repair it</u>." [*my emphasis*]
>
> *Warren v. Keen* [1953] 2 All ER 1118, p. 1121; Plaintiff's Authorities **Vol II Tab 50**

73. In *NWS Holding v. Oceanex Inc* (2011), the Newfoundland Supreme Court, restated this principle, saying:

> "It is not necessary that the Plaintiff allege Negligence [*sic*], in fact, once damage has been shown, the burden then shifts to the Defendant to show that it <u>was not due to its negligence</u> and was damage caused by the expected wear and tear on the building considering the use it was put to and considering the age and condition of the building at the time it was <u>first occupied by the Defendant</u>." [*my emphasis*]
>
> *NWS Holding v. Oceanex Inc.* 2011 NLTD 43 (CanLII), **p. 24**, **para 69**; Plaintiff's Authorities **Vol II, Tab 72**

74. Some authorities place the onus on the landlord to prove damages beyond wear and tear "with solid evidence of tenant abuse". Westsea has not alleged this, and there is no evidence of my having abused the windows/doors/fans.

> *Destaron Property Management v. Girardin*, 2015 CanLII 8696 (Ont. Sm. Cl), para 4-5; Plaintiff's Auth **Vol I Tab 30**

75. The evidence in this case easily discharges this burden. Prior to the installation of the new windows, I arranged an inspection of my old windows. This was conducted by Brad Hutchings of Pillar-to-Post inspections, dated September 23, 2016. Mr. Hutchings stated:

> "Original windows in their current state are in fair condition for their age" …
>
> "Although usable and in fair condition for their age, the single pane aluminum windows are currently in the process of being replaced. <u>There is no obvious damage to the windows and they are still functional</u>."

Plaintiff's Docs Vol. I, doc #15, p. 16; **Key Docs Tab 4**

76. Further, an inspection report I obtained for Suite 805 by Fairhome Building Inspections, dated January 12, 2011, made no mention of any damage to the windows and probably would have mentioned any such damage had there been any.

Plaintiff's Docs **Vol. I, doc # 8**

77. Photographs I took of the windows and sliding doors confirm that I have caused no damage to them. My testimony further confirms this and Westsea provided no evidence to the contrary. I testified that I have maintained the windows and have in past vacuumed and wiped debris from around the windows.

Plaintiff's Docs **Vol I. doc #6, photos 1 – 10**

vi. Mr. Trenchard made reasonable use of the windows, doors and fans

78. In the Lease, the relevant phrase is "<u>reasonable</u> wear and tear", as it is in the *Short Form of Leases Act*. What does "reasonable" mean in this context?

79. The authorities establish two arms to reasonableness in this context: 1. the tenant's use of the items in question for their ordinarily expected purposes; 2. the tenant's fulfillment of the general obligation to maintain and repair.

a. *Ordinary expected use*

80. The court in *Kreeft v. Pioneer Steel Ltd* held that reasonableness arises in the context of the ordinarily expected use of the item. The court said:

> "The position of the defendant is that the consequent damage to the premises was the natural result of the use which the premises were being put to and therefore envisaged with respect to the lease in question is the wear and tear one reasonably might expect from the use of the warehouse to store steel. In support of this proposition it cited the case of *Inverarity v. Muller* (1926), 31 O.W.N. 339 at 340. In that case machinery caused a great deal of vibration and the tenant claimed that the cracks in the walls were caused by the machines and that the use of machines was envisaged in the premises and that any damage consequent upon their use is reasonable wear and tear.
>
> "The machinery caused a great deal of vibration, but it was not established that the cracks in the walls were caused by the machines. Even if so caused, having regard to the character of the demised premises, built for business purposes, and the use to which, to the knowledge of the defendant, they were to be put by the plaintiff, the cracks in the walls would come within the exception of 'reasonable wear and tear' in the covenant to repair contained in the lease."
>
> It is my view that this case is very persuasive as there is a clear analogy to the case at bar. It is my opinion that the damage was reasonable wear and tear as it relates to the warehouse floor and the parking lot. I hold therefore that the damage to the floor was a result of reasonable wear and tear and the defendant has met the onus upon it to bring itself within the exception to the covenant to repair. [*underlining added*]
>
> *Kreeft v. Pioneer Steel Ltd,* [1978] 8 B.C.L.R. 138 (B.C. Co. Ct), p. 140-141; Plaintiff's Authorities **Vol II Tab 54**

81. In *Homestar Holding v. Old Country*, the B.C. Supreme Court said, "It is a question of degree" and that "It is, of course, whatever appears reasonable in the circumstances".

> *Homestar Hldg. Ltd. v. Old Country Inn Ltd*., 1986 CanLII 813 (BC SC), paras 33-34; Plaintiff's Authorities **Vol II Tab 46**

82. Shedding further light on this, the B.C. Supreme Court *in Kenmar Inns Ltd. v. Letroy*, applied the reasoning in *Homestar* in finding that the plaintiff tenant was not liable for the cost to replace a carpet, saying:

> It was clear that a large number of patrons would make use of the pub and one might expect stains and wear over a period of five years. Eventually, one might well conclude that the landlord would see fit to replace worn or stained carpets and other floor coverings for the more effective use of the premises as a pub. It seems to me that the wear and tear which here occurred was not deliberate nor malicious and was reasonable in the circumstances. I conclude therefore that the plaintiff is not liable for such wear and tear. [emphasis added]
>
> *Kenmar Inns Ltd. v. Letroy*, 1992 CanLII 1647 (BCSC), p.18; Plaintiff's Authorities **Vol II Tab 51**

83. The evidence shows the Lease specifically requires Suites in Orchard House be used for residential purposes. The City of Victoria has zoned the building for residential use. Further, I testified that I sub-rented suite 805 for about 1 ½ years before I moved in. I testified that the tenants were reliable and trustworthy, and I am aware of no damage they caused to the windows/doors.

Orchard House head lease; Plaintiff's Docs **Vol I # 57**; also **Doc #3, p. 7-17**
City of Victoria zoning, Plaintiff's **Docs Vol I #17**

84. I testified that I used the suite for nothing other than what would be expected for a residential suite. My evidence confirms my Suite has been the subject to very little wear between the time I acquired my Suite and the beginning of the Phase 2 Project in July 2016.

86. In any event, Westsea has neither asserted nor provided any evidence to show that I used the Suite 805 unreasonably or for some purpose that might have caused damage premature wear and tear of the windows and doors. They were old and worn many years before I acquired my leasehold interest.

b. *Regis v. Dudley* and *Haskell v. Marlow*: consequential damage and the second arm of reasonableness

87. The decisions of the House of Lords in *Regis v. Dudley* and *Haskell v. Marlow* warrant more detailed analysis, especially since Westsea relies on these decisions to support its pleading that:

> "The lessees had an obligation to undertake such repairs as were necessary to stop further damage. The lessees failed to perform that obligation and it was instead performed by Westsea pursuant to Article 8 of the Lease. The amount paid or payable in connection with such repairs is chargeable to the lessees pursuant to Article 8 of the Lease."
>
> Response para 10.2(b) (Part 3)

88. In *Regis v. Dudley,* the House of Lords reinstated the decision of *Haskell v. Marlow,* the effect of which was that the wear and tear exception did not exonerate tenants from *consequential damage* flowing from the effects of wear and tear. Lord Denning stated:

> "I find myself in full agreement with what TALBOT J., said on this subject in *Haskell v. Marlow* (2) ([1928] 2 K.B. 45 at p. 59)… I have never understood that, in an ordinary house, a "fair wear and tear" exception reduced the <u>burden of repairs</u> to practically nothing at all. It exempts a tenant from liability for repairs that are decorative and remedying parts that wear out or come adrift in the course of reasonable use, but it does not exempt him from anything else. If further damage is likely to flow from the wear and tear, he must do such repairs as are necessary to stop that further damage. If a slate falls off through wear and tear and in consequence the roof is likely to let through water, the tenant is not responsible for the slate coming off but he to put in another one to prevent further damage." [underlining added]
>
> *Regis v. Dudley* [1958] All E.R. 491 (HL), 511-512 Plaintiff's Authorities **Vol II Tab 78**

89. All Lord Denning is saying is that wear and tear does not excuse a tenant's failure to undertake ordinary repairs and maintenance during the life of the item in question. In other words, a tenant cannot simply do nothing and rely upon the wear and tear exception when the place falls to pot. Lord Denning simply identifies an element of "reasonableness" in the phrase "reasonable wear and tear"; i.e. it is unreasonable to do no nothing to maintain and repair one's premises. When Lord Denning refers to the "burden of repairs" he is explicitly referring to the otherwise prevailing obligation to maintain and repair.

90. This becomes clear when we review the circumstances in *Haskell v. Marlow.* In *Haskell v. Marlow* the deceased tenant occupied the premises for 42 years and "did nothing to actively injure the premises, but did nothing to counteract the natural process of decay" (headnote). To fully appreciate the meaning of Judge Talbot's reasons, it is instructive to quote him at length:

"The plaintiffs said that, while the tenant for life was not liable for the defects directly caused by wear and tear, the exception did not supersede the first part of the condition, and she was bound to do such repairs as were necessary to prevent further damage, even if originally caused by wear and tear, from producing further damage; or (putting it somewhat differently) that damage caused by reasonable wear and tear meant damage so caused by a tenant who acted reasonably. The defendants said that as to any damage caused by reasonable wear and tear the tenant for life was entitled to do nothing, simply to be inactive, whatever the consequences to the property.

…

The meaning is that the tenant (for life or years) is bound to keep the house in good repair and condition, but is not liable for what is due to wear and tear. That is to say, his obligation to keep in good repair is subject to that exception. If any want of repair is alleged and proved in fact, it lies on the tenant to show that it comes within the exception. Reasonable wear and tear means the reasonable use of the house by the tenant and the ordinary operation of natural forces. The exception of want of repair due to wear and tear must be construed as limited to what is directly due to wear and tear, reasonable conduct on the part of the tenant being assumed. It does not mean that if there is a defect originally proceeding from reasonable wear and tear the tenant is released from his obligation to keep in good repair and condition everything which it may be possible to trace ultimately to that defect. He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce.

For example, if a tile falls off the roof, the tenant is not liable for the immediate consequences; but, if he does nothing and in the result more water gets in, the floor and walls decay and ultimately the top floor, or the whole house, becomes uninhabitable, he cannot say that it is due to reasonable wear and tear, and that therefore he is not liable under his obligation to keep the house in good repair and condition. In such a case the want of repair is not in truth caused by wear and tear. Far the greater part of it is caused by the failure of the tenant to prevent what was originally caused by wear and tear from producing results altogether beyond what was so caused. On the other hand, take the gradual wearing away of a stone floor or staircase by ordinary use. This may in time produce considerable defect in wear and tear, and the tenant is not liable in respect of it. [*underlining added*]

Haskell v. Marlow [1928] 2 KB 45, p. 58-59; Plaintiff's Authorities **Vol II Tab 43**

91. It is clear that Judge Talbot is speaking of reasonable conduct on the tenant's part in complying with ordinary repair and maintenance covenants that prevent consequential damage that flows from wear and tear. For my windows in suite 805, this simply means, for instance, that if the windows had become so loose in their frames to allow continuous rain to flood the floors, I was obligated to plug up the holes as best as possible. But this does not mean I was obligated to replace the windows at my own cost: the damage to the windows *per se* was directly caused by the natural forces of nature and liability for their replacement falls on Westsea. Judge Talbot's reasons also imply that over the years I was obligated to undertake regular maintenance and repair, such as cleaning the windows and keeping the windows free of debris, oiling the rollers, and re-gluing the weather stripping – that sort of periodic but relatively minor maintenance and repair.

