COURT OF APPEAL FILE NO. CA46417

COURT OF APPEAL

ON APPEAL FROM the Order of the Honourable Madam Justice Douglas of the Supreme Court of British Columbia, pronounced the 1st day of October, 2019.

BETWEEN:

HUGH TRENCHARD

APPELLANT
(Plaintiff)

AND:

WESTSEA CONSTRUCTION LTD.

RESPONDENT
(Defendant)

RESPONDENT'S AMENDED FACTUM

Hugh Trenchard

Appellant:

805 – 647 Michigan Street
Victoria, BC V8V 1S9

Email: h.a.trenchard@gmail.com

Westsea Construction Ltd.

Counsel for the Respondent:

Mark C. Stacey and Claire S. Immega
Singleton Urquhart Reynolds Vogel LLP
1200 – 925 West Georgia Street
Vancouver, BC V6C 3L2
Tel: 604-682-7474
Fax: 604-682-1283

INDEX

CHRONOLOGY

Date	Event
1974	Westsea and Capital Construction Supplies Ltd. enter into the Lease for Orchard House
1974 onward	Capital Construction Supplies Ltd. sells assignments *pro tanto* of its leasehold interests to various third parties, and those interests are sold to other third parties from time to time
2009	Westsea retains engineering firm Read Jones Christoffersen to investigate leaks occurring at Orchard House
2009-2010	Read Jones Christoffersen investigates and repairs are conducted relating to the leaks at Orchard House
2011	Mr. Trenchard purchases a leasehold interest in suite 805 on assignment *pro tanto* of the Lease
Jan 25, 2011	Mr. Trenchard's assignment of leasehold interest is registered at the Victoria Land Title Office
Sept 6, 2013	Read Jones Christoffersen issues Priority Assessment Report for Orchard House recommending plaza membrane renewal, roof membrane renewal and replacement of windows and sliding doors to Westsea
Nov 30, 2013	Westsea delivers a letter to Orchard House leaseholders that describes the estimated Operating Expenses for 2014 and anticipated expenses relating to the replacement of windows and sliding doors

Mar 24, 2016	Read Jones Christoffersen issues an engineering report titled the Building Enclosure Condition Assessment Report summarizing the general condition of and recommendations for the Orchard House building enclosure, including the windows and the sliding doors
Mar 31, 2016	Westsea delivers a letter to Orchard House leaseholders enclosing the Building Enclosure Condition Assessment Report and advising of the upcoming expenses associated with the replacement of windows and sliding doors at Orchard House
July 5, 2016	Westsea delivers a letter to Orchard House leaseholders to notify them of their proportionate share of the Project Cost and demand payment under the Lease
July 11, 2016	Work on the Project commences at Orchard House
August 9, 2016	Mr. Trenchard files his notice of civil claim
August 31, 2016	Westsea files its response to civil claim
May 24, 2017	Project is substantially completed
June 3-7 and 10-14, 2019	Trial is heard before Madam Justice Douglas
October 1, 2019	Madam Justice Douglas issues the Reasons for Judgment holding that Westsea was obligated under the Lease to undertake the Project and entitled to charge the Project Cost to leaseholders as Operating Expenses

OPENING STATEMENT

The Respondent, Westsea Construction Ltd. ("**Westsea**"), is the owner and manager of a long-term leasehold apartment complex in Victoria known as Orchard House. The units at Orchard House are leased pursuant to various assignments of a 99-year lease agreement (the "**Lease**").

The Appellant, Hugh Trenchard, is a leaseholder at Orchard House and commenced the underlying Action for relief with respect to alleged breaches of the Lease by the Respondent in relation to a building envelope remediation project (the "**Project**"). The Appellant sought to relieve the leaseholders at Orchard House of liability for costs of the Project attributable to the replacement of the sliding doors, windows and bathroom fans.

The trial judge dismissed the action on the basis that the Lease was clear and unambiguous in both obliging Westsea to undertake the Project and entitling Westsea to charge leaseholders their proportionate share of the Project as Operating Expenses under the Lease.

In this appeal, the Appellant contends that the trial judge made various errors in her interpretation of the Lease to find that the leaseholders were liable for their share of the Project by, among other things: implying a covenant in the Lease; excluding evidence of other, unrelated leases; and interpreting certain Lease provisions to include "capital costs".

Westsea respectfully submits that the arguments of the Appellant mischaracterize the trial judge's reasoning, are inconsistent with contemporary principles of contract interpretation, and are not grounded in law nor in the Lease.

Accordingly, Westsea further submits that the trial judge made no errors of law, fact, or mixed law and fact, the Appellant has failed to establish any compelling bases to overturn the decision of the Court below, and therefore the appeal should be dismissed.

PART 1 – STATEMENT OF FACTS

Background

1. This appeal is about the interpretation of the Orchard House Lease.

2. Orchard House is a 22-story concrete apartment complex located at 647 Michigan Street, Victoria, British Columbia (the "**Building**").

Respondent's Appeal Book ("**AB**"), pg. 2 at para. 1.

3. The Respondent Westsea is the fee simple owner of the Building and the underlying lands.

AB, pg. 2 at para. 2.

4. The Building contains 211 apartment units, which are leased pursuant to various assignments of a 99-year lease agreement (the "**Lease**").

AB, pg. 2 at para. 4.

5. The Lease was entered into between Westsea and Capital Construction Supplies Ltd. on May 1, 1974. The Lease expires on December 31, 2073.

AB, pg. 3 at para. 7.

6. After entering into the Lease, Capital Construction Supplies Ltd. sold assignments *pro tanto* of its leasehold interest in individual suites to third parties. These leasehold interests have been variously sold to new third parties in the intervening period.

AB, pg. 3 at para. 8-9.

7. The Appellant is the owner of a leasehold interest in suite 805 (the "**Suite**"), which he purchased in 2011 as an assignee *pro tanto* of the Lease.

AB, pg. 2 at para. 5 and pg. 38-46.

8. The Lease outlines, in detail and in plain language, the obligations owed and the rights of both Westsea and the various leaseholders of the Building.

AB, pg. 12-37.

9. Pursuant to Article 5.03 of the Lease, Westsea has an obligation keep in good repair and condition the foundation, outer walls and the roofs. There is no exception for reasonable wear and tear. Article 5.03 states:

> 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.
>
> [emphasis added]

AB, pg. 17.

10. Article 4.03 of the Lease provides that leaseholders must repair and maintain the Suites, reasonable wear and tear excepted:

> 4.03 To repair and maintain each of the Suites including all doors, windows, walls, floors and ceilings thereof and all sinks, tubs and toilets 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.
>
> [emphasis added]

AB, pg. 15.

