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Court of Appeal File No. 46417

COURT OF APPEAL

ON APPEAL FROM: The order of Madam Justice Douglas in the Supreme Court of British Columbia, pronounced October 1, 2019

BETWEEN:

HUGH TRENCHARD

Appellant (Plaintiff)

AND:

WESTSEA CONSTRUCTION LTD.

Respondent (Defendant)

APPELLANT'S FACTUM

Hugh Trenchard, Appellant

APPEARING ON HIS OWN BEHALF

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Westsea Construction Ltd., Respondent

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CHRONOLOGY OF DATES RELEVANT TO THE APPEAL

Date	Event
1969	The respondent, Westsea Construction Ltd. ("Westsea"), builds an apartment building in Victoria, British Columbia, called "Orchard House".
May 1, 1974	Westsea enters into a lease (the "Lease") for Orchard House with Capital Construction Supplies Ltd. ("Capital"). The term is 99 years.
1974 to 1977	Capital assigns leasehold interests in respect of individual apartment units to other persons.
August 4, 1976	Capital (assignor) assigns the Lease of suite 805 to Inez Dauphinee (assignee) for pre-paid rent of $40,500.
2010-early 2011	Westsea completes Phase 1 remediation of Orchard House which includes replacing all east/west facing windows and windows at building corners, as well as exterior wall and other repairs. The costs associated with Phase 1 are charged back to leaseholders.
January 2011	By re-assignment, Mr. Trenchard purchases a leasehold interest in suite 805 for the remainder of the term, for $220,000.
July 5, 2016	Westsea writes to all leaseholders, including the appellant, notifying them of their respective share of the costs of Phase 2 of the remediation project and requiring payment on September 1, 2016.
July 11, 2016	Westsea commences the second phase of the project to replace all remaining windows, sliding doors, bathroom fans and for exterior wall and related repairs at Orchard House ("Phase 2").
August 9, 2016	Mr. Trenchard files a Notice of Civil Claim (amended subsequently).
August 27, 2016	Mr. Trenchard pays under protest $37,155.92 as demanded by Westsea for his purported proportionate share of Phase 2.

August 31, 2016	Westsea files its Response to Civil Claim (amended subsequently).
May 24, 2017	Westsea substantially completes Phase 2.
June 3-14, 2019	Trial before Madam Justice Douglas.
October 1, 2019	The trial judge issues her reasons for judgment finding that Westsea was obliged under the Lease to undertake the Phase 2 project, and that Westsea was entitled to charge to the appellant his proportionate share of the project as operating expenses.

OPENING STATEMENT

This appeal arises from a multi-million-dollar capital construction project carried out in 2016-2017 primarily to replace windows and sliding glass doors, as well as bathroom fans, in a high-rise apartment building in Victoria BC ("Orchard House").

A 99-year term lease for Orchard House governs the relationship between the Respondent lessor ("Westsea") and the lessee ("Lease"). Assignees of the Lease ("Lessees") are responsible to maintain and repair their suite interiors, and this expressly includes windows and doors, reasonable wear and tear excepted. Westsea is expressly responsible to maintain and repair the building, foundation, and outer walls. Westsea can charge the costs of its covenants to Lessees as Operating Expenses. The main issue at trial was who pays to replace old and worn windows, doors and fans: Westsea or the Lessees.

The trial judge (hereafter, "the judge") found the Lessees liable to pay for costs to replace windows, doors and fans as Operating Expenses. Although she found that the windows and doors were replaced due to wear and tear, the judge failed to recognize that the wear and tear exonerates Lessees from costs to replace old and worn windows and doors. Instead, the judge ignored the express effect of the wear and tear exception by implying a term by which Westsea is obliged to replace old and worn windows, doors, and fans. In turn, this allows Westsea to recover replacement costs from Lessees as an Operating Expense.

The judge's implied covenant in this way is contrary to the law on when terms can be implied in contracts. In doing so, the judge failed to give effect to the historical intended purpose of the wear and tear exception, which is that rent-paying Lessees are not liable to pay for the costs to replace old and worn components of property that is owned by the landlord.

Further, the judge erroneously interpreted Operating Expenses to include capital costs. In doing so, she failed to consider various clauses in the Lease that make it clear that Operating Expenses are common, repetitive and highly predictable expenses. Operating Expenses are not intended to include major replacement costs or capital outlays.

PART 1 — STATEMENT OF FACTS

i. Background

1. The appellant holds a lease interest, by re-assignment, for Suite 805 in Orchard House, a 22-storey high-rise in Victoria. Orchard House contains 211 suites and was built in about 1969[1]. The appellant has lived there since 2013[2].

2. The head lease was made under the *Short Form of Leases Act*, 1960. c. 357[3] between Westsea and Capital on May 1, 1974, as lessee (the "Lease")[4]. The appellant and Westsea executed the re-assignment in January 2011.

3. The original assignment for Suite 805 was executed August 4, 1976 for $40,500[5]. Westsea sold Lease assignments for Orchard House in the 1970's as pre-paid rent for the 99-year term, and this was profitable for Westsea[6].

4. Article 4.03 of the Lease outlines the following lessee's covenants:

> To repair and maintain each of the Suites including all doors, windows, walls, floors and ceilings thereof and all sinks, tubs and toilets therein and to keep the same in a state of good repair, reasonable wear and tear and such damage as is insured against by the Lessor only excepted; to permit the Lessor, its agents 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. [*underline added*]

5. Article 5.03 outlines the following lessor's covenants:

> 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.

6. Article 7.01 defines operating expenses:

> "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

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[1] AR p 061 para 1; AB p 039 para 1.5

[2] Transcript Extract Book ("**TEB**") p 019 line 13

[3] Appendix A

[4] Appeal Book ("**AB**") p 1 – 18.11 (lease copy with assignment & LTO registered lease)

[5] AB p. 29

[6] TEB p 010 line 7-11; AR p 100 para 161

> 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 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), 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. [*hereafter "Operating Expenses"*][7]

7. George Mulek, majority shareholder for both Westsea and the original lessee[8] signed the Lease as lessee and lessor[9]. George Mulek was deceased at the time of the trial, and the current president for Westsea, Julie Trache, had no knowledge of circumstances surrounding the creation of the Lease.[10]

8. Westsea led no evidence about the intentions of the original parties to the Lease and argued that "what happened in 1974 has absolutely no bearing on this case."[11]

9. Westsea pled, "No implied terms can be read into the Lease"[12]

10. The appellant sought no legal advice about terms of the Lease and, after inquiring with his realtor about negotiating part of the Lease, understood he could not do so[13].

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[7] AB p 2 (lease copy with assignment); AB p 8, registered lease (Art. 4.03), 10 (Art. 5.03), 12 (Art. 7.01)

[8] TEB p 26 line 27 – 30, line 42 – 45, p 027 line 17 – 39, p 028 line 11 – 22; AB p 33-37 (Securities Registers)

[9] Ibid note 7, p 18; TEB p 024 line 23 – 40

[10] TEB p 024 line 41 – 44, p 027 line 7 – 13, p 028 line 29-37

[11] TEB p 010 line 20-21

[12] Appeal Record ("**AR**") p 053 (para 7.1)

[13] TEB p 018 line 1 – 13, p 020 line 15 – 35

11. Westsea finished the first phase of a windows replacement project in 2010-2011. Westsea began the second phase in July 2016, which involved replacing all remaining windows, replacing sliding doors, fans, and related wall repairs[14] ("Phase 2").