92. Indeed, in *Agtan Pty* the Australian (Victoria State) Court of Appeal explained Judge Talbot's reasons and said the tenant was not liable for immediate damage caused by wear and tear, only for consequential damage; per Santamaria JA:

> "It will be recalled that, in the course of discussing when a tenant may be disentitled to relay upon an exception for fair wear and tear, Talbot J in *Haskell v. Marlow* said the tenant is 'bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would directly produce.' As mentioned above, Agtan submitted that Caltex was not entitled to rely upon the fair wear and tear exception because, as the trial judge found, the decommissioning of Tank 2 was not in the nature of a repair and therefore, Caltex had not carried out any repairs.
>
> The submission entirely fails. The consequence that flowed directly from the fair wear and tear in the present case was the rupture in Tank 2 and the concomitant water leak. There was no pleading, let alone any evidence, that that particular consequence produced any other consequences that the fair wear and tear would not have directly produced. The situation would have been different had Caltex discovered the water leak and failed to carry out repairs to Tank 2 and the water leak caused damage to the other parts of the Tank System, for example. However, as explained, there was no evidence to that effect." [*underlining added*]
>
> *Agtan Pty Ltd. v Caltex Australia Petroleum Pty Ltd*. [2018] VSCA 169, para 194-195; Plaintiff's Authorities **Vol I Tab 13**

93. Justice Santamaria's reasons apply directly to this case. Westsea pleads rather as Agtan did: that the leaseholders did no repairs to their windows and therefore cannot rely on the wear and tear exception. However, as Santamaria JA pointed out, the argument misses the meaning of Judge Talbot's reasons, which is that leaseholders may be liable only for consequential damage that flows from the wear and tear, and Santamaria JA gives an example of the sort of consequential damage that might flow from wear and tear.

94. In the Orchard House case, there is *some* evidence of damage to the outer walls due to failing windows. Evidence on that point is clear from Perry Caris, Farmer Construction's Site Superintendent, and Sameer Hasham, the consulting engineer from Read Jones Christoffersen.

95. This is exactly why I do not dispute paying for repairs to the outer walls as an Operating expense. Some consequential damage to the outer walls may have been caused by the worn windows, and I do not dispute repair costs recoverable as an Operating expense.

96. Leaseholders' liability to pay for consequential damage to the outer walls is very much in keeping with the decision of the Alberta Supreme Court (as it was then) in *Lane v. B-Line Express Ltd.* (1976), where the court found some proportion of liability to the landlord for old and worn warehouse bumpers, but the tenant was liable for consequential damage to the walls. Applying *Regis v. Dudley*, the court said:

> "It is impossible to determine the exact portion of the damage to the bumpers that is attributable to reasonable wear and tear and what portion was caused by negligent docking, but on the evidence before me I have determined that one-third of the cost of the new bumpers as claimed by Lane would be a reasonable amount to impose on B-Line, and I fix that sum at $265. [7] The damage to the walls I find to be consequent damages to the damaged bumpers. Even if all or a portion of the damage to the bumpers were the responsibility of the landlord, the tenant is liable for the consequent damages. In the case of *Regis Property Co. Ltd. v. Dudley*, [1959] A.C. 370, [1958] 3 All E.R. 491, Viscount Simonds, at p. 393, in overruling *Taylor v. Webb*, [1937] 2 K.B. 283, [1937] 1 All E.R. 590, reaffirmed the principle as enunciated by Talbot J. in *Haskell v. Marlow*, [1928] 2 K.B. 45…" [*underlining added*]
>
> *Lane v. B-Line Express Ltd.* 1976 CanLII 306 (AB QB), para 7; Plaintiff's Authorities **Vol II Tab 57**

97. Moreover, regarding Westsea's pleading that leaseholders failed to maintain their windows to prevent consequential damage, Westsea gave no evidence of this. Indeed, my evidence shows the contrary.

98. To the extent there was damage to the plywood liners below the windows, repair costs in this respect are part of the Suite as defined by the Floor Plan, and the windows installation process and should be included with the new windows/door replacement costs.

99. Closing off my submission on the effect of *Regis v. Dudley* and *Haskell v. Marlow*, the case comment of Robert Kennerman assists. In describing the effect of *Haskell v. Marlow*, he states "It appeared that the tenants were responsible for *consequential damage* resulting from fair wear and tear." [italics in original]. Kennerman further states:

> "Then a tenant with a fair wear and tear exception in his lease has the responsibility of avoiding consequential damage stemming originally from a fair wear and tear defect, even though a landlord does not repair the fair wear and tear defect."
>
> Kennerman, R. 1960. *Regis Property v. Dudley* Osgoode L.J. Vol 2, No.1, **p. 167**; Plaintiff's Authorities **Vol III Tab 111**

100. Again, I do not dispute liability to pay for repairs to wall damage that may have been a consequence of the failing windows.

vii. Westsea's pleading paragraphs 10.2(b) of its Response

101. Here I wish to address Westsea's pleading at paragraph 10.2(b) of its Response.

102. Westsea pleads:

> 10.2 (b)…where the condition of the windows and sliding doors had deteriorated due to reasonable use by the Lessees and the ordinary operation of natural forces, further damage to Orchard House building components was were necessary to stop that further damage. The lessees failed to perform that obligation and it was instead performed by Westsea pursuant to Article 8 of the Lease. The amount paid or payable in connection with such repairs is chargeable to the lessees pursuant to Article 8 of the Lease.

103. Article 8.02 reads:

> "If the Lessee shall fail to perform any covenant or condition of this Lease on his part to be performed, the Lessor may (but shall not be obligated so to do) perform such covenant or condition as agent of the Lessee and all amounts paid by the Lessor in respect thereof and all costs, damages and expenses suffered or incurred by the Lessor in respect thereof shall be due and payable by the Lessee to the Lessor on demand as rent and the Lessor may exercise any remedy in respect of the recovery of any such amounts as it might for rent in arrears."

104. An example is if my nephew throws a ball through the window and I decide not to repair the broken window and leave it sitting indefinitely, Article 8.02 authorizes Westsea to come in and fix it instead, and to recover the cost from me personally – and quite reasonably so.

105. However, Article 7.01 is clear that costs directly charged to individual leaseholders are not Operating expenses under the Lease:

> "7.01
> "Operating expenses" shall not include any amount directly chargeable by the Lessor to any Lessee or Lessees".

106. This is a direct reference to Westsea's costs incurred pursuant to Article 8.02.

107. Moreover, even without the exclusion clause above, Westsea's pleading makes sense only if leaseholders are actually obliged to replace their old and worn windows. The whole premise of the wear and tear exception is that it is exculpatory, i.e. leaseholders <u>are not obligated</u> to replace old and worn parts of their Suites.

viii. The requirement "to repair and maintain each of the Suites including all doors, windows…and to keep the same in a state of good repair"

107. Before delving into the legal and conceptual foundation of the wear and tear exception, I submit that <u>even in the absence of the wear and tear exception</u>, leaseholders do not have a responsibility to replace old and worn things. Article 4.03 requires leaseholders to "repair and maintain…<u>to keep</u> the same in a good state of repair" from the date the tenancy began. Similarly, Westsea's obligations are "<u>to keep</u> in good repair and condition."

108. In *Vicro Investments Ltd. v. Adams Brands Ltd*. (1963), the Ontario High Court considered a repairing covenant like that found in the Orchard House lease. The court said:

> "But, as has been pointed out, the lessor cannot insist on repairs that will make the building new or that will give him a building substantially different that that which he rented. He can only require the building to be repaired as an old building…He is not entitled to point to the marks of old age and require them to be so altered as to become symbols of youth…
>
> The modern trend, I think, is to construe a covenant to "keep in repair" or "leave in repair" as an obligation to keep the demised premises in the condition they were in at the beginning of the term…"
>
> *Vicro Investments Ltd. v. Adams Brands Ltd.* [1963] 2 O.R. 583 (HCJ), p. 600 – 601; Plaintiff's Authorities Vol III, **Tab 99**

109. For the Orchard House lease, it is not immediately clear whether the term begins when each assignee acquires their interest (in my case in January 2011), or if the term begins on May 1, 1974 when the original lease was made.

110. The decision in *O'Connor v. Fleck* might suggest that the term reaches back to May 1, 1974, despite successive re-assignments. *O'Connor v. Fleck* involved lease *renewals* such that any term ending points were what Madam Justice Smith called "no more than a legal fiction" (para 87). However, Madam Justice Smith did not consider the consequences of lease re-assignments like those that often occur during 99-year residential leases. In these cases, when a party re-assigns her interest to another, there is a true ending of the contract between one set of parties and a starting point between another set, which periods are clearly real and not a legal fiction.

> *O'Connor v. Fleck,* 2000 BCSC 1147, para 84-87; Plaintiff's Authorities **Vol II Tab 73**

111. The English case *Walker v. Hatton* (1842) addresses this circumstance. A 21-year lease was first made in 1828, and then upon the same lease terms (there was one minor change, but the court considered the terms to be the same) the term residue was sub-leased to a third party two-years later. The lessee sought to hold the sub-lessee liable to a paint and repair covenants that would have kept the demise in 1828 condition. Counsel for the sub-lessee argued (p.465):

> "Suppose the lease were of a new house for one hundred years, and there was a general covenant to repair, and at the end of fifty years a person were to take the underlease, with a covenant in the same words, the latter covenant must be construed with reference to the state of the premises at the time…
>
> Here there was an interval of more than two years between the two leases, and the covenants may therefore apply to a very different state of things: the one would refer to the state of repair in 1828, and the other to that in 1830, which might be widely different; to that what would be a breach of covenant in one case, might be consistent with performance in the other. They are, therefore, essentially different. The covenant to paint varies in its terms. The plaintiff is in fact attempting to convert the covenant to repair into a covenant to indemnify, which is a totally different thing; and it would be great hardship to impose on the defendant a liability arising from the stipulations of the original lease, with the terms of which it is not shewn that he was ever acquainted."
>
> *Walker v. Hatton* (1842) 152 ER 462 (Exch. of Pleas) Plaintiff's Authorities **Vol III Tab 99.1**

112. The Exchequer of Pleas agreed, per Parke B:

> "Although the covenants contained in the sub-lease are, with the exception of that relating to painting, the same language with those contained in the original lease, yet they are different in substance; the periods at which the leases were granted being different. It is now perfectly settled that a general covenant to repair must be construed to have reference to the condition of the premise <u>at the time when the covenant begins to operate</u>; and as the one lease was granted in 1828, and the other in 1830, allowing an interval of two years, it is clear that the covenants would not have the same effect, but would vary substantially in their operation. [*underlining added*]
>
> *Walker v. Hatton* (1842) 152 ER 462 (Exch. of Pleas). p. 466; Plaintiff's Authorities **Vol III Tab 99.1**

113. This is supported by the analysis of the court in *NWS Holdings v. Oceanex* in which the court said the defendant (tenant) must show that damage was not due to its negligence and was caused by wear and tear "considering the age and condition of the building at the time it was first occupied by the Defendant."

NWS Holding v. Oceanex Inc. 2011 NLTD 43 (CanLII), **p. 24**, **para 69**; Plaintiff's Authorities **Vol II, Tab 72**

114. *Walker v. Hatton* was referred to in *Vicro Investments Ltd.* where the court observed *Walker v. Hatton,* among other old English cases were applied in Ontario.

Vicro Investments Ltd. V. Adams Brands Ltd. [1963] 2 O.R. 583 (H.C.J), at **p. 591**, Plaintiff's Authorities **Vol III Tab 99**

115. Here, the key is that the sub-lessee's covenants began when the sublease was granted, which is equivalent to the assignment date for Orchard House leases. The sublessee could not be held to keep the premises in the condition they were in at the start of the original term, just as here on the very argument presented by counsel in *Walker v. Hatton*, it makes no reasonable sense that I should put the premises in their 1974 condition: I am bound only to covenants that began only in January of 2011, some 40 years into the life of a 99-year lease.

116. Be that as it may, the wear and tear exception qualifies leaseholders' repair and maintenance obligation. The presence of the wear and tear exception thus nullifies any controversy on the starting point of a lessee's requirement to keep the suite in good condition. This is because the wear and tear exception intrinsically *span the entire life-history* of natural deterioration from the installation of the items in question to the present, and absolves leaseholders of liability to replace those items captured by the wear and tear exception. Thus, the wear and tear exception expresses a physical reality about natural deterioration that operates independently of legal abstractions involving term periods. The effect of the wear and tear exception on repair covenants was stated by the Ontario Court of Appeal in *Manchester et al. v. Dixie Cup Company (Canada) Limited:*

> "All the cases referred to on behalf of the appellant in this connection were decided upon *absolute* covenants to repair, with no exception for reasonable wear and tear. In long-term leases with absolute covenants to repair it is reasonable that "keep in repair" should be construed as "put and keep in repair", but that interpretation cannot apply where there is an exception for reasonable wear and tear" [*my emphasis*]
>
> *Manchester et al. v. Dixie Cup Company (Canada) Limited.* [1951] O.R. 686-705 (Ont. CA) (p. 6/23 CanLII). Plaintiff's Authorities **Vol. II Tab 63**

117. Moreover, in *O'Connor v. Fleck* Madam Justice Smith did, in any event, go on to consider the wear and tear exception in the lease and found the exception applied to a gas heater, the replacement of which the landlord was liable for – this supports the application of the wear and tear exception to the windows, doors, and fans at Orchard House.

