Court of Appeal File No. 46417

COURT OF APPEAL

ON APPEAL FROM: The order of Madam Justice Douglas in the Supreme Court of British Columbia, pronounced October 1, 2019

BETWEEN:

HUGH TRENCHARD

Appellant (Plaintiff)

AND:

WESTSEA CONSTRUCTION LTD.

Respondent (Defendant)

APPELLANT'S AMENDED FACTUM

Hugh Trenchard, Appellant

APPEARING ON HIS OWN BEHALF

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I

CHRONOLOGY OF DATES RELEVANT TO THE APPEAL

Date	Event
1969	The respondent, Westsea Construction Ltd. ("Westsea"), builds an apartment building in Victoria, British Columbia, called Orchard House.
May 1, 1974	Westsea, lessor, and Capital Construction Supplies Ltd., lessee ("Capital") execute a lease (the "Lease") for Orchard House. The Lease term is 99 years, ending in 2073.
1974 to 1977	Capital assigns leasehold interests in respect of individual apartment units to other persons ("Lessees" or "Leaseholders").
August 4, 1976	Capital (assignor) assigns the Lease of suite 805 to Inez Dauphinee (assignee) for pre-paid rent of $40,500.
2010-early 2011	Westsea completes Phase 1 remediation of Orchard House which includes replacing all east/west facing windows and windows at building corners, as well as exterior wall and other repairs. The costs associated with Phase 1 are charged back to Leaseholders.
January 2011	By re-assignment, Mr. Trenchard purchases a leasehold interest in suite 805 for the remainder of the term, for $220,000.
July 5, 2016	Westsea notifies leaseholders of their alleged respective payments for a second phase of the remediation project and demands payment by September 1, 2016.
July 11, 2016	Westsea commences the second phase of the project to replace all remaining windows, sliding doors, bathroom fans, and for exterior wall and related repairs at Orchard House ("Phase 2").
August 9, 2016	Mr. Trenchard files a Notice of Civil Claim (amended subsequently).
August 27, 2016	Under protest, Mr. Trenchard pays $37,155.92 as demanded by Westsea for his purported proportionate share of Phase 2.

II

August 31, 2016	Westsea files its Response to Civil Claim (amended subsequently).
May 24, 2017	Westsea substantially completes Phase 2.
June 3-14, 2019	Trial before Madam Justice Douglas.
October 1, 2019	The trial judge issues her reasons for judgment finding that Westsea was obliged under the Lease to undertake the Phase 2 project, and that Westsea was entitled to charge to the appellant his proportionate share of the project as Operating Expenses.

III

OPENING STATEMENT

This appeal arises from a multi-million-dollar capital construction project carried out in 2016-2017 primarily to replace windows and sliding glass doors, as well as bathroom fans, in a high-rise apartment building in Victoria BC called Orchard House.

A 99-year residential lease for Orchard House governs the relationship between the Respondent lessor ("Westsea") and third-party lease assignees (the "Lease"), one of which is the appellant. Assignees' ("Lessees" or "Leaseholders") covenants include the maintenance and repair of suite interiors, which expressly includes windows and doors, reasonable wear and tear excepted. Westsea expressly covenants to maintain and repair the building, foundation, and outer walls. Westsea may charge the costs of its covenants to Lessees as Operating Expenses. The main issue at trial was who pays to replace old and worn windows, doors and fans: Westsea or the Leaseholders.

Contrary to law on when terms can be implied in contracts, the trial judge (the "judge") found that, as part of its covenant to maintain the outer walls and the building, an implied term exists by which Westsea is obliged to replace old and worn windows, doors, and fans. This allows Westsea to recover replacement costs from Lessees as an Operating Expense.

The judge found the windows, doors, and fans, were replaced due to wear and tear, but she failed to recognize that the wear-and-tear exception exonerates Lessees from the cost liability to replace these old and obsolete items. The wear-and-tear exception is a longstanding historical benefit to Lessees under the Lease designed to exempt them from liability to replace old and worn items that are part of the landlord's property. Under the Lease, windows and doors are specifically identified as subject to the wear-and-tear exception (bathroom fans are part of suite interiors, embedded in the ceilings, and therefore also exempt). Since windows and doors are specific terms in the Lease, Westsea's general covenants over the "outer walls" and "buildings" do not extend to them.

Further, the judge erroneously interpreted Operating Expenses to include capital costs. In doing so, she misapplied existing caselaw and failed to consider various clauses in the Lease which show that Operating Expenses are common, repetitive and highly predictable expenses. Operating Expenses are not intended to include major replacement costs or capital outlays to replace old and obsolete items.

PART 1 — STATEMENT OF FACTS

The Lease

1. In 2011, the appellant acquired by re-assignment a lease interest in Suite 805 in Orchard House, a 22-storey high-rise in Victoria. Orchard House has 211 suites and was built in about 1969[1]. The appellant has been resident since 2013[2].

2. Parties to the head lease made May 1, 1974 under the *Short Form of Leases Act*, 1960. c. 357[3], were Westsea and Capital Construction Supplies Ltd. ("Capital") (the "Lease")[4].

3. Westsea sold Lease assignments for Orchard House suites in the 1970's as pre-paid rent for the 99-year term, and this was profitable for Westsea[5]. The original Suite 805 assignment on August 4, 1976 was for $40,500[6].

4. Article 4.03 of the Lease outlines the following Lessee's covenants:

> To repair and maintain each of the Suites including all 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; 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 to leave each of the Suites in good repair except as aforesaid. [underline added]

5. The *Short Form of Leases Act* extends the meaning of "to leave each of the Suites in good repair" to include leaving the demised premises "at the expiration or other sooner determination of the said term…in good and substantial repair and condition in all respects, reasonable wear and tear and damage by fire only excepted." [underline added]

6. Article 5.03 states the following lessor's covenants:

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[1] Appeal Record ("**AR**") p 061 para 1; Amended Appeal Book ("**AB**") p 039 para 1.5

[2] Transcript Extract Book ("**TEB**") p 019 line 13

[3] Appendix A

[4] AB p 001 – 005.6 (copy of lease as Schedule 2 to lease assignment); p 006 – 018.11 (LTO registered lease)

[5] TEB p 010 line 7-11; AR p 100 para 161

[6] AB p. 29

> 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. [underline added]

7. Article 7.01 defines 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] [Hereafter "Operating Expenses"]

8. George Mulek, large majority shareholder for both Westsea and Capital[8], signed the Lease on behalf of both parties[9]. George Mulek died years ago and current Westsea president, Julie Trache, knew nothing of circumstances involving the creation of the Lease.[10]

9. Westsea argued that "what happened in 1974 has absolutely no bearing on this case"[11]. At trial, no extrinsic evidence was adduced of the intentions of the original parties to the Lease.

10. Westsea pled, "No implied terms can be read into the Lease".[12]

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[7] AB p 2 (lease copy Schedule 2); AB p 008 (registered lease) (Art. 4.03), p 010 (Art. 5.03), p 012 (Art. 7.01)

[8] TEB p 26 line 27 – 30, line 42 – 45, p 027 line 17 – 39, p 028 line 11 – 22; AB p 33-37 (Securities Registers)

[9] Ibid note 7, p 018; TEB p 024 line 23 – 40

[10] TEB p 024 line 41 – 44, p 027 line 7 – 13, p 028 line 29-37

[11] TEB p 010 line 20-21

[12] Appeal Record ("**AR**") p 053 (para 7.1)

11. The appellant sought no legal advice about terms of the Lease; and after inquiring with his realtor about negotiating part of the Lease, understood he could not do so[13].

Westsea's Phase 2 windows, sliding doors, and fans replacement project

12. In 2010-2011 Westsea finished Phase 1 of a windows replacement project. In July 2016 Westsea began Phase 2, which involved replacing all remaining windows, all sliding glass doors, bathroom fans; and related wall repairs[14] ("Phase 2").

The character of the windows and sliding doors

13. The Orchard House floor plan legend defines suite interiors to include balconies. Sliding glass doors and some windows face onto the balconies; some windows do not[15], but those are inset in the walls by two to 2.5 inches[16]. Fans are embedded in bathroom ceilings[17].

14. The appellant's old windows and all the windows at Orchard House were "fixed" and "slider" windows[18]. Fixed windows cannot be opened, while slider windows can be opened; the new windows are both fixed and casement (openable by swinging out).[19]

15. The judge made no finding that the windows comprise the entire face of the building, and there is no suggestion of this in the evidence.

