



This is the 2nd Affidavit of G. Rotering
in this case and was made on March 22, 2022

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, GABRIELLA EVA SCOFIELD, GERALD
JOHN ROTERING, HELEN ELISABETH VERWEY,
HUGH ALEXANDER TRENCHARD, IRIS IRENE HAYS,
JACALYN GAIL HAYS, JAMES SCOT WALKER, JUDITH McNEIL SIM,
MARTINE GODDARD, MICHAEL GORDON CLARK,
CHANTELLE MARIE CLARK, NIGEL JOHN JOSLIN, PATRICIA ANNE SMITH,
PETER JAMES ROURKE, REINER JOACHIN PIEHL,
DOREEN GREETA PIEHL, ROBERT JOHN CALDER,
SANDRA SCOTT JONSSON also known as SANDRA SCOTT GROVER-SAGER,
GORDON WILLIAM GROVE, SEE-LIN SHUM,
STEPHEN JAMES MATTHEW, ANNE UDALE, WENDY ELIZABETH DUVAL**

Respondents

AFFIDAVIT

I, Gerald John Rotering, retired, of 807 -647 Michigan Street, Victoria, British Columbia,
MAKE OATH AND SAY that:

1. I am one of the respondents herein and as such have knowledge of the matters hereinafter deposed to, except where the same are stated to be made on information and belief, and as to such matters, I do believe them to be true.
2. Where I refer to other respondents, such statements are based on statements they made to me and which I believe are true.
3. Prior to my move to Victoria and purchase of my unit, I was a realtor specializing in the purchase and sale of condominium units in Alberta, many of which were located in high rise concrete and steel towers. I also had been the chair of a

concrete tower condominium council for a period of ten years. In addition, I have been an owner of a number of suites in concrete tower condominiums.


4. Many of the non-Trenchard litigation charges do not pertain to any discernible legal proceeding or entail discernible legal issues. Particulars were provided for those charges only after court order.
5. Prior to 2016, conflicts between leaseholders and the petitioner did not involve the application of legal charges. Letters to leaseholders, and the resolution of conflicts between leaseholders were handled by the management of the Petitioner with no legal charges that were then incorporated into the operating expenses for which the petitioner demanded payment from leaseholders.
6. For example, on January 23 2017 the petitioner included as legal expenses enforcement of the lease provisions prohibiting short term rentals. Prior to 2017, this had always been handled by the petitioner's management. Those who engaged in short term rentals, or leased to another their unit without approval from the petitioner were dealt with by the management of the Petitioner, with no involvement with a law firm. The same with leaks – when I had a leak issue in my unit in 2009 and 2010, I did not deal with lawyers acting on behalf of the Petitioner, rather I dealt with the staff of the Petitioner.
7. In their summary of charges dated February 21 2017 the Petitioner seeks to charge the respondents for communication dealing with BBB, which I believe would be the Better Business Bureau. No explanation has been provided as to the connection such a charge would have to the building. Correspondence re: fans may have dealt with my request to install a switch at my expense to control the built in bathroom fan in my unit. No explanation as provided as to why counsel had to be involved. The follow up on personal litigation matters is difficult to reconcile with the fact that we pay for insurance which covers, inter alia, third party bodily injury claims. My experience on managing high rise residential buildings as a council chair is to refer all personal injury claims to our insurer, and work with our insurer in the resolution of such claims. Odour issues and carpet remediation were common issues I dealt with without requiring the intervention of counsel.
8. In regards to charges summarized on March 28 2017 there are references to matters such as marijuana complaints, leaks and flood damage, Aquamist Carpet Care and queries about concrete that used to be handled by the Petitioner

without the involvement of their counsel. In this same time period \$10,000 was charged in regards to the Canada Pension Plan, Old Age Security and a tri-partite agreement, with no information as to the connection of such advice to the building.

9. Additional administrative acts, now billed as legal charges since 2017 include:
 - (a) installation of electrical panel in suite and letter to leaseholder re same
 - (b) correspondence re power outage
 - (c) review Orchard House issues
 - (d) marijuana complaint and letter to leaseholder
 - (e) review power outage notices and revised notices
 - (f) correspondence re smoke issues
 - (g) letter to lessee re accounting inquiries
 - (h) review Low Voltage report
 - (i) review Westsea projects and prepare memorandum
 - (j) review Orchard House welcome letter/rules and regulations
 - (k) correspondence re cigarette butts
 - (l) review Orchard House actuals letter
 - (m) review schedule of operating expenses for 2017
 - (n) correspondence from leaseholder re past/future special assessments
 - (o) email to Westsea re dog issues
 - (p) correspondence re door locks
 - (q) review and revise welcome letter
 - (r) correspondence re broken tap and repairs
 - (s) letter to leaseholder re concerns with balcony and deck
 - (t) correspondence re leak issues
 - (u) follow up letter to leaseholders re repair projects and budget
 - (v) review letter re repair of carpet
10. Some charges legal charges were included as operating expenses that were, per the terms of the Lease, not to be charged. This included enforcement proceedings against leaseholders who were delinquent in their payments. An example of this are the charges arising from the Kamble petition proceeding. Ultimately, that petition proceeding lead to a consent order between the Petitioner and the Kambles in which \$63,133.54 was paid to the Petitioner, subject to an accounting. Attached hereto and marked Exhibit "A" to this my affidavit is a true copy of the petition and consent order.
11. A number of charges in 2019 were incurred as a result of 15 leaseholders, including respondents to this proceeding, making a claim in anticipation of Hugh Trenchard being successful in his proceeding against the Petitioner in his claim proceeding. Attached hereto and marked Exhibit B to this are samples of these claims.

12. The petitioner responded by filing nearly identical responses in standard form. Attached hereto and marked Exhibit "C" to this my affidavit is a true copy of the said responses to the claims noted in paragraph 6.
13. Matters that were not Trenchard litigation matters included responding to personal injury claims, which I thought would be handled by our insurers, flooding and water damage claims which I also thought would be handled by insurers as well as other miscellaneous issues. The time involved in this has consumed over \$100,000.
14. A significant charge from 2017 onward was dealing with the issue of dishwashers in some units. Apparently, none of the units had dishwashers when the petitioner was selling the leasehold interests in 1974. Over time, some leaseholders installed dishwashers, and some of those units in which dishwashers were installed were transferred to subsequent leaseholders. In those cases, the dishwashers were included as part of the sale of the leasehold interest.
15. Recently, the petitioner has taken the position that installation of all dishwashers had to be approved in writing before they could take place, and are now seeking to have dishwashers installed removed. That issue seems to have consumed tens of thousands of dollars. For all the money spent, including significant sums with a consulting engineer (Tarnopolsky of AME) no dishwashers have been removed and no court proceedings have been initiated to compel the removal of these dishwashers. Attached hereto and marked Exhibit D to this my affidavit is a true copy of the CSO summary for all proceedings involving the petitioner. Those proceedings marked with an X are those issued from the Victoria Supreme Court Registry.

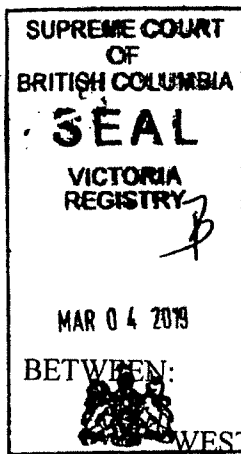
SWORN BEFORE ME at)
Victoria, British Columbia,)
on March 22, 2022)



Andrew M. Rafuse
A Commissioner for taking
Affidavits for British Columbia



GERALD JOHN ROTERING



This is Exhibit A referred to in the Affidavit of
G. Dootson sworn before
me at the City of Victoria, in the Province of British
Columbia, this 21 day of MARCH, 2022

-1-

19 0923

No.

Victoria Registry

*A Commissioner for taking Affidavits in and for
British Columbia*

IN THE SUPREME COURT OF BRITISH COLUMBIA

WESTSEA CONSTRUCTION LTD. and CAPITAL CONSTRUCTION
SUPPLIES LTD.

PETITIONERS

AND:

RAJKUMAR DAULATRAO KAMBLE and NANDA KAMBLE

RESPONDENTS

PETITION TO THE COURT

This proceeding has been started by the Petitioner(s) for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the Petitioner(s)
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the Petitioner(s),

- (a) if you reside anywhere within Canada, within 21 days after the date on which a copy of the filed petition was served on you,

- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed petition was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed petition was served on you, or
- (d) if the time for response has been set by order of the court, within that time.

(1)	<p>The address of the registry is:</p> <p>800 Smithe Street Vancouver, British Columbia V6Z 2E1</p>
(2)	<p>The ADDRESS FOR SERVICE of the Petitioners is:</p> <p>1200 – 925 West Georgia Street Vancouver, British Columbia, V6C 3L2 Tel: (604) 682-7474 Attention: Mark C. Stacey</p> <p>Fax number for service: 604-682-1283</p>
(3)	<p>The name and office address of the Petitioners' lawyer is:</p> <p>1200 – 925 West Georgia Street Vancouver, British Columbia, V6C 3L2 Tel: (604) 682-7474</p> <p>Attention: Mark C. Stacey</p>

CLAIM OF THE PETITIONERS

Part 1: ORDER SOUGHT

1. A declaration that the Respondents are in default of Articles 7.02, 7.03 and 8.04 of the Lease and Assignment of Lease, defined herein, between the parties registered under C59483 and EV108338 against lands and premises legally described as:

Lot A of Lots 1761 to 1765 inclusive and Lots 1803 to 1807 inclusive,
Victoria City, Plan 22534 PID 004-154-878 (the "Lands")

and, specifically, the following suite:

- (a) suite 303 - 647 Michigan Street, Victoria, B.C. (the "Suite").
2. An order for the sale of an assignment of the Suite and that the Petitioners have exclusive conduct of the sale of the assignment on the following terms:
 - (a) the Petitioners be at liberty to list the Suite for sale, until further order, and to pay a realtor's commission of up to 7% of the first \$100,000 of the gross selling price and 2.5% of the balance, plus applicable taxes, from the sale proceeds;
 - (b) any sale be subject to Court approval unless otherwise agreed by the Petitioners and the Respondents;
 - (c) the Respondents or any person(s) on their behalf (including anyone in possession of the Suite) shall permit any agent of the Petitioners to inspect, appraise or show to any prospective purchaser the Suite including the interior of the Suite on any day between 9:00 a.m. and 7:00 p.m., and to post signs offering the Suite for sale;
 - (d) an order for appointment of a receiver, or a receiver and a manager; and
 - (e) an order for possession of the Suite.
3. An order setting a date for redemption of the Suite.
4. An order that the amount to be paid to the Petitioners on redemption of the Suite or on the sale of the Suite shall be the balance found to be due and owing as at the date of the

redemption or sale plus interest under the Lease accruing to the date of redemption or the date the proceeds from a sale are received and the costs of the Petitioners in these proceedings.

5. An order that the Respondents pay to the Petitioners the amount of money found to be due at the dates set out above and the costs of this proceeding.
6. Alternatively, if the Suite is not redeemed, an order that:
 - (a) the Petitioners may apply for an order that, on pronouncement, the Respondents and all persons claiming by or through them, shall be foreclosed from all right, title, interest and equity of redemption in and to the Suite, or any one of them;
 - (b) by reason of said defaults, all right, title and interest of the Respondents in the Suite pursuant to the Lease be, and are hereby forthwith, cancelled and at an end;
 - (c) all money received under or pursuant to the Lease shall become the property of the Petitioners;
 - (d) the Respondents forthwith deliver vacant possession of the Suite within 14 days of this Court's order; or, alternatively,
 - (e) the Respondents deliver up vacant possession of the Suite in a manner that the Court directs;
 - (f) Writs of Possession be issued accordingly; and
 - (g) the Registrar of the Victoria Land Title Office discharge, release and cancel charges from title to the Lands in respect to the Respondents' leasehold interests.
7. An order for leave to further amend this Petition and to file and deliver further affidavits in support of those amendments in respect to further arrears that may be later owed by the Respondents.
8. An order that the Petitioners may apply for a summary accounting of amounts owed to the Petitioners for interest or as reimbursement for payments made for protective disbursements in relation to taxes, insurance premiums or appraisal or for inspecting, repairing or maintaining the Suite, or for other expenses which the Petitioners may incur

before or after the date of the orders set out above before a Master or by reference to the Registrar.

9. An order for all necessary accounts, directions and inquiries and such further and other relief as this Honourable Court deems just.

