No. 18 4015
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

WESTSEA CONSTRUCTION LTD.

Petitioner

AND:

ANDREW SCOTT TAYLOR, DOUGLAS GEORGE ROUTLEY, LEANNE FINLAYSON, EDITH WOOD, GABRIELLA EVA SCOFIELD, GERALD JOHN ROTERING, HELEN ELISABETH VERWEY, HUGH ALEXANDER TRENCHARD, IRIS IRENE HAYS, JACALYN GAIL HAYS, JAMES SCOT WALKER, JUDITH McNEIL SIM, MARTINE GODDARD, MICHAEL GORDON CLARK, CHANTELLE MARIE CLARK, NIGEL JOHN JOSLIN, PATRICIA ANNE SMITH, PETER JAMES ROURKE, REINER JOACHIN PIEHL, DOREEN GREETA PIEHL, ROBERT JOHN CALDER, SANDRA SCOTT JONSSON also known as SANDRA SCOTT GROVER-SAGER, GORDON WILLIAM GROVE, SEE-LIN SHUM, STEPHEN JAMES MATTHEW, ANNE UDALE, WENDY ELIZABETH DUVAL

Respondents

RESPONSE TO PETITION

Filed by: Andrew Scott Taylor, Edith Wood, Gerald John Rotering, Helen Elisabeth Verwey, Iris Irene Hayes, Jacalyn Gail Hays, Judith McNeil Sim, Martine Goddard, Patricia Anne Smith, Peter James Rourke, Reiner Joachim Piehl, Doreen Greeta Piehl and Su-Lin Shum a.k.a. See-Lin Shum (the "petition respondents")

THIS IS THE RESPONSE TO the petition filed September 12 2018.

Part 1: Orders Consented to

The petition respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the petition:

NONE

Part 2: Orders Opposed

The petition respondent opposes the granting of the orders set out in paragraphs 1 of Part 1 of the petition.

Part 3: Orders on Which No Position is Taken

The petition respondent takes no position on the granting of the orders set out in paragraphs NONE of Part 1 of the petition

Part 4: Factual Basis

1. The petition respondents agree with the allegations of fact set out in paragraphs 1, 2, 3, 4, 5, 6, 8, 9, 10 and 11 of the Petition.

2. The petitioner is in the business of being a lessor of a number of buildings in this province in which the units are 99 year leaseholds.

3. Prior to entering into the leases referred to in the Petition, the petitioner prepared an offering memorandum dated July 12 1974, in which it was described as the registered owner of Orchard House, offering leasehold interests through Capital Construction Supplies Ltd. This document set out that there would be no monthly rent payments, but that each prospective owner would have to cover operating expenses on a monthly basis. These operating expenses would be defined in the lease as to include land taxes, insurance, wages, all services and utilities, supplies, repairs and maintenance of common areas and facilities and any costs necessary to operate the building.

4. The petitioner set out that the prospective purchaser of the leasehold interest would make a down payment and the petitioner was available to provide financing for the balance of the purchase price.

5. The lease does not contain any term with respect to payment of rent as rent was prepaid through the purchase of the leasehold interest.

6. The respondents do not recall the petitioner charging for legal fees as part of its operating expenses until 2016.

7. In August 2014, one respondent, Hugh Trenchard, filed a petition against the petitioner seeking, inter alia, orders for disclosure of certain documents relating to a window replacement project. This petition proceeding was *Trenchard v. Westsea Construction Ltd.,* Victoria Registry proceeding 14 2941.

8. After a hearing of four days duration before Justice Mackenzie in January 2016, the parties in that proceeding entered into a consent order which may be summarized as follows:

   (a) The petitioner would provide all leaseholders with a letter explaining the basis for the window replacement project along with a copy of an engineering report;
   (b) Hugh Trenchard would dismiss the petition.

9. The issue of costs, in the consent order, was addressed as a separate issue to be determined. In costs submissions on January 7th 2016, the petitioner stated that the petition proceeding commenced by Mr. Trenchard was of great significance to the petitioner if it had been allowed and would have an impact on the way it conducted its business with respect to all of its buildings.

10. The petitioner advised the respondents by letter dated February 12 2016 that it intended to collect from all lessees their legal costs if successful.