16. The judge relied on evidence from Westsea's engineer Sameer Hasham ("Mr. Hasham") that the windows and building are "structurally integrated"[20] when she concluded that worn windows may undermine the "structural integrity of the Building foundation and walls" and that to replace old windows was "necessary to ensure the structural integrity of the Building envelope and, by extension, the Building structure."[21]

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[13] TEB p 018 line 1 – 13, p 020 line 15 – 35

[14] AR p 062 – 065, para 9 – 21 (Factual Background)

[15] AB p 019

[16] TEB p 050 line 35-47 to 050.1 line 1-8

[17] AR p 067, para 38

[18] AB p 022 (805 Inspection Report)

[19] AB p 026 – 027 (805 Inspection Report); AB p 039-040 (RJC Enclosure Report)

[20] AR p 068, para 43; TEB p 044 line 20 – 23

[21] AR p 072 para 55

17. Yet in cross-examination Mr. Hasham explained that the windows and walls are integrated by a deflection track, which he agreed allows the glass door to float in its space, and he stated that windows are not structural components of the building[22].

18. Similarly, Phase 2 site superintendent, Perry Caris, testified that windows are installed with a deflection header that allows the windows to shift inside the wall space "so it's not a hard connection from top to bottom."[23]

19. Evidence on the record shows that for Orchard House:

- The window/door glazing allows light through; the walls do not admit light[24]
- Some of the windows are fixed and not openable, and some of the windows are openable as sliders and casements; the walls are not openable[25]
- The sliding doors are, by definition, openable; the walls are not[26]
- The sliding doors allow access and egress to the balcony[27]; the walls do not
- Windows (frames and glazing) are inserted *into* the wall space and defined that way[28]
- The windows do not comprise the entire face of the building[29]
- The windows are non-load bearing and non-structural[30]
- Windows "provide light and ventilation for homes, at the expense of some heat loss (windows let more heat escape than even an uninsulated wall)"[31]

20. The Lease does not refer to the "building envelope". There is no express covenant for Westsea to maintain and repair the building envelope. Nor is there an express covenant for Westsea to replace old and worn windows, sliding doors or fans.

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[22] TEB p 052 line 14 – 47; p 053 line 1 - 31

[23] TEB p 043 line 12 – 21

[24] AB p 020

[25] AB p 022, p 26 – 27 (805 Inspection report); AB p 039 – 040 (RJC Enclosure Report)

[26] AB p 022, p 26 – 27 (805 Inspection report); AB 040 (RJC Enclosure Report)

[27] AB p 039 (RJC Enclosure Report)

[28] AB p 040

[29] AB p 020; AB p 047 - 048

[30] TEB p 052 line 43 to p 053 line 24

[31] AB p 025 (805 Inspection Report)

21. Westsea's expert architect, Pierre Gallant, said the Orchard House building envelope includes: 1) Wall assemblies; 2) Windows & Balconies and Doors; 3) Roofs; 4) Balconies[32].

Phase 2 involved minimal wall repair

22. Orchard House is over 200 feet high, about 100 feet wide on north/south faces, and less on the east/west faces[33]. Slab edge delamination repairs comprised a total of 50 *linear* feet[34]. Brick repointing comprised less than 1.6% of the Phase 2 cost[35].

Windows, doors, and fans were replaced due to wear and tear

23. The judge found the windows, doors and fans were replaced due to wear and tear[36].

Evidence that Phase 2 was a capital cost

24. The Phase 2 cost was $5,551,460[37]. The vast majority of this was to replace the old and obsolete windows and doors; $25,110 was attributable to 50 linear feet of wall delamination repairs, and something less than 1.6% for brick repointing[38]. The Appellant's payable Phase 2 proportion was $37,155.92; he acquired his Lease interest in 2011 for $220,000[39].

25. When evaluating and making its proposal for Phase 2 work, Westsea's engineering consulting firm, Read Jones Christoffersen ("RJC") stated:

> "…Westsea is currently developing a maintenance schedule and budget for capital expenditures for the building…"[40]

and:

> "We understand the client wishes to determine the current general condition of the building enclosure of the building to assist in their efforts for related long-term capital expenditures"[41].

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[32] AB p 057 (Pierre Gallant Report)

[33] TEB p 051 line 7-16

[34] TEB p 51 line 24 – 30; AB p 053 (final costs)

[35] AB p 053, 055 (final costs)

[36] AR p 075 para 63; p 084 para 98; p 087 para 109(a)

[37] AR p 064 para 18

[38] TEB p 051 line 23-38, line 33 – 36; AB p 46 (bid quote), p 53 (final costs), p 055

[39] AR p 062 para 9

[40] AB p 37.1 (first para); AR p 96, para 143

[41] AB p 37.4 (second para); AR p 96, para 143

PART 2 - ERRORS IN JUDGMENT

A. The judge failed to consider and find that the Lease is a standard-form contract.

B. The judge erred in law by finding the Lease contains an implied covenant for Westsea to replace old and worn windows, doors and fans; thus, by re-writing the Lease through the application of incorrect legal tests and principles.

C. The judge erred in law by failing to consider and find that the wear-and-tear exception specifically exonerates Lessees from liability for costs to replace old and worn windows, doors and fans; and she failed to recognize that by conferring Westsea with a covenant to replace those items creates a conflict in liabilities because Westsea can then charge those costs back to the Lessees as Operating Expenses; and she failed to resolve this conflict by reference to the principles in *BG Checo v. BC Hydro Power Authority* [1993] 1 SCR 12.

D. The judge erred by misinterpreting the meaning of Operating Expenses and by finding they are broad enough to include capital costs, and by implying the Phase 2 costs were *not* capital costs.

PART 3 - ARGUMENT

Standard of review

27. Correctness is the appropriate standard because, a) the Lease is a standard-form contract: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., 2016 SCC 37; b) there are extricable errors of law: *Sattva Capital Corp. v. Creston Moly Corp*., [2014] 2 SCR 633, para 53.

28. In *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37, the Supreme Court of Canada said, at para 43:

> "[T]he interpretation of a standard form contract could very well be of "interest to judges and lawyers in the future". In other words, the interpretation itself has precedential value. The interpretation of a standard form contract can therefore fit under the definition of a "pure question of law", i.e., "questions about what the correct legal test is": *Sattva*, at para. 49; *Southam*, at para. 35. Establishing the proper interpretation of a standard form contract amounts to establishing the "correct legal test", as the interpretation may be applied in future cases involving identical or similarly worded provisions."

A. The judge failed to consider and find that the Lease is a standard-form contract

29. In error, the judge declined to consider if the Lease is a standard-form contract and excluded other 99-year leases made on boiler-plate forms identical to the Lease[42]. The appellant now seeks to introduce these leases as fresh evidence to support the assertion the Lease is standard-form. There is also evidence the appellant did not negotiate the Lease and that it was a take-it-or leave it contract.[43] Further, the Lease was made under the *Short Form of Leases Act*, R.S.B.C. 1960, c. 357, indicating it contains standard terms. As noted, such a finding affects the standard of review on appeal; and, as to be argued more fully, it affects whether *contra proferentem* may be applied in resolving ambiguities in the Lease.

B. The judge erred in finding Westsea has an implied covenant to replace old and obsolete windows, doors, and fans

30. In the Lease there is no express covenant obliging Westsea to replace old and worn windows, doors, and fans. However, the judge found that the Lease contains an implied covenant for Westsea to replace these items. She held that:

> "In my view, it would be illogical to conclude the parties intended outer wall repairs occasioned by reasonable wear and tear would not also include repairs to failing windows and sliding doors necessary to ensure the structural integrity of the Building envelope and, by extension, the Building structure… To conclude otherwise would result in an absurdity, which would be inconsistent with the notion of commercial efficacy and what the parties could reasonably have contemplated when they entered the lease…"[44] [underline added]

31. Similarly, the judge found in effect that it was reasonable and convenient for Westsea to replace old and obsolete windows, doors and fans. She found: 1) Westsea was the only party with control over all the building windows, sliding doors, and fans; 2) Westsea could most efficiently and practically obtain Phase 2 permits and perform the work cost-effectively; 3) Westsea was best positioned to coordinate Phase 2 with contractors to ensure safety and functionality; it was too inefficient for lessees to undertake such work individually[45].

