# Whither the wear-and-tear exception in long-term leases in British Columbia? Case commentary *Trenchard v. Westsea Construction Ltd*. 2020 BCCA 152

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Trenchard v. Westsea Construction Ltd., 2020 BCCA 152 (CanLII)

**Background**

In 2016 the respondent (defendant) landlord commenced the second part of a two-phase multi-million-dollar windows and sliding-glass doors replacement project in a 22-storey high-rise apartment building in Victoria, British Columbia. A 99-year residential lease executed in 1974 governs the relationship between the landlord and the lessees. Leases longer than 20 years are not subject to provincial residential tenancy legislation.

Under the lease, the lessees' covenants require the lessees to maintain the interior space of their suites, "including all doors, windows… and to keep the same in a state of good repair, reasonable wear and tear…only excepted". The lessor is required to maintain the "foundations, outer walls…of the Building, all of the common areas therein…". The lessor may recover the costs of its covenants as operating expenses from the lessees.

The plaintiff lessee, self-represented, sued for an interpretation of the lease on two main points: that the wear-and-tear exception exonerated leaseholders from liability to pay for the windows and doors; that operating costs under the lease did not contemplate capital expenses like the replacement of all the windows and doors in the building. In terms of wear and tear, he argued that the floor plan expressly showed the windows and doors were part of the interior space of the lessees' suites and, since it was common ground that the windows and doors were replaced because they were old and worn, leaseholders were not liable to pay for their replacement.

It is significant in this case that, for the purpose of establishing the appropriate standard of review on appeal, the Court of Appeal agreed with the appellant (plaintiff) that the lease is a standard-form contract. Given this, the court said the interpretation question would be reviewed for correctness and matters relating to the circumstances for palpable and overriding error. In terms of the standard-form

lease, the appeal court did not identify the underlying imbalance in the bargaining power associated with standard-form contracts or in the particular lease in issue as identified by the Supreme Court of Canada in *Ledcor Construction v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, and more recently *Uber Technologies Inc. v. Heller*, 2020 SCC 16.

In addition to his application to interpret the lease the plaintiff sought to adduce evidence to show it was unfair for the landlord to install new windows entirely at the cost of the leaseholders. He adduced some evidence that the landlord sold all its lease interests in the 1970s. By profiting from the sale of the original sale of the lease interests, the plaintiff argued that the landlord assumed an obligation to earmark some of those funds for future capital expenditures for a building it owned and would eventually repossess and could market again in 99-years. The landlord admitted it received profitable pre-paid rent, but the judge ascribed no significance to this admission since the plaintiff had not specifically noted this factual matter in his pleadings.

In response, the landlord argued that the wear-and-tear exception shifted an obligation under the lease to the landlord to replace the failing windows, thus entitling the landlord to charge replacement costs back to the leaseholders as operating expenses. The landlord argued that if neither the lessees nor the landlord had such an obligation, the building would have fallen into disrepair to the detriment of the leaseholders' quality of life. The landlord also adduced evidence of a connection between the failing windows and damage to the exterior walls. The plaintiff did not dispute this connection or damage to the outer walls, but argued that the windows were specifically identified as a separate component of the building under the lease to which the wear-and-tear exception applied.

In addition, the landlord argued that since the leaseholders buy and sell their lease interests, they can recover at least some of the costs of new windows and doors. Though not directly addressed by the trial judge, this argument had force in the absence of expert evidence from the plaintiff that might have shown how, beginning sometime midway through the lease, the value of leaseholders' interests diminishes to zero by the end of the lease.[1] The landlord also argued that the leaseholders, as occupants of the suites, were the only beneficiaries of the new windows. The plaintiff admitted that the leaseholders obtained some benefit from the new windows and doors, whilst the landlord testified that "catastrophic consequences" would flow if the landlord were required to pay for the windows and doors.

At the time of the trial, about 54 years remained on the lease. The plaintiff adduced no expert evidence to show that the new windows, due to last about 25 years, afforded long-term economic benefit to the landlord for the installation of the new windows and doors. Absent expert evidence that the windows extended the life of the building beyond the end of the lease, the judge did not consider appraisal literature to which the plaintiff referred, and she concluded in essence that the new windows did not extend the life of the building if the windows themselves did not last beyond the end of the lease.

The lower court and the Court of Appeal placed substantial weight on these surrounding circumstances concerning the windows project and the long-term lease. Ultimately, the defendant successfully argued, upheld on appeal, that the windows and doors could be construed as part of the outer walls and building. Thus, the landlord's windows and doors replacements were within its covenant to maintain the outer walls and building, and costs could be recovered from the lessees. The landlord also successfully argued that, in any case, if leaseholders were not responsible to replace old and worn windows, then the landlord must be vested with this responsibility.

