

Trenchard v. Westsea Construction Ltd., 2017 BCCA 352 (CanLII)

Date: 2017-10-06

File CA44007; 2173

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Trenchard v. Westsea Construction Ltd.*,
2017 BCCA 352

Date: 20171006
Docket: CA44007

Between:

Hugh Alexander Trenchard

Respondent
(Petitioner)

And

Westsea Construction Ltd.

Appellant
(Respondent)

Before: The Honourable Mr. Justice Frankel
The Honourable Madam Justice Bennett
The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated September 23, 2016 (*Trenchard v. Westsea Construction Ltd.*, 2016 BCSC 1752 (CanLII), Victoria Registry 14-2941).

Oral Reasons for Judgment

Counsel for the Appellant:

M.C. Stacey
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Respondent Appearing In Person: → H.A. Trenchard

Place and Date of Hearing: → Vancouver, British Columbia
October 6, 2017

Place and Date of Judgment: → Vancouver, British Columbia
October 6, 2017

Summary:

*The appellant landlord, Westsea, appealed the order below interpreting its lease as not allowing it to charge back legal fees and expenses incurred in resisting a petition brought by an individual leaseholder seeking disclosure of operating expenses. The disclosure issues were resolved after a four-day hearing. The issue of costs was argued. Westsea elected to seek indemnification of its costs under the lease; however notice of this election was not given to other leaseholders. Held: appeal allowed in part. The issue concerning the interpretation of the lease was premature. The proper procedure to follow was that set out in *P & T Shopping Centre Holdings Ltd. v. Cineplex Odeon Corp.*, 1995 CanLII 448 (BC CA), [1995] 3 B.C.L.R. (3d) 309, 37 C.P.C. (3d) 294 (C.A.). As it was wrong for Westsea to have urged the court to decide a premature issue, resulting in it incurring additional legal expenses here and in the court below, and the issue was decided in this court on a matter not raised by the appellant, the appeal was allowed but without costs.*

[1] ^{Judge} **SAVAGE J.A.:** Westsea Construction Ltd. ("Westsea") appeals from the order of Mr. Justice MacKenzie that Westsea's legal costs were not "Operating Expenses" under Article 7 of its lease (the "Lease") with Mr. Trenchard. It seeks an order setting the order aside and declaring that "legal charges" in Article 7.01 includes its legal costs incurred as a result of the petition and appeal.

[2] Mr. Trenchard, who was self-represented here and in the court below, owns a leasehold interest in a unit of the Orchard House apartment building in Victoria, B.C. (the "Property"). Under the Lease, Westsea is responsible for certain covenants relating to the maintenance and management of the Property. It may charge the amounts it pays to perform these covenants to the leaseholders as "Operating Expenses", but must exercise "prudent and reasonable discretion" in incurring them and must submit accounting annually.

[3] Mr. Trenchard was not satisfied with the information Westsea provided supporting the operating expenses it incurred, and filed a petition seeking, *inter alia*, disclosure of documents. He also asked the court to read into the agreement an "implied term of transparency" requiring Westsea to share such information. On the fourth day of the hearing, the parties reached an agreement regarding the requested disclosure and the petition was dismissed by consent. The parties made submissions on costs.

[4] Westsea elected to rely on the lease agreement in its attempt to recover all of the costs it incurred resisting the petition, rather than seeking tariff costs under Rule 14-1 (RFJ, para. 10). It argued it had incurred legal fees and expenses responding to the petition, which were "Operating Expenses" under the lease, and that it could charge those legal fees and expenses in their entirety back to the leaseholders. The judge found that Westsea was not entitled to charge the legal fees and expenses incurred back to the leaseholders under Article 7 of the Lease.

[5] In the course of his reasons the Chambers judge paused "to note that because there is no evidence of a specific demand for payment of costs and a corresponding refusal by the unit holders to do so, one might conclude that Westsea's application is premature" (RFJ, para. 12). This observation was made in reference to the decision of *B.U.K. Investments Ltd. v. Pappas*, 2002 BCSC 161 (CanLII), citing this Court in *P & T Shopping Centre Holdings Ltd. v. Cineplex Odeon Corp.*, 1995 CanLII 448 (BC CA), [1995] 3 B.C.L.R. (3d) 309, 37 C.P.C. (3d) 294. However, as both parties made submissions on the issue, he proceeded to determine the lease interpretation issue against Westsea, concluding that legal fees and expenses incurred in response to the petition were not "Operating Expenses" under the Lease.

3 [6] The primary issue on appeal is whether the judge erred by holding that the legal fees and expenses incurred as a result of the petition are recoverable as Operating Expenses under Article 7.01 of the Lease. I say the "primary issue" because Mr. Trenchard in his factum seeks various other remedies in the absence of any appeal by him. Clearly he is not entitled to the relief he seeks as he did not cross-appeal.

