IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Trenchard v. Westsea Construction Ltd.,* 2019 BCSC 1675

Date: 20191001
Docket: S163355
Registry: Victoria

Between:

Hugh Trenchard

Plaintiff

And

Westsea Construction Ltd.

Defendant

Before: The Honourable Madam Justice Douglas

Reasons for Judgment

Plaintiff appearing in person:	H. Trenchard
Counsel for the Defendant:	M. Stacey K. Thompson
Place and Date of Trial:	Victoria, B.C. June 3-7 and 10-14, 2019
Place and Date of Judgment:	Victoria, B.C. October 1, 2019

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INTRODUCTION

[1] The plaintiff, Hugh Trenchard, is the owner of a leasehold interest in suite 805 in a 22-storey residential building in Victoria known as Orchard House (the "Building"). The defendant, Westsea Construction Ltd. ("Westsea"), is the lessor and registered owner of the Building.

[2] Mr. Trenchard alleges a breach of contract by Westsea and seeks to recover his proportionate share of costs for the Building restoration project which started in July 2016 and was substantially completed by May 2017 (the "Project"). He says Westsea improperly charged him and other leaseholders millions of dollars for wear and tear and capital costs for the Project as Building operating expenses, contrary to the parties' 99-year lease agreement (the "Lease").

[3] Westsea argues the Lease is clear and unambiguous and says the Project falls within the scope of its covenants to keep the "foundations, outer walls, [and] roofs" of the Building in "good repair and condition" pursuant to Article 5.03 of the Lease and that such costs are chargeable to leaseholders as "operating expenses" pursuant to Article 7.01 of the Lease.

ISSUES

[4] The two central issues in this dispute are:

a) Was Westsea obliged under the Lease to undertake the Project?

b) Was Westsea entitled to charge the plaintiff his proportionate share of the Project as operating expenses?

[5] For the reasons which follow, I conclude the answer to both questions is yes.

LITIGATION HISTORY

[6] The parties have a lengthy litigation history.

[7] In 2014, the plaintiff filed a petition seeking documentary disclosure from Westsea, alleging an implied duty of transparency under the Lease. This application was dismissed by consent in 2016.

[8] The plaintiff has amended his notice of civil claim four times. Although originally filed pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, the plaintiff took no steps to certify these proceedings as a class action.

FACTUAL BACKGROUND

[9] In 2010, the plaintiff began to investigate the possibility of purchasing a leasehold interest in the Building. He engaged the services of a realtor but obtained no legal advice regarding the Lease, the terms of which he did not negotiate. In January 2011, he purchased the leasehold interest in suite 805 for $220,000 after obtaining mortgage financing. He signed a re-assignment of lease from the previous leasehold owner of suite 805. At the time he purchased his leasehold interest, the plaintiff agreed to abide by all the lessee covenants in the Lease.

[10] A two-phase building restoration project began at the Building in 2010. Phase 1 involved the replacement of corner windows and windows on the east and west sides of the Building and was undertaken before the plaintiff purchased his leasehold interest. The plaintiff makes no claim regarding Phase 1 of the Building restoration project. This dispute relates to Phase 2.

[11] The lessor covenants in the Lease oblige Westsea to complete the maintenance and repair of the Building. Westsea may charge leaseholders the amount it pays to satisfy these covenants as “operating expenses” provided it exercises “prudent and reasonable discretion” in incurring them. Westsea is required to prepare an estimate of operating expenses for the calendar year based on “prior years’ experience”.

[12] In 2013, Westsea engaged Read Jones Christoffersen Ltd. (“RJC”), a professional engineering firm, to review the condition of the building envelope (also referred to as “building enclosure”), roof, and membrane of the Building.

[13] By letter dated September 6, 2013, RJC wrote to Westsea regarding projects required at the Building, provided opinions of probable cost ("OPCs"), and recommended prioritisation as follows: Priority 1 was the plaza membrane renewal project, Priority 2 was the roof membrane renewal project, and Priority 3 was the window and door replacement project which relates to this litigation.

[14] On or about November 20, 2013, the leaseholders received notice of the estimated operating expenses for 2014. The plaintiff recalls this letter "standing out in [his] mind". It referenced the RJC priority assessment report and provided OPCs for the remediation work. The 2015-2018 window and door replacement budget was $3 million.

[15] On November 30, 2013, the plaintiff wrote to Westsea, disputing that it could replace windows and doors at the Building and properly charge the costs as operating expenses under the Lease.

[16] He received a partial reply by letter dated December 12, 2013. Westsea noted the replacement of doors and windows fell within the lessor's obligations to "keep in good repair and condition [. . .] the outer walls" of the Building and that replacement, as opposed to maintenance of the windows and doors, was related to the durability and integrity of the surrounding walls and exterior building envelope. It was noted the cost of any such remedial work (as first paid by the lessor) would be charged to lessees as "operating expenses" under Article 7 of the Lease and that each leaseholder was required to pay his or her proportionate share if the estimated annual operating expenses were insufficient to pay the actual operating expenses incurred by the lessor.

[17] RJC prepared a Building Enclosure Condition Assessment (the "BECA") dated March 24, 2016. The intent of the BECA was to assess the "present condition of the building enclosure assemblies with regard to moisture-induced deterioration." Based on RJC's review, the BECA recommended the replacement of windows, sliding doors, and bathroom exhaust fans at the Building. By letter dated March 31, 2016, Westsea sent the plaintiff a copy of the BECA.

[18] Following receipt of the BECA, Westsea decided to undertake the building envelope remediation recommended by RJC. Westsea engaged RJC to issue a tender on its behalf for the Project. Following the tender process, it rejected all bids and instructed RJC to enter negotiations with the lowest bidder, Farmer Construction Ltd., to negotiate a reduction of the Project costs. The concluded contract price was $5,551,460 inclusive of GST.

[19] Westsea wrote to all leaseholders, including the plaintiff, on July 5, 2016, notifying them of their respective share of the Project costs and requiring payment by September 1, 2016. Westsea offered leaseholders a 12-month payment plan.

[20] The cost, scope, and reasonableness of the work performed during the Project are not in issue.

[21] The plaintiff paid under protest the $37,155.92 demanded by Westsea for his proportionate share of the Project costs. The plaintiff takes no issue with the amount charged to him by Westsea to repair the outer walls of the Building. For that reason, he disputes only 75% of his proportionate share of the Project.

THE LEASE

[22] Three provisions in the Lease are relevant to this dispute.

[23] Article 4.03 outlines the lessee's covenants as follows:

> 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 foresaid.

[24] Article 5.03 outlines the lessor's covenants as follows:

> 5.03 To keep in good repair and condition the foundations, outer walls, roofs, spouts and gutters of the Building, all of the common areas therein and the plumbing, sewage and electrical systems therein.

[25] Article 7.01 defines operating expenses as follows:

> 7.01 "Operating expenses" in this Lease means the total amount paid or payable by the Lessor in the performance of its covenants herein contained (save and except those contained in Article 5.11) and includes but without restricting the generality of the foregoing, the amount paid or payable by the Lessor in connection with the maintenance, operation and repair of the Building, expense 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 any such 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 licences, janitorial service, building maintenance service, resident manager's salary (if applicable), any legal and accounting charges and all other expenses paid or payable by the Lessor in connection with the Building, the common property charges 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.

[26] The parties agree the Lease is not governed by any legislation.

POSITIONS OF THE PARTIES

[27] The plaintiff advances two main arguments:

a) The wear and tear exception in Article 4.03 renders Westsea liable to pay for the replacement costs of windows, doors, and fans at the Building, which costs are not operating expenses pursuant to Article 7.01; and

b) Reference to "all costs" in Article 7.01 excludes capital costs or replacement reserves like those he argues were contemplated by the Project.

[28] Westsea submits operating expenses, as defined in Article 7.01, expressly includes all amounts paid by the lessor in connection with the "maintenance, operation and repair of the Building" and "all other expenses paid or payable by the lessor in connection with the Building, the common property therein or the lands". Westsea says the Project costs fall within this definition.

GENERAL PRINCIPLES OF CONTRACT INTERPRETATION

[29] This case involves an interpretation of the Lease. It is therefore instructive to set out the general principles of contract interpretation.