> *O'Connor v. Fleck,* 2000 BCSC 1147, **para 121-123**; Plaintiff's Authorities **Vol III Tab 73**

ix. The rationale for the wear and tear exception

118. This analysis is not entirely necessary: the wear and tear exception exists, and it should be applied. However, I think it useful to understand the underlying rationale for the wear and tear exception. So, here I examine in more detail what "wear and tear" means, and how and why the exception places the responsibility to pay for the replacement of old and worn windows squarely in Westsea's hands.

119. First, it should be borne in mind that Westsea is the owner of the property. The tenants are mere occupiers and users of the space for which the tenants have paid rent (in this case, pre-paid rent, as Westsea has admitted). The space is granted to the tenants for occupying or using the space for a term, after which the space reverts to the landlord. In the Orchard House lease, the consequences of overholding after the expiry of the term is addressed in Article 8.06. Conceptually, this is significant because Westsea accrues the benefit of any upgrades through major component replacements by potentially extending the useful and economic life of its property. I'll explore this concept more in relation to capital costs subsequently, but it is also significant in relation to wear and tear.

120. The rationale that grounds a landlord's liability for the replacement of an old and worn components was well-set out in what is perhaps one of the earliest wear and tear decisions on record, the 1766 Scottish Court of Sessions decision, *Sellers v. Brown*. Brown was a tenant under a 15-year lease of a dwelling house and brewery that included "brewing utensils". Brown covenanted to:

> "…restore and deliver back the said brewing looms, and others above mentioned, and the going graith upon the well, all in good condition, at the expiry of the present tack, tear and wear always expected…" [emphasis added].

Sellers v. Brown 1766 Hailes 131 Scot Ct of Sessions, p. 131; Plaintiff's Authorities **Tab 85**

121. At issue was whether Brown was obliged to pay the cost of replacing the "brewery utensils" which were worn to the point requiring replacement within three years. The lower court found the tenant was "not thereby bound to uphold the utensils belonging to the brewery." The tenant's counsel described the problem:

> "It remains, then, to consider, Whether the obligation on the tenant, in this case, to uphold the brewing loom, is to be understood as making him liable to bestow such repairs only as may be requisite for preserving those utensils as long as they are capable of being so preserved, or as making him liable to furnish new utensils in place of those which have become useless; and not the granter of the lease." [*emphasis added*]

ibid p. 132

122. The court went on to find in favor of the tenant, whose counsel argued as follows:

> "The words of the lease are sufficient to show that the granter of the lease, not the tenant, is obliged to renew or replace the utensils. The utensils are granted for a particular purpose, and at an adequate rent: hence the utensils must either be such as can last during the whole term of the tack, or must be repaired by the granter, for otherwise the subject would not exist. By the lease the tenant is bound to uphold, restore, and deliver back; therefore, the same utensils which are upheld are to be delivered back. The tenant cannot be bound to keep in repair and deliver back in good condition, at the end of fifteen years, what may become useless in the course of five years. The exception of *wear* and *tear*, imports that the tenant may use the subject in the common way; so that, if by *wear* and *tear* any part becomes useless, he is not bound to restore it in good condition. [*underlining added, italics in original*]

ibid p. 132

123. In adopting this reasoning, the Lord President asked (p.133): "Suppose a tenant bound to uphold and the house should fall, must he rebuild?"

124. In answering this question, Lord Kaimes commented (p.133):

> "If the house or the brewing-looms be destroyed *casu fatali*, no rent can be paid; because *casu fatali* there remains no subject. In such case the master must rebuild or replace; otherwise he can have no claim for rent."

125. To that end, Lord Alemore simply affirmed the plain reading of the lease (p.133):

> "By the clause the tenant is obliged to "uphold and deliver back, tear and wear excepted." The setters, therefore, are not liable for new utensils".

126. Applying this reasoning, we can substitute 99 years for the lease term in *Sellars v. Brown* of 15 years, and the 45-year period of window use at Orchard House as a substitute for 5-year use of the utensils in *Sellars v. Brown*.

127. Thus, the court in *Sellars v. Brown* illuminates the underlying rationale for the wear and tear exception. Tenants pay rent to use and occupy a space and are obliged to return the premises in the condition it was when he or she commenced occupancy. When items that are part of the landlord's property, like windows and doors at Orchard House, become useless due to age and wear, the landlord is obliged to pay for replacing them.

x. The question of rent

128. This is a good point to address the meaning of rent in the context of Orchard House. As noted in *Sellars v. Brown*, rent is connected to the rationale for why leaseholders do not pay for old and worn items that are owned by the landlord. After a brief excursion into this issue, I will return to the meaning and principles of wear and tear.

129. In the case of Orchard House, rent was pre-paid at the outset of the lease. Westsea admitted rent was pre-paid and it was profitable. Nothing turns on a precise figure.

[reply] xi. The effect of leaseholder sales of their term residues

[reply] 130. At this point, I want to address an argument Westsea may raise that an inequity stems from the fact that leaseholders can sell the residual of their lease interest, potentially for a profit. Westsea may argue that given this tenant profit potential, surely it is fair for Westsea to charge back the costs of replacing windows to the leaseholders.

[reply] 131. This is easily refuted. It is well-recognized that the residual value of 99-year leases begins to diminish from the mid-point of the term, down to zero by the end. A concept that is also recognized within the *Property Transfer Tax Regulations*, BC Reg 74/88 (s. 12, 14 and Table 1; Plaintiff's Authorities **Tab 1.1**). The following graph from Hamilton (1991) illustrates this point:

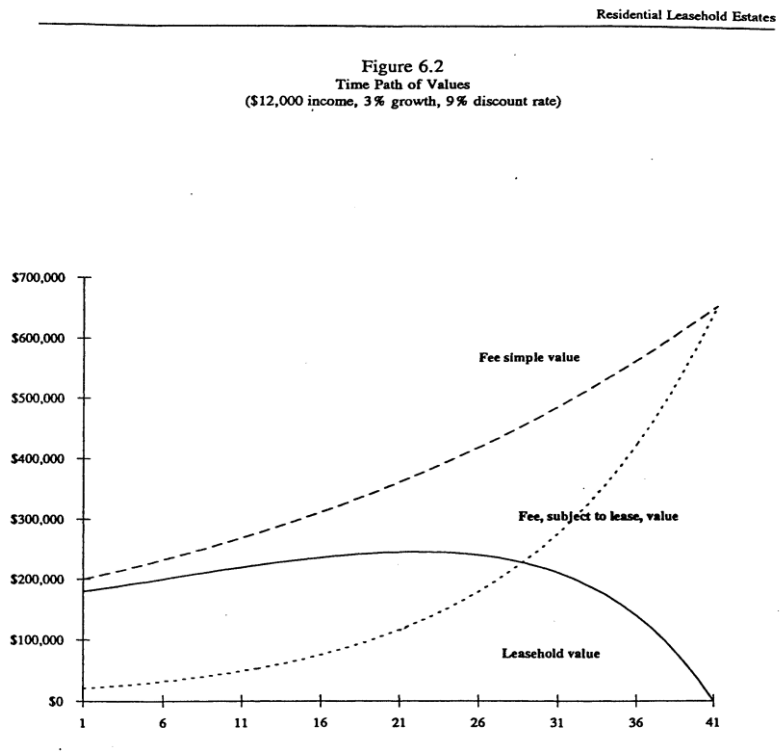


Figure 4. Diminishing value of long-term lease residue relative to fee simple value. Hamilton (1991) *Residential Leasehold Estates*, p. 71*;* Plaintiff's Authorities **Tab 110**

[reply]132. Thus, profit potential diminishes over the life of the lease. I submit that no expert evidence is required for this basic concept. An expert might be needed if we want to quantify the exact point in the life of the lease the values diminish, and by how, much the basic principle is straightforward. Indeed, Julie Trache admitted that the value of leaseholds near the end of the life of the Lease, a conclusion reached by common-sense.

Plaintiff's Docs Vol I, doc #2 (Island Savings mortgage)

[reply] 133. Thus, there is no reasonable suggestion that the re-sale of lease term residuals tips the equities in favor of Westsea such that Westsea should be able recover costs to replace all the windows as Operating expenses under the Lease.

xii. Returning to the rationale for the wear and tear exception

134. Like the reasoning of the court in *Sellars v. Brown*, in the early case of *Lister v. Lane and Nesham*, the English court referred to the rationale for imposing wear and tear costs on the landlord. The rationale is revealed by an absurdity that arises from the potential for the landlord to claim the costs from tenants for replacing or rebuilding an entire worn-out dilapidated building, an absurdity intimated by Lord President in *Sellars v. Brown*, as discussed. Similarly, the Court of Appeal in *Lister v. Lane* said,

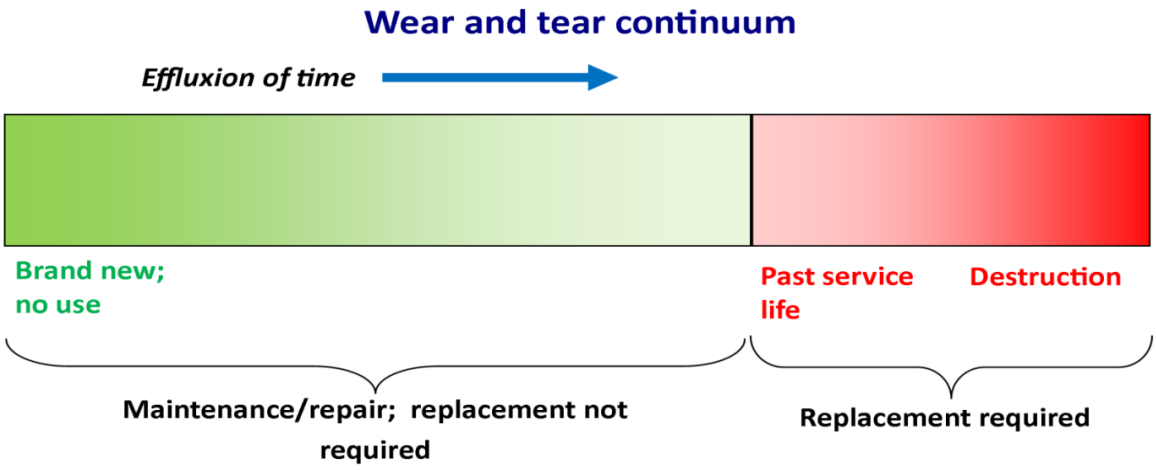
> "And in *Gutteridge v. Munyard* (1 Mood. & Rob. 334) Tindal, C.J., in his summing up said, that "What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss, which, so far as it results from time and nature, falls upon the landlord." This applied to the present case, and shewed that the cost of rebuilding such a house was not within the lessee's covenant to repair."

Lister v. Lane and Nesham [1893] 2 QB 212

135. Replacing all the old and worn windows at Orchard House is different only in degree from replacing the building in its entirety when it becomes worn out: in both cases, the landlord is liable because it owns the building and the windows and doors, and it makes no sense to pass replacement costs to the tenants.

xiii. The wear and tear continuum

136. Wear and tear falls on a continuum: *Pinewood Recording v. City Tower* (1998) 61 BCLR (3d); 110 CanLII 5469 (BCCA), para 5, 11. Thus:



137. The continuum demonstrates that items that need replacing are in a different category from those which exhibit *some* wear and tear but do not need to be replaced. Indeed, courts treat these types of wear and tear cases differently, but when items such as old and worn windows have exceeded their service life and need to be replaced, the costs of doing so are borne 100% by the landlord.

138. To illustrate the different judicial treatment for these two categories of wear and tear, below I present decisions involving items that were not so worn as to require replacement, or which were replaced before the end of their expected life. I then contrast those cases with ones in which items were sufficiently old and worn to require replacement, like the windows and doors were in our case.

xiv. Liability for old and worn items that do not need to be completely replaced or which are replaced before the end of their expected life

139. For items which do not require complete replacement, it is more difficult to determine the extent of wear and tear and any respective liabilities as between the landlord and the tenant for the costs of repairing wear and tear. This was the outcome of *Stellarbridge Management Inc. v. Magna International (Canada) Inc. et al*. (2004), a case in which the tenant was originally awarded a 35% discount for wear and tear. That case involved a building that was brand new at the beginning of the lease and where "...at the end of the Lease, the building was left in a dirty and unkempt state" (p.276). Thus, where roof and other *repairs* were effected but apparently nothing of note was replaced, the Ontario Court of Appeal said it was an error to apply a 35% discount for wear and tear.