11. Justice MacKenzie ruled on September 23rd 2016, in *Trenchard v. Westsea Construction Ltd.* 2016 BCSC 1752 ("the Decision"), that the costs of that proceeding could not be placed on the respondents or those similarly situated to the respondents. His reasons stated:

> [19] Accordingly, I must construe Articles 5 and 7 together in considering whether the lease agreement allows Westsea to collect its legal expenses from the leaseholders as Operating Expenses. Article 5 makes it clear that the lessor's covenants are directed at the repairs and maintenance of the Property. They include the provision of services such as heat and cablevision, and the maintenance of the Property in good repair and condition. None of these covenants relate in any way to the issues that were raised in this petition.
> [20] In interpreting Article 7, I do not agree with Westsea's interpretation of the decision in *Steers* to mean that any legal costs incurred by Westsea that have any connection with the Property may be charged as Operating Expenses. I also find that *Steers* is distinguishable from the present circumstances since the costs in that case were incurred in replacing windows. Here Westsea has incurred legal costs to interpret the terms of its lease agreement with the leaseholders at the Property. In *Steers*, as Romilly J. found at para. 23, the costs incurred were as a result of certain leaseholders who obstructed the lessor in "performing its covenant under the lease 'to repair and maintain' the building" (emphasis added). I do not find that Romilly J. intended, when he referred to a single item in the list of Operating Expenses, to read each one as a stand-alone item. Rather, all are subject to the requirement that Operating Expenses are limited to costs incurred in the performance of the lessor's covenants, as outlined in Article 5.
> [21] In fact, as Mr. Trenchard submits, if I were to accept Westsea's submission, Westsea could seek reimbursement from the leaseholders, including Mr. Trenchard, for its legal costs even if Mr. Trenchard had succeeded with his petition. This is not that different a scenario than what in essence occurred here. Westsea agreed to provide Mr. Trenchard with what he was seeking and in exchange the petition was dismissed by consent. As a result, I agree with Mr. Trenchard that it is contrary to common sense to conclude that Westsea would be entitled to costs against him and the other leaseholders in the present case.
> [22] In these unique circumstances, I do not find that the legal costs incurred by Westsea as a result of this petition fall within the meaning of "legal charges" contemplated under Article 7.
> [23] Even if I am wrong in this conclusion, I note again that under Article 7 Westsea also "agrees to exercise prudent and reasonable discretion in incurring Operating Expenses, consistent with its duties hereunder." If I were to accept that the legal fees which Westsea incurred in relation to this petition were "Operating Expenses," I would find that Westsea breached its duty of "prudent and reasonable discretion" in incurring them. In my view, Mr. Trenchard made a legitimate request to Westsea to disclose information regarding Westsea's operating expenditures in relation to the Property. It would have been relatively simple and inexpensive for Westsea to comply with this request. Instead, Westsea chose to resist Mr. Trenchard's request for disclosure and agreed to an order to provide the requested documentation only after retaining counsel and four days of court hearings.

12. The petitioner sought leave to appeal the Decision, which was granted. The Court of Appeal in *Trenchard v. Westsea Construction Ltd.* 2017 BCCA 352 allowed the appeal based on the adjudication being premature. The court ordered that the matter of legal expenses and enforcement of same be dealt with by notifying each person situated as the respondents being served with a demand to pay, with legal proceedings to enforce the claim as against those unitholders who refused to pay. As the Court of Appeals decision turned on an

issue not raised by the appellant, the court ordered that each party bear its own costs.

13. The Court of Appeal went on to state that "Nothing in these reasons should be construed as impugning or supporting the interpretation of the Lease in the court below."

14. Both Mr. Trenchard and the petitioner sought leave to appeal and cross-appeal, respectively, from the Supreme Court of Canada. Ultimately, leave was not granted.

15. Mr. Trenchard commenced another proceeding against the petitioner under Victoria Registry proceeding 16 3355. Justice Power ordered the petitioner to pay Mr. Trenchard costs of Scale B forthwith on August 2nd 2017.

16. The 16 3355 proceeding is ongoing. Trial of that matter is scheduled for 15 days, commencing June 3rd 2019.

17. On December 22 2017, counsel for the petitioner advised all lessees that it would be including all legal charges for 2017 as part of the operating expenses. The lessees were further advised that operating expenses for 2018 would include anticipated legal charges as "operating costs".

18. In its letter of June 8 2018 setting out its demand for monthly operating expenses, it included the auditor's report prepared by BDO Canada LLP. This audited report showed the bulk of the operating costs - $426,337 – were described as legal fees. No particulars were disclosed of this amount, such as what these fees were for.