[30] The overarching goal of contractual interpretation is to give effect to the parties' intentions at the time the contract was formed. Courts have repeatedly emphasized that the purpose of contractual interpretation is to give practical effect or, in commercial settings, to give commercial or business efficacy to the parties' agreement. The purpose of interpretation is not to rewrite the parties' contract or to relieve one of them from the consequences of an improvident contract: *Staburn Westbank Holdings Ltd. v. Home Depot of Canada Inc.*, 2015 BCSC 418 at para. 7, aff'd 2015 BCCA 510.

[31] In giving effect to the parties' intention, words in a contract must be given their "ordinary and grammatical meaning" and must be interpreted in light of the contract as a whole: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 at 23-24 [*BG Checo*]; *Sattva Capital Corp. v. Creston Moly Corp*, 2014 SCC 53 at para. 47 [*Sattva*].

[32] Courts will deviate from the plain meaning of words only if the literal construction of a contract leads to an absurdity which reasonable people cannot be supposed to have contemplated in the circumstances: *Toronto (City) v. W.H. Hotel Ltd.*, [1966] S.C.R. 434 at 440.

[33] While the court may consider the surrounding circumstances when interpreting the contract, "they must never be allowed to overwhelm the words of that agreement": *Sattva* at para. 57.

[34] In *JEKE Enterprises Ltd. v. Northmont Resort Properties Ltd.*, 2017 BCCA 38 [*JEKE*], the Court held the meaning of a defined term in a lease is not determined by commercial or accounting usage of the term and that parties are free to define words or phrases in a manner which differs from their ordinary usage. "When they have clearly done so, a court need go no further than this unambiguous language when interpreting the meaning of that word or phrase": *JEKE* at para. 54.

WAS WESTSEA OBLIGED UNDER THE LEASE TO UNDERTAKE THE PROJECT?

[35] In analysing this issue, I have considered the following questions:

a) Are windows, sliding doors, and exhaust fans properly considered part of "outer wall" repairs in the context of Article 5.03?

b) Was the Project necessary pursuant to the lessor's obligation to keep the foundation and outer walls in "good repair and condition"?

c) Was Westsea obliged to undertake the Project?

d) Did the Project result in betterment?

Are windows, sliding doors and exhaust fans part of "outer wall" repairs in the context of Article 5.03?

Evidence at Trial

Mr. Hugh Trenchard, Plaintiff

[36] The plaintiff concedes there was evidence at trial about damage to the Building outer walls due to failing windows. He admits some consequential damage to the outer walls may have been due to worn windows, which is why he does not dispute his share of the Project costs for outer wall repairs. He admits those costs are recoverable by Westsea as operating expenses pursuant to Article 7.01.

[37] He argues the Lease contemplates the windows and sliding doors at the Building being separate from outer walls and therefore "disconnected from Westsea's covenants to maintain and repair". The plaintiff spent a considerable amount of time at trial attempting to distinguish windows and sliding doors from "outer walls".

[38] The plaintiff referenced Article 1.01 of the Lease, which defines a "suite" by reference to a floor plan filed in the Victoria Land Registry Office. The legend on this floor plan states "balconies are located in suite areas" and "suite dimensions are to the centreline of inside walls and to the outside of exterior building walls". Based on this description, the plaintiff argues windows and sliding doors facing the balconies are "interior to" suites. He argues bathroom exhaust fans, which he said are "embedded in suite ceilings", are also "interior to the suites".

[39] The plaintiff concedes it is less clear whether non-balcony windows are interior to suites and relies on photographs and an RJC engineering drawing as evidence they are “inset” by 2 to 2.5 inches from the outer walls. On that basis, he concludes the inset windows are “in the suite interiors”, not part of the outer walls, and therefore excluded from the lessor’s covenant to repair in Article 5.03.

[40] The plaintiff asserts outer walls at the Building could have been repaired without replacing the windows. He provided no expert evidence to support this position.

Mr. Sameer Hasham, RJC Engineer

[41] Mr. Sameer Hasham was the RJC engineer involved in the Project. He was called by Westsea, testified in a direct, forthright, and non-partisan manner, and was an impressive witness.

[42] Mr. Hasham explained windows form part of the Building envelope, which provides interior and exterior environmental separation. He confirmed complete repair of the Building outer walls was not possible without also replacing the windows and sliding doors (collectively, the “glazing assemblies”). Although there were multiple sources of water ingress, including cracks in the brick and mortar joints which could be repaired, leakage was also occurring through the windows.

[43] Significantly, Mr. Hasham testified the Building windows and outer walls are structurally integrated. RJC noted in the BECA that the loads imposed by the new windows needed to be transferred onto the brick walls. RJC recommended this be done with the use of structural steel angle installation as this was a cheaper and more practical option than filling the bricks with mortar or concrete.

[44] Mr. Hasham confirmed new glazing assemblies would prevent recurring instances of leakage into suites and the concrete wall assembly, improve occupant comfort, thermal performance and efficiency, and prevent long-term deterioration of the Building.

Mr. Pierre E. Gallant, Architect

[45] Mr. Gallant, an architect with over 35 years' experience, was retained by Westsea to answer questions regarding design and construction matters related to the Project. He prepared an expert report dated February 11, 2019, which was introduced into evidence unchallenged. The plaintiff took no issue with Mr. Gallant's professional qualifications or the opinions set out in his report.

[46] Mr. Gallant offered the following opinions in his report:

a) Windows and balcony doors comprise one of five major constituent parts of the Building envelope system (in addition to wall assemblies, roofs, balconies, and the podium waterproofing assembly);

b) A building enclosure includes "building materials, components and assemblies exposed to exterior space or the ground, including those separating interior space from exterior space or separating interior space from the ground", as defined in the BC *Building Code*;

c) When a building has failing windows and doors, the risk of water-related damage to the walls is high;

d) If the original doors and windows at the Building had not been replaced, adjacent wall assemblies around the window sills would eventually have water penetration into the wall assemblies, causing corrosion of any metal fasteners and reinforcing bars within concrete and brick ties, ultimately leading to concrete and brick spalling and other Building component failures;

e) Control of interior moisture is important for the long-term viability of any occupied building;

f) Proper building envelope and interior moisture control is important to prevent condensation from occurring at the interior faces of the building materials and within wall assemblies;

g) The Building envelope system controls interior moisture primarily by kitchen and bathroom exhaust fans;

h) The function of windows and sliding doors is integral to the control of the indoor Building; the main function of the windows and sliding doors is to act as part of the Building envelope in separating indoor space from outdoor space;

i) The original windows and doors at the Building had poor air tightness; unintended air leakage from the original windows carried the risk of air leakage into Building assemblies and resulting condensation; and

j) The replacement windows and sliding doors are heavier and sturdier than the original windows and sliding doors; it was therefore reasonable to assume additional structural support would be required.

Analysis and Conclusion

[47] The plaintiff cites *Holiday Fellowship v. Viscount Hereford*, [1959] 1 All E.R. 433 (Eng. C.A.) [*Holiday Fellowship*], as support for his argument that windows are not walls. He concedes Lord Ormerod identified two features which could bring windows within the description of walls: (i) if they support the structure of the building, or (ii) if they enclose the building face. The plaintiff argues the Building exterior windows and sliding doors are not part of the outer walls because they do not comprise the entire face of the Building and do not support the Building structure. He says windows and doors are physically and functionally distinct from walls, noting the former, unlike the latter, are not structural building components and that windows and doors perform different functions than walls.

[48] Westsea relies on the evidence of Mr. Gallant and Mr. Hasham to conclude the Building windows, sliding doors, and fans collectively form an integral part of the Building envelope and it was not possible to complete outer wall repairs without addressing failing windows and doors and replacing fans (which are instrumental in ensuring adequate moisture control).

[49] Lords Evershed, Romer, and Ormerod in *Holiday Fellowship* agreed the question of whether windows form part of the outer walls of a building is a matter of degree, to be determined on the facts. The plaintiff's argument fails to address the evidence of Mr. Hasham that complete repair of the outer walls was not possible without also addressing the water ingress problem due to failing windows and sliding doors. It also overlooks the unchallenged expert opinion evidence of Mr. Gallant that the windows and sliding doors at the Building form part of the Building envelope system which separates interior and exterior space.