> *Stellarbridge Management Inc. v. Magna International (Canada) Inc. et al*. (2004)71 O.R. (3d) 263 (CA), p. 278, para 49-52; Plaintiff's Authorities **Vol III Tab 90**

140. So, it is easy to see how there is difficulty in determining an appropriate value for wear and tear that is <u>less than</u> full replacement. That said, courts will <u>apportion</u> wear and tear liability in cases where less than complete replacement is required, or when replacement is made before the end of the expected life of the item:

- Costs to restore corroded ceiling, found to be due to wear and tear, reduced by ~37% *Bachechi bros. Realty Inc. v. Aslchem International Inc*., 1995 CanLII 679 (BCSC), **p. 9**, **para 16-17;** Plaintiff's Authorities **Vol I Tab 17**

- Roof required to be replaced in 12 years versus its expected life of 18-22 years; tenant liable for 1/3 (6/18 years) of the replacement costs *Darmac Credit Corp. v. Great Western Containers Inc*., 1994 CanLII 9213 (ABQB), p. 14, **para 45**; Plaintiff's Authorities **Vol I Tab 29**

- Bumpers designed to shield truck-to-wall damage were partially damaged due to negligence, and partially due to wear and tear; lessee liable for 1/3 of costs to replace the bumpers: *Lane v. B-Line Express Ltd*., 1976 CanLII 306 (ABQB), **p. 4. para 12** Plaintiff's Authorities **Vol II Tab 57**

- Cost to repair floor cracks caused by the heavy weight of stored steel were within the wear and tear exception: *Kreeft v. Pioneer Steel Ltd*. (1978), 8 B.C.L.R. 138, p. 141; Plaintiff's Authorities **Vol II Tab 54**

141. Similarly, B.C. Residential Tenancy Branch (RTB) arbitration decisions provide guidance on how to value wear and tear that falls in the middle of the wear and tear continuum. The RTB has developed guidelines for the expected useful life of various components of rental properties. If the age of a component is less than the useful life and needs to be replaced, arbitrators determine the ratio of the expired life to the useful life and apply that ratio to the landlord's liability for damage to the component. The tenant is liable for the balance for damage he or she has caused directly, not due to wear and tear.

B.C. RTB Policy Guideline #40; Plaintiff's Authorities **Vol. I. Tab 3**

142. For example, where the useful life of a carpet was 10 years, but needed to be replaced after eight years, an RTB arbitrator found the landlord was 80% (8/10) liable for the replacement cost, and the tenant was 20% liable.

BC RTB decision 668/2018, October 5, 2018; Plaintiff's Authorities **Vol. I Tab 22**

143. Where the useful life of a carpet was 10 years, but the landlord had to replace it 4.33 years into the tenancy, the landlord was liable for 4.33/10 of the replacement cost, whereas the tenant was required to pay for the balance (56%). The implication is that the tenant caused 56% of the damage, while the balance was due to wear and tear for which the landlord was liable.

BC RTB decision 150309/2013, September 6, 2013, **p. 4** Plaintiff's Authorities **Vol. I Tab 21**

144. The implication is that if a component is at least as old as its useful life and is damaged and needs to be replaced, landlords are 100% liable.

xv. Liability for old and worn items that require complete replacement

145. The cases are clear that where items fall within the wear and tear exception and are sufficiently worn to require complete replacement, the landlord is 100% liable:

- Replacement of underground old and worn steel storage tank with design life of 20-30 years: *Agtan Pty Ltd. v. Caltex Australia Petroleum Pty Ltd*. [2018] VSCA 169 (Supreme Court of Victoria, Court of Appeal, Australia), **paras 192-197**; Plaintiff's Authorities **Vol I Tab 13**

- Replacement of old and worn windows: BC Residential Tenancy Branch (RTB) decision 2296/2012, July 5, 2012, **p. 2,7**; c.f. RTB policy on determining liability for wear and tear); Plaintiff's Authorities **Vol I Tab 20; Tab 3**
- Replacement of damaged parking lot falling within wear and tear exception: *Parsons Precast Inv. v. Sbrissa*, 2012 ONSC 6098, **paras 17-23** Plaintiff's Authorities **Vol III Tab 75**
- Replacement of windows not shown by landlord to exceed wear and tear: *Hawco v. Nelson* [2009] O.J. No. 2122, p. 41, 46 (Ont. S.C. J. Small Claims) Plaintiff's Authorities **Vol II Tab 42**
- Heater repair or replacement falling within wear and tear exception and a capital cost: *No 6 Investments Ltd. v. Quick Coach Lines Ltd.*, 2000 BCPC 0090, p. 6 Plaintiff's Authorities **Vol II Tab 71**
- Replacement of gas heater falling within wear and tear exception: *O'Connor v. Fleck* 2000 BCSC 1147, **para 121-122** Plaintiff's Authorities **Vol II Tab 73**
- Cost to replace carpet: *Kenmar Inns Ltd. v. Letroy*, 1992 CanLII 1647 (BCSC), p.18 Plaintiff's Authorities **Vol II Tab 51**

146. Here it is worth referring to a recent American case in which the court found that damage directly related to failed caulking designed as a seal between windows and walls met the definition of wear and tear:

> His examination of the hotel's exterior walls revealed "improper flashing detail" consisting of failed caulk that had originally been installed to seal the areas where each room's exterior walls and windows met the hotel's concrete floors and surrounding masonry walls... It was this engineer's opinion that, during the hurricane, large amounts of rainwater passed through the openings created by the failed caulk, penetrated the walls and entered the interior of the hotel, damaging carpets, walls and interior finishes. The engineer thus opined with a reasonable degree of engineering certainty that the cause of the water damage to the hotel during the hurricane was the failure of the caulk as a result of age and poor maintenance — that is, wear and tear… We agree with Supreme Court that these submissions were sufficient to meet defendant's burden to establish on a prima facie basis that plaintiff's loss was caused by wear and tear within the meaning of the policy exclusion…[*emphasis added*]
>
> *Superhost Hotels Inc. v Selective Ins. Co. of Am* 2018 NY Slip Op 02519 App Div., **p. 2-3**; Plaintiff's Authorities **Vol II Tab 91**

147. Overall, I submit that it is clear beyond all doubt, let alone a balance of probabilities, that the Orchard House windows and doors, having surpassed their intended service life had deteriorated due to wear and tear, and that their replacement cost is Westsea's liability. Again, *BG Checo* and *Forbes v. Git* clearly apply and there is no mechanism for Westsea to transform its liability into an Operating expense or any other cost chargeable to the leaseholders.

C. Windows replacement are a capital Cost and/or replacement reserve and are not Operating expenses

148. If the wear and tear argument is not sufficiently persuasive, or you find, for instance, that the fans were not old and worn (but the windows and doors were old and worn), then we must examine Westsea's assertion that it may charge the costs to replace the windows, doors, and fans based on the catch-all in Article 7.01.

149. Article 7.01 reads:

> "ARTICLE 7 – OPERATING EXPENSES
>
> > 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 the Building, expenses in heating the common areas of the Building and each of the Suites therein (unless any of the Suites are equipped with their own individual and independent heating system in which event the cost shall be payable by the Lessee of each suite) 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 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 the Building, 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."

i. *Ejusdem generis*

150. The *ejusdem generis* principle dictates that the catch-all "all other expenses paid or payable by the Lessor in connection with the Building, the common property therein or the Lands" is limited by the categories of the specific items that precede the general terms.

151. The court in *Helme v. Clause* (2008) described the principle:

> "[16] This same principle of interpretation, *ejusdem generis*, is also examined in Geoff R. Hall, *Canadian Contractual Interpretation Law*, (LexisNexis Canada, 2007). The Rule is discussed at p. 97:
>
> > The *ejusdem generis* rule is a maxim of interpretation recently described in the following terms: "[W]hen general words follow an enumeration of persons or things with a particular and specific meaning, the general words are not to be construed in their broadest sense but are to be viewed as applying only to person [*sic*] or things of the same general kind, class or genus as those specified in the enumeration. Thus the effect of the rule is to interpret general words narrowly in order to accord with the meaning of more specific words preceding the general words. The rationale for the rule is said to be a presumption that when parties are focused on the particular objects of their contract they may use phrases which are literally wider than they intend, and a presumption that parties may use general words to guard against an accidental omission without intending to extend the contract to different objects. Like the *expressio unius* maxim, it is often thought of more as a rule of statutory interpretation than one of contractual interpretation, but it clearly does apply to contracts as well as to statutes. The rule only applies where general words follow specific ones (not when it is the other way around), and does not apply where the contract indicates that it would be inappropriate."

Helme v. Clause, 2008 BCSC 1523, par 16; Plaintiff's Authorities **Tab 44**

152. The application of the rule was affirmed recently by the BC Court of Appeal in *Robb v. Walker*, where the court said, "Interpretation may be aided by use of the *ejusdem generis*, or the limited class rule."

Robb v. Walker, 2015 BCCA 117, par 37
Plaintiff's Authorities **Tab 81**

153. Referring to the G. Hall quotation in *Helme v. Clause* excerpt above, in which parties "may use phrases which are literally wider than they intend", it is easy to think of absurd circumstances that a purely literal interpretation of the phrase "*all other expenses paid or payable by the Lessor in connection with the Building, the common property therein or the Lands*" might entail. For instance, if Westsea decides to build an entirely new complex on the property greenspace behind the existing Orchard House building, that would be "connected" to the Lands, which, according to a literal interpretation, Westsea could charge to the leaseholders as Operating expenses. Or, if the existing Orchard House building collapses in the coming mega-thrust earthquake during a point when there happens to be a lapse in Westsea's insurance – that would be connected to the Building and, according to a literal interpretation, Westsea could charge to the leaseholders as an Operating expense. Clearly the lease was never intended to encompass such consequences.

154. In *Helfand et a. v. Royal Canadian Art Pottery* (1970), the Ontario Court of Appeal considered the effect a similarly expansive phrase by which a manufacturer

> "agrees to protect the purchaser against <u>all claims</u>, losses, damages, costs and expenses, which arise from or occur as a result of the sales against any item purchased" (*underlining added*)
>
> *Helfand et a. v. Royal Canadian Art Pottery* [1970] 2. O.R. 527 (CA), p. 538; Plaintiff's Authorities **Vol II Tab 43.1**

155. In concluding that "all claims" could produce absurd results, the court observed that the words were "tending to remote and preposterous consequences." The court also applied *contra proferentem* in considering the vagueness and obscurity of the words in question:

> "It was the plaintiffs who put forward the document containing words which are by no means free of vagueness and obscurity when considered in light of the subject-matter concerned, the nature of the contract, and its other terms and they contend that those words should be given wide and unlimited scope, tending to remote and preposterous consequences. In the circumstances the rule *contra proferentem* should be applied.
>
> *Helfand et a. v. Royal Canadian Art Pottery* [1970] 2. O.R. 527 (CA), **p. 538**; Plaintiff's Authorities **Vol II Tab 43**

156. I will address *contra proferentem* more subsequently.

157. Returning then to the general term of the Lease "all other expenses paid or payable by the Lessor in connection with the Building, the common property therein or the Lands". Before I list the specific expenses set out in Article 7.01, consider first that the expenses must relate to the "performance of its [Westsea's] covenants herein contained…in connection with the maintenance, operation and repair of the Building".

158. The limitation of Operating expenses to Westsea's covenants to maintain and repair was recognized by Mr. Justice MacKenzie in *Trenchard v. Westsea Construction Ltd*. (2016), in the context of finding that "legal charges" did not include Westsea's litigation costs:

> "However, I find that the lease agreement does not authorize Westsea to seek recovery of the legal costs it incurred in these proceedings from the leaseholders as "Operating Expenses". In my view, Westsea did not incur such legal costs in the performance of its covenants of the lease agreement and they are not payable by Westsea "in connection with the building".
>
> *Trenchard v. Westsea Construction Ltd* 2016 BCSC 1752, para 17; Plaintiff's Authorities, **Vol III Tab 96**

159. The Court of Appeal set aside Mr. Justice MacKenzie's decision on a procedural ground. The Court of Appeal said that since only Mr. Trenchard was before the court, Westsea should notify all leaseholders that Westsea was seeking to charge its litigation costs to the leaseholders, upon which notice the leaseholders could refuse to pay and the matter relitigated. The Court of Appeal expressly said that "*Nothing in these reasons should be construed as either impugning or supporting the interpretation of the Lease in the court below*". Thus, I submit that the reasoning process undertaken by Mr. Justice MacKenzie remains viable for this court to adopt.