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[42] TEB p 15 line 21-28

[43] c.f. appellant's application for fresh evidence of identical leases

[44] AR p 072 para 54 – 55, p 088 para 109 (e-f)

[45] AR p 086 - 088 para 106 -110

32. The judge went on to find "If neither party was obliged to undertake the Project and this work was not completed, the evidence confirms the Building would have fallen into disrepair and may not have survived the term of the Lease."[46]

33. Simply because it was reasonable for Westsea to replace windows, doors, and fans, is a flawed basis for finding it is commercially absurd if Westsea is not obliged under the Lease to replace these old and obsolete items. The legal test that the judge was required to consider is not the intention of reasonable parties, but what the original parties in fact intended: *Moulton Contracting Ltd. v. British Columbia* 2015 BCCA 89, para 54, 58.

34. There was no extrinsic evidence of the actual intentions of the original parties to the Lease, and the original common signatory to the Lease was deceased.[47] At the same time, the express wear-and-tear exception in favor of the Lessees is evidence on its face that the Lease intends for Lessees to be exempt from the costs to replace old and worn windows and doors. Instead, the judge relied on fictional "reasonable" parties to create a covenant favorable to Westsea, contrary to a plain reading of the Lease.

Rule against absurdity may be applied only when ambiguity exists

35. The judge said: "Given my finding the Lease, construed as a whole, is clear and unambiguous, it is unnecessary for me to consider the need to interpret it in favour of either party."[48] The rule against commercial absurdity, however, may be applied only when an ambiguity in a contract exists: *Maxam Opportunities Fund Limited Partnership v. 729171 Alberta Inc*., 2015 BCSC 271, para 125; aff'd 2016 BCCA 53.

36. By finding that the Lease was unambiguous the judge could not then also apply the rule against absurdity since doing so was a contradiction in legal doctrine.

To apply the rule against absurdity, the contract must be negotiated

37. The judge found[49]:

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[46] AR p 087 para 108

[47] TEB p 024 line 44; p 027 line 11-13; p 028 line 29-37

[48] AR p 099 para 157; AR p 100 para 164(a)

[49] AR p 099, para 155

> "There was no evidence before this Court about whether or not the original parties to the Lease negotiated its terms, whether money exchanged hands, or whether the original signatory to the Lease was the "common directing mind" who had "de facto control" of both signing entities." [underline added]

38. However, only when the document to be construed is a negotiated commercial document should a court avoid an interpretation that would result in a commercial absurdity: *Kentucky Fried Chicken v. Scott's Foods* (1998) 114 OAC 357, para 27; referring to *City of Toronto v. WH Hotel Ltd.* 1966 SCR 434.

39. With no evidence before her that the Lease was negotiated, the judge had no basis to imply a term based on commercial efficacy. On the contrary, she ignored evidence that the Lease was not negotiated, including evidence that the appellant did not negotiate the Lease. She also excluded evidence of other 99-year residential leases with identical terms that show the Lease is a boiler-plate non-negotiated document.

The appellant did not negotiate the Lease

40. The judge acknowledged that the appellant said he did not negotiate the Lease, but then she dismissed this factor by reference to the appellant "approving the Lease as part of his purchase"[50]. Instead, the judge ought to have recognized the appellant's approval was evidence of the "take-it" (as opposed to "leave-it") aspect of the transaction and she ought to have found that he did not negotiate the Lease.

41. Had the judge properly considered whether the Lease was negotiated, and had she properly concluded that in fact it was not negotiated, she ought also to have found the Lease is a standard-form contract. In addition to its effect on the standard of review, when a Lease is a standard-form contract (adhesion contract) courts are more willing to apply *contra proferentem*: *Zurich Life Insurance v. Davies* [1981] 2 SCR 670, at 674; *Ledcor v. Northbridge*, *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37.

An implied term must not conflict with an express term

42. Courts must be cautious not to rewrite contracts for the contracting parties; the law recognizes that sometimes, to avoid an absurd result, the court will find an implied term in the contract if the implied term is not in conflict with an express term: *Zeitler v. Zeitler (Estate),*

[50] AR p 099 para 154

2010 BCCA 216, para 25. Further, to imply a term there must be a degree of obviousness to it, and if there is evidence of a contrary intention by either party, an implied term may not be found: *MJB Enterprises v. Defence Construction (1951) Ltd*. [1999] 1 SCR 619, p 621.

43. In finding no conflict in terms[51], the judge said, "In my view, Article 5.03 does not destroy the obligations in Article 4.03"[52]. Here she erred by considering the respective covenants (obligations) as free-standing and by ignoring the conflicting liabilities that underlie these covenants. This conflict arises because Article 4.03 expressly exempts Lessees from liability to replace old and obsolete windows, doors and fans; whereas an implied covenant for Westsea to replace old windows permits Westsea to reverse liability and recover costs from Lessees as an Operating Expense under Article 7.01.

44. If Westsea sought to qualify the wear-and-tear exception and revive lessees' liability to pay to replace old and worn windows, doors, and fans, Westsea ought to have done so by express provisions.

45. Generally, there is a duty imposed on a party in a position of superior bargaining power to make explicit its rights under a contract: *Olympic Industries Inc. v. McNeill*, 1993 CanLII 318 (BCCA), para 36.

46. Westsea is the party in the position of superior bargaining power and it has not made explicit its purported right to recover the costs to replace old and obsolete windows, doors, and fans from the Lessees' as Operating Expenses.

No implied covenant for landlord to repair if excepted from tenants' covenants

47. Further, the judge's finding is contrary to well-established law which says that, in the case of an exception to lessees' liability to repair for loss by fire, there is no implied covenant on the landlord to repair. In *Dunkelman v. Lister*, Kelly J. agreed with the following statement from counsel:

> "Unless the landlord has covenanted to repair, he need not rebuild the premises if destroyed by fire during the term; and, though the tenant has covenanted to repair with an exception of damage by fire, this does not imply an obligation to rebuild on the part of the landlord." [emphasis added]
>
> *Dunkelman v. Lister* [1927] 2 DLR 219 (Ont SC), aff'd [1927] 4 DLR 612

[51] AR p 072 para 53

[52] AR p 073 para 58

48. As will be argued further, the wear-and-tear exception is parallel to lessees' exemption from liability for fire damage. This parallel was recognized by the Ontario Court of Appeal in *Weinbaum v. Zolumoff and Zolumoff and Zolumoff* [1956] OWN 27 (CA), a case in which the parties agreed that repairs to an oil-burner were due to reasonable wear and tear, and that such repairs were reasonable. The Ontario Court of Appeal applied the Court of Appeal of Nova Scotia decision in *Victor v. Lynch* [1944] 3 DLR 94 (NSCA), saying, at p. 29:

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

49. Thus, if Westsea replaces old and obsolete windows, doors, and fans, then Westsea does so at its option or in accordance with other legal requirements, and associated costs are not chargeable as Operating Expenses.

50. The point is well-illustrated by considering the reverse circumstance in which *Lessees* might seek to enforce an implied covenant for Westsea to replace old and worn windows if Westsea had failed to do so. If Westsea did not think it could charge the costs as an Operating Expense, Westsea likely would argue there was in fact no covenant to replace old and worn windows, and such an argument would be *well-supported* in law.

51. But a landlord cannot have it both ways. It is only because Westsea thinks it can charge the cost to replace old and worn windows, doors and fans, as Operating Expenses that Westsea argues there is a covenant to do so. This is a flawed basis upon which to vest Westsea with an obligation that is not in the Lease in the first place, as the judge has done.

Other legal requirements

52. If Westsea elected not to replace windows at its own cost, Westsea was potentially liable under negligence law, other common law obligations to keep premises habitable, and *Occupiers Liability Act* [RSBC 1996] c. 337, s.3 and s.6[53], for failure to undertake repairs to ensure the building is safe. Thus, Westsea was already obliged to replace the old windows and doors as a matter of statute and common law, not under the Lease. Under that law, Westsea has no inherent right to charge the costs of its legal obligation to replace the old windows back to Leaseholders as Operating Expenses.

[53] Appendix C

53. The appellant did not argue or plead this, but the judge is assumed to know the law on these points by judicial notice: see s. 34 of *Evidence Act*, RSBC 1996, c. 124[54] in which judicial notice of statutes must be taken: *Halvorson v. British Columbia (Medical Services Commission)*, 2010 BCCA 267, para 36.