[50] The evidence of Mr. Gallant and Mr. Hasham is clear that glazing assemblies are integral parts of the Building envelope and exterior wall systems. The unchallenged evidence of Mr. Gallant establishes the exterior wall system controls interior moisture primarily by exhaust fans and that, if they are not functional, the Building exterior wall system would be adversely affected by an increased risk of high interior humidity which would, in turn, cause condensation on the glazing assemblies and water-related damage.

[51] On all the evidence, I find repair of the outer walls, remediation of the water ingress problem, and ensuring the integrity of the Building envelope and structure were inextricably linked to the replacement of old and failing windows, sliding doors, and fans. I conclude complete outer wall repair would not have been possible without replacing failing windows, sliding doors, and fans at the same time. For those reasons, I conclude the proper interpretation of "outer wall" repairs in the context of Article 5.03 must include the glazing assemblies and exhaust fans to give effect to the parties' agreement in the Lease.

[52] The plaintiff cites *BG Checo* and *Forbes v. Git*, [1921] 61 D.L.R. 353 [*Forbes*], for the proposition that, if there is an apparent conflict in a contract, specific terms supersede general terms and earlier terms supersede terms which follow. He argues these principles mean that Article 4.03 (the lessee covenant to repair and maintain windows and doors) precedes and supersedes Article 5.03 (the lessor covenant to keep in good repair and condition the foundations and outer walls), to the extent there is an inconsistency or overlap. In other words, he argues Article 4.03, which

specifically mentions windows and doors, informs an interpretation of Article 5.03 and means that maintenance of “outer walls” does not include windows or sliding doors.

[53] The plaintiff’s position requires this Court to find an inconsistency in the terms of the Lease. Only if an interpretation which gives reasonable consistency to the terms cannot be found will a court rule one term ineffective: *BG Checo* at para. 24. On a careful review of the Lease as a whole, I am not satisfied it contains any inconsistencies which must be resolved in this manner.

[54] In my view, it is possible to construe the Lease as a whole and give effect to Articles 4.03 and 5.03. Article 4.03 requires leaseholders to repair and maintain windows in all instances, except those relating to reasonable wear and tear. Article 5.03 requires the lessor to keep in good repair and condition the Building foundations and outer walls; this may include the repair or replacement of failing windows and doors which have deteriorated due to reasonable wear and tear and which may be undermining the structural integrity of the Building foundation and outer walls. Such an interpretation is consistent with the plain wording of the Lease, the reasonable expectations of the parties at the time they entered into the Lease, the evidence at trial, the notion of commercial efficacy, and common sense. The Lease does not distinguish between structural and non-structural components of the outer walls. The law on this issue, including the decisions cited by the plaintiff, indicates that whether windows and doors are part of exterior building walls is fact-specific.

[55] In my view, it would be illogical to conclude the parties intended outer wall repairs occasioned by reasonable wear and tear would not also include repairs to failing windows and sliding doors necessary to ensure the integrity of the Building envelope and, by extension, the Building structure. To conclude otherwise would lead to an absurd result. The plaintiff’s interpretation of the Lease would mean the lessor could undertake outer wall repairs while ignoring water ingress problems due to failing doors and windows, thereby undermining the integrity of structural Building

components in the outer walls. In my view, such an interpretation cannot reasonably be one the parties would have contemplated when they entered into the Lease.

[56] I find the only commercially efficacious interpretation of the Lease is one which requires the lessor to replace windows, sliding doors, and exhaust fans which have deteriorated due to reasonable wear and tear and which are undermining the structural integrity of the Building. On the unchallenged evidence of Mr. Gallant, the Building envelope included windows and sliding doors. The evidence also established that fans play a key role in the Building exterior wall system and their proper function is linked to the condition of the outer walls.

[57] I am not persuaded the terms in Article 4.03 are more specific than those in Article 5.03. I am more inclined to view the leaseholders' responsibility to repair and maintain windows as separate and distinct from the lessor's obligation "to keep in good repair and condition [the Building] foundation [and] outer walls". For these reasons, I find it unnecessary to attempt to reconcile the meaning of Articles 4.03 and 5.03.

[58] The principle from *Forbes* applies to situations where an earlier clause in a contract is followed by a later clause which modifies or destroys the obligation in the earlier clause. If the later clause destroys the obligation from the earlier clause, the later clause is to be rejected as repugnant. On a plain reading of the Lease as a whole, I conclude Articles 4.03 and 5.03 are not in conflict. These provisions describe independent obligations of the lessees and lessor. In my view, Article 5.03 does not destroy the obligations in Article 4.03. Arguably, the term in Article 5.03 to "keep in good repair and condition" the outer walls modifies the term in Article 4.03 to "repair and maintain" windows, if window replacement is considered necessary to maintain the condition of outer walls and the terms in Article 5.03 apply. If Article 5.03 modifies Article 4.03, I conclude that interpretation does not result in a rejection of Article 5.03 as repugnant.

Was the Project necessary pursuant to the lessor obligation to keep the foundation and outer walls in "good repair and condition"?

[59] The lessees' covenant to "repair and maintain" the suites including "all doors, windows, [and] walls" is subject to a "reasonable wear and tear" exception. There is no such exception in Article 5.03. In analysing this issue, I must therefore consider whether replacement of the windows, sliding doors, and fans during the Project was due to reasonable wear and tear.

Evidence at Trial

Plaintiff, Mr. Trenchard

[60] The plaintiff admitted or did not dispute the following facts:

a) In 2016, there were issues with the outer walls at the Building which required repair;

b) The Project was required to replace old and worn windows;

c) The water ingress problem at the Building would have become more serious if the Project had not been completed;

d) If the Project had not been completed, the leaks and other problems identified by RJC (including concrete delamination and water ingress) may have worsened and the condition of the Building would have continued to deteriorate; and

e) Having a leaky Building could significantly affect the value of leasehold suites.

[61] The plaintiff conceded the windows and sliding doors at the Building were sufficiently old and worn to require replacement in 2016. He agreed he has no reason to dispute what is set out in section 2.0 of the BECA regarding interior conditions, exterior masonry brick wall assemblies, or water ingress through the brick assemblies at the Building. He admitted he had no empirical scientific evidence regarding the extent of water ingress at the Building and no opinion from a building envelope expert.

[62] The plaintiff admitted the BECA indicates it was expected water ingress would be “typical” throughout the Building. The BECA noted sealant repairs could not be expected to provide a long-term solution to water leakage. The plaintiff did not dispute this statement.

[63] The plaintiff spent a considerable amount of time at trial introducing evidence to support the conclusion that the windows, sliding doors, and fans replaced during the Project were “old and worn” and thus fell within the exception of Article 4.03. On all the evidence, that conclusion is not controversial. The plaintiff adduced evidence he had not damaged the windows, sliding doors, or fans inside his suite. Westsea did not assert he had done so. The plaintiff argued he had made reasonable use of the windows, sliding doors and fans in his suite. That conclusion is not in dispute.

Mr. Caris, Farmer Construction

[64] The plaintiff called Mr. Caris, site superintendent with Farmer Construction. Mr. Caris was a forthright witness who testified in a straightforward manner, with no apparent attempt to advocate on behalf of either party. I found his evidence to be credible and reliable.

[65] Mr. Caris was the Project site superintendent. His role involved scheduling and ensuring work was completed in accordance with RJC’s engineering plans. He was on site daily and had an opportunity to inspect the work of the contractors who were engaged in the Project. Mr. Caris recalled the Project included removing old windows, drywall, and trim around the suites, placing angle irons on top of the bricks, and installing new sills, liners, and windows. He confirmed Farmer Construction replaced fans, windows and sliding doors, and repointed some brick on the outer walls to address cracks in the mortar during the Project.

[66] Mr. Caris said Farmer Construction would “always” look for signs of damage to the brick on interior wall spaces. Any observed damage was brought to the attention of RJC project engineer, Mr. Hasham. Mr. Caris thinks there were instances of drywall damage due to water ingress at the Building. He noted the old windows were single pane and said moisture buildup tends to accumulate if

residents do not use a fan after showering or when cooking. Mr. Caris admitted damage to the outer walls of the Building was apparent before the old windows were removed. He recalls the exterior face of the Building walls had cracked bricks and mortar rims. He confirmed cracks in the mortar permit water ingress.

