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 REPLY

Hugh Trenchard, Appellant

APPEARING ON HIS OWN BEHALF

805 – 647 Michigan Street
Victoria, B.C. V8V 1S9
Phone: (250) 472-0718

Westsea Construction Ltd., Respondent

MARK C. STACEY
COUNSEL FOR THE RESPONDENT

SINGLETON REYNOLDS
1200 925 WEST GEORGIA STREET
VANCOUVER BC V8C 3L2
Phone: (604) 673-7516

INDEX

---

1. References in this Reply are to the Respondent's Factum filed February 12, 2020. Since the parties have consented to amend their factums, some references to specific paragraph numbers may change.

Test for determining extricable errors

2. The Respondent raises an argument relating to the test for determining extricable errors of law, and relies on *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 to argue that the appellant has not identified any such extricable errors.

3. In addition to the appellant's argument that the correctness standard applies because the Lease is a standard-form contract, *Teal Cedar* supports the appellant's argument that the judge made an extricable error of law by isolating the factual matrix, as it relates to Westsea's Phase 2 project, from the words of the Lease, and by effectively re-writing the Lease.

4. In *Teal Cedar*, the Supreme Court of Canada said, at para 65:

> "To extricate a question of law based on the alleged error of having overwhelmed the contract, a reviewing court must be satisfied that the decision-maker interpreted the factual matrix isolated from the words of the contract; an approach which could effectively create a new agreement."

5. The Supreme Court said that extricating errors of law on this basis is difficult in practice. However, this is a clear case in which the judge made such an error. The judge failed to give effect to the express words of the wear-and-tear exception as it applies to windows and doors specifically (and fans because they are interior to the suites and embedded in the ceilings) and instead found that, absent an express covenant to this effect in the Lease, Westsea had an obligation to replace old and obsolete windows and doors because it was *practical to do so* and because the building might otherwise fall into disrepair[1]. This is precisely the error the Supreme Court refers to.

[1] AR p 086 – 087 para 106 – 108; cf paras 47 – 51 Appellant's Factum

6. Indeed, it was never in dispute that it was *reasonable* (and therefore practical) for Westsea to undertake the Phase 2 project[2] – the issue was always about liability.

7. Here reasonableness and practicality are synonymous with "commercial efficacy". Simply because it was commercially efficacious for Westsea to undertake the Phase 2 project is not a proper basis for the judge to overwhelm the wear-and-tear exception and a proper interpretation of the Lease in general.

Whether the Lease is a commercial contract

8. At paragraph 101 of the Respondent's Factum the Respondent has raised a new issue whether the Lease is a commercial contract.

9. The appellant submits that the Lease is not a commerical contract. Rather, it is a contract that involves a residential tenancy. The Respondent does not define a "commercial contract" but suggests at paragraph 100 that a commercial contract must "work".

10. The appellant respectfully submits that there are fundamental differences in character between a commercial contract and a residential lease. The repondent's characterization of the Lease as a commerical contract suggests an ongoing relationship between the parties in which they, in the course of their mutual contractual transactions, are each motivated by commercial, or profit-based, objectives. Here, while the landlord earned profit by sale of Lease assignments in the 1970s[3], there is no mutuality of commerical purpose in the relationship between the landlord and tenant: i.e. the Lessees are principally concerned with the social necessity of having a roof over their heads.

11. Nor is the Lease a commercial lease. Article 4.09 of the Lease requires Lessees "To use each of the Suites for the purpose of a private residence only." The Lease is a residential tenancy in terms of its usage, and not a commercial tenancy in which tenants may use premises for well-known business, office, or industrial

[2] Respondent's AB p. 4 (item 28, p. 5, items 32-33)
[3] Appellant's TEB, p 010, lines 7 - 12

purposes. Commercial tenants carry on profit-motivated businesses in their leased premises and typically do not live on the premises.

12. McLaughlin J. of the Supreme Court of Canada in *Reference re Amendments to the Residential Tenancies Act* (N.S), [1996] 1 SCR, para 100, recognized the distinction between residential tenancies and commercial tenancies, saying "Residential leases may be properly contrasted with commercial leases".