11. Pursuant to Article 7.01 of the Lease, Westsea pays the costs of its obligations in respect to Orchard House, and the amounts paid or payable by Westsea in doing so are defined as "Operating Expenses":

> 7.01 "Operating expenses" in this Lease means the total amount paid or payable by the Lessor in the performance of its covenants herein contained (save and except those contained in Article 5.11) and includes but without restricting the generality of the foregoing the amount paid or payable by the Lessor in connection with the maintenance, operation and repair of the Building, expenses in heating the common areas of the Building and each of the Suites therein (unless any of the Suites are equipped with their own individual and independent heating system in which even the cost shall be payable by the Lessee of any such suite) and providing hot and cold water, elevator maintenance, electricity, window cleaning, fire, casualty liability and other insurance, utilities, service and maintenance contracts with independent contractors or property managers, water rates and taxes, business licences, janitorial service, building maintenance service, resident manager's salary (if applicable) and legal and accounting charges and all

> other expenses paid or payable by the Lessor in connection with the Building, the common property therein or the Lands. "Operating Expenses" shall not include any amount directly chargeable by the Lessor to any Lessee or Lessees. The Lessor agrees to exercise prudent and reasonable discretion in incurring Operating Expenses, consistent with its duties hereunder.
>
> [emphasis added]

AB, pg. 19-20.

12. Pursuant to Article 7.02 of the Lease, Westsea prepares an estimate of the Operating Expenses for the Building for the calendar year based on prior years' experience. Under that same Article, the leaseholders are obligated to pay their proportionate share, as defined in Article 7.04, of estimated Operating Expenses on a monthly basis.

AB, pg. 20.

The Project

13. In 2013, Westsea engaged the professional engineering firm Read Jones Christoffersen Ltd. ("**RJC**") to review the condition of the Building.

AB, pg. 4 at para. 20.

14. In March of 2016, RJC prepared a Building Envelope Condition Assessment which addressed, among other things, the replacement of windows, sliding doors and bathroom exhaust fans at the Building (the "**BECA**").

AB, pg. 47-71.

15. Westsea provided the BECA to the Appellant by a letter dated March 31, 2016.

AB, pg. 72-73.

16. Following receipt of the BECA, Westsea decided to follow RJC's recommendation and engaged Farmer Construction Ltd. ("**Farmer**") to perform the work for the Project.

AB, pg. 4 at para. 26.

17. The contract price was $5,551,460, inclusive of GST (the "**Project Cost**").

AB, pg. 4 at para. 27.

18. While originally in issue, by the time of trial the Appellant withdrew his claims challenging the reasonableness of the Project Cost.

AB, pg. 4 at para. 28.

19. Westsea wrote to all leaseholders, including the Appellant, on July 5, 2016, notifying each of them of their respective share of the Project Cost and requiring payment by September 1, 2016. Westsea also offered a payment plan of 12 months to leaseholders who did not wish to or were unable to pay in a lump sum.

AB, pg. 74-75.

20. Farmer commenced the Project in July of 2016 and the Project was substantially completed in May of 2017.

AB, pg. 5 at paras. 30-31.

21. The work and the scope of the work performed in the course of the Project was not in issue at trial.

AB, pg. 5 at para. 32.

22. After receiving a demand by Westsea, the Appellant paid, under protest, $37,155.92 for his proportionate share of the Project Cost. Westsea accepted the Appellant's payment and does not allege the Appellant to be in default of payment.

AB, pg. 6-11.

The Action and Trial

23. On August 9, 2016, the Appellant commenced the underlying action in the British Columbia Supreme Court, Victoria Registry No. 163355 (the "**Action**"). The Action sought relief with respect to alleged breaches of the Lease by Westsea in relation to the Project.

Appeal Record ("**AR**"), pg. 1.

24. The Appellant amended the Notice of Civil Claim on October 14, 2016, December 12, 2017, and March 4, 2019, adding further claims and legal theories, amending the relief sought, and withdrawing some of his claims.

AR, pg. 1-34.

25. A trial of the Action was heard before Madam Justice Douglas in Victoria over ten days from June 3, 2019 to June 14, 2019.

26. By the time of trial, the Appellant had limited the relief sought in the Action to relieving the leaseholders from financial responsibility for the amount of the Project Cost attributable to the replacement of the sliding doors, windows and bathroom fans.

AR, pg. 14-16 at paras. 68-69, 73 and 74;
Respondent's Transcript Extract Book ("**TEB"**), pg. 2.

27. There were two central issues at trial: whether Westsea was obliged under the Lease to undertake the Project; and whether the Project Cost was properly charged to leaseholders as Operating Expenses pursuant to the Lease.

AR, pg. 61 at para. 4.

28. Westsea took the position that the plain language of the Lease, interpreted in light of commercial efficacy, established that it was obliged to undertake the Project and that the Project Cost was properly charged to leaseholders as Operating Expenses.

TEB, pg. 21-22.

29. While Westsea primarily relied on admitted facts and the Lease itself, it also took the position that the Appellant failed to lead sufficient or any evidence to support his claims and that his claims lacked a basis in law or in the Lease.

TEB, pg. 22.

30. The Appellant's position was, essentially, that leaseholders should have no financial responsibility to pay for the Project Cost associated with the replacement of the sliding doors, windows and bathroom fans. The Appellant advanced a variety of arguments in support of his interpretation of the Lease, with reference to various concepts such as betterment, capital expenditures, and piercing the corporate veil, among others.

The Reasons for Judgment

31. On October 1, 2019, the trial judge issued the reasons for judgment (the "**Reasons for Judgment**").

AR, pg. 58-101.

32. The trial judge found that outer wall repairs, in the context of Article 5.03 of the Lease, necessarily included the replacement of old and failing windows, sliding doors, and fans:

> [51] On all the evidence, I find repair of the outer walls, remediation of the water ingress problem, and ensuring the integrity of the Building envelope and structure were inextricably linked to the replacement of old and failing windows, sliding doors, and fans. I conclude complete outer wall repair would not have been possible without replacing failing windows, sliding doors, and fans at the same time. For those reasons, I conclude the proper interpretation of "outer wall" repairs in the context of Article 5.03 must include the glazing assemblies and exhaust fans to give effect to the parties' agreement in the Lease.

AR, pg. 71 at para. 51.

33. The trial judge held that Articles 4.03 and 5.03 of the Lease were not inconsistent, and that Article 5.03 required Westsea to repair or replace 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:

> [54] In my view, it is possible to construe the Lease as a whole and give effect to Articles 4.03 and 5.03. Article 4.03 requires leaseholders to repair and maintain windows in all instances, except those relating to reasonable wear and tear. 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.