19. The petitioner has not disclosed or produced any of the legal bills which are the bases of these "operating expenses" for which it seeks indemnity from the respondents.

20. The respondents have objected to paying Westsea's legal expenses as operating expenses but have no objection to paying other expenses which are covered in the lease agreement as operating expenses in connection with the building and lands.

21. There has been no assessment of the petitioner's legal bills under section 70 of the *Legal Profession Act*.

22. The petitioner has withheld and applied to its own benefit the 2018 homeownership grants to which the respondents were entitled and had applied for. Because they were not owners, the petitioner was the agent for the respondent's application for their respective homeowner's grants. The petitioner itself was not entitled to claim the homeowner's grants as it was not resident in any of the Building.

23. The petitioner has not sought any court order or utilized any attachment process that would grant legal justification for retention of these grants.

Part 5: Legal Basis

1. There are several bases upon which to challenge the relief sought in this petition. They are as follows:
   (a) Contractual interpretation involving the language of the lease and surrounding circumstances;
   (b) Contractual interpretation in light of contractual doctrines focused on public policy;
   (c) Contractual interpretation in light of unconscionability;
   (d) Abuse of process.

2. In regards to the last ground, there may be a threshold issue of the degree to which the Decision binds this court in regards to the doctrine of issue estoppel. This will be discussed when abuse of process is discussed.

3. If the court concludes that the relief set out in the petition ought to be granted, prior to exercising such relief there should be an order that the accounts underlying the claim of legal charges be referred to the Registrar for an assessment thereof.

Contractual interpretation

4. "Operating expenses" are defined in the first sentence of clause 7.01 of the Lease, as "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...."

5. The covenants referred to are expressed in Article 5 of the Lease, which starts with the phrase "The Lessor covenants with the Lessee:"

6. "Foregoing" has the dictionary definition of "that which has been mentioned or described" or "preceding". Thus foregoing refers the covenants of the Lessor.

7. The balance of that first sentence in clause 7.01 recapitulates and particularizes the obligations of the lessor as set out in Article 5 of the Lease. The concluding phrase of that sentence states "an [sic] 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".

8. The Building refers to Orchard House (per paragraph B of the preamble). There is no definition of the term "common property" in the lease, although there is a definition of the Lands.

9. The second sentence of that clause states that "'Operating expenses' shall not include any amount directly chargeable by the Lessor to any Lessee or Lessees."

10. The final sentence of that clause states that "the Lessor agrees to exercise prudent and reasonable discretion in incurring Operating expenses, consistent with its duties hereunder."

11. The Lease provided in Article 12.01 that "The definition of any words used in any Article of this Lease shall apply to such words when used in any other Article hereof whenever the context is consistent." The landlords covenants,

described as covenants, are set out in Article 5. Article 7.01 refers to covenants herein.

12. The Lease provides, in Article 8.02, that if a lessee fails to perform any covenant or condition of the Lease, the Lessor may perform such covenant and all amounts paid by the Lessor in respect thereof and all costs, damage as and expenses suffered or incurred by the Lessor thereof shall be due and payable by the Lessee to the lessor on demand as rent and the lessor may exercise any remedy in respect of the recovery of any such amounts as it might for rent in arrears.

13. In the performance of contractual obligations, each contracting party is under the obligation to deal in good faith with the other.

Bhasin v. Hrynew 2014 SCC 71

14. There is no clause in the lease that states, or could be construed to be, a clause setting out that the written agreement is the entire agreement and that there are no representations or warranties outside the lease.

15. The petitioner made representations to all prospective lessees in 1974, prior to their entry into the lease, that no monthly rent would be payable and described that each prospective purchaser would be paying operating expenses which would include "any costs necessary to operate the building".

16. The lease document itself refers to the lessees covenanting to pay rent, and the lessor was granted certain remedies with respect to non-payment of rent. However, there is no definition of rent and it appears that no rent has ever been charged by the lessor to any lessee at any time following the purchase of leasehold interest.

17. The framework of analysis of a written contract requires that the court look first to the language of the contract as a whole, within the four corners of the contract, to interpret any particular term in that contract.

