

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Trenchard v. Westsea Construction Ltd.*,
2016 BCSC 1752

Date: 20160923
Docket: 14-2941
Registry: Victoria

Between:

Hugh Alexander Trenchard

Petitioner

And:

Westsea Construction Ltd.

Respondent

Before: The Honourable Mr. Justice B.D. MacKenzie

Reasons for Judgment

Petitioner Appearing In Person:

H.A. Trenchard

Counsel for the Respondent:

M.C. Stacey and
C.S.S. Immega

Place and Date of Hearing:

Victoria, B.C.
January 4-7, 2016

Place and Date of Judgment:

Victoria, B.C.
September 23, 2016

I. INTRODUCTION

[1] This matter was before the court pursuant to a petition filed by Hugh Trenchard. Mr. Trenchard owns a leasehold interest in Unit #805 of the 211-unit apartment building known as Orchard House, located at 647 Michigan Street in Victoria, B.C. (the "Property"). The lease agreement between Mr. Trenchard and the respondent Westsea Construction Ltd. ("Westsea") is the subject matter of the dispute in this proceeding.

[2] Under the lease agreement, Westsea is responsible for certain covenants relating to the maintenance and management of many of the services and facilities at the Property. In turn, Westsea may charge the amounts it pays to perform these covenants to the leaseholders of the Property as "Operating Expenses." However, Westsea must exercise "prudent and reasonable discretion" in incurring Operating Expenses, and must submit annually an accounting of Operating Expenses for an auditor's certification.

[3] The petition concerned Mr. Trenchard's request that Westsea disclose documents and information to the leaseholders of the Property relating to Westsea's operating expenditures. In particular, Mr. Trenchard sought disclosure of information pertaining to a proposed project to replace the windows and doors at the Property and to the operating expenditures for "Repairs and maintenance," which had doubled from the previous year.

[4] Among other relief, the petitioner asked the court to read into the lease agreement an "implied term of transparency" to require Westsea to share such information. The petitioner did not allege that Westsea had acted in bad faith by incurring Operating Expenses. Rather, he simply alleged Westsea had breached the implied term by refusing to share the requested information. Westsea disputed the petition and opposed the granting of any of the relief sought by the petitioner.

[5] However, on the fourth day of the hearing, Mr. Trenchard and Westsea reached an agreement regarding the disclosure which Mr. Trenchard had requested.

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Under the settlement agreement Mr. Trenchard basically received what he had sought and the court dismissed the petition by consent, apart from the question of costs. The parties then made submissions with respect to costs. Westsea advised the court at the time that it was not seeking costs under Rule 14-1 against Mr. Trenchard. Rather, Westsea elected to rely on the terms of the lease agreement if it sought costs.

[6] In this regard, Westsea submits that it had incurred legal costs in responding to Mr. Trenchard's petition and that these constitute "Operating Expenses" that Westsea may rightfully charge back to the leaseholders under the lease agreement. Mr. Trenchard disputes this and argues that Westsea's legal costs are not related to the covenants as provided under the lease agreement and thus Westsea cannot charge them to the leaseholders as Operating Expenses.

II. LEASE AGREEMENT

[7] There are several provisions of the lease agreement relevant to the issue of legal costs in this matter.

[8] First, Article 5 outlines Westsea's covenants as the lessor of the Property:

The Lessor covenants with the Lessees:

- 5.01 For quiet enjoyment.
- 5.02 To provide heat to all common areas of the Building and to each of the Suites ...
- 5.03 To keep in good repair and condition the foundations, outer walls, roofs, spouts and gutters of the Building, all of the common areas therein and the plumbing, sewage and electrical systems therein.
- 5.04 To keep the entrance halls, staircases, corridors and other like areas in the Building clean and properly lighted and heated and the elevators properly lighted and in good working order.
- 5.05 The Lessor shall provide or engage the services of such staff as may be requisite for the proper care and servicing of the Building.
- 5.06 To pay taxes.
- 5.07 To provide passenger elevator service except during the making of repairs.