> *Trenchard v. Westsea Construction Ltd.* 2017 BCCA 352, para 11-13 Plaintiff's Authorities, **Vol III also at Tab 96**

160. But Mr. Justice MacKenzie is not alone in this view. Mr. Justice MacKenzie's view that Operating expenses must be connected to Westsea's covenants to maintain and repair is mirrored by His Worship Armstrong in *Archibald v. 1219 Harwood Street (Chelsea) Ltd.* The Chelsea lease is a 99-year residential lease identical to the Orchard House lease. His Worship Armstrong stated:

> Insofar as Article 5 contains the Lessor's covenants as "To keep in good repair and condition" electrical systems and the "elevators" "in good working order", it does not appear that the expenses going beyond these obligations can be charged to the Lessees.
>
> *Archibald v. 1219 Harwood Street (Chelsea) Ltd,* 2009 BCPC 0364, para 26 Plaintiff's Authorities, **Vol I, Tab 16**

[Reply] Covenants in the Lease other than in Article 5.03

[Reply] 161. Westsea seeks to show there are covenants within the Lease that expand the categories of costs that define Operating expenses. Westsea suggests that Article 8.01 involves such a covenant. But when we look closely at Article 8.01, even if it involves a covenant, which is not agreed, such a covenant does not involve any category of Operating expense whatsoever:

> "Provided always that and it is hereby agreed as follows:
>
> 8.01 In the event of damage to the Building by fire or other casualty against which the Lessor has covenanted to insure, the Lessor agrees that it will with reasonable diligence repair the Building or the part thereof so damaged <u>to the extent of the proceeds payable in respect of the insurance therefore</u>. [*underlining added*]

[**Reply**] 162. First, the Article refers to a specific covenant, Article 5.08, which obligates Westsea to obtain casualty insurance, and so the requirement to use proceeds to pay for casualty damage from the insurance coverage is conditional upon the subsisting insurance, and the term is thus a condition; further and alternatively, the term is on its face a *proviso*, which is distinct from the express covenants in the Lease.

[Reply] 163. However, even if the provision entails a covenant, the covenant is for Westsea to <u>use the proceeds</u> from the insurance to pay for the repair of damages by fire or casualty. In this way, the provision involves a relationship to expenses that is *entirely opposite* to an Operating cost: it implies that Westsea <u>must not</u> charge any costs for repairs by fire or casualty to the leaseholders. Thus, there is simply no expanded category of costs involved that might expand the narrow category of repetitive, periodic, or predictable costs listed as Operating expenses under Article 7.01.

[Reply] 164. If we look to see where there might be other covenants, in the sense of an agreement, we will find such "covenants" involve either no costs at all, or they are simply the same kind of recurring and repetitive cost as already identified under Article 7.01.

[Reply] 164. For instance, Article 8.04 states

> "Proviso for re-entry by the Lessor on non-payment of rent or non-performance of covenants."

[Reply] 165. This could potentially involve a cost that is non-repetitive and unpredictable, but the costs involved under Article 8.04 are already covered under Article 8.02 as a cost that is directly chargeable to a lessee who has failed to pay rent or performed his or her covenant. Article 8.02 states:

> If the Lessee shall fail to perform any covenant or condition of this Lease on his part to be performed, the Lessor may (but shall not be obligated) perform such covenant or condition as agent of the Lessee and all amount paid by the Lessor in respect thereof and all costs, damages and expenses suffered or incurred by the Lessor in respect thereof shall be due and payable by the Lessee to the Lessor on demand as rent and the Lessor may exercise any remedy in respect of the recovery of any such amount as it might for rent in arrears. [*underlining added*]

[Reply] 166. Thus costs incurred by Westsea to re-enter a suites is one that is directly recoverable from individual lessees, and is expressly stated under Article 7.01 not to be an Operating expense: " '*Operating expenses' shall not include any amount directly chargeable by the Lessor to any Lessee or Lessees*".

[Reply] 167. Article 11 also implies postage costs associated with Westsea's requirement to give notices by mail. However, that is simply a recurring, repetitive and predictable cost, just like all the other costs enumerated under Article 7.01.

[**Reply**] 168. There could also be costs associated with Westsea's right under the Rules and Regulations, paragraph 12, to enter suites for the purpose of pest control. But again, that is exactly the sort of repetitive and periodic cost that we see under Article 7.01.

ii. The categories of costs under Articles 5 and 7.01

169. Itemizing the specific covenants under Article 5, "Lessor's Covenants", the lessor must:

- provide heat
- keep in good repair and condition the foundations, outer walls, roofs, spouts and gutters of the Building, all of the common areas, the plumbing, sewage and electrical systems
- keep clean halls, staircases, corridors and like areas and properly lighted and heated
- keep elevators properly lighted and in good working order
- engage services of staff for care and service of the Building
- pay taxes
- provide elevator service
- keep insurance
- provide cablevision and front door intercommunication
- observe terms contained in prior charges

170. Now listing the items in Article 7.01, they include costs connected to:

- providing hot and cold water
- providing 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 service
- resident manager's salary
- legal and accounting charges
-

171. In my pleadings I identified these items as coming under identifiable categories:

1) **fixed costs**: costs that are not generally subject to change over the course of a year, such as insurance and taxes; and

2) **variable costs**: costs that vary according to occupancy levels; e.g. heating, water, electrical, window cleaning, elevator maintenance, maintenance and repair expected within a period of about a year.

172. Appraisal literature identifies fixed and variable costs, and also identifies replacement reserves as costs that typically comprise operating expenses.

> The Appraisal Institute of Canada. 2010. The Appraisal of Real Estate (3rd ed.) *Sauder School of Business, Real Estate Division, University of British Columbia,* pp. 20.15-20.16; 21.16-21.24
> Plaintiff's Authorities **Vol III Tab 106**

173. However, in reviewing the list above of Operating expenses in the Lease, there is no category of replacement reserves that can be gleaned. The cost to replace windows and doors is a "replacement reserve" cost, or a capital cost that provides long-term enduring benefit to the landlord and is not a fixed or variable expense.

174. I submit that no expert evidence is required for this common-sense conclusion. Expert evidence is required for exceptional issues that require special knowledge outside the experience of the trier of fact. Expert evidence is required when the content is unique or scientifically puzzling.

> *HMTQ v. D.D.* [2000] 2 SCR 275 [headnote]

175. In this case, all we are doing is identifying a name for categories of costs. The exercise involves looking at common sense items and then matching those items to categories that have names in standard appraisal literature.

Common, repetitive and highly predictable

174. However, there is yet a simpler approach taken by the courts. In *Skyline Holdings v. Scarves and Allied Arts* (2000), the Quebec Court of Appeal applied *ejusdem generis* (without expressly naming it as such and referring to the Quebec Civil Code for the principle) in the context of a lease like the Orchard House lease. The Quebec Court of Appeal identified categories of **"common, repetitive and highly predictable"** expenses, thus excluding the cost to replace a roof which did not fall under those descriptions:

> [16] The first observation that must be made when reading the operating cost clauses is that the majority of expenses are recurring and relate to the use of the building. This is the case with heating, electricity, maintenance costs, the janitor's salary, and so on. Other fees may be related to a combination of causes, such as tenant use, such as insurance, taxes and permits, etc. These last expenses are still **common, repetitive and highly predictable** during the term of the lease. In accordance with Article 1020 CCLC, however general the terms may be, their meaning must be limited to the things on which it appears the parties intended to contract. [*bolding added*]
>
> …

> [19] Can the words "all reasonable costs chargeable against income from the building" have the effect of including expenses that would normally be excluded by interpretation of the enumeration? Such an interpretation would be contrary to the rule quoted above but also to common sense. Indeed, such a broad interpretation could result in the inclusion of all of the building's operating expenses when this is not the appellant's purpose, as demonstrated by the debate over administrative costs.
>
> *Skyline Holdings v. Scarves and Allied Arts* [2000] QJ No.2786 (English translation via Google) Plaintiff's Authorities **Vol III Tab 87, para 16,19** (French version included)

175. The decision in Skyline is very much on point, and we need only substitute "windows/doors/fans" for "roofs" for the same result. Implicitly, "common, repetitive and highly predictable" expenses exclude costs that are incurred irregularly and intermittently, such as the Phase 2 windows and doors replacement costs.

176. In effect, this is also what the B.C. Supreme Court concluded in *Kotsovos Investments v. Oliver Twist* 2005. In the context of whether costs to replace heating and HVAC were chargeable as additional rent, Mr. Justice Ehrcke essentially defined a capital cost category by reference only to caselaw and without experts, saying:

> "[13] The defendant submits, and I agree, that costs properly chargeable to the capital account of the landlord are those costs which produce an "enduring benefit". Going back to subclause (v), items requiring periodic replacement are items the replacement of which would not produce an enduring benefit. Put simply, items requiring periodic replacement are items which need to be replaced regularly on a short term basis, things like light bulbs or furnace filters, and not things where the benefit of replacement would extend over a period of many years."
>
> *Kotsovos Investments v. Oliver Twist Neighborhood Public House* 2005 BCSC 176, para 13; Plaintiff's Authorities **Vol II Tab 53**

177. The evidence shows that windows, sliding doors and fans need be replaced perhaps twice within the lifespan of the Orchard House building. As such windows, sliding doors and fans exemplify Mr. Justice Ercke's description of things for which the benefit of their replacement would extend over many years. Windows and doors and fan replacement are

not short-term periodic replacements in the sense described by Mr. Justice Ercke and, quite simply, are not the sort of common, repetitive and highly predictable expenses that comprise Operating expenses in the Orchard House lease.

178. A similar view was expressed more recently by Mr. Justice Weatherill in *Spence v. Caravans West Association* (2015). In that case the owners' association sought to recover from individual owners the cost of a $3.5 million electrical facility upgrade on the basis that the costs were "common expenses", defined as "All expenses incurred in the ongoing operation of the resort". The individual owner petitioners asserted that the costs were capital costs not covered by the contract. Mr. Justice Weatherill's assessment of a capital cost was even more straightforward that Mr. Justice Ercke's in *Kotsovos*, being simply "expenses incurred in the day-to-day operating of the resort. Mr. Justice Ercke did not rely on expert opinion.

179. It is instructive to quote Mr. Justice Weatherill at length:

> "[14] The Co-Owners Agreement is silent regarding how capital expenditures will be dealt with. In my view, the installation of the electrical upgrade at a cost exceeding $3.5 million was unquestionably a capital expenditure. It was not in the nature of repair or maintenance of the existing system, which could have continued to have been utilized with relative and modest changes, provided the owners restricted their power consumption
>
> [16] The respondent takes the position that the installation of the upgrades was an expense that is and was plainly intended to be captured by the definition of "Common Expenses", which again means all expenses incurred in the ongoing operation of the resort, as well as by the language of Clause 11.4 of the Co-Owners Agreement and that, accordingly, only a simple majority of the owners approving the expenditure was required. The respondent takes the position that such a simple majority was obtained.
>
> [17] If the respondent is correct in its interpretation, the respondent would be able, on the strength of a simple majority of the owners, to assess all owners for the cost of a new pool or a new indoor tennis facility or indeed the installation of supercharging stations at each site for a Tesla automobile on the basis that they are simply expenses that are being incurred. If such was to be the arrangement, in my view, the agreement would have said so.
>
> [18] <u>The right of the respondent to assess owners under the Co-Owners Agreement, in my view, was limited to expenses incurred in the day-to-day operation of the resort. The installation of the new electrical service was not part of the day-to-day operation of the resort. It was not in the nature of a repair or restoration of the existing system. Rather, the purpose was to install a substantial upgrade and improvement to the existing system. It changed the character of the development's services in a significant way in order to</u>

> provide an enduring benefit to the owners. The only reason for doing so was to enhance the service to sites that wished to draw more power than had been originally allocated to that site.
>
> [19] In my view, the phrase "ongoing operation of the resort" as used in the definition of Common Expenses does not capture capital improvements to the resort in the nature of this $3.5 million electrical services expansion. Moreover, the phrase "expenses from time to time" as used in Clause 11.4 does not include capital expenditures. In each case, the Co-Owners Agreement was plainly intended to capture expenses incurred to operate the resort as originally developed and built, not as may be changed, reconfigured, enhanced or improved in material ways in the future. The electrical system as originally installed was capable of functioning and providing the services as intended.
>
> [20] If the co-owners collectively wish to enhance or improve the electrical service, as has occurred, an amendment to the Co-Owners Agreement pursuant to Clause 5.2 is required in order to authorize the capital expenditure.
>
> *Spence v. Caravans West Owners Association* 2015 BCSC 1289, par 14, 16-19; Plaintiff's Authorities, **Tab 88**

180. Here again, the $5.5 million Phase 2 Project in which all remaining windows and doors not replaced in the Phase 1 project (and fans) were replaced, are clearly not day-to-day expenses incurred in the operation, maintenance and repair of Orchard House.