Part 2: FACTUAL BASIS

Background

1. The Petitioner Westsea Construction Ltd. ("**Westsea**") is a company incorporated under the laws of British Columbia with an address for service in these proceedings of 1200 – 925 West Georgia Street, Vancouver, British Columbia, V6C 3L2.
2. The Petitioner Capital Construction Supplies Ltd. ("**Capital**") is company incorporated under the laws of British Columbia with an address for service in these proceedings of 1200 – 925 West Georgia Street, Vancouver, British Columbia, V6C 3L2.
3. This Petition is in relation to the Suite, which is found in the 22-storey concrete apartment complex located at 647 Michigan Street in Victoria, British Columbia ("**Orchard House**").
4. Westsea is the registered owner in fee simple and the manager of Orchard House.
5. The Respondents have a leasehold interest in Orchard House as the registered owner of a lease (registration number EN8952A and transfer number CA915703) in the Suite.

The Lease

6. The relationship between the Petitioners and the Respondents is governed by a lease agreement entered into between Westsea and Capital on May 1, 1974 (the "**Lease**").
7. After entering into the Lease, Capital sold assignments of its leasehold interests in individual suites to third parties, which have been variously sold to other third parties in the intervening period.

8. The Respondents purchased their leasehold interest in the Suite by a re-assignment of the leasehold interest that once belonged to Capital (the "**Assignment of Lease**"), and this interest was registered on September 15, 2008 at the Victoria Land Title Office.
9. On September 12, 2008, the Respondents expressly agreed to abide by all the covenants of the lessee as contained in the Lease, and to "pay all monies payable with respect to the Suite pursuant to the Lease and observe and perform each and every of the Lessee's covenants [...]".
10. The Lease includes, *inter alia*, the following express terms:

ARTICLE 5 – LESSOR'S COVENANTS

[...]

5.03 To maintain the Structure – 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.

[...]

ARTICLE 7 – OPERATING EXPENSES

7.01 Definition of Operating Expenses – "Operating expenses" in this Lease means the total amount paid or payable by the Lessor in the performance of its covenants herein contained (save and except those contained in Article 5.11) and includes but without restricting the generality of the foregoing the amount paid or payable by the Lessor in connection with the maintenance, operation and repair of the Building, expenses in heating the common areas of the Building and each of the Suites therein (unless any of the Suites are equipped with their own individual and independent heating system in which event the cost shall be payable by the Lessee of any such suite) and providing hot and cold water, elevator maintenance, electricity, window cleaning, fire, casualty liability and other insurance, utilities, service and maintenance contracts with independent contractors or property managers, water rates and taxes, business licences, janitorial service, building maintenance service, resident manager's salary (if applicable) and legal and accounting charges and all other expenses paid or payable by the Lessor in connection with the Building, the common property therein or the Lands. "Operating expenses" shall not include any amount directly chargeable by the Lessor to any Lessee or Lessees. The Lessor agrees to exercise prudent and reasonable discretion in incurring Operating expenses, consistent with its duties hereunder.

7.02 Estimate of Operating Expenses – Prior to commencement of each calendar year during the Term other than the Base Year, the Lessor shall furnish to the Lessee an estimate of the Operating expenses for such calendar year based on prior years experience and the Lessee shall pay to the Lessor on the first day of each and every month during such calendar year, One-Twelfth (1/12th) of the Lessee's Share of such estimated Operating expenses.

7.03 Actual Operating Expenses – In the event that the actual Operating expenses in any calendar year exceed the estimated Operating expenses for that calendar year, the Lessee agrees to pay, within Thirty (30) days of written demand by the Lessor the Lessee's Share of such excess and in the event that the actual Operating expenses in any calendar year is less than the estimated Operating expenses for that year the Lessee's share of operating expenses for the following year shall be reduced accordingly. The actual Operating expenses shall be calculated by the Lessor for each calendar year and shall be certified by the auditors of the Lessor in accordance with generally accepted accounting principles.

7.04 Definition of Lessee's Share – “Lessee's Share” in this Lease means the ratio which the area of each of the suites bears to the total area of all suites in the Building, which ratio is hereby agreed to be in percentage terms and as applicable to each suite as set forth in Schedule “A” hereto.

[...]

ARTICLE 8 – PROVISOS

[...]

8.04 Proviso for Re-entry – Proviso for re-entry by the Lessor on non-payment of rent or non-performance of covenants.

[underlining added]

Operating Expenses

11. As described in the above Articles, Westsea has several obligations in respect to Orchard House, including an obligation to keep in good repair and condition the foundation, outer walls and the roofs pursuant to Article 5.03.
12. In performing its Lease obligations, Westsea incurs costs. The total amount paid or payable by Westsea in performing its obligations are called “**Operating Expenses**” as described in Article 7.01 of the Lease.

13. Pursuant to Article 7.02 of the Lease, Westsea prepares an estimate of the Operating Expenses for Orchard House for the calendar year based on experience from prior years. Under that same Article, the leaseholders then pay their proportionate share (as defined in Article 7.04) of estimated Operating Expenses on a monthly basis.
14. During the course of any given calendar year, there are expenses incurred at Orchard House that were not contemplated in the estimated annual budget. Non-budgeted maintenance and repair costs are accounted for at the end of the budgeted year, and are included in Operating Expenses for that year.
15. In the event that the estimated Operating Expenses are insufficient to meet Orchard House's actual Operating Expenses, pursuant to Article 7.03 of the Lease Westsea may determine the amount of the difference and require leaseholders to pay the amount of the difference on the first day of the month following notice of said difference.
16. Despite demands, the Respondents have failed to pay the Operating Expenses associated with the Suite to Westsea.
17. On February 20, 2018, Westsea sent a Final Notice demanding payment of the Operating Expenses owed at the time and advising that, in absence of the Respondents making arrangements to pay within five business days, Westsea would refer the collection of the Operating Expenses owed to its legal counsel for further action.
18. On April 20, 2018, Westsea, via its solicitors, sent a letter to the Respondents demanding payment of the Operating Expenses owed at the time by May 11, 2018 and advising that, in absence of payment, Westsea would seek remedies pursuant to the Lease in BC Supreme Court, including a Court Order cancelling the Respondents' leasehold interest. The letter was sent to an address in Richmond, Texas which Westsea had on file but was subsequently returned as undeliverable.
19. On April 20, 2018, Westsea also, via its solicitors, sent a letter to the Respondents' mortgagee the Royal Bank of Canada ("RBC"). In this letter, Westsea advised RBC of the Operating Expenses owed to Westsea to offer RBC an opportunity to cure the Respondents' default.

20. On August 14, 2018, the Respondents' daughter spoke with Westsea's solicitors and informed them Mr. Kamble was currently in the hospital and that the Respondents current address for delivery was 102 – 5825 Vine Street, Vancouver, British Columbia.
21. On August 16, 2018, Westsea, via its solicitors sent a letter to the Respondents enclosing the demand letter from April 20, 2018 and asking them to contact its solicitors after reviewing the letter.
22. The Operating Expenses were incurred with the prudent and reasonable discretion of Westsea.
23. As of February 20, 2019 the Respondents are in arrears of \$13,234.94 in Operating Expenses.

The Special Assessments

24. Orchard House requires remediation work. In 2009, Read Jones Christoffersen Ltd. (“RJC”) was retained by Westsea to investigate leaks occurring at Orchard House. Investigations and repairs were conducted from approximately 2009 to 2010, and its recommendations were summarized in a document entitled “**Project Prioritization Recommendation**”, dated September 6, 2013.
25. RJC eventually recommended a complete plaza membrane renewal in spring 2014 (the “**Plaza Membrane Renewal**”). Westsea accepted RJC’s recommendations to do the work and commenced a special assessment to fund the Plaza Membrane Renewal.
26. The Project Prioritization Recommendation also noted that the windows and sliding balcony doors at Orchard House had surpassed their intended service life and made recommendations for their replacement between 2015-2018 (the “**Window and Door Replacement**”).
27. Since 2013, Orchard House leaseholders have been informed of upcoming repair costs for the Window and Door Replacement.

28. On March 24, 2016, RJC summarized the general condition and performance of the Orchard House building enclosure, including the windows and sliding doors, in a document entitled "**Building Enclosure Condition Assessment**".
29. On March 31, 2016, Westsea sent letters to all Orchard House leaseholders enclosing the Building Enclosure Condition Assessment.
30. On July 5, 2016, Farmer Construction Ltd. provided a contract quote for the Window and Door Replacement, including engineering fees, in the amount of \$5,551,460, including GST (the "**Second Special Assessment**").
31. The proportionate share of the Special Assessment attributable to the Suite was \$25,242.49 (the "**Suite's Second Special Assessment**"), payable either as a one-time payment due on September 1, 2016 or in 12 monthly installment payments of \$2,103.54 beginning September 1, 2016. Interest at a rate of prime + 3% per annum would be charged on all payments made after September 1, 2016, including installment payments.
32. The Petitioners provided notice of the Second Special Assessment together with the amount of the Suite's Second Special Assessment to the Respondents by way of a letter dated July 5, 2016.
33. As of January 24, 2019 the Respondents owe \$29,212.07 with respect to the Suite's Second Special Assessment.

The Respondent's Overall Arrears

34. As of January 15, 2019, the Respondents owe \$42,447.01 in total in respect to the Operating Expenses and Special Assessments.

Part 3: LEGAL BASIS

1. The Petitioners plead and rely upon the following Rules from the *Supreme Court Civil Rules*, BC Reg 168/2009:
 - a. Rule 14-1;

b. Rule 16-1.

2. The Petitioners plead and rely upon the *Land Title Act*, RSBC 1996, c 245.
3. The Petitioners rely on the law of leasing.
4. The relationship between the Petitioners and the Respondents is governed by the terms of the Lease.

Westsea Construction Ltd. v. Mathers,
2014 BCSC 143 at para. 32.

5. The lease provides the Petitioners with powerful remedies for collection of outstanding arrears, including termination of leasehold interests and a re-taking of the property.

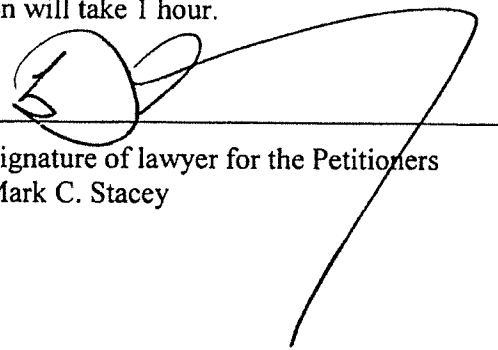
Westsea Construction Ltd. et al v. Shao et al, Vancouver Registry Docket: S140051,
June 1, 2018 at para. 24

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Brian Slater, sworn March 15, 2019.
2. Affidavit #1 of Helen Ware, sworn March 15, 2019.
3. Such further material as counsel will advise.

The Petitioners estimate that the hearing of the Petition will take 1 hour.

Date: March 15, 2019



Signature of lawyer for the Petitioners
Mark C. Stacey

To be completed by the court only:

Order made

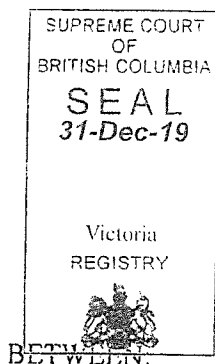
☐ in the terms requested in paragraphs of Part 1 of this petition

☐ with the following variations and additional terms:

.....
.....
.....

Date:

.....
Signature of ☐ Judge ☐ Master



No. 190923
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

WESTSEA CONSTRUCTION LTD. and CAPITAL CONSTRUCTION
SUPPLIES LTD.

PETITIONERS

AND:

RAJKUMAR DAULATRAO KAMBLE and NANDA KAMBLE

RESPONDENTS

CONSENT ORDER

BEFORE A MASTER OF THE COURT

27 / DEC / 2019

ON THE APPLICATION of the Petitioners, without a hearing, AND BY CONSENT;

THIS COURT ORDERS that:

1. The Petition filed March 4, 2019 (the "Petition") is dismissed.
2. On completion of the sale of #303 – 647 Michigan Street, Victoria, B.C., legally described as:

Lot A of Lots 1761 to 1765 inclusive and Lots 1803 to 1807 inclusive, Victoria
City, Plan 22534
PID 004-154-878

(the "Unit")

- 2 -

and the receipt of \$ 151,000.00 (the "Sale Proceeds") by the conveyancing lawyer for the Respondents, Sunny Tathgar, on October 31, 2019 (the "Closing Date"), Mr. Tathgar will cause the following amounts to be paid directly from the sale proceeds of the Unit:

- a. all real estate commissions due and owing respecting the sale transaction;
- b. all property taxes and utilities due and owing with respect to the Unit, if any; and
- c. all other necessary costs and expenses required to complete the sale transaction, including Mr. Tathgar's reasonable expenses.

