Form 6 (Rules 9 (3) (a) (i), 33 (1) (a) and 36 (2) (a) (i))

Court of Appeal File No. 46417

COURT OF APPEAL

BETWEEN:

Hugh Trenchard

Appellant
(Plaintiff)

AND:

Westsea Construction Ltd.

Respondent
(Defendant)

NOTICE OF MOTION

TO: Westsea Construction Ltd.

TAKE NOTICE THAT AN APPLICATION will be made by the Appellant (Plaintiff), Hugh Trenchard, to the presiding justices at 800 Hornby Street, Vancouver, British Columbia, at 9:30 a.m. on May 5, 2020 for an order that

a) further evidence in respect of the matter being appealed from, be made available for the Court of Appeal, pursuant to Section 31 of the *Court of Appeal Rules* and Section 9(1) of the *Court of Appeal Act*

AND TAKE NOTICE THAT in support of the application will be read the affidavit of Hugh Trenchard sworn on March 27, 2020.

The applicant anticipates this application will be contested.

Dated: March 30, 2020 Signed………………………………

Hugh Trenchard

This application will take no more than 30 minutes to be heard.

ARGUMENT

Application for further evidence

1. This application concerns:

    a) the Appellant's appeal of the trial judge's decision in *Trenchard v. Westsea Construction Ltd.*, Supreme Court action 16-3355, Victoria Registry, made October 1, 2019;

    b) the Appellant's appeal of the trial judge's interim decision made the second day of trial, June 4, 2019, to exclude evidence which the Appellant now seeks to introduce as fresh evidence.

Appellant's Transcript Excerpt Book ("**TEB**") p. 013 (line 8) to p. 015 (line 28)

Appellant's Amended Factum, p.7 ("Error A"); para 27 - 29, 40 - 41

The leases before the trial judge

2. In addition to the Orchard House lease in issue, the Appellant sought to introduce nine 99-year residential leases from Vancouver and Victoria as evidence that the Orchard House lease is a standard-form contract.

TEB p.012, line 23 – 25 ("non-Orchard House leases referenced at tabs 25 to 34"; not including the Lancaster lease, which was introduced for a different purpose: **TEB** p. 014, line 31-34)

3. Following the judge's decision to exclude these leases from the evidence, all these leases were removed from the court record and shredded.

TEB p. 017, line 41-45

The replicated lease

4. Since the copy quality of the lease documents are poor, the Appellant has included a typed copy of the Schedule 2 (described subsequently) Orchard House Lease, which includes all the Rules and Regulations.

Affidavit #1 Hugh Trenchard sworn March 27, 2020 ("**Affidavit #1**") **Exhibit A**

<u>The excluded leases cannot be reviewed unless they are introduced as fresh evidence</u>

5. Since the leases in issue were removed from the court record, the Appellant cannot include them in the Appeal Book for the purpose of appellate review. The only possible way for the Court of Appeal to review these leases is if they are introduced as fresh evidence.

6. Two of the leases, both in Victoria, contained a common additional provision that was not included in the other leases and the Appellant is not seeking to introduce those two leases into evidence at this time.

7. Instead, the Appellant now applies to introduce seven identical leases that he sought to introduce at trial, plus two additional ones he did not seek to introduce at trial.

Affidavit #1 **Exhibits C – K**

8. In Affidavit #1, the Appellant identifies the following differences in the nine leases at **Exhibits C – K** and the Orchard House Head Lease (10 leases in total):

- the parties
- the property descriptions and suite proportions
- the base year Operating expense amount
- the dates of registration and land registry office.

Affidavit #1 **para 11**

9. The Appellant submits that differences in specific parties and properties like this are not relevant to the issue of whether the lease is a standard-form contract. Such differences are no different than, for example, consumer tickets for a stadium sports game or concert in which the terms of numerous tickets are identical, but each ticket is sold to a specific purchaser and is assigned to a specific seat in the stadium; and depending on location in the stadium, the tickets may be differently priced. Such tickets are obviously standard-form contracts.