AR, pg. 72 at para. 54.

34. The trial judge held that the Project was required by the reasonable wear and tear of old windows, sliding doors, and fans:

> [91] "Reasonable wear and tear" has been interpreted to mean the reasonable use of the premises by the tenant and the ordinary operation of natural forces: *Haskell v. Marlow*, [1928] 2 K.B. 45 at p. 59. On all the

> evidence, I conclude the Project was intended to replace old windows, sliding doors, and fans which had deteriorated due to the passage of time and which were no longer functioning as expected due to reasonable wear and tear. Thus, it fell within the exception in Article 4.03 and was not a leaseholder obligation.
>
> AR, pg. 82 at para. 91.

35. The trial judge held that Westsea was obliged to undertake the Project pursuant to Article 5.03 of the Lease:

> [109] On a plain reading of Article 5.03, considered in the context of the Lease as a whole and the relevant authorities including, notably, *JEKE*, and a review of all the evidence, I conclude as follows:
>
> (a) By 2016, the windows, sliding doors, and fans replaced during the Project had deteriorated due to reasonable wear and tear occasioned by the passage of time and were not functioning at the expected level;
>
> (b) The windows, doors and fans could not be repaired and required replacement;
>
> (c) Leaseholders were not obliged under the Lease to replace windows, sliding doors, or fans in their suites damaged due to reasonable wear and tear;
>
> (d) Requiring individual leaseholders to do so would be impractical, inefficient, and expensive, assuming that were possible and permitted by the City of Victoria;
>
> (e) Article 5.03 is reasonably construed in the context of the Lease as a whole as obliging Westsea, as lessor, to replace failing Building components, as contemplated by the Project; and
>
> (f) 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 into the Lease.
>
> [110] For these reasons, I conclude Westsea was required to undertake the Project pursuant to its lessor covenants in the Lease.
>
> AR, pg. 87-88 at paras. 109-110.

36. The trial judge held that the Project did not result in betterment of the Building:

> [118] I am satisfied on a review of all the evidence that the Project did not result in betterment. I conclude *Archibald*, while not binding on this Court, stands for the proposition a lessor cannot charge for improvements or alterations pursuant to a covenant to keep a building in good repair and condition. In this case, unlike *Archibald*, the evidence establishes that the Project returned the Building to its original condition. As the Project did not result in betterment, there is no basis to conclude it was inconsistent with the lessor obligation to "keep in good repair and condition" the Building outer walls and foundation under Article 5.03.
>
> AR, pg. 90 at para. 118.

37. The trial judge held that Westsea was entitled to charge the costs of the Project to the leaseholders as Operating Expenses pursuant to Article 7.01 of the Lease:

> [139] I find it unnecessary to apply the principles of *noscitur a sociis* or *ejusdem generis* so as to limit operating expenses pursuant to Article 7.01. On all the evidence, construing the Lease as a whole on its plain meaning with regard to the notion of commercial efficacy, I am satisfied Westsea was entitled to charge the Project costs to leaseholders as operating expenses, as defined in Article 7.01 of the Lease.
>
> AR, pg. 95 at para. 139.

38. The trial judge decided it was not necessary to consider whether the Project was a "capital cost":

> [152] I am not persuaded it is necessary for this Court to consider whether or not the Project was a capital cost. The Lease makes no provision for capital costs. I find the definition of operating expenses within Article 7.01 is sufficiently broad to encompass the Project whether or not, in a different context, it might have been considered a capital cost.
>
> AR, pg. 98 at para. 152.

39. The trial judge concluded:

> [164] My conclusions are summarised as follows:
>
> (a) The Lease, construed as a whole, is clear and unambiguous;
>
> (b) The Project was necessary to address a water ingress problem at the Building occasioned by reasonable wear and tear;
>
> (c) The Project outer wall repairs could not have been completed without replacing the existing windows, sliding doors, and fans;

(d) Westsea was required to undertake the Project pursuant to its lessor covenants in Article 5.03 of the Lease;

(e) Westsea was entitled to charge the plaintiff his proportionate share of the Project as operating expenses, as defined in Article 7.01 of the Lease;

(f) Westsea did not breach Article 7.02 of the Lease;

(g) The Project did not result in betterment;

(h) It is unnecessary for this Court to consider whether:

(i) The Project was a capital cost or could have been paid for using prepaid rent;

(ii) The Lease was a standard form contract;

(iii) The doctrine of *contra proferentum* applies; or

(iv) It is appropriate to pierce Westsea's corporate veil.

AR, pg. 100 at para. 164.

40. Based on the above, the trial judge dismissed the Action.

AR, pg. 101 at para. 165.

PART 2 – ISSUES ON APPEAL

41. The issues on appeal are:

(a) What is the appropriate standard of review;

(b) Whether the trial judge erred by finding Westsea was obligated under the Lease to replace old and worn windows, sliding doors and fans;

(c) Whether the trial judge erred by failing to find that Article 4.03 specifically exonerates lessees from liability for costs to replace old and worn windows and doors; and

(d) Whether the trial judge erred by finding that the definition of Operating Expenses is sufficiently broad to encompass the Project whether or not, in a different context, it might have been considered a capital cost.

PART 3 – ARGUMENT

A. The appropriate standard of review is palpable and overriding error

42. At the outset, Westsea submits that the appropriate standard of review on this Appeal is palpable and overriding error, rather than correctness, because it involves contractual issues of mixed fact and law and issues of fact. Westsea further submits that there are no appealable errors in the Reasons for Judgment on either standard of review.

43. In his Amended Factum, the Appellant argues that the issues presented by this Appeal should be reviewed on a standard of correctness. However, the Appellant fails to establish that a standard of correctness applies to the errors he asserts in this Appeal.

44. This is because the Appellant has not established that the Lease is a standard form contract or identified any extricable errors in law that justify the application of a standard of correctness to the trial judge's interpretation of the Lease. As such, Westsea submits that the appropriate standard of review is one of palpable and overriding error.

Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.,
2016 SCC 37 at para. 21 ["*Ledcor*"].

45. The Supreme Court of Canada has held that: "Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix."

Sattva Capital Corp. v. Creston Moly Corp.,
2014 SCC 53 at para. 50 ["*Sattva*"].

46. Accordingly, a trial court's interpretation of a contract is reviewable on a standard of palpable and overriding error.

Ledcor, supra at para. 21.

47. The Appellant also argues that the trial judge erred in her decision to exclude a number of non-Orchard House 99 year leases (the "**Unrelated Leases**") and in her consideration of other evidence presented at trial.