12. The completed Phase 2 cost was $5,551,460[15]. The vast majority of the cost was to replace the old and worn windows and doors; $25,110 was attributable to 50 linear feet of wall delamination repairs, and something less than 1.6% for brick repointing[16].

ii. The character of the windows and sliding doors

13. The Orchard House 8th floor plan legend defines suite interiors to include balconies. Sliding glass doors and some windows face onto the balconies; some windows do not[17], but those are inset into the walls by two to 2.5 inches[18]. Fans are interior to the suites because they are embedded in suite ceilings[19].

14. The appellant's old windows, and all the windows at Orchard House, were "fixed" and "slider" windows[20]. Fixed windows cannot be opened, while slider windows can be opened; the new windows are both fixed and casement (openable by swinging out).[21]

15. The judge made no finding that the windows comprise the entire face of the building, and there is no suggestion of this in the evidence.

16. The judge relied on evidence from Westsea's consulting engineer Sameer Hasham ("Mr. Hasham") that the windows and building are "structurally integrated"[22] in concluding that worn windows may be undermining the "structural integrity of the Building foundation and walls" and that replacing old windows was "necessary to ensure the structural integrity of the Building envelope and, by extension, the Building structure."[23]

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[14] AR p 062 – 065, para 9 – 21 (Factual Background)

[15] AR p 064 para 18

[16] TEB p 051 line 23-38, line 33 – 36; AB p 46 (bid quote), p 53 (final costs), p 055

[17] AB p 019

[18] TEB p 050 line 35-47 to 050.1 line 1-8

[19] AR p 067, para 38

[20] AB p 022 (805 Inspection Report)

[21] AB p 026 – 027 (805 Inspection Report); AB p 039-040 (RJC Enclosure Report)

[22] AR p 068, para 43; TEB p 044 line 20 – 23

[23] AR p 072 para 55

17. However, in cross-examination, Mr. Hasham explained that the windows and walls are integrated by a deflection track, which he agreed allows the glass door to float in its space, and he stated that windows are not structural components of the building[24].

18. Similarly, Phase 2 site superintendent, Perry Caris ("Mr. Caris"), testified that windows are installed with a deflection header that allows the windows to shift inside the wall space "so it's not a hard connection from top to bottom."[25]

19. Evidence on the record shows that for Orchard House:

- The window/door glazing allows light through; the walls do not admit light[26]
- Some of the windows are fixed and not openable, and some of the windows are openable as sliders and casements; the walls are not openable[27]
- The sliding doors are, by definition, openable; the walls are not[28]
- The sliding doors allow access and egress to the balcony[29]; the walls do not
- Windows (frames and glazing) are inserted *into* the wall space and defined that way[30]
- The windows do not comprise the entire face of the building[31]
- The windows are non-load bearing and non-structural[32]
- Windows also "provide light and ventilation for homes, at the expense of some heat loss (windows let more heat escape than even an uninsulated wall)"[33]

20. The Lease contains no references to the "building envelope" and there is no specific covenant in the Lease for Westsea to maintain and repair the building envelope. There is also no express covenant for Westsea to replace old and worn windows, sliding doors and fans.

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[24] TEB p 052 line 14 – 47; p 053 line 1 - 31

[25] TEB p 043 line 12 – 21

[26] AB p 020

[27] Ibid 26; AB p 022, p 26 – 27 (805 Inspection report); AB 040 (RJC Enclosure Report)

[28] AB p 022, p 26 – 27 (805 Inspection report); AB 040 (RJC Enclosure Report)

[29] AB p 039 (RJC Enclosure Report)

[30] AB p 040

[31] AB p 020; AB p 047 - 048

[32] TEB p 052 line 43 to p 053 line 24

[33] AB p 025 (805 Inspection Report)

21. Westsea's architectural expert, Pierre Gallant, reported the Orchard House building envelope includes: 1) Wall assemblies; 2) Windows & Balconies and Doors; 3) Roofs; 4) Balconies[34].

iii. Phase 2 involved minimal wall repair

22. Orchard House is over 200 feet high; about 100 feet wide on north/south faces, and less on the east/west faces[35]. Slab edge delamination repairs comprised a total of 50 *linear* feet[36]. Brick repointing comprised less than 1.6% of the Phase 2 cost[37].

23. Mr. Caris, who observed all the Phase 2 windows installed in the building, was never asked to look for damage to wall interior spaces and did not see any wall damage, although he did see damage to the window liners which were replaced[38].

24. The judge found the windows, doors and fans were replaced due to wear and tear[39].

iv. Evidence that Phase 2 was a capital cost

25. When evaluating and making its proposal for Phase 2 work, Westsea's engineering consulting firm, Read Jones Christoffersen ("RJC") stated:

> "...Westsea is currently developing a maintenance schedule and budget for capital expenditures for the building..."[40]

and:

> "We understand the client wishes to determine the current general condition of the building enclosure of the building to assist in their efforts for related long-term capital expenditures"[41].

PART 2 - ERRORS IN JUDGMENT

26. The judge made three main categories of errors, from which others follow.

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[34] AB p 057 (Pierre Gallant Report)

[35] TEB p 051 line 7-16

[36] TEB p 51 line 24 – 30; AB p 053 (final costs)

[37] AB p 053, 055 (final costs)

[38] TEB p 037 line 1 – 18, line 32-34

[39] AR p 075 para 63; p 084 para 98; p 087 para 109(a)

[40] AB p 37.1 (first para); AR p 96, para 143

[41] AB p 37.4 (second para); AR p 96, para 143

A. The judge erred by implying a covenant for Westsea to replace old and worn windows, doors and fans, and therefore re-writing the Lease.

27. In connection with this, the judge erred by failing to consider the intentions of the actual parties; by finding the Lease is unambiguous; by implying a term based on commercial efficacy and the rule against absurdity, which may be achieved only if terms are ambiguous and involve negotiated contracts.

27. Further, the judge erred by failing to find the Lease was ambiguous and in turn failed to consider whether the doctrine of *contra proferentem* was available to resolve the ambiguity. In connection with this, the judge erred by excluding probative evidence to show the Lease was a non-negotiated standard-form contract and declining to find whether the Lease was non-negotiated.

28. The judge also erred in applying a "practicality" test as the basis for implying Westsea's said covenant, without considering that Westsea is already obliged by law to replace old and worn windows and doors.

B. The judge failed to find Article 4.03 specifically exonerates lessees from liability for costs to replace of old and worn windows and doors and that such costs are therefore excluded from Operating Expenses. The judge also erred by:

29. Finding Westsea's covenant to maintain the building and walls modified the wear and tear exception to lessees' covenant to maintain and repair their windows and doors.

30. Failing to apply law set by the Supreme Court of Canada in *BG Checo v. BC Hydro* [1993] 1 SCR 12 that general terms do not include the subject matter of specific terms.

31. Finding that windows are "structurally integrated" with the walls, while failing to consider contradictory evidence that the windows are not structural parts of the building.

C. The judge erred by finding that Operating Expenses are broad enough to include capital costs.

32. Similarly, the judge erred by declining to consider if Phase 2 involved capital costs, while at the same time implying that Phase 2 did *not* involve capital costs.

33. Further, the judge erred by failing to consider *ejusdem generis* in the context of Operating Expenses considered as common, repetitive and highly predictable costs that do not include extraordinary costs like replacement reserves or capital costs.

34. The judge erred by failing to address argument that for such a major cost to be chargeable, it must be expressly stated.

