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Amended pursuant to Case Plan Orders of Madam Justice Power made September 23, 2019 and Master Bouck made May 9, 2019, and pursuant to Rule 16-1(19)(b)(i) of the Supreme Court Civil Rules. Original Petition Response filed October 19, 2018. Further amended pursuant to the Case Plan Order of Mr. Justice Gaul on January 21, 2022.

Form 67 (Rule 16-1 (5))

No. 18 4015
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

WESTSEA CONSTRUCTION LTD.

PETITIONER

AND:

ANDREW SCOTT TAYLOR, DOUGLAS GEORGE ROUTLEY, LEANNE FINLAYSON, EDITH WOOD, GERALD JOHN ROTERING, HELEN ELISABETH VERWEY, HUGH ALEXANDER TRENCHARD, IRIS IRENE HAYS, JACALYN GAIL HAYS, JUDITH McNEIL SIM, MARTINE GODDARD, PATRICIA ANNE SMITH, PETER JAMES ROURKE, REINER JOACHIN PEIHL, DOREEN GREETA PIEHL, SANDRA SCOTT JONSSON also known as SANDRA SCOTT GROVE-SAGER, GORDON WILLIAM GROVE, SEE-LIN SHUM

RESPONDENTS

FURTHER AMENDED RESPONSE TO PETITION

Filed by: Hugh Alexander Trenchard [*party(ies)*] (the "Petition Respondent")

THIS IS A RESPONSE TO the Amended petition filed January 13, 2021 ~~12, September 2018~~ (the "Amended Petition") and the Further Amended Petition filed June 18, 2021 ("Further Amended Petition"). In theis Amended Response, red underlines indicate underlines that were in the original petition. In this Further Amended Response, blue underlines and strikethroughs indicate further amendments.

Part 1: ORDERS CONSENTED TO

The Petition Respondent, Hugh Trenchard, consents to the granting of the orders set out in the following paragraphs of Part 1 of the petition: NONE

Part 2: ORDERS OPPOSED

The Petition Respondent opposes the granting of the orders set out in paragraphs ALL of Part 1 of the Petition.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Petition Respondent takes no position on the granting of the orders set out in paragraphs NONE of Part 1 of the petition.

Part 4: FACTUAL BASIS

1. The Petition Respondent, Hugh Alexander Trenchard ("Mr. Trenchard"), is the lessee of suite 805 as identified in the Petition in a 22-storey, 211-suite high-rise, called Orchard House located at 647 Michigan Street, in Victoria, British Columbia ("Orchard House").

   Trenchard Affidavit #1, para 2

2. The petitioner, Westsea Construction Ltd. ("Westsea") is the lessor and fee simple owner of Orchard House. Westsea consists of two shareholders and directors, Bruce Sembaliuk and Julie Trache, with a registered office at 300 – 1122 Mainland Street in Vancouver. Westsea is the lessor for other 99-year leases, including Westsea Towers in Vancouver, Sun Creek Estates in Surrey, and Sussex Square in Richmond. Westsea is the fee simple owner of apartment complexes including View Towers in Victoria, Westsea Place in Vancouver, Bluehaven/Royal Apartments in Richmond.

   Trenchard Affidavit#2, para 17, Ex C, p. 198; Ex D, p. 200

3. On May 1, 1974, Westsea executed a 99-year term head lease agreement between itself and Capital Construction Supplies Ltd. ("Capital") in which Capital leased the 211 suites in Orchard House from Westsea (the "Head Lease").

   Slater Affidavit #1, Ex 2 (registered Head Lease), p. 21-42;
   Slater Affidavit #1, Ex 2 assigned lease version, p. 91-102;

4. The Head Lease was executed by the same individual representative for Westsea and Capital, George Mulek. George Mulek was an 85% majority shareholder for Westsea and a 99.99% majority shareholder of Capital when the Head Lease was executed in in 1974. Having been executed under a common owner and director, no terms of the Head Lease were the subject of any negotiations.

5. After May 1, 1974, Capital assigned its lease interests to third parties, many of whom have in turn re-assigned their lease interests. Pursuant to a lease re-assignment, Mr. Trenchard acquired his suite 805 in Orchard House (the "Lease Assignment").

Slater Affidavit #1, para 7-8

6. The Head Lease was drafted pursuant to the *Short Form of Leases Act* (now the *Land Transfer Form Act*). The *Short Form of Leases Act* provides for the expanded definition of certain terms of the Head Lease and does not regulate the terms agreed to under the Head Lease.

7. There are several identical, or nearly identical, 99-year leases in British Columbia, most or all of which are listed as follows. Those leases in italics were before the Court of Appeal in CA46417 and were recognized by the court as standard-form contracts:

Building	**Location**	**Owner/Lessor**	**Units**	**Lease start**
Orchard House	*Victoria*	*Westsea Construction Ltd.*	*211*	*May 1, 1974*
Villa Royale	Victoria	Congdon Construction Ltd.	128	May 1, 1974
El Mirador	Victoria	Congdon Construction Ltd.	65	May 1, 1974
Ocean Villa	Victoria	Congdon Construction Ltd.	42	May 1, 1974
Westsea Towers	*Vancouver*	*Westsea Construction Ltd*	*157*	*May 1, 1974*
The Chelsea	*Vancouver*	*First Canadian Land Corp.*	*40*	*May 1, 1974*
The Heritage	*Vancouver*	*First Canadian Land Corp.*	*171*	*May 1, 1974*
El Cid	Vancouver	Sheridan Investments Ltd.	208	May 1, 1974
The Horizon	*Vancouver*	*First Canadian Land Corp.*	*89*	*May 1, 1974*
The Martinique	*Vancouver*	*First Canadian Land Corp.*	*92*	

The St. Pierre	*Vancouver*	*First Canadian Land Corp.*	*41*	*May 1, 1974*
The Surfcrest	*Vancouver*	*Sheridan Investments Ltd.*	*160*	*May 1, 1974*

Trenchard Affidavit #2, para 31

8. There are other 99-year leases drafted pursuant to the *Land Transfer Form Act*, that contain somewhat different terms, including express provisions for control, management and administration, which are not included in the leases executed in 1974.

Building	**Location**	**Owner/Lessor**	**Units**	**Lease start**
Suncreek Estates	Surrey	Westsea Construction Ltd	302	Oct 24, 1988
Bristol Court	Richmond	Ryan Gardens Apartments Ltd.	110	Aug 1, 1986
Lindsay Gardens	Richmond	Westsea Construction Ltd. and Capital Construction Supplies Ltd.	216	Oct 1, 1984 Modified: Jan 1, 1988

Trenchard Affidavit #1, Ex I, p. 396, 412, 427

9. Having been drafted pursuant to the *Short Form of Leases Act* and is in identical form to several other 99-year leases, tThe Head Lease and the lease assignments are is a standard-form contracts. The B.C. Court of Appeal made this express finding in *Trenchard v. Westsea Construction Ltd*. 2020 BCCA 152, para 47. In turn, the Lease Assignment is the assignment of a standard-form contract. Neither Mr. Trenchard nor any of the Head Lease assignees were Mr. Trenchard was not involved in negotiating any aspect of the Head Lease. The Head Lease was presented to Mr. Trenchard as a take-it-or-leave it proposition.

Trenchard Affidavit #1, para 4

Rent under the Head Lease

10. Article 4.01 of the Head Lease obligates lessees to pay rent. Mr. Trenchard has no information as to what Capital paid as rent when the Head Lease was originally executed, but payment for the original assignments constituted pre-paid rent for 99 years. The consideration paid by

~~assignees on re-assignment of their interests is the market value of the lease interest for the term remainder of the Head Lease.~~

Operating expenses

~~11. Operating expenses under the Head Lease are a separate category of costs from rent. There are no provisions in the Head Lease for "additional rent" and Operating expenses do not comprise rent. Operating expenses are costs incurred by Westsea in fulfilling its covenants under the lease, which are then recoverable from the Head Lease assignees.~~

12. Article 7.01 defines Operating expenses to mean:

> "…the total amount paid or payable by the Lessor in the performance of its covenants herein contained and includes without restricting the generality of the foregoing the amount paid or payable by the Lessor in connection with the maintenance, operation and repair of the Building, expenses in heating the common areas of the Building and each of the Suites therein (unless any of the Suites shall be 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 and liability and other insurance, utilities, service and maintenance contracts with independent contractors or property managers, water rates and taxes, business licenses, janitorial services, 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.

13. Where Operating expenses (also "Operating costs" herein) include "all other expenses paid or payable in connection with the Building, common property therein or the Lands", such expenses are directly tied to Westsea's covenants under Article 5 of the Head Lease and contemplate operating costs that may not otherwise be specifically listed, but which are confined to Westsea's covenants under Article 5.

13.1. These expenses relate to the *property and its operations, not the lease*. Both Action 14-2941 and Action 16-3355 (subsequently described) involved *interpretation* of the Head Lease and alleged breaches thereof. The Head Lease expresses a legal relationship between the parties, not the physical building and its operations, as Article 5 covenants involves.

Lessor's covenants under Article 5

14. Article 5 of the Head Lease describes "LESSOR'S COVENANTS", including:

> 5.01 For quiet enjoyment.
> 5.02 To provide heat to all the common areas of the Building and to each of the Suites…
> 5.03 To keep in good repair and condition the foundations, outer walls, roofs, spouts and gutters of the Building, all of the common areas therein and the plumbing, sewage, and electrical systems therein.
> 5.04 To keep the entrance halls, staircases, corridors and other like areas in the Building clean and properly lighted and heated and the elevators properly lighted and in good working order.
> 5.05 The Lessor shall provide or engage the services of such staff as may be requisite for the proper care and servicing of the Building.
> 5.06 To pay taxes.
> 5.07 To provide passenger elevator service except during the making of repairs.
> 5.08 To keep the Building insured…
> 5.09 To maintain a policy or policies of general public liability insurance…
> 5.10 To the extent the service is available to provide cablevision and front door intercommunication service to the Suites in the Building.
> 5.11 To observe and perform…prior charges…
>
> [*emphasis added*]

No control, management or administration covenants exist

15. At paragraph 12 of the Amended Petition, Westsea describes several "obligations" including "maintenance, repair, operation, care, servicing, control, insurance, management and administration." [*emphasis added*]

16. In relation to this list, Westsea incorrectly construes all "obligations", including control, management and administration to be covenants under the Head Lease. The terms,

> "repair" (5.03),
> "repairs" (5.07),
> "care and servicing" (5.05),
> "services of such staff" (5.05),
> "service" (5.10),
> "insurance" (5.09),
> "keep…insured" (5.08),

do expressly describe Westsea's covenants under the Head Lease.

16.1 Westsea's covenants under Article 5 involve **services** to the leaseholders, *for their benefit*, related to the maintenance and operations of the building, the lands, and the common property. This is also reflected in Article 6 – Interruption of Service:

> 6.01 The Lessor does not warrant that any service or provided by it in accordance with the provisions of this Lease will be free from interruption…

~~17. To the extent that repairs and maintenance refer to "operation" of the building, it is not disputed that an "operation" describes Westsea's covenants under the Head Lease.~~

18. However, the words "control", "management" and "administration" are not expressly contained in Westsea's covenants. There is no general covenant for Westsea itself to control, manage or administrate that forms the basis of Operating expenses under the Head Lease. Incidental management and/or administration costs may be inferred to be included when staff members effectuate these covenants, but only to the narrow and specific extent identified in this Response.

Slater Affidavit #1, Ex 2, p 25-26 (registered Head Lease)
Ex.6, p. 92 (lease version attached to assignments)

~~19. In contrast, certain other 99-year leases such as for Lindsay Gardens, Bristol Court and Suncreek Estates, do expressly include "control, management and administration" as Operating expenses. The fact that these words are omitted from the Head Lease reflect the parties' intention to exclude them and to exclude costs associated with these functions.~~

~~Trenchard Affidavit #1, Ex I, p. 396, 412, 427~~

20. Historically, Westsea has not charged litigation costs or management fees as Operating expenses under the Head Lease. Only in 2016 and 2017 did Westsea decide for the first time that litigation costs and management fees were recoverable as Operating expenses under the Head Lease.

Trenchard Affidavit #1, Ex G

21. Historically, Westsea has charged "administration and accounting" costs as Operating expenses in past, and it employs a property manager and a resident manager to fulfil Westsea's covenants under Article 5 of the Head Lease. However, only Bruce Sembaliuk and Judy Trache instruct counsel on litigation matters, which they will do for all their property interests, including but not limited to Orchard House, Westsea Towers, Suncreek Estates, Lindsay Gardens, View Towers, Blue Haven, and Westsea Place.

Trenchard Affidavit #1, Ex G
Trenchard Affidavit #2, paras 13-17

22. There are three tiers of "management" functions involved in the operations of Orchard House and Westsea:

    1. At the lowest tier are Orchard House resident managers, ~~Betty and Brian Sutton~~, who reside at Orchard House and have an office in Orchard House, and manage on-site Orchard House operations ("Resident Management");

    2. The second tier consists of Brian Slater, property manager, whose office is located at Westsea Towers in Vancouver. Brian Slater may approve suite sub-rentals and suite alterations, for example, and may be Westsea's representative for renovation projects for specific properties owned by Westsea including Orchard House and Westsea Towers in Vancouver~~, but he does not have signing authority on major contracts~~ ("Property Management").

    3. The third and highest management tier consists of the owners and directors of Westsea, Bruce Sembaliuk and Judy Trache. Their functions include ~~critical decisions concerning when to acquire real estate, how to finance or when to finance, when to position a property on the market; consent to re-assignments and execution of major contracts and~~ the authority to retain and instruct counsel for litigation. Bruce Sembaliuk's and Judy Trache's ~~have authority to override any decision made by Brian Slater, and their~~ management function oversees all properties owned by Westsea ("Head Management").

Trenchard Affidavit #2, para 14

23. Staff and contractors employed by Westsea carry out the covenants listed in Article 5. Their responsibilities may be characterized as administrative in nature, but their "managerial" functions are limited to the first two levels, Resident Management and Property Management.