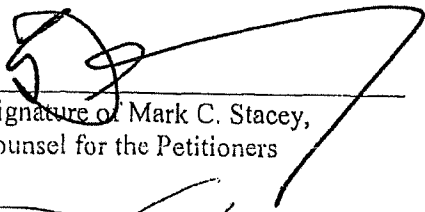
(collectively, the "Sale Expenses")

3. On the Closing Date and after having paid the Sale Expenses, Mr. Tathgar will cause the a total of \$63,133.54 to be paid by a trust cheque directly from the Sale Proceeds to counsel for the Petitioners, Singleton Urquhart Reynolds Vogel LLP, in trust (the "Petitioners' Amounts").
4. After the Sale Expenses and the Petitioners' Amounts have been paid from the Sale Proceeds, Mr. Tathgar is at liberty to release the remaining funds from the sale proceeds of the Unit to the Respondents.
5. After the outstanding arrears for the Unit as of the Closing Date have been confirmed by the Petitioners, Singleton Urquhart Reynolds Vogel LLP will return any amounts remaining from the \$63,133.54 held in trust to Mr. Tathgar.

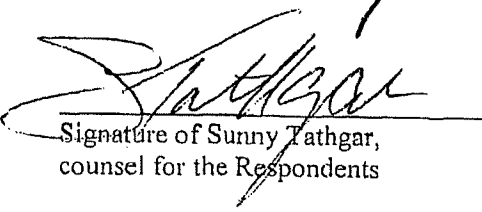
- 3 -

6. This Consent Order may be executed in counterpart, each of which, including but not limited to faxed or emailed pages, when so executed and delivered, shall be deemed to be an original, and all of which constitute the same document.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS NOTED ABOVE:



Signature of Mark C. Stacey,
counsel for the Petitioners



Signature of Sunny Tathgar,
counsel for the Respondents

By the Court.
Digitally signed by Vos, T Digitally signed by Eli, Beryle

Registrar

- 4 -

No. 190923
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

WESTSEA CONSTRUCTION LTD. and CAPITAL CONSTRUCTION
SUPPLIES LTD.

PETITIONERS

AND:

RAJKUMAR DAULATRAO KAMBLE and NANDA KAMBLE

RESPONDENTS

CONSENT ORDER

Singleton Urquhart Reynolds Vogel LLP
1200 – 925 West Georgia Street
Vancouver, BC V6C 3L2

Attention: Dan Barber
TEL: (604) 682-7474
FAX: (604) 682-1283

File: 59666.130

NOTICE OF CLAIM

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA (SMALL CLAIMS COURT)

REGISTRY FILE NUMBER 18-0132
REGISTRY LOCATION Victoria

NOTICE OF CLAIM**FROM:**

NAME Gerald John Rotering (lessee) CLAIMANT(S)

ADDRESS 807 Orchard House tower 647 Michigan Street

CITY, TOWN, MUNICIPALITY Victoria BC V8V-1S9 TEL. # 778 679-5855

PROV. POSTAL CODE

TO:

NAME Westsea Construction Ltd. (lessor) DEFENDANT(S)

ADDRESS Suite 300, 1122 Mainland Street

CITY, TOWN, MUNICIPALITY Vancouver BC V6B-5L1 TEL. # 604 681-2727

PROV. POSTAL CODE

WHAT HAPPENED?

See attached pages.

This is Exhibit B referred to in the Affidavit of G. Rotering sworn before me at the City of Victoria, in the Province of British Columbia, this 21 day of March, 2022

☒ If you need more space to describe what happened, attach another page, mark it "Page 2 of the Notice of Claim" and check this box. A copy of the attached page must accompany each copy of the Notice of Claim

WHERE?

CITY, TOWN, MUNICIPALITY Victoria

PROV. BC

A Commissioner for taking Affidavits in and for British Columbia

WHEN? July 2016

HOW MUCH?

a See Attached

b

c

d

☐ I am abandoning the amount of my claim that is over \$35,000

TIME LIMIT FOR A DEFENDANT TO REPLY

The defendant must complete and file the attached reply within 14 days from being served with this notice, unless the defendant settles this claim directly with the claimant. If the defendant does not reply, a court order may be made against the defendant without any further notice to the defendant. Then the defendant will have to pay the amount claimed plus interest and further expenses.

The Court Address for filing documents is:

Victoria Law Courts
850 Burdett Avenue
Victoria
British Columbia V8W 9J2

+ FILING FEES

+ SERVICE FEES

= TOTAL CLAIMED

\$ 18,947.13

\$ 618.07

\$ 2,000.00

\$ 176.00

\$

156.00

20.00

\$ 21,741.20

☐ DEBT
☐ OTHER THAN DEBT

 26MAR18 1802956 R1P0
12014 C18-0132

156.00

Ministry of Justice
Court Registry
2nd Floor - 850 Burdett Ave
PO BOX 9248 Stn Prov Govt
Victoria BC V8W 9J2

What led to this claim:

Beginning in July of 2016 Westsea Construction, owner of our leasehold building, replaced all original exterior windows and balcony doors with upgraded double-pane "thermal-coated" glass materials and new structural beams to hold the new weight, plus replaced all perfectly serviceable bathroom fans, at a cost of \$5,732,549. For my studio suite, I was required to pay \$19,565 towards this capital expense, which I believe is a breach of our "head lease", dated 17 May 1974.

Our standard-form long-term residential lease does not address capital expenses. At 5.03 the Lessor covenants "to keep in good repair" various aspects of the building, and components are listed, but windows are not.

At 7.01 "operating expenses" are defined as including "maintenance, operation and repair of the building" and lists building components and specific services including "window cleaning", but does not mention window maintenance, repair and replacement.

Under Lessee's Covenants, at 4.03, as the suite lessee, I am specifically charged with maintaining my suite's "doors, **windows**, walls, floors and ceilings thereof and all sinks, tubs and toilets therein and to keep the same in a state of good repair, reasonable wear and tear and such damage as is insured against by the Lessor only excepted....".

My suite's original single-pane window sets were in working order and not leaking water into the building or causing any damage to the building structure. Westsea Construction did not notify me of any need for me to maintain or replace my windows, nor would it reveal any professional advice it had received about the windows until my neighbour, Hugh Trenchard, sued for disclosure and endured four days of court hearings.

Had I been informed of leakage or issues that required maintenance of my suite's windows, I—and I'm sure other lessees—would have cooperated in a contract for comprehensive building window maintenance. If replacement of all windows was required from an engineering point of view, it's clear to me that the lease leaves that capital expense to the building owner, lessor Westsea Construction.

If the Court finds the lease to be ambiguous regarding capital expenses and specifically windows, I believe that the *contra preferentem* rule should apply to what is an adhesion contract in which I had no say.

If the court decides that the lessor may bill lessees for windows replacement, Westsea Construction should have limited itself to "like with like" quality, and not upgraded its asset building at the lessees' expense. The absurd extension of Westsea's interpretation of our lease would allow it to replace and upgrade the windows again in the final year of the lease (2073), entirely at the expense of lessees who will be shown the door on December 31 of that year.

A civil claim in this regard has been filed in B.C. Supreme Court by lessee Mr. Hugh Trenchard (No. 16 335 Victoria Registry) and is scheduled for trial beginning 3 June 2019. I make this claim to meet the two-year limitation on initiating action and ask that it be held until Mr. Trenchard's test case is concluded.

- Gerald R. Steing
26 March 2018



NOTICE OF CLAIM - ATTACHMENT PAGE

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA (SMALL CLAIMS COURT)

HOW
MUCH?

DESCRIPTION

a	Initial billing to me dated 5 July 2016.	\$	18,947.13
b	Billing for cost overrun of 3.26% billed to me 14 December 2017.	\$	618.07
c		\$	
d		\$	
e		\$	

INTEREST

a	Interest at 3% for three years. <i>(Through to date of</i>	\$	2,000.00
b	<i>Mr. Trenchard's trial.)</i>	\$	

TOTAL	21,565.20
+ FILING FEES	156.00
+ SERVICE FEES	20.00
= TOTAL CLAIMED	<u>\$21,741.20</u>

NOTICE OF CLAIM

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA (SMALL CLAIMS COURT)

REGISTRY FILE NUMBER	18 0175
REGISTRY LOCATION	Victoria

APR 19 2018

REGISTRY

FROM:

Fill in the name, address and telephone number of the person(s) or business(es) making the claim.

NAME Peter James Rourke (lessee)
ADDRESS Suite 2208, 647 Michigan Street

CLAIMANT(S)

CITY, TOWN, MUNICIPALITY Victoria PROV. BC POSTAL CODE V8V 1S9 TEL. # 250-920-0836

TO:

Fill in the name, address and telephone number of the person(s) or business(es) the claim is against.

NAME Westsea Construction Ltd. (lessor)
ADDRESS Suite 300, 1122 Mainland Street

DEFENDANT(S)

CITY, TOWN, MUNICIPALITY Vancouver PROV. BC POSTAL CODE V6B 5L1 TEL. # 604-681-2727

WHAT HAPPENED?

Tell what led to the claim.

See attached Page 2 Notice of Claim

☒ If you need more space to describe what happened, attach another page, mark it "Page 2 of the Notice of Claim" and check this box. A copy of the attached page must accompany each copy of the Notice of Claim.

WHERE?

Tell where this happened.

CITY, TOWN, MUNICIPALITY Victoria**WHEN?**

Tell when this happened.

July 2016PROV. BC**HOW MUCH?**

Tell what is being claimed from the defendant(s). If the claim is made up of several parts, separate them here and show the amount for each part. Add these amounts and fill in the total claimed.

a Initial billing to me dated 5th July, 2016\$ 24,787.27b Billing to me for 3.25% cost overrun dated 14th December 2017\$ 808.57c Interest at 3% for three years through to the date of Mr Trenchard's trial scheduled for June 2019\$ 3,182.00d

\$

e

\$

TOTAL28,777.84

+ FILING FEES

156.00

+ SERVICE FEES

20.00

= TOTAL CLAIMED

\$ 28,953.84☐ DEBT☐ OTHER THAN DEBT**TIME LIMIT FOR A DEFENDANT TO REPLY**

The defendant must complete and file the attached reply within 14 days from being served with this notice, unless the defendant settles this claim directly with the claimant. If the defendant does not reply, a court order may be made against the defendant without any further notice to the defendant. Then the defendant will have to pay the amount claimed plus interest and further expenses.

The Court Address for filing documents is:

Victoria Law Courts
850 Burrard Avenue
Victoria
British Columbia V8W 9J2

FORM 1
SCL 801 (4/07/17)
(OFC 700000001)

19APR18 1803842 R10
12014 C18-0175

5.00

court copy

court copy

Page 2 of Notice of Claim

Peter James Rourke

I am the occupant and lessee of suite #2206 of 647 Michigan Street. On July 2016 Westsea Construction Ltd, owner and lessor of 647 Michigan Street gave notice to bill me my proportionate share for the cost of a \$5,732,549 project to:

1. Remove certain balcony single pane sliding doors and replace them with upgraded double pane thermal glass doors.
2. Remove certain bedroom and livingroom windows and replace them with upgraded double pane thermal glass windows and the structural beam necessary to support the added load of these new windows.
3. Remove the perfectly serviceable bathroom fans with an upgraded fan.

For my one bedroom apartment the proportionate share I was required to pay was \$24,787.27. Following a 3.26% project cost over-run I was required to pay a further \$808.57, for a grand total of \$25,595.84.

The standard form long term residential lease I have with Westsea does not include capital expenses and/or replacement costs as operating expenses. Article 5.03 of the lease is a covenant for the Lessor "to keep in good repair" various aspects of the building and lists components. This list does not include windows.

Article 7.01 of the lease defines the "Operating Expenses" that the Lessor Westsea may charge to me the Lessee. These include the "maintenance and repair of the building" and lists building components and certain services including "window cleaning". It does not mention window maintenance, repair or replacement.