18. In *Atwal v. Black Top Cabs Ltd.* 2012 BCCA 107 the Court of Appeal held that:

> [42] The contractual intent of parties to a written contract is objectively determined by construing the plain and ordinary meaning of the words of the contract in the context of the contract as a whole and the surrounding circumstances (or factual matrix) that existed at the time the contract was made, unless to do so would result in an absurdity. Where the language of a contract is not ambiguous (that is, when viewed objectively it raises only one reasonable interpretation), the words of the written contract are presumed to reflect the parties' intention. An interpretation that renders one or more of the contract's provisions ineffective will be rejected.
>
> [43] Extrinsic evidence to explain the meaning of an unambiguous contractual provision is not admissible. Evidence of a party's subjective intention in executing the contract, or of their understanding of the meaning of the words used in the contract, is not admissible to vary, modify, add to or contradict the express words of the written contract. This is particularly so where a contract contains an "entire agreement" clause. As was noted by the authors of *Cheshire, Fifoot and Furmston's Law of Contract*, 13th ed. (London,

UK: Butterworths, 1996) at p. 127, "the court is usually concerned not with the parties' actual intentions but with their manifested intention."

19. Where the court notes that there may be various interpretations available to a term, the court then may look to surrounding circumstances. In *Sattva Capital Corporation v. Creston Molybdenum Ltd.* 2014 SCC 53, the court held that

> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 1997 CanLII 4085 (BC CA), 101 B.C.A.C. 62).
>
> [58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

20. The Supreme Court went on to describe the circumstances in which parole evidence may be used:

> [59] It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and Hall, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (Hall, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, 1998 CanLII 791 (SCC), [1998] 2 S.C.R. 129, at paras. 54-59, *per* Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, 1993 CanLII 88 (SCC), [1993] 2 S.C.R. 316, at pp. 341-42, *per* Sopinka J.).
>
> [60] The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at

or before the date of contracting; therefore, the concern of unreliability does not arise.

21. In interpreting the Lease, the court may apply the *contra proferentem* rule, described in *Attwal* as follows:

> [42] If a contractual ambiguity still remains after a consideration of extrinsic evidence relating to the parties' conduct under the agreement, then I may consider whether to apply the principle of *contra proferentem*, under which contractual ambiguities are resolved against the party responsible for drafting a written contract. Neilson J.A., writing for the court in *Miller v. Convergys CMG Canada Ltd.*, 2014 BCCA 311 (CanLII) at para. 15, discussed this principle, and particularly its use in the interpretation of employment contracts and its relationship to the other principles of contractual interpretation, as follows:
>
> [15] The court should strive to give effect to what the parties reasonably intended to agree to when the contract was made. The starting point is the language of the contract, which should be given its plain and literal meaning, and be interpreted in the context of the entire agreement. Consideration may also be given to the factual matrix surrounding the creation of the contract. If the contractual language reveals two possible interpretations, the court should seek to resolve this ambiguity by searching for an interpretation that reflects the true intent and reasonable expectations of the parties when they entered the contract, and achieves a result consistent with commercial efficacy and good sense. Considerations of reasonableness and fairness inform this exercise. If these principles do not resolve the ambiguity, extrinsic evidence may be admissible to assist in ascertaining the parties' intent. As a last resort the principle of *contra proferentem* may be invoked to favour construction of the ambiguity against the party that drew the agreement. This principle may not be used, however, to create or magnify an ambiguity. As to employment contracts in particular, these will be interpreted in a manner that favours employment law principles, specifically the protection of vulnerable employees in their dealings with their employers. Nevertheless, the construction of an employment contract remains an exercise in contractual interpretation, and the intentions of the parties will generally prevail, even if this detracts from employment law goals that are otherwise presumed to apply: Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2d ed (Markham, Ont.: LexisNexis, 2012) at 9-52, 66-70, 187-88.
>
> [43] As noted by Neilson J.A., the principle of *contra proferentem* is a last resort where other principles of contractual interpretation have failed to resolve an ambiguity. Further, the principle is "generally reserved for situations where one party has had no meaningful opportunity to negotiate the contract": *Pepin v. Telecommunications Workers' Union*, 2017 BCCA 194 (CanLII) at para. 7, citing *Ironside v. Smith*, 1998 ABCA 366 (CanLII) at paras. 66-67.

22. However, where the court concludes that the contract is a contract of adhesion, then the court is more willing to apply the *contra proferentem* rule.

Zurich Life Insurance co. of Canada v. Davies [1981] 2 SCR 670 at 674

23. The Lease is a contract of adhesion as it has the five characteristics of a contract of adhesion:
(a) It was drafted by one party to the transaction, namely the petitioner;
(b) On a form regularly used by the drafter;

(c) Presented to the respondents on a take-it-or-leave-it basis;
(d) Is a contract in which the respondent enters into relatively rarely as compared to the petitioner;
(e) The lease is a contract in which the principal obligation of the respondent is the payment of money.