48. Westsea submits that these issues are properly characterized as questions of fact and questions of mixed fact and law, both of which are reviewable on a standard of palpable and overriding error.

Houston v. Kine, 2011 BCCA 358 at para. 14 ["*Houston*"];
Housen v. Nikolaisen, 2002 SCC 33 at paras. 10 and 31 ["*Housen*"].

49. "Palpable and overriding error is a highly deferential standard of review … 'Palpable' means an error that is obvious. 'Overriding' means an error that goes to the very core of the outcome of the case."

Benhaim v. St-Germain, 2016 SCC 48 at para. 38 ["*Benhaim*"],
citing *South Yukon Forest Corp. v. R.,* 2012 FCA 165.

i. <u>The Appellant has not established that the Lease is a standard form contract</u>

50. The Appellant argues that the Lease is a standard form contract, the interpretation of which he submits should attract a standard of correctness.

51. The trial judge, having found that the Lease was clear and unambiguous, expressly declined to consider whether the Lease was a standard form contract.

AR, pg. 100-101 at para. 164.

52. Further, the trial judge held that the Appellant failed to introduce any evidence regarding "whether the terms of the Lease were negotiated, whether money exchanged hands, or whether the original signatory of the Lease was the 'common directing mind' who had 'de facto control' of both signing entities".

AR, pg. 100-101 at para. 164.

53. Given that the trial judge declined to consider whether the Lease is a standard form contract and her finding that the Appellant failed to adduce evidence establishing that the Lease is a standard form contract, Westsea submits that the Appellant has failed to establish that the Lease is a standard form contract.

54. Westsea submits that the trial judge's interpretation of the Lease is entitled to deference, absent a palpable and overriding error.

Sattva, supra at para. 50.

55. Westsea further submits that the Appellant inappropriately seeks to rely on evidence which was not admitted at trial and which should not be admitted on this Appeal to establish that the Lease is a standard form contract.

ii. <u>The Appellant does not identify any palpable and overriding errors in the trial judge's decisions to exclude evidence of other lease agreements</u>

56. At paragraphs 29 and 39 of his Amended Factum, the Appellant asserts that the trial judge erred by excluding the Unrelated Leases.

57. Westsea submits that the trial judge's decision to exclude the Unrelated Leases was correct and notes that the Appellant fails to engage in legal analysis in support of his claim that the trial judge's decision to exclude the Unrelated Leases was in error.

58. Relevance is based on the material issues in dispute as defined by the pleadings.

Beazley v. Suzuki Motor Corp., 2010 BCSC 681 at paras. 15-16.

59. A trial judge's decision regarding the admissibility of evidence is entitled to considerable deference, provided that the decision was not based on an incorrect legal principle or the result of a palpable and overriding error.

Houston, supra at para. 14.

60. The deference afforded to a trial judge applies to their decisions regarding both the threshold admissibility of evidence and to the exercise of the residual discretion to exclude relevant evidence where its prejudicial effect outweighs its probative value.

R. v. Evans, 2019 ONCA 715 at paras. 107 and 194.

61. This deference is a product of the trial judge's unique position and ability to assess the evidence in the context of the trial. Absent any identifiable palpable and overriding errors, Westsea submits that the trial judge's decision not to admit evidence is entitled to considerable deference and was, in any event, correct.

R. v. B.(C.R.), [1990] 1 S.C.R. 717 at paras. 60 and 71.

62. The Appellant fails to identify any appealable error in the trial judge's factual assessment of the Unrelated Leases, or in her application of the relevant legal principles to the determination of their admissibility.

iii. The Unrelated Leases cannot be adduced as fresh evidence

63. At paragraph 29 of his Amended Factum, the Appellant suggests that he intends to apply for leave to introduce the Unrelated Leases as fresh evidence on appeal.

64. Westsea submits that the Unrelated Leases are not admissible as fresh evidence, as fresh evidence is evidence that was available at the time of trial but was not put before the trial court.

Ratnam v. Priyanthan, 2017 BCCA 343 at para. 11.

65. The Unrelated Leases were put before the trial judge, who exercised her discretion not to admit them on the basis that the probative value of such evidence was minimal relative to its cost in terms of trial time. As such, Westsea submits that the Appellant is not entitled to ask this Court to admit the Unrelated Leases as fresh evidence.

TEB, pg. 4.

iv. The Appellant has not identified any extricable error in law in the trial judge's interpretation of the Lease

66. The Appellant contends that there are extricable errors of law in the Reasons for Judgment.

67. "Courts should, however, exercise caution in identifying extricable questions of law because mixed questions, by definition, involve aspects of law." Courts must be vigilant in distinguishing between true extricable questions of law, such as the alteration of a legal test in the course of its application, and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome.

Teal Cedar Products Ltd. v. British Columbia, 2017 SCC 32 ["*Teal Cedar*"] at para 45.

68. Westsea respectfully submits that the Appellant has not identified any extricable errors of law in the trial judge's interpretation of the Lease.

69. Instead, Westsea submits that the Appellant attempts to frame as errors of law various instances in which the trial judge's correct application of the law to the interpretation of the Lease resulted in an outcome with which he disagrees. *Teal Cedar* shows that such instances are not extricable errors of law.

70. Westsea respectfully submits that the alleged errors identified in the Appellant's Amended Factum are properly characterized as questions of mixed fact and law.

Teal Cedar, supra at paras. 45 and 47; *Ledcor, supra* at para. 21.

B. The trial judge made no error in finding Westsea was obligated under the Lease to replace old and worn windows, sliding doors and fans

i. <u>The Reasons for Judgment are not based on an implied term</u>

71. Westsea respectfully submits that the Appellant fails to establish the myriad of appealable errors he asserts under this issue because his arguments are based on a misinterpretation of the Reasons for Judgment.

72. Specifically, the Appellant argues, at paragraphs 30 to 54 of his Amended Factum, that the trial judge found that Westsea was obligated to replace old and worn windows, sliding doors and fans under the Project based on an implied term in the Lease, and that the trial judge made various errors in reaching that finding.

73. However, the trial judge did not make any finding of an implied term in the Lease. Instead, the trial judge held that an express term of the Lease, Article 5.03, required Westsea to repair or replace failing windows and doors which have deteriorated due to reasonable wear and tear:

> [54] In my view, it is possible to construe the Lease as a whole and give effect to Articles 4.03 and 5.03. Article 4.03 requires leaseholders to repair and maintain windows in all instances, except those relating to reasonable wear and tear. 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.
>
> AR, pg. 72 at para. 54.

74. The Appellant's arguments on this issue must fail because the trial judge's finding that Westsea is obligated to replace old and worn windows and doors is not based on an implied term, as the errors alleged by the Appellant assume.