[7] The issue raised was not properly before the Court below because the question of whether legal fees are Operating Expenses under the Lease is premature. It was wrong for Westsea to have urged the court to decide an issue prematurely, resulting in it incurring additional legal expenses here and in the court below.

[8] There are two cases from this Court that are relevant to Westsea's claim. In *P & T Shopping Centre Holdings Ltd.* the plaintiff sought special costs relying on a covenant in the lease. The Court said that the lessor had two options and had to make an election, either to seek party and party costs under the tariff, or to seek costs under the lease. If it sought costs under the Lease it had to follow the following procedure:

[22] The respondent's remedy is to send to the appellant a statement setting out its claim under the clause and demanding payment and, if the appellant refuses to pay, to sue for those costs as unpaid rent. As to what the appellant should do, *Re Holliday and Godlee, supra*, may give it a clue.

[23] If the Court ought not to order special costs, and I do not think it should, should the Court make any order as to costs? Again, my answer is "no". The respondent has its contractual remedy. It has no need of assistance from this Court. If the respondent, however, wishes to abandon its rights under the covenant, it would be entitled to the usual order for the party and party costs awarded to a successful respondent.

[24] Thus, there will either be no order as to costs in this Court or an order for party and party costs of both appeal and cross-appeal to the respondent. It is for the respondent to elect which it shall be.

[9] This decision was followed in *P.T. Hero Enterprises Inc. v. Paris Restaurant Ltd.*, [1996] B.C.J. No. 2173:

[16] The judge, of course, having found that the renewal lease was in force looked to the term concerning costs in that lease which is somewhat different in its language. She did not have drawn to her attention the judgment of this Court in *P & T Shopping Centre Holdings Ltd. v. Cineplex Odeon Corp.* (1995), 37 C.P.C. (3d) 294. On the authority of that judgment the order below could not stand even on the term as to costs in the renewal lease. The respondent was entitled in the court below to [choose] either to be given an order for ordinary costs or to proceed upon the covenant in the lease concerning the costs in the manner described in the *P & T Shopping Centre* case.

[10] These cases have been followed in the Court below many times. A recent example is *Aspen Enterprises v. Quiding*, 2009 BCSC 50 (CanLII) where Fenlon J. (as she then was) said:

[23] Although the Agreements specify that Kingsway is entitled to be "indemnified" for "all expenses including attorney fees", Kingsway is not entitled to an order from this Court for costs on a solicitor and client basis: *P. & T. Shopping Centre Holdings v. Cineplex Odeon* (1995), 1995 CanLII 448 (BC CA), 3 B.C.L.R. (3d) 309 [*P. & T.*]; *B.U.K. Investments Ltd. v. Pappas*, 2002 BCSC 161 (CanLII); *Halle v. Ritchie*, 2008 BCSC 1452 (CanLII). As discussed by Southin J.A. in *P. & T.* at paras. 23-24, Kingsway can elect to either enforce the terms of the Agreements or abandon its contractual remedy and seek costs on a party and party basis. If Kingsway opts to rely on its contractual rights, it is not entitled to costs in these proceedings. Rather, Aspen's remedy is to demand payment of its legal costs; if Aspen does not pay, Kingsway can sue on the Agreements. Alternatively, if Kingsway opts to abandon its indemnity for legal costs under the Agreements, it is entitled to its costs in these proceedings against Aspen at Scale B.

[11] In this proceeding Westsea elected to seek indemnity under the Lease. Articles 7.02-7.04 of the Lease allow the lessor, if the clause applies, to charge back Operating Expenses against all of the leaseholders based on the ratio of the areas of their units to the total area of suites in the building. That has not been done and Westsea may yet decide that it should not attempt to charge the leaseholders for the legal fees and expenses related to the petition.

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[12] I would also add that in this case because the operation of the clause is as I have described, all of the leaseholders have an interest in the matter, and only Mr. Trenchard is before this court. It is only by proceeding in the manner described (providing a statement of the legal fees and expenses to the leaseholders setting out its claim under the clause) that the issue would properly be raised before all of the interested parties: all of Orchard House's 210 leaseholders. The issue was not properly before the court below.

[13] In the result, I would set aside that part of the order below. As the appeal is allowed, but not for the reasons argued before us, I would not make any award as to costs in this court. Nothing in these reasons should be construed as impugning or supporting the interpretation of the Lease in the court below.

[14] **FRANKEL J.A.:** I agree.

[15] **BENNETT J.A.:** I agree.

[16] **FRANKEL J.A.:** The appeal is allowed to the extent of setting the order below aside. There is no order as to costs.

“The Honourable Mr. Justice Savage”