PART 3 - ARGUMENT

i. Standard of review

35. Correctness is the appropriate standard because, a) the Lease is a standard-form contract: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37; b) there are extricable errors of law: *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 SCR 633, para 53.

36. In *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37, the Supreme Court of Canada said, at para 43:

> "[T]he interpretation of a standard form contract could very well be of "interest to judges and lawyers in the future". In other words, the interpretation itself has precedential value. The interpretation of a standard form contract can therefore fit under the definition of a "pure question of law", i.e., "questions about what the correct legal test is": *Sattva*, at para. 49; *Southam*, at para. 35. Establishing the proper interpretation of a standard form contract amounts to establishing the "correct legal test", as the interpretation may be applied in future cases involving identical or similarly worded provisions."

37. In error, the judge declined to consider if the Lease is a standard-form contract and excluded other 99-year leases made on standard forms identical to the Lease[42]. The appellant now seeks to introduce these leases as fresh evidence to support that assertion the Lease is standard-form. There is, however, other evidence that the appellant did not negotiate the Lease and so it was a take-it-or leave it contract.[43] Further, the Lease was made under the *Short Form of Leases Act*, R.S.B.C. 1960, c. 357, indicating it contains standard terms.

A. The judge re-wrote the Lease by implying a covenant contrary to several rules of contract interpretation

38. Since there is no express Lease term by which Westsea must replace old and worn windows, doors, and fans, the judge found that the Lease contains an implied covenant for Westsea to replace these items. She held that:

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[42] TEB p 15 line 21-28

[43] c.f. appellant's application for fresh evidence of identical leases

> "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 structural integrity of the Building envelope and, by extension, the Building structure... 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 the lease..."[44] [*underline added*]

39. First, the judge conflates minor wall *repairs* due to "reasonable wear and tear", which was not a phrase used by the parties in connection with walls, with *replacing* all the windows and doors due to wear and tear. More seriously, however, to confer Westsea a covenant to replace old and worn windows, the judge was required to consider the intentions of the actual parties to the Lease. The court said in *Moulton Contracting Ltd. v. British Columbia* 2015 BCCA 89, at paras 54 and 58:

> "Justice Iacobucci noted that while it was not clear from *Canadian Pacific Hotels Ltd.* whether the "business efficacy" and "officious bystander" tests were two separate tests, what was "important in both formulations is a focus on the intentions of the actual parties", and not "the intentions of reasonable parties... "Thus, the intention of parties is not what reasonable parties would intend, but rather what the actual parties in the actual circumstances of the contract intended." [*underlining in original*]

40. The judge erred in relying on what reasonable parties would have contemplated, not on what the original parties in fact contemplated. Given that the original common signatory to the Lease was deceased,[45] there was no extrinsic evidence of the actual intentions of the original parties to the Lease. However, by looking at the Lease itself, Article 4.03 is clear evidence on its face of an intention that costs to replace old and worn windows and doors are excepted from leaseholders' liability. Ignoring this entirely, the judge instead invented fictional "reasonable" parties to create a covenant favorable to Westsea.

ii. Rule against absurdity may be applied only when ambiguity exists

41. The rule against commercial absurdity may be applied only when an ambiguity in a contract exists. In *Maxam Opportunities Fund Limited Partnership v. 729171 Alberta Inc.*, 2015 BCSC 271, para 125; aff'd 2016 BCCA 53, the court said:

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[44] AR p 072 para 54 – 55, p 088 para 109 (e-f)

[45] TEB p 024 line 44; p 027 line 11-13; p 028 line 29-37

> "It is a principle that in construing the words of a commercial contract the exercise is to be conducted in accordance with business common sense so as to avoid any interpretation that would result in commercial absurdity. Resort to construing a term in a contract through the rule against absurdity occurs when an ambiguity exists. It is a high test. A seemingly unreasonable term is not determinative of absurdity, it must be beyond that." *[Emphasis added]*

42. Here the judge's finding was directly contrary to this requirement:

> "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."[46]

43. Clearly the judge interpreted the Lease in favor of Westsea. However, in finding that the Lease was unambiguous, she could not also apply the rule against absurdity since doing so was a contradiction in legal doctrine.

iii. To apply the rule against absurdity, the contract must be negotiated

44. In *Kentucky Fried Chicken v. Scott's Foods* (1998) 114 OAC 357, para 27, referring to the Supreme Court of Canada decision in *City of Toronto v. WH Hotel Ltd.* 1966 SCR 434, the Ontario Court of Appeal said:

> "Where, as here, the document to be construed is a negotiated commercial document, the court should avoid an interpretation that would result in a commercial absurdity". [*emphasis added*]

45. In this respect, the judge found, at para 155[47]:

> "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." [*underline added*]

46. Finding no evidence on this point, the judge had no basis for implying a term based on commercial efficacy. Further, she ignored the appellant's evidence that he did not negotiate the Lease, and excluded evidence of other 99-year leases with identical terms that show the Lease is a boiler-plate non-negotiated document.

iv. The judge erred in applying a practicality test

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[46] AR p 099 para 157; AR p 100 para 164(a)

[47] AR p 099, para 155

47. The judge found that it was commercially absurd if Westsea was not obliged to replace old and worn windows because: 1) Westsea was the only party with control over all the building windows, sliding doors, and fans; 2) Westsea could most efficiently and practically obtain Phase 2 permits and perform the work cost-effectively; 3) Westsea was best positioned to coordinate Phase 2 with contractors to ensure safety and functionality; it was too inefficient for lessees to undertake such work individually[48].

48. Further, the judge found that:

> "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."[49]

49. However, if Westsea elected not to replace windows at its own cost, Westsea was potentially liable under negligence law, other common law obligations to keep premises habitable, and *Occupiers Liability Act* [RSBC 1996] c. 337, s.3 and s.6[50], for failure to undertake repairs to ensure the building is safe. Thus, Westsea was already obliged to replace the old windows as a matter of statute and common law, not under the Lease. Under that law, Westsea has no inherent right to charge the costs of its legal obligation to replace the old windows back to leaseholders as Operating Expenses.

50. The appellant did not argue or plead this, but the judge is assumed to know these aspects of the law because judicial notice is implied. This is the effect of s. 34 of *Evidence Act*, RSBC 1996, c. 124[51] in which judicial notice of statutes must be taken. Also: *Halvorson v. British Columbia (Medical Services Commission)*, 2010 BCCA 267, para 36.

51. There is no test in law by which simply because it is more practical for one party to do something, that party has an obligation to do it. If there is such a test, this is not appropriate case to apply it for the reasons argued, and because Westsea was already obliged by law to replace failing old windows/doors. Thus, it is apparent the judge wrongly implied a covenant for Westsea to replace windows so Westsea can recover associated costs from lessees as Operating Expenses, not to fill a gap in the law that imposes an

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[48] AR p 086 - 087 para 106 -108

[49] AR p 087 para 108

[50] Appendix C

[51] Appendix B

obligation on Westsea to replace the windows. This rationale for re-writing the Lease contradicts law that it is not the role of the court to re-write an improvident contract, as the judge herself recognized[52].

v. The appellant did not negotiate the Lease

52. The judge acknowledged the appellant's evidence that he did not negotiate the Lease but she made no finding that the Lease was non-negotiated or standard-form. She referred to the appellant "approving the Lease as part of his purchase"[53]. She suggests this means he negotiated the Lease; instead she ought to have found the appellant's approval was without negotiation and is evidence of the "take-it" (as opposed to "leave-it") aspect of the transaction, which supports the assertion the Lease is standard-form.