[67] Mr. Caris confirmed the original windows and sliding doors at the Building were in "pretty bad shape" when replaced. There was rot around the windows and gaps in the frames through which daylight could be seen; some had been caulked from the inside. In his view, the condition of these windows was consistent with their age.

[68] The plaintiff reviewed RJC's stipulated price contract with Mr. Caris. This document references concrete slab edge repairs. Mr. Caris believes there was water ingress at the concrete slab of the Building, which indicated water had reached the rebar, causing it to rust and damage the concrete. Mr. Caris admitted the Project addressed rusted rebar; he noted that concrete does not adhere well to rusted rebar and, if rebar rusting is sufficiently severe, it can cause concrete to fall off a building.

[69] Mr. Caris said the bathroom fans at the Building were replaced because they were old, noisy, and inefficient. The rationale for doing so was to improve the air quality inside the Building suites and to bring it up to current standards.

Ms. Julie Trache, Westsea President

[70] Ms. Trache, President of Westsea, was called by the plaintiff as an adverse witness and by Westsea. She was involved in the Project, worked with RJC and the Project engineers, and followed their recommendations. She described herself as a manager who helped her team oversee day-to-day operations. Westsea is a family business. Ms. Trache gave clear, direct, and responsive answers to the questions she was asked and I found her to be a credible witness.

[71] Ms. Trache said Westsea considered the Project to be a necessary "special" project which represented an "extraordinary expense" undertaken by Westsea pursuant to its obligations in the Lease. She explained that "Priority 3" in the RJC

priority assessment report refers to the Project. The Project did not proceed until 2016 as Westsea followed RJC's recommendation to prioritise two other projects to commence first. Ms. Trache understood the Project needed to proceed forthwith.

[72] RJC advised Westsea the windows and sliding doors located in the north and south elevations of the Building had reached the limit of their expected service life and that moisture damage due to glazing assembly leakage was becoming more frequent and widespread, was resulting in damage to interior finishes, and would increase and contribute to the recurrence of rebar corrosion and concrete deterioration if not addressed.

[73] Ms. Trache said it causes Westsea concern when there is water ingress into a building. She understood water ingress was a problem at the Building which needed to be addressed or the Building would deteriorate. Based on the BECA, Ms. Trache understood:

a) The existing exterior masonry brick wall assemblies at the Building had no remaining service life;

b) The original windows and sliding doors at the Building had no remaining service life; and

c) The existing fans at the Building had exceeded their service life.

[74] Westsea followed RJC's recommendations in the BECA.

Mr. Hasham, RJC Project Engineer

[75] Mr. Hasham provided site inspection feedback for the preparation of the Building priority assessment report. The RJC priority assessment report set out OPCs, which Mr. Hasham explained were RJC's budgeted estimates of repair or replacement costs for the scope of work.

[76] Mr. Hasham was familiar with the BECA. He signed it as RJC's design engineer and collaborated in its preparation. Its purpose was to review the Building enclosure and to summarise RJC's visual assessment of its condition. Typically, this involved a sampling of suites. In the BECA, it was noted the existing aluminum

window assemblies, exterior masonry brick wall assemblies, and fans at the Building had “0 years” of remaining service life.

[77] The BECA describes interior conditions at the Building in detail, including:

a) Moisture damage to interior finishes, primarily as a result of condensation, had occurred; and

b) The exhaust fans in the suites, which help to circulate and control interior humidity levels, were almost 50 years old and most had impaired function.

[78] RJC assessed the interior condition around the windows and exterior façade of the Building and looked for signs of moisture deterioration around those finishes (i.e., damage to Building components from water ingress). RJC observed variable degrees of damage in the inspected suites. Consistent staining and mildew around the windows were present, indicating condensation and moisture ingress. A water test was performed on two windows. Water ingress was immediately observed with very little suction. RJC noted much of the sealant around the windows and adjacent components was “in distress”.

[79] Two ground floor windows were tested and six other suites were visually inspected for signs of deterioration and damage to assess the condition and operation of the windows and bathroom fans and the presence of any leakage. Most window sills were stained; some were jammed and could not be opened. Daylight was visible through some frames in the closed position. Mildew growth was present due to high humidity. Sufficient damage was observed to permit RJC to conclude there was failure of the existing windows which were allowing water ingress.

[80] Mr. Hasham confirmed interior window damage at the Building was not cosmetic. There was damage to the plywood liners beneath the windows and to the interior plaster finishes and exterior brick. Mr. Hasham confirmed that, once the windows had failed and water ingress was present, there was nothing to stop water from getting into the wall assembly below. The application of sealant would not have provided a long-term solution or extended the life of the windows. Mr. Hasham

explained that, once water penetrates the hollow bricks, it accumulates on the bottom of the brick walls.

[81] RJC inspected fans as part of its assessment of the Building enclosure to determine whether interior ventilation rates were affected by window replacement. Mr. Hasham explained that fans assist with controlling interior humidity and condensation on exterior walls. All fans assessed by RJC were determined not to be working at the intended level. One was completely non-functional. The old fans were single speed switch-operated fans.

[82] The BECA comments extensively on the condition of the original glazing assemblies at the Building as follows:

a) They were in “poor” condition, commensurate with their age and exposure;

b) They were non-thermally broken aluminum frames with single-pane glazing;

c) Evidence of leakage through the window frames or glazing seals and related moisture damage to the interior finished space was observed and expected to be “typical throughout the building”;

d) Where tested, the windows failed to prevent water ingress at a pressure representative of only moderate wind-driven rains;

e) Condensation tracks and drainage paths within the window frames were “easily obstructed” and, even if clear, were “unable to drain water which penetrates the assemblies, as evidenced by the water damage observed and the water penetration test results”;

f) While sealant repairs might address isolated leakage in the short term, they could not be expected to provide long term performance; and

g) Moisture damage due to glazing assembly leakage was “becoming more frequent and widespread”.

[83] RJC noted that, if not addressed, this water ingress would increase and contribute to the recurrence of rebar corrosion and concrete deterioration. If the

Project had not been completed, water ingress at the Building would have continued into the walls.

[84] Mr. Hasham described the old windows removed and replaced during the Project. He noted the exterior coatings had completely disintegrated and the frames were virtually unprotected. The aluminum had oxidised, which he likened to the corrosion of steel. There were rusted fasteners and some joints in the frames had started opening up. Some of the glazing stops (i.e., the snap-in sections of the windows which hold the glass in position from the outside) were loose; one was missing. Rust was present in the window tracks, indicating the rollers had rusted; in some instances the windows were jammed. Significant drafts were present with windows in the closed position. Mr. Hasham testified these signs indicated aging and weather-related deterioration of the windows which "were not intended to last forever".

[85] Mr. Hasham explained the original sliding doors and windows at the Building were almost 50 years old in 2013 and had an expected service life of about 30 to 35 years. Mr. Hasham confirmed that, beyond their service life, building components fail and performance reduces significantly. Once glazing assemblies fail, the frames open up at the joints and water ingress is not preventable.

[86] The BECA comments on the condition of exterior masonry brick wall assemblies at the Building as follows:

a) Water ingress into and through the brick assemblies was occurring, as evidenced by observed interior damage; and

b) Deteriorated or cracked mortar joints and cracked bricks (as demonstrated by appended photographs of the Building) and failed transition sealants were noted to exacerbate moisture ingress.

[87] RJC observed signs of brick deterioration, not isolated to the bottom and the middle of the bricks but also present around the windows. RJC observed signs of efflorescence (i.e., discolouration due to a calcification reaction with cement or lime-based products and water) on the brick, cracked brick, and cracked mortar joints,

which were indications of water ingress behind the Building face and into the Building enclosure and exterior brick. Mr. Hasham confirmed the purpose of a building enclosure is to keep water out of the interior space.