Article 4.03 specifically changes me the lessee to maintain the suites' "doors, windows, walls, floors and ceilings thereof and sinks, tubs and toilets therein and to keep the same in good repair, reasonable wear and tear and such damage as insured by the Lessor only excepted...".

It is my contention that my lease leaves the capital expense for the replacement of the windows, doors, bathroom fans and the installation of new window support beams as the responsibility of Westsea Construction. I contend that since Westsea Construction did not replace 'like with like' then this project represents a building improvement and enhancement. This means the value of the improvement is a cost the Lessor is required to pay.

Should the court find the lease ambiguous with regard to capital expenses for this window and door replacement project I ask that since the lease is an adhesion contract in which I had no input then the *contra preferentem* rule should apply.

It is my contention that Westsea's litigation costs associated with defending these claims are not "legal charges" under Article 7.01 of the lease.

A civil claim in this regard has been filed in B.C. Supreme Court by lessee Mr. Hugh Trenchard (No. 16 335 Victoria Registry) scheduled for trial beginning 3rd June, 2019. I make this claim to meet the two year limitation for initiating action and request that it be held in abeyance until Mr Trenchard's case is concluded.

Peter Rourke

April, 2019

18 0204

NOTICE OF CLAIM
IN THE PROVINCIAL COURT OF BRITISH COLUMBIA (SMALL CLAIMS COURT)

REGISTRY LOCATION
Victoria

FILED
MAY 04 2018

REGISTRY

NOTICE OF CLAIM

FROM:

NAME Jennifer Cabeldu CLAIMANT(S)

ADDRESS 1005 Ash Place

CITY, TOWN, MUNICIPALITY Squamish BC V8B-0W2 TEL # 604 644-9108

NAME David Clyde CLAIMANT(S)

ADDRESS 1005 Ash Place

CITY, TOWN, MUNICIPALITY Squamish BC V8B-0W2 TEL # 604 612-2062

TO:

NAME Westsea Construction Ltd - Lessor DEFENDANT(S)

ADDRESS 300 1122 Mainland Street

CITY, TOWN, MUNICIPALITY Vancouver BC V6B-5L1 TEL # 604 681-2727

**WHAT
HAPPENED?**

See attached pages.

☒ If you need more space to describe what happened, attach another page, mark it "Page 2 of the Notice of Claim" and check this box. A copy of the attached page must accompany each copy of the Notice of Claim

WHERE?

CITY, TOWN, MUNICIPALITY Victoria
PROV. BC

WHEN?

July 2016

04MAY18 180440 RPD
12014 C18-0204

156.00



NOTICE OF CLAIM - ATTACHMENT PAGE **IN THE PROVINCIAL COURT OF BRITISH COLUMBIA (SMALL CLAIMS COURT)**

What Happened? - Other

What led to this claim:

In July 2016, we were notified we needed to pay \$25,242.49 for window and door replacements in our leasehold apartment. We paid the amount but then began further research as the window replacement and upgrade was a capital improvement.

Westsea contracted a company to begin replacing windows and door with upgraded double-pane "thermal coated" materials as well as new structural beams to hold the new increased weight, plus all bathroom fans, regardless of working condition at a cost of \$5,732,549.27. For our 1 bedroom suite, we were required to pay \$25,242.49 towards this capital expenses which we believe is in breach of our "head lease" dated May 1974.

Our standard-form long-term residential lease does not address capital expenses. At 5.03 the Lessor covenants "to keep in good repair" various aspects of the building, and components are listed, but windows are not.

At 7.01 "operating expenses" are defined as including "maintenance, operation and repair of the building" and lists building components and specific services including "window cleaning" but does not mention window maintenance, repair or replacement.

Under lessee's covenants, at 4.03, as a suite lessee, we are specifically charged with maintaining our suites "doors, windows, walls, floors and ceilings thereof all sinks, tubs, toilets, therein and to keep the same in state of good repair, reasonable wear and tear and such damage as is insured against by the Lessor only expected..."

Our suites original single-pane windows were in good working order and not leaking water into the building or causing any damage to the building structure. Westsea Construction did not notify me of any need for me to maintain or replace my windows, nor would it reveal details of professional advice it had received regarding the windows until our neighbour, Hugh Trenchard, sued for disclosure and attended four days of court hearings.

Had we been informed of leakage or issues requiring maintenance of our suite's windows, we would have cooperated in a contract for comprehensive building window maintenance. If replacement of all windows was required from an engineering standpoint, it's clear to us that the lease leaves that capital expense to the building owner, lessor Westsea Construction.

If the court finds the lease to be ambiguous regarding capital expenses, specifically windows, we believe that the contra preferentem rule should apply to what is an adhesion contract in which we had no say.

If the court finds that the lessor may bill lessors for window replacement, Westsea Construction should have limited itself to "like with like" quality and not upgraded its asset building at the expense of the lessees. The absurd extension of Westsea's interpretation of our lease would allow it to replace and upgrade windows again in the final year of the lease (2073), entirely at the expense of lessees who would no longer have occupancy rights as of December 31 of that year.

A civil claim in this regard has been filed in the BC Supreme Court by lessee Mr. Hugh Trenchard (no 16 335 Victoria Registry) and is scheduled for trial beginning June 3 2019. We are making this claim to meet the two-year limitation on initiating action and ask that it be held until Mr. Trenchard's test case is concluded.



NOTICE OF CLAIM - ATTACHMENT PAGE
IN THE PROVINCIAL COURT OF BRITISH COLUMBIA (SMALL CLAIMS COURT)

**HOW
MUCH?**

DESCRIPTION

a Initial billing dated July 5 2016	\$	25,242.49
b subsequent billing for cost overruns of 3.26% billed Dec 14 2017	\$	823.42
c	\$	
d	\$	
e	\$	
INTEREST		
a interest at 3% for 3 years	\$	2,345.91
b	\$	

TOTAL	28,411.82
+ FILING FEES	156.00
+ SERVICE FEES	20.00
= TOTAL CLAIMED	<u>28,587.82</u>

REPLY

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA (SMALL CLAIMS COURT)

- ☒ To a Claim
☐ To a Counterclaim

REGISTRY FILE NUMBER 18 0132
REGISTRY LOCATION Victoria

TO:

Copy the name, address and telephone number of the claimant from the Notice of Claim or Notice of Civil Resolution Tribunal Claim.

NAME GERALD JOHN ROTERING
ADDRESS 807 Orchard House tower 647 Michigan Street

CLAIMANT(S)

REPLY

FROM:

Fill in the name, address and telephone number of the defendant filling this reply.

NAME WESTSEA CONSTRUCTION LTD.
ADDRESS c/o SINGLETON REYNOLDS, 1200-925 W. GEORGIA STREET (attn: F. TROEN)
CITY, TOWN, MUNICIPALITY Vancouver British Columbia V6C 3L2 TEL. # 604-682-7474
PROV. POSTAL CODE

DEFENDANT

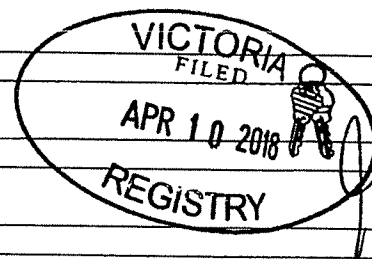
DISPUTE:

Using the "HOW MUCH" section of the Notice of Claim or the Notice of Civil Resolution Tribunal Claim as a guide, tell why you disagree with each part (a - e). If you agree with parts of the claim say so.

a See attached Schedule "A"

b This is Exhibit C referred to in the Affidavit of
C. R. ROTHERING sworn before
me at the City of Victoria, in the Province of British
c Columbia, this 21 day of March, 2022

d
e A Commissioner for taking Affidavits in and for
British Columbia



AGREEMENT WITH THE CLAIM: (NAME)

If you agree to pay all or part of what is claimed, make a proposal.

I could make the following payments:
(GIVE DATES AND AMOUNTS)

agree to pay \$

COUNTERCLAIM

(YOU SHOULD ONLY FILL OUT THIS PART OF THE FORM IF YOU WISH TO MAKE A CLAIM AGAINST THE CLAIMANT)
(THIS PART IS NOT TO BE USED WHEN REPLYING TO A COUNTERCLAIM OR TO A NOTICE OF CIVIL RESOLUTION TRIBUNAL CLAIM)

WHAT HAPPENED?

Briefly tell what has led to your counterclaim.

HOW MUCH?

Tell what you are claiming. If your counterclaim has more than one part, separate each part and fill in each individual amount, then add the individual amounts to make the total.

a	\$	
b	\$	
c	\$	

Copy of REPLY and
Mailed to Claimant

10APR18 1803505 RDRP
12014 C18-0132

Date: Apr 11/18 Initials CRB

TOTAL \$ 0.00
50.00 + FILING FEES \$ 50.00
= TOTAL CLAIMED \$

court copy

court copy

No. 180132
Victoria Registry

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
(Small Claims)

BETWEEN:

GERALD JOHN ROTERING

CLAIMANT

AND:

WESTSEA CONSTRUCTION LTD.

DEFENDANTS

SCHEDULE "A" TO REPLY

Filed by: The Defendant Westsea Construction Ltd. ("**Westsea**")

Part 1: RESPONSE TO NOTICE OF CLAIM FACTS

Division 1 – Defendant's Response to Facts

1. The facts alleged in all paragraphs of the Notice of Claim are denied.

Division 2 – Additional Facts

2. This Action is in relation to a 22 story concrete apartment complex located at 647 Michigan Street, Victoria, British Columbia, known as Orchard House (the "**Building**"). There are 211 leased apartment units in the Building.
3. The Claimant owns a leasehold interest in suite 807 at the Building (the "**Suite**").
4. The relationship between the Defendant Westsea and the Claimant is governed by a 99-year lease agreement.

- 2 -

5. The lease agreement was entered into between the Westsea and Capital Construction Supplies Ltd. in 1974 (the "**Lease**"). The Lease expires in 2083.
6. The Lease is a private contract, and is not governed by any legislation. It is not a commercial lease within the meaning of the *Commercial Tenancy Act* nor the law of leasing generally.
7. After entering into the Lease, Capital Construction Supplies Ltd. sold assignments *pro tanto* of its leasehold interest in individual suites to third parties.
8. The leasehold interests in individual suites has been variously sold to new third parties in the intervening period.
9. At the time Claimant purchased his leasehold interest, being an assignment *pro tanto* of the Lease, he expressly agreed to abide by all the covenants of the lessee as contained in the Lease, and to "pay all monies payable with respect to the Suite pursuant to the Lease [...]".
10. The Claimant was represented by legal counsel in the purchase of his leasehold interest in the Suite.
11. The Lease and the assignments *pro tanto* thereof are commercial, arms' length contracts.
12. The Lease includes, *inter alia*, the following express terms:

ARTICLE 4 – LESSEE'S COVENANTS

[...]

4.03 To repair and maintain each of the Suites including all doors, windows, walls, floors, and ceilings thereof and all sinks, tubs and toilets and to keep the same in good condition and repair, reasonable wear and tear and such damage as insured against by the Lessor only excepted; to permit the Lessor, its agents or employees to enter and view the state of repair; to repair according to notice in writing except as aforesaid and leave each of the Suites in good repair except as aforesaid.

[...]

ARTICLE 5 – LESSOR'S COVENANTS

[...]

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.

[...]

ARTICLE 7 – OPERATING EXPENSES

7.01 "Operating Expenses" in this Lease means the total amount paid or payable by the Lessor in the performance of its covenants herein contained (save and except those contained in Article 5.11) and includes but without restricting the generality of the foregoing the amount paid or payable by the Lessor in connection with the maintenance, operation and repair of the Building, expenses in heating the common areas of the Building and each of the Suites therein (unless any of the Suites are equipped with their own individual and independent heating system in which even the cost shall be payable by the Lessee of any such suite) and providing hot and cold water, elevator maintenance, electricity, window cleaning, fire, casualty liability and other insurance, utilities, service and maintenance contracts with independent contractors or property managers, water rates and taxes, business licences, janitorial service, building maintenance service, resident manager's salary (if applicable) and legal and accounting charges and all other expenses paid or payable by the Lessor in connection with the Building, the common property therein or the Lands. "Operating Expenses" shall not include any amount directly chargeable by the Lessor to any Lessee or Lessees. The Lessor agrees to exercise prudent and reasonable discretion in incurring Operating Expenses, consistent with its duties hereunder.