53. Had the judge properly considered whether the Lease was negotiated, and had she properly concluded that in fact it was not negotiated, she could not have applied the rule against absurdity, and ought instead to have considered the doctrine of *contra proferentem* as the appellant argued[54].

54. In *Hillis Oil and Sales v. Wynn Canada*, [1986] 1 SCR 57, p. 68, the Supreme Court of Canada explained the *contra proferentem* rule:

> "The rule is, however, one of general application whenever, as in the case at bar, there is ambiguity in the meaning of a contract which one of the parties as the author of the document offers to the other, with no opportunity to modify its wording."

55. If the Lease is a standard-form contract (adhesion contract), courts are more willing to apply *contra proferentem*: *Zurich Life Insurance v. Davies* [1981] 2 SCR 670, at 674.

vi. An implied term must not conflict with an express term

56. As stated in *Zeitler v. Zeitler (Estate)*, 2010 BCCA 216, para 25:

> "Courts must be cautious not to rewrite contracts for the contracting parties. Interpretation of a contract, however, is not restricted to consideration of those terms that are explicit. The law recognizes that sometimes, to avoid an

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[52] AR p 066 para 30

[53] AR p 099 para 154

[54] TEB p 14 line 20-28 (ruling on admissibility)

> absurd result, the court will find an implied term in the contract if the implied term is not in conflict with an express term." [*underlining added*]

57. The judge found there was no conflict in terms[55] saying, "In my view, Article 5.03 does not destroy the obligations in Article 4.03"[56]. The judge considered the covenants on their face, but failed to consider the competing liabilities associated with the respective covenants, as pled by the appellant.[57] There is obvious conflict in the liabilities connected to the parties' respective covenants: 4.03 rests costs for replacing windows/doors with Westsea; an implied covenant for Westsea to replace old windows allows Westsea to reverse liability and recover costs from lessees under Article 7.01.

vii. The implied covenant destroys the purpose of the wear and tear exception

58. To imply a term there must be a degree of obviousness to it, and if there is evidence of a contrary intention by either party, an implied term may not be found: *MJB Enterprises v. Defence Construction (1951) Ltd.* [1999] 1 SCR 619, p 621. As argued, the wear and tear exception is clear evidence of a contrary intention. Indeed, by reversing liability through such an implied term, the judge eviscerates the centuries-old rationale for the wear and tear exception in leases. As stated by tenant's counsel in *Sellers v. Brown* [1766] Hailes 131, Scottish Court of Sessions, where the court found for the tenant:

> "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 no longer exist. By the lease the tenant is bound to uphold, and to restore, and deliver back; therefore, the same utensils which are upheld are to be delivered back. The tenant cannot be said to deliver back new utensils which he never received. Neither can he 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. [*italics in original, underlining added*]

59. The wear and tear exception is ancient and must have been intended by the drafter of the Lease. The rationale for the clause is that the lessor, as owner of the building, is

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[55] AR p 072 para 53

[56] AR p 073 para 58

[57] AR p 10 para 51, p 15 para 69

obliged to replace worn and torn things at his or her expense, since tenants pay rent merely to occupy the space. Here, Westsea admitted that the original lease assignees pre-paid their rent for the whole 99-year term, and that this was profitable for Westsea[58].

60. Lord Denning, in *Warren v. Keen* [1953] 2 All ER 1118 (CA) stated the rationale:

> "The tenant must take proper care of the place. He must, if he is going away for the winter, turn off the water and empty the boiler. He must clean the chimneys, when necessary, and also the windows. He must mend the electric light when it fuses. He must unstop the sink when it is blocked by his waste. In short, he must do the little jobs about the place which a reasonable tenant would do. In addition, he must, of course, not damage the house, wilfully or negligently; and he must see that his family and guests do not damage it; and if they do, he must repair it. But apart from such things, if the house falls into disrepair through fair wear and tear or lapse of time or for any reason not caused by him, then the tenant is not liable to repair it. [*underlining added*]

61. Key to Lord Denning's reasons are the exception to tenant's liability for "reasons not caused by him". Such other reasons might be fire or catastrophe. Indeed, "such other damage as insured by the lessor" is included in the Lease as an exception to lessees' liability along with wear and tear, and Article 5.08 of the Lease is a requirement for the landlord to obtain such insurance.

62. This general exclusion to tenant's liability was recognized by the Supreme Court of Canada in *Agnew-Surpass v. Cummer-Yonge*, [1976] 2 SCR 221, p. 247, as part of tenants' exception to pay for insured damage, referred to as an exculpatory clause. Similarly, in *United Motors Services, Inc. v. Hutson et al.*, [1937] SCR 294, the Supreme Court considered exceptions for wear and tear and insured damages.

63. In American law these clauses are well-recognized as exculpatory in nature[59]. In the Illinois Supreme Court case (a five-panel appeal), *Cerny-Pickas v. CR Jahn and Co* (1955) 131 NE 3d 100, the issue was whether such a clause excepted negligence for fire. The majority found the clause excepted negligence for fire, while the dissenting judges, in saying the clause did not except negligence, considered the clause exonerating lessees from liability for ordinary wear (p. 105):

> "The clause refers to loss by ordinary wear as well as to loss by fire. The lessee would not be liable for loss by "ordinary wear" even in the absence of the clause,

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[58] TEB p 010 line 6 -11, AR p 100 para 161

[59] *Effect of Exculpatory Clause in Lessees' Surrender Covenant* 1957 Duke LJ Vol 7,59

> and unless those words mean something more, the clause in this respect merely restates the common-law consequences. Yet it could hardly be maintained that "ordinary wear" was meant to include negligent damages to the premises. If the clause does no more than restate the common-law obligation as to loss by ordinary wear, such must be likewise the limit of its effect as to loss by fire. The two are treated exactly alike." [*underline added*]

64. While the issue in those cases was whether the exculpatory clause covered fire started by negligence, the Supreme Court of Canada, as well as American courts, recognize the rationale for the wear and tear exception is to relieve tenants from liability for damage not caused by them, just as lessees are not liable for insured losses.

65. Thus, it perverts the underlying rationale of the wear and tear exception to imply a covenant for Westsea to replace old and worn windows when Westsea can simply reverse its historical liability by charging it to lessees as an Operating Expense.

viii. The question of rent

66. Article 4.01 of the Lease requires lessees to pay rent.[60]

67. The Supreme Court of Canada defined rent in *Johnson v. British Canadian Ins. Co* [1932] SCR 680, at p 685:

> "Rent" in legal language may be defined as the compensation which a tenant of the land or other corporeal hereditament makes to the owner for the use thereof. It is frequently treated as profit arising out of the demised land.

68. Fundamental to the landlord-tenant relationship is that tenants pay rent to occupy and use space owned by the landlord. A direct result of this relationship is that lessors are liable to replace parts of their property damaged for reasons not caused by the tenants, as argued above.

69. The appellant sought to adduce evidence that rent was pre-paid by the original Lease assignees. The judge declined to consider evidence of pre-paid rent and its profitability, saying[61]:

> [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.

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[60] AB p 002; p 008

[61] AR p 100 para 161-162

> [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.

70. Pre-paid rent was raised in the appellant's pleadings[62], although he did not plead that Westsea should have invested it or set some aside to pay for future capital costs by prudent investments. Nevertheless, pre-paid rent is relevant to the relationship between Westsea and the lessees, a matter raised in the appellant's opening, cross-examination and in closing[63]. The judge erred in declining to consider pre-paid rent and its relevance.