54. Thus, the judge did not need to imply a covenant for Westsea to replace windows and doors to fill a gap in the Lease or law to protect occupants from failing windows and doors. The true rationale is revealed: she implied such a covenant so Westsea did not have to pay the bill and could recover the costs from Lessees as Operating Expenses. This rationale for re-writing the Lease contradicts established law that it is not the role of the court to re-write an improvident contract, as the judge herself recognized[55].

C. The judge failed to consider that the wear-and-tear exception specifically exonerates lessees from liability for costs to replace old and worn windows, doors and fans

55. The implied covenant found by the judge destroys the purpose of the wear-and-tear exception, which is to exempt Lessees from the liability to pay for costs to replace old and obsolete windows, doors, and fans.

56. The wear-and-tear exception is ancient and deeply entrenched in law and must be taken to have been intended by the drafter of the Lease. Indeed, by reversing liability through such an implied term, the judge eviscerates the centuries-old rationale for the wear-and-tear exception. This rationale is first that the lessor, as owner of the building, is obliged to replace old and obsolete things at her expense, since tenants pay rent merely to occupy the space: *Sellers v. Brown* [1766] Hailes 131, Scottish Court of Sessions.

57. Here, Westsea admitted that the original Lease assignees pre-paid their rent for the whole 99-year term, and that this was profitable for Westsea[56].

58. Lord Denning, in *Warren v. Keen* [1953] 2 All ER 1118 (CA) further articulated the rationale:

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[54] Appendix B

[55] AR p 066 para 30

[56] TEB p 010 line 6 -11, AR p 100 para 161

> "The tenant must take proper care of the place… But apart from such things, if the house falls into disrepair through fair wear and tear or lapse of time or for any reason not caused by him, then the tenant is not liable to repair it. [underline added]

59. Key to Lord Denning's reasons is the exception to tenant's liability for "reasons not caused by him". Other exceptions for damage not caused by Lessees are fire or catastrophe. Indeed, "such other damage as insured by the lessor" is included in the Lease as an exception to Lessees' liability along with wear and tear.

60. This general exception to tenant's liability was recognized by the Supreme Court of Canada in *Agnew-Surpass v. Cummer-Yonge*, [1976] 2 SCR 221, p. 247, as part of tenants' exception to pay for insured damage, which the court referred to as an exculpatory clause.

61. While the issue in that case was whether the exculpatory clause covered fire started by negligence, the Supreme Court of Canada recognized that the rationale for the wear-and-tear exception is to relieve tenants from liability for damage not caused by them, just as Lessees are not liable for insured damages not caused by them.

62. Moreover, it is critical to recognize that obligations are not free-standing. Unless there is an express agreement otherwise, a party who bears a covenant to do something typically bears the cost liabilities associated with fulfilling that obligation. Liability is fundamentally intertwined with any obligation. So, if a party is exempt from a covenant, he is also exempt from its associated liability. The trial judge ignored this legal reality.

63. Indeed, in *Skelton v. Evans* [1889] 16 SCC 637 per Strong, J. at p. 647, the Supreme Court of Canada recognized that these exceptions are exceptions to lessees' *liability*. In *Skelton* Strong J. observed the wear-and-tear exception is analogous to an exception for fire-caused-by-accidents:

> "The law imposes upon a lessee the obligation of restoring the thing let to the lessor in as good condition as it was in at the date of the lease, ordinary wear and tear excepted; in other words, and in the terms of articles 1627 and 1628 of the Civil Code, the lessee is responsible for injuries and loss which may happen to the thing leased during his enjoyment of it, unless he proves that the loss was not occasioned by his fault or by the acts of persons of his family or of his sub-tenants. In case of the destruction of the subject of the lease by fire the lessee does not relieve himself from the responsibility which the law thus imposes on him by shewing that the fire was accidental in the sense that its origin is unknown…"

64. In *Skelton*, Gwynne J. recognized that the exception for loss by accidental fire exempts leaseholders from liability:

> "I am of the opinion that under the terms of the lease entered into between the parties the defendants are relieved from liability to reinstate the damage done by the fire in the present case which destroyed the leased house" [underline added]
>
> *Skelton v. Evans*, per Gwynne J., p. 660

65. Taken together, the reasons of Gwynne J. and Strong J. show that the wear-and-tear exception, just like the exemption for loss by accidental fire, is intended to relieve Lessees of liability for costs to replace old and worn windows, doors, and fans.

66. Similarly, American law well-recognizes such clauses are exculpatory in nature[57]. In the Illinois Supreme Court case (a five-panel appeal), *Cerny-Pickas v. CR Jahn and Co* (1955) 131 NE 3d 100, the issue was whether such a clause excepted negligence for fire. The majority found the clause excepted negligence for fire, while the dissenting judges, in saying the clause did not except negligence, said that lessees' exemptions from loss due to ordinary wear, and loss due to fire "are treated exactly alike" (p. 105).

67. In *Delamatter v. Brown Brothers* (1905), 9 O.L.R. 351 (Ont C.A.), p. 363, Magee J. (in dissent, but not on this point) was even more direct and specifically said that the wear-and-tear exception relieves lessees from liability for old and worn things.

68. Thus, it perverts the underlying rationale of the wear-and-tear exception to imply a covenant for Westsea to replace old and worn windows when Westsea can simply reverse Lessees' liability-exemption by charging them the costs as Operating Expenses.

The wear-and-tear exception is a benefit to the Lessees under the Lease

69. Further, the trial judge has unfairly deprived Lessees of the benefit of the wear-and-tear exception. The Lower Canada Court of Queen's Bench (Appeal side) recognized this benefit at the dawn of Confederation in *Skelton v. Evans*, [1888] 31 LC Jur. 307, per Cross J., p. 313 (aff'd SCC [1889] 16 SCC 637), regarding "reasonable wear and tear and accidents by fire excepted", saying:

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

70. By conferring Westsea with a covenant to replace windows, doors, and fans, the judge has deftly eliminated with one hand what is a benefit to the Lessees on the other.

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[57] *Effect of Exculpatory Clause in Lessees' Surrender Covenant* 1957 Duke LJ Vol 7,59

Resolving the conflict in terms

71. As noted, Westsea recovers costs related to its covenants by charging those costs from Lessees under Article 7.01 as Operating Expenses.

72. Westsea's impugned implied covenant through which Westsea recovers from Lessees the costs to replace windows, doors, and fans, as found by the judge, is directly opposed to the Lessees' wear-and-tear liability-exemption.

73. This conflict can be resolved by applying the rule stated by the Supreme Court of Canada in *BG Checo v. BC Hydro Power Authority* [1993] 1 SCR 12:

> …general terms of a contract will be seen to be qualified by specific terms – or, to put it another way, where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term.

74. The judge erred in law by failing to recognize this conflict and rejected the application of *BG Checo*, saying "I am not satisfied it [the Lease] contains any inconsistencies which must be resolved in this manner"[58].

75. By applying *BG Checo,* buildings and walls are more general in description than windows, doors, and fans. Thus, the wear-and-tear exemption prevails since Lessees are specifically exempted from costs to replace old and obsolete, windows, doors and fans. Westsea's covenant to maintain the building and outer walls does not extend to replacing the noted items, since this wrongly permits Westsea to return liability back to the Lessees.

76. This is much like *Lavin Agency Ltd. v. Blackhall & Company Ltd*. [2004],185 OAC 48, para 6, when the Ontario Court of Appeal applied *BG Checo*. In *Lavin*, the tenant argued it could deduct payments made directly to a hydro utility company from rent since base rent included "utilities". However, the court found that *hydro* costs payable directly to the utility company were a specific category of "utilities" and were payable under a different term of the lease, so the tenant could not deduct the cost from rent.

77. *Lavin* applies here. Under Article 4.03, Lessees are specifically exempt from liability for old and worn windows, doors, and fans, which may be considered a specific subset of the

[58] AR p 072 para 53

building and walls, just as hydro is a specific category of utilities in *Lavin.* Westsea's general covenant to maintain the building and outer walls, and its purported right to recover associated costs under Article 7.01 do not extend to the windows, doors, and fans.

78. The judge erred in finding that Westsea's covenant to maintain the building and outer walls *qualifies* the exception to the Lessee's covenant to maintain windows and doors[59], and she misinterpreted the reasons of the Privy Council in *Forbes v. Git* [1922] 1 AC 256. In *Forbes*, the Privy Council said there is an exception to the general rule that preceding terms prevail over later terms if those terms are in conflict. Thus, a later term can prevail if it modifies an earlier term by a *conditional circumstance*, such as "If *x* condition exists in relation to an earlier term, then *y* follows to modify the earlier term".