7.02 Estimate of Operating Expenses – Prior to commencement of each calendar year during the Term other than the Base Year, the Lessor shall furnish to the Lessee an estimate of the Operating expenses for such calendar year based on prior years experience and the Lessee shall pay to the Lessor on the first day of each and every month during such calendar year, One-Twelfth (1/12th) of the Lessee's Share of such estimated Operating expenses.

7.03 Actual Operating Expenses – In the event that the actual Operating expenses in any calendar year exceed the estimated Operating expenses for that calendar year, the Lessee agrees to pay, within Thirty (30) days of written demand by the Lessor the Lessee's Share of such excess and in the event that the actual Operating expenses in any calendar year is less than the estimated Operating expenses for that year the Lessee's share of operating expenses for the following year shall be reduced accordingly. The actual Operating expenses shall be calculated by the Lessor for each calendar year and shall be certified by the auditors of the Lessor in accordance with generally accepted accounting principles.

7.04 Definition of Lessee's Share – "Lessee's Share" in this Lease means the ratio which the area of each of the suites bears to the total area of all suites in the Building, which ratio is hereby agreed to be in percentage terms and as applicable to each suite as set forth in Schedule "A" hereto.

[...]

[underlining added]

13. The Lease does not distinguish between capital and non-capital expenses.

Annual Operating Expenses

14. As described in the above Articles, Westsea has several obligations in respect to the Building, including an obligation to keep in good repair and condition the foundation, outer walls and the roofs pursuant to Article 5.03.
15. In performing its Lease obligations, Westsea incurs costs. The total amount paid or payable by Westsea in performing its obligations are called "**Operating Expenses**" as described in Article 7.01 of the Lease.
16. Pursuant to Article 7.02 of the Lease, Westsea prepares an estimate of the Operating Expenses for Orchard House for the calendar year based on prior years' experience. Under that same Article, the leaseholders then pay their proportionate share (as defined in Article 7.04) of estimated Operating Expenses on a monthly basis.
17. During the course of any given calendar year, there are expenses incurred at Orchard House that were not contemplated in the estimated annual budget. Non-budgeted maintenance and repair costs are accounted for at the end of the budgeted year, and are included in Operating Expenses for that year.
18. Pursuant to Article 7.03 of the Lease, the actual Operating Expenses for each calendar year are certified by the Lessor's auditors in accordance with generally accepted accounting principles.

19. The audited financial statements are provided to the leaseholders.

The Windows and Doors Project

20. In 2013, Westsea engaged the professional engineering firm Read Jones Christoffersen Ltd. ("RJC") to prepare a report regarding the building envelope, roof, and membrane of the Building. RJC prepared that report, entitled "**Priority Assessment Report**" dated September 6, 2013.
21. The Priority Assessment Report made recommendations for, *inter alia*, window and sliding door replacement. In the Priority Assessment Report, RJC stated:

Priority 3: Orchard House Window and Door Replacement (2015-2018)*

The windows and sliding balcony doors at Orchard House are not in immediate need of replacement, although they have surpassed their intended service life. RJC recommends planning for a replacement program within five (5) years as we have observed condensation accumulation which may affect long term durability of the surrounding concrete. The final extent of replacement is as yet undetermined and the scope would be clarified once the work described by Priority 1 and Priority 2 is completed. The exact number and location of windows and sliding doors would presumably be determined by testing the assemblies to determine their resistance to frame leakage, and by acoustical sounding of the surrounding concrete to determine the level of delamination present. Replacement of the windows and sliding balcony doors would also improve thermal performance of the building and interior comfort levels [...]

OPC: \$2,000,000 to 3,000,000 (dependent on number/location of windows)

Priority 3 project scope would include repair of delaminated/spalled concrete adjacent and below windows and doors (where present)

[italics in original, underlining added]

22. Westsea delivered a letter to the Orchard House leaseholders dated November 30, 2013 describing, in part, the estimated Operating Expenses for the calendar year 2014. That letter stated, in part:

"Read Jones Christoffersen has done a Project Prioritization Assessment as follows:

[...] Window and Door Replacement, 2015-2018 with a budget cost of \$3,000,000 [...]

Please consider these expenses when planning your future personal financial requirements."

23. RJC subsequently prepared a building envelope condition assessment dated March 24, 2016, regarding window and door replacement at the Building (the "BECA"). The BECA assessed the current general condition and performance of the building enclosure, focusing on:
- a. interior conditions;
 - b. exterior walls;
 - c. glazing assemblies, including windows and sliding doors;
 - d. balcony assemblies;
 - e. roof assemblies;
 - f. parkade assemblies; and
 - g. at-grade assemblies.
24. In the BECA, RJC made a number of conclusions and recommendations, including as follows:

"Building enclosure assemblies and component materials of the building enclosure of Orchard House, with the exception of the windows, sliding doors, and brick spandrels of the north and south elevations, are generally in good condition having been renewed or replaced within the past 5 years.

The relative humidity inside the suites contributes to condensation which occurs on the window and sliding door frames. New bathroom exhaust fan controls (timers or humidistats) are recommended to help control interior humidity levels and mitigate to [sic] potential for condensation and related damage to interior finishes.

A predominant exterior feature of Orchard House, the masonry brick walls, require targeted repointing and repairs to maintain their current level of performance. This work is recommended to be completed in conjunction with the replacement of the window assemblies.

[...] The windows and sliding doors located on the north and south elevations have reached the limit of their expected service life. Moisture damage due to glazing assembly leakage is becoming more frequent and widespread, and is resulting in damage to interior finishes and will increase and contribute to re-occurrence of rebar corrosion and concrete deterioration.

[...]" [Emphasis added]

25. In the BECA, RJC recommended *inter alia* that Westsea:
- a. install new bathroom exhaust fans to limit interior humidity;
 - b. repair and maintain brick wall assemblies to address leakage and deterioration to reinstate the intended level of performance; and
 - c. replace the north and south elevation suite windows and sliding doors with new situationally appropriate, thermally broken IGU assemblies.
26. RJC estimates that the replacement glazing assemblies (windows and sliding glass doors) will have a service life of 30-35+ years, meaning that the glazing assemblies will likely reach the end of their service life by approximately 2046-2051 (or slightly later).
27. The BECA also provided an opinion of probable cost to perform the recommended steps, and stated, in part:
- "The following Opinions of Probable Cost (OPCs) are presented by RJC to provide an expectation as to the general magnitude of the costs required to complete the recommendations described above."
28. The total opinion of probable cost for the recommended repairs was \$3,645,000.
29. Following receipt of the BECA, Westsea decided to undertake the building envelope remediation steps recommended by RJC.
30. Westsea sent the BECA to all leaseholders by letter dated March 29, 2016.
31. Westsea engaged RJC to issue a tender on its behalf for the required work.
32. Westsea received a number of bids; however, all the bids were above the budget set out in the tender documents. As a result, Westsea rejected all of the tender bids and instructed RJC to cancel the tender process and to enter into negotiations with the lowest bidder,

Farmer Construction Ltd. ("**Farmer**"), to attempt to negotiate a reduction of the project costs.

33. As a result of those negotiations, which did result in a reduction of the project price, Westsea and Farmer entered into a contract for the scope of work prepared by RJC (the "**Contract**").
34. The work contemplated by the Contract is designed to bring the Building back to its original condition. The only changes to the original condition of the Building contemplated by the Contract are those required by current building codes.
35. The Contract price was \$5,551,460, inclusive of GST (the "**Project Price**").
36. Farmer commenced work on July 11, 2016, with an anticipated project schedule of 44 weeks.
37. Westsea wrote to all leaseholders, including the Claimant, on July 5, 2016, notifying each of them of their share of the Project Price and requiring payment by September 1, 2016. Westsea also offered a payment plan of 12 months to leaseholders who were unable to pay in a lump sum.
38. Westsea wrote to all leaseholders on July 21, 2016, and August 22, 2016, and October 21, 2016 providing further details regarding construction.
39. On August 9, 2016, Hugh Trenchard, a leaseholder in the Building, filed a Notice of Civil Claim in the British Columbia Supreme Court, Victoria Registry, in which he named Westsea as the defendant, Registry No. 163355 (the "**Supreme Court Action**").
40. The allegations and claims made against Westsea in the Supreme Court Action include allegations and claims that are the same or substantially the same as those made in the Claimant's Notice of Claim.

41. On August 31, 2016, Westsea filed a Response to Civil Claim in the Supreme Court Action, denying all of Mr. Trenchard's allegations.
42. The trial of the Supreme Court Action is scheduled for June 3, 2019.

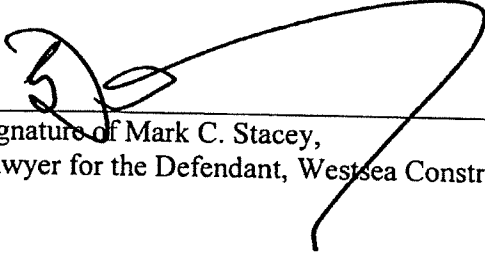
Part 2: RESPONSE TO RELIEF SOUGHT

1. Westsea opposes the granting of the relief sought in the Claimant's Notice of Claim.

Part 3: LEGAL BASIS

1. Westsea specifically pleads that it has not breached the Lease as alleged or at all, and puts the Claimant to the strict proof thereof.
2. Westsea's obligations under Article 5.03 of the Lease include installing new windows and doors.
3. All costs and expenses associated with the replacement of windows and doors at Orchard House were incurred pursuant to the Lease and in the exercise of Westsea's reasonable and prudent discretion on the recommendation of its professional advisers.
4. The express terms of the Lease are clear and not ambiguous.
5. No implied terms can be read into the Lease.
6. The interpretive principle of *contra preferentum* is not applicable.
7. The Lease is not a contract of adhesion, and the Claimant entered into the Lease freely, voluntarily and with legal advice.

Dated: April 9, 2018

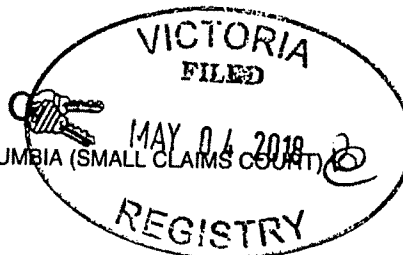


Signature of Mark C. Stacey,
Lawyer for the Defendant, Westsea Construction Ltd.

REPLY

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA (SMALL CLAIMS COURT)

- ☒ To a Claim
☐ To a Counterclaim



REGISTRY FILE NUMBER	180175
REGISTRY LOCATION	Victoria

TO:

Copy the name, address and telephone number of the claimant from the Notice of Claim or Notice of Civil Resolution Tribunal Claim.

NAME **PETER JAMES ROURKE**
 ADDRESS **Suite 2206 - 647 Michigan Street**

CLAIMANT(S)

CITY, TOWN, MUNICIPALITY **Victoria** PROV. **British Columbia** POSTAL CODE **V8V 1S9** TEL. # **250-920-0836**

FROM:

Fill in the name, address and telephone number of the defendant filing this reply.

NAME **WESTSEA CONSTRUCTION LTD.**
 ADDRESS **c/o SINGLETON REYNOLDS, 1200-925 W. GEORGIA STREET (attn: M. STACEY)**

DEFENDANT

CITY, TOWN, MUNICIPALITY **Vancouver** PROV. **British Columbia** POSTAL CODE **V6C 3L2** TEL. # **604-682-7474**

DISPUTE:

Using the "HOW MUCH" section of the Notice of Claim or the Notice of Civil Resolution Tribunal Claim as a guide, tell why you disagree with each part (a - e). If you agree with parts of the claim say so.

a See attached Schedule "A"

b

c

d

e

AGREEMENT WITH THE CLAIM: (NAME)

If you agree to pay all or part of what is claimed, make a proposal.

I could make the following payments:
 (GIVE DATES AND AMOUNTS)

agree to pay \$

COUNTERCLAIM

(YOU SHOULD ONLY FILL OUT THIS PART OF THE FORM IF YOU WISH TO MAKE A CLAIM AGAINST THE CLAIMANT)
 (THIS PART IS NOT TO BE USED WHEN REPLYING TO A COUNTERCLAIM OR TO A NOTICE OF CIVIL RESOLUTION TRIBUNAL CLAIM)

WHAT HAPPENED?

Briefly tell what has led to your counterclaim.

HOW MUCH?