- 5.08 To keep the Building insured against loss or damage by fire, lightning or tempest ...
- 5.09 To maintain a policy or policies of general public liability insurance against claims for bodily injury, death or property damage arising out of the use and occupancy of the Building ...
- 5.10 To the extent that the service is available to provide cablevision and front door intercommunications service to the Suites in the Building.
- 5.11 To observe and perform all the terms, covenants, provisions and agreements contained in any prior charge and without restricting the generality of the foregoing, to make all payments of money required to be made thereunder on their due dates ...

[9] Next, Article 7 pertains to the Operating Expenses under the lease agreement:

- 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 ... 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. [Emphasis added].

III. POSITION OF THE PARTIES

[10] Westsea submits that it is entitled to costs, subject to the court's discretion, since the court dismissed the petition. As noted, Westsea does not rely on Rule 14-1 but rather seeks to recover its legal expenses pursuant to the terms of the lease agreement. Westsea submits that the total legal costs incurred in responding to the petition constitute "Operating Expenses" and points out that Article 7 provides "legal charges" as one example of the types of expenses properly charged to the leaseholders.

[11] Westsea accepts that when a party is entitled to costs under both the Rules and pursuant to the terms of a contract, it must elect one or the other, relying on *B.U.K. Investments Ltd. v. Pappas*, 2002 BCSC 161:

[29] In *P & T Shopping Centre Holdings*, the landlord claimed judgment for a specific amount owing pursuant to a lease as well as for “costs pursuant to the terms of the lease”. An alternative claim was advanced for costs pursuant to the Rules of Court. Similar claims are made in this action. The lease entitled the landlord to claim costs as additional rent. The lease described the costs as “the complete legal costs incurred by the landlord as a result of any default by the tenant.”

...

[31] Southin J.A. distinguished the contractual claim from an order for costs and pointed out that the landlord’s remedy was to make demand for payment and then sue for additional rent in the event of non-payment. Alternatively, she held that the landlord would be entitled to party and party costs if it abandoned its rights under the covenant.

[32] The plaintiff in this case is, in my view, in the same position as the plaintiff in *P & T Shopping Centre Holdings*. I am prepared to grant an order of costs on scale 3. Alternatively, if the plaintiff wishes to pursue its contractual remedy, it should make demand on the tenant and indemnitor for the amounts claimed and if not paid bring action. If the plaintiff elects to follow its contractual remedy, it is not entitled, as per the reasoning of Southin J.A. to costs in this proceeding.

[12] I pause here to note that because there is no evidence of a specific demand for payment of costs and a corresponding refusal by the unit holders to do so, one might conclude that Westsea’s application is premature. However, both parties have made submissions on this issue and seek an answer at this point in time.

[13] In fact, Westsea made it clear in submissions that it intends to recover the full amount paid as legal fees in this proceeding and would not limit itself to party and party costs as generally provided for under the Rules. Westsea also agrees that it cannot seek indemnification under the lease agreement personally against Mr. Trenchard, as he has not defaulted on any of his obligations under the lease.

[14] In reply, Mr. Trenchard says that Westsea may not recover the legal costs of this proceeding on the basis they are Operating Expenses under the lease agreement. He says the “legal charges” referred to in Article 7 are limited to those paid in Westsea’s performance of its covenants under Article 5 and that provision

does not contemplate legal charges stemming from litigation against Westsea. He also submits that this proceeding is not to enforce the lease agreement but rather to interpret it. He contends this distinguishes the circumstances in the present case from those in the authorities provided by Westsea, including *B.U.K. Investments*.

[15] In response, Westsea submits that the legal charges contemplated in Article 7 are free-standing and are not limited to those incurred to perform the covenants. Westsea notes that Article 7 provides for costs incurred to perform the covenants “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” (emphasis added), and then lists several types of specific expenses. Westsea says the list of expenses following the “and” in that provision are additional to those related to the covenants under the lease. Simply put, Westsea submits that any costs it incurs in connection with the Property are “Operating Expenses.”

[16] In support of its position, Westsea relies on *Steers v. Sheridan Investments Ltd.* (27 August 2012), Vancouver 08-21644 (B.C.P.C.), an action to recover from certain lessees the costs the lessor incurred to replace windows. The provision regarding Operating Expenses in that lease was, for all intents and purposes, the same as the one in these circumstances (at para. 9). In *Steers*, Romilly J. found at para. 21 that the lessor incurred the expenses “in connection with the maintenance, operation and repair of the Building” and therefore properly claimed them as Operating Expenses. Westsea submits that in making this finding, the court in *Steers* determined that each type of expense contemplated in Article 7, including legal charges, must be read on their own as an independent and properly chargeable Operating Expense.