75. For example, the Appellant relies on *Moulton Contracting Ltd. v British Columbia*, 2015 BCCA 89 ["*Moulton*"] to argue that the trial judge erred in failing to consider the intentions of the actual parties to the Lease.

76. *Moulton* clearly addresses the requirements in law for finding implied terms in a contract based on commercial efficacy:

> In *M.J.B. Enterprises Ltd. v. Defence Construction* (1951) Ltd., 1999 CanLII 677 (SCC), [1999] 1 S.C.R. 619 at para. 27, cited by the trial judge in support of the implied terms, Justice Iacobucci for the Supreme Court summarized the three circumstances (identified in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, 1987 CanLII 55 (SCC), [1987] 1 S.C.R. 711 at 774-776) where terms may be implied in a contract:
>
> > (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed" [citation omitted].
>
> *Moulton, supra* at para. 53.

77. In her reasons, the trial judge was clear that her references to commercial or business efficacy were not for the purpose of implying a term in the Lease but to provide general guidance regarding contractual interpretation:

> [30] The overarching goal of contractual interpretation is to give effect to the parties' intentions at the time the contract was formed. Courts have

> repeatedly emphasized that the purpose of contractual interpretation is to give practical effect or, in commercial settings, to give commercial or business efficacy to the parties' agreement. The purpose of interpretation is not to rewrite the parties' contract or to relieve one of them from the consequences of an improvident contract: *Staburn Westbank Holdings Ltd. v. Home Depot of Canada Inc.*, 2015 BCSC 418 at para. 7, aff'd 2015 BCCA 510.

AR, pg. 66 at para. 30.

78. In *Staburn Westbank Holdings Ltd. v. Home Depot of Canada Inc.*, 2015 BCSC 418 ["*Staburn*"], the following summary of the law from *Halsbury's Laws of Canada*, 2013 release was adopted:

> Courts have repeatedly emphasized that the purpose of contractual interpretation is to give practical effect, or in commercial settings, to give commercial or business efficacy, to the parties' agreement. Consequently, any interpretation that results in absurd or unworkable consequences is to be avoided at all cost. But the purpose of interpretation should not be to rewrite the parties' contract or relieve one of them from the consequences of an improvident contract.

Staburn, supra at para. 7.

79. At no point did the trial judge engage in an analysis of whether there were implied terms in the Lease. Instead, her reliance on notions of commercial or business efficacy was in service to construing the Lease as a whole on its plain meaning.

AR, pg. 66, 72, 87-88 and 95 at paras. 30, 54, 109 and 139.

80. Similarly, the Appellant's arguments that the trial judge erred in implying a term in conflict with an express term, or implying a covenant which destroys the purpose of the wear and tear exception, or implying a covenant based on an exception in a tenant's covenant, must fail because the trial judge's reasons do not rely on the implication of a term into the Lease.

ii. <u>The Appellant alleges errors based on other misinterpretations of the Reasons for Judgment</u>

81. The Appellant also argues that the trial judge erred in applying a legal rule against commercial absurdity because that rule should only be engaged where an ambiguity

exists and where a contract is negotiated. These arguments similarly rest on the Appellant's misinterpretation of the trial judge's Reasons for Judgment.

82. The Appellant contends that because the trial judge found that the Lease, construed as a whole, was clear and unambiguous, it was not open to her to engage the rule against absurdity in interpreting the Lease, relying on *Maxam Opportunities Fund Limited Partnership v. 729171 Alberta Inc.*, 2015 BCSC 271 at para. 125 ["*Maxam*"].

83. The Supreme Court of Canada recently outlined the crucial role that commercial reasonableness plays in interpreting a contract:

> [144] Given, then, the choice between an interpretation that allows the contract to function in furtherance of its commercial purpose and one that does not, it is generally the former interpretation that should prevail (see *Humphries*, at para. 15). While a party cannot avoid its contractual obligations simply because the bargain that they entered into was undesirable or unusual, commercially absurd interpretations should be avoided (see *Canadian Contractual Interpretation Law*, at pp. 61-63). As this Court said in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 61, "[i]f a given construction of the contract would lead to an absurd result, the assumption is that this result could not have been intended by rational commercial actors in making their bargain, absent some explanation to the contrary". See also *City of Toronto v. W.H. Hotel Ltd.*, [1966] S.C.R. 434, at p. 440.
>
> *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60 at para. 144 ["*Resolute*"].

84. In this case, the trial judge correctly relied on *Toronto (City) v. W.H. Hotel Ltd.*, [1966] S.C.R. 434 ["*Toronto (City)*"] in holding that courts will only deviate from the plain meaning of words if the literal construction of a contract leads to an absurdity which reasonable people cannot be supposed to have contemplated in the circumstances.

AR, pg. 66 at para. 32.

85. Westsea submits that the Appellant once again mischaracterizes the Reasons for Judgment, this time based on the trial judge's references to the absurd results to which his submissions would lead.

86. The Appellant's argument puts the proverbial cart before the horse. The Appellant argued at trial that the Lease was ambiguous in several ways, and the trial judge correctly applied the law to find that the Appellant's preferred interpretation of the Lease, which relied on the ambiguities he proposed, would lead to absurd results.

AR, pg. 72-73 at para. 55.

87. For example, the Appellant argued at trial that the Lease was ambiguous, and that any ambiguity should be resolved in favour of the leaseholders per *contra proferentum*.

TEB, pg. 20.

88. The Appellant also argued at trial that under the Lease neither Westsea nor the leaseholders were obligated to undertake the repair or replacement of Building components that had deteriorated due to reasonable wear and tear. If the Appellant's argument were accepted, the Lease would clearly be ambiguous on this issue.

TEB, pg. 18; AR, pg. 87 at para. 108.

89. In Westsea's submission, the trial judge's finding that the Lease was clear and unambiguous is the correct result of construing the Lease as a whole in light of commercial efficacy.

AR, pg. 87-88 at paras. 108-109.

90. Westsea further submits that the trial judge's reasoning is consistent with *Maxam* and the principle therein that commercial contracts "are to be interpreted in accordance with sound commercial principles and good business sense which more likely gives effect to the intention of the parties."

Maxam, *supra* at para. 88.

91. The Appellant also argues at paragraphs 37-39 of his Amended Factum that the rule against absurdity does not apply even if there is ambiguity in the Lease because it is only applicable where a contract is negotiated, citing *Kentucky Fried Chicken v. Scott's Foods* (1998), 114 OAC 357 (ONCA) at paragraph 27, which in turn was citing *Toronto (City)*.