181. The *Spence v. Caravans* decision also supports the proposition that where the B.C. Building Code required upgraded standards to the Orchard House windows/doors/fans, such regulatory requirements do not transform a capital cost into an Operating expense. In *Spence*, the project involved an upgrade that was one of two mandatory options imposed by the B.C. Safety Authority. While the second option was for owners to reduce power consumption, the key point is that the court found the project to be a capital cost upgrade that "was not in the nature of repair or maintenance of the existing system" and the regulatory requirement did not alter that finding.

> *Spence v. Caravans West Owners Association* 2015 BCSC 1289, para 7, 15

182. In addition to the noted limitations on "all costs" under the Orchard House lease and in addition to the *Helfand* case referred to above, there are several decisions in which an expansive term like "all costs" has been limited to categories determined by the preceding list of specific expenses.

183. For instance, in *Glasgow Tramway and Omnibus Company, Limited v. Glasgow Corporation* (1897), the Scottish court examined the following phrase in the context of a claim by the landlord for the tenant to pay the landlord's personal taxes:

> "the company shall pay to the Corporation the expenses of borrowing, management, &c., and this provision shall be so construed as to keep the Corporation free from all expenses whatever in connection with the said tramways." [underlining added]

The court limited the expansive phrase, saying:

> "The taxes – local or imperial – paid by the owner of the property in respect of his ownership are not, I think identical or *ejusdem generis* with expenses of borrowing or expenses of management. They are not properly expenses in connection with the owner's property, although the income from the property may form their measure. They are rather personal burdens imposed upon the owner as a citizen, the amount of which is estimated in a particular way. If a tenant taking a house binds himself in general terms to keep his landlord free of 'all expenses connected with it', he would not, I think, be held to undertake to pay the property or income-tax which the landlord has to pay in respect of his rent. Still less would he be held to do so if the general obligation was subjoined to an obligation with reference to specific expenses of quite a different character." [*underlining added*]

> *Glasgow Tramway and Omnibus Company, Limited v. Glasgow Corporation* (1897) Scottish LR. (34) 460, p. 463, second column; Plaintiff's Authorities **Vol I Tab 38**

184**.** As stated, the character of the expenses listed in the Orchard House lease are fixed and variable expenses; or common, repetitive and predictable expenses. Replacement reserves or capital costs are not listed or included within the genus of expenses listed, consistent with the decision of Mr. Justice Ercke in *Kotsovos*.

185. In *Galt v. Frank Waterhouse* (1944), the B.C. Court of Appeal examined the effect of the phrase:

> "All operating expenses shall in the first instance be borne and paid by the Waterhouse Company, and shall be charged against the joint venture and operation of the said Steamer. `Operating Expenses' shall include wages, costs of supplies, port and pilotage charges, repairs, insurance, the cost of annual overhaul, and all other costs, including claims contracted under this agreement, and expenses incidental to the use and operation of the said Steamer. [underlining added]

> *Galt v. Frank Waterhouse* [1944] 2 DLR 158 (BCCA), p. 160; Plaintiff's Authorities **Vol I Tab 37**

186. The Court of Appeal examined the meaning of "cost of annual overhaul". Part of the analysis involved whether the broad reference to 'all other costs' permitted charging certain structural replacements to the ship due to dry rot as operating expenses. In finding the lease did not allow such a broad construction, O'Halloran, JA referred the meaning on its face of "operating expense", saying:

> In my view, whatever meanings may be ascribed in the abstract to "cost of annual overhaul", the key to its meaning in this case, is its designation in the agreement as an operating expense. That master provision and overriding consideration definitely rules out any substantial expense of a capital nature which might perhaps be included in other circumstances. We need not in this case mark the line between what is, and what is not a substantial expense of a capital nature. It suffices that here, the expense involved is unquestionably of a substantial capital nature, since it equalled the most optimistic estimate of the ship's value.

Galt v. Frank Waterhouse [1944] 2 DLR 158 (BCCA), p. 165-166; Plaintiff's Authorities **Vol I Tab 37**

187. While there is no dispute that parties are free to define terms in a contract in ways that are different from industry practice, when the terms do not expressly refer to capital costs, there is a presumption that "Operating expenses" do not contain capital costs. This is effectively what the O'Halloran JA concluded when he said,

> "…the key to its meaning in this case, is its designation in the agreement as an operating expense. That master provision and overriding consideration definitely rules out any substantial expense of a capital nature which might perhaps be included in other circumstances.

Galt v. Frank Waterhouse [1944] 2 DLR 158 (BCCA), p. 165-166; Plaintiff's Authorities **Vol I Tab 37**

iii. Terms must be expressly stated

188. The object of a written agreement is to create certainty for the parties.

> e.g. *Lydiatt v. Banff Rocky Mountain Resort* 2008 ABPC 333, para 42; Plaintiff's Authorities **Vol II Tab 60**

189. From this the principle extends that contracts must clearly expressly state the intentions of the parties. This principle was applied relatively recently (2003) by the BC Supreme Court in *G.M. Pace Enterprises v. Daniel Tsai.* In that case, where a roof and septic tank were not in immediate need of replacement but soon would be, the court held that if the lease obligated the tenant to replace these items, the lease would clearly have said so. Mr. Justice Taylor said:

> [77] Thus, on the assumption that the petitioner and respondents entered into this written agreement in a considered manner, as described in ***Reardon Smith v. Yngvar Transen-Tanger,*** *supra*, if the respondent expected the premises to be returned to him in better condition than they were in 1997, I would have expected the lease to have contained some provision to that effect.
>
> [78] This lease had no such term.
>
> [79] In the absence of such a provision, the petitioner is simply obliged to maintain, through repairs, the building as it existed in 1997. This obligation does not include a duty to replace either the roof or the septic field.
>
> *G.M. Pace Enterprises Inc. v. Daniel Tsai et al,* 2003 BCSC 1336, p. 21-22; Plaintiff's Authorities **Vol II Tab 39**

190. Obligations imposed on parties must therefore be clearly expressed in a contract. This view was expressed by the Ontario High Court of Justice in *Vicro Investments Ltd. et al. v. Adams Brands Ltd,* a case I have referred to earlier in these submissions. The court said:

> One would expect that an obligation to put and keep premises in better condition than they were at the beginning of the term to be expressed in plain words.
>
> *Vicro Investments Ltd. et al. v. Adams Brands Ltd*. [1963] 2 O.R. 583, p. 600; Plaintiff's Authorities **Vol II Tab 99**

191. This view was similarly expressed by the court in *Alderman Holdings v. McCutcheon Business Forms* (1997). In that case, the landlord sought to recover from the tenant the cost of a roof replacement as additional rent on the basis that it was a recoverable repair expense. The tenant resisted on the basis that the cost was a capital cost for which there was no express obligation under the lease for the tenant to pay. Finding for the defendant tenant, the court said:

> **19** I accept the defendants' argument that the lease should be construed in accordance with the principle of contra proferentum as against the landlord. Had the landlord intended the additional rent clause to apply to replacement or capital improvement rather than maintenance and repair, he ought to have worded the additional rent clause accordingly. The bulk of the repair is over the area occupied by the tenant. Had the landlord intended this tenant to be responsible for something approaching pro rata "replacement", he could have included this as a term in the lease. The lease was prepared by his counsel. The tenant stood to benefit from the extensive roof work. It would not have been unreasonable for the landlord to have negotiated or attempted to negotiate either a reduction in the sale price for the roof work or to have included a clause extending the additional rent to the particular tenant to include something more than mere "repairs". [underlining added]

Alderman Holdings v. McCutcheon Business Forms [1997] O.J. No. 4386, **para 19**; Plaintiff's Authorities **Vol I Tab 14**

192. The reasoning applies to the Orchard House lease. There is no express requirement for the leaseholder to pay for a large-scale capital cost replacement of the windows, doors and fans. Had Mr. Mulek, the original common party to the lease in 1974, intended for such a requirement, he ought to have expressly included it in the lease.

193. Indeed, this is precisely the view of the court in *Archibald v. 1219 Harwood Street (Chelsea) Ltd.* As earlier noted, this case involves a 99-year residential lease in Vancouver, identical to the Orchard House lease.

> From a plain reading of the Lease, the Lessor is obliged to keep in good repair and condition electrical systems and to keep elevators properly lighted and in good working order. Where Article 7.01 defines "operating expenses" as amounts paid or payable by the Lessor in performance of its covenants, the obligations arise under Article 5. Those operating costs referred to in Article 5 include amounts paid or payable in connection with the "maintenance, operation and repair of the building". The Lease does not authorize the Lessor to charge the Lessees for expenses relating to alterations or improvements. Those expenses are not "maintenance, operation or repair of the building". As Allan, J. said in Sector et al v.

> Priatel and Priatel supra "had the contracted parties intended to include" alterations or improvements in the Lease, it would have been a simple matter to incorporate the appropriate contractual provision. [underlining added]
>
> *Archibald v. 1219 Harwood Street (Chelsea) Ltd,* 2009 BCPC 0364, par 30 Plaintiff's Docs **Vol I Tab 32** (the Chelsea lease)

iv. Capital costs

194. I have already touched on authorities that refers to capital costs. Here I examine in more detail what is meant by capital costs, and why they are excluded from Operating Expense.

195. First, it is noteworthy that Westsea's engineering consultant, Read Jones Christoffersen, itself identified the Phase 2 Project as a capital project. In its January 20, 2016 Proposal for Consulting Services Building Enclosure Condition Assessment Orchard House, said:

> "We understand that the Client wishes to determine the current general condition of the building enclosure of the building to assist in their efforts to plan for related long-term capital expenditures."
>
> …and
>
> "A Building Enclosure Condition Assessment, which includes options for maintenance, renewal or repair strategies (with corresponding budges and phasing options) will provide the Client with a clear understanding of the current condition of the building enclosure and possible requirement to plan long-term capital expenditures." [underlining added]
>
> Plaintiff's Documents **Vol III, Doc #2**

196. The reference to capital expenditures also appears three years earlier in RJC's Priority Assessment Report, September 6, 2013:

> "RJC understands that Westsea is currently developing a maintenance schedule and budget for capital expenditures for the building and would like assistance in determining an appropriate course of action based on current conditions of the building's components." [underlining added]
>
> Plaintiff's Documents **Vol I, Doc #10**

197. There is a reasonable inference that discussions occurred between RJC and Westsea principals in which Westsea itself used the term "capital expenditures". Indeed, it is likely there were written communications from Westsea to RJC that set out the terms of reference for RJC's report, in which references were made to capital expenditures. If there were such documents, these were not disclosed. Regardless, it is apparent that both RJC and Westsea itself believed the Phase 2 Project met the criteria of a capital expenditure.

198. In terms of distinguishing capital costs from current or operating expenses, I have referred to cases above in which criteria were identified that define capital costs. The court in *RioCan* applied a common-sense approach, saying an overly technical approach is unhelpful (para 96).

> *RioCan Holdings v. Metro Ontario Real Estate Limited* 2012 ONSC 1819, para 90, 93-95; aff'd on appeal 2012 ONCA 839; Plaintiff's Authorities **Vol II Tab 80**

199. Most strikingly, the court said:

> [93] As stated by counsel to Metro at paragraph 51 of its factum, "for RioCan to succeed in its Application, the court must conclude that pursuant to the Lease, it was permitted to charge its tenants the entire $431,000 in 2002. The Cost alone suggests that the Work is not repair nor maintenance".
>
> [94] I agree with this statement and conclusion.
>
> [95] It seems to me that an inescapable conclusion, on the facts of this case, is that the Work performed on the parking lot went beyond a simple repair or patch job.
>
> *RioCan Holdings v. Metro Ontario Real Estate Limited* 2012 ONSC 1819, para 93-94; aff'd on appeal 2012 ONCA 839; Plaintiff's Authorities **Vol II Tab 80**

200. The cost for the Phase 2 Project was $5.5 million, which Westsea charged leaseholders over the course of 12 months. In RioCan, the court agreed that $431,000 (in 2012) was sufficient to demonstrate the work was not repair or maintenance! Surely, on this alone, the conclusion is also inescapable here that the Phase 2 Project is a capital project.