Two versions of the Orchard House lease

10. There are two different but nearly identical versions of the Orchard House lease. One is of the original Orchard House head lease that was registered at the Victoria Land Registry Office ("**Head Lease**"). The second is "Schedule 2" as it was attached to the Appellant's lease re-assignment document, furnished to him when he acquired his leasehold interest in 2011. The Appellant has itemized the differences in Affidavit #1.

Affidavit #1 **paras 3, 4; 9**

11. The Appellant points out a discrepancy in his Affidavit #1 sworn March 29, 2020. At paragraphs 3 and 4 he refers to the "Appeal Book" and the page location of the two lease versions in issue. The reference should be to his Amended Appeal Book, filed January 27, 2020:

- the Orchard House Head Lease, found at **p. 006 – 18.11**
- the Schedule 2 copy of the Orchard House lease, found at **p. 001 – 005.6**, which omits paragraphs 25 – 36 of the Rules and Regulations.

Other miniscule, insignificant differences among the leases

12. In Affidavit #1, the Appellant observes that all 10 leases (the nine sought to be introduced as fresh evidence plus the Orchard House Head Lease), are identical in content including the page and paragraph numbers, except for two differences:

- **Ex. E** (the Heritage) and the Orchard House Head Lease, Article 1.01, line 13, contain the word "egress"; whereas all the others contain the word "agress"
- Article heading "13 – Binding on Heirs, Etc." is omitted (heading only, not content) from the Westsea Towers (**Ex. C**), Royal Richmond (**Ex. J**), Imperial Richmond (**Ex. K**) leases; it is also omitted in the Orchard House Head Lease.

Affidavit #1 **para 12**

13. As between the Orchard House Head Lease and the Schedule 2 version of the Orchard House lease, there are other miniscule differences.

Affidavit #1 **para 9**

14. Aside from the miniscule discrepancies between the Orchard House Head Lease and the 99-year leases included as **Exhibits C – K** in Affidavit #1, all these leases are identical and constitute evidence that the Orchard House lease is a boiler-plate standard-form contract.

15. Further indications that these leases are identical and drafted by the same author include the common misspelling of "gramatical" (single "m") in Article 13.01, and the stamp on the front page of each of the leases indicating their endorsement by Buell, Ellis & Co., probably the law firm which drafted this standard-form document for distribution and use by prospective 99-year residential lessors.

Affidavit #1 **para 13**

16. In addition, the Orchard House lease was prepared unilaterally by the Respondent lessor without any negotiations as to the terms of the lease between the Appellant and Respondent.

TEB p. 018 line 2 – 13; p. 20 line 14 – 35

17. Moreover, there was a single common signatory to the lease as landlord and lessee, George Mulek.

TEB p. 024 line 11 to p. 026 line 28;
Appellant's Amended Appeal Book, p. 018 (lease signatory block)

Test for further evidence

18. Four factors for the admission of further evidence are set in *R. v. Palmer*:

- The evidence was not discoverable by reasonable diligence before the end of the trial;
- The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue at trial;
- The evidence must be credible in the sense that it is reasonably capable of belief;
- The evidence must be conclusive in the sense that it could reasonably be expected to have affected the result.

R. v. Palmer [1980] 1 SCR 759 (headnote); Appellant's Book of Authorities (**BOA**) **Tab 33**

19. The Appellant submits that the first criterion does not apply to the first seven leases (Affidavit #1, **Exhibits C – I**) because Mr. Trenchard specifically sought to adduce these leases in evidence at trial, and they were excluded by the court.

20. Regarding the other two leases (**Affidavit #1, Exhibits J and K**), because they constitute evidence of the same character and purpose as the other seven leases, all of which comprise a complete evidentiary package, it is reasonable to conclude the trial judge would also have excluded these.

21. The evidence is relevant because it bears upon a decisive issue at trial: whether the Orchard House lease is a standard-form contract. The evidence is credible because the leases are copies of certified copies from the Victoria Land Title Office. The evidence could reasonably be expected to have affected the result since, if the Orchard House lease is a standard-form contract, this permits the application of the doctrine of *contra proferentem* where lease terms are ambiguous.