92. The Appellant's argument confuses a sufficient condition for a necessary one. As the Supreme Court of Canada held in *Resolute*, the role of commercial reasonableness and avoiding absurd interpretations is "simply a corollary of the object of discerning the parties' intentions: when interpreting commercial contracts, courts seek to reach a commercially sensible interpretation, since doing so is more likely than not to give effect to the intention of the parties". Courts safely assume that those who enter into commercial contracts intend for their contracts to "work".

Resolute, *supra* at para. 142.

93. Westsea respectfully submits that the Lease is a commercial contract. Accordingly, the trial judge made no error in interpreting the Lease to reach a commercially sensible interpretation.

94. Further, the Appellant argues at paragraphs 52 to 54 of his Amended Factum that the trial judge erred by implying a covenant into the Lease without considering statute and common law that was not plead or argued before her. Again, Westsea respectfully submits that what the Appellant describes as implying a covenant is simply the correct application of the law of contractual interpretation to the express terms of the Lease, where the purpose is to give commercial efficacy to the Lease and avoid at all costs absurd or unworkable consequences, as set out in *Staburn*, *Maxam* and *Resolute*.

C. The trial judge made no error in interpreting Article 4.03

i. A decision not to adopt the Appellant's submissions is not an appealable error

95. The Appellant reiterates arguments in this Appeal that were properly considered by the trial judge without identifying an appealable error.

96. For example, the Appellant argues that the trial judge erred in not accepting his arguments at trial that because Article 4.03 precedes Article 5.03 and the terms "windows" and "doors" are more specific than "outer walls", the maintenance of "outer walls" does not include windows or sliding doors.

97. The Appellant relies on *BG Checo v. BC Hydro Power Authority,* [1993] 1 S.C.R. 12 ["*BG Checo*"] and *Forbes v. Git*, [1921] 61 D.L.R. 353, [1922] 1 W.W.R. 250 (UK JCPC) ["*Forbes*"] to reiterate this argument from trial.

98. The Appellant contends that the trial judge misinterpreted *Forbes* in her interpretation of the Lease at paragraph 78 of his Amended Factum.

99. Westsea respectfully submits that the trial judge made no error in her application of *Forbes* and *BG Checo* to the interpretation of the Lease, as she correctly found that the Lease did not contain inconsistencies or conflicts which required resolution in the manner submitted by the Appellant.

AR, pg. 71-72 at paras. 52-54.

100. Moreover, the Appellant again incorrectly characterizes the Reasons for Judgment as relying on an implied term in the Lease, at paragraph 80 of his Amended Factum, when none of the trial judge's conclusions are based on the implication of any terms into the Lease. The Appellant further argues that this implied covenant obliterates the effect of the wear and tear exception.

101. But the trial judge clearly engaged with the Appellant's arguments on this point in the Reasons for Judgment and noted that, on all of the evidence, the windows, sliding doors, and fans replaced during the Project fell within the reasonable wear and tear exception of Article 4.03.

AR, pg. 75 at para. 63.

102. What the trial judge did not accept were the Appellant's submissions, which he reiterates on this Appeal, that because those costs were incurred pursuant to the reasonable wear and tear exception, the leaseholders were not liable to pay their proportionate share of those costs as Operating Expenses under the Lease.

103. Most critically, at trial the Appellant failed to address the issue that if leaseholders are not obligated to undertake some or all of the Project, then logically that obligation must rest with Westsea, and all costs incurred by Westsea in the performance of its covenants under the Lease are recoverable as Operating Expenses.

104. Instead, the Appellant argues at paragraph 68 of his Amended Factum that "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."

105. In Westsea's respectful submission, this is not an appealable error on any standard of review.

106. In support of this argument, the Appellant cites case law at paragraphs 63 to 69 of his Amended Factum involving different leases and factual contexts where a tenant benefitted from an exculpatory clause. Reliance on these cases continues the Appellant's failure to engage with the inclusion of Article 7.01 in the Lease which expressly defines Operating Expenses as "the total amount paid or payable by the Lessor in the performance of its covenants herein contained".

107. An appeal is not an opportunity to retry the case. An appellant bears the burden of establishing an appealable error. A failure to do so is fatal to an appeal.

King v. Borserio, 2018 BCCA 308 at paras. 50-52.

ii. <u>The trial judge properly weighed the evidence regarding the windows' role in the Building's structure</u>

108. Additionally, the Appellant claims that the trial judge ignored evidence that the windows are not structural and ought to have found that the windows and doors are factually distinct from the walls and the Building.

109. An appeal is not a retrial and the scope for appellate review of a trial judge's findings of fact is limited to palpable and overriding errors. It was within the province of the trial judge to assess the evidence and give it the weight she considered it deserved.

Fumich v. Babic, 2005 BCCA 552 at paras. 30-31.

110. The Appellant fails to identify palpable and overriding errors in the trial judge's evaluation of the evidence. Instead, he alleges at paragraph 89 of his Amended Factum

that the trial judge erred because she failed to properly weigh the evidence of various factors of windows that distinguish them from walls.

111. The trial judge's Reasons for Judgment clearly set out the evidence at trial, her factual findings based on that evidence, and her legal conclusions regarding the interpretation of the Lease. In Westsea's submission, those findings are both correct and entitled to deference.

AR, pg. 87-88 at para. 109.

112. The evidence presented at trial consistently demonstrated that the windows at Orchard House are a part of the building envelope system. It was Pierre Gallant's evidence that the windows, together with the balcony doors, comprise one of the five major constituent parts of the building envelope system of Orchard House.

AR, pg. 69-70 at para. 46; AB, pg. 78.

113. Similarly, Sameer Hasham testified that the windows at Orchard House form part of the building's enclosure – the "shell of the building" that provides "separation from the interior space and the exterior environment".

AR, pg. 68 at para. 42; TEB, pg. 15-16.

114. The evidence further demonstrated that the failure of the windows put the integrity of the wall assemblies at risk. Both Mr. Gallant and Mr. Hasham gave evidence that moisture ingress from failing window assemblies threatened to damage the concrete and brick of the surrounding walls, and this evidence was accepted by the trial judge.

AB, pg. 80; TEB, pg. 13; AR, pg. 69-70 at para 46.

115. The trial judge accepted the evidence of Mr. Gallant and Mr. Hasham to find that glazing assemblies are integral parts of the Building envelope and exterior wall systems.

AR, pg. 71 at para. 50.

116. The evidence at trial from Mr. Hasham, Mr. Gallant and Perry Caris also established that moisture ingress had been observed in and around the window assemblies at Orchard House.

TEB, pg. 14 (Mr. Hasham); TEB, pg. 10-11 (Mr. Caris); AB, pg. 80.