Tell what you are claiming. If your counterclaim has more than one part, separate each part and fill in each individual amount, then add the individual amounts to make the total.

a

b

c

RDPR

50.00

\$

\$

\$

TOTAL

\$

0.00

+ FILING FEES

\$

= TOTAL CLAIMED

\$

court copy

court copy

No. 180175
Victoria Registry

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
(Small Claims)

BETWEEN:

PETER JAMES ROURKE

CLAIMANT

AND:

WESTSEA CONSTRUCTION LTD.

DEFENDANT

SCHEDULE "A" TO REPLY

Filed by: The Defendant Westsea Construction Ltd. ("Westsea")

Part 1: RESPONSE TO NOTICE OF CLAIM FACTS

Division 1 – The Defendants' Version of Facts

1. The facts alleged in all paragraphs of the Notice of Claim are denied.

Division 2 – Additional Facts

2. This Action is in relation to a 22-story concrete apartment complex located at 647 Michigan Street, Victoria, British Columbia, known as Orchard House (the "**Building**"). There are 211 leased apartment units in the Building.
3. The Claimant owns a leasehold interest in suite 2206 at the Building (the "**Suite**").
4. The relationship between the Defendant Westsea and the Claimant is governed by a 99-year lease agreement.

5. The lease agreement was entered into between the Westsea and Capital Construction Supplies Ltd. in 1974 (the "Lease"). The Lease expires in 2083.
6. The Lease is a private contract, and is not governed by any legislation. It is not a commercial lease within the meaning of the *Commercial Tenancy Act* nor the law of leasing generally.
7. After entering into the Lease, Capital Construction Supplies Ltd. sold assignments *pro tanto* of its leasehold interest in individual suites to third parties.
8. The leasehold interests in individual suites has been variously sold to new third parties in the intervening period.
9. At the time Claimant purchased his leasehold interest, being an assignment *pro tanto* of the Lease, he expressly agreed to abide by all the covenants of the lessee as contained in the Lease, and to "pay all monies payable with respect to the Suite pursuant to the Lease [...]".
10. The Claimant was represented by legal counsel in the purchase of his leasehold interest in the Suite.
11. The Lease and the assignments *pro tanto* thereof are commercial, arms' length contracts.
12. The Lease includes, *inter alia*, the following express terms:

ARTICLE 4 – LESSEE'S COVENANTS

[...]

4.03 To repair and maintain each of the Suites including all doors, windows, walls, floors, and ceilings thereof and all sinks, tubs and toilets and to keep the same in good condition and repair, reasonable wear and tear and such damage as insured against by the Lessor only excepted; to permit the Lessor, its agents or employees to enter and view the state of repair; to repair according to notice in writing except as aforesaid and leave each of the Suites in good repair except as aforesaid.

[...]

ARTICLE 5 – LESSOR'S COVENANTS

[...]

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.

[...]

ARTICLE 7 – OPERATING EXPENSES

7.01 "Operating Expenses" in this Lease means the total amount paid or payable by the Lessor in the performance of its covenants herein contained (save and except those contained in Article 5.11) and includes but without restricting the generality of the foregoing the amount paid or payable by the Lessor in connection with the maintenance, operation and repair of the Building, expenses in heating the common areas of the Building and each of the Suites therein (unless any of the Suites are equipped with their own individual and independent heating system in which even the cost shall be payable by the Lessee of any such suite) and providing hot and cold water, elevator maintenance, electricity, window cleaning, fire, casualty liability and other insurance, utilities, service and maintenance contracts with independent contractors or property managers, water rates and taxes, business licences, janitorial service, building maintenance service, resident manager's salary (if applicable) and legal and accounting charges and all other expenses paid or payable by the Lessor in connection with the Building, the common property therein or the Lands. "Operating Expenses" shall not include any amount directly chargeable by the Lessor to any Lessee or Lessees. The Lessor agrees to exercise prudent and reasonable discretion in incurring Operating Expenses, consistent with its duties hereunder.

7.02 Estimate of Operating Expenses – Prior to commencement of each calendar year during the Term other than the Base Year, the Lessor shall furnish to the Lessee an estimate of the Operating expenses for such calendar year based on prior years experience and the Lessee shall pay to the Lessor on the first day of each and every month during such calendar year, One-Twelfth (1/12th) of the Lessee's Share of such estimated Operating expenses.

7.03 Actual Operating Expenses – In the event that the actual Operating expenses in any calendar year exceed the estimated Operating expenses for that calendar year, the Lessee agrees to pay, within Thirty (30) days of written demand by the Lessor the Lessee's Share of such excess and in the event that the actual Operating expenses in any calendar year is less than the estimated Operating expenses for that year the Lessee's share of operating expenses for the following year shall be reduced

accordingly. The actual Operating expenses shall be calculated by the Lessor for each calendar year and shall be certified by the auditors of the Lessor in accordance with generally accepted accounting principles.

7.04 Definition of Lessee's Share – "Lessee's Share" in this Lease means the ratio which the area of each of the suites bears to the total area of all suites in the Building, which ratio is hereby agreed to be in percentage terms and as applicable to each suite as set forth in Schedule "A" hereto.

[...]

[underlining added]

13. The Lease does not distinguish between capital and non-capital expenses.

Annual Operating Expenses

14. As described in the above Articles, Westsea has several obligations in respect to the Building, including an obligation to keep in good repair and condition the foundation, outer walls and the roofs pursuant to Article 5.03.
15. In performing its Lease obligations, Westsea incurs costs. The total amount paid or payable by Westsea in performing its obligations are called "**Operating Expenses**" as described in Article 7.01 of the Lease.
16. Legal charges incurred by Westsea in relation to Orchard House are Operating Expenses pursuant to Article 7.01.
17. Pursuant to Article 7.02 of the Lease, Westsea prepares an estimate of the Operating Expenses for Orchard House for the calendar year based on prior years' experience. Under that same Article, the leaseholders then pay their proportionate share (as defined in Article 7.04) of estimated Operating Expenses on a monthly basis.
18. During the course of any given calendar year, there are expenses incurred at Orchard House that were not contemplated in the estimated annual budget. Non-budgeted

- maintenance and repair costs are accounted for at the end of the budgeted year, and are included in Operating Expenses for that year.
19. Pursuant to Article 7.03 of the Lease, the actual Operating Expenses for each calendar year are certified by the Lessor's auditors in accordance with generally accepted accounting principles.
 20. The audited financial statements are provided to the leaseholders.

The Windows and Doors Project

21. In 2013, Westsea engaged the professional engineering firm Read Jones Christoffersen Ltd. ("RJC") to prepare a report regarding the building envelope, roof, and membrane of the Building. RJC prepared that report, entitled "**Priority Assessment Report**" dated September 6, 2013.
22. The Priority Assessment Report made recommendations for, *inter alia*, window and sliding door replacement. In the Priority Assessment Report, RJC stated:

Priority 3: Orchard House Window and Door Replacement (2015-2018)*

The windows and sliding balcony doors at Orchard House are not in immediate need of replacement, although they have surpassed their intended service life. RJC recommends planning for a replacement program within five (5) years as we have observed condensation accumulation which may affect long term durability of the surrounding concrete. The final extent of replacement is as yet undetermined and the scope would be clarified once the work described by Priority 1 and Priority 2 is completed. The exact number and location of windows and sliding doors would presumably be determined by testing the assemblies to determine their resistance to frame leakage, and by acoustical sounding of the surrounding concrete to determine the level of delamination present. Replacement of the windows and sliding balcony doors would also improve thermal performance of the building and interior comfort levels [...]

OPC: \$2,000,000 to 3,000,000 (dependent on number/location of windows)

Priority 3 project scope would include repair of delaminated/spalled concrete adjacent and below windows and doors (where present)

[italics in original, underlining added]

23. Westsea delivered a letter to the Orchard House leaseholders dated November 30, 2013 describing, in part, the estimated Operating Expenses for the calendar year 2014. That letter stated, in part:

"Read Jones Christoffersen has done a Project Prioritization Assessment as follows:

[...] Window and Door Replacement, 2015-2018 with a budget cost of \$3,000,000 [...]

Please consider these expenses when planning your future personal financial requirements."

24. RJC subsequently prepared a building envelope condition assessment dated March 24, 2016, regarding window and door replacement at the Building (the "BECA"). The BECA assessed the current general condition and performance of the building enclosure, focusing on:
- a. interior conditions;
 - b. exterior walls;
 - c. glazing assemblies, including windows and sliding doors;
 - d. balcony assemblies;
 - e. roof assemblies;
 - f. parkade assemblies; and
 - g. at-grade assemblies.
25. In the BECA, RJC made a number of conclusions and recommendations, including as follows:

"Building enclosure assemblies and component materials of the building enclosure of Orchard House, with the exception of the windows, sliding doors, and brick spandrels of the north and south elevations, are generally in good condition having been renewed or replaced within the past 5 years.

The relative humidity inside the suites contributes to condensation which occurs on the window and sliding door frames. New bathroom exhaust fan controls (timers or humidistats) are recommended to help control interior humidity levels and mitigate to [sic] potential for condensation and related damage to interior finishes.

A predominant exterior feature of Orchard House, the masonry brick walls, require targeted repointing and repairs to maintain their current level of performance. This work is recommended to be completed in conjunction with the replacement of the window assemblies.

[...] The windows and sliding doors located on the north and south elevations have reached the limit of their expected service life. Moisture damage due to glazing assembly leakage is becoming more frequent and widespread, and is resulting in damage to interior finishes and will increase and contribute to re-occurrence of rebar corrosion and concrete deterioration.

[...]" [Emphasis added]

26. In the BECA, RJC recommended *inter alia* that Westsea:
- a. install new bathroom exhaust fans to limit interior humidity;
 - b. repair and maintain brick wall assemblies to address leakage and deterioration to reinstate the intended level of performance; and
 - c. replace the north and south elevation suite windows and sliding doors with new situationally appropriate, thermally broken IGU assemblies.
27. RJC estimates that the replacement glazing assemblies (windows and sliding glass doors) will have a service life of 30-35+ years, meaning that the glazing assemblies will likely reach the end of their service life by approximately 2046-2051 (or slightly later).
28. The BECA also provided an opinion of probable cost to perform the recommended steps, and stated, in part:
- "The following Opinions of Probable Cost (OPCs) are presented by RJC to provide an expectation as to the general magnitude of the costs required to complete the recommendations described above."
29. The total opinion of probable cost for the recommended repairs was \$3,645,000.

30. Following receipt of the BECA, Westsea decided to undertake the building envelope remediation steps recommended by RJC.
31. Westsea sent the BECA to all leaseholders by letter dated March 29, 2016.
32. Westsea engaged RJC to issue a tender on its behalf for the required work.
33. Westsea received a number of bids; however, all the bids were above the budget set out in the tender documents. As a result, Westsea rejected all of the tender bids and instructed RJC to cancel the tender process and to enter into negotiations with the lowest bidder, Farmer Construction Ltd. ("**Farmer**"), to attempt to negotiate a reduction of the project costs.
34. As a result of those negotiations, which did result in a reduction of the project price, Westsea and Farmer entered into a contract for the scope of work prepared by RJC (the "**Contract**").
35. The work contemplated by the Contract is designed to bring the Building back to its original condition. The only changes to the original condition of the Building contemplated by the Contract are those required by current building codes.
36. The Contract price was \$5,551,460, inclusive of GST (the "**Project Price**").
37. Farmer commenced work on July 11, 2016, with an anticipated project schedule of 44 weeks.
38. Westsea wrote to all leaseholders, including the Claimant, on July 5, 2016, notifying each of them of their share of the Project Price and requiring payment by September 1, 2016. Westsea also offered a payment plan of 12 months to leaseholders who were unable to pay in a lump sum.

39. Westsea wrote to all leaseholders on July 21, 2016, and August 22, 2016, and October 21, 2016 providing further details regarding construction.
40. On August 9, 2016, Hugh Trenchard, a leaseholder in the Building, filed a Notice of Civil Claim in the British Columbia Supreme Court, Victoria Registry, in which he named Westsea as the defendant, Registry No. 163355 (the "**Supreme Court Action**").
41. The allegations and claims made against Westsea in the Supreme Court Action include allegations and claims that are the same or substantially the same as those made in the Claimant's Notice of Claim.
42. On August 31, 2016, Westsea filed a Response to Civil Claim in the Supreme Court Action, denying all of Mr. Trenchard's allegations.
43. The trial of the Supreme Court Action is scheduled for June 3, 2019.