> *Hillis Oil & Sales v. Wynn's Canada* [1986] 1 SCR 57, p 67-68 (**BOA Tab 15**)

22. When a contract is standard form (adhesion contract), courts are more willing to apply *contra proferentem*.

> *Zurich Life Insurance v. Davies* [1981] 2 SCR 670, at 67; (**BOA Tab 50**)
>
> *Ledcor v. Northbridge Indemnity Insurance Co*. 2016 SCC 37, p. 66, para 96; (**BOA Tab 24**)

<u>The evidence assists in determining the standard of review on appeal</u>

23. Entirely independent of the *Palmer* criteria, the evidence is critical because it informs the appropriate standard of review on this appeal. The issue is a threshold question of law: is the Orchard House lease a standard-form contract for which correctness is the appropriate standard of review?

24. In *Ledcor v. Northbridge*, the Supreme Court of Canada said that correctness is the standard of review when a disputed contract is standard-form. This implies that the Court of Appeal, in order to establish the applicable standard of review, must determine whether in fact the lease in question is a standard-form contract.

> *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., 2016 SCC 37, para 4, 24 (**BOA Tab 24**)

25. A foundational question for determining the standard of review for a question of contractual interpretation is whether the contract is in fact a standard-form contract, as contemplated in *Ledcor*.

> *Corydon Village Mall Ltd v TEL Management Inc*, 2017 MBCA 8, para 37; (**BOA Tab 10)**

26. *Corydon* involved a commercial shopping-mall lease, which the Manitoba Court of Appeal found not to be a standard-form contract. However, in reviewing the criteria by which to determine of the lease was standard-from, the court observed that the permitted use was in fact negotiated at the offer to lease stage, and the lessee received independent legal advice from her lawyer on at least one version of the offer to lease. Neither of these occurred in the case at bar.

> **TEB** p. 018 line 2 – 13; p. 20 line 14 – 35

27. In *Corydon*, the Court of Appeal also observed that the lessee reviewed the lease with her real estate agent before signing, but this by itself should not be determinative of a finding that is a lease is a standard-form contract.

28. Critically, in *Corydon*, the Court of Appeal noted there was no evidence that the lease was widely used: paras 43-45 (**BOA Tab 10**).

29. This criterion underscores the necessity and critical importance of the nine leases the Appellant seeks to introduce as fresh evidence.

30. It is vital to recognize that the nine leases at Exhibits C – K represent a total of 840 distinct suites and each suite represents a separate lease under Article 10 of each head lease:

> "**ARTICLE 10 – SEPARATE LEASES**
>
> 10.01 It is hereby declared and agreed between the parties hereto that each of the Suites shall be held during the Term separately from and independently of each of the other Suites and shall not be affected by the breach of any of the covenants, stipulations or conditions herein contained in respect of any others or other of the Suites and accordingly each suite shall be held during the Term with the benefit of all rights and privileges appurtenant thereto as if each suite had been demised to separate lessees by separate leases in the form of this Lease." [underline added]

> Affidavit # 1 **para 10**; **Exhibits** p. 11, 49-50, 77-78, 99-100, 127-128, 151-152, 175-176, 197-198, 219-220, 243-244

31. Orchard House contains 211 suites.

Respondent's Appeal Book, p. 2 (Agreed Facts, para 4)

32. Thus, the total number of leases among these ten leases is 1051 separate but identical leases. Consequently, key evidence is before this court that the Orchard House lease is in fact widely used, as required in *Corydon*.

33. Where contract terms are "take it or leave it", non-negotiated and widely used, they may represent standard-form terms. The key is whether an interpretation of the contract in issue may have precedential value and general importance in a way that other contracts do not.

True Construction Ltd. v. Kamloops, 2016 BCCA 173, para 34 (BOA **Tab 45)**
Ledcor Const. v. Northbridge [2016] 2 SCR 23, par 4, 24, 28, 31 (BOA **Tab 24)**

34. In the case at bar, the judge acknowledged that the Appellant said he did not negotiate the lease, but then she dismissed this factor by reference to the Appellant "approving the Lease as part of his purchase". Instead, the judge ought to have recognized the Appellant's approval was evidence of the "take-it" (as opposed to "leave-it") aspect of the transaction and she ought to have found that he did not negotiate the lease.