Trenchard Affidavit #2, para 14

24. ~~The Head Lease allows for the payment of salaries for property managers, which includes the Resident Management and Property Management, but it does not include costs associated with Head Management. Head Management costs are not connected with Westsea's covenants to repair, maintain and service the building. If the Head Lease was intended to include Head Management responsibilities and associated costs under the Head Lease, the parties would have included express terms to that effect. Not having included such express terms, Head Management responsibilities are~~ not ~~covenants under the Head Lease.~~

25. Retaining and instructing counsel is the central responsibility of Westsea's Head Management. It is as an overarching responsibility that relates to all of Westsea's various property interests. Local Orchard House tier-one resident managers~~, Betty and Brian Sutton,~~ do not retain and instruct counsel. Nor does Westsea's tier-two property manager, Brian Slater, retain and instruct legal counsel on matters of litigation. Retaining and instructing counsel on litigation matters are beyond the local responsibilities of Westsea's individual satellite properties. Therefore, Westsea's litigation costs are simply too remote to constitute legal charges or Operating expenses~~.~~ under the Head Lease.

Trenchard Affidavit#2, para 14

26. Legal charges under the Head Lease must be associated with Westsea's covenants under Article 5, and properly include matters such as the drawing of contracts for employees or independent contractors; review of insurance, taxes or accounting matters that require a legal opinion. These characterize matters that affect the day-to-day operations of the building or within the time period of about one year.

26.1. In *JEKE Enterprises Ltd. v. Northmont Resort Properties Ltd.* 2016 BCSC 401 (aff'd 2017 BCCA 38) ("*JEKE*") to which Westsea refers at paragraph 7 of its Amended Petition, the court allowed litigation costs to be charged to leaseholders under a specific provision "9(p) all expenses incurred by the Lessor in the *management* of the Vacation properties" (emphasis added). This provision does not exist in the Head Lease.

Westsea's *res judicata* pleading

26.2. Westsea pleads that some responses raised in Mr. Trenchard's Response to Petition are barred by *res judicata*.

26.3. Generally, in response, the issues are distinct and arise from different causes of action. Westsea's assertions of *res judicata* are more properly framed in terms of *precedent* that may or may not be binding.

26.4. Further and alternatively, Westsea's *res judicata* pleading is itself barred by *res judicata* because Madam Justice Power already decided in her August 2, 2017 decision that where there are different issues and different causes of action between Mr. Trenchard and Westsea, *res judicata* does not bar proceeding.

26.5. Specifically, in response to Westsea's pleading that extrinsic evidence cannot be referred to, Mr. Trenchard has removed references to other 99-year leases in paragraphs 7,8, and 19. However, he pleads and maintains that references to Westsea's other properties in paragraphs 21 and 25 herein are appropriate since they relate to the pleading that litigation "management" is an overarching function that is too remote from any intended managerial functions that might constitute Operating costs under the Head Lease.

26.6. In response to Westsea's pleadings that references to standard-form contracts are *res judicata*, Mr. Trenchard says the standard-form nature of the Head Lease was found as a fact by the Court of Appeal at paragraph 47 of its judgment: *Trenchard v. Westsea Construction Ltd*. 2020 BCCA 152. The purpose for admitting the evidence in that appeal is irrelevant to the court's finding of fact. Further, the effects of standard-form contracts on issues of unconscionability were clarified by the Supreme Court of Canada in *Uber v. Heller*, 2020 SCC 16, a decision made June 26, 2020 **after** the *Trenchard* Court of Appeal decision, made May 28, 2020, and therefore this issue should be considered by this court.

26.7. In response to Westsea's pleadings at paragraph 88-90, regarding an "implied term of transparency", Mr. Trenchard's pleadings at paragraphs 38.1 to 38.5 herein are simply responses to Westsea's pleadings of fact and law, matters which Westsea has raised and to which Mr. Trenchard is entitled to respond. Further, the decision in *Courtenay Lodge Ltd. v.*

Forbidden Brew Corp. 2017 BCSC 1850 was rendered after Mr. Trenchard's petition action 14-2941 was concluded in 2016.

26.8. In response to Westsea's paragraphs 91 to 93, the matter of whether Westsea has obligations outside those stated in the Head Lease under the *Occupier's Liability Act* and in negligence law to maintain the Orchard House building, as pled herein at paragraphs 41.17 to 41.24, was never considered or decided upon by the Court of Appeal or Madam Justice Douglas. These matters speak to Mr. Trenchard's pleading that Westsea defended itself fundamentally in its own interest so that Westsea would not have to pay for the windows and doors project, and that Westsea was not incurring litigation costs in the leaseholders' interests, as Westsea has pled.

26.9. In response to Westsea's pleading at paragraphs 86 – 87 regarding the meaning of operating expenses *simpliciter*, Mr. Trenchard says the Court of Appeal was very specific in describing how obligations that were not explicitly stated in the Head Lease could be included within the ambit of Operating expenses. The court said that expenses must fall within "the maintenance, operation and repair of the Building" and "in connection with the Building…" (para 63). Mr. Trenchard pleads and maintains that any Operating costs that fall outside of these narrow confines are not Operating expenses under the Head Lease, unless otherwise explicitly stated and appropriately interpreted. In action 16-3355, the costs in issue were incurred to install new windows, doors, and fans, which the courts found were components of the "Building". Litigation costs are too remote from the "Building" to constitute Operating costs and, in any event, are chargeable only as against Mr. Trenchard due to privity and are therefore **expressly excluded** as Operating expenses under Article 7.01.

Separate Leases; privity of contract

27. Legal costs do not~~, however,~~ include costs to litigate disputes raised by individual leaseholders, or costs to litigate the enforcement of individual lessees' covenants under the Head Lease under Article 4 of the Head Lease. Litigation costs incurred by Westsea in defending against individual claims by leaseholders are not properly Operating expenses.

28. This is supported by Article 7.01 of the Head Lease:

> "Operating expenses" shall not include any amount directly chargeable by the Lessor to any Lessee or Lessees.

So, even if Westsea's litigation costs do constitute "legal charges", which is denied, such costs incurred defending against the claims of a single leaseholder are appropriately sought as against only that person, or individuals against whom Westsea commences an action.

29. Westsea may enforce the lessees' covenants or conditions under Article 8.02:

> 8.02 If the Lessee shall fail to perform any covenant or condition of this Lease on his part to be performed, the Lessor may (but shall not be obligated so to do) perform the covenant or condition as agent of the Lessee and all amounts paid by the Lessor in respect thereof and all costs, damages, and expenses suffered or incurred by the Lessor in respect thereof shall be due and payable by the Lessee to the Lessor on demand as rent and the Lessor may exercise any remedy in respect of the recovery of any such amounts as it might for rent in arrears.

29.1 Article 10.01 of the Head Lease, headed 'SEPARATE LEASES', reads:

> 10.01 It is hereby declared and agreed between the parties hereto that each of the Suites shall be held during the Term separately 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.

29.2. The Separate Leases clause, along with Article 8.02 and the excerpt from Article 7.01 which excludes from Operating costs those costs chargeable to individual lessees, evinces the parties' intention that litigation costs arising from one lessee's claims cannot affect other lessees and are not chargeable as Operating costs.

29.3. Similarly, the Separate Leases clause expresses privity of contract such that liabilities in the form of litigation costs arising between Mr. Trenchard and Westsea cannot be charged to other leaseholders.

29.31. Privity of contract between Mr. Trenchard and Westsea also exists by virtue of the lease assignment and re-assignment. The original parties to the lease were Westsea Construction Ltd. and Capital Construction Supplies Ltd. Capital Construction Supplies Ltd. assigned its lease interests, a fraction of which was eventually re-assigned to Mr. Trenchard. Privity flows through each lease re-assignment. This is indicated also in the language of the lease re-assignment.

Affidavit # 1 Brian Slater, Ex 5, p 84-85, 88

29.4. Privity of contract also exists between Westsea and its legal counsel. There is no contract for legal services between Westsea's legal counsel and any of the leaseholders.

29.5. In *JEKE*, while the court considered a similar clause to Article 8.02, it did not consider any clause like the Separate Lease clause, or the noted excerpt in Article 7.01.

30. ~~There is no similar provision that permits Westsea to recover litigation costs as an Operating expense under the Head Lease. This Article is parallel in principle to the defense of a claim against an individual leaseholder, but on the opposite side of the litigation coin.~~ If the parties in drafting the Head Lease had intended Westsea to have a right under the Head Lease to charge ~~this kind of~~ litigation costs as an Operating expense, they would have expressly said so.

Article 7.02 prior years experience

31. Article 7.02 of the Head Lease requires the Lessor to make estimates of Operating expenses that are payable in future "based on prior years experience."

32. For at least 20 years ~~P~~prior to ~~Except for~~ 2016 ~~and 2017~~, Westsea ~~has~~ never sought to recover legal expenses as a category of Operating expenses under the Head Lease. ~~of any kind as Operating expenses under the Head Lease. This is despite historical litigation and/or matters involving direct communications from legal counsel, in relation to insurance-related disputes or default/foreclosure issues, or other matters, such as costs incurred in *Westsea v. Billedeau* 2010 BCPC 109.~~

32.01 Further to the Case Plan Order of Madam Justice Power of June 28, 2021, Westsea disclosed non-Trenchard-related legal costs. A large proportion of these costs appear to be for a variety of non-litigation matters ("Non-Litigation-Costs").

Trenchard Affidavit # 3 Ex G-H

32.02. Unlike a "one-off" special assessment which has no prior years' history against which to evaluate current costs, most if not all of the Non-Litigation-Costs Westsea has charged are not "one-offs" and are the types of costs that Westsea has always or intermittently incurred. Yet, Westsea only began charging these Non-Litigation-Costs as Operating costs in 2016 without a prior history of doing so.

Trenchard Affidavit #3, par 13 Exhibit G; Trenchard Affidavit #1 Ex. G

32.1. There having been no prior years' experience upon which to base their ~~litigation~~ Non-Litigation-Costs, Westsea breached the Head Lease by charging costs in advance.

Action 14-2941

33. In August 2014, Mr. Trenchard filed a petition against Westsea related to issues of disclosure and on the question of whether Westsea could properly charge its litigation costs as Operating expenses under the lease. (See Schedule A for outline of proceedings *Trenchard v. Westsea Construction Ltd*., BC Supreme Court Action 14-2941, Victoria Registry)~~.~~ ("Action 14-2941").

34. After 4 days of hearings, the parties consented to dismiss Mr. Trenchard's application, conditional upon Westsea providing all leaseholders at Orchard House with a letter and an engineering report related to Westsea's pending windows replacement project at Orchard House. This left the remaining question of whether Westsea's litigation costs were Operating expenses under the Head Lease. On September 23, 2016, Mr. Justice MacKenzie found that Westsea's litigation costs are not Operating expenses under the Head Lease. Mr. Justice MacKenzie also found that Westsea breached its covenant to exercise prudent and reasonable discretion incurring its litigation costs.

Trenchard Affidavit #1, Ex D, p. 71-73

35. On appeal heard in October 2017, the B.C. Court of Appeal held that Mr. Justice MacKenzie's decision was premature; that Westsea must first notify leaseholders of its intention to charge its petition litigation costs; leaseholders could then refuse to pay and the issue of whether litigation costs are Operating expenses could be re-litigated. The Court of Appeal did not overturn Mr. Justice MacKenzie's interpretation of the lease. In relation to costs of the appeal, the Court of Appeal ordered "no order as to costs".

Trenchard v. Westsea Construction Ltd. 2017 BCCA 352, para 13, 16

36. Mr. Trenchard applied for leave to appeal to the Supreme Court of Canada. Westsea applied to the Supreme Court of Canada for leave to cross-appeal. In August 2018, the Supreme Court of Canada dismissed both applications, without costs.

Trenchard Affidavit #1, Ex D, p. 79

37. In none of the proceedings in Action 14-2941 has a court specifically awarded costs in favor of Westsea. In all interim proceedings costs were "costs in the cause", and all final proceedings, costs were either "no award as to costs", or "without costs". In Action 14-2941 Mr. Justice MacKenzie found divided success and found that Westsea had breached its duty to exercise prudent and reasonable discretion in incurring its litigation costs.

38. Mr. Trenchard asked for a detailed breakdown of Westsea's litigation costs, to which Westsea has not replied.

Trenchard Affidavit#1, Ex F, p. 158, 186
Trenchard Affidavit#2, Ex H, p. 236, 246, 253

38.01. Only as a result of court orders did Westsea finally provide details as to its claimed legal charges.

Trenchard Affidavit#3, par 13.

Westsea's claim that Mr. Trenchard sought to restructure the lease without legal basis

38.1. At paragraph 32 of the Amended Petition, Westsea asserts that "The Petition sought, without legal justification, to restructure Westsea's obligations under the Lease…" In response, Mr. Trenchard says the following:

38.2. To find an implied term requiring broad disclosure would not have "restructured the lease". If an implied term exists in a contract, then that term was always part of the contract.

38.3. Since the parties consented to a conditional dismissal of action 14-2941, the court itself made no finding whether there was legal basis for Mr. Trenchard's claim that the Head Lease contained an implied term of transparency.

38.4. Further, it is incorrect that an implied term of transparency has no basis in law. Courts have found disclosure obligations in similar lease circumstances. In *1877353 Ontario Inc. v. 699147 Ontario Inc*. (2016), the court said:

> The duty of the Landlord to honestly and reasonably perform its obligations under this Lease is served by requiring it to deliver all documents that are the basis for the annual adjustment: see *Bhasin v. Hrynew*, 2014 SCC 71, [2014] S.C.J. No. 71, at paras. 60, 63, 65, 93). In my view it is commercially reasonable to imply a term into the Lease that requires the Landlord to deliver with its annual adjustment for Additional Rent a copy of all the documents, such as tax bills, insurance premiums, property management invoices, which support and explain the amounts claimed from the Tenant in the adjustment.
>
> *1877352 Ontario Inc. v. 699147 Ontario Inc*., 2016 ONSC 445, para 30

38.5. *1877352 Ontario Inc*. was cited in the BC decision in *Courtenay Lodge Ltd. v. Forbidden Brew Corp.*:

> [70] Even in the absence of an express contractual provision, there is an organizing principle of good faith governing contractual performance (*Bhasin v. Hrynew*, 2014 SCC 71 at paras. 62-63). In the context of a landlord's obligation to prepare accounts to calculate additional rent under a lease, the governing obligation of the parties to deal in good faith, and the landlord's duty to honestly and reasonably perform its obligations, can be served by the landlord providing "all of the documents that are the basis for the annual adjustment" (*1877352 Ontario Inc. v. 699147 Ontario Inc.*, 2016 ONSC 445 at para. 30).