117. Westsea respectfully submits that the evidence presented at trial clearly shows a structural relationship between the window assemblies and the outer walls at Orchard House because the failure of the window assemblies would have caused moisture ingress into the surrounding wall, thereby causing damage to the concrete, brick and rebar of the walls, which in turn would have led to structural weakness, delamination, and falling hazards.

118. The Appellant led no evidence to the contrary on this issue at trial.

119. The trial judge properly found that "repair of the outer walls, remediation of the water ingress problem, and ensuring the integrity of the Building envelope and structure were inextricably linked to the replacement of old and failing windows, sliding doors and fans" and concluded that "complete outer wall repair would not have been possible without replacing failing windows, sliding doors, and fans at the same time".

AR, pg. 71 at para. 51.

120. The Appellant's argument that the trial judge erred in ignoring evidence that "the windows are not structural" does not identify any palpable or overriding error in her review of the evidence.

121. The degree to which the windows are physically integrated with or affixed to the walls did not determine the trial judge's conclusions. The evidence establishes that the deteriorating condition of the windows posed a significant risk to the integrity of the Building's walls.

122. The evidence that the Appellant alleges the trial judge erroneously ignored – including Mr. Hasham's evidence that the windows do not physically support the weight of the building and Mr. Caris' evidence that the windows are installed in a deflexion track – does not affect her findings regarding the consequences of moisture ingress from the deteriorating windows. Though the Appellant may disagree with how the trial judge weighed the evidence, he has failed to identify any palpable and overriding error.

D. The trial judge made no error in finding the definition of Operating Expenses is sufficiently broad to encompass the Project

i. <u>The trial judge properly distinguished the Appellant's authorities</u>

123. The Appellant argues that the trial judge erred in finding that Operating Expenses are defined broadly enough to include capital costs:

> [152] I am not persuaded it is necessary for this Court to consider whether or not the Project was a capital cost. The Lease makes no provision for capital costs. I find the definition of operating expenses within Article 7.01 is sufficiently broad to encompass the Project whether or not, in a different context, it might have been considered a capital cost.

AR, pg. 98 at para. 152.

124. The Appellant seeks to rely on this Court's decision in *Galt v. Frank Waterhouse & Co. of Canada Ltd.*, [1944] 2 D.L.R. 158 (BCCA) ["*Galt*"], the Ontario Court of Appeal's decision in *Parsons Precast Inc. v. Sbrissa*, 2013 ONCA 558 ["*Parsons*"], and the Supreme Court of Canada's decision in *Minister of National Revenue v. Haddon Hall Realty Inc.*, [1962] SCR 109 ["*Haddon*"] to argue that the trial judge's error lies in not recognizing that unless "costs of a capital nature" are expressly included in the definition of Operating Expenses, then such costs are excluded from that definition.

125. Westsea respectfully submits that, as before, there is no appealable error here on any standard of review, only a (correct) refusal by the trial judge to accept the Appellant's submissions at trial.

126. Westsea further submits that the Appellant has failed to account for the significant factual distinctions driving differing outcomes in the cases he cites and that were considered by the trial judge.

127. For example, the Appellant cites an excerpt from *Parsons Precast Inc. v. Sbrissa*, 2013 ONCA 558 ["*Parsons*"] to support his argument that operating expenses do not include "costs of a capital nature". A fuller excerpt from that decision is instructive:

> We do not accept this submission. 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 and that, as he put it, "the case law is not 'black and white' in this area". Against this backdrop, we can see no error in the application judge's interpretation of the lease in this case, nor in his use of common dictionary definitions for the word 'maintenance' to assist his analysis. In the end, we agree with his analysis anchored in an interpretation of the words of the lease in the context of the reasonable expectations of the parties.
>
> [emphasis added]

Parsons, supra at para. 3.

128. The Ontario Superior Court of Justice's decision in *Parsons* on which the Appellant relies and which was affirmed by the Ontario Court of Appeal in the case cited above turns on different contractual language and a distinct factual context.

129. In *Parsons*, the Court considered whether the costs of a parking lot repaving were the responsibility of the tenants or the landlord of a 20-year commercial lease, and held that the repair provisions of the lease excepted reasonable wear and tear, that the repaving fell within that exception, and that therefore the repaving did not fall under the maintenance or repair provisions of the lease.

Parsons, supra.

130. The trial judge correctly distinguished *Parsons* on its facts from this case:

> Parsons is distinguishable on its facts from this case. The lease in Parsons contained no lessor obligation to keep the leased property in good repair and condition. The provision in the Parsons lease relating to operating expenses was not similar to Article 7.01, and did not oblige tenants to pay for the landlord's costs in performing its covenants under the lease. Most significantly, Parsons involved a 20-year commercial lease with only 14 months left in its term when the parking lot was replaced. The Court in Parsons found that "[t]o require this tenant to be responsible for its proportionate share of the entire repaving cost, when the paving job has a life expectancy of 20 years, and the tenant has only 14 months left on its lease is unfair and unjust". By contrast, the Lease is for 99 years. On the evidence, the only parties who will benefit from the Project are the leaseholders.

AR, pg. 85 at para. 102.

131. The Appellant also relies on *Galt* to argue that a contractual designation of Operating Expenses on its face does not include costs of a capital nature at paragraph 102 of his Amended Factum.

132. Westsea submits that *Galt* is similarly distinguishable from the facts of this case, as *Galt* involved a lease for a ship, rather than real property, and turned on the definition of the appropriate meaning of the expression "cost of annual overhaul", which was included in "operating expenses," as used in the written agreement. That provision was not similar to Article 7.01 and did not oblige the lessee to pay for the lessor's costs in performing its covenants under the lease, as the Lease does.

Galt, supra.

133. Similarly, *Haddon* is distinguishable from the matters at issue in this case. In *Haddon*, the Supreme Court of Canada was considering whether an expenditure was an income expense or capital outlay pursuant to specific provisions of the *Income Tax Act*.

Haddon, supra at 110-111

134. Westsea further submits that the Appellant's arguments on this issue on appeal do not identify an appealable error in the Reasons for Judgment, but simply resubmit his interpretations of cases which were properly considered and rejected by the trial judge.

135. Further, the Appellant argues at paragraphs 109 and 114 of his Amended Factum that the trial judge erred in suggesting or implying the costs of replacing the sliding doors and windows were not of a capital nature because those components will have to be replaced again before the end of the Lease.

136. Westsea respectfully submits that this is another mischaracterization of the Reasons for Judgment, as the trial judge expressly decided that it was not necessary to determine whether the Project was a capital cost.

AR, pg. 98 at para. 152.