The courts adopted a relative-benefits test and found that on the evidence, only the leaseholders benefitted from the installation of the new windows. If the lease were shorter, or if the useful life of the windows exceeded the expiration of the lease, the benefit to the landlord of the new windows would presumably have been clearer. By affirming a relative-benefits test, the Court of Appeal upheld what is essentially an equitable principle, saying at paragraph 58:

"Whether in a particular situation the Lessor is under an obligation to make repairs that include replacing the windows, doors and fans cannot be answered by a categorical interpretation of the Lease; it depends on the circumstances in which the need for replacement arises."

**The rationale for the wear-and-tear exception**

This case calls into question the meaning of the wear-and-tear exception in terms of its affect on the liability of lessees to pay for such excepted damages, a matter the appellant took some pains to address in his factum and raised at trial. The lower court recognized that wear and tear has been interpreted "to mean the reasonable use of the premises by the tenant and the ordinary operation of natural forces."[2] However, the judge confined her analysis in terms of whose responsibility it was to replace damages due to wear and tear, and did not consider the question of liability. The appeal court's treatment of the meaning of the

provision similarly sidestepped the issue of liability associated with the wear-and-tear provision, finding only that the provision could not "compel such a categorical result" (para 55) in which the landlord would not have the responsibility of replacing obsolete windows and thus charging the costs to leaseholders.

The wear-and-tear exception and its exculpatory effect is deeply rooted in the jurisprudence, with its origins in Roman law[3]. The underlying rationale for the exception is that tenants are not liable to repair damage to the landlord's property for causes beyond a tenant's control. Such causes might be accidental fire or tempest, or the gradual deterioration of the leased premises by natural forces[4]. In Anglo-American common law, the principle can be traced to the 12th century in England as it relates to the law of permissive waste, the doctrine that tenants are liable only for damage under their control[5]. In this way, leases have evolved through centuries of jurisprudence and principled reasoning to contain express exceptions to contractual obligations under which lessees are otherwise liable to repair and maintain tenant-occupied premises that revert to the landlord at the end of the lease.

Similarly, the wear-and-tear exemption may be traced to the landlord's ownership of property for which the tenant merely pays rent to occupy and use. If the occupied property, or some part of it, deteriorates such that it must be replaced, then in principle the tenant can no longer use the occupied space to its agreed-upon extent, and he or she is either entitled to a reduction in rent or the landlord must replace the deteriorated property or can have no claim for rent equivalent in value to the deteriorated property.[6] This principle implies that if landlords replace property damaged by wear and tear, they must do so at their own expense. In this case, it was established on the evidence that the tenants pre-paid their rent for the duration of their tenancies, and that the landlord profited from this pre-paid rent.

**The wear-and-tear exception is an exculpatory clause**

The appellant argued that in the leasing context there are two different kinds of exculpatory clauses: one that exonerates the landlord from tortious liability[7]; a second kind that exculpates leaseholders from liability to pay for damages beyond their control. R.H. Chappel explains this as follows:[8]

"At common law it was firmly established that a covenant to repair or to leave the premises in good repair bound the tenant to rebuild the buildings even though destroyed by fire or other accident without fault or negligence on the part of the tenant. If he desired to relieve himself from this liability he had to do so by

excepting such liability from the operation of his covenant. To counter the harsh effects of the common law rule there came to appear in the typical lease language to the effect that the leased premises would be surrendered in good condition, "reasonable wear and tear and damage by fire or other casualty excepted.""

In Canadian law, the principle that the wear-and-tear exception represents an exception to lessees' liability for replacement costs may be traced to the Supreme Court of Canada decision in *Skelton v. Evans* [1889] 16 SCC 637. In *Skelton* the Supreme Court observed that the wear-and-tear exception is analogous to an exception for fire caused by accidents, whereby the defendants were relieved from liability to reinstate damage done by fire.[9]

Similarly, in *Delamatter v. Brown Brothers* (1905), 9 O.L.R. 351 (Ont C.A.), Magee J. (in dissent, but not on this point) said specifically that the wear-and-tear exception relieves lessees from liability for damage due to wear and tear:

"The short form clauses…and now have appended to each of them the words "reasonable wear and tear and damage by fire, lightning and tempest only excepted" – thereby expressly relieving the covenanting lessee from liability for such damage."

More recently, in *Agnew-Surpass v. Cummer-Yonge*, 1975 CanLII 26 (SCC), [1976] 2 SCR 221 the Supreme Court of Canada observed that a clause which exempts lessees from liability for wear and tear is a kind of exculpatory clause. *Agnew Surpass* concerned a shopping centre lease that required the tenant to take good and proper care of the leased premises, "except for reasonable wear and tear…and damage to the building caused by perils against which the lessor is obligated to insure hereunder."[10] The issue in *Agnew Surpass* was whether the clause covered fire started by negligence, and did not involve wear and tear. However, like insured perils, the Supreme Court recognized that such clauses relieve tenants from liability for damage not caused by them.