13. The appellant submits a further underlying feature of this distinction is the historical imbalance in the residential landlord and tenant relationship referred to by McLaughlin, J. at paragraphs 53 and 104 of *Reference re Amendments to the Residential Tenancies Act*. Such an imbalance is evidenced when a tenancy agreement is not negotiated, as is the case here.

14. Similarly, and perhaps most importantly, there is the obvious legal distinction between a commercial agreement and a residential tenancy, namely that a commerical agreement is <u>negotiated</u> between parties of equal bargaining power, which is not the case here.

15. In *Resolute FP Canada Inc. v. Ontario (Attorney General),* 2019 SCC 60, a case relied on by the respondent, the Supreme Court affirmed the principle *in Kentucky Fried Chicken Canada v. Scott's Food Services Inc* (1998) 114 OAC 357, as the appellant has argued, that

> "where…the document to be construed is a <u>negotiated commercial document,</u> the court should avoid an interpretation that would result in a commercial absurdity."

16. *Resolute* also affirms that commerical reasonableness, if it applies here, must be assessed from the *perspective of both parties* (para 148). The wear-and-tear exception is plain that the Lease does not intend for Leaseholders to pay for the costs to replace old and obsolete windows, doors, and fans.

Whether the appellant failed to dispute that Westsea is obliged under the Lease to replace the old and obsolete windows, doors, and fans

17. At paragraph 111, the Respondent asserts:

> "Most critically, at the trial the Appellant failed to dispute that if leaseholders are not obligated to undertake some or all of the Project, then logically that obligation must rest with Westsea, and all costs incurred by Westsea in the performance of its covenants are recoverable as Operating Expenses."

18. This assertion is simply incorrect. The judge canvassed this matter with the appellant during his reply submissions, as follows[4]:

> THE COURT: So you say it doesn't just shift the responsibility to undertake those repairs, it also shifts the cost?
>
> MR. TRENCHARD: Well, actually I say it doesn't shift the responsibility because the lease is silent. So I know that that's another matter that I wanted to address, because Mr. Stacey has said that I have suggested that there's a shift in obligation. But there isn't. The lease is actually silent as to who would undertake the replacement of old and worn things. But really -- so what I am saying is what Westsea has done is they have, at their own option, chosen to make this large scale replacement cost for worn and torn things and having done so, they are now obligated to pay for it. Or at least the leaseholders are not obligated to pay for it.
>
> THE COURT: So whose responsibility do you say the lease provides for -- I'm not going to -- I'm going to have to start over because that's a very awkwardly worded question. You say the responsibility to undertake projects like the phase 2 project do not fall -- that responsibility does not fall to the leaseholders. You say it did not fall to the lessor either. So what do you say the lease contemplated? Who would have paid for those? Or do you say that the lease contemplated that no such work would be undertaken for 99 years?
>
> MR. TRENCHARD: The lease is silent for this kind of large scale replacement cost for worn and torn things. So it just doesn't say.
>
> THE COURT: So how is one to interpret that?
>
> MR. TRENCHARD: Well, I would interpret it to mean that the landlord has at their option chosen to replace worn and torn things, and, therefore, they're obligated to pay for it.

[4] Transcript of Proceedings at Trial, day 10, p. 39 line 47 to page 40 line 35

> THE COURT: So it's a voluntary thing. They can do it if they wish.
> MR. TRENCHARD: Yes.
>
> [underline added]

19. This a very important exchange, because it foreshadows the judge's erroneous reasoning. In her decision, she goes on in error to read, or imply, into the Lease an obligation for Westsea to replace old and obsolete windows, doors, and fans, which does not expressly exist in the Lease.

All of which is respectfully submitted,

February 18, 2020

_____

Hugh Trenchard

LIST OF AUTHORITIES	Page (para)
Kentucky Fried Chicken v. Scott's Foods (1998), 114 OAC 357	
Reference re Amendments to the Residential Tenancies Act (N.S), [1996] 1 SCR	
Resolute FP Canada Inc. v. Ontario (Attorney General), 2019 SCC 60	
Teal Cedar Products Ltd. v. British Columbia, 2017 SCC 32	