137. The Appellant further argues at paragraph 115 of his Amended Factum that the trial judge erred in fact-and-law by holding that on the evidence, the only parties who will benefit from the Project are the leaseholders.

138. Westsea respectfully submits that what the Appellant characterizes as an error in fact-and-law is simply a reasonable inference from the evidence that he disagrees with.

AR, pg. 85 at para 102

139. The trial judge properly addressed the Appellant's argument that the Project potentially extended the useful and economic life of the Building. The trial judge correctly held that this argument was not supported by the evidence, which established that the windows, sliding doors, and fans will require replacement again before the end of the Lease's term.

AR, pg. 97 at para. 148.

ii. <u>The trial judge properly relied on binding Court of Appeal authority</u>

140. Westsea respectfully submits that the trial judge correctly applied the binding authority of the Court of Appeal in *JEKE Enterprises v. Northmont Properties Ltd.*, 2017 BCCA 38 ["*JEKE*"], and that there is no appealable error in the Reasons for Judgment that would have affected the outcome of the trial despite the Appellant's varied arguments.

141. Westsea does acknowledge that the Appellant has identified two minor issues in the Reasons for Judgment, but says that neither amounts to an appealable error:

(a) First, that the trial judge lists "management fees" as part of the Lease and argues that this is an error because the term "management fees" is not contained in the Lease; and

(b) Second, that the trial judge misquoted the definition of Operating Expenses in the Lease as including "any legal charges" instead of "and legal charges".

142. In Westsea's submission, the first issue is not an appealable error as the trial judge was simply paraphrasing Article 7.01, which does include explicit references to "service

and maintenance contracts with independent contractors or property managers" and "resident manager’s salary (if applicable)".

AB, pg. 19-20.

143. Westsea further submits that the second issue is merely an insignificant typographical error which has no impact on the trial judge’s reasoning.

144. The trial judge properly cited *JEKE* in holding that contracting parties are free to define terms in a manner other than ordinary usage, and where they have clearly done so a court need go no further than this unambiguous language in its interpretation.

AR, pg. 66 at para. 34.

145. Westsea submits that *JEKE* is binding authority which the trial judge properly followed.

146. The Appellant contends that the trial judge erred in not considering his argument that *ejusdem generis* applied to restrict the definition of Operating Expenses to common, repetitive or highly predictable expenses at paragraph 115 of his Amended Factum.

147. This argument was considered and properly rejected. The trial judge, citing *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029 ["*National Bank*"], correctly held that the *ejusdem generis* does not apply where a general term is followed by the word "including" and a list of specific terms because that is a term of extension which enlarges, rather than restricts, the meaning of the preceding words.

AR, pg. 93-94 at paras. 129-133.

148. The Appellant argues that *ejusdem generis* is not ousted because of a tortured analysis of the separate lists in Articles 5.03 and 7.01 and the relationships between them, but this argument is doubly flawed.

149. First, the *ejusdem generis* rule applies when one finds a clause that sets out a list of specific words followed by a general term. Here, the Appellant applies the rule across separate clauses in separate Articles of the Lease.

National Bank, supra at 1040.

150. Second, the *ejusdem generis* rule is a particular application of the more general rule of interpretation, *noscitur a sociis*, also known as the associated words rule.

National Bank, supra at 1078.

151. As this Court held in *JEKE*, the associated words rule does not operate where the list is preceded by "including, without limiting the generality of the foregoing, the following", as is provided by Article 7.01 of the Lease.

JEKE at para. 63.

152. Accordingly, Westsea submits that neither *ejusdem generis* nor *noscitur a sociis* can apply based on the express terms of the Lease, and the trial judge made no error.

153. Moreover, the trial judge did not simply find that the rules were ousted by the terms of the Lease, but engaged further with the Appellant's arguments and correctly held that even if not ousted by the plain language of Article 7.01, those rules did not apply in the way argued by the Appellant.

AR, pg. 93 at para. 130.

154. Specifically, the trial judge relied on this Court's authority in *JEKE,* reviewed the itemized list in Article 7.01 of the Lease, and found that there was no common feature which would limit the meaning of Operating Expenses through the operation of any form of the associated words rule.

AR, pg. 94 at paras. 133-134.

155. The Appellant argues that the trial judge erred by relying on the binding authority of this Court because of distinctions in the contractual language at issue in *JEKE* and in the Lease. Westsea respectfully submits that these distinctions are not relevant to the analysis of whether the associated words rule can apply based on the clear authority of this Court in *JEKE*, and that the trial judge made no error in finding there was no common feature in the list of types of Operating Expenses which would exclude the Project Cost.

iii. The trial judge properly declined to consider arguments regarding rent

156. Westsea admitted at trial that rent was pre-paid at the start of the Lease term and the trial judge admitted evidence of Lease assignments showing purchase prices.

AR, pg. 100 at para. 161; TEB, pg. 6-8.

157. The trial judge weighed that evidence based on its limited relevance to the material issues at trial, and declined to consider the Appellant's argument that pre-paid rent should have been invested and/or used for a replacement reserve because there was no basis for it in the Appellant's pleadings and it was unsupported by the evidence.

AR, pg. 100 at paras. 161-162.

158. Westsea respectfully submits that there is no error in the trial judge's reasoning in declining to consider the Appellant's arguments about pre-paid rent in the absence of support for such arguments in the Appellant's pleadings or the evidence.

159. Ultimately, the Appellant has failed to establish any appealable error on the part of the trial judge and, through this Appeal, seeks to re-argue his submissions from the trial regarding the interpretation of the Lease before this Court.

PART 4 – NATURE OF ORDER SOUGHT

160. Westsea respectfully requests that this Appeal be dismissed.

161. Westsea is electing to pursue its contractual remedies for costs and so seeks no order as to costs.

All of which is respectfully submitted.

Dated at the City of Vancouver, Province of British Columbia, this 26th day of March 2020.

_____

Mark C. Stacey and Claire S. Immega
Counsel for the Respondent, Westsea Construction Ltd.

LIST OF AUTHORITIES

Authority	**Page #**	**Paragraph #**
Ratnam v. Priyanthan, 2017 BCCA 343	13	64
Resolute FP Canada Inc. v. Ontario (Attorney General), 2019 SCC 60	17-19	83, 92, 94
Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53	10-11	45, 54
Staburn Westbank Holdings Ltd. v. Home Depot of Canada Inc., 2015 BCSC 418	16, 19	78, 94
Teal Cedar Products Ltd. v. British Columbia, 2017 SCC 32	13-14	67, 69-70
Toronto (City) v. W.H. Hotel Ltd., [1966] S.C.R. 434 (in line citation)	17-18	83-84, 91