Appeal Record, p 099 para 154;
c.f. **Appellants Amended Factum**, para 40-41

35. Regardless, the Orchard House lease interpretation issues clearly have broad precedential value and general importance.

The contract applies to multiple parties with the same meaning for all

36. A standard-form contract is not confined to mass consumer contracts. In *Styles v. Investment Management Corporation*, the Alberta Court of Appeal found that a compensation arrangement used with multiple employees and not negotiated, was a standard-form contract. The key was that the contract had the same meaning for all employees, each of whom did not separately negotiate the contract.

Styles v Alberta Investment Management Corporation, 2017 ABCA 1, para 20 (**BOA Tab 43)**

Is the Orchard House lease a non-negotiated "take-it-or-leave-it" standard-form contract?

37. In addition to other leases identical to the Orchard House lease – evidence that the Orchard House lease is a boiler-plate form on which landlords merely inserted details about the parties and the buildings – the Appellant testified at trial that he did not negotiate any part of the Orchard House lease with the Respondent. Indeed, he testified that he specifically wanted to re-negotiate a lease term that restricted the use of elevators to transport bicycles, but understood that he could not negotiate such a term.

    TEB p.18 line 1-13; p. 20 line 14-35

38. Further, the presence of a single common signatory as landlord and lessee is *prima facie* evidence that no negotiations occurred between the original lessee and lessor, and that boiler-plate terms to the lease were simply adopted by the common signatory, George Mulek.

    TEB p. 24 line 20 to p.28 line 28

39. Moreover, the Orchard House lease was drafted pursuant to the *Short Form of Leases Act*. The *Short Form of Leases Act* lists standard extensions to terms written in a short-form lease, as recognized by the Supreme Court of Canada in *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd*. Since the Orchard House lease a short-form of a longer-form lease with standard terms that were not negotiated, it is thus a "standard-form" contract.

    Short Form of Leases Act, R.S.B.C. 1960, c. 357; (**BOA Tab 3)**

    Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd., [1971] SCR 562, at 569; (**BOA Tab 17)**

40. Further, each of the ten head leases (and therefore the 1000+ separate leases) appears to have been prepared by the same law firm, Buell, Ellis & Co. This is apparent from the stamp on the first page of each lease.

    Appellant's Amended Appeal Book, p. 006; Affidavit # 1 Exhibits p. 39, 67, 89, 117, 141, 165, 187, 209, 233

41. That the same firm prepared these identical leases is evidence of their standard-form nature. This is akin to leases being prepared on "stationers' forms", which the B.C. Law Institute observed to be typical of leases prepared pursuant to the *Short Form of Leases Act*.

    Report on Proposals for a New Commercial Tenancy Act, BCLI No 55, Oct 2009 (**BOA Tab 36**, p. 17)

42. The underlying precaution regarding standard-form contracts is that since such contracts are not negotiated, they are susceptible to containing terms favorable to the drafter without complete knowledge and understanding of the non-drafting party and that, as such, real freedom of contract is suspect.

Admission of the fresh evidence is in the interests of justice

43. Further, the appellant respectfully submits that this is a unique case in which it is in the interests of justice to admit the fresh evidence.

R. v. Palmer [1980] 1 SCR 759 (headnote)

44. The *Palmer* criteria typically involve evidence that concerns questions of fact, not legal questions. While the Appellant submits the fresh evidence may have altered the outcome of the trial in respect of the potential application of *contra proferentem*, because the evidence directly concerns a strictly legal question that has wide precedential value for over 1000 leaseholders, namely the standard of review in this case, it is in the broad interests of justice to consider this evidence in circumstances that also do not directly engage the *Palmer* criteria.

Golder Associates Ltd. v. North Coast Wind Energy Corp., 2010 BCCA 263 (**not in BOA**)

All of which is respectfully submitted

Dated this 30th day of March 2020

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Hugh Trenchard, Applicant (Appellant)