[88] Based on its observations, RJC made several recommendations in the BECA, including:

a) Installation of new bathroom exhaust fans to limit interior moisture;

b) Replacement of the existing glazing assemblies at the “earliest opportunity” to prevent “reoccurring instances of leakage into the suites and the concrete wall assembly” and to “prevent long term deterioration” of the Building;

c) Repair and maintenance of the brick wall assemblies, which would include mortar repointing (replacement where required), brick repair, sealant replacement, and subject to further review and analysis, the application of a surface water repellant to the brick; and

d) Reinforcing the exterior brick with angle iron installation to ensure the new windows were attached to a sound structure.

Mr. Gallant, Architect

[89] Mr. Gallant offered the following opinions, based on assumed facts and reviewed documents, all of which were in evidence at trial:

a) The BECA indicated the original windows at the Building had inadequate water penetration resistance; the original sliding doors were of a similar make and material;

b) Water penetration resistance and condensation control are poor for aluminum framed windows and doors that are over 50 years old;

c) The control of interior moisture is important for the long-term viability of any occupied building;

d) A combination of property building envelope and interior moisture control is important to prevent condensation from occurring at the interior faces of the building materials and within the wall assemblies;

e) Failure to prevent unintended condensation will allow for potential building material damage; and

f) The building/exterior wall/envelope system controls interior moisture primarily by kitchen and bathroom exhaust fans.

[90] Mr. Gallant states in his report that, if the original windows and sliding doors had not been replaced:

> (a) "[…] more interior finishes around the window sill [would] be damaged by condensation and mould growth [would] likely occur if it has not occurred already";
>
> (b) "The adjacent wall assemblies around the window sill [would] eventually have water penetration into the wall assemblies, causing corrosion to occur at any metal fasteners, reinforcing bars within concrete, brick ties, and will ultimately cause concrete and brick spalling and other building component failures";
>
> (c) "Any organic component around the windows such as wood blocking, organic drywall surfaces [would] have organic growth as well as rot and eventual decomposition"; and
>
> (d) "The windows and doors, with surrounding components failing, [would] not be properly fastened to the building and [would] have a high risk of detaching from the building".

Analysis and Conclusion

[91] "Reasonable wear and tear" has been interpreted to mean the reasonable use of the premises by the tenant and the ordinary operation of natural forces: *Haskell v. Marlow*, [1928] 2 K.B. 45 at p. 59. On all the evidence, I conclude the Project was intended to replace old windows, sliding doors, and fans which had deteriorated due to the passage of time and which were no longer functioning as expected due to reasonable wear and tear. Thus, it fell within the exception in Article 4.03 and was not a leaseholder obligation.

[92] This Court, in *G.M. Pace Enterprises Inc. v. Tsai*, 2003 BCSC 1336 [*G.M. Pace*], held a covenant to "keep in repair" or "leave in repair" is an obligation to keep the premises in the condition they were in at the beginning of the term. On all the evidence, I conclude there was a water ingress problem at the Building in 2016 which would have worsened if not addressed, thereby causing the Building to fall

into a serious state of disrepair. I am satisfied the Project was necessary to "keep in good repair and condition" the "outer walls" of the Building, pursuant to Article 5.03.

Was Westsea obliged to undertake the Project?

Evidence at Trial

Mr. Trenchard, Plaintiff

[93] The plaintiff agrees Article 4.03 outlines lessee obligations and one such covenant is to repair and maintain the suites, including windows, doors and walls, and to keep them in a good state of repair, reasonable wear and tear and such damage as is insured against by the lessor only excepted. He understands this to mean lessees have an obligation to repair and maintain the windows, doors and walls in their own suites, unless they have been damaged due to reasonable wear and tear.

[94] The plaintiff concedes the repair of "outer walls" falls within Westsea's lessor covenants in Article 5.03 of the Lease. He agrees he is required to pay his proportionate share of the Project costs for outer wall repairs at the Building and accepts those repairs were necessitated, at least in part, due to reasonable wear and tear.

[95] The plaintiff described Westsea's obligation to undertake the Project as a "freestanding" one which he says falls outside its covenants in the Lease. In advancing this position, he likened the Building to a "set of Russian nesting dolls" and argued the "lands" contain the "Building", the Building contains the "foundation, roofs and outer walls", and the outer walls contain the windows and sliding doors.

Ms. Trache, Westsea President

[96] In undertaking the Project, Westsea was guided by its understanding of the lessor obligations in the Lease and RJC's recommendations. The BECA recommended fan installation, repair of exterior masonry brick wall assemblies, replacement of the original glazing assemblies, and internal reinforcement with angle iron installation to accommodate the new heavier window assemblies.

Mr. Gallant, Architect

[97] Mr. Gallant's unchallenged report included the following opinions:

a) A building permit and an envelope engineer or architect would have been required to act as the coordinating registered professional in order to replace windows and sliding glass doors at the Building in 2016 and 2017; and

b) When an existing building undergoes an envelope rehabilitation, new building components must respect the original building design. While different products of varying specifications could "hypothetically" be installed, installation would have to be coordinated so as not to affect overall building façade patterns and aesthetics. It would also be necessary for each leaseholder to hire a building envelope professional and to submit individual permit applications.

Analysis and Conclusion

[98] The Project replaced the original windows, sliding doors, and fans which were at the end of their service life in 2016 as a result of reasonable wear and tear due to the passage of time and exposure to natural forces. The plaintiff agrees replacement is required at the end of the service life of a building component. The parties agree leaseholders were not required to undertake the Project. Article 4.03 sets out the lessee obligations to "repair and maintain" their suites including "all doors, windows [and] walls". It expressly excludes "reasonable wear and tear".

[99] The parties disagree about whose obligation it is to repair or replace building components damaged due to reasonable wear and tear. The plaintiff contends no one is obliged under the Lease to undertake these repairs but, if Westsea chooses to do so, it must bear the associated cost. Westsea says the obligation to undertake these repairs belong to Westsea as lessor.

[100] In support of his position, the plaintiff relies on the *Short Form of Leases Act*, R.S.B.C. 1960, c. 357, which expressly excludes reasonable wear and tear from the lessee's obligation to repair and maintain. He contends the combined effect of Article 4.03 and the imported meaning of the phrase "leave in good repair" contained within

the *Short Form of Leases Act*, means a lessee is never liable under the Lease for costs to replace “old and worn things” which form part of individual suites at the Building.

[101] The plaintiff cites *Parsons Precast Inc. v. Sbrissa*, 2012 ONSC 6098 [*Parsons*], as support for his position a landlord is “100% liable” when items fall within a reasonable wear and tear exception and are sufficiently worn to require complete replacement. The Court in *Parsons* interpreted the provisions of a commercial lease and considered whether the applicant was required to pay his proportionate share of parking lot repaving costs at a rented premises. The Court found the parking lot was a common area and the essential issue was whether the repaving costs constituted “maintenance” or “repair (reasonable wear and tear . . . excepted)” within the meaning of the lease. The Court concluded the parking lot required replacement (rather than repair) due to wear and tear and that total replacement did not fall within the meaning of “maintenance”. As a result, the applicant was not required to pay its proportionate share of the repaving costs.

[102] *Parsons* is distinguishable on its facts from this case. The lease in *Parsons* contained no lessor obligation to keep the leased property in good repair and condition. The provision in the *Parsons* lease relating to operating expenses was not similar to Article 7.01, and did not oblige tenants to pay for the landlord’s costs in performing its covenants under the lease. Most significantly, *Parsons* involved a 20-year commercial lease with only 14 months left in its term when the parking lot was replaced. The Court in *Parsons* found that “[t]o require this tenant to be responsible for its proportionate share of the entire repaving cost, when the paving job has a life expectancy of 20 years, and the tenant has only 14 months left on its lease is unfair and unjust”. By contrast, the Lease is for 99 years. On the evidence, the only parties who will benefit from the Project are the leaseholders.

[103] In direct answer to *Parsons*, Westsea relies on *JEKE*, where the Court says at para. 68:

> In any event, I do not credit the submission that the essential obligation the lessor took under the VIA was to provide merchantable units throughout the

> term of the lease at its cost. That is not said anywhere expressly in the VIA. Indeed, to the contrary, where ongoing costs are contemplated, clause 9 makes it clear that they "all" are the responsibility of the lessee. This is again illustrated by the responsibility for management costs. Clause 10 of the VIA imposes a duty on the lessor to "manage and maintain the Vacation Resort in a prudent and workmanlike manner". The lessor's expenses incurred in this regard – "all expenses" – are expressly the responsibility of the lessees under clause 9(p).