79. The result of such a modification is a *refinement* to the degree or magnitude of the obligation in question. Thus, in *Forbes*, a recoverable sum was higher due to the modification of the later term, but one term did not destroy the effect of another term. So, the two clauses could be read together such that the liable party was required to pay $3,840.36 as opposed to $3000. In this respect, the Privy Council said:

> "The third clause does not destroy the first, but qualifies it. Its effect may be said to make the $3000 of the first clause an estimated sum whose accuracy is to be tested and controlled by taking the accounts for which provision is made in the third clause."

80. In contrast, an implied covenant which allows Westsea to recover from Lessees the costs to replace windows, doors, and fans, does not refine the accuracy of some amount in issue; it entirely obliterates the effect of the wear-and-tear exception.

81. On this point, the judge referred to *Rado-Mat Holdings Co. v. Peter Inn Enterprises Ltd* (1985), 32 A.C.W.S. (2d) 269 (Ont HC). In *Rado-Mat*, the *lessee* argued the landlord was obliged to repair the roof as part of a general covenant to keep the premises in "a clean and wholesome condition", since the lessee was excepted from such repairs under the wear-and-tear exception. While the court found the lessor's covenants did include roof repair, the result was that the landlord was liable for the roof repair. Thus, there was no conflict in the *respective liabilities* as between the lessee and the landlord, for otherwise surely the lessee would not have argued the landlord was obliged to replace the roof.

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[59] AR p 073 para 58

82. Here, the *opposite* occurs: if Westsea is obliged to replace windows and doors under its covenant to repair the building and outer walls, it can reverse its financial liability by charging the cost to the Lessees as an Operating Expense. *Rado-Mat* does not address this obvious conflict in Lease terms. Moreover, *Rado-Mat* was wrongly decided: the Ontario Court of Appeal decisions in *Dunkelman v. Lister* and *Weinbaum v. Zolumoff* (cf. paras 47-48 herein) say no implied covenant to repair exists.

The judge ignored evidence that the windows are not structural

83. In addition to the legal distinction between specific windows & doors and general outer walls & building under *BG Checo*, the judge should have found the windows and doors are *factually* distinct from the outer walls and the building.

84. In finding the windows and walls are structurally integrated, the judge said[60]:

> [47] The plaintiff cites *Holiday Fellowship v. Viscount Hereford*, [1959] 1 All E.R. 433 (Eng. C.A.) [*Holiday Fellowship*], as support for his argument that windows are not walls. He concedes Lord Ormerod identified two features which could bring windows within the description of walls: (i) if they support the structure of the building, or (ii) if they enclose the building face. The plaintiff argues the Building exterior windows and sliding doors are not part of the outer walls because they do not comprise the entire face of the Building and do not support the Building structure. He says windows and doors are physically and functionally distinct from walls, noting the former, unlike the latter, are not structural building components and that windows and doors perform different functions than walls.
>
> [49] Lords Evershed, Romer, and Ormerod in *Holiday Fellowship* agreed the question of whether windows form part of the outer walls of a building is a matter of degree, to be determined on the facts. The plaintiff's argument fails to address the evidence of Mr. Hasham that complete repair of the outer walls was not possible without also addressing the water ingress problem due to failing windows and sliding doors. It also overlooks the unchallenged expert opinion evidence of Mr. Gallant that the windows and sliding doors at the Building form part of the Building envelope system which separates interior and exterior space.
>
> [54] … Article 5.03 requires the lessor to keep in good repair and condition the Building foundations and outer walls; this may include the repair or replacement of failing windows and doors which have deteriorated due to reasonable wear and tear and which may be undermining the structural integrity of the Building foundation and outer walls. Such an interpretation is consistent with the plain wording of the Lease, the reasonable expectations of the parties at the time they entered into the Lease, the evidence at trial, the notion of commercial efficacy, and common sense. The Lease does not distinguish between structural and non-structural components of the outer

[60] AR p 070 – 072, para 47 – 54

> walls. The law on this issue, including the decisions cited by the plaintiff, indicates that whether windows and doors are part of exterior building walls is fact-specific. [underline added]

85. The judge found that since wall repairs cannot be completed without replacing windows, this demonstrates an "integrated connection" between the windows and outer walls. Due to this connection, she found that Westsea has a covenant to replace the windows in order to maintain the walls, thus recoverable from Lessees as an Operating Expense.

86. This conclusion is flawed because it starts with a faulty premise. First, she only partially stated the test set by the court in *Holiday Fellowship* in which windows might be part of the walls if they "support the structure of the building or have directly to do with its stability". Then she ignored the following evidence from Mr. Hasham that the windows are not structural and do not support building stability, thus applying the test incorrectly:

> Q. So the frame structure in the glass, they're not structural components of the building, are they?
>
> A. They're not structural – they're not carrying the weight of the building or they're not holding up the building. What they are providing is wind load essentially.
>
> …
>
> Q. But the building itself as a whole has to be designed to bear the weight of the windows?
>
> A. Yes, the structure below that, yes.
>
> Q. And just to be clear, the windows themselves don't bear any of the weight of the building?
>
> A. Yeah, they don't support the building. They don't keep the building up in that sense[61].

87. Similarly, the judge ignored evidence from Perry Caris who testified that windows are installed with a deflection header that allows the windows to move inside the wall space "so it's not a hard connection from top to bottom."[62]

88. In *Holiday Fellowship*, Lord Omerod agreed with Lords Romer and Evershed, saying (p. 437):

> "The issue is whether the windows in the walls of this house—photographs of which we have before us—can be regarded as part of the "main walls" as "those which support the structure of the building or have directly to do with its stability"; and I suppose that,

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[61] TEB p 052 line 43 to p 053 line 24

[62] TEB p 043 line 12 – 21; AB p 50-51

> in addition, they go further than that in that they are a necessary part of the building as they inclose, or help to inclose, the area on which the building or structure is erected. But they may well perform another function. In a building it is necessary to have means of ingress and egress, and, of course, some means of admitting light: therefore, the walls form the setting for the necessary doors and windows which certainly a dwelling-house and a very large number of other buildings must have. But to say that those doors and windows, inserted in those settings, are part of the main walls of the building seems to me to be going very much further than the ordinary use of language would allow. It is, as Romer, L.J., has said, a matter of degree. There may be cases where the walls are built so much of glass that it would be impossible to say whether they are walls or windows. In the sense that they admit light they are windows, and in the sense that they inclose the premises they are walls. In the case of a house of this kind, however, an ordinary house with walls and the normal amount of windows, that position of course cannot apply."

89. While the judge recognized that the question of whether windows are part of the walls is a matter of degree, in assessing that degree she failed to weigh evidence of various factors the appellant identified as aspects of windows that distinguish them from walls, against evidence she relied on to conclude that windows were part of the walls. The appellant's evidence included: Orchard House window glazing is transparent and admits light, walls of Orchard House do not; the windows do not comprise the entire face of the building; some (but not all) Orchard House windows are openable and allow ventilation; windows in general are poor insulators even compared to uninsulated walls; sliding glass doors permit access and egress to the balconies; Orchard House windows were inserted *into* a wall space, and are defined this way[63]; and critically that the Orchard House windows are not structural and do not support building stability as confirmed by both Mr. Hasham and Perry Caris.[64]

90. It is important that Mr. Gallant, an architect, said he was not qualified to opine on building structure[65]. Mr. Gallant provided a broad description of "building envelope" which, in turn, contains specific and distinct sub-components like walls and windows[66].

91. While Mr. Gallant opined that windows and walls both divide the interior from the exterior[67], windows are plainly defined on the Lease floor plan to be interior to the suites[68].

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[63] See para 19 herein for TEB and AB references

[64] TEB p 052 line 13-47 to p 052 line 1-24 (Hasham); p 043, line 12-21 (Caris)

[65] AB p 062 para 17 (Pierre Gallant Report)

[66] AB p 057 (Pierre Gallant Report)

[67] AB p 058 para 2 (Pierre Gallant Report)

[68] AB p 019 (8th Floor Plan and Legend)

This is obvious for windows and sliding doors that face onto each balcony, which are included in the suite floor plan[69], although perhaps less obvious for windows which do not face balconies but are inset by 2 to 2.5 inches from the walls[70].

92. Being thus defined in the Lease as part of the interior, it is meaningless to characterize windows as having some common feature with the exterior walls. The judge mentioned that interior space is defined by the floor plan[71], but failed to weigh this fact against Mr. Gallant's view that both windows and walls divide the interior from the exterior.