Courtenay Lodge Ltd. v. Forbidden Brew Corp. 2017 BCSC 1850, para 70

Westsea's claim that it would have been bound to open-ended disclosure had it not opposed Mr. Trenchard's application

38.6. At paragraph 33 of the Amended Petition, Westsea says if it did not oppose Mr. Trenchard's application, it would have been "bound to open-ended obligations to satisfy requests for documents and information from leaseholders". There is no dispute that the nature of disclosure sought was broad, but it was not "open-ended". Such disclosure was necessarily limited to Westsea's operating expenditures, as Mr. Justice Mackenzie recognized.

Trenchard v. Westsea Construction Ltd. 2016 BCSC 1752, para 3

38.7. Westsea says providing such information is costly and costs would be "borne by all leaseholders". Yet Westsea presents no evidence of costs associated with disclosing details about Operating expenses. Westsea fails to consider the benefits to leaseholders of reasonable disclosure and how costs might be minimized through modern technology such as emails or secure file transfers; or through a representative leaseholder organization.

Action 16-3355

39. On August 9, 2016, Mr. Trenchard commenced Action 16-3355, in which he claimed~~s~~ that Westsea's charge to leaseholders for the replacement of all remaining windows and doors (after an earlier project replaced corner windows) in Orchard House constituted~~s~~ a breach of the Head Lease, as assigned. See Schedule "A" for an outline of proceedings in *Trenchard v. Westsea Construction Ltd*., BC Supreme Court, No 16-3355, Victoria Registry)~~.~~ ("Action 16-3355").

39.1. Mr. Trenchard did not dispute that it was reasonable to replace the windows and doors. At no time did he argue that the windows and doors should *not* have been replaced. Mr. Trenchard paid the project costs project under protest, and sued for an *interpretation* of the Head Lease.

Trenchard v Westsea Construction Ltd., 2019 BCSC 1675, para 20,21, 29

39.2. The central interpretation issue was who was responsible to pay for the project costs under the Head Lease: Westsea as owner of the building; or the leaseholders as long-term tenants. A related issue was whether Westsea was obliged under the Head Lease to undertake the project. The consequence of such an obligation under the Head Lease was that Westsea could recover the project costs as Operating costs from the lessees.

Trenchard v. Westsea Construction Ltd., 2020 BCCA 152, para 1

40. On August 2, 2017, Madam Justice Power~~'s~~ dismissed Westsea's application to strike Mr. Trenchard's pleadings and awarded $2800 payable forthwith to Mr. Trenchard (items 30-31 Appendix B). ~~Proceedings are still under way and a trial is set for June 3, 2019.~~

41. About 21 other Orchard House leaseholders have filed small claims actions for 24 lease interests on the same issues, including the issue of whether Westsea may charge its litigation costs as Operating expense (see Schedule "B"). Most, if not all, of these small-claims actions have been stayed pending the outcome of Action 16-3355.

Injunction application on litigation costs charged in advance

41.1 Prior to the trial in June 2019, Mr. Trenchard applied for an injunction to stop Westsea from charging its litigation costs to lessees prior to the court's decision in Action 16-3355. An injunction hearing on October 10, 2018 was adjourned and tentatively re-set for January 2019, after which Mr. Trenchard withdrew his application. His application was supported by some 30 affidavits from leaseholders explaining the detrimental effects of Westsea's advance litigation charges.

Madam Justice Douglas' decision

41.2 After a 10-day trial in June 2019, Madam Justice Douglas rendered her decision in favor of Westsea on October 1, 2019. On July 20, 2020, after the Court of Appeal decision, corrections were made to her original decision to change "*any* legal charges" to "*and* legal charges" in paragraph 25, and to delete a reference to "management fees" in paragraph 133.

Mr. Trenchard's main arguments in Action 16-3355

41.3. Mr. Trenchard argued two main points: the wear and tear exception exonerated leaseholders from liability to pay for the windows and doors; that the windows and doors project constituted a capital cost not contemplated by the meaning of Operating costs. He pled that Westsea undertook the project at its option and was liable for the costs. If his claim been successful, it would have meant that leaseholders would not have been liable to pay for the costs of the windows project.

Trenchard v. Westsea Construction Ltd., 2020 BCCA 152, para 30
Trache affidavit #1 p. 73, para 69 (Notice of Civil Claim)

For an Operating cost to be chargeable, it must benefit leaseholders

41.4. Madam Justice Douglas recognized that for Operating costs to be recoverable from lessees, the lessees must benefit from the service for which they are charged, finding that "On the evidence the only parties who will benefit from the Project are the leaseholders."

Trenchard v Westsea Construction Ltd., 2019 BCSC 1675, par 102

41.5. In *Sector v. Priatel*, the court also recognized the connection between recoverable Operating costs and their benefits to leaseholders.

Sector et al. v. Priatel and Priatel, 2004 BCSC 45, para 41

41.6. Under Article 7.01 of the Head Lease, Westsea must incur costs through the exercise of prudent and reasonable discretion. A benefit requirement has also been recognized as a factor under a prudence test.

Nova Scotia Power Inc., *Re*, 2005 NSUARB 27, paras 20, 197, 266, 285, 298, ref'd to in *Ontario (Energy Board) v. Ontario Power Generation Inc*., 2015 SCC 44, para 97-98

Westsea's litigation costs were incurred with no benefit to lessees

41.7 In paragraphs 34, 40 and 50 of the Amended Petition, Westsea claims that it defended Actions 14-2941 and 16-3355 to the benefit of both Westsea and all Orchard House lessees.

41.8. In general, Westsea incurred its litigation costs for no discernable benefit to the lessees. Further, Mr. Trenchard is a leaseholder. Westsea's assertion raises the impossible and nonsensical circumstance in which their litigation costs also benefit Mr. Trenchard. Either the impugned costs benefit everyone, or no one. If they do not benefit the specific lessee litigant (here, Mr. Trenchard), then the costs cannot benefit any lessee.

Action 14-2941 – Westsea's defence was of no benefit to leaseholders

41.9. At paragraphs 34 and 40 of the Amended Petition, Westsea asserts that it defended against "the Petition…to ensure the continued operation of the Lease…for the benefit of both Westsea and all the leaseholders at Orchard House."

41.10. This is wrong: Westsea acted purely in its own interests when it defended against the Petition and against disclosure related to Operating expenses paid for by lessees. It is not in lessees interests to be in the dark about how Westsea spends lessees' money.

41.11. Further, for Westsea to have been acting in lessees' interests in the litigation, there must have been a retainer agreement between Westsea or its counsel and the lessees. At no time did Westsea apply to join any leaseholders as parties to the litigation as co-respondents or co-defendants alongside Westsea, nor did any leaseholders do so.

41.12. At no time did Westsea's counsel represent any of the leaseholders and to do so would have been a conflict of interest.

No benefit to leaseholders for Westsea's costs in Action 16-3355

41.13. At paragraph 50 of the Amended Petition, regarding Action 16-3355, Westsea says that it defended lessees' interests since if there was no obligation under the Head Lease for either party to replace the old windows and doors, the building would have fallen into disrepair and become uninhabitable, to the detriment of the quality of life of the lessees.

41.14. First, Westsea mistakes the benefit to the lessees of the windows project *per se* with the litigation result. At no time did Mr. Trenchard dispute that it was reasonable to replace the old windows and doors. Mr. Trenchard admitted the new windows and doors provided some benefit to lessees and Madam Justice Douglas found this to be so.

Trenchard v. Westsea Construction Ltd. 2019 BCSC 1675, para 20, 102, 112(c)

41.15. The litigation issue was always who, under the proper construction of the Head Lease, was responsible to pay for the costs of the windows project.

Trenchard v. Westsea Construction Ltd. 2020 BCCA 152, para 1-2

41.16. The litigation **result** was that *Westsea did not have to pay* for the windows project because Westsea could charge the cost of the project back to the lessees. This is what Westsea sought in its defence and received: this was absolutely in Westsea's own interests.

Absent the lease, Westsea was obliged *in law* to maintain the building

41.17. Secondly, absent repair and maintenance covenants under the Head Lease, negligence law and the *Occupiers' Liability Act* operate to hold Westsea liable if the building condition falls below a certain safety standard.

Klajch (Guardian) v. Jongeneel, 2002 BCCA 14, para 12

41.18. Absent the repair covenants under the Head Lease, it is negligent and irresponsible for Westsea to allow Orchard House, a building it owns, to become unsafe and uninhabitable.

41.19. The test for negligence under the *Occupiers Liability Act* is discussed in *Agar v. Weber*, 2014 BCCA 297 (para 48-58).

41.20. *Basset Realty v. Lindstrom* 1979 CanLII 2573 (NSCA) (para 27-28) is an example of a case in which a landlord was negligent for failure to repair windows when a child fell out, sustaining injuries.

41.21. Similarly, for repairs and maintenance necessitated under negligence law and the *Occupiers Liability Act*, Westsea must conform to construction standards under the BC Building Code and other regulations, just as it was obliged to do when Westsea undertook the windows project.

Building and Plumbing Regulation Bylaw No 17-113 A Bylaw of the City of Victoria

41.22. Westsea implies that it was willing to ignore the law so that it could avoid paying to replace failing windows and doors in the event the building became unsafe.

41.23. The difference between requirements imposed by law and those imposed by the Head Lease is in **who pays** for the project: under negligence law and the *Occupiers Liability Act*, Westsea is liable; under the Head Lease, Westsea recovers project costs from the lessees. It was 100% in Westsea's interest to prove it was obliged under the Head Lease to undertake the windows project so Westsea did not have to pay for it.

41.24. Mr. Trenchard argued this point on appeal, but it was not addressed in the decision.

Trenchard Affidavit #2, para 18

No retainer between Westsea and lessees and no instructions obtained

41.25. Just as for Action 14-2941, for Westsea to have acted in the interests of the lessees in Action 16-3355, it needed to enter a retainer agreement with the lessees and obtain their instructions.

41.26. There is no evidence that any leaseholder ever instructed Westsea's counsel to argue the position that Westsea asserts was in their interests. Westsea called no lessee witnesses at trial to say what degree of disrepair they were prepared to tolerate in exchange for not paying tens of thousands of dollars for new windows and doors. Westsea cannot purport to know how any other leaseholder would have instructed counsel had Westsea's counsel in fact been representing them.

Serious hardship for lessees

41.27. Further, Westsea's litigation costs create conditions of serious hardship for many lessees, as the affidavits of some 30 leaseholders show. If there is any benefit at all in paying for Westsea's defence against Mr. Trenchard's claims, which is denied, that benefit is far outweighed by the detriment to lessees created by the costs, the result being zero benefit.

Trenchard Affidavit #2, Exhibit A

Westsea's impermissible collateral attack of Mr. Justice Mackenzie's findings on Westsea's breach of the duty of prudence

41.28. Mr. Justice Mackenzie found that Westsea breached its duty to exercise prudent and reasonable discretion in incurring its costs ("duty of prudence") in Action 14-2941.

41.29. At paragraph 39 of the Amended Petition, Westsea correctly notes Mr. Justice Mackenzie's finding that Mr. Trenchard "basically received what he had sought" and the finding that Westsea breached its duty of prudence in incurring legal charges defending the Petition.

41.30 However, Westsea fails to explain that Mr. Justice Mackenzie's finding that Westsea breached its duty of prudence when incurring legal charges was not set aside or disturbed by the Court of Appeal.

41.31. At paragraph 40 of the Amended Petition, Westsea notes it appealed Mr. Justice Mackenzie's decision. The Court of Appeal stated that "In the result, I would set aside *that part* of the order below" (emphasis added) referring only to Mr. Justice Mackenzie's finding that Westsea was not entitled to charge its legal fees and expenses incurred back to the leaseholders under Article 7 of the Head Lease.

Trenchard v. Westsea Construction Ltd. 2017 BCCA 352, para 4, 13

41.32. This is clear from the Order of the Court of Appeal: "THIS COURT ORDERS that the appeal is allowed **in part**, and the order of Mr. Justice Mackenzie is set aside" (bold added). The order of Mr. Justice Mackenzie addressed whether legal costs incurred by Westsea in the Petition were chargeable as operating expenses, and no more.

Trenchard v. Westsea Construction Ltd. 2017 BCCA 352, para 12-13

Order of Court of Appeal CA44007, Trenchard Affidavit #1, Ex "D", p. 76

Order Made After Application, No 142941, Mr. Justice Mackenzie; Trenchard Affidavit #1, Exhibit "D", p. 73

41.33 An appellate order "appeal allowed in part" means that the remainder of a trial decision is undisturbed.

Edward Jones v. Voldenburg, 2012 BCCA 295, para 56

Pepper v. Pepper,1996 CanLII 2841 (BCCA), paras 15, 19

41.34 The only matter that Westsea may seek to relitigate is "that part of the order below" regarding the interpretation of "legal charges" and whether they constitute Operating costs. All else in Mr. Justice Mackenzie's decision remains good law.

41.35. Yet Westsea now seeks to re-argue Mr. Justice Mackenzie's finding that Westsea had breached its duty of prudence by attacking, at paragraph 40 of the Amended Petition, Mr. Justice Mackenzie's "…errors in characterizing Mr. Trenchard's success in the Petition and without consideration of the consequences of the relief sought by Mr.Trenchard…"

41.36. By seeking to raise this issue again, Westsea launches an impermissible collateral attack on a finding of fact by Mr. Justice Mackenzie that was not disturbed by the Court of Appeal.

41.37. To determine whether a claim constitutes a collateral attack, the court should inquire into whether the claim, or any part of the claim, is "in effect" an appeal of an order.

Krist v. British Columbia 2017 BCCA 78 (CanLII), para 47

41.38. Indeed, Westsea applied unsuccessfully for an order that Action 16-3355 was *res judicata*, partly based on Westsea's argument that Mr. Trenchard had already put the lease before the court and according to Mr. Justice Mackenzie, received "what he had sought".

Trenchard v. Westsea Construction Ltd. June 12, 2017, Oral Reasons for Judgment, Madam Justice Power, para 18, 30

41.39. In this respect, Westsea knowingly advances inconsistent positions, which is an abuse of process.

Este v. Esteghamat-Ardakani, 2018 BCCA 290 (CanLII) para 93-94

41.40. Westsea's pleadings that relate to Mr. Justice Mackenzie's findings that were not disturbed by the Court of Appeal, should not be considered in these proceedings.

If it becomes necessary to re-argue Mr. Justice Mackenzie's finding that Westsea breached its duty of prudence in Action 14-2941

41.41. Because Mr. Justice Mackenzie made a binding finding of fact, not overturned on appeal, that Westsea breached its duty of prudence in incurring its costs in Action 14-2941, Mr. Trenchard's position is that this should not be re-argued for reasons set out above. However, if the court finds it necessary to re-argue this point, Mr. Trenchard pleads further as follows.