[104] In *Rado-Mat Holdings Co. v. Peter Inn Enterprises Ltd* (1985), 32 A.C.W.S. (2d) 269 [*Rado-Mat*], the Court considered a lessor's obligation to complete roof repairs at a multi-tenant building. The lessor covenanted to keep the leased lands and premises in a "clean and wholesome condition". The lessee covenanted to repair, reasonable wear and tear and damage by lightning, fire and tempest only excepted. Roof repair fell outside the scope of the lessee's covenant because there was no evidence that leakage from the roof was due to anything other than reasonable wear and tear. The Court was satisfied that, in order for the premises to be kept in a "clean and wholesome condition", the lessor was required to effect the necessary roof repairs. The Court found at para. 61 that when a lessee's covenant to repair a building component contains a reasonable wear and tear exception, the lessor's covenant includes its repair.

[105] Westsea argues the lessor's covenant in Article 5.03 of the Lease to "keep in good repair and condition the [Building] foundations [and] outer walls" must be interpreted to include the replacement of outer wall components such as windows and sliding doors damaged by reasonable wear and tear. Westsea says *Rado-Mat* supports the conclusion it had an obligation to perform the Project.

[106] Westsea submits the evidence establishes it is the only party to the Lease with control over all the windows, sliding doors, and fans at the Building and in a position to:

a) Obtain the necessary permits to complete the Project;

b) Perform the Project in a cost-effective manner; and

c) Coordinate the Project with the assistance of professional engineers to ensure the Building envelope system would remain functional and pose no risk of damage to the Building.

[107] By operation of Article 4.08 of the Lease, Westsea says leaseholders require its express written consent to undertake any work involving cutting the walls or ceilings (which replacement of the windows, sliding doors, and fans all require). Accordingly, Westsea argues it must be in a position to replace the glazing assemblies and bathroom fans at the Building as necessary.

[108] I am not persuaded by the plaintiff's argument the Lease obliges neither leaseholders nor the lessor to undertake the repair or replacement of deteriorated Building components damaged due to reasonable wear and tear. I conclude such an interpretation would lead to an absurd result which the parties could not reasonably have contemplated when they entered into the Lease. If neither party was obliged to undertake the Project and this work was not completed, the evidence confirms the Building would have fallen into disrepair and may not have survived the term of the Lease.

[109] On a plain reading of Article 5.03, considered in the context of the Lease as a whole and the relevant authorities including, notably, *JEKE*, and a review of all the evidence, I conclude as follows:

a) By 2016, the windows, sliding doors, and fans replaced during the Project had deteriorated due to reasonable wear and tear occasioned by the passage of time and were not functioning at the expected level;

b) The windows, doors and fans could not be repaired and required replacement;

c) Leaseholders were not obliged under the Lease to replace windows, sliding doors, or fans in their suites damaged due to reasonable wear and tear;

d) Requiring individual leaseholders to do so would be impractical, inefficient, and expensive, assuming that were possible and permitted by the City of Victoria;

e) Article 5.03 is reasonably construed in the context of the Lease as a whole as obliging Westsea, as lessor, to replace failing Building components, as contemplated by the Project; and

f) To conclude otherwise would result in an absurdity, which would be inconsistent with the notion of commercial efficacy and what the parties could reasonably have contemplated when they entered into the Lease.

[110] For these reasons, I conclude Westsea was required to undertake the Project pursuant to its lessor covenants in the Lease.

Did the Project result in betterment?

Evidence at Trial

Mr. Trenchard, Plaintiff

[111] The plaintiff alleges the Project resulted in betterment. He argues that, if the parties had intended Westsea could improve the condition of the Building and charge lessees the cost of doing so, the Lease ought to have stated this expressly, citing *Archibald v. 1219 Harwood Street (Chelsea) Ltd*., 2009 BCPC 364 [*Archibald*]. The Court in *Archibald* concluded the 99-year lease in that case did not authorise the lessor to charge lessees for expenses related to alterations or improvements which were not “maintenance, operation or repair of the building”.

[112] In cross-examination, the plaintiff admitted or did not dispute:

a) When he purchased his leasehold interest in 2011, the Building was nearly 40 years old and there were 62 years left in the Lease term;

b) The windows replaced during the Project have an expected life of 25 to 35 years and may therefore need to be replaced again once or twice before the end of the Lease;

c) The Project benefited the leaseholders who were left with nicer windows and fewer leaks;

d) The value of his suite has likely increased since 2017; and

e) He has no independent appraisal evidence to support his theory completion of the Project increased the value of the Building.

Ms. Trache, Westsea President

[113] Ms. Trache confirmed:

a) The replacement glazing assemblies have a remaining service life of 30 to 35 years; and

b) The replacement fans have a remaining service life of 10 to 25 years.

Mr. Sameer Hasham, RJC Project Engineer

[114] Mr. Hasham testified the BC *Building Code* would not have permitted the installation of new single-pane windows at the Building during the Project. The new windows, in addition to being double-glazed, had thermally broken aluminum frames, were more energy efficient, and were designed to provide internal drainage. They were also installed with a waterproofing membrane not present in the original windows.

Mr. Gallant, Architect

[115] Mr. Gallant confirmed it was not possible to replace the old single pane windows with new single pane windows as doing so would not have complied with the BC *Building Code*. The new double pane windows were heavier and therefore required additional structural support in the form of angle iron installation. Because the new windows were more airtight than the old ones, higher capacity fans to control interior moisture were necessarily installed.

Analysis and Conclusion

[116] A covenant to keep in repair is an obligation to keep the premises in the condition they were in at the beginning of the term. Plain words are required if the contracting parties intend to impose an obligation to put them in a better condition than they were at the inception of the term: *G.M. Pace* at paras. 66-89.

[117] The evidence at trial establishes that failing to replace the windows, sliding doors, and fans would have caused the Building to deteriorate to a state worse than its original condition. The evidence also establishes the windows, sliding doors, and fans replaced during the Project will require further replacement in another 25-35 years (or 20-30 years before the end of the Lease term).

[118] I am satisfied on a review of all the evidence that the Project did not result in betterment. I conclude *Archibald*, while not binding on this Court, stands for the proposition a lessor cannot charge for improvements or alterations pursuant to a covenant to keep a building in good repair and condition. In this case, unlike *Archibald*, the evidence establishes that the Project returned the Building to its original condition. As the Project did not result in betterment, there is no basis to conclude it was inconsistent with the lessor obligation to "keep in good repair and condition" the Building outer walls and foundation under Article 5.03.

WAS WESTSEA ENTITLED TO CHARGE THE COSTS OF THE PROJECT TO LEASEHOLDERS AS OPERATING EXPENSES?

[119] In analysing this issue, I have considered the following questions:

a) Is there any ambiguity in Article 7.01 which must be resolved?

b) Was the Project a capital expense?

c) Does the Lease attract the doctrine of *contra proferentum* because it is a standard form contract?

d) Did Westsea comply with Article 7.02?

e) Could the Project have been paid for by prepaid rent and/or a capital reserve?

f) Is it necessary for this Court to pierce the corporate veil?

Is there any ambiguity in Article 7.01 that must be resolved?

Evidence at Trial

Ms. Trache, Westsea President

[120] Ms. Trache said operating expenses, as defined in Article 7.01, refer to the lessor's covenants in Article 5.03. Ms. Trache understood "maintenance, operation and repair of the Building" in Article 7.01 to refer to all the costs of running the Building. She explained some of these costs are recurring ones which can be anticipated while others are incurred periodically on an as-needed basis.

[121] The plaintiff reviewed Westsea's schedules of operating costs with Ms. Trache and suggested separate reference in those documents to "operating expenses" and "special assessments" meant they fell into different categories. Ms. Trache rejected that suggestion and explained these items are categorised separately for ease of tracking payments and to facilitate leaseholder understanding. She said to do otherwise would result in confusion as all costs would be lumped together under one category in the annual operating budget and noted these audited financial statements are prepared by Westsea's professional accounting firm.