93. Similarly, the judge's finding that "The Lease does not distinguish between structural and non-structural components of the outer walls"[72] is meaningless. True, the Lease does not make this distinction, but it plainly distinguishes between windows and walls. Moreover, the judge's observation in this regard contradicts the test as set out in *Holiday Fellowship*, which identifies structure and building stability, or lack thereof, as part of the test to determine whether windows are separate from the walls. She thus erred by applying the wrong legal test for distinguishing windows from walls and the building.

94. Further, Mr. Gallant's report says nothing about the distinctive specific features of windows that make them different from walls and the Orchard House building in general. Branches and leaves are both part of a tree, but they are quite different in their specific functions and character, and no one would reasonably call a leaf or a branch a tree, just as they would not call a window or a wall a building. Nor would they call a leaf a branch, just as they would not call a window a wall except in the narrow circumstances set out in *Holiday Fellowship*, which a proper weighing of all the evidence establishes do not apply.

95. Had the judge done this analysis and weighed the evidence properly on the test set in *Holiday Fellowship*, the correct and only reasonable conclusion is that the Orchard House windows are distinct from the walls.

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[69] AB p 019 (8th Floor Plan)

[70] TEB p 050 line 35-47 to p 050.1 line 1-7; AR p 068 para 39; AB p 049 (top-left image)

[71] AR p 067 para 38

[72] AR p 072 para 54

96. Thus, when evidence shows as it does here that the windows *by themselves* are old and obsolete, then the precise condition exists by which Lessees are exempt from liability under the wear-and-tear exception. Similarly, the old and obsolete state of the windows is entirely independent of whether the windows need to be removed in order to fix damage to the walls.

97. Indeed, the evidence is that there was very little damage to the outer walls. From the evidence of Mr. Hasham, supported by the evidence of Mr. Caris, and shown in the work contract and final costs, only 50 linear feet of wall delamination repairs and some brick repointing was required, amounting to a tiny fraction of the total cost of the $5.5 million project[73]. Still this is beside the point: the windows were old and obsolete and, being so, meet the criteria for the application of the wear-and-tear exception.

D. The judge erred by interpreting Operating Expenses to include capital costs and erred by implying that Phase 2 costs were not capital costs

98. The appellant argued that replacing windows and doors and fans involved a capital cost[74], and argued that under the Lease, Operating Expenses do not include costs of a capital nature.

99. The judge first declined to consider whether Phase 2 was a capital cost, then went on to imply that the Phase 2 is not a capital cost[75], and then found the definition of Operating Expenses in Article 7.01 is sufficiently broad to encompass capital costs.[76]

100. Westsea's consulting engineering firm, RJC viewed Phase 2 as a capital cost. RJC expressed this view formally in reports of 2013 and in 2016.[77]

101. The Supreme Court of Canada recognized that landlords' costs to replace old and obsolete things are capital outlays: *MNR v. Haddon* [1961] 1 SCR 109, p 111:

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[73] TEB p 045 line 8-34; p 051 line 24 – 36 (Hasham); p 037 line 1- 43 (Caris); AB p 046 (bid quote), p 053, p 055 (final costs)

[74] AR p 96-98

[75] AR p 097 para 148

[76] AB p 098, para 152

[77] AB p 037.1 para 1; AB p 37.4 para 2

> "Expenditures to replace assets which have become worn out or obsolete are something quite different from those ordinary annual expenditures for repairs which fall naturally into the category of income disbursements".

102. Similarly, in *Galt v. Frank Waterhouse & Co. of Canada Ltd*. [1944] 2 DLR 158 (BCCA) at 165-166, this court held that a contractual designation "operating expense" on its face does not include costs of a capital nature, saying:

> In my view, whatever meanings may be ascribed in the abstract to "cost of annual overhaul", the key to its meaning in this case, is its designation in the agreement as an operating expense. That master provision and overriding consideration definitely rules out any substantial expense of a capital nature which might perhaps be included in other circumstances. We need not in this case mark the line between what is, and what is not a substantial expense of a capital nature. (underline added)

103. This was similarly expressed by the Ontario Court of Appeal in *Parsons Precast v. Sbrissa* 2013 ONCA 558:

> "We agree with the application judge that there is a line between repair and maintenance on the one hand and capital expenses on the other hand…"

104. Thus, contrary to the judge's finding, *Galt* tells us that since the Lease contains a master provision for Operating Expenses, which does not expressly include costs to replace all the old and obsolete windows, doors, and fans in the building (costs of a capital nature), then such costs are not intended to be Operating Expenses.

105. Absent express words to the contrary, the ordinary meaning of terms must be adopted: *Maxam Opportunities Fund v. Greenscape Capital Group Inc*., 2013 BCCA 460, para 49. In this case the ordinary meaning of Operating Expenses is that they do not include capital costs, as this court found in *Galt.*

106. Since costs to replace windows and doors are expressly excluded from Lessees' liability under the wear-and-tear exception, this is evidence on the face of the Lease that such replacement costs are not intended to comprise Operating Expenses. The judge failed to consider the intentions of the parties as evidenced by the express terms of the Lease.

107. The Lease must be taken intentionally to exclude costs to replace old and obsolete things (capital costs) as Operating Expenses because they are already excluded from Lessee liability under the wear-and-tear exemption. This connection between the wear-and-tear exception and an intention for Operating Expenses to exclude costs to replace old and obsolete items because they are not "ordinary annual expenditures for repairs" is reflected in *MNR v. Haddon Realty* [1961] 1 SCR 109.

108. If it is not obvious that costs to replace worn and obsolete windows, doors, and fans, are not intended to be the sort of "ordinary annual expenditures for repairs" or common, repetitive, and highly predictable expenses that otherwise comprise Operating Expenses, then there is ambiguity between the express wear-and-tear exception and any implication that Operation Expenses includes capital costs. This is the sort of ambiguity that is resolved by *contra proferentem*, as found by Supreme Court of Canada in *Hillis Oil & Sales v. Wynn's Canada* [1986] 1 SCR 57, p. 67- 68.

109. While the judge first declined to resolve whether the cost was of a capital nature, she went on in error to suggest that the evidence showed the cost was *not* of a capital nature or of "such a substantial nature", as the appellant argued[78], to fall within a category of cost not contemplated by the Lease, saying:

> "[148] The plaintiff argues Westsea, as owner, accrues the benefit of any upgrades undertaken through "major component replacements" such as the Project, which he says potentially extend the useful and economic life of the Building. This argument overlooks the evidence of Mr. Caris, Mr. Hasham, and Ms. Trache which confirms the expected service life of the replacement windows, sliding doors and fans installed during the Project is 25-35 years, while the remaining term of the Lease is 54 years. Accordingly, on all the evidence, the windows, sliding doors, and fans will need to be replaced again before the end of the Lease term."[79] [underline added]

110. It is well established that major renovations can extend a building's life by "resetting the clock", and that a building's life can be repeatedly extended. This principle was discussed in *Administrative Tribunal of Quebec v Montreal (City)*, 2011 CanLII 48495 (QC TAQ), para 221, in which the Tribunal quoted in English from the text, *The Appraisal of Real Estate*, Twelfth Edition, p. 386:

> "Renovation and modernization can effectively extend a building's life expectancy by "resetting the clock". For example, consider a building with a 40 year economic life expectancy. If at the 10-year mark the property was substantially modernized, bringing the physical components up to current market standards for new construction, then the effective age of the property would be reset to zero and the remaining economic life expectancy (before the renovation) of 30 years would be reset to the original 40 years-or to some other figure, depending on the extent of modification to the property. Many historic properties have an economic life equal to or greater than the physical life of the building materials because of continued renovation and restoration."

111. Following this quotation, the Quebec Tribunal made a finding of fact, at para 222:

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[78] TEB p 068 line 16 – 39

[79] AR p 097 para 148

> [222] Il ne faut pas confondre la vie physique du bâtiment qui east donc largement supérieure à sa vie économique et IL faut prendre en compte qu'un bâtiment peut avoir pluses vies économiques tout au long de sa vie physique, enframement grâce à des rénovations ou modernisations majeures.

112. Using www.Reverso.net translation service (October 8, 2019), this translates to:

> "We must not confuse the physical life of the building, which is thus vastly superior to its economic life, and we must take into account that a building can have several economic lives throughout its physical life, usually through major renovations or retrofits"[80].