72. Moreover, the appellant included uncontroverted evidence of original Lease assignments showing purchase prices[64]. Using these assignments, in connection with the building mortgage (a document excluded by the judge)[65], the court could easily have extrapolated approximate total earnings from original Lease sales in the 1970's.

73. The judge erred by excluding evidence that established the relationship between lessees as rent-paying tenants and the land-owning landlord,

B. The judge failed to find Article 4.03 specifically exonerates lessees from liability for costs to replace of old and worn windows and doors and that such costs are therefore excluded from Operating Expenses.

74. The appellant argued there is conflict or inconsistency between Articles 4.03 (the wear and tear exception to lessees' covenant to maintain windows and doors which shifts liability to Westsea for replacing them) and Article 5.03 (Westsea's covenant to repair

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[62] AR p 003 para 5, p 006 para 27

[63] TEB p 001 line 30-47, p 004 line 42-47, p 005 to 009, p 054 line 23-36, p 056.1 line 32 to p 056.2 line 47

[64] AB p 028 - 032

[65] TEB p 015 line 21 to p 016 line 37 (ruling on admissibility)

outer walls and the building), which, together with 7.01, might permit Westsea to recover windows/doors/fans replacement costs from lessees.

75. This inconsistency can be resolved by applying the rule stated by the Supreme Court of Canada in *BG Checo v. BC Hydro Power Authority* [1993] 1 SCR 12:

> A frequent result of this 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 term to not extend to the subject-matter of the specific term.

76. The judge declined to consider the effect of *BG Checo*, saying:

> "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"[66].

77. Again, if Westsea has an implied covenant to replace the old windows, Westsea can recover the costs from lessees under Article 7.01. This is plainly inconsistent with the wear and tear exception which puts liability to replace old windows and doors on Westsea.

78. This can be resolved by applying the reasoning in *BG Checo*: buildings and walls are more <u>general</u> than windows and doors. Thus, Westsea's covenant under Article 5.03 to maintain the building and outer walls does not extend to replacing old and worn windows since the Lease already specifically says under Article 4.03 that replacing old and worn windows and doors is Westsea's liability. Consequently, Article 7.01 Operating Expenses cannot include costs to replace old and worn windows.

79. This is like the decision in *Lavin Agency Ltd. v. Blackhall & Company Ltd.* [2004],185 OAC 48. The court applied the reasoning of *BG Checo*. In *Lavin*, the tenant argued it was entitled to deduct payments made directly to the hydro utility company from the tenant's rent since base rent included "utilities". However, the court found that *hydro* costs payable directly to the utility company were a <u>specific category</u> of "utilities", and were payable under a different term of the lease, so the tenant could not deduct them from rent:

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[66] AR p 072 para 53

> "Clause 3.01 provides that the Gross Rent payable to the landlord includes Base Rent as well as a list of expenses associated with the operation of the Building, namely, "all Taxes, Maintenance, Insurance, Utilities, and other costs". Clause 3.01 also provides that no other amount shall be payable and requires that the Landlord operate the Building in a first class manner. However, clause 4.00 is a more specific provision. It identifies a particular category of utilities, and specifies that the tenant should pay that expense *directly*, rather than treating it as an expense that is paid by the landlord and passed on to the tenant as part of Gross Rent. By interpreting clauses 3.01 and 4.00 in this way, it can be seen that clause 3.01 is a general provision dealing with expenses that are payable by the landlord, while clause 4.00 addresses a specific expense payable by the tenant directly. Moreover, the word "directly" has a distinct meaning and the apparent inconsistency between clauses 3.01 and 4.00 is resolved. [*italics in original, underlining added*]

80. These reasons apply in principle, although factually the inverse of those in *Lavin*. Here Article 4.03 refers to windows and doors which are separate from, or a specific category, of the broader description of building and walls. Lessees are specifically exonerated from liability for worn and torn windows. Lessees are thus excluded from any wider liability for windows and doors as Operating Expenses under Article 7.01.

81. The judge erred in finding that Westsea's covenant to maintain the building and outer walls merely qualifies the exception to the lessee's covenant to maintain windows and doors[67], and misinterpreted the reasons of the Privy Council in *Forbes v. Git* [1922] 1 AC 256. In *Forbes*, the Privy Council held there is an exception to the general rule that preceding terms prevail over later terms if those terms are in conflict. Thus, a later term can prevail if it modifies an earlier term by a *conditional circumstance*, such as "If *x* condition exists in relation to an earlier term, then *y* follows to modify the earlier term".

82. The result of such a modification is a *refinement* to the degree or magnitude of the obligation in question. Thus, in *Forbes*, a recoverable sum was higher due to the modification of the later term, but one term did not altogether destroy the effect of another term. So, the two clauses could be read together such that the liable party was required to pay $3,840.36 as opposed to $3000. In this respect, the Privy Council said:

> "The third clause does not destroy the first, but qualifies it. Its effect may be said to make the $3000 of the first clause an estimated sum whose accuracy is to be tested and controlled by taking the accounts for which provision is made in the third clause."

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[67] AR p 073 para 58

83. In contrast, an implied covenant by which Westsea can recover from lessees the cost of window replacement, does not refine the accuracy of some amount in issue; it entirely obliterates the effect of the wear and tear exception.

84. On this point, the judge referred to *Rado-Mat Holdings Co. v. Peter Inn Enterprises Ltd* (1985), 32 A.C.W.S. (2d) 269. In *Rado-Mat*, the *lessee* argued the landlord was obliged to repair the roof as part of a more general covenant to keep the premises in "a clean and wholesome condition", since the lessee was excepted from liability under the wear and tear exception. While the court found the landlord's covenants included repairing the roof when such a covenant was not otherwise expressly stated, the result was that the landlord was liable for the costs of repairing the roof. Thus, there was no conflict in the *respective liabilities* as between the lessee and the landlord, for otherwise surely the lessee would not have argued the landlord was obliged to replace the roof.

85. Here, the *opposite* result occurs: if Westsea is obliged to replace windows and doors as part of its covenant to repair the walls and the building, it can reverse its financial liability by charging the cost to the lessees as an Operating Expense. Again, this is an obvious conflict in Lease terms. *Rado-Mat* does not address this conflict.

ix. The judge ignored evidence that the windows are not structural

86. If the legal distinction between windows/doors and walls/building under *BG Checo* is not enough, the judge ought to have found the windows and doors are *factually* distinct from the walls and the building.

87. In finding the windows and walls are structurally integrated, the judge said[68]:

> [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.
>
> [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

[68] AR p 070 – 072, para 47 – 54

> 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.
>
> [54] ... 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. [*underline added*]

88. The judge appears to agree that if the evidence shows the windows and doors are structural in nature, that might tend to show the windows are part of the walls. However, she found that since wall repairs cannot be completed without replacing windows, this demonstrates an integrated connection between the windows and the walls. Due to this connection, she found that Westsea has a covenant to replace the windows in order to maintain the walls, thus recoverable from lessees as an Operating Expense.

89. This conclusion is flawed because it begins with a faulty premise. Having stated the test set by the court in *Holiday Fellowship* in which windows might be part of the walls if they are structural in nature, she ignored the following evidence from Mr. Hasham that the windows are not structural:

> Q. So the frame structure in the glass, they're not structural components of the building, are they?
> A. They're not structural – they're not carrying the weight of the building or they're not holding up the building. What they are providing is wind load essentially.
> ...
> Q. But the building itself as a whole has to be designed to bear the weight of the windows?
> A. Yes, the structure below that, yes.
> Q. And just to be clear, the windows themselves don't bear any of the weight of the building?
> A. Yeah, they don't support the building. They don't keep the building up in that sense[69].