Part 2: RESPONSE TO RELIEF SOUGHT

1. Westsea opposes the granting of the relief sought in the Claimant's Notice of Claim.

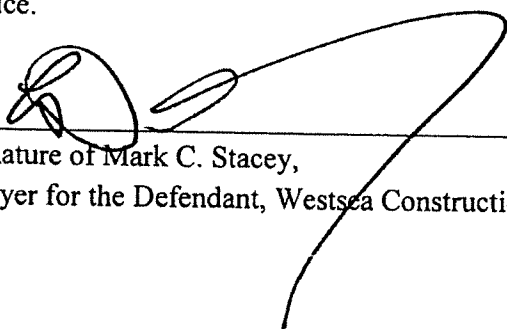
Part 3: LEGAL BASIS

1. Westsea specifically pleads that it has not breached the Lease as alleged or at all, and puts the Claimant to the strict proof thereof.
2. Westsea's obligations under Article 5.03 of the Lease include installing new windows and doors.
3. All costs and expenses associated with the replacement of windows and doors at Orchard House were incurred pursuant to the Lease and in the exercise of Westsea's reasonable and prudent discretion on the recommendation of its professional advisers.
4. The express terms of the Lease are clear and not ambiguous.

- 10 -

5. No implied terms can be read into the Lease.
6. The interpretive principle of *contra preferentum* is not applicable.
7. The Lease is not a contract of adhesion, and the Claimant entered into the Lease freely, voluntarily and with legal advice.

Dated: May 3, 2018



Signature of Mark C. Stacey,
Lawyer for the Defendant, Westsea Construction Ltd.

Victoria

22-May-18

REGISTRY

REPLY

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA (SMALL CLAIMS COURT)

☒ To a Claim☐ To a Counterclaim

REGISTRY FILE NUMBER

180204

REGISTRY LOCATION

Victoria

TO:

Copy the name, address and telephone number of the claimant from the Notice of Claim or Notice of Civil Resolution Tribunal Claim.

NAME JENNIFER CABELDU and DAVID CLYDE

CLAIMANT(S)

ADDRESS 1005 Ash Place

CITY, TOWN, MUNICIPALITY Squamish

British Columbia

V8B 0W2

TEL # 604-644-9108

NAME WESTSEA CONSTRUCTION LTD.

DEFENDANT

ADDRESS c/o SINGLETON REYNOLDS, 1200-925 W. GEORGIA STREET (attn: M. STACEY)

CITY, TOWN, MUNICIPALITY Vancouver

British Columbia

V6C 3L2

TEL # 604-682-7474

FROM:

Fill in the name, address and telephone number of the defendant filing this reply.

DISPUTE:

Using the "HOW MUCH" section of the Notice of Claim or the Notice of Civil Resolution Tribunal Claim as a guide, tell why you disagree with each part (a - e). If you agree with parts of the claim say so.

a See attached Schedule "A"

b

c

d

e

AGREEMENT WITH THE CLAIM: I (NAME)

If you agree to pay all or part of what is claimed, make a proposal.

I could make the following payments:

(GIVE DATES AND AMOUNTS)

agree to pay \$

COUNTERCLAIM (YOU SHOULD ONLY FILL OUT THIS PART OF THE FORM IF YOU WISH TO MAKE A CLAIM AGAINST THE CLAIMANT)
(THIS PART IS NOT TO BE USED WHEN REPLYING TO A COUNTERCLAIM OR TO A NOTICE OF CIVIL RESOLUTION TRIBUNAL CLAIM)**WHAT HAPPENED?**

Briefly tell what has led to your counterclaim.

HOW MUCH?

Tell what you are claiming. If your counterclaim has more than one part, separate each part and fill in each individual amount, then add the individual amounts to make the total.

a

\$

b

\$

c

\$

TOTAL

\$

0.00

+ FILING FEES

\$

= TOTAL CLAIMED

\$

court copy

court copy

No. 180204
Victoria Registry

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
(Small Claims)

BETWEEN:

JENNIFER CABELDU and DAVID CLYDE

CLAIMANTS

AND:

WESTSEA CONSTRUCTION LTD.

DEFENDANT

SCHEDULE "A" TO REPLY

Filed by: The Defendant, Westsea Construction Ltd. ("Westsea")

Part 1: RESPONSE TO NOTICE OF CLAIM FACTS

Division 1 – The Defendants' Version of Facts

1. The facts alleged in all paragraphs of the Notice of Claim are denied.

Division 2 – Additional Facts

2. This Action is in relation to a 22-story concrete apartment complex located at 647 Michigan Street, Victoria, British Columbia, known as Orchard House (the "Building"). There are 211 leased apartment units in the Building.
3. The Claimants own a leasehold interest in suite 1209 at the Building (the "Suite").
4. The relationship between the Defendant Westsea and the Claimants is governed by a 99-year lease agreement.

5. The lease agreement was entered into between the Westsea and Capital Construction Supplies Ltd. in 1974 (the "Lease"). The Lease expires in 2083.
6. The Lease is a private contract, and is not governed by any legislation. It is not a commercial lease within the meaning of the *Commercial Tenancy Act* nor the law of leasing generally.
7. After entering into the Lease, Capital Construction Supplies Ltd. sold assignments *pro tanto* of its leasehold interest in individual suites to third parties.
8. The leasehold interests in individual suites has been variously sold to new third parties in the intervening period.
9. At the time Claimants purchased their leasehold interest, being an assignment *pro tanto* of the Lease, she expressly agreed to abide by all the covenants of the lessee as contained in the Lease, and to "pay all monies payable with respect to the Suite pursuant to the Lease [...]".
10. The Claimants were represented by legal counsel in the purchase of her leasehold interest in the Suite.
11. The Lease and the assignments *pro tanto* thereof are commercial, arms' length contracts.
12. The Lease includes, *inter alia*, the following express terms:

ARTICLE 4 – LESSEE'S COVENANTS

[...]

4.03 To repair and maintain each of the Suites including all doors, windows, walls, floors, and ceilings thereof and all sinks, tubs and toilets and to keep the same in good condition and repair, reasonable wear and tear and such damage as insured against by the Lessor only excepted; to permit the Lessor, its agents or employees to enter and view the state of repair; to repair according to notice in writing except as aforesaid and leave each of the Suites in good repair except as aforesaid.

[...]

ARTICLE 5 – LESSOR'S COVENANTS

[...]

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[...]

[underlining added]

13. The Lease does not distinguish between capital and non-capital expenses.

Annual Operating Expenses

14. As described in the above Articles, Westsea has several obligations in respect to the Building, including an obligation to keep in good repair and condition the foundation, outer walls and the roofs pursuant to Article 5.03.
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19. Pursuant to Article 7.03 of the Lease, the actual Operating Expenses for each calendar year are certified by the Lessor's auditors in accordance with generally accepted accounting principles.
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The Windows and Doors Project

21. In 2013, Westsea engaged the professional engineering firm Read Jones Christoffersen Ltd. ("RJC") to prepare a report regarding the building envelope, roof, and membrane of the Building. RJC prepared that report, entitled "**Priority Assessment Report**" dated September 6, 2013.
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32. Westsea engaged RJC to issue a tender on its behalf for the required work.
33. Westsea received a number of bids; however, all the bids were above the budget set out in the tender documents. As a result, Westsea rejected all of the tender bids and instructed RJC to cancel the tender process and to enter into negotiations with the lowest bidder, Farmer Construction Ltd. ("**Farmer**"), to attempt to negotiate a reduction of the project costs.
34. As a result of those negotiations, which did result in a reduction of the project price, Westsea and Farmer entered into a contract for the scope of work prepared by RJC (the "**Contract**").
35. The work contemplated by the Contract is designed to bring the Building back to its original condition. The only changes to the original condition of the Building contemplated by the Contract are those required by current building codes.
36. The Contract price was \$5,551,460, inclusive of GST (the "**Project Price**").
37. Farmer commenced work on July 11, 2016, with an anticipated project schedule of 44 weeks.

38. Westsea wrote to all leaseholders, including the Claimants, on July 5, 2016, notifying each of them of their share of the Project Price and requiring payment by September 1, 2016. Westsea also offered a payment plan of 12 months to leaseholders who were unable to pay in a lump sum.
39. Westsea wrote to all leaseholders on July 21, 2016, and August 22, 2016, and October 21, 2016 providing further details regarding construction.
40. On August 9, 2016, Hugh Trenchard, a leaseholder in the Building, filed a Notice of Civil Claim in the British Columbia Supreme Court, Victoria Registry No. 163355, in which he named Westsea as the defendant (the "**Supreme Court Action**").
41. The allegations and claims made against Westsea in the Supreme Court Action include allegations and claims that are the same or substantially the same as those made in the Claimants' Notice of Claim.
42. On August 31, 2016, Westsea filed a Response to Civil Claim in the Supreme Court Action, denying all of Mr. Trenchard's allegations.
43. The trial of the Supreme Court Action is scheduled for June 3, 2019.

Part 2: RESPONSE TO RELIEF SOUGHT

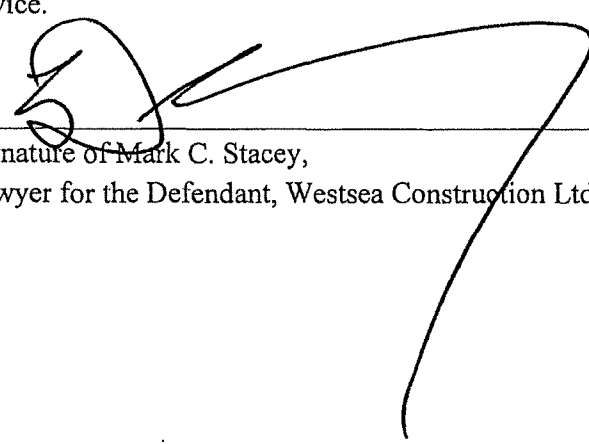
1. Westsea opposes the granting of the relief sought in the Claimants' Notice of Claim.

Part 3: LEGAL BASIS

1. Westsea specifically pleads that it has not breached the Lease as alleged or at all, and puts the Claimants to the strict proof thereof.
2. Westsea's obligations under Article 5.03 of the Lease include installing new windows and doors.

3. All costs and expenses associated with the replacement of windows and doors at Orchard House were incurred pursuant to the Lease and in the exercise of Westsea's reasonable and prudent discretion on the recommendation of its professional advisers.
4. The express terms of the Lease are clear and not ambiguous.
5. No implied terms can be read into the Lease.
6. The interpretive principle of *contra preferentum* is not applicable.
7. The Lease is not a contract of adhesion, and the Claimants entered into the Lease freely, voluntarily and with legal advice.

Dated: May 18, 2018



Signature of Mark C. Stacey,
Lawyer for the Defendant, Westsea Construction Ltd.