41.42. At paragraph 36 of the Amended Petition, Westsea says that it "had already agreed to circulate the said engineering report to all leaseholders prior to the commencement of the Petition."

41.43. In response Mr. Trenchard says: Westsea's December 17, 2013 letter indicating that Westsea would send an engineering report, was addressed specifically to Mr. Trenchard and not to *all the leaseholders*. Given Westsea's resistance, as Mr. Justice Mackenzie observed, in providing any requested documents to Mr. Trenchard, it was reasonable for the Consent Dismissal Order to be conditional upon Westsea's court-ordered agreement to send the noted engineering report to all leaseholders, despite Westsea's letter of December 17, 2013.

Trenchard Affidavit #1, para 8, 10-29; Trache Affidavit #1, Ex F, p 57

41.44. In respect of "half-truths and omissions" in Action 14-2941 there is evidence that Westsea knowingly misconstrued the nature of Mr. Trenchard's request for engineering reports that Westsea said did not exist, but which on the evidence did exist.

Trenchard Affidavit #1, para 8-29; Ex A, p 4; Ex B, p 56 and 66; Ex C, p 69-70

C.M. Callow Inc. v. Zollinger 2020 SCC 45, para 47, 80, 91

41.45. Further, Westsea refuses to disclose the amounts it alleges that lessees owe for litigation costs. This is despite the Court of Appeal's explicit requirement that Westsea provide "a statement of the legal fees and expenses to the leaseholders setting out the claim under the clause", and continual requests from leaseholders for Westsea to do so.

Trenchard v. Westsea Construction Ltd. 2017 BCCA 352, para 12

41.46. By ignoring the Court of Appeal and lessees' requests for disclosure, Westsea has failed to have appropriate regard for the legitimate contractual interests of the leaseholders who pay for Westsea's Operating expenses. Consequently, Westsea has breached the duty of honest performance and the duty to exercise prudent and reasonable discretion when incurring costs.

Bhasin v. Hrynew, 2014 SCC 71, para 65

41.47. Sufficiently detailed invoices are required to determine if the services are related to the proceedings; whether the costs were reasonably incurred or excessive~~; or whether the costs claim could result in unjust enrichment~~. A wholly unsupported claim for legal costs is tantamount to a blank cheque.

ATCO Electric Ltd. v R & S Resource Services Ltd., 2018 ABSRB 68 (CanLII), paras 28-29, 32

41.48. Further, if the landlord does not provide requested details about additional expenses where a lease requires them, the tenant is not obligated to pay **any** of them.

Courtenay Lodge Ltd. v. Forbidden Brew Corp. 2017 BCSC 1850, para 702-73, 76

41.49. Westsea therefore breached its duty of prudence in Action 14-2941 in incurring its litigation costs in that case for these reasons, in addition to or alternatively to those as stated by Mr. Justice Mackenzie.

Trenchard v. Westsea Construction Ltd., 2016 BCSC 1752, para 23

Westsea's inappropriate use of hindsight

41.50. In paragraph 47 of the Amended Petition, Westsea sets out Madam Justice Douglas' decision summary. In doing so Westsea, a) demonstrates its success in the litigation, and b) relies on hindsight to justify charging costs in advance.

41.51. There is no dispute that Westsea was successful in Action 16-3355. However, one of the main issues in this case is whether Westsea comes to the court with clean hands and/or breached its duty of prudence in charging lessees its costs *prior to* the conclusion of proceedings. The Supreme Court of Canada endorsed a no-hindsight test when considering the exercise of prudent and reasonable discretion in forecasting costs. Under a prudence review, a court must consider what the parties knew *when the costs were forecast, and not what they knew after the costs were incurred*.

Ontario (Energy Board) v. Ontario Power Generation Inc., 2015 SCC 44, paras 79, 81-83, 910, 99, 102, 104, 108, 110, 112, 114

41.52. Thus, the fact that Westsea successfully defended Action 16-3355 is irrelevant to a determination whether Westsea breached its duty of prudence by charging lessees its litigation costs *before the conclusion of proceedings.*

41.53. It *is* relevant that Westsea knew or ought to have known, *at the time*, that charging its costs in advance was contrary to law and professional ethics. In full knowledge of this, Westsea breached its duty of prudence in Action 16-3355.

Litigation costs charged in advance as Operating expenses

41.54. In general, Westsea demands payments for alleged Operating costs twice a year. It first demands payments in advance under Article 7.02, as an estimate of the following years' Operating costs, payable by leaseholders in 12 monthly installments. After costs for a given year have been incurred, Westsea calculates whether there is a shortfall or overpayments, upon which it demands further payment for the shortfall.

41.55. It is possible to determine after the fact what Westsea charged in advance by looking at their Schedule of Operating Costs ("SOC") for the year ended, when Westsea typically also charges for shortfalls. For 2017 to 2020, Westsea demanded litigation charges to be paid as follows:

	Amount charged as shortfall	Amount charged in advance	When demanded	Affidavit	When precise amount identified	Affidavit
2017	$426,337				June 7, 2018 SOC	HT#1 Ex F p 177
2018		$453,771	Oct 24 2017	HT#1 Ex F p 156	May 14 2019 SOC	HT#2 Ex F p. 210
2019		$659,525	Oct 12 2018	HT#1 Ex F p 196	October 19 2020 SOC	HT#2 Ex F p 226
2020		$659,525*	Oct 11 2019	HT#2 Ex F p 212		
Total	**$426,337**	**$1,772, 821**				

*SOC not yet received; this is my estimate based on 2019 given no decrease was projected for "legal charges" for 2020.

41.56. Westsea charged the 2017 legal charges of $426,337 as a shortfall and did not seek that amount in advance. Most of the 2017 charges appear to have been for Action 14-2941, costs for which Westsea breached its duty of prudence for other reasons as discussed, with a small amount for Action 16-3355, commenced on August 9, 2016. The total litigation costs Westsea charged is about **$2.19 million**, with **$1.77 million** charged in advance.

41.57. By charging litigation costs *in advance* to leaseholders, Westsea comes to the court with unclean hands and/or breached its duty of prudence, even if litigation costs are properly charged as Operating costs under the Head Lease, which is denied. In turn, Westsea is not entitled to recover any of these costs from leaseholders.

42. By letter dated October 24, 2017, Westsea notified Mr. Trenchard and the Orchard House leaseholders of a 38% increase in Operating expenses payable for 2018, which included an unspecified sum of litigation costs which Westsea anticipated it would incur in 2018 (the "38% Increase"). In this letter, Westsea indicated for the first time that it intended to recover "management fees". This is significant because Westsea appears to want to argue that "management" is one of its covenants, when it is not, and inappropriately relies on lessee acquiescence. ~~Moreover, Westsea inappropriately suggested to the court in Action 16-3355 that management fees were one of Westsea's covenants such that Madam Justice Douglas included an erroneous reference to this at paragraph 133 in her original decision, which was later corrected.~~ Mr. Trenchard requested Westsea to provide a more detailed breakdown of the costs, to which Westsea did not respond.

Trenchard affidavit #1, Ex F, p 156-159

43. Originally Mr. Trenchard sent 12 monthly cheques in advance ~~38%~~ to pay the amount demanded including the 38% Increase. ~~this amount.~~ In October 2018, Mr. Trenchard elected to withdraw payment for litigation costs payable in advance for 2018 and notified Westsea to of his refusal to pay Westsea's litigation costs payable in advance for 2018.

43.1. By letter dated January 16, 2018, Westsea's counsel explained in part the basis for Westsea's 2018 operating budget in relation to litigation costs. Westsea's counsel also explained that it would prepare a "summary of the legal charges relating to the remediation

of work done at Orchard House, ongoing leaseholder and/or tenant issues and the litigation initiated by Mr. Hugh Trenchard."

Trenchard Affidavit#2, Ex G

43.2. Mr. Trenchard ~~has~~ never received such a summary~~.~~ until Westsea provided this information as a result of court orders.

Trenchard Affidavit#2, para 27

44. By letter dated October 12, 2018, Westsea advised leaseholders of a further 25% increases in "management fees, legal fees, insurance, repairs and maintenance budgeted for 2019". Like the 38 % Increase, Westsea gave no breakdown of estimated costs among the individual costs but instead mixed litigation costs among a set of others.

Trenchard affidavit #1, Ex F, p 196-197; cf. para 20 herein

45. On or about June 7, 2018, Westsea sent a demand to the leaseholders for payment of an Operating costs shortfall for 2017 totalling $551,954. Nearly 80% of this ($426,337), was attributable to "legal" costs (the "2017 Litigation Cost Shortfall"). Mr. Trenchard refused to pay his alleged share of the 2017 Litigation Cost Shortfall, but agreed to pay his share of the balance of the total of $551,954 and sent a cheque for that amount (the "Undisputed Balance").

Trenchard Affidavit #1, Ex F, p 172-178

46. Westsea later returned Mr. Trenchard's payment for Undisputed Balance. Mr. Trenchard then re-sent payment to Westsea for the Undisputed Amount. For a second time, Westsea then returned Mr. Trenchard's payment for the Undisputed Balance. Mr. Trenchard says that Westsea has now therefore waived its right to receive payment for the Undisputed Balance ($840.76).

Trenchard Affidavit#1, Ex F p 186

47. Despite requests to Westsea for such information, Mr. Trenchard has been unable to determine from Westsea how the costs of the 38% Increase, and the 2017 Litigation Cost Shortfall, are divided as between Action 14-2941 and Action 16-3355. This now includes costs of the Petition herein.

Trenchard Affidavit#1, Ex F, p 158-159, 179-180

48. Mr. Trenchard made a demand under the Supreme Court Rules for an itemization of Westsea's costs in 16-3355 since it was a matter raised in its pleadings. Westsea expressly refused to provide such disclosure. Such a breakdown will aid in determining what quantity of litigation costs Westsea attributes to Action 14-2941 and what quantity to Action 16-3355.

Trenchard Affidavit #1, Ex E, p 151-155

49. By letters dated December 22~~0~~, 2017, and January 16, 2018, counsel for Westsea reiterated its intention to charge litigation costs as Operating expenses and indicated that counsel had instructions to pursue legal action including termination of leases for refusal to pay litigation costs.

Trenchard Affidavit #1, Ex F, p 168-171
Trenchard Affidavit#2, Ex G, p 234
Slater Affidavit#1, para 69

50. On October 9, 2018 Mr. Justice Steeves made an award of "no order as to costs for this application" ~~costs in this court, consistent with the defendant's position herein.~~" This term of the order was settled by Master Bouck on February 26, 2019.

Trenchard Affidavit#2, Ex I, p 257

50.1. By letter dated October 11, 2019, Westsea provided leaseholders with its operating budget for 2020, indicating an 8.90% increase for "electricity, elevator, insurance, property, scavenging, water, and repairs and maintenance". This means Westsea's estimated "legal

charges" demanded for 2020 were the same as what Westsea projected for 2019, which according to Westsea's October 19, 2020 budget shortfall letter was about $659,525.

Trenchard Affidavit#2, Ex F, p 212-217

50.2. By letter dated November 3, 2020, Westsea provided its 2021 operating budget, indicating a projected decrease in 28% for "elevator, property taxes, legal and repairs and maintenance". There is no way to determine how much of the decrease is attributable to legal costs, and how much Westsea continues to charge in advance for prospective litigation costs not incurred.

Trenchard Affidavit#2, Ex F, p 228-232

50.3. As of March 1, 2021, Mr. Trenchard has not received Westsea's 2020 shortfall letter.

Trenchard Affidavit#2, para 20

50.4. By letter dated December 15, 2020, Mr. Trenchard responded to say in essence it was impossible to estimate how much Westsea was demanding in advance for "legal" charges in 2021, so Mr. Trenchard refused to pay any Operating costs for 2021.

Trenchard Affidavit #2, Ex H, p 252-255

Other factors that limit an award of costs to Westsea

50.5. Mr. Trenchard achieved some success on his appeal of Madam Justice Douglas' decision. The Court of Appeal agreed with Mr. Trenchard that the Head Lease was a standard-form contract. This significant component of Mr. Trenchard's appeal involved an extensive affidavit on his application for further evidence on the appeal.

Trenchard v. Westsea Construction Ltd. 2020 BCCA 152, para 47

50.6. The Supreme Court of Canada in *Uber v. Heller* observed that standard-form contracts should be closely scrutinized for unconscionable content.

Uber v. Heller 2020 SCC 16, para 87-91

50.7. The fact that the Orchard House lease and several other 99-year leases are standard-form contracts represents a quasi-public interest finding that has implications for future interpretation of these leases.

50.8. The Court of Appeal also clarified that under the Head Lease, betterments cannot be charged as Operating costs. This settles an important issue because it overrules Mr. Justice Romilly's finding in his 2012 Provincial Court decision *Steers v. Sheridan* that under a 99-year lease in Vancouver, the lessor was allowed to charge betterments as Operating costs under the lease.

Trenchard v. Westsea Construction Ltd. 2020 BCCA 152, para 71.

Steers v. Sheridan 2012 File Provincial Court, 08-21644 Vancouver, para 26, per Romilly, J., August 27, 2012

50.9. In cases of public importance, the court has discretion to award no costs to a successful litigant. Given that "many multiples of leaseholders" are affected (Court of Appeal in *Trenchard v. Westsea* 2020 BCCA 152, para 47), the litigation in this case transcends the immediate issues of the parties involved, and have not been previously resolved.

OPEIU v. B.C. Hydro et al 2005 BCSC 8, para 9

50.91. A further consideration is that Westsea has actually been paid by most of the leaseholders for most of its litigation costs – costs which those leaseholders will never be able to recover even if the respondents are successful in this matter. In this action, Westsea is claiming a total of about $65,000 (as of January 2021) in relation to some 14 leaseholders, about 3% of the total $2.1 million Westsea has charged. Having recovered 97% of its litigation costs already, it is not appropriate that Westsea should receive 100% of its claimed costs in these circumstances.

Trache Affidavit #1, p 12 para 56

Part 5: LEGAL BASIS

~~The lease is void ab initio~~

51. Parties cannot be both a landlord and a tenant of the same premises.

Rye v. Rye [1962] AC 496 (H.L.)

52. Since George Mulek (deceased) was 85% shareholder of Westsea and 99.99% shareholder of Capital when the Head Lease was executed, the parties to the Head Lease were effectively one and the same individual, George Mulek. Applying *Rye v. Rye*, the Head Lease was therefore void ab initio.