113. It is apparent that the Phase 2 project re-sets the economic life of the building with a corresponding benefit to Westsea after the end of the 99-year term. The enduring benefit to Westsea of the new windows, doors, and fans, is thus a marketable building well beyond the end of its current 99-year term. This puts the cost to replace windows, doors, and fans, into a very different category from the common, repetitive or highly predictable expenses enumerated as Operating Expenses.

114. Thus, the judge erred in law by implying that costs to replace windows and doors were *not* of a capital nature since windows may be replaced again before the end of the Lease[81].

115. The judge also erred in fact and law by saying that "on the evidence the only parties who will benefit from the Project are the leaseholders."[82] Here she conflated an *absence* of evidence to show how the Respondent benefits from the Phase 2 project with a *conclusion* that the Respondent does not benefit from the project during the 99-year term Lease.

Operating expenses are common, repetitive or highly predictable expenses

115. The appellant argued that Operating Expenses contain categories of "common, repetitive or highly predictable" expenses, as the Quebec Court of Appeal referred to in *Skyline Holdings v. Scarves and Allied Arts* [2000] QJ No.2786, para 16[83]. The judge

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[80] Other online services give substantially the same translation: https://www.google.com; Oct 8, 2019; https://www.deepl.com, Oct 8, 2019

[81] AR p 097 para 148

[82] AR p 085 at para 102

[83] TEB p 057 line 43 to p 058 line 31; p 060 line 3 to p 061 line 47

considered the point but after she already decided *ejusdem generis* did not apply[84], and thus erred in law by not considering "common, repetitive or highly predictable" expenses under *ejusdem generis*, as the appellant argued[85].

116. Article 5.03 and Article 7.01 present two lists referencing costs connected with Westsea's covenants. The first list in Article 5 contains:

> "To provide heat…to keep in good repair and condition the outer walls, foundations, roofs… all of the common areas and the plumbing, sewage and electrical systems… to keep the entrance halls… and like areas… clean…lighted …heated and elevators properly lighted and in good working order…provide or engage services of staff… pay taxes…to provide passenger elevator service…to keep the Building insured…to maintain a policy…of general public liability insurance… to provide cable-vision… intercommunication service…(the "**First List'**)

117. The second list in Article 7.01 contains:

> "maintenance, operation and repair of the Building"…"heating the common areas"… "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"…"legal and accounting charges".. (the "**Second List**")

118. The Second List is <u>followed by</u> the catch-all "and all other expenses paid or payable by the Lessor in connection with the Building, the common property therein or the Lands". Preceding the Second List but following the First List is the phrase "includes without restricting the generality of the foregoing…<u>in connection with the maintenance, operation and repair of the Building</u>" [underline added].

119. The appellant argued that *ejusdem generis* limits "all other expenses" to the categories of expenses in the Second List. The Supreme Court of Canada in *National Bank of Greece (Canada) v. Katsikonouris* [1990] 2 SCR 1029, p.1040 explained the principle:

> " …when one finds a clause that sets out a list of specific words <u>followed by a general term</u>, it will normally be appropriate to limit the general words to the genus of the narrow enumeration that <u>precedes</u> it. But it would be illogical to proceed in

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[84] AR p 095 para 139 p 096 para 145

[85] TEB p 057 line 43 to p 058 line 31; p 060 line 3 to p 061 line 47

> the same manner when a general term precedes an enumeration of specific examples." [underline added]

120. The illogical element to which the Supreme Court refers arises when a general term *precedes* a specific list but does not follow it. But the Supreme Court does not say that where there are two general terms between which is a list of items comprising a specific genus, any constraint of the second general term according to *ejusdem generis* is nullified by the first general phrase. In other words, *ejusdem generis* still applies to the catch-all "all other expenses paid…" which is limited to the preceding list of common, repetitive and highly predictable expenses.

121. A further rule referred to by the judge,[86] was stated by the Supreme Court in *National Bank*, p. 1041, para b:

> "Moreover, in this instance, the very language used to introduce the list of omissions and mis-representations confirms that it would be erroneous to view them as exhaustive. …the term "including" precedes the list…these words are terms of extension, designed to enlarge the meaning of preceding words, and not to limit them."

122. However, in the Lease, the term "includes but without restricting the generality of the foregoing" is followed by "in connection with the maintenance, operation and repair of the Building" and a comma after which the Second List begins "expenses in heating…". The phrase "without restricting the generality of the foregoing" is thus limited immediately thereafter by costs in connection with "maintenance, operation and repair of the Building".

123. Thus, a proper interpretation of the Lease recognizes that: a) the First List remains restricted to costs connected to "maintenance, operation and repair of the Building" while the Second List is limited to "common, repetitive or highly predictable" expenses, categories of costs which the judge erred in failing to consider in the context of *ejusdem generis*.

124. In relation to the First List, the key is whether "maintenance, operation and repair" of the Building includes the replacement of all the windows in Orchard House, an event which the evidence shows occurs perhaps twice within the entire 99-year life of the Lease as the judge recognized[87].

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[86] AR p 093 para 129

[87] AR p 090 para 117

125. In *Parsons Precast Inc. v. Sbrissa*, 2012 ONSC 6098 (aff'd 2013 ONCA 558), the court addressed the identical question, saying:

> "[17] It seems to me that the issue comes down to whether the total repaving of the parking lot can fairly be found to constitute "maintenance" or "repair (reasonable wear and tear…excepted)".
>
> [18] Undoubtedly in arrangements of this type there will be a myriad of items which must be replaced in the normal course of events and yet which replacement can reasonably classified as an item of maintenance – for example a light bulb, or an air filter in a heating or air conditioning system. It seems to me that other items, however, are so substantial in their nature and in their expense that they cannot reasonably be considered as an item of repair or maintenance.
>
> …
>
> [22] Nor in my opinion does the total replacement of this pavement reasonably fall within the term "maintenance"… This parking lot pavement wasn't "kept up". It was totally replaced. [*underline added*]

126. In *Skyline Holdings v. Scarves and Allied Arts* [2000] QJ No.2786, para 23-26, the Quebec Court of Appeal made a similar finding where a roof was completely replaced by the landlord and charged in error to the tenant as an operating expense. The court said:

> "In this case, the expense confers a lasting benefit and it is not repetitive, at least it should not happen again for about twenty years" [*Google translation*]

127. This is consistent with the decision of the Supreme Court of Canada in *MNR v. Haddon* [1961] 1 SCR 109 in which costs to replace old and obsolete items are capital in nature and fundamentally distinct from "ordinary annual expenditures for repairs."

128. Similarly, costs that are extraordinarily high are not typically contemplated by "repair and maintenance": *Kerrigan v. Harrison* 62 SCR 374, at 382-383. This applies even for 99-year residential leases: *March et al. v Colin Campbell Limited*, [1972] NJ No 23 (Nfld. SC). Thus, contrary to the judge's erroneous findings, the law in Canada is that a project to completely replace a major property component comprises a fundamentally different category of cost from maintenance and repair, and therefore cannot comprise Operating Expenses.

129. The judge relied upon *JEKE Enterprises v. Northmont Properties Ltd*. 2017 BCCA 38, observing the Lease costs listed in *JEKE* "were so varied no category was created to limit "operating costs to expenses of a particular kind"[88]. [*Note the judge erroneously lists*

[88] AR p. 094 para 133

"management fees" as part of the Lease[89], but this is not in the Lease. Similarly, she misquotes Operating Expenses to include "any legal…" which should read "and legal…"[90]]

130. Key to the court's finding in *JEKE*, not considered by the judge, was that the *JEKE* lease expressly stated, "OPERATING COSTS AND RESERVE FOR REFURBISHING" [caps in original, underline added] as the first words of the clause followed by "and replacement costs incurred". The court then identified within the list in issue "repairs to the interior and exterior" (para 60*).* Of course no limited categories could be found! In the Lease here, such expansive terms as "reserve for refurbishing; replacement costs; repairs to interior and exterior" simply do not appear. The exercise is substantially different, which the judge failed to recognize.

131. The judge then erred in law by finding that *ejusdem generis* and *noscitur a sociis* are "ousted by the language of the Lease" and refers to the qualifier "without limiting the generality of the foregoing"[91], referring to *JEKE*. Again, in *JEKE* the foregoing included "reserve for refurbishing" and "replacement costs"; terms that do not appear in the Lease.