[122] Ms. Trache confirmed reference to "expenses" and "extraordinary expenses" in Westsea's auditor's year end financial statements comprise operating expenses as defined in Article 7.01. Reference in these statements to "normal accounting" and "special assessment" is to an accounting reconciliation completed by Westsea's auditors. The Project was completed over two years which explains why these costs were expensed over two fiscal years.

[123] Ms. Trache said "catastrophic consequences" for the Building would have resulted if Westsea had been unable to charge the Project to leaseholders as operating expenses. Westsea would have been unable to afford the Project costs and the Building have would fallen into a serious state of disrepair. She agreed the leaseholders will likely be responsible for funding the cost of replacing windows again at the end of their expected service life in 30 to 35 years.

Analysis and Conclusion

[124] Westsea says Article 7.01 is clear and unambiguous. It argues the Lease clearly contemplates all the costs of maintaining and managing the Building during its term are to be borne by the leaseholders, through the mechanism of operating expenses, which has a broad, unlimited definition in the Lease and includes all costs incurred in its performance of lessor covenants "in connection with the maintenance, operation and repair of the Building".

[125] Ms. Trache confirmed the Project could not have been undertaken unless the associated costs were chargeable to the lessees as operating expenses. Without the Project, she testified the water ingress problem would have progressed and the Building would have deteriorated. That evidence was not contradicted and was consistent with that given by Mr. Caris, Mr. Hasham, and Mr. Gallant.

[126] The plaintiff argues the principles of *noscitur a sociis* or *ejusdem generis* ought to be applied by this Court in interpreting the definition of "operating expenses" in Article 7.01. *Noscitur a sociis*, or the associated words rule, provides that the generality of a term can be limited by a series of more specific terms which precede or follow it: *JEKE*, at para. 58. *Ejusdem generis,* or the limited class rule, provides that general terms may be restricted to the same genus as the specific terms which precede them: *National Bank of Greece (Canada) v. Katsikonouris,* [1990] 2 S.C.R. 1029 [*National Bank*] at 1040.

[127] Article 7.01 lists a variety of specific items which qualify as operating expenses and concludes with the statement "and all other expenses paid or payable by the Lessor in connection with the Building, the common property therein or the Lands". The plaintiff argues the specific items listed in Article 7.01 limit the meaning of operating expenses through the operation of *noscitur a sociis* or *ejusdem generis* to "fixed costs" and "variable costs". He further argues the costs of the Project were "replacement reserve" or "capital" costs not captured in Article 7.01.

[128] Westsea says completion of the Project falls within the scope of "the performance of its covenants herein contained", which precedes the list of specific

items falling within the definition of operating expenses, and that the costs of the Project are “expenses paid or payable by the Lessor in connection with the Building”.

[129] Westsea relies on *JEKE* at paras. 62-63, where the Court found the operation of *noscitur a sociis* is expressly ousted when a list of specific terms is preceded by the qualifier “without limiting the generality of the foregoing”. It also relies on *National Bank* at 1040-1041*,* where Justice La Forest held *ejusdem generis* does not apply where a general term is followed by the word “including” and a list of specific terms. The words “include” and “including” are terms of extension, which enlarge rather than restrict the meaning of preceding words.

[130] Operating expenses is a defined term in the Lease. The list in Article 7.01 is preceded by a qualifier “includes but without restricting the generality of the foregoing”. Based on the authorities, it would appear the operation of *noscitur a sociis* and *ejusdem generis* is ousted by the language of the Lease. Even if not ousted by the plain language of Article 7.01, it is not clear these rules apply to restrict the meaning of “operating expenses” in the way the plaintiff contends.

[131] The plaintiff admits the Lease makes no reference to:

a) Short-lived, long-lived, or cyclical building components; or

b) Fixed expenses, variable expenses, a replacement reserve, capital costs, depreciation, or amortization.

[132] The plaintiff argues the meaning of “operating expenses” is limited because Article 7.01 does not explicitly include a category of replacement reserves, capital costs, and/or short-lived components. In other words, he argues *noscitur a sociis* and *ejusdem generis* limit the meaning of a general term based on the absence of certain language. The operation of these doctrines does not proceed based on the absence of language. Instead, *noscitur a sociis* and *ejusdem generis* require a list of specific terms have a common feature, which indicates how the broader term is to be narrowed: *JEKE*, at paras. 59-60; *National Bank* at 1040.

[133] In *JEKE*, at paras. 5 and 59-60, the lease provided operating costs and replacement costs included repairs to the exterior and interior of the premises, insurance, accounting costs and management fees. The Court held those terms were so varied no category was created to limit "operating costs" to expenses of a particular kind. Similarly, the itemised list in Article 7.01 of the Lease includes maintenance and repair of the Building, the provision of hot and cold water, insurance, window cleaning, management fees, and legal and accounting charges. In my view, those items are not characterised by any common feature which would limit the meaning of operating expenses through the operation of *noscitur a sociis* or *ejusdem generis.*

[134] If the plaintiff wished to argue the list of specific items in Article 7.01 have a common feature by reference to accounting or appraisal terms such as "fixed expenses", "variable expenses" or "long-lived components", he failed to adduce the expert evidence necessary to do so.

[135] I do not find the tax and accounting cases relied on by the plaintiff to be helpful or persuasive. Based on *JEKE*, it is unnecessary to import extraneous principles to explain the meaning of a term (i.e., operating expenses) which is defined in the Lease (i.e., in Article 7.01). The Court in *JEKE* held at paras. 55-56 that, if a party wishes to classify expenses by reference to accounting or commercial practice, such evidence is properly the subject of expert opinion. Opinion evidence concerning a matter of technical expertise must come from a qualified expert if it is to be admissible as an opinion which can be relied upon by the trier of fact: *American Creek Resources Ltd. v. Teuton Resources Corp.,* 2013 BCSC 1042, aff'd 2015 BCCA 170, at para. 18.

[136] The plaintiff attempted to argue that "even the auditors" who prepared Westsea's schedules of operating expenses appeared not to accept the Project costs were operating expenses. No auditors gave evidence at trial. In the absence of such evidence, I am left with the evidence of Ms. Trache, introduced as part of the plaintiff's case, that all costs associated with "running the Building" are operating

expenses, as defined in Article 7.01, regardless of how they are categorised for ease of reference by Westsea's auditors in their schedules of operating expenses.

[137] In his closing submissions, the plaintiff attempted to retreat from Ms. Trache's evidence, arguing she was not credible, reliable, or appropriately qualified as an expert to comment on the description of costs in Westsea's schedules of operating expenses. I do not find those arguments to be persuasive. Ms. Trache's comprehensive description of operating expenses is consistent with the comments of the Court in *JEKE* at paras. 52-54.

[138] I am not persuaded it is appropriate for this Court to limit the scope of "operating expenses" in Article 7.01 based on commercial or accounting concepts such as "capital costs", "replacement reserves", or "short-lived components" not included in the Lease. In my view, it is possible to determine the meaning of "operating expenses", based on the plain wording of Article 7.01, construed in the context of the Lease as a whole, without doing so.

[139] I find it unnecessary to apply the principles of *noscitur a sociis* or *ejusdem generis* so as to limit operating expenses pursuant to Article 7.01. On all the evidence, construing the Lease as a whole on its plain meaning with regard to the notion of commercial efficacy, I am satisfied Westsea was entitled to charge the Project costs to leaseholders as operating expenses, as defined in Article 7.01 of the Lease.

Was the Project a capital expenditure?

Evidence at Trial

Ms. Trache, Westsea President

[140] Ms. Trache testified the Project was not a capital expenditure and the Lease has no provision for that kind of cost. She said the Lease provides for operating expenses and the Project fell into that category. She had no discussions with RJC about capital expenditures.

[141] Ms. Trache confirmed no aspect of the Project was capitalised. Based on information from RJC, the expected life of the Project repairs is about 25 years. For

that reason, she said the current and future leaseholders are the sole beneficiaries of the Project.

Mr. Sameer Hasham, RJC Engineer

[142] At no time did RJC ever look at the Lease; it never does so. Mr. Hasham did not know if the Lease provided for capital expenditures. Mr. Hasham does not consider whether an item is a capital expense. Rather, he looks at the service life of a building component in the context of repair, renewal, or replacement.