53. Although the void Head Lease was re-assigned, it does not create a valid and enforceable agreement because for that to be, Mr. Trenchard must have known of his right to void the lease, such as via legal advice to that effect, but conducted himself as though the lease was valid and enforceable.

The Owners, Strata Plan 1261 v. 360204 B.C. Ltd., 1995 CanLII 659 (BCSC), para 155-156

54. In this case, Mr. Trenchard has never received legal advice to the effect that the lease was void.

55. Further, the corporate veil may be lifted in circumstances in which third parties might suffer if the corporate veil is not lifted, as the assignee leaseholders do in this case. Where two corporate entities have common officers and directors, whether to lift the corporate veil is a triable issue.

National Leasing Group Inc. v. Acme Enterprises Ltd. 2015 ABQB 631

56. If the Head Lease is not void, all the following arguments and claims are made further and alternatively.

An interpretative presumption against Westsea

57. George Mulek was the majority shareholder and principle for both Westsea and Capital. This creates an additional or magnified *prima facie* presumption against Westsea when interpreting ambiguities in the Head Lease. No bargaining was carried out on behalf of an independent or second party lessee, and therefore no bargaining was carried out to protect the interests of subsequent assignees, as they would reasonably expect to have occurred.

~~58. This creates a presumption in favor of Mr. Trenchard and the leaseholders when interpreting the Head Lease.~~

Res Judicata

51. The causes of action are distinct – whether litigation costs are operating costs in this case, versus whether costs to replace windows/doors/fans were operating costs in action 16-3355, versus the issue of whether the lease contained an implied term of transparency in action 14-2941. *Res judicata* does not apply if the issues are distinct, even though there may be material common facts between cases and the parties may be the same.

Trenchard v. Westsea Construction Ltd. Oral reasons of Madam Justice Power, 2017 08 02, Victoria, Action 16-3355, para 28, 31-35

52. *Res judicata* may not apply where there are special circumstances, including new law since the impugned decisions were rendered, and it would be in the interests of justice not to apply the doctrine. The consideration and/or the application of *Uber v. Heller* (2020 SCC) and *Courtenay Lodge* (BCSC 2017), as pled herein meet this threshold.

Hockin v. Bank of British Columbia, 1995 CanLII 6268 (BCCA), para 26, 36

The standard-form contract

58.1 The B.C. Court of Appeal found the Head Lease is a standard-form contract.

Trenchard v. Westsea Construction Ltd. 2020 BCCA 152, para 47

~~59.~~ ~~Further, the Head Lease is~~ As ~~a standard-form or adhesion contract, the parties did not negotiate terms, and the Head Lease was put to the leaseholders as a take-it-or-leave-it proposition. Thus, the doctrine of *contra proferentem* applies when resolving ambiguities. The phrase contained in the Head Lease as assigned, "…and all other expenses paid or payable by the Lessor in connection with the Building, the common property therein or the Lands" is ambiguous, and should be resolved in favor of the leaseholders.~~

~~*Ledcor Construction Ltd. v. Northbridge Indemnity* Insurance Co., 2016 SCC 37, para 28~~

A term under which leaseholders are required to pay litigation costs is unconscionable

59.1. The doctrine of unconscionability has implications for standard-form contracts. The potential for such contracts to create an inequality of bargaining power is clear, as is the potential to enhance the advantage of the stronger party at the expense of the more vulnerable one.

Uber v. Heller 2020 SCC 16, headnote, paras 87-90

Article 10 Separate Leases, privity of contract

59.2. The Separate Leases clause expresses the doctrine of privity of contract. The principle was expressed by the Supreme Court of Canada:

> We come now to deal with the effects of a valid contract when formed, and to ask, to whom does the obligation extend? What are the limits of a contractual agreement? This question must be considered under two separate headings: (1) **the imposition of liabilities upon a third party**, and (2) the acquisition of rights by a third party. We shall see that the general rule of the common law is that no one but the parties to a contract can be bound by it, or entitled under it. This principle is known as that of privity of contract. [bold added]

Greenwood Shopping Plaza Ltd. v. Beattie et al., 1980 CanLII 202 (SCC), [1980] 2 SCR 228, p. 239

59.21 Under the doctrine of privity there is no exception in law for related or simultaneously-made contracts.

Benfield Corporate Risk Canada Limited v. Beaufort International Insurance Inc. 2013 ABCA 200, para 95

59.3. The doctrine applies where different tenants with a common landlord and identical lease and neighboring suites cannot be liable for any breach of the other.

West Lonsdale Medical Clinic Inc. v. 0706394 B.C. Ltd. 2019 BCSC 1205, para 48-49

59.4. The court in *West Lonsdale* stated there would need to be an explicit link between the obligations of one tenant to another. No such explicit link exists in this case.

West Lonsdale Medical Clinic Inc. v. 0706394 B.C. Ltd. 2019 BCSC 1205, para 49

59.5. There are three exceptions to the doctrine of privity of contract. Agency, trust, and the principled exception set out in *Fraser River Pile v. Can Dive Services*. [1999] 3 SCR 108.

Price Security Holdings Inc. v., 2019 BCCA 36, para 19

59.6. None of these exceptions apply in this case. Privity applies and Westsea's litigation cost liabilities should not be imposed on third-party lessees.

59.7. Privity of contract is also evidenced by the lease assignment and re-assignments. If an assignee assumes the original tenant's obligations under the lease, as is the case here, the assignee comes under privity of contract as well.

Friedman on Leases, 1st ed. Vol 1, p 218

Westsea's claim of solicitor-client privilege

59.9. Westsea indicated at a Case Planning Conference that it intends to assert solicitor-client privilege over its litigation costs. Westsea has not pleaded privilege to prevent disclosing its litigation costs, so it may not now assert privilege.

59.10. However, if Westsea is permitted to assert privilege, the BC Court of Appeal has indicated there is a rebuttable presumption of solicitor-client privilege over legal costs. The strength of the presumption diminishes over the course of proceedings.

British Columbia (Attorney General) v. Canadian Constitution Foundation, 2020 BCCA 238, paras 70-75

59.11. It is essential to analyse the issue in the context of the litigation as it then existed when disclosure was sought, and not as the case subsequently unfolded.

Ibid, para 72

59.12. Westsea asserts privilege after the conclusion of proceedings and there is no prejudice now in disclosing its costs breakdown. Depriving the court of these details severely limits the courts' ability to get to the bottom of the issues in this case. The presumption is rebutted, and Westsea should be ordered to disclose a detailed breakdown of its litigation costs.

59.13. Alternatively, Westsea's counsel's trust ledgers for Actions 14-2941 and 16-3355 are not subject to privilege and should be disclosed

Ibid, para 62

No breach has occurred

60. No breach of the Head Lease by Mr. Trenchard has occurred that gives rise to Westsea's Petition for default/forfeiture because he has refused to pay litigation costs which are not Operating expenses under the Head Lease.

61. Further and alternatively, if a breach has occurred, it gives rise to a debt claim in relation to a minor term of the lease and is not a breach of a fundamental term or a fundamental breach of the Head Lease such that it gives rise to Westsea's Petition for default/forfeiture or to terminate the lease.

61.1. A fundamental breach giving rise to a right of termination arises "Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of *substantially the whole benefit* which it was the intention of the parties that he should obtain from the contract". Even if rent is owing, if the amount owing is less than "substantially the whole benefit" and the foundation of the contract is not undermined, there is no fundamental breach.

Action Helicopters Ltd. v. Siller Brothers Inc., 1996 CanLII 1447 (BC SC), para 30-31

61.2. Here, the litigation costs that Westsea has demanded are roughly 1/3 of the total Operating costs owing for 2017-2019, just like the 33% of rent payable in *Action Helicopters*, for which the court found no fundamental breach.

Ibid, para 33

61.3. Westsea knew or ought to have known it could not terminate leases for non-payment of litigation costs and, by threatening leaseholders with this consequence, comes to the court with unclean hands. Westsea's action repressed leaseholders from asserting their right to dispute the charges, a right the Court of Appeal expressly recognized in *Trenchard v. Westsea Construction Ltd*, 2017 BCCA 352, para 12.

Trenchard Affidavit #1, Ex F, p 188
Trenchard Affidavit #2, Ex A; various lessees; Ex G, p.234

62. If a breach of the Head Lease has occurred that gives rise to Westsea's action in default/forfeiture, Mr. Trenchard claims relief from forfeiture under Section 24 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

62.1. Forfeiture and judicial sale of the lease interest is inappropriate where there is significant disparity between the arrears and the value of the properties. If arrears can otherwise be paid by the debtors, relief from forfeiture is justified in such circumstances.

Canada (Attorney General) v. Wang, 2001 BCSC 422 (CanLII), para 22-24

63. Further, the issues raised by Westsea's Amended Petition and this response may require the introduction of other evidence not available to Mr. Trenchard. Mr. Trenchard may seek orders related to disclosure of:

- the extent to which Bruce Sembaliuk and Judy Trache are the sole parties who retain and instruct counsel for Orchard House and their related properties, and their management functions therein;
- the nature of the types of costs Westsea has historically incurred and charged as Operating expenses;
- details of the litigation costs Westsea has charged to see how they are divided between the various actions, and what categories of costs (i.e. costs awarded to Mr. Trenchard, or on "without costs" basis) are being charged as Operating expenses.

Lease terms must be expressly stated

64. Unless **expressly** stated to form part of a lease, many kinds of costs are not included as Operating expenses in leases, including management fees and those carried out by the landlord in its own interest.

> *Sami's Restaurant Corp. v. W. Hanley & Company*, 2003 BCSC 1181 (CanLII) , para 38, aff'd 2004 BCCA 157
>
> *R. Denninger Ltd. v. Metro International General Partner Canada Inc. and Lehndorff Property Management Ltd.* 8 O.R. (3d) 720 (Gen. Div.), applied in *A.L. Scot v. PDF Training Inc. et al*. 2004 BCSC 164, para 129

~~65. The doctrine of *noscitur a sociis* is like the *ejusdem generis* rule, whereby the generality of a term can be limited by a series of more specific terms that precede or follow it.~~

~~66. In *JEKE Enterprises v. Northmont Resort Properties Ltd*., 2017 BCCA 38, the BC Court of Appeal found the *noscitur* rule did not apply in that case because the language of the lease was so broad that no *genus* could be determined to limit the general words of the term in issue.~~

~~67. This is not so under the Orchard House Head Lease. In the Head Lease, the *genuses* that define "Operating expenses" are those costs which relate to the maintenance, repair, and operation of the building; and services or staffing to conduct the maintenance, repair, and operation of the building. An operating cost is one incurred to maintain and keep something operational, such as cleaning, greasing, tightening, or replacing minor components like weather stripping, filters, fuses and lightbulbs. Taxes are a legal requirement that cover public services that contribute to the maintenance and operation of the building and its occupants. Insurance allows for the operation of the building in case of disaster. These *genuses* do not include litigation costs to defend against disputes related to the interpretation of the lease contract.~~

~~68. Further and alternatively, the *genuses* that define "Operating expenses" are fixed expenses and variable expenses, which include the repair, maintenance and operating costs in connection with the building, pursuant to Westsea's covenants under Article 5 read together with Article 7.01. These *genuses* do not include Westsea's litigation costs incurred in defending disputes raised by individual leaseholders, nor do they include Head Management costs.~~

~~*The Appraisal Institute of Real Estate*, 2010, 3rd Canadian Ed, Appraisal Institute of Canada, Sauder School of Business, pp. 21.16 – 21.24 (and reference to footnote 2)~~

69. Mr. Justice MacKenzie in *Trenchard v. Westsea Construction Ltd.* 2016 BCSC 1752 held that litigation costs are not Operating expenses under the Head Lease as assigned. He found that Article 5 (Westsea's covenants) must be construed together, and that "Article 5 makes it clear that the lessor's covenants are directed at the repairs and maintenance of the Property."

Trenchard v. Westsea Construction Ltd. 2016 BCSC 1752, para 19

69.1. The language of the Head Lease therefore distinguishes between costs that are incurred in relation to the physical property and its operations, and the abstract legal exercise of construing the terms of the Head Lease. Any legal charges must therefore be directly related to the physical property and its operations, not in relation to the *lease itself* and litigation that construes the lease.

70. Westsea relies on the Court of Appeal decision in *JEKE*. ~~Further, a~~ A close review of the relevant lease provision in *JEKE* shows the *JEKE* lease is easily distinguishable from the Orchard House Head Lease. In *JEKE*, lease clause 9(p) included "all administration costs…in the management of the Vacation Properties" [*emphasis added*].

JEKE Enterprises v. Northmont Resort Properties Ltd., 2017 BCCA 38, para 83

70.1. Further, the *JEKE* lease was not circumscribed by the express application of reasonable and prudent discretion, a critical distinction that limits the scope of any costs that might be recoverable by Westsea to being on a party-party basis only.

Park Royal Shopping Centre Holdings Ltd. v. Gap (Canada) Inc., 2017 BCSC 1257 (CanLII), paras 79-84

71. The Orchard House Head Lease contains no language anywhere, let alone under the Article 5 covenants, that permits Westsea a broad management mandate.

72. Further, in *JEKE* the standard-form nature of the lease was not under consideration, as it should be here. ~~Thus *contra proferentem* was not applied in *JEKE* as it should be here.~~ Further, the nature of the *JEKE* lease is not strictly residential, unlike the residential Orchard House Head Lease. The *JEKE* lease relates to a luxury resort, which is more commercial in nature than a permanent residence.

JEKE Enterprises v. Northmont Resort Properties Ltd., 2017 BCCA 38, para 5

73. In *JEKE*, the courts found that litigation costs "do arise from the management of the Resort…" But this finding was rooted in clause 9(p) of the *JEKE* and the express reference to management costs as operating expenses in that lease. As noted, there is no such express provision permitting Westsea to charge management costs as Operating expenses in the Head Lease.

JEKE Enterprises Ltd. v. Northmont Resort Properties Ltd., 2016 BCSC 401 at para 377

Westsea's covenants are restricted to those in Article 5

~~74. Westsea may argue that its covenants are broader than those contained in Article 5 of the Head Lease. This might permit a court to conclude that wider management functions, which could involve litigation related to the building, involve costs that are recoverable as Operating expenses.~~

75. ~~Such a~~ A broad interpretation of "covenant" is not indicated by the language of the Head Lease. In the Head Lease, all the terms in both Articles 4 (Lessees' covenants) and 5 (Lessor's covenants) are preceded by the phrase, "The Lessee/Lessor covenants with the Lessor/Lessee" [*emphasis added*]. This phrase limits the meaning of "covenant". Nowhere else in the Head Lease are any other obligations described expressly as a "covenant". Thus "legal charges" are confined to those covenants under Article 5, as Mr. Justice MacKenzie held in *Trenchard v. Westsea*.

