

REGISTRY FILE NUMBER	18 0132
REGISTRY LOCATION	Victoria

REPLY

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

- To a Claim
 To a Counterclaim

REPLY

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

NAME GERALD JOHN ROTERING **CLAIMANT(S)**
ADDRESS 807 Orchard House tower 647 Michigan Street

CITY, TOWN, MUNICIPALITY Victoria **PROV.** British Columbia **POSTAL CODE** V8V 1S9 **TEL. #** 778-679-5855

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

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

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

DISPUTE:

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

- a See attached Schedule "A"
- b
- c
- d
- e



AGREEMENT WITH THE CLAIM: I (NAME) _____ agree to pay \$ _____

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

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

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

WHAT HAPPENED?

Briefly tell what has led to your counterclaim.

HOW MUCH?

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

a	\$	
b	\$	
c	\$	

Copy of REPLY and _____
 Mailed to Claimant

10 APR 18 1803505 ROPR
 12014 C18-0132

50.00 + FILING FEES \$ 50.00

Date: April 18 Initials CRB

= TOTAL CLAIMED \$ _____

TOTAL \$ 0.00

court copy

court copy

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

(Small Claims)

BETWEEN:

GERALD JOHN ROTERING

CLAIMANT

AND:

WESTSEA CONSTRUCTION LTD.

DEFENDANTS

SCHEDULE "A" TO REPLY

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

Part 1: RESPONSE TO NOTICE OF CLAIM FACTS

Division 1 – Defendant's Response to Facts

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

Division 2 – Additional Facts

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

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

ARTICLE 4 – LESSEE'S COVENANTS

[...]

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

[...]

ARTICLE 5 – LESSOR'S COVENANTS

[...]

5.03 To keep in good repair and condition the foundations, outer walls, roofs, spouts and gutters of the Building, all of the common areas therein and the plumbing, sewage, and electrical systems therein.

[...]

ARTICLE 7 – OPERATING EXPENSES

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

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

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

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

[...]

[underlining added]

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

Annual Operating Expenses

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

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

The Windows and Doors Project

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

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

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

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

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

[italics in original, underlining added]

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

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

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

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

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

24. In the BECA, RJC made a number of conclusions and recommendations, including as follows:

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

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

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

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

[...]" [Emphasis added]

25. In the BECA, RJC recommended *inter alia* that Westsea:
 - a. install new bathroom exhaust fans to limit interior humidity;
 - b. repair and maintain brick wall assemblies to address leakage and deterioration to reinstate the intended level of performance; and
 - c. replace the north and south elevation suite windows and sliding doors with new situationally appropriate, thermally broken IGU assemblies.
26. RJC estimates that the replacement glazing assemblies (windows and sliding glass doors) will have a service life of 30-35+ years, meaning that the glazing assemblies will likely reach the end of their service life by approximately 2046-2051 (or slightly later).
27. The BECA also provided an opinion of probable cost to perform the recommended steps, and stated, in part:

"The following Opinions of Probable Cost (OPCs) are presented by RJC to provide an expectation as to the general magnitude of the costs required to complete the recommendations described above."

28. The total opinion of probable cost for the recommended repairs was \$3,645,000.
29. Following receipt of the BECA, Westsea decided to undertake the building envelope remediation steps recommended by RJC.
30. Westsea sent the BECA to all leaseholders by letter dated March 29, 2016.
31. Westsea engaged RJC to issue a tender on its behalf for the required work.
32. Westsea received a number of bids; however, all the bids were above the budget set out in the tender documents. As a result, Westsea rejected all of the tender bids and instructed RJC to cancel the tender process and to enter into negotiations with the lowest bidder,

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

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

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

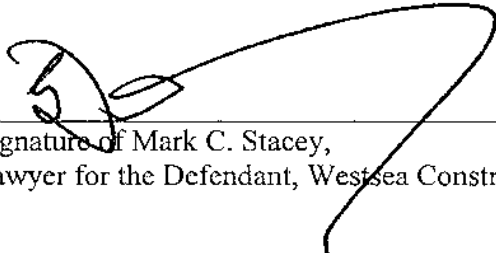
Part 2: RESPONSE TO RELIEF SOUGHT

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

Part 3: LEGAL BASIS

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

Dated: April 9, 2018



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