Brissette Estate v. Westbury Life Insurance Co. [1992} 3 SCR 87 at para. 34

24. The Lease specified that operating expenses arose from the Lessor's performance of its covenants, as defined in the agreement, and could only include legal and accounting charges in connection with the Building, common property or Lands. Because of this, each legal charge must arise from the performance of its covenants, as defined in the lease, and be in connection with the Building.

25. The operating expenses in issue include a significant sum, for legal expenses, the particulars of which are unknown. It is but a bald assertion on the part of the petitioner that they are in connection with the Building; no evidence has been provided by the Petitioner to substantiate this connection.

26. No evidence has been provided by the Petitioner to show that such legal charges were incurred by acting in a prudent and reasonable manner.

27. In this context, prudent and reasonable are two distinct concepts. "Reasonable" would take into account factors as set out in section 71 of the *Legal Profession Act*, SBC 1998, c. in particular subsections 71(2)(a) and 71(3)(a).

28. "Prudent" would encompass the wisdom of the course of action taken by the Petitioner. According to the Supreme Court of Canada, "a prudent cost is one which may be described as wise or sound".

ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission) 2015 SCC 45 at paragraph 34.

29. With no evidentiary guidance from the Petitioner, the court in the Decision, had no way of assessing to what degree the Petitioner's conduct was prudent. All the court had was the petition and responding material, and the submissions of the Petitioner's counsel and Hugh Trenchard. The Petitioner did not meet the onus to prove that these legal expenses were prudent and reasonable.

30. A term for disclosure of documents may be implied in a contract if such gives business efficacy to the contract. The contract places the onus on the lessor petitioner to show that its expenditures incurred as operating costs are "reasonable and prudent"; only disclosure of the documentary basis for the "legal charges" can comport with such business efficacy.

Bosa v. Canada (Attorney General) 2013 BC 793

31. The failure to provide copies of the legal accounts, or other documents, underlying the legal charges claimed deprives the court of being able to fully

and properly assess whether the charges claimed are connected to the building or the extent to which they are reasonable and prudent.

32. There is available a means to determine the "reasonableness" of these legal charges, and that is to have the bills reviewed by a registrar.

Section 70 and 71 *Legal Profession Act* SBC 1998 c. 9

Public Policy

33. One of the consequences that would arise if the petitioner's interpretation of the contract prevails would be to deter lessees from seeking redress through the courts if the lessor abuses the authority granted to it by the Lease.

34. Access to the courts is an important principle governing the principles of civil society. It is submitted that it is not appropriate to interpret a contractual provision so as to be inconsistent with this important principal.

35. To paraphrase the wording of paragraph 40 of the Supreme Court of Canada decision of *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)* 2014 SCC 59, in the context of contracts which effectively denies people the right to take their cases to court, concerns about the rule of law are not abstract or theoretical. If people cannot challenge contractual terms in court, individuals cannot hold their contractual counterpart to account – the other party to the contract will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect.

36. Fees associated with any legal proceeding involving the lessor, if it has any connection to the Building, no matter how remote, would be treated as an operating expenses.

37. Even if the lessor is found to be in default or otherwise does not prevail in such legal proceedings, it would be entitled to collect its entire legal fee as an "operating cost".

38. Accordingly, the lessee in making a claim against the lessor will have to pay his or her lawyer's fees and pay the legal fees of the petitioner as operating costs. Under the petitioner's interpretation, any costs award to the benefit of the lessee would be included in the "operating costs" of all lessees.

39. Even where the court has ordered that costs be borne by the parties, the interpretation advanced by the Petitioner would have those same parties contributing to the costs of the Petitioner.

40. Even if the petitioner takes extra-judicial steps to enforce what it perceives to be its rights, the respondents will be forced to bear the costs of the petitioner to contest a remedy such wrongs as seizure of their home owner grants.

41. Such an interpretation is not consistent with commercial efficacy and good sense. The House of Lords stated, in *Schuler A. G. v. Wickman Machine Tool Sales Ltd.* [1974] AC 235 at 251, that "the more unreasonable the result the

more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear".