> *Trenchard v. Westsea* Construction Ltd. 2016 BCSC 1752, para. 19

76. The Head Lease distinguishes between covenants and other kinds of obligations in several places:

Article	**Phrase**
1.01	"the covenants and agreements…to be observed and performed"; and "terms, covenants and conditions."
5.11	"all the terms, covenants, provisions and agreements…".
7.03	"the Lessee agrees to pay…the Lessee's share of such excess…" [*emphasis added*]
8.02	"covenant or condition"
8.05	"covenant, proviso, or condition"
8.06	"covenants and conditions"
8.07	"The Lessor agrees that it will request…" [*emphasis added*]
10.01	"covenants, stipulations or conditions"
Reassignment	"covenants and agreements and the conditions, provisos, rules and regulations in the Lease and contained"

77. If the parties to the lease intended the word "covenant" to include *all* obligations under the lease, hypothetically including litigation costs in defending against lessees' against Westsea, the parties would have expressly said so in plain words, and there would have been no need to distinguish between "proviso" "condition", "agreement", "rules and regulations". This principle of lease interpretation is well established in leasing law.

~~78. For example:~~

Cost held not to be part of lease unless expressly stated	**Authority**
Costs of agent to perform ordinary duties of landlord; management fees, administrative costs, mark-ups, audit fees	*R. Denninger Ltd. v. Metro International General Partner Canada Inc.* (1992), 8 O.R. (3d) 720, p. 18/20
Roof replacement costs/capital improvement	*Alderman Holdings Inc. v. McCutcheon Business Forms Ltd.* [1997] O.J. No. 4386, para 19
Management or administrative fees	*C.C. Tatham & Associates Ltd. v. 2057870 Ontario Inc.* 2011 ONSC 3891, para 22 (contrast *Han v. 9938 Investments* (1995), 5 BCLR (3d) 306 (CA), p.3, (d); para 9 in which admin. overhead was expressly allowed in the lease)
Costs of fire alarm and sprinkler system	*Shunjing Trading Inc. v EB Engineered Panels and Trading and Barnes*, 2010 NBQB 207 aff'd 2011 NBCA 29 paras 4,7
Liability to pay landlord's taxes	*Glasgow Tramway and Omnibus Company, Limited v. Glasgow Corporation* (1897), The Scottish L.R. (34) 460, at 463, para 2
Costs to put premises in better condition	*Vicro Investments Ltd. et al. v. Adams Brands Ltd.* [1963] 2 O.R. 583, headnote
Capital Costs/roof replacement	*Skyline Holdings Inc. v. Scarves and Allied Arts Inc.* [2000] J.Q. no 2786 J.E. 2000-1623 (Que C.A.), para 28

Express covenants are distinct from covenants in law

79. Further and alternatively, the Head Lease contains both expressly named covenants, and covenants in law. Express covenants effectively constitute a code of specific covenants to the exclusion of covenants in law: *expressio unius est exclusio alterius*, not unlike a finding of this Court of Appeal in *Lehndorff Can Pension.*

Lehndorff Can. Pension Properties Ltd. v. Davis Mgmt. Ltd [1989] 5 WWR 481 (BCCA), para 65

80. Here the Head Lease defines "covenants" expressly under Article 5, while distinguishing them from other covenants obligations that might exist within the Head Leasein law. Article 7 Operating expenses refers specifically to Article 5 covenants. This is elucidated further by the fact that Article 5.11 is excepted from the "covenants contained herein."

80.1 Parties to a contract are free to define words and phrases that may differ from their ordinary usage. Where parties have clearly done so, a court need look no further than this unambiguous language in interpreting the meaning of that word or phrase.

Trenchard v. Westsea Construction Ltd. 2020 BCCA 152, paras 62-63

80.2. A proper construction of lease terms must hew to the definition contained in the lease.

Trenchard v. Westsea Construction Ltd. 2020 BCCA 152, para 70

80.3. "Covenant" is an expressly defined term in the Head Lease under Article 5 and there is no need look further at what else in the lease might be Westsea's "covenants". Only costs connected with these covenants may be charged as Operating costs.

80.4. The Court of Appeal in *Trenchard v. Westsea Construction* 2020 BCCA 152 recognized that Operating costs are confined to tangible matters "in connection with the maintenance, operation and repair of the Building," at one end, and "in connection with the Building" the common property and the lands, at the other end.

Trenchard v. Westsea Construction Ltd. 2020 BCCA 152, paras 63

80.5. Matters connected to a physical building and its operations do not include litigation, an intangible societal process for determining rights between parties.

81. Some leases are drafted to include a provision to ensure that all legal covenants and obligations together constitute "covenants" under the lease. These are known as "obligation as covenant" clauses, in the form:

> "Each obligation or agreement of the Landlord or Tenant expressed in the Lease, even though not expressed as a covenant, is considered to be a covenant for all purposes".
>
> Harvey Haber, Q.C. *The Commercial Lease*. 1989. Canada Law Book Inc. Aurora, **p. 243**

82. No such obligation as covenant term appears in the Head Lease.

Reasonable expectations

83. It is not with the reasonable expectation of the parties that Westsea's litigation costs would be recoverable as Operating expenses. Further, Operating costs are reasonably expected to increase predictably and marginally from year-to-year. It is not reasonably expected for Operating costs to increase suddenly by 38% in 2018 and 25% as projected for 2019.

84. Where there are ambiguities, the reasonable expectations of the parties should be considered.

> *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252, p. 271 para a

85. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the transaction in the first place should be discarded in favour of an interpretation which promotes a sensible result.

> *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 SCR 888, p. 901

~~**Unjust enrichment**~~

~~86. Alternatively, if Westsea's litigation costs are properly Operating expenses, which is denied, Westsea is unjustly enriched in recovering litigation costs from leaseholders in circumstances in which courts have not specifically found Westsea to be the successful party, and in which courts have awarded costs against Westsea. No courts have found Westsea to be the successful party in Action 14-2941; the outcome of Action 16-3355 is still to be determined, and Mr. Trenchard was specifically awarded his costs ($2800) on Westsea's application to strike his pleadings (see items 31-34 Schedule "A"), a cost that Westsea appears to be charging to leaseholders as an Operating expense.~~

Breaches of prudent and reasonable discretion

87. Further and alternatively, if Westsea's litigation costs are properly Operating expenses, which is denied, Westsea has failed to exercise prudent and reasonable discretion in charging those costs, as required under the Head Lease. Further and alternatively, Westsea has breached the Head Lease, does not come to the court with clean hands, and should be denied recovery of those costs.

88. Westsea has breached its duty under the Head Lease to exercise prudent and reasonable discretion in the following ways:

- a) By conflating litigation costs of different actions, mixing them among several other Operating costs, such that leaseholders cannot discern what amount of costs they may dispute;

- b) By conflating litigation costs with other possibly legitimate "legal" costs, again making it difficult for leaseholders to discern what amount or categories of costs they may dispute;

- c) By failing to disclose a detailed breakdown of litigation costs as between the different actions and failing to disclose the distinction between those costs and other Operating expenses, after repeated requests to do so including a demand under the Supreme Court Rules in Action 16-3355;

- d) By charging litigation costs that had ~~have~~ yet to be incurred, prior to a judicial decision on the issue of whether the costs are properly chargeable as Operating expenses. Westsea's decision not to wait for a resolution of the issues was made when Westsea knows or ought to know there is a reasonable prospect it might lose given the existing reasons of Mr. Justice MacKenzie;

- e) Connected with the above, by breaching clear common law and legislation that says Westsea cannot claim litigation costs until the end of proceedings and the successful party has been determined;

- f) By pursuing a heavy-handed approach in seeking to recover costs by threatening termination of leases and returning leaseholder payments for undisputed Operating expenses so as to place leaseholders in a wider position of default. This Westsea has done when it knows or ought to know that lease termination is an unlikely remedy for leaseholders' refusal to pay one specific item of Operating expenses;

- g) By providing one-sided information about litigation proceedings to leaseholders for whom Mr. Trenchard does not have immediate contact information, and for whom Mr. Trenchard cannot offer other information that explains his version of proceedings. One effect of this unilateral provision of information is to suggest that Westsea is acting in the best interests of leaseholders in opposition to Mr. Trenchard. This creates confusion and polarization among leaseholders.

88.1. Regarding item "f", courts are loath to terminate long-term residential leases in default circumstances since termination would deprive leaseholders of their equity in the lease, even where amounts owing are comparatively large.

Westsea Construction Ltd. et al. v. Shao et al. (1 June 2018), Vancouver S145001 (BCSC), para 24, 43.

88.2. In the face of the Court of Appeal's recognition that the lessees have a right to dispute the costs in issue and the unlikely result that a court would order lease termination, Westsea threatened to seek terminations when leaseholders allegedly failed to pay considerably smaller debts than in *Shao*. Moreover, in this case Westsea has only applied for lease termination as an alternative "if the Suite is not redeemed." This means that Westsea is aware that lease termination is an inappropriate remedy in the circumstances, yet used termination as a Damocles sword before litigation started, contrary to its duty of prudence.

Trenchard Affidavit#2, Ex G, p 234; Ex A various leaseholders

88.3. The effect of Westsea's action was to cow leaseholders into paying the litigation costs such that the vast majority of Westsea's $2.1 million in litigation costs have been paid by lessees with no claims for recovery.

Westsea's failure to exercise prudent and reasonable discretion in incurring costs in action 14-2941

88.4. ~~Further and alternatively,~~ ~~i~~If Westsea's litigation costs are properly Operating expenses in Action 14-2941, which is denied, Westsea breached its duty of prudent and reasonable discretion in incurring them. This was Mr. Justice Mackenzie's finding:

> Mr. Trenchard made a legitimate request to Westsea to disclose information regarding Westsea's operating expenditures. It would have been relatively simple and inexpensive for Westsea to comply with this request. Instead, Westsea chose to resist Mr. Trenchard's request for disclosure and agreed to an order to provide the requested documentation only after retaining counsel and four days of court hearings.
>
> *Trenchard v. Westsea Construction Ltd*., 2016 BCSC 1752, para 23

~~89. Further, there is clear evidence that engineering reports existed at the time which fulfilled the nature of Mr. Trenchard's requests. This was among the evidence that was before Mr. Justice MacKenzie, and is clear from additional evidence obtained after Mr. Justice MacKenzie's decision.~~

~~Affidavit #1 of Hugh Trenchard 18-4015~~

~~90. Therefore, even if Westsea's litigation costs in Action 14-2941 constitute operating expenses, which is denied, they are not recoverable because Westsea breached the Head Lease by incurring them.~~

91. The appropriate common law test for determining prudent and reasonable discretion was outlined by the Supreme Court of Canada in *Ontario (Energy Board) v. Ontario Power Generation Inc*., in 2015 (OEB), and includes the following factors (applied analogously to this case):

a) There is a ~~no~~ presumption of prudence unless challenged on reasonable grounds;

b) There should be a just and reasonable balance between Westsea's interests and those of the leaseholders;

c) Is there a risk that by disallowing the costs, there will be a chilling effect on Westsea's willingness to incur operating costs in the future, which may be the desired effect;

d) Are the costs committed costs in the sense of Westsea having been unable to reduce them, or forecast costs;

~~e) Whether the costs incurred generate some benefit to the leaseholders and meet the reasonable expectations of the leaseholders;~~

f) Hindsight is not permitted. The costs must have been reasonable in circumstances known to Westsea at the time they were incurred.

Ontario (Energy Board) v. Ontario Power Generation Inc., 2015 SCC 44, paras 79, 81-83, 910, 99, 102, 104, 108, 110, 112, 114

91.1. Similarly, the SCC in OEB observed that, by analogy, when ensuring that Westsea incurs just and reasonable expenses, leaseholders must be assured that they are paying no more than is necessary for the service they receive.

Ontario (Energy Board) v. Ontario Power Generation Inc., 2015 SCC 44, para 20

91.2. A prudence review may be applied to operating costs.

Ontario (Energy Board) v. Ontario Power Generation Inc., 2015 SCC 44, para 102

91.3. In OEB, the SCC also referred to two *Nova Scotia Power Inc* decisions in which the tribunal rendered decisions partly on the basis that the impugned costs must benefit the consumers, in this case the leaseholders. Lessees received nil service and nil benefit in the case at bar.

Ontario (Energy Board) v. Ontario Power Generation Inc., 2015 SCC 44, para 97-98

Nova Scotia Power Inc., *Re*, 2005 NSUARB 27, paras 20, 197, 266, 285, 298

Nova Scotia Power Inc. (Re), 2012 NSUARB 227, paras 182, 439, 443-444, 465, 514

Westsea's breach of its duty to accommodate reasonable disclosure requests relating to costs

92. Further, Westsea has breached its duty of honest performance in failing to accommodate leaseholders' reasonable requests for disclosure of information that directly affects the interests of leaseholders.

Bhasin v. Hrynew, 2014 SCC 71

C.M. Callow Inc. v. Zollinger, 2020 SCC 45 (CanLII), para 90-91

Litigation costs demanded as payable in advance: if such a right exists, it is not triggered under contract unless party successful on conclusion of proceedings

92.1. In charging litigation costs in advance to leaseholders in Action 16-3355, Westsea breached the exercise of prudent and reasonable discretion.

93. ~~Further~~, ~~i~~If Westsea's litigation costs constitute Operating expenses, which is denied, Westsea can charge them only if it is successful on the conclusion of the proceedings or if a court specifically orders, and must wait for the appeal period to pass before it can attempt to charge such costs. This is the effect *of Halle v. Ritchie*, and all the decisions referred to by the Court of Appeal in *Trenchard v. Westsea Construction Ltd*. 2017 BCCA 352.