American law well-recognizes such clauses are exculpatory in nature[11]. 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. Again, although the issue before the court did not involve wear and tear, the court observed that the lessees' exemption from losses due to ordinary wear and the exemption for losses due to fire "are treated exactly alike" (p. 105).

**No corresponding obligation on the landlord to replace old and worn items**

Canadian courts have also recognized that the wear-and-tear exception in favor of leaseholders does not mean there is a corresponding obligation on the landlord to replace worn items unless the lease expressly says so. In *Weinbaum v. Zolumoff and Zolumoff* [1956] OWN 27 (CA) the parties agreed that repairs to an oil-burner were due to reasonable wear and tear and that such repairs were reasonable, much as the parties had agreed in the subject case that the windows and doors were replaced due to wear and tear. In *Weinbaum*, the Ontario Court of Appeal applied the Court of Appeal of Nova Scotia decision in *Victor v. Lynch* [1944] 3 DLR 94 (NSCA) specifically to the wear-and-tear exception, saying, at p. 29:

"…it is well-established law that there is no obligation upon the landlord to repair unless there is an express covenant to that effect"

**The wear-and-tear exception is intended to benefit the party to whom it applies**

In addition, Canadian courts have recognized that the wear-and-tear exception was intended to benefit leaseholders. The Lower Canada Court of Queen's Bench (Appeal side) recognized this benefit in *Skelton v. Evans*, [1888] 31 LC Jur. 307, per Cross J., p. 313 (aff'd SCC [1889] 16 SCC 637), regarding "reasonable wear and tear and accidents by fire excepted", saying:

"it is but fair that the tenant should be allowed the benefit of every exception under which he could be entitled to claim exemptions" [underline added]

It is clearly contrary to this principle if the responsibility to replace old windows simply shifts to the landlord who then imposes liability on the leaseholders.

**Conclusion**

In this case the courts sidestepped the long-established meaning of the wear-and-tear exception largely on an apparently equitable basis; i.e., in view of the long-term nature of the lease and the absence of evidence to show that the landlord benefitted from the new windows. The courts missed an opportunity to review the underlying rationale of the wear-and-tear exception in leases, and instead effectively emasculated the intended effect of the provision and allowed weak evidence of relative lessee-lessor benefits to dominate a rigorous analysis of the provision.

These decisions demonstrate that British Columbia courts have little hesitation in viewing the terms of long-term residential leases as fluid and, in the circumstances

of this case, favorable to the landlord regardless of long-established meanings of lease terms. It remains to be seen if 25 or 30 years from now, when there are just a few years remaining on these leases and landlords again wish to replace obsolete windows and doors on the leaseholders' dime, the courts will see the circumstances to have shifted in favor of leaseholders; or if the existing decisions are treated as binding precedent to the detriment of leaseholders regardless of the circumstances.

[1] Hamilton, S. 1991. *Residential Leasehold Estates - A paper prepared for Canada Mortgage and Housing Association*. Faculty of Commerce and Business Administration, UBC; p. 71, Fig 6.2

[2] Trenchard v. Westsea Construction Ltd., 2019 BCSC 1675 (CanLII), quoting from *Haskell v. Marlow*, [1928] 2 K.B. 45 at p. 59

[3] Catarina, R. 2002. *A Comparative Overview of the Fair Wear and Tear Exception: the Duty of Holders of Temporary Interests to Preserve Property*. Edin L.R. Vol 6; pp 85-100

[4] *Haskell v. Marlow* [1928] 2 KB 45, pp. 58-59

[5] Homan, F.1967. *Alterations by a Life Tenant or Tenant for Years as Waste* 16:2 Clev St L Rev 220

[6] *Sellers v. Brown* 1766 Hailes 131 Scot Ct of Sessions, p. 133

[7] E.g. *Majestic Theatres Limited v. N.A. Properties Ltd.,* 1985 ABCA 13 (CanLII)

[8] Chappell, R.H. Jr. 1967. *Lease covenants: exculpation by implication*. 9 Wm. & Mary L. Rev. 452

[9] Per Strong J. p. 647; Gwynne J., p. 660

[10] *Agnew-Surpass v. Cummer-Yonge*, 1975 CanLII 26 (SCC), [1976] 2 SCR 221, headnote; p. 221

[11] Duke University School of Law. 1957. *Effect of Exculpatory Clause in Lessees' Surrender Covenant* Duke LJ Vol 7,59