Plaintiff's Documents **Vol I, Tab 11, 13**
Defendant's Response to Plaintiff's Notice to Admit, April 4, 2019, item #2

201. This is much like the court's comment in *Parsons Precast*, where total replacement of a parking lot was among a class of items "…so substantial in their expense that they cannot reasonably be considered as an item of repair or maintenance." In this vein, it is not even necessary to call the cost a capital cost – it is simply an extraordinary expense that doesn't match the character of all the other enumerated costs in Article 7.01.

Parsons Precast v. Sbrissa, 2012 ONSC 6098, p. 6, para 17-23; Plaintiff's Documents **Vol II, Tab 75**

203. Similar to the criteria identified earlier in which operating expenses are day-to-day, repetitive and predictable expenses, in a decision involving a tax evaluation of whether the purchase of adjacent mining land was a current or capital cost, the Supreme Court of Canada found that the cost was a current cost largely because it involved a repetitive cost made in the course of day-to-day business operations that was necessary to avoid immediate shut-down of operations.

Johns-Manville Canada v. The Queen [1985] 2 S.C.R. 46, p 68-69 (item 10); Plaintiff's Authorities **Vol II Tab 47**

204. Further, in *Johns-Manville* the Supreme Court observed that the expenditure relative to the cost of operating the mine was small, at 3%. This is unlike the evidence in this case that shows the $5.5 million windows/doors/fans costs was some 200% (triple) the Orchard House operating costs for 2016. This is in addition to the relative value of the windows/doors/fans to the assessed value of the Orchard House building (20%).

Johns-Manville Canada v. The Queen [1985] 2 S.C.R. 46, p 68-69; Plaintiff's Authorities **Vol II Tab 47**

205. The project-cost/operating-expense ratios are shown the following histogram of Operating expenses from 1974 to 2017:

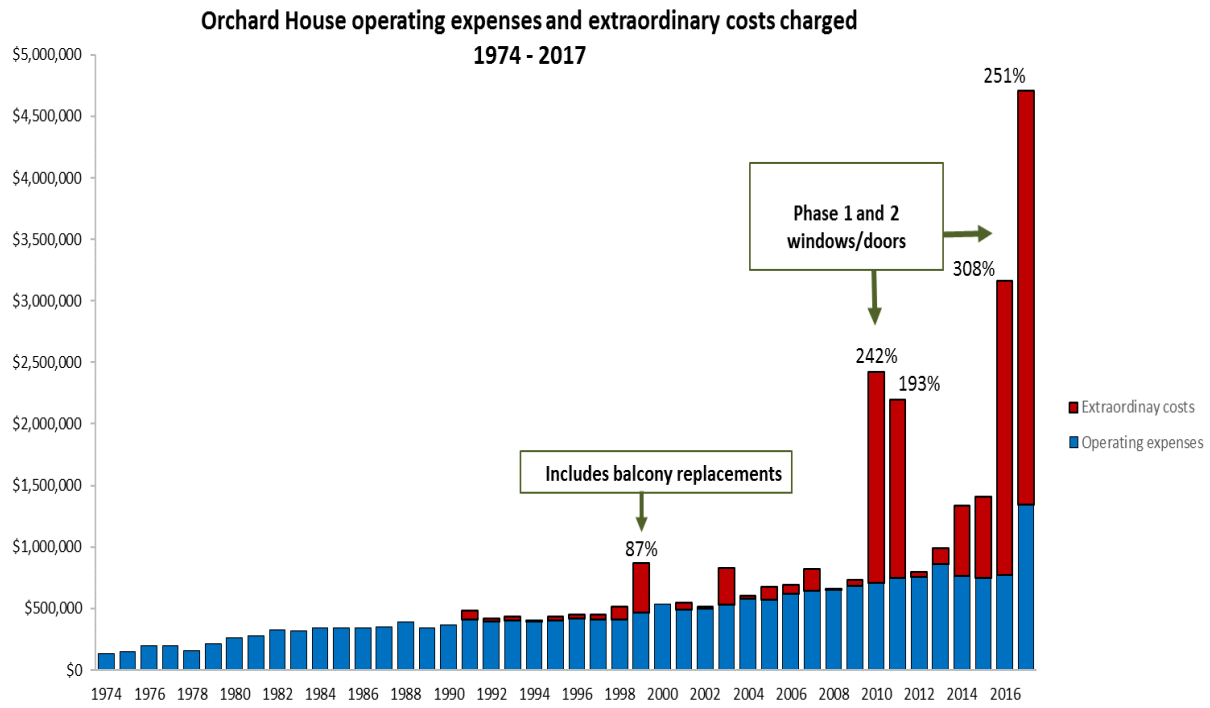


Figure 5. Operating and extraordinary expenses charged to leaseholders and reported in Orchard House auditors' reports, from lease inception to 2017. Phase 1 costs, 2010-2011, are spread over two years, as are Phase 2 costs (but paid for by leaseholders in 12 months) and are multiples of the operating costs for those years. There are no other years in which extraordinary costs are more than 100% (double) operating expenses. 2014 (74%) and 2015 (88%) involved roof and plaza membrane repairs. Further, there are no other years in which extraordinary costs represent items that are expressly stated in the lease to be parts of suite interiors. Balconies (see noted replacements in 1999) are ambiguous in terms of who is responsible for repair/maintenance, but windows/doors are clearly leaseholders' responsibility subject to the wear and tear exception. Fans are ambiguous since they are not expressly stated to be the leaseholders' responsibility, but the *Short Form of Leases Act* captures suite interiors "in all respects", and fans are part of the ceilings. The audit reports themselves indicate the auditors do not view the windows/doors projects as Operating expenses, which are identified under separate categories "special assessment" and "special project". There is no authority under the Lease to charge "special assessment" or "special projects" to leaseholders. From Plaintiff"s Docs **Vol II Tabs 1-44.**

206. In addition to the massive ratio of the Phase 2 Project costs to ordinary operating costs, there are other inferences we can draw from this plot. First, it is apparent that the 2010-2011 and 2016-2017 Phases 1 and 2 windows replacement projects, when considered together as part of a single two-part project, have no precedent in terms of Operating expenses that originate from what are either expressly stated or what are interior components part of the suites. The windows and doors are clearly part of suite interiors according to article 4.03 and the floor plan. Fans are not expressly stated to be part of the suite interiors, but would seem to be part of the ceilings, which are expressly part of suite interiors.

207. The absence of such a precedent means Westsea has not relied on prior years experience in estimating and charging Phase 2 Project costs to leaseholders, in breach of Article 7.02. Even if you retain the Phase 1 and 2 windows replacement projects as separate projects, Phase 1 does not reasonably represent "prior years experience" when viewed more broadly in the context of the entire history of Operating expenses at Orchard House.

Westsea's Response, Para 15

208. In *Archibald v. 1219 Harwood* the court considered three years as reasonable "prior years experience", but in the face of such massively skewed Operating expenses for two projects (that are inherently connected), "prior years experience" must span a far greater period. The graph shows from 1974 to 2017, a gradual trend in increasing Operating expenses; this gradual trend is "prior years experience." Massive spikes, like those of 2010-11 and 2016-17 should be considered as outliers in the longer-term trend of "prior years experience".

Archibald v. 1219 Harwood (Chelsea) Ltd. 2009 BCPC 364, para 32; Plaintiff's Authorities **Vol I Tab 16**

209. Further, the fact that Westsea spread its Phase 1 and 2 costs over two years each while actually charging the costs to leaseholders over a 12-month period (and in the case of 2010-11, charged to leaseholders over 10 months, although this is not in the evidence), creates the illusion of more "years" than the number of years over which the costs were actually charged.

Plaintiff's Docs **Vol I Tabs 11, 13**; Facts Admitted **Item 34**

210. Further, if we look at the ratio for the Phase 2 cost to the cost for other standard repair and maintenance costs (an annual entry in the Schedule of Operating costs), the ratio is $5,551,460 / $71,372 = 77.8 times, or about 7800% for 2016!

Plaintiff's Docs **Vol II Tab 44**

211. As noted in previous paragraphs, the court in *RioCan Holdings* that the sheer quantum of costs may determine whether the cost s a capital expense or not.

RioCan Holdings v. Metro Real Estate, 2012 ONSC 1819; aff'd on appeal *RioCan Holdings Inc. v. Metro Ontario Real Estate Limited* 2012 ONCA 839

vii. The effect of new windows and doors that comply with B.C. Code requirements

212. It is not disputed that the new windows, doors and fans conform with B.C. Building Code standards. This does not alter the reality that the windows, doors and fans are nonetheless a capital cost under the various definitions shown above.

213. I have already mentioned the effect of *Spence v. Caravans*, but it bears repeating. *Spence v. Caravans* involved an electrical upgrade that was one of two mandatory options imposed by the B.C. Safety Authority. While the second option was for owners to reduce power consumption which would have meant no replacement electrical system was required, the key point is that the option selected was a capital cost upgrade that "was not in the nature of repair or maintenance of the existing system" and the regulatory requirement did not alter that finding. In other words, the regulatory requirement was a neutral consideration that didn't transform a capital cost into an operating expense.

Spence v. Caravans West Owners Association 2015 BCSC 1289, para 7, 15; Plaintiff's Authorities **Vol III Tab 88**

214. Indeed, this is the sentiment expressed by Mr. Justice Jorre in *Aon v. The Queen* (2017).

> "10. Where the law, for example building codes or safety requirements, imposes certain obligations in terms of repairs or replacements that will not change the character from what it would otherwise be. Specifically, work that would otherwise be capital does not become current simply because of the legal requirement.[28] "
>
> *Aon v. The Queen* 2017 TCC 166, para 82(10)
> Plaintiff's Authorities, **Vol I Tab 11**

215. I submit the effect of Mr. Justice Jorre's view is really that you can ignore the legal requirement and simply apply the physical facts: are the new windows an improvement over the old ones or not? Clearly the answer is yes.

viii. The connection between capital costs and wear and tear

216. In the case of the old Orchard House windows and doors, there is considerable evidence that the windows were well-beyond their expected useful life of 30-35 years. This fact is not in dispute. The very concept of a capital replacement inherently accounts for wear and tear, since this is exactly why the windows were replaced. This reveals one underlying rationale for excluding capital costs from Operating costs: the Lease itself tells us that costs for wear and, therefore, associated capital costs, are not the leaseholders obligation.

x. Even the auditors do not seem to believe the Phase 2 Project is an Operating expense

217. Further, it is apparent that Westsea's auditors themselves do not believe either the Phase 1 or Phase 2 costs in question are Operating expenses under standard accounting principles. For both the December 31, 2011 and December 31, 2017 Schedules of Operating Costs, Westsea's auditor, BDO specifically identifies:

- In the Schedule of Operating Costs for the year ended December 31, 2011, separate categories for "Building renovation – special project" (2011) as an "Extraordinary expense" and on another line a "Special Assessment";

- In the Schedule of Operating Costs for the year ended December 31, 2017, a line item for "Special Assessment (Note 2)", which is

distinct from "Operating expenses recoverable" at the top of page 4 and "Normal operating" at the bottom;

- Note 2 addresses matters under "Special Assessment".

Plaintiff's Docs **Vol II Tab 38 and Tab 44**

218. On its face, the auditors view the "Special Assessments" as comprising a category of costs that is different from normal Operating expenses.

[Reply] 219. Westsea relies on the Court of Appeal decision in *JEKE v. Northmont* (2017).

JEKE involved a time share contract, about which the court observed:

> "…clause 9, the opening words of which are very broad indeed. I reproduce that portion of the clause below for ease of reference:
>
> > OPERATING COSTS AND RESERVE FOR REFURBISHING: In addition to…maintenance and repair costs (the "Operating costs") and replacement costs…without restricting the generality of the foregoing… [underlining added]
>
> *JEKE Enterprises Ltd. v. Northmont Resort Properties Ltd.* 2017 BCCA 38; Plaintiff's Authorities **Tab 45**

[Reply] 220. Unlike the Orchard House lease, the *JEKE* contract contained an express reference to reserves for refurbishing. It is under this category that capital costs were appropriately chargeable. The court also mentioned other sub-clauses among clause 9 that pointed to the lessee's obligation to pay the costs imposed by Northmont, including express terms that allowed Northmont to charge certain management costs. Such clauses do not exist in the Orchard House lease.