132. Further, given that the judicial exercise ought to have been focussed on Lease interpretation and not evidence, the judge erred in law by failing to consider other clauses in the Lease, including Article 3.01 (Base Year), and 7.02 (estimate of Operating Expenses based on prior years experience)[92], which show an intention to limit Operating Expenses to common, repetitive or highly predictable expenses; not large-scale, unusual capital costs. The Base Year total monthly Operating expenses in 1974 was $60; subsequent estimates based on prior years are rooted in the original Base Year and are expected to increase yearly according to inflation without massive spikes in costs from year to year, as occurred here.

The question of rent

133. Tenants pay rent to occupy and use space owned by the landlord. A direct result of this fundamental landlord-tenant relationship is that lessors are liable to replace parts of their property damaged for reasons not caused by tenants, as argued above.

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[89] AR p. 094 para 133

[90] AR p 065 para 25; p 094 para 133; AB p 001 – 002; p 007- 008, 012 (Lease)

[91] AR p 093 para 129-130

[92] AB p 001-002; AB p 007, 013 (Lease)

134. The Supreme Court of Canada defined rent in *Johnson v. British Canadian Ins. Co* [1932] SCR 680, at p 685:

> "Rent" in legal language may be defined as the compensation which a tenant of the land or other corporeal hereditament makes to the owner for the use thereof. It is frequently treated as profit arising out of the demised land.

135. Article 4.01 of the Lease requires Lessees to pay rent.[93]

136. The appellant sought to adduce evidence that rent was pre-paid by the original Lease assignees. Although the appellant did not plead that Westsea should have invested it or set some aside to pay for future capital costs by prudent investments, pre-paid rent was raised in the appellant's pleadings[94].

137. The judge declined to consider evidence of pre-paid rent and its profitability for Westsea, saying[95]:

> [161] Westsea admits rent was "pre-paid" at the start of the Lease term and was profitable. The plaintiff argues Westsea could have invested that rent and/or used it to maintain a replacement reserve to address future capital expenditures like the Project.
>
> [162] The plaintiff did not raise this allegation in his pleading. It is unsupported by the evidence or a plain reading of the Lease as a whole. I therefore decline to consider it.

138. In saying "it is unsupported by the evidence", the judge ignored the obvious fact that Westsea admitted to it, which is therefore evidence. Moreover, the appellant included uncontroverted evidence of original Lease assignments showing purchase prices[96],which was also evidence of the pre-paid rent.

139. It was therefore proven at trial that original assignees pre-paid rent for 99 years. By ignoring evidence that Westsea received pre-paid rent and that it was profitable, the judge erred because:

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[93] AB p 002; p 008 (Lease)

[94] AR p 003 para 5, p 006 para 27

[95] AR p 100 para 161-162

[96] AB p 028 - 032

a) this evidence supports the rationale for the wear-and-tear exception, namely that Lessees do not pay to replace obsolete items that are part of Westsea's property;

b) it is well-understood that landlords accrue a benefit from receipt of a large lump sum at Lease inception: *Saskatoon Square Ltd. v. Canada Mortgage and Housing Corporation*, 1995 CanLII 6112 (SKQB), per Rothery J. The benefit to the landlord is that the landlord can invest the proceeds and enjoy further profits, so it is only reasonable that landlords are expected to use investment returns on pre-paid rent to pay for capital expenditures for their property.

140. The judge erred in failing to consider that in receiving pre-paid rent, Westsea ought to have set aside a portion of pre-paid rent for future capital costs, an assertion that follows naturally from the argument that the Lease is not intended to include capital costs as Operating Expenses.

Summary

141. The judge made multiple errors of law by incorrectly applying legal tests and misinterpreting caselaw, misapprehending critical evidence and improperly interpreting the Lease, and her decision ought to be overturned.

PART 4 — NATURE OF ORDER SOUGHT

142. An order that the judge's decision be quashed; that replacement costs for windows, doors and fans, and/or capital expenses, are not chargeable to the Lessees, and for costs paid by the appellant to Westsea for same, be returned with interest; and for appeal and trial costs.

All of which is respectfully submitted.

February 21, 2019

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Hugh Trenchard

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APPENDIX A

CHAPTER 357

Short Form of Leases Act

Title.

1. This Act may be cited as the *Short Form of Leases Act.* R.S. 1948, c. 307, s. 1.

Interpretation.

2. In this Act, unless the context otherwise requires,

"lands" extends to all tenements and hereditaments of freehold tenure, or any undivided part or share therein respectively;

"parties" includes any body politic, or corporate, or collegiate, as well as an individual. R.S. 1948, c. 307, s. 2.

Effect of lease made according to First Sch. and Column I of Second Sch.

3. Where a lease of lands made according to the form in the First Schedule, or any other lease of lands expressed to be made in pursuance of this Act, or referring thereto, or expressed to be made in pursuance of the *Leaseholds Act,* or referring thereto, contains any of the forms of words contained in Column I of the Second Schedule, and distinguished by any number therein, such lease shall have the same effect and be construed as if it contained the form of words contained in Column II of the Second Schedule, and distinguished by the same number as is annexed to the form of words used in such lease; but it is not necessary in any such lease to insert any such number. R.S. 1948, c. 307, s. 3.

SECOND SCHEDULE

(Sections 3, 7)

COLUMN I	COLUMN II

13. And that he will leave premises in good repair.

13. And, further, that the said lessee, his executors, administrators, and assigns, will, at the expiration or other sooner determination of the said term, peaceably surrender and yield up unto the said lessor, his heirs, executors, administrators, or assigns, the said premises hereby demised, with the appurtenances, together with all buildings, erections, and fixtures now or hereafter to be built or erected thereon, in good and substantial repair and condition in all respects, reasonable wear and tear and damage by fire only excepted.

APPENDIX B

Evidence Act [RSBC 1996], Chapter 124

Judicial notice of statutes

24 (1)In this section, **"Imperial Parliament"** means the Parliament of the United Kingdom of Great Britain and Northern Ireland, or any former kingdom that included England, whether known as the United Kingdom of Great Britain and Ireland or otherwise.

(2) Judicial notice must be taken of all of the following:

(a)Acts of the Imperial Parliament;

(b)Acts of the Parliament of Canada;

(c)ordinances made by the Governor in Council of Canada;

(d)ordinances made by the Governor in Council, Lieutenant Governor in Council or Commissioner in Council of any province, colony or territory which, or some portion of which, forms part of Canada, and all Acts and ordinances of the Legislature of, or other legislative body or authority competent to make laws for, the province, colony or territory;

(e)Acts and ordinances of the Legislature of, or other legislative body or authority competent to make laws for, any dominion, empire, commonwealth, state, province, colony, territory, possession or protectorate of Her Majesty;

(f)regulations published in the Gazette.

(3)This section applies to

(a)all dominions, empires, commonwealths, states, provinces, colonies, territories, possessions and protectorates now existing and those constituted at some time in the future, and

(b)ordinances and Acts that are made or enacted

(i)now,

(ii)at any time before now, or

(iii)any time after now.

APPENDIX C

Occupiers Liability Act [RSBC 1996] c. 337

"occupier" means a person who

(a) is in physical possession of premises, or

(b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,

and, for this Act, there may be more than one occupier of the same premises;

"premises" includes

(a)land and structures or either of them, excepting portable structures and equipment other than those described in paragraph (c),

"tenancy" includes a statutory tenancy, an implied tenancy and any contract conferring the right of occupation, and "landlord" must be construed accordingly.

Occupiers' duty of care

3 (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.

(2) The duty of care referred to in subsection (1) applies in relation to the

(a) condition of the premises,

(b) activities on the premises, or

(c) conduct of third parties on the premises.

Tenancy relationship

6 (1) If premises are occupied or used under a tenancy under which a landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show toward any person who, or whose property, may be on the premises the same care in respect of risks arising from failure on the landlord's part in carrying out the landlord's responsibility, as is required by this Act to be shown by an occupier of premises toward persons entering on or using the premises.

(2) If premises are occupied under a subtenancy, subsection (1) applies to a landlord who is responsible for the maintenance or repair of the premises comprised in the subtenancy.

(3) For the purposes of this section

(a)a landlord is not in default of the landlord's duty under subsection (1) unless the default would be actionable at the suit of the occupier,

(b)nothing relieves a landlord of a duty the landlord may have apart from this section, and

(c)obligations imposed by an enactment in respect of a tenancy are deemed to be imposed by the tenancy.

(4) This section applies to all tenancies.