Halle v. Ritchie, 2008 BCSC 1452, para 67

94. Further Westsea has breached Supreme Court Rule 14-1(9) and (13). Rule 14-1(13) is clear that costs are not payable by any party until the conclusion of proceedings, unless otherwise ordered by a court. Rule 14-1(9) is clear that costs are awarded to the successful party, a fact unknown when Westsea began charging costs in advance.~~, and it is impossible at this time to know who the successful party will be.~~

Costs to follow event

> (9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.
>
> **When costs payable**
> (13) If an entitlement to costs arises during a proceeding, whether as a result of an order *or otherwise*, those costs are payable on the conclusion of the proceeding unless the court otherwise orders. [italics added]
>
> *Supreme Court Civil Rules* BC Reg 168/2009, Rule 14

94.1. The concern here is not with Westsea's election to charge costs under the Head Lease *per se*. Of course, Westsea may do so to the extent the Head Lease is properly interpreted to allow for it. The concern here is that the legislation establishes that such an election is conditional upon Westsea's *success at the end* of the proceedings:.

94.2. This presupposes a *finding* by the court that Westsea was successful in its defence, a result that necessarily crystallized only at the conclusion of proceedings.

94.3. Further, the word "otherwise" in 14-1(13) refers to an entitlement to costs that might arise under contract.

94.4. No court has ordered that Westsea was entitled to charge its costs out prior to the conclusion of the proceedings. Indeed Mr. Justice Steeves assumed that Westsea would only seek to recover its costs at the conclusion of the proceedings.

> *Trenchard v. Westsea Construction Ltd*., BCSC 16-3355, Oral Reasons for Judgment, Mr. Justice Steeves, October 9, 2018, paras 8-9

94.5. For instance, in *Chew Fidelity Ltd. v. Greater Victoria Contracting Services*, the court observed that the right to pursue contractual costs is conditional on a *finding* of default:

> …our courts have held that where a contractual provision obliges **a defaulting party** to pay specific costs, the plaintiff may elect to pursue its right to contractual costs or elect to abandon its contractual right and seek ordinary costs…[bold added]

> *Chew Fidelity Ltd. v Greater Victoria Contracting Services Ltd*., 2019 BCSC 1474 (CanLII), para 80

94.6. Indeed, if a party is only partially successful, he or she is not entitled to all their legal costs under the contract. In such a case, a reference to the Registrar under Rule 18-1 (1) is appropriate.

> *Freshslice Properties Ltd. v. RTM Holdings Ltd.*, 2013 BCSC 135, para 124 – 130
> *923063 B.C. Ltd. v JM Food Services Ltd*., 2019 BCSC 553 (CanLII), para 110
> *Shang v Dhuu*, 2021 BCSC 68 (CanLII), para 20

94.7. So even if the Head Lease allows Westsea to recoup litigation costs, there is no automatic right for Westsea simply to bill costs as it sees fit and to expect payment: *the courts retain oversight at the conclusion of proceedings* regarding the propriety of the costs incurred.

94.8. If the court finds Westsea was entitled to, a) charge its litigation costs as Operating costs under the Head Lease; and b) charge costs in advance, Mr. Trenchard applies for a Rule 18-1(1) assessment in addition to or instead of a s. 70 *Legal Profession Act* review.

~~94.9. Further, if a Rule 18-1(1) reference is ordered, whatever Westsea is allowed after amounts are excluded for breaching its duty of prudence, the amount due should be valued *quantum meruit* in terms of "the amount the [claimant] deservers", "what the job is worth", or "the value of the benefit obtained by the defendant." For the lessees that value is nil.~~

~~*Infinity Steel Inc. v. B & C Steel Erectors Inc.*, 2011 BCCA 215, para 12, 20-22~~

94.10. At paragraph 7 (Legal Basis) of the Amended Petition, Westsea relies on *JEKE*. In *JEKE*, costs were recoverable under the lease only at the *conclusion* of proceedings including a Special Case, an appeal; i.e., costs were not charged in advance before they were incurred.

JEKE v. Northmont Resort Properties, 2016 BCSC 401 (aff'd 2017 BCCA 38), para 373 – 379

No contracting out of legislation

95. Unless the legislation expressly permits parties to contract out of the legislative provision, parties cannot do so.

Health Care Developers Inv. v. Newfoundland 1996 CanLII 11074 (NLCA), para 63

95.1. It is permissible to contract out of legislation only if the contractual provision increases protections to the vulnerable party. Parties cannot contract for less than minimum protections under statute. In situations where parties may not possess equal bargaining power, there is a prohibition on contracting out of statute.

Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre), 1996 CanLII 190 (SCC), [1996] 2 SCR 3, para 21, 26

Ontario Human Rights Commission v. Etobicoke, 1982 CanLII 15 (SCC), [1982] 1 SCR 202, p. 213-214

95.2. Further and alternatively, any waiver of or contracting out of *Supreme Court Civil Rule* 14-1(13) is contrary to public policy, especially because the parties to the standard-form Head Lease do not possess equal bargaining power.

Ontario Human Rights Commission v. Etobicoke, 1982 CanLII 15 (SCC), [1982] 1 SCR 202, p. 213-214

Uber v. Heller, 2020 SCC 16 (CanLII) para 85-91

95.3. Article 7.02 of the Head Lease which permits Westsea to furnish lessees with an estimate of Operating costs for a year ahead and demand payment, cannot be used as evidence of the parties' intention. If the intention of the parties is to make an unlawful contract, no contractual term can be derived from that intention.

Machtinger v. HOJ Industries Ltd., 1992 CanLII 102 (SCC), [1992] 1 SCR 986, p 1001, para *f*

95.4. As noted, Rules of Court 14-1(9) and (13), apply. No court decisions (see paras 96.5 – 96.6 herein) that resolved whether a party could rely on contract to charge litigation costs are inconsistent with these Rules, including *JEKE*; only Westsea's actions are.

The clean-hands doctrine applies in this case

96. By breaching the clear law in this case, Westsea does not come to the court with clean hands to claim any such costs and should be denied recovery of any litigation costs claimed in advance of the conclusion of Action 16-3355. This also disentitles Westsea to claim that portion of its costs at the conclusion of the proceedings.

96.1. Westsea is seeking a declaratory judgment and judicial sale, which is equitable relief to which the doctrine of clean hands applies.

Hongkong Bank of Canada v. Wheeler Holdings Ltd. [1993] 1 SCR 167, p. 192 - 193

96.2. It is a venerable rule that unless there is a specific agreement between counsel and client, a solicitor is not entitled to any fee under an entire contract until he or she has completed the work.

Nathanson, Schachter & Thompson v. Inmet Mining Corp., 2009 BCCA 385, para 47, 51, 59

96.3. Westsea's decision to apply a different standard in demanding costs from lessees prior to the conclusion of the proceedings, without an explicit agreement or consent from them, is unethical and wrong. Westsea breached its duty of prudence and comes to the court with unclean hands under the misconception that ethical and lawful conduct in billing practices somehow does not apply to them when recovering costs from leaseholders.

96.4. Further, there being no retainer agreement and a failure of Westsea to obtain an agreement to interim bill leaseholders estops Westsea from claiming its pre-billed costs in Action 16-3355.

Nathanson, Schachter & Thompson v. Inmet Mining Corp., 2009 BCCA 385, para 59

Litigation-costs indemnification clauses must be explicit and unequivocally worded

96.5. Solicitor-and-client costs are enforceable as a contractual right if unequivocally expressed in the parties' contract.

Bakshi v. Shan, 2013 BCSC 969, paras 43-44

96.6. Such as the following:

12.7…all legal fees and disbursements incurred in enforcing the Landlord's rights hereunder and in connection with all necessary court proceedings at trial or on appeal on a solicitor and own client basis, as if the same were Rent reserved and in arrears hereunder…	*Freshslice Properties Ltd. v. RTM Holdings Ltd.*, 2013 BCSC 135, para 120

11.07 Legal Fees …the party in default will pay the aggrieved party or parties all amount due and all damages, costs and expenses, including reasonable legal fees, incurred by the aggrieved party or parties in any legal action, arbitration or other proceeding as a result of such default…	*0923063 B.C. Ltd. v JM Food Services Ltd*., 2019 BCSC 553, para 107
9. …the complete legal costs incurred by the Lender in enforcing this Promissory Note as a result of any default by the Borrower…	*Shang v Dhuu*, 2021 BCSC 68 (CanLII), para 9
11.06. …any and all manner of actions or causes of action, damages, costs, loss, or expenses of whatever kind (including without limitation legal fees on a solicitor and client basis) that the Landlord may sustain, incur…	*Chew Fidelity Ltd. v Greater Victoria Contracting Services Ltd.*, 2019 BCSC 1474, para 78
18.04 … the complete legal costs incurred by the Landlord as a result of any default by the Tenant…	*P & T Shopping Centre Holdings Ltd. v. Cineplex Odeon Corp*., 1995 CanLII 448 (BCCA), para 7
12(I) …any action or proceeding against the other relating to this Agreement or any default hereunder, then and in that event the prevailing party in such unappealable action or proceeding shall be entitled to recover from the other party its reasonable attorneys' fees…	*Halle v. Ritchie*, 2008 BCSC 1452, para 63
11.03 …a breach is established, the Tenant shall pay to the Landlord all reasonable expenses incurred therefor on a solicitor-client basis…	*B.U.K. Investments Ltd. v. Ken Pappas*, 2002 BCSC 161 (CanLII), para 6
…any and all claims, demands, losses, costs charges and expenses whatsoever (including without limitation, legal fees) which	

Kingsway may suffer or incur…(iii) Kingsway defending, prosecuting or settling any claim, suit or other proceedings which may be brought or threatened by or against the Guarantor or Kingsway …	*Aspen Enterprises Ltd. v. Quiding*, 2009 BCSC 50, para 22
6(o)...if the Lessor shall consider it desirable to retain the services of a solicitor or any other person for the purposes of assisting the Lessor in enforcing any of its rights hereunder in the event of default on the part of the Lessee it shall be entitled to collect from the Lessee the cost of such services as if the same were rent...	*P.T. Hero Enterprises v. Paris Restaurant* 1997 CanLII 686 (BCSC), para 32

96.7. Under the Head Lease, "Legal charges" are not explicit like any leases quoted above. This supports the assertion that "legal charges" were never intended to apply to solicitor-client legal costs, or this would have been clearly stated like the leases above. Moreover, in each of the proceedings above, the successful party could seek its contractual entitlement to costs only at the conclusion of the proceedings.

If recoverable, Westsea's costs cannot be on a solicitor-client basis

96.8. Further and alternatively, Westsea's duty to exercise reasonable discretion when incurring costs limits the scope of litigation costs chargeable. Where "reasonable legal costs" are allowed under a contract, such costs are as applied by a court in the ordinary course of litigation, not on a solicitor-client basis.

Park Royal Shopping Centre Holdings Ltd. v. Gap (Canada) Inc., 2017 BCSC 1257 (CanLII), paras 79-84

96.9. This also means that Rule 14-1(9) and 14-1(13) apply, which Westsea has breached.

Proceedings in which success was divided or in which Mr. Trenchard was clearly successful

96.9. This section may be most appropriately dealt with on a Rule 18-1(1) reference. However, the court may wish to consider these matters in its decision. These factors address the costs that might remain after deducting those for which Westsea is disentitled due to its breach of its duty of prudence, and should be on a party-party basis per *Park Royal* (2017).

97. In some of the proceedings as between Mr. Trenchard and Westsea there was either divided success (all proceedings related to Action 14-2941) where interim proceedings were costs in the cause, or Mr. Trenchard himself was successful and costs were specifically ordered in his favor~~.~~, such as the Order of Madam Justice Power of August 2, 2017 in Action 16-3355. See Schedule "A" for a detailed chronology of the proceedings in these two actions.

98. An order of "no award as to costs", distinct from "no costs in this court", means that each party must bear their own costs. Therefore, this must include the order of the Supreme Court of Canada dismissing the parties' respective applications for leave "without costs" dated August 12, 2018, as well as the Order of Mr. Justice Steeves dated October 9, 2019.

> *Can-Pac Energy Consultants Ltd. v. Carriage Management Inc*., 1990 CanLII 209 (BCSC), final paragraph
>
> *Thompson v. Thompson*, 2008 SKQB 116 (CanLII), final paragraph
>
> *Spraggs v. Coldstream Court Resort (1966) Ltd*., 2011 BCCA 32, para 13

99. Further, costs payable to Mr. Trenchard forthwith, such as ordered by Madam Justice Power in Chambers, cannot reasonably be an Operating expense under the Head Lease. Charging costs awarded to Mr. Trenchard as an Operating expense is an unreasonable clawback that offends public policy and could never have been intended by the parties under the Head Lease.

> *Trenchard v. Westsea Construction Ltd*. B.C. Supreme Court, 16-3355, Victoria Registry, Madam Justice Power, in Chambers, August 2, 2017

100. If Westsea's litigation costs constitute Operating expenses, which is denied, costs that have been awarded on the basis of divided success do not reasonably constitute Operating expenses.

~~**Mr. Justice Steeve's October 9, 2018 cost award**~~

~~101. Mr. Justice Steeve's October 9, 2018 "no costs in this court, consistent with the defendant's position" [*emphasis added*] is a unique award that is distinct from usual~~

~~orders of "no award as to costs" and should be treated as a new or different category of a costs award.~~

Public policy

102. The Head Lease is strictly a residential lease. The lease itself imposes a residency requirement on leaseholders. It is a standard-form contract which has similar or identical effects on many leaseholders despite that each individual leaseholder holds separate leases governed by the doctrine of privity.

103. Residential leases are fundamentally different in nature from commercial leases and different legal standards exist as between residential and commercial leases.

104. Further, freedom of contract in residential tenancies is a fiction. This is well-reflected in Canadian law where legislation has long since intervened. As stated by D. Lamont in his review of landlord/tenant law in respect of residential tenancies:

> The underlying consideration of the Commission for the study of the respective rights of landlords and tenants was that residential tenants had little bargaining power to achieve changes in lease terms. To put it another way, freedom of contract does not stand up to close examination. For many other contracts, e.g., mortgages and sale of goods, statutory remedies have been enacted for the protection of the borrower or consumer.
>
> Lamont, D. (Q.C.) 1978. *Residential Tenancies*. 3rd ed. The Carswell Company Limited, Toronto, p 1.

105. In the case of residential leases in British Columbia with terms greater than 20 years, there is no legislation that governs residential leases.

The Residential Tenancy Act, SBC 2002, c 78, s. 4

106. The residential nature of the Head Lease reveals an imbalance in the bargaining power between Westsea and the leaseholders. This has arisen largely because Westsea holds a monopoly on the information exchange.

107. Further, one distinction between commercial leases and the 99-year Head Lease is the expectation that parties to a commercial lease are sophisticated and frequently represented by legal counsel who bargain rigorously in the parties' interests. By contrast, residential tenants are likely to be unsophisticated and enter leases with reduced means for legal representation, and therefore enter leases with reduced bargaining power.