Analysis and Conclusion

[143] The plaintiff argues the Project was an unauthorized capital expense. He referenced RJC's priority assessment report and consulting services proposal which refer to planning for "capital expenditures" and to the Project as a "capital project". He says express words in the Lease are required to permit Westsea to charge leaseholders for capital costs, citing *Parsons* at paras. 17-23 and *RioCan Holdings v. Metro Ontario Real Estate Limited*, 2012 ONCS 1819 at paras. 93-94.

[144] The plaintiff invoked a "grapevine of costs" analogy at trial, arguing ordinary operating expenses are like "grapes" and the Project (the size, scale and nature of which he argued make it distinguishable from all other operating expenses) is like a "watermelon". He suggested the $5.5 million cost of the Project represented about 20% of the assessed value of the Building for tax purposes for the year 2016 (which he conceded did not represent its fair market value).

[145] The plaintiff relies on a decision of the Quebec Supreme Court in *Skyline Holdings v. Scarves and Allied Arts*, [2000] Q.J. No. 2786, in support of his argument "common, repetitive and highly predictable" expenses (i.e., "usual" operating expenses pursuant to Article 7.01) exclude costs which are incurred irregularly and intermittently (such as the Project). He cited decisions of this Court in *Kotsovos Investments Ltd. v. Oliver Twist Neighbourhood Public House Ltd.*, 2005 BCSC 176 [*Kotsovos*], and *Spence v. Caravans West Owners Association*, 2015 BCSC 1289 [*Spence*], to argue the Project produced an "enduring benefit" which extends over

many years and therefore falls outside the “common, repetitive and highly predictable" expenses which comprise operating expenses under the Lease.

[146] This case is distinguishable on its facts from *Kotsovos* and *Spence*. In *Kotsovos*, the decision of Mr. Justice Ehrcke turned on whether an HVAC system and a hot water tank were fixtures and equipment “which by their nature require periodic repair and replacement”. The lease in *Kotsovos* explicitly excluded capital costs being charged to tenants. In *Spence*, the Court concluded the $3.5+ million cost of installing an electrical upgrade was “unquestionably a capital expenditure”. Mr. Justice G.C. Weatherill found at para. 19 that 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”. In my view, that statement highlights an important distinguishing feature of the *Spence* case. The intention of the Project was not to change, reconfigure, enhance or improve the Building windows, sliding doors or fans.

[147] On the evidence, any improvement in the quality of windows, doors or fans due to the Project is explained by Westsea’s mandatory compliance with the BC *Building Code* and not an attempt to improve the Building. The plaintiff did not challenge this evidence at trial but suggested this Court can overlook the “legal requirement” (stipulated by the BC *Building Code)* and simply conclude the new windows, doors and fans at the Building are an improvement over the old ones.

[148] The plaintiff argues Westsea, as owner, accrues the benefit of any upgrades undertaken through “major component replacements” such as the Project, which he says potentially extend the useful and economic life of the Building. This argument overlooks the evidence of Mr. Caris, Mr. Hasham, and Ms. Trache which confirms the expected service life of the replacement windows, sliding doors and fans installed during the Project is 25-35 years, while the remaining term of the Lease is 54 years. Accordingly, on all the evidence, the windows, sliding doors, and fans will need to be replaced again before the end of the Lease term.

[149] The plaintiff's argument also overlooks the plain wording of Article 7.01, read in the context of the Lease as a whole. Article 7.01 does not limit operating expenses chargeable to leaseholders to those which are "common, repetitive or highly predictable". It makes no reference to capital costs or capital expenses. The Lease differs in this respect from the one in *Kotsovos*.

[150] Operating expenses is a defined term in the Lease and does not distinguish between:

a) Capital and non-capital costs;

b) Fixed expenses, variable expenses, replacement reserves, or capital costs; or

c) Short and long-lived components.

[151] While the plaintiff concedes parties are free to define terms in a way which differs from industry practice, he says when terms do not expressly refer to "capital costs", there is a presumption the parties did not intend to include them. Accordingly, he says "operating expenses" in Article 7.01 do not include capital costs, citing *Galt v. Frank Waterhouse & Co. of Canada Ltd*, [1944] 2 D.L.R. 158 (B.C.C.A.) at 165-166.

[152] I am not persuaded it is necessary for this Court to consider whether or not the Project was a capital cost. The Lease makes no provision for capital costs. I find the definition of operating expenses within Article 7.01 is sufficiently broad to encompass the Project whether or not, in a different context, it might have been considered a capital cost.

Was the Lease a standard form contract?

[153] The plaintiff asserts the Lease was a non-negotiated, non arms' length standard form contract which ought to attract the doctrine of *contra proferentum*. He argues it must be interpreted in a manner favourable to the leaseholders.

[154] The plaintiff argues the Lease was a standard form contract because it was made in accordance with the *Short Form of Leases Act*, citing *Highway Properties*

Act v Kelly, Douglas & Co., [1971] S.C.R. 562 at 569. He says it was a non arms' length contract because he did not negotiate the Lease when he purchased his leasehold interest in 2011 and the same individual signed the original Lease as both lessee and lessor. In cross-examination, he admitted reading and approving the Lease as part of his purchase.

[155] There was no evidence before this Court about whether or not the original parties to the Lease negotiated its terms, whether money exchanged hands, or whether the original signatory to the Lease was the "common directing mind" who had "de facto control" of both signing entities.

[156] The doctrine of *contra proferentum* applies only when the general rules of contractual interpretation fail to resolve an ambiguity: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 51.

[157] Given my finding the Lease, construed as a whole, is clear and unambiguous, it is unnecessary for me to consider the need to interpret it in favour of either party.

Does this Court need to consider Article 7.02 of the Lease?

[158] The plaintiff argues Westsea did not properly rely on "prior years' experience" in estimating the Project costs, contrary to Article 7.02. He cites *Archibald* and says Westsea is therefore precluded from charging the Project costs to leaseholders as operating expenses.

[159] In *Archibald*, the Court reduced some operating expenses because, on the evidence, the charges related to improvements rather than a covenant to "keep in good repair and condition" and were not based on prior years' experience. The Court did not consider the effect that charging a shortfall or reimbursing an overestimate (as permitted in Article 7.03 of the Lease) would have on this analysis.

[160] The plaintiff argues because actual operating expenses were extraordinary in 2016, they cannot be based on prior years' experience. In my view, that position is untenable. On the evidence, buildings necessarily require both regular and intermittent maintenance and repair.

Could the Project have been funded by prepaid rent and/or a capital reserve?

[161] Westsea admits rent was “pre-paid” at the start of the Lease term and was profitable. The plaintiff argues Westsea could have invested that rent and/or used it to maintain a replacement reserve to address future capital expenditures like the Project.

[162] The plaintiff did not raise this allegation in his pleading. It is unsupported by the evidence or a plain reading of the Lease as a whole. I therefore decline to consider it.

Is it necessary to pierce the corporate veil?

[163] The authorities confirm piercing the corporate veil is an available remedy only when there has been fraud or improper conduct: *Edgington v. Mulek Estate*, 2008 BCCA 505, at paras. 22-24.There was no evidence to support those conclusions in this case.

SUMMARY

[164] My conclusions are summarised as follows:

a) The Lease, construed as a whole, is clear and unambiguous;

b) The Project was necessary to address a water ingress problem at the Building occasioned by reasonable wear and tear;

c) The Project outer wall repairs could not have been completed without replacing the existing windows, sliding doors, and fans;

d) Westsea was required to undertake the Project pursuant to its lessor covenants in Article 5.03 of the Lease;

e) Westsea was entitled to charge the plaintiff his proportionate share of the Project as operating expenses, as defined in Article 7.01 of the Lease;

f) Westsea did not breach Article 7.02 of the Lease;

g) The Project did not result in betterment;

h) It is unnecessary for this Court to consider whether:

   i. The Project was a capital cost or could have been paid for using prepaid rent;

   ii. The Lease was a standard form contract;

   iii. The doctrine of *contra proferentum* applies; or

   iv. It is appropriate to pierce Westsea's corporate veil.

[165] For the reasons set out herein, the plaintiff's claim is dismissed.

[166] If the parties are unable to agree on costs, they may apply to speak to them within 30 days.

"Douglas J."