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[69] TEB p 052 line 43 to p 053 line 24

90. Similarly, the judge ignored evidence from Mr. Caris who testified that windows are installed with a deflection header that allows the windows to move inside the wall space "so it's not a hard connection from top to bottom."[70]

91. In *Holiday Fellowship*, Lord Omerod agreed with Lords Romer and Evershed, saying (p. 437):

> "The issue is whether the windows in the walls of this house—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."

92. While the judge recognized that the question of whether windows are part of the walls is a matter of degree, in assessing that degree she failed to weigh evidence of various factors the appellant identified as aspects of windows that distinguish them from walls, against evidence she relied on to conclude that windows were part of the walls. The appellant's evidence included: Orchard House window glazing is transparent and admits light, walls of Orchard House do not; the windows do not comprise the entire face of the building; some (but not all) Orchard House windows are openable and allow ventilation; windows in general are poor insulators even compared to uninsulated walls; sliding glass doors permit access and egress to the balconies; Orchard House windows

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[70] TEB p 043 line 12 – 21; AB p 50-51

were inserted *into* a wall space, and are defined this way[71]; and critically that the Orchard House windows are not structural as confirmed by both Mr. Hasham and Mr. Caris.[72]

93. It is important that Mr. Gallant, an architect, said he was not qualified to opine on building structure[73]. Mr. Gallant provided a broad description of "building envelope" which, in turn, contains specific and distinct sub-components like walls and windows[74].

94. While Mr. Gallant opined that windows and walls both separate the interior from the exterior[75], windows are plainly defined on the Lease floor plan to be interior to the suites[76]. This is obvious for windows and sliding doors that face onto the balcony, which are included in the suite floor plan[77], although perhaps less obvious for windows which do not face the balcony but are inset by 2 to 2.5 inches from the walls[78].

95. Being thus defined in the Lease as part of the interior, it is meaningless to characterize windows as having some common feature with the exterior walls. The judge mentioned that interior space is defined by the floor plan[79], but failed to weigh it against Mr. Gallant's view that both windows and walls divide the interior from the exterior.

96. Similarly, the judge's finding that "The Lease does not distinguish between structural and non-structural components of the outer walls"[80] is meaningless. True, the Lease does not make this distinction, but it plainly distinguishes between windows and walls. Moreover, the judge's observation in this regard contradicts the test as set out in *Holiday Fellowship*, which identifies structure, or lack thereof, as part of the test to determine whether windows are separate from the walls.

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[71] See para 20 for TEB and AB references

[72] TEB p 052 line 13-47 to p 052 line 1-24 (Hasham); p 043, line 12-21 (Caris)

[73] AB p 062 para 17 (Pierre Gallant Report)

[74] AB p 057 (Pierre Gallant Report)

[75] AB p 058 para 2 (Pierre Gallant Report)

[76] AB p 019 (8th Floor Plan and Legend)

[77] AB p 019 (8th Floor Plan)

[78] TEB p 050 line 35-47 to p 050.1 line 1-7; AR p 068 para 39; AB p 049 (top-left image)

[79] AR p 067 para 38

[80] AR p 072 para 54

97. Further, Mr. Gallant's report says nothing about the distinctive specific features of windows that make them different from walls and the Orchard House building in general. Branches and leaves are both part of a tree, but they are quite different in their specific functions and character, and no one would reasonably call a leaf or a branch a tree, just as they would not call a window or a wall a building. Nor would they call a leaf a branch, just as they would not call a window a wall except in the narrow circumstances set out in *Holiday Fellowship*, which a proper weighing of all the evidence establishes do not apply.

98. Had the judge done this analysis and weighed the evidence properly on the test set in *Holiday Fellowship*, the correct and only reasonable conclusion that follows is that the Orchard House windows are distinct from the walls.

99. Thus, when evidence shows, as it does here, that the windows *by themselves* are old and worn, then the precise condition exists by which Westsea is liable under the wear and tear exception. The old and worn state of the windows is entirely independent of whether the windows need to be removed in order to fix damage to the walls.

100. Indeed, the evidence shows there was very little damage to the outer walls. From the evidence of Mr. Hasham, supported by the evidence of Mr. Caris, and shown in the work contract and final costs, only 50 linear feet of wall delamination repairs and some brick repointing was required, amounting to a small fraction of the total cost of the $5.5 million project[81]. Still this is beside the point: the windows were old and worn and, *as worn out old windows*, meet the criteria for the application of the wear and tear exception.

C. The judge erred by interpreting Operating Expenses to include capital costs

101. The judge said:

> [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.[82]

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[81] TEB p 045 line 8-34; p 051 line 24 – 36 (Hasham); p 037 line 1- 43 (Caris); AB p 046 (bid quote), p 053, p 055 (final costs)

[82] AB p 098, para 152

102. The appellant argued that replacing windows and doors and fans involved a capital cost[83], and argued that under the Lease, operating expenses do not include costs of a capital nature. Article 7 of the Lease is expressly headed "Operating Expenses".[84]

103. The appellant pled that categories of Operating Expenses under Article 7.01 include "fixed" and "variable" costs, but do not include "replacement reserve" or "capital costs"[85]. The judge excluded the appellant's appraisal authority that defined fixed and variable expenses[86], a decision not in issue here.

104. Evidence on the record shows that Westsea's consulting engineering firm, RJC viewed Phase 2 as a capital cost. RJC expressed this view formally in reports of 2013 and in 2016.[87]

105. In *Galt v. Frank Waterhouse & Co. of Canada Ltd.* [1944] 2 DLR 158 (BCCA), at 165-166 this court held that a contractual designation "operating expense" on its face does not include costs of a capital nature, 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. (underline added)

106. This was similarly expressed by the Ontario Court of Appeal in *Parsons Precast v. Sbrissa* 2013 ONCA 558:

> "We agree with the application judge that there is a line between repair and maintenance on the one hand and capital expenses on the other hand…"

107. Thus, contrary to the judge's finding, *Galt* tells us that since the Lease contains a master provision for Operating Expenses, which does not expressly include costs to replace all the windows and doors in the building (costs of a capital nature), then such costs are not intended to be Operating Expenses.

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[83] AR p 96-98

[84] AB p 002; AB p 12

[85] AR p 18-20; AR p 092 - 094 para 126 - 135

[86] TEB p 063 line 15 to p 064 line 17 (ruling on admissibility)

[87] AB p 037.1 para 1; AB p 37.4 para 2

108. Further, since costs to replace of windows and doors are expressly excluded from lessees' liability under the wear and tear exception, this is evidence on the face of the Lease that replacement costs are not intended to comprise Operating Expenses. This is reflected by the Supreme Court of Canada in *MNR v. Haddon Realty* [1961] 1 SCR 109, p 111:

> "Expenditures to replace assets which have become worn out or obsolete are something quite different from those ordinary annual expenditures for repairs which fall naturally into the category of income disbursements".

109. In that case, the court found that costs to replace worn old refrigerators, stoves and blinds in an apartment were capital outlays. It is clear, therefore, that there is a fundamental connection between the wear and tear exception and an intention for Operating Expenses under the Lease to exclude costs to replace old and worn items.