108. In this respect, decisions like *Sector v. Priatel* that say a 99-year residential lease should be interpreted according to commercial principles with "business entities dealing at arm's length" in the context of "commercial interactions between parties at arm's length", are inappropriate for the Orchard House 99-year residential Head Lease.

Sector v. Priatel 2004 BCSC 45, at paras 52, 61-63

109. Furthermore, it is well-established in American landlord-tenant legislation that leases cannot contain one-sided agreements for tenants to pay a landlord's attorney's fees. This indicates that such an agreement is contrary to public policy. The concept does not seem to have been addressed in Canadian law.

> AK Stat § 34.03.040 (2016) (Alaska), CT Gen Stat § 47a-4a (2012) (Connecticut), KS Stat § 58-2547 (2015) Kansas, KY. Rev. Stat 383.570 (2016) (Kentucky), NE Code 76-1415 (1)(c) (2016), NV Rev Stat § 118A.220 (2015) (Nevada), Ohio Rev Code § 5321.13 (2016), 41 OK Stat § 41-113 (2016) (Oklahoma). Variations: permitting 25% of unpaid rent as attorney's fees HI Rev Stat § 521-35 (2016) (Hawaii); fees awarded to prevailing party: AZ Rev Stat § 33-1315 (2016) (Arizona) OR Rev Stat § 90.255 (2015); VA Code § 55-248.9 (2016) (Virginia), MA Gen L ch.186 § 20 (2016) (Massachusetts),WA Rev Code § 59.18.230 (2016) (Washington)

110. The underlying rationale for such a public policy rests on an absurdity that arises if the landlord's litigation costs are recoverable as operating costs from tenants, regardless of the landlord's success in the litigation: there would never be a risk or disincentive for a landlord to litigate with maximum resources, or to delay proceedings and appeal them indiscriminately, since the associated costs would always be paid by the leaseholders.

110.1. The United Kingdom recently enacted similar legislative reforms over long-term leases, described in 2016 parliamentary debates in which public policy concern was identified:

> The hon. Gentleman is nodding; that is the situation in the case that he mentioned. That can lead to unfairness, because the leaseholder will have no choice but to pay the costs of proceedings as an administration charge, regardless of the proceedings. That discourages leaseholders from exercising their rights to challenge the amount of a service charge, particularly as the landlord's costs in the proceedings could well exceed the amount that is being disputed. The commencement planned early in the new year of section 131 of the Housing and Planning Act will enable the tribunal or court to consider, on application by the leaseholder, whether it is reasonable for a landlord to recover all or part of those costs.
>
> Hansard United Kingdom, *Leasehold and Commonhold Reform Volume 618*: debated Tuesday 20 December 2016; Member Siobhain McDonagh

111. Mr. Justice MacKenzie observed that this situation would defy common sense.

> *Trenchard v. Westsea Construction Ltd*. 2016 BCSC 1752, para 21

112. This problem was identified by Boyer, R (1973):

> "If only the landlord is entitled to such fees, as the lease often provides, the tenant will be discouraged from asserting his right because, even if successful, the cost of litigation may be in excess of recovery."
>
> Boyer, R., Amato, L. 1973. *Up From Feudalism – Florida's New Residential Leasing Act*. 28 U. Miami Rev. 115, at 118

113. Similarly, punitive costs awarded against a landlord could also be charged back to the lessees. There is no rational economic or legal system in which there is essentially zero risk to any competitive or adversarial course of action; yet that is what Westsea has proposed.

The Petition should be dismissed

114. Accordingly, Mr. Trenchard seeks an order dismissing Westsea's Petition, and such further Orders as this court deems appropriate. Mr. Trenchard seeks costs and special damages against Westsea.

115. Mr. Trenchard relies on further law and authorities and seeks leave to introduce such other affidavits and evidence or appropriate material as the court will permit.

Part 6: MATERIAL TO BE RELIED ON

Affidavit # 1 of Hugh Trenchard made **18/October/2018**

Affidavit #2 of Hugh Trenchard made **01/March/2021**

Affidavit #3 of Hugh Trenchard made **08/March/2022**

The petition respondent(s) estimate(s) that the application will take ~~5~~ 7 10 days.

Date: ~~19 Oct 2018~~ ~~March 2 2021~~

March 10, 2022

Hugh A. Trenchard .....

Signature of [X] petition respondent
[ ] lawyer for petition respondent(s)

Hugh Trenchard

Petition respondent's address for service: 805 647 Michigan Street, Victoria BC V8V 1S9

Fax number address for service (if any):

E-mail address for service (if any): **h.a.trenchard@gmail.com**

Name of the petition respondent's(s') lawyer, if any:

Schedule A

Summary of litigation proceedings between Mr. Trenchard and Westsea

Petition Action 14-2941 (BCSC Victoria Registry)

1	August 1, 2014	Trenchard commences Petition on issues of disclosure, to imply a term of "transparency" into the Head Lease, and for interpretation of whether litigation costs are Operating expenses under the lease.
2	August 21, 2014	Westsea files Response to Petition.
3	November 12, 2014	Trenchard files Amended Petition.
4	December 15, 2014	Trenchard applies for order of substituted service.
5	December 2014	Westsea files response to application for substituted service.
6	January 15, 2015	Hearing before Madam Justice Power of Trenchard's application for substituted service. Order granted. Trenchard effects substituted service.
7	January 30, 2015	Westsea files Amended Response to Petition.
8	June 22, 2015	Westsea files application to strike portions of Trenchard's evidence.
9	June 29, 2015	Trenchard files response to Westsea's application to strike portions of Mr. Trenchard's evidence.
10	July 7, 2015	Hearing before Mr. Justice Kelleher on Westea's application to strike evidence. Mr. Justice Kelleher decides issues must be decided by the court hearing submissions on their merits.

11	January 4-7, 2016	Hearing before Mr. Justice MacKenzie. On consent, Trenchard's disclosure and "transparency" applications are dismissed on condition that Westsea disclose to all leaseholders an engineering report. The remaining issue to be decided was whether Westsea could recover its litigation costs as Operating expenses under the Head Lease.
12	Sept 23, 2016	Mr. Justice MacKenzie decides that Westsea's litigation costs are not Operating expenses under the Lease.
13	October 2016	Westsea files application for leave to appeal the decision of Mr. Justice MacKenzie
14	January 17, 2017	Hearing before Madam Justice Fenlon (Court of Appeal Chambers), granting Westsea leave to appeal.
15	May 2, 2017	Westsea files Amended Notice of Appeal of Mr. Justice MacKenzie and files Appeal Book and Factum accordingly.
16	May 31, 2017	Trenchard files Respondent's Factum on appeal. Trenchard files Application for admission of fresh evidence showing the Head Lease is a standard form contract.
17	October 6, 2017	Court of Appeal allows Westsea's appeal in part. Court of Appeal did not overturn lower court interpretation, but said that Westsea, if it elects to seek recovery of its litigation costs related to the Petition, must first send leaseholders a bill and, if leaseholders refuse to pay, to sue them for recovery. Court orders no costs to either party.
18	November 2017	Trenchard files an application for leave to appeal the BCCA decision to the Supreme Court of Canada.
19	December 2017	Hearing before BCCA Registrar to settle terms of the Order of the Court of Appeal, since parties did not agree as to proper terms.

19.1	January 29, 2018	Registrar Outerbridge states, "As the Court indicated its order, there is no award as to costs for the purpose of the within appeal. That includes the hearing before the Registrar.
20	March 2018	Westsea files and serves its SCC Application for Leave to Cross-Appeal. Trenchard files and serves a Response to the Westsea's Application for Leave to Cross-Appeal.
21	August 12, 2018	Applications for leave to appeal and leave to cross appeal to the SCC dismissed "without costs".

Action 16-3355 (BCSC Victoria Registry)

22	August 9, 2016	Trenchard commences action for interpretation of Head Lease that costs to replace windows and doors are not Operating expenses.
23	August 31, 2016	Westsea files response to Trenchard's Notice of Civil Claim.
24	October 14, 2016	Trenchard files Amended Notice of Civil Claim.
25	November 1, 2016	Westsea files Amended Response to Civil Claim.
26	December 5, 2016	Westsea applies to strike claims as *res judicata* and abuse of process.
27	December 11, 2016	Trenchard files response to Westsea's application to strike pleadings.
28	January 24, 2017	Case Planning Conference #1. Master Scarth orders no further steps until hearing of Westsea's application to strike claims; parties at liberty to set trial date.
29	January 27, 2017	Trenchard applies to amend pleadings.
30	June 12, 2017	Hearing before Madam Justice Power whether to strike pleadings, Trenchard's application to further amend claims.
31	August 2, 2017	Court dismisses Westsea's *res judicata* claim, allows Trenchard's application to amend, and orders costs payable forthwith to Trenchard.

32	August 2017	Pursuant to the order of Madam Justice Power, Westsea pays approximately $2800 costs to Trenchard.
33	September 2017	Westsea appeals decision of Madam Justice Power. Due to Westsea's appeal, parties agree to adjourn trial date originally set for May 2018.
34	November 2017	Westsea abandons its appeal.
35	December 2017	Trenchard files Further Amended Notice of Civil Claim. Parties re-set trial date for 15 days starting June 3, 2019.
36	January 31, 2018	Westsea files Further Amended Response to Civil Claim
37	Spring 2018	Parties exchange lists of documents; Westsea provides ~6000 pages of documents after Trenchard makes further demand for documents
38	May 29, 2018	2nd Case Planning Conference re exchange of witness lists; whether to order joint accountant re capital costs; whether implied undertaking of confidentiality to share Westsea's documents with other leaseholders may be lifted; Master orders issues of joint accountant and issues of implied undertaking must be heard by at full Chambers hearing with affidavits.
39	June 2018	Trenchard files three application for injunction; to amend pleadings; for joint accountant
40	January 2017	Trenchard applies for pre-trial examination of witness who is a non-party to the action.
41	July 5, 6 2018	Examinations for discovery of both parties; parties agree that Westsea may continue its examination of Trenchard at later date.

42	July 2018	Application for pre-trial examination adjourned generally to ensure proper service of application on witness.
43	July 2018	Trenchard effects personal service and re-applies for order allowing pre-trial examination of witness.
44	August 10, 2018	Trenchard writes to counsel for Westsea demanding disclosure of litigation costs incurred in action 16-3355 in relation to Westsea's specific pleading in its Further Amended Response to Civil Claim, filed January 31, 2018: "12. Westsea elects to pursue its contractual right to costs, and does not seek an order for costs from this Court. In the alternative, Westsea seeks costs, including an order for special costs against the Plaintiff."
45	August 15, 2018	Master Taylor grants order for pre-trial examination of non-party witness.
46	Sept 12, 2018	Westsea responds to Trenchard's demand for disclosure, saying "With regard to your request for further document disclosure made by letter dated August 10, 2018, Westsea objects to the production of the requested documents as they are not relevant to any issue raised in the pleadings in this action."
47	Sept 28, 2018	Date set for hearing of whether parties must appoint a joint-accountant. [did not proceed]
48	October 9, 2018	Hearing before Mr. Justice Steeves in Chambers to amend pleadings; consequential pleadings, not opposed, allowed; cost pleadings dismissed; judge affirms Court of Appeal's statement that it neither impugned nor supported the decision of Mr. Justice MacKenzie in 14-2941, and affirmed Trenchard's right to argue the quantum and justification of costs in this action. Mr. Justice Steeves orders "No order as to costs for this application."
49	October 10, 2018	Application for an injunction to stop Westsea from charging litigation costs prior to the conclusion of the trial in June 2019

		and a determination of whether Westsea may properly charge such costs; *adjourned and eventually withdrawn*
50	~~November 29, 2018~~	~~Trenchard's application for joint accounting expert~~
51	December 14, 2018	Westsea's continued discovery of Mr. Trenchard in Vancouver
52	December 31, 2018	Parties exchange witness lists
53	Spring 2019	Exchange of expert reports~~; possible application by Westsea that certain expert evidence is inadmissible~~
54	June 3-7; 10-14, 2019	~~Trial set for 15 days.~~ 10-day trial.
55	October 1, 2019 July 9, 2020	Decision of Madam Justice Douglas Correction notice for paragraphs 25 and 133
56	October 2, 2019	Trenchard files Notice of Appeal (CA46417)
57	May 5, 2020	Appeal hearing
58	May 28, 2020	Decision by the Court of Appeal

Schedule B – Provincial Small Claims actions

	Date filed	**Parties**	**Action Number**
1	March 25, 2018	*Gerald Rotering v. Westsea Construction Ltd.*	180132
2	April 19, 2018	*Peter Rourke v. Westsea Construction Ltd.*	180175
3	May 4, 2018	*Jennifer Cabeldu v. Westsea Construction Ltd.*	180204
4	May 4, 2018	*Martine Goddard v. Westsea Construction Ltd.*	180205
5	May 4, 2018	*Peggy Folkes v. Westsea Construction Ltd.*	180202, 180203
6	May 15, 2018	*Bryan Kingsfield v. Westsea Construction Ltd.*	180212
7	May 16, 2018	*Edith Wood v. Westsea Construction Ltd.*	180214

8	May 16, 2018	*Linda Bennett v. Westsea Construction Ltd.*	180213
9	June 12, 2018	*Diane Picken v. Westsea Construction Ltd.*	180249
10	June 14, 2018	*Sally Walker v. Westsea Construction Ltd.*	180251
11	June 28, 2018	*William McDonald v. Westsea Construction Ltd*	180254
13	June 28, 2018	*Don Rycroft v. Westsea Construction Ltd.*	180285, 180288, 180289
14	June 28, 2018	*Sandra Couture v. Westsea Construction Ltd.*	180286
15	June 29, 2018	*Sandra Millott v. Westsea Construction Ltd.*	180292
16	July 3, 2018	*Sharon Billedeau v. Westsea Construction Ltd.*	180294
17	July 4, 2018	*Jacalyn Hays v. Westsea Construction Ltd.*	180298
18	July 4, 2018	*Reiner Piehl v. Westsea Construction Ltd.*	180297
19	July 4, 2018	*Sue Hiscocks v. Westsea Construction Ltd.*	180296
20	July 5, 2018	*Richelle Wright v. Westsea Construction Ltd.*	180300
21	July 24, 2018	*Lorraine Christie v. Westsea Construction Ltd.*	180256