[Reply] 221. For more clarity on this point, we need to look at the lower court decision in *JEKE*, where Madam Justice Fitzpatrick observed that capital costs were captured by "reserve for refurbishing". Madam Justice Fitzpatrick stated:

> "…I agree with Northmont that the plain wording of paragraph 9 of the JEKE VIAs is to the effect that the owners are to pay for *all* costs arising from the operation of

the Resort, including refurbishing costs. Nothing detracts from this plain working when paragraph 9 is considered in the context of the entire agreement. In particular:

…

2) lessees are expressly stated to be responsible for "replacement costs"

JEKE Enterprises Ltd. v. Northmont Resort Properties Ltd. 2016 BCSC 401, para 257; Plaintiff's Authorities **Vol II Tab 45.1**

[Reply] 222. Again, the JEKE lease is an example of one in which references to replacement costs were *expressly* stated, as the authorities require. Also, the lease in *JEKE*, while it does contain reference to wear and tear exception (clause 12) in relation to negligent or malicious damage, the lease contains no wear and tear exception in relation to lessee's maintenance and repair obligation, a fact that the court specifically noted:

> "There is no basis upon which the JEKE VIAs can be said to limit the responsibility to pay costs only for "regular maintenance" or "reasonable wear and tear".
>
> *JEKE Enterprises Ltd. v. Northmont Resort Properties Ltd.* 2016 BCSC 401, para 258; Schedule A, s.12; Plaintiff's Authorities **Vol II Tab 45.1**

[Reply] 223. Also, in JEKE, the lessees made no arguments that the lease was standard-form. The Court of Appeal observed that JEKE (the party) specifically stated this was not a case of a standard-form contract. This is unlike the case here, wherein I have specifically pleaded the Orchard House lease is a standard-form contract, which may lead to an interpretation of the Lease *contra proferentem.*

JEKE Enterprises Ltd. v. Northmont Resort Properties Ltd. 2017 BCCA 38, para 44; Plaintiff's Authorities **Tab 45**

D. Lease issues that point to a *contra proferentem* interpretation of ambiguities

224. The following arguments originate from paragraphs 4, 10-11, and 125 -131, of the NoCC.

i. Westsea and Capital are not at arms length

225. I have pleaded that the lease was not created at arms length (NoCC, par 125), to which Westsea has asserted that the lease and assignments "are commercial arms' length contracts" (Response, par 11).

226. Westsea may rely on the decision in *Sector v. Priatel* (2004) for the notion that the Orchard House lease is an arms-length, negotiated contract. *Sector v. Priatel* involved an identical 99-year residential lease in Vancouver. In that case Madam Justice Allan found:

> "[52] The Lease is a commercial document entered into by parties dealing with one another at arm's length. Nothing in the Lease requires the Lessor to act in good faith or in the best interests of the leaseholders."
>
> *Sector v. Priatel* 2004 BCSC 45, para 52; Plaintiff's Authorities **Vol III Tab 84.1**; Plaintiff's Docs Vol I Tab 31 "The Heritage"

227. I submit that it is open for this court to conclude that the original lessor and lessees in the Orchard House lease were <u>not</u> at arms' length; that the lease was not negotiated between the original parties to the lease, and that no negotiations occurred between Westsea and subsequent assignees. There is evidence of this in the case before you.

228. In turn, as argued above, absent such arms-length dealings, I submit that ambiguities should be resolved against the party drafting the lease, and any imposition of extraordinary expenses upon the leaseholders should be very clearly expressed in the lease.

228. The law of non-arm's length transactions in Canada was reviewed by the tax appeal court in *Capello v. MNR* (2000). The court said:

> "In effect what these cases say is that if a person moves money from one of his pockets to the other, even if he does so consistently with a regular commercial transaction, he is still dealing with himself, and the nature of the transaction remains "non-arm's length".
>
> *Cappello v. M.N.R.*, 2000 CanLII 358 (TCC), **para 33, 35, 42**
> Plaintiff's Authorities **Vol I Tab 26**

229. The court in *Capello* identified l factors in determining whether a transaction is non-arm's length (para 35):

> "a) the existence of a common mind which directs the bargaining for both parties to the transaction,
> (b) parties to a transaction acting in concert without separate interests, and
> (c) "de facto" control."

230. In the Orchard House lease, signed by George Mulek as both landlord and tenant, was clearly a common directing mind between Westsea and Capital. Both Westsea and Capital acted in concert without separate interests, and George Mulek had *de facto* control of both entities.

231. The court in *Capello* summarized the test for what constitutes a non-arm's length contract as follows (para 42):

> "[42] At the end of the day it would seem to me that what is intended by the words "dealing at arm's length" can best be described by way of an example. If one were to imagine two traders, strangers, in the market-place negotiating with each other, the one for the best price he could get for his goods or services and the other for the most or best quality goods or service he could obtain, these persons, one would say, would be dealing with each other at arm's length. If, however, these same two persons, strangers, acted with an underlying interest to help one another, or in any manner in which he or she would not deal with a stranger, or if their interests were to put a transaction together which had form but not substance in order to jointly achieve a result, or obtain something from a third party, which could not otherwise be had in the open market-place, then one would say that they were not dealing with each other at arm's length."

232. The conclusion emerges that these companies engaged in a *prima facie* non-arms length transaction. This suggests again that ambiguities in the Lease ought to be resolved in favor of the leaseholders.

ii. Landlord may not be his own tenant

233. That a party may not be both a landlord and tenant at the same time is made clear by the House of Lords in *Rye v. Rye,* in which the House of Lords observed that the covenants of

a lease are contractual and since a person cannot contract with himself, the lease itself cannot stand. Here I cite the principle only to bolster the proposition that ambiguities should be resolved in favor of the leaseholders.

Rye v. Rye [1962] A.C. 497 (HL), per Lord Denning p. 513-515; Plaintiff's Authorities **Vol II Tab 82**

iv. The lease is a standard-form contract

234. Further on the matter of *contra proferentem*, I submit the evidence is overwhelming that the Orchard House lease was a non-negotiated, non-arms-length, standard-form contract that attracts the application of *contra proferentem*.

235. The Lease was made pursuant to the *Short Form of Leases Act*, a clear indication that the Lease is standard-form. The Supreme Court of Canada recognized the standard-form nature of leases drafted pursuant to the *Short Form of Leases Act*:

> "In the various common law Provinces, standard contractual terms (reflected, for example, in Short Forms of Leases Acts) and, to a degree, legislation, have superseded the common law of landlord and tenant; for example…" [emphasis added]

Highway Properties Ltd. v. Kelly, Douglas & Co. [1971] SCR 562, at p. 569

236. In *MacDonald v. Chicago Title Insurance*, the Ontario Court of Appeal described standard-form contracts:

> [34] The Title Policy was a pre-printed contract produced by Chicago Title and provided to the appellants on a take-it-or-leave-it basis. Chicago Title did not sit across from the appellants and hammer out the details of their bargain. The terms of the Title Policy were simply not negotiated in any meaningful sense and it would be illusory to suggest that anything could be inferred about the meaning of the contract from the facts surrounding its formation.

MacDonald v. Chicago Title Insurance 2015 ONCA 842; para 33; Plaintiff's Authorities **Vol 2 Tab 61**

237. In the case before you, the Lease is clearly a standard-form contract that was drafted by Westsea and/or Capital Construction Supplies Ltd., and for whom there is no effective difference.

238. The Supreme Court of Canada in *Ledcor v. Northbridge* commented on the interpretation exercise required when standard-form contracts are involved; Per Cromwell J.:

> "Indeed, while a proper understanding of the factual matrix of a case is crucial to the interpretation of many contracts, it is less relevant for standard form contracts because the parties do not negotiate the terms. The contract is put to the receiving party as a take-it-or-leave-it proposition.
>
> In this case, while the base coverage under the relevant clause of the policy …"
> [*headnote*]
>
> …
> "Where, however, the policy's language is ambiguous, general rules of contract construction must be employed to resolve that ambiguity. These rules include that the interpretation should be consistent with the reasonable expectations of the parties, as long as that interpretation is supported by the language of the policy; it should not give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which the insurance policy was contracted, and it should be consistent with the interpretations of similar insurance policies.
>
> Only if ambiguity still remains after the above principles are applied can the *contra proferentem* rule be employed to construe the policy against the insurer"
>
> *Ledcor Construction Ltd. v. Northbridge Indemnity* [2016] 2 SCR 23, para 106

239. The Supreme Court of Canada in *Consolidated-Bathurst v. Mutual Boiler* outlined the *contra proferentem* rule:

> "In interpreting an insurance contract, effect must first be given to the intention of the parties, to be gathered from the words they have used, just as in any other contract. Step two is the application, when ambiguity is found of the *contra proferentem* doctrine by which any doubt as to the meaning and scope of the excluding or limiting term is to be resolved against the party who has inserted it and who is not relying on it. Even apart from this doctrine the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract."
>
> *Consolidated-Bathurst v. Mutual Boiler* [1980] 1 SCR 888-889 [*headnote*]

E. Conclusion

240. Overall, the Lease and Westsea's imposition of the Phase 2 Project costs as Operating expenses reflect fundamental interpretation problems and ambiguities within the Lease. The words of J.C. Arnold (1930) are apt in such circumstances:

> "The law hates ambiguities in considered documents, just as nature abhors a vacuum, and will not allow itself to be strained into importing light where there is nothing but darkness. The words of Brook, L.J., as reported in Plowden Part. i. p. 162, should be constantly kept in the mind of every conveyancer: "There ought to be apt words to express the meaning or else the meaning shall be void. For the party ought to direct his meaning according to the law and not the law according to his meaning, for if a man should bend the law to the intent of the party rather than the intent of the party to the law, this would be the way to introduce barbarousness and grievance and to destroy all learning and diligence."
>
> Arnold, J.C. (1930) *Covenants Relating to Leases and Tenancy Agreements.* Butterworth & Co., London

241. I submit that if the Lease is to permit Westsea to charge such a large-scale cost of a capital nature or replacement reserve, it ought to expressly say so. The Lease does not say so, and Westsea's attempt to construe it so is, I respectfully submit, to strain the law to import light where there is nothing but darkness.

Damages

242. Noting that I pleaded (para 73):

> "An order that the Defendant, having substantially and materially breached the Lease, is required to pay for the entire cost of the Phase 2 Windows Project, and accordingly must return all, or to such extent as this court deems appropriate, monies paid by the Plaintiff in relation to the Phase 2 Windows Project or the equivalent monetary compensation, with appropriate interest".

243. At paragraph 80 of the NoCC, I have also pleaded:

> "Further orders or remedies as this court may deem appropriate, including apportionment of liabilities."

244. During the trial and in my opening, I said that I am not disputing that the Plaintiff is liable for the costs of repairs to the outer walls, since this falls clearly under Westsea's covenant to maintain and repair. If the court decides apportionment of damages may be appropriate, I propose the following method for determining damages:

Damages for Suite 805 based on unit entitlement and final costs incurred as stated in RJC Summary of Costs in Substantial Completion Letter May 24, 2017

	Cost*	Suite 805 size percentage 805**	
Demolition	$300,000.00	0.006693	$2,007.90
Aluminum windows & Doors	$2,729,000.00	0.006693	$18,265.20
Window preparation and flashings (laundry room windows)	$325,000.00	0.006693	$2,175.23
Rough carpentry (misc. items and trim)	$300,000.00	0.006693	$2,007.90
Steel angle	$40,000.00	0.006693	$267.72
Bathroom fans	$172,022.00	0.006693	$1,151.34
Total	**$2,941,022.00**	**0.006693**	**$25,875.29**

from **Tab 35 Exh. # 5*

***from **Tab 57 Exh. # 5**, p. 15; NOTE: percentage is .6693 of 1% which is the same as 0.006693*

E. Costs

245. Costs should be spoken to separately once the outcome of this matter is determined. Further, if Westsea is successful, the issue arises whether Westsea may charge its costs to leaseholders under the Lease. This matter that is before the courts in separate petition action 18-4015. If I am successful, there are other matters to address, including whether Westsea may seek to recover costs payable to me from the leaseholders as Operating expenses under the Lease, as Westsea appears to plead that it may do.

Trenchard v. Westsea Construction 16-3355, Oral Reasons of Mr. Justice Steeves, October 9, 2018; Plaintiff's Authorities **Tab 98**

All of which is respectfully submitted,

June 12, 2019

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Hugh Trenchard

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