110. If this is not obvious, then there is ambiguity between the express wear and tear exception and the unexpressed omission of capital costs under Article 7.01. This is the sort of ambiguity that is resolved by *contra proferentem*, as found by Supreme Court of Canada in *Hillis Oil & Sales v. Wynn's Canada* [1986] 1 SCR 57, p. 68. The court explained the issue, not unlike the interpretation question here, at p. 67:

> The question is whether, having regard to their inclusion of the above words in clause 20 and their omission in clause 23, the words "at any time" in the latter clause nevertheless make it clear and unequivocal that the agreement may be terminated without cause with immediate effect. In my respectful opinion they do not.

111. Further, absent expressed words to the contrary, the ordinary meaning of terms must be adopted: *Maxam Opportunities Fund v. Greenscape Capital Group Inc.*, 2013 BCCA 460, para 49. In this case the ordinary meaning of Operating Expenses is that they do not include capital costs, as this court found in *Galt.*

112. The judge further erred in suggesting that costs to replace windows and doors were *not* of a capital nature because the windows may be replaced again before the end of the Lease[88].

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[88] AR p 097 para 148

113. While the judge expressly declined to resolve whether the cost was of a capital nature, she went on to suggest that the evidence showed the cost was *not* of a capital nature or of "such a substantial nature", as the appellant argued[89], so as to fall within a category of cost not contemplated by the Lease, saying:

> "[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."[90] [*underlining added*]

114. It is well established that major renovations can extend a building's life by "resetting the clock", and that a building's life can be repeatedly extended. This principle was discussed in *Administrative Tribunal of Quebec v Montreal (City)*, 2011 CanLII 48495 (QC TAQ), para 221, in which the Tribunal quoted in English from the text, *The Appraisal of Real Estate*, Twelfth Edition, p. 386:

> "Renovation and modernization can effectively extend a building's life expectancy by "resetting the clock". For example, consider a building with a 40 year economic life expectancy. If at the 10-year mark the property was substantially modernized, bringing the physical components up to current market standards for new construction, then the effective age of the property would be reset to zero and the remaining economic life expectancy (before the renovation) of 30 years would be reset to the original 40 years-or to some other figure, depending on the extent of modification to the property. Many historic properties have an economic life equal to or greater than the physical life of the building materials because of continued renovation and restoration."

115. Following this quotation, the Quebec Tribunal made a finding of fact, at para 222:

> [222] Il ne faut pas confondre la vie physique du bâtiment qui east donc largement supérieure à sa vie économique et IL faut prendre en compte qu'un bâtiment peut avoir pluses vies économiques tout au long de sa vie physique, enframement grâce à des rénovations ou modernisations majeures.

116. Using www.Reverso.net translation service (October 8, 2019), this translates to:

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[89] TEB p 068 line 16 – 39

[90] AR p 097 para 148

> "We must not confuse the physical life of the building, which is thus vastly superior to its economic life, and we must take into account that a building can have several economic lives throughout its physical life, usually through major renovations or retrofits"[91].

117. Thus, it is apparent that the Phase 2 project re-sets the economic life of the building with a corresponding benefit to Westsea after the end of the 99-year term. The enduring benefit to Westsea of the new windows presently installed is thus a marketable building well beyond the end of its current 99-year term. This puts the cost to replace windows and doors into a very different category from the "common, repetitive and highly predictable" expenses enumerated as Operating Expenses.

118. It was thus an error for the judge to infer that simply because the windows and doors need to be replaced again before the end of the Lease term, Phase 2 does not confer an enduring benefit to Westsea and is not a capital cost.

x. Operating expenses are common, repetitive or highly predictable expenses

119. The appellant argued that Operating Expenses contain categories of "common, repetitive or highly predictable" expenses, as the Quebec Court of Appeal referred to in *Skyline Holdings v. Scarves and Allied Arts* [2000] QJ No.2786, para 16[92]. The judge considered the point but after she already decided *ejusdem generis* did not apply[93], and thus erred by not considering "common, repetitive or highly predictable" expenses under *ejusdem generis* since it was clearly part of the appellant's argument[94].

120. Article 5.03 and Article 7.01 present two lists referencing costs connected with Westsea's covenants. The first list in Article 5 contains:

> "To provide heat...to keep in good repair and condition the outer walls, foundations, roofs... all of the common areas and the plumbing, sewage and electrical systems... to keep the entrance halls... and like areas... clean...lighted ...heated and elevators properly lighted and in good working order...provide or

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[91] Other online services give substantially the same translation: https://www.google.com; Oct 8, 2019; https://www.deepl.com, Oct 8, 2019

[92] TEB p 057 line 43 to p 058 line 31; p 060 line 3 to p 061 line 47

[93] AR p 095 para 139 p 096 para 145

[94] TEB p 057 line 43 to p 058 line 31; p 060 line 3 to p 061 line 47

> engage services of staff... pay taxes...to provide passenger elevator service...to keep the Building insured...to maintain a policy...of general public liability insurance... to provide cable-vision... intercommunication service...(the "**First List**')

121. The second list in Article 7.01 contains:

> "maintenance, operation and repair of the Building"..."heating the common areas"... "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"..."legal and accounting charges".. (the "**Second List**")

122. The Second List is followed by the catch-all "and all other expenses paid or payable by the Lessor in connection with the Building, the common property therein or the Lands". Preceding the Second List but following the First List is the phrase "includes without restricting the generality of the foregoing...in connection with the maintenance, operation and repair of the Building" [*underling added*].

123. The appellant argued that *ejusdem generis* limits "all other expenses" to the categories of expenses in the Second List. The Supreme Court of Canada in *National Bank of Greece (Canada) v. Katsikonouris* [1990] 2 SCR 1029, p.1040 explained the principle:

> " ...when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general words to the genus of the narrow enumeration that precedes it. But it would be illogical to proceed in the same manner when a general term precedes an enumeration of specific examples." [*underlining added*]

124. The illogical element to which the Supreme Court refers arises when the general term precedes the specific list, but the Supreme Court does not say that where there are two general phrases, between which is a specific list, the second general phrase and its limitation according to *ejusdem generis* is nullified by the generality of the first. Thus, in this case, *ejusdem generis* still applies to the Second List that precedes the catch-all.

125. A further rule referred to by the judge,[95] was stated by the Supreme Court in *National Bank*, p. 1041, para b:

> "Moreover, in this instance, the very language used to introduce the list of omissions and mis-representations confirms that it would be erroneous to view them as exhaustive. ...the term "including" precedes the list...these words are terms of extension, designed to enlarge the meaning of preceding words, and not to limit them."

126. However, in the Lease, the term "includes but without restricting the generality of the foregoing" is followed by "in connection with the maintenance, operation and repair of the Building" and a comma after which the Second List begins "expenses in heating...". The phrase "without restricting the generality of the foregoing" is thus limited immediately thereafter by costs in connection with "maintenance, operation and repair of the Building".

127. Thus, a proper interpretation recognizes that: a) the First List remains restricted to costs connected to "maintenance, operation and repair of the Building" while the Second List is limited to "common, repetitive or highly predictable" expenses, categories of costs which the judge did not consider in the context of *ejusdem generis*.

128. In relation to the First List, the key is whether "maintenance, operation and repair" of the Building includes the replacement of all the windows in Orchard House, an event which the evidence shows occurs perhaps twice within the entire 99-year life of the Lease as the judge recognized[96].