IV. ANALYSIS

[17] As noted above, Westsea says it intends to pursue recovery of legal costs under the terms of the lease agreement and to forgo a costs award under the Rules. However, I find that the lease agreement does not authorize Westsea to seek recovery of the legal costs it incurred in these proceedings from the leaseholders as

“Operating Expenses.” In my view, Westsea did not incur such legal costs in the performance of the covenants of the lease agreement and they are not payable by Westsea “in connection with the building.”

[18] As Westsea submits, a contract must be interpreted objectively by construing the plain and ordinary meaning of the words of the contract and the surrounding circumstances at the time the contract was entered. My obligation is to “read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract”: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47; see also *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107 at para. 42.

[19] Accordingly, I must construe Articles 5 and 7 together in considering whether the lease agreement allows Westsea to collect its legal expenses from the leaseholders as Operating Expenses. Article 5 makes it clear that the lessor’s covenants are directed at the repairs and maintenance of the Property. They include the provision of services such as heat and cablevision, and the maintenance of the Property in good repair and condition. None of these covenants relate in any way to the issues that were raised in this petition.

[20] In interpreting Article 7, I do not agree with Westsea’s interpretation of the decision in *Steers* to mean that any legal costs incurred by Westsea that have any connection with the Property may be charged as Operating Expenses. I also find that *Steers* is distinguishable from the present circumstances since the costs in that case were incurred in replacing windows. Here Westsea has incurred legal costs to interpret the terms of its lease agreement with the leaseholders at the Property. In *Steers*, as Romilly J. found at para. 23, the costs incurred were as a result of certain leaseholders who obstructed the lessor in “performing its covenant under the lease ‘to repair and maintain’ the building” (emphasis added). I do not find that Romilly J. intended, when he referred to a single item in the list of Operating Expenses, to read each one as a stand-alone item. Rather, all are subject to the requirement that

Operating Expenses are limited to costs incurred in the performance of the lessor's covenants, as outlined in Article 5.

[21] In fact, as Mr. Trenchard submits, if I were to accept Westsea's submission, Westsea could seek reimbursement from the leaseholders, including Mr. Trenchard, for its legal costs even if Mr. Trenchard had succeeded with his petition. This is not that different a scenario than what in essence occurred here. Westsea agreed to provide Mr. Trenchard with what he was seeking and in exchange the petition was dismissed by consent. As a result, I agree with Mr. Trenchard that it is contrary to common sense to conclude that Westsea would be entitled to costs against him and the other leaseholders in the present case.

[22] In these unique circumstances, I do not find that the legal costs incurred by Westsea as a result of this petition fall within the meaning of "legal charges" contemplated under Article 7.

[23] Even if I am wrong in this conclusion, I note again that under Article 7 Westsea also "agrees to exercise prudent and reasonable discretion in incurring Operating Expenses, consistent with its duties hereunder." If I were to accept that the legal fees which Westsea incurred in relation to this petition were "Operating Expenses," I would find that Westsea breached its duty of "prudent and reasonable discretion" in incurring them. In my view, Mr. Trenchard made a legitimate request to Westsea to disclose information regarding Westsea's operating expenditures in relation to the Property. It would have been relatively simple and inexpensive for Westsea to comply with this request. Instead, Westsea chose to resist Mr. Trenchard's request for disclosure and agreed to an order to provide the requested documentation only after retaining counsel and four days of court hearings.

[24] At the same time, while Mr. Trenchard had initially sought an order for costs, his petition was dismissed by consent once the parties reached a settlement. As a result, it cannot be said he was substantially successful. In fact, in my view both parties enjoyed partial success. Mr. Trenchard will therefore bear his own costs.

[25] Finally, for the same reason, even if Westsea had asked me to make an order for costs under the Rules, I would order that it should also bear its own costs.

"B.D. MacKenzie, J."

The Honourable Mr. Justice B.D. MacKenzie

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