This is Exhibit D referred to in the Affidavit of
G. B. TOLING sworn before
 me at the City of Victoria, in the Province of British
 Columbia, this 26 day of MARCH, 2022

-57-

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Results: 1 - 30 of 113 [1](#) [2](#) [3](#) [4](#) [Next>](#)

Last Name, First Name Style of Cause	Classification of File	Court Location	File Number	Date File Opened	Date Last Updated	View
WESTSEA CONSTRUCTION LTD. BODNER, ALEXANDER v MCDONALD, MELVIN	Supreme Enforcement/Legislated Statute	Vancouver Law Courts	A934099	28Oct1993	11Sep1996	View
WESTSEA CONSTRUCTION LTD. CANADA MORTGAGE & HOUSING v WESTSEA CONSTRUCTION LTD.	Supreme Supreme Civil (General)	Vancouver Law Courts	C901019	28Feb1990	28Feb1990	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v GERLING GLOBAL INSURANCE CO	Supreme Supreme Civil (General)	Vancouver Law Courts	C932260	22Apr1993	22Apr1993	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v BUKI, IRENE	Supreme Supreme Civil (General)	Vancouver Law Courts	C934195	22Jul1993	03Sep1993	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v SAGRIS, STEVEN	Supreme Supreme Civil (General)	Vancouver Law Courts	C942272	21Apr1994	21Apr1994	View
WESTSEA CONSTRUCTION LTD. MATOUSEK, IVAN v WESTSEA CONSTRUCTION LTD.	Supreme Supreme Civil (General)	Vancouver Law Courts	C943812	07Jul1994	24Sep1996	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v HEROD, Robert	Supreme Enforcement/Legislated Statute	Victoria Law Courts	040663	12Feb2004	13Feb2004	View
WESTSEA CONSTRUCTION LTD. CAPITAL CONSTRUCTION SUPPLIES LTD.	Supreme Supreme Civil (General)	Vancouver Law Courts	064796	26Jul2006	13Jun2008	View
WESTSEA CONSTRUCTION LTD. SONA HOLDINGS INC. v CAPITAL CONSTRUCTION SUPPLIES LTD.	Supreme Supreme Civil (General)	Victoria Law Courts	064240	22Sep2006	12Jul2012	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v OAKLEY, Patrick	Supreme Supreme Civil (General)	Victoria Law Courts	081059	11Mar2008	23Apr2008	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v TROY, Beverlee- Mae	Provincial Small Claims	Robson Square Provincial Court	0821616	04Jul2008	04Jul2008	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v TROY, Beverlee- Mae	Supreme Enforcement/Legislated Statute	Vancouver Law Courts	080278	04Jul2008	04Jul2008	View

CONSTRUCTION LTD. v KWOK, Sandy	Supreme	Vancouver	110869	09Feb2011	15Mar2011	View
WESTSEA CONSTRUCTION LTD.	Supreme Civil (General)	Law Courts				
WESTSEA CONSTRUCTION LTD. v IP, Leung	Supreme	Vancouver	110867	08Feb2011	15Mar2011	View
WESTSEA CONSTRUCTION LTD.	Supreme Civil (General)	Law Courts				
WESTSEA CONSTRUCTION LTD. v POON, Edwin	Supreme	Vancouver	116261	20Sep2011	11Feb2020	View
WESTSEA CONSTRUCTION LTD.	Supreme Civil (General)	Law Courts				
WESTSEA CONSTRUCTION LTD. v 0759553 B.C. LTD.	Supreme	Vancouver	133689	17May2013	26Oct2018	View
WESTSEA CONSTRUCTION LTD.	Supreme Civil (General)	Law Courts				
CAPITAL CONSTRUCTION SUPPLIES LTD. v MONTESENA, Ada	Supreme	Vancouver	152277	13Jun2013	18Jul2014	View
WESTSEA CONSTRUCTION LTD.	Supreme Enforcement/Legislated Statute	New Westminster Law Courts				
WESTSEA CONSTRUCTION LTD. v DUNATOV, Joe	Supreme	Vancouver	140051	03Jan2014	09Jul2019	View
WESTSEA CONSTRUCTION LTD.	Supreme Civil (General)	Law Courts				
WESTSEA CONSTRUCTION LTD. v WONG, Steven	Supreme	Victoria Law	144264	18Nov2014	19Aug2015	View
WESTSEA CONSTRUCTION LTD.	Foreclosure	Courts				
ISLAND SAVINGS CREDIT UNION v WESTSEA CONSTRUCTION LTD.	Supreme	Vancouver	151930	06Mar2015	01Dec2015	View
WESTSEA CONSTRUCTION LTD.	Supreme Civil (General)	Law Courts				
HARBUZ, Viktoriya v CAPITAL CONSTRUCTION SUPPLIES LTD.	Supreme	Victoria Law	153518	14Sep2015	02Nov2015	View
WESTSEA CONSTRUCTION LTD.	Supreme Enforcement/Legislated Statute	Courts				
WESTSEA CONSTRUCTION LTD. v CARRIGAN, Mike	Supreme	Victoria Law	161399	08Apr2016	08Feb2021	View
WESTSEA CONSTRUCTION LTD.	Motor Vehicle Accidents	Courts				
BROWN, Stephanie v WESTSEA CONSTRUCTION LTD.	Supreme	Vancouver	163855	29Apr2016	17Oct2017	View
WESTSEA CONSTRUCTION LTD.	Supreme Civil (General)	Law Courts				
WESTSEA CONSTRUCTION LTD. v BYUN, Song	Supreme	Victoria Law	163355	09Aug2016	09Dec2019	View
WESTSEA CONSTRUCTION LTD.	Supreme Civil (General)	Courts				
TRENCHARD, Hugh v WESTSEA CONSTRUCTION LTD.	Supreme	Victoria Law	164475	25Oct2016	06Jul2021	View
WESTSEA CONSTRUCTION LTD.	Supreme Civil (General)	Courts				
WESTSEA CONSTRUCTION LTD. v KIVIMAA, Deborah	Supreme	Vancouver	170790	26Jan2017	16Mar2017	View
WESTSEA CONSTRUCTION LTD.	Supreme Civil (General)	Law Courts				
FALCIONI, Ronald v WESTSEA CONSTRUCTION LTD.	Supreme	Vancouver	175411	07Jun2017	27Jul2018	View
WESTSEA CONSTRUCTION LTD.	Supreme Civil (General)	Law Courts				
WESTSEA CONSTRUCTION LTD. v NELSON, Anthony	Provincial	Victoria Law	180132	25Mar2018	18Jun2018	View
WESTSEA CONSTRUCTION LTD.	Small Claims	Courts				
ROTERING, Gerald v WESTSEA CONSTRUCTION LTD.	Provincial	Victoria Law	180175	19Apr2018	07Jun2018	View
WESTSEA						

CONSTRUCTION LTD. ROURKE, Peter v WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. CABELDU, Jennifer v WESTSEA CONSTRUCTION LTD.	Small Claims Provincial Small Claims	Courts Victoria Law 180204 Courts	 04May2018 04Jul2018	View
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Item is identified as duplicate of item 180204.

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Results: 61 - 90 of 113 <Previous 1 2 3 4 Next>

Last Name, First Name Style of Cause	Classification of File	Court Location	File Number	Date File Opened	Date Last Updated	View
WESTSEA CONSTRUCTION LTD. GODDARD, Martine v WESTSEA CONSTRUCTION LTD.	Provincial Small Claims	Victoria Law Courts	180205	04May2018	06Jul2018	View
WESTSEA CONSTRUCTION LTD. KINGSFIELD, Bryan v WESTSEA CONSTRUCTION LTD.	Provincial Small Claims	Victoria Law Courts	180212	15May2018	04Jul2018	View
WESTSEA CONSTRUCTION LTD. WOOD, Edith (Eydie) v WESTSEA CONSTRUCTION LTD.	Provincial Small Claims	Victoria Law Courts	180214	16May2018	24Jul2018	View
WESTSEA CONSTRUCTION LTD. BENNETT, Linda v WESTSEA CONSTRUCTION LTD.	Provincial Small Claims	Victoria Law Courts	180213	16May2018	12Jul2018	View
WESTSEA CONSTRUCTION LTD. PICKEN, Diane v WESTSEA CONSTRUCTION LTD.	Provincial Small Claims	Victoria Law Courts	180249	12Jun2018	04Oct2019	View
WESTSEA CONSTRUCTION LTD. RYCROFT, Donald v WESTSEA CONSTRUCTION LTD.	Provincial Small Claims	Victoria Law Courts	180288	28Jun2018	21Aug2018	View
WESTSEA CONSTRUCTION LTD. RYCROFT, Donald v WESTSEA CONSTRUCTION LTD.	Provincial Small Claims	Victoria Law Courts	180289	28Jun2018	21Aug2018	View
WESTSEA CONSTRUCTION LTD. MILLOTT, Sandra v WESTSEA CONSTRUCTION LTD.	Provincial Small Claims	Victoria Law Courts	180292	29Jun2018	24Sep2018	View
WESTSEA CONSTRUCTION LTD. BILLEDEAU, Sharon v WESTSEA CONSTRUCTION LTD.	Provincial Small Claims	Victoria Law Courts	180294	03Jul2018	26Aug2020	View
WESTSEA CONSTRUCTION LTD. HAYS, Jacalyn v WESTSEA CONSTRUCTION LTD.	Provincial Small Claims	Victoria Law Courts	180299	04Jul2018	27Aug2018	View
WESTSEA CONSTRUCTION LTD. HISCOCKS, Susan v WESTSEA CONSTRUCTION LTD.	Provincial Small Claims	Victoria Law Courts	180296	04Jul2018	13Aug2018	View
WESTSEA CONSTRUCTION LTD. WRIGHT, Richelle WESTSEA	Provincial Small Claims Supreme	Victoria Law Courts Victoria	180300 184015	05Jul2018 12Sep2018	13Nov2019 11Mar2022	View

CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v TAYLOR, Andrew	Supreme Civil (General)	Law Courts				View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v BUXTON, Victor	Supreme Enforcement/Legislated Statute	Victoria Law Courts	184579	24Oct2018	07Jan2019	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v DHILLON, Narinder	Supreme Supreme Civil (General)	Vancouver Law Courts	1813186	07Dec2018	06Aug2019	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v KAMBLE, Rajkumar	Supreme Foreclosure	Victoria Law Courts	190923	04Mar2019	31Dec2019	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v HO, Simpson	Supreme Supreme Civil (General)	Vancouver Law Courts	194878	24Apr2019	29Jun2020	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v YANG, Ai-Tsung	Supreme Supreme Civil (General)	Vancouver Law Courts	194877	24Apr2019	24Apr2019	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v PEACEY, Jaana	Supreme Supreme Civil (General)	Vancouver Law Courts	198425	26Jul2019	07Jun2021	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v GILL, Harjeet	Supreme Enforcement/Legislated Statute	Vancouver Law Courts	190341	21Aug2019	21Aug2019	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v ASTLE, Steven	Supreme Supreme Civil (General)	Vancouver Law Courts	199361	22Aug2019	12Mar2021	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v FREIBERG, Hugh	Supreme Supreme Civil (General)	Vancouver Law Courts	199363	23Aug2019	28Jan2020	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v DUONG, Kim	Supreme Supreme Civil (General)	Vancouver Law Courts	199362	22Aug2019	03Mar2022	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v ZHAO, Kai	Supreme Enforcement/Legislated Statute	Vancouver Law Courts	190357	03Sep2019	03Sep2019	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v EBRAHIM, Aziz	Supreme Supreme Civil (General)	Vancouver Law Courts	204615	22Apr2020	10Feb2021	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v WALKER, Sally v	Supreme Supreme Civil (General)	Vancouver Law Courts	204616	22Apr2020	16Nov2021	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v RYAN GARDENS	Supreme Supreme Civil (General)	Vancouver Law Courts	204619	22Apr2020	01Mar2021	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v RYAN GARDENS	Supreme Supreme Civil (General)	Vancouver Law Courts	205987	08Jun2020	13Nov2020	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v RYAN GARDENS	Provincial Small Claims	Victoria Law Courts	200180	06Aug2020	26Oct2020	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v RYAN GARDENS	Supreme Supreme Civil (General)	Vancouver Law Courts	2011434	26Oct2020	24Dec2020	View

WESTSEA CONSTRUCTION LTD. v MANTIKA, Taylor	Statute	Courts				
WESTSEA CONSTRUCTION LTD. MUSE, Beverley v WESTSEA CONSTRUCTION LTD.	Supreme Supreme Civil (General)	Victoria Law Courts	211659	20May2021	02Feb2022	View
WESTSEA CONSTRUCTION LTD. LEE, Kwok Hei v WESTSEA CONSTRUCTION LTD.	Provincial Small Claims	Richmond Provincial Court	29722	29Sep2021	15Feb2022	View
WESTSEA CONSTRUCTION LTD. HUSTON, Scott v WESTSEA CONSTRUCTION LTD.	Provincial Small Claims	North Vancouver Provincial Court	2127469	07Oct2021	07Jan2022	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD.	Supreme Enforcement/Legislated Statute	Vancouver Law Courts	210369	03Nov2021	03Nov2021	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v MOHENS, Seyed	Supreme Enforcement/Legislated Statute	Vancouver Law Courts	210396	25Nov2021	25Nov2021	View
WESTSEA CONSTRUCTION LTD.	Supreme Enforcement/Legislated Statute	Vancouver Law Courts	210405	02Dec2021	02Dec2021	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v EISENHUT-HAJOS, Hilda	Supreme Supreme Civil (General)	Victoria Law Courts	220096	12Jan2022	12Jan2022	View
WESTSEA CONSTRUCTION LTD. WESTSEA CONSTRUCTION LTD. v CHOWDHURY, Sauradeep	Supreme Enforcement/Legislated Statute	Victoria Law Courts	220576	16Feb2022	16Feb2022	View
WESTSEA CONSTRUCTION LTD.	Supreme Enforcement/Legislated Statute	Vancouver Law Courts	220048	08Feb2022	08Feb2022	View
WESTSEA CONSTRUCTION LTD.	Supreme Enforcement/Legislated Statute	Vancouver Law Courts	220049	08Feb2022	08Feb2022	View