129. In *Parsons Precast Inc. v. Sbrissa*, 2012 ONSC 6098 (aff'd 2013 ONCA 558), the court addressed the identical question, saying:

> "[17] It seems to me that the issue comes down to whether the total repaving of the parking lot can fairly be found to constitute "maintenance" or "repair (reasonable wear and tear...excepted)".
> [18] Undoubtedly in arrangements of this type there will be a myriad of items which must be replaced in the normal course of events and yet which replacement can reasonably classified as an item of maintenance – for example a light bulb, or an air filter in a heating or air conditioning system. It seems to me that other items, however, are so substantial in their nature and in their expense that they cannot reasonably be considered as an item of repair or maintenance.
> ...

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[95] AR p 093 para 129

[96] AR p 090 para 117

> [22] Nor in my opinion does the total replacement of this pavement reasonably fall within the term "maintenance"... This parking lot pavement wasn't "kept up". It was totally replaced. [*underline added*]

130. In *Skyline Holdings v. Scarves and Allied Arts* [2000] QJ No.2786, para 23-26, the Quebec Court of Appeal made a similar finding where a roof was completely replaced by the landlord and charged in error to the tenant as an operating expense. The court said:

> "In this case, the expense confers a lasting benefit and it is not repetitive, at least it should not happen again for about twenty years" [*Google translation*]

131. This is consistent with the decision of the Supreme Court of Canada in *MNR v. Haddon* [1961] 1 SCR 109 in which costs to replace old and obsolete items are capital in nature. Thus, the law in Canada is that a project to completely replace a major property component comprises a very different category of cost from maintenance and repair.

132. The judge relied upon *JEKE Enterprises v. Northmont Properties Ltd.* 2017 BCCA 38, observing the lease costs listed in *JEKE* "were so varied no category was created to limit "operating costs to expenses of a particular kind"[97]. [*Note the judge erroneously lists "management fees" as part of the Lease*[98]*, but this is not in the Lease. Similarly, she misquotes Operating expenses to include "any legal..." which should read "and legal..."*[99]]

133. Key to this court's finding in *JEKE*, not considered by the judge, was that the *JEKE* lease expressly stated, "OPERATING COSTS AND RESERVE FOR REFURBISHING" [*caps in original, underline added*] as the first words of the clause followed by "and replacement costs incurred". The court then identified within the list in issue "repairs to the interior and exterior" (par 60). Of course no limited categories could be found! In the Lease here, such expansive terms as "reserve for refurbishing; replacement costs; repairs to interior and exterior" simply do not appear. The exercise is substantially different.

134. The judge then found, in error, that *ejusdem generis* and *noscitur a sociis* are "ousted by the language of the Lease" and refers to the qualifier "without limiting the

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[97] AR p. 094 para 133

[98] AR p. 094 para 133

[99] AR p 065 para 25; p 094 para 133; AB p 002, p 012 (Lease)

generality of the foregoing"[100], referring to *JEKE*. Again, in *JEKE* the foregoing included "reserve for refurbishing" and "replacement costs", which do not appear in the Lease.

135. Further, given that the judicial exercise was focussed on Lease interpretation and not evidence, the judge failed to consider other clauses in the Lease, including Article 3.01 (Base Year), and 7.02 (estimate of operating expenses based on prior years experience)[101], which show an intention to limit Operating Expenses to common, repetitive or highly predictable expenses; not large-scale, unusual capital costs. The Base Year rent estimated total month-to-month costs in 1974, while estimates based on prior years are rooted in the original Base Rent and are expected to increase yearly according to inflation without massive spikes in costs from one year to the next, as occurred here.

Summary

134. The judge made several errors of law, misapprehended critical evidence, improperly interpreted the Lease, and her decision ought to be overturned.

PART 4 — NATURE OF ORDER SOUGHT

135. An order that the judge's decision be quashed; that replacement costs for windows, doors and fans, and/or capital expenses, are not chargeable to the lessees; and an order for the costs of this appeal and trial proceedings. All of which is respectfully submitted.

November 22, 2019

Hugh Trenchard

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[100] AR p 093 para 129-130

[101] AB p 001-002; AB p 007, 013

APPENDIX A

CHAPTER 357

Short Form of Leases Act

Title.

1. This Act may be cited as the *Short Form of Leases Act*. R.S. 1948, c. 307, s. 1.

Interpretation.

2. In this Act, unless the context otherwise requires,

"lands" extends to all tenements and hereditaments of freehold tenure, or any undivided part or share therein respectively;

"parties" includes any body politic, or corporate, or collegiate, as well as an individual. R.S. 1948, c. 307, s. 2.

Effect of lease made according to First Sch. and Column I of Second Sch.

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 of 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 used in such lease; but it is not necessary in any such lease to insert any such number. R.S. 1948, c. 307, s. 3.

SECOND SCHEDULE

(Sections 3, 7)

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 said 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.

APPENDIX B

Evidence Act [RSBC 1996], Chapter 124

Judicial notice of statutes

24 (1)In this section, **"Imperial Parliament"** means the Parliament of the United Kingdom of Great Britain and Northern Ireland, or any former kingdom that included England, whether known as the United Kingdom of Great Britain and Ireland or otherwise.

(2) Judicial notice must be taken of all of the following:

(a)Acts of the Imperial Parliament;

(b)Acts of the Parliament of Canada;

(c)ordinances made by the Governor in Council of Canada;

(d)ordinances made by the Governor in Council, Lieutenant Governor in Council or Commissioner in Council of any province, colony or territory which, or some portion of which, forms part of Canada, and all Acts and ordinances of the Legislature of, or other legislative body or authority competent to make laws for, the province, colony or territory;

(e)Acts and ordinances of the Legislature of, or other legislative body or authority competent to make laws for, any dominion, empire, commonwealth, state, province, colony, territory, possession or protectorate of Her Majesty;

(f)regulations published in the Gazette.

(3)This section applies to

(a)all dominions, empires, commonwealths, states, provinces, colonies, territories, possessions and protectorates now existing and those constituted at some time in the future, and

(b)ordinances and Acts that are made or enacted

(i)now,

(ii)at any time before now, or

(iii)any time after now.

APPENDIX C

Occupiers Liability Act [RSBC 1996] c. 337

"occupier" means a person who

(a)is in physical possession of premises, or
(b)has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,

and, for this Act, there may be more than one occupier of the same premises;

"premises" includes

(a)land and structures or either of them, excepting portable structures and equipment other than those described in paragraph (c),

"tenancy" includes a statutory tenancy, an implied tenancy and any contract conferring the right of occupation, and "landlord" must be construed accordingly.

Occupiers' duty of care

3 (1)An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.

(2) The duty of care referred to in subsection (1) applies in relation to the

(a)condition of the premises,
(b)activities on the premises, or
(c)conduct of third parties on the premises.

Tenancy relationship

6 (1)If premises are occupied or used under a tenancy under which a landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show toward any person who, or whose property, may be on the premises the same care in respect of risks arising from failure on the landlord's part in carrying out the landlord's responsibility, as is required by this Act to be shown by an occupier of premises toward persons entering on or using the premises.

(2) If premises are occupied under a subtenancy, subsection (1) applies to a landlord who is responsible for the maintenance or repair of the premises comprised in the subtenancy.

(3) For the purposes of this section

(a)a landlord is not in default of the landlord's duty under subsection (1) unless the default would be actionable at the suit of the occupier,

(b)nothing relieves a landlord of a duty the landlord may have apart from this section, and

(c)obligations imposed by an enactment in respect of a tenancy are deemed to be imposed by the tenancy.

(4) This section applies to all tenancies.