Peacock, Inc. v. Reliance Foundry Co. 2001 BCSC 232 at para. 97

42. Agreements that have the consequence of deterring a party going to court are void as contrary to public policy. The respondents submit that the same policy considerations should inform the interpretation of this clause of the lease.

Novamaze Pty Ltd. v. Cut Price Deli Pty Ltd. 128 ALR 540

Unconscionable interpretations

43. An interpretation of a clause such as to yield an unconscionable result should also be avoided.

44. A term so out of keeping with the rest of the contract that it would require special notice to be drawn to the party against whom the clause is sought to be enforced, may be unenforceable as it is unconscionable. This is especially the case where the lease was in the form of a standard form contract, applicable to all lessees in Orchard House, which did not arise from negotiation, no attention of the lessees were drawn to the clause, it contained terms which are unusual in character, and would render meaningless other phrases of the lease such as only incurring expenses that are reasonable and prudent.

Davidson v. Three Spruces Realty Ltd.; Farr v. Three Spruces Realty Ltd.; Edlson v. Three Spruces Realty Ltd. (1977) 79 DLR (3d) 481 at 493

Abuse of process

45. Finally, there is the issue that this petition constitutes an abuse of process in that it is a re-litigation of facts and issues already decided as a matter barred by issue estoppel.

46. For the court to conclude that the doctrine of issue estoppel applies to bar this proceeding, the court must be satisfied that;

(a) The same question has been decided;
(b) That the judicial decision which is said to create the estoppel is final; and
(c) That the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

Angle v. MNR 47 DLR (3d) 544 (SCC)

47. In the case before the court, the Decision dealt with the issue before this court.

48. While the Decision was overturned on appeal, the Court of Appeal overturned the decision not on the basis that the Decision was wrong in and of itself, but that the petitioner had invited the court to make a decision not in keeping with the procedure binding upon it. The Court of Appeal confirmed that their decision should not be construed to be a decision on the merits of the Decision itself.

49. The findings of fact made by Justice Mackenzie in Decision were not set aside by the Court of Appeal; the interpretation of the lease in the Decision were not criticized or found wrong in law.

50. Given that there was no conclusion from the court of appeal on the correctness of the Decision or the findings of fact thereon, it would be inappropriate to entertain any attack on such findings.

Skender v. Farley 2007 BCCA 629

51. The parties are not the same in that there are Respondents in addition to Hugh Trenchard. However, all the respondents are governed by the same lease, and the petitioner seeks to impose its interpretation of the lease and the obligations contained therein which were common to all respondents.

Legal Profession Act Review

52. If the court concludes that operating expenses includes legal charges as claimed by the petitioner, the respondents are persons who have been found to have agreed to indemnify the petitioner, thus falling within section 70 of the Legal Profession Act to receive and have the registrar review the accounts rendered by the Petitioner's lawyers.

53. If leave is required to have a review of these accounts, the special circumstances include the size of the account, that any delay is attributable to the fact that the lessees were entitled to rely upon Justice Mackenzie's order that relieved them of the indemnification for the subject costs, the recent determination of this court that the lessees are to indemnify the petitioner, the lack of delivery of the accounts underlying the legal charges and the lack of prejudice to the petitioner as it will benefit from any reduction of accounts it has paid.

Worth v. Spelliscy 2011 BCSC 847 at para. 22

Homeowner Grants

54. Under section 1 of the *Home Owner Grant Act* RSBC 1996, c. 194 the respondents are "eligible occupants", each residing in an "eligible apartment". Section 3 confers on Westsea Construction Ltd. (Westsea) the authority to apply for grants for units in an eligible building occupied by an eligible occupant. Section 6(3) prohibits any eligible occupant from applying for a home owner grant where the owner has applied for one.

55. Section 7(1) directs that each owner who receives a grant under section 3(1) of the *Act* **must** benefit each eligible occupant in the amount attributable to that occupant's eligible apartment. Failure to benefit an eligible occupant confers on that person a statutory cause of action, per section 7(2) of the *Act*.

56. In addition to the statutory obligation and cause of action, the relationship of the petitioner to the respondents, in these circumstances as they relate to the

grants gives rise to a fiduciary obligation owed by the petitioner to the respondents.

Hodgkinson v. Simms [1994] 3SCR 377

57. There is a three part test to determining whether a relationship between parties is fiduciary in scope: (1) there has to be scope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to effect the beneficiary's legal or practical interests; and (3) a peculiar vulnerability to the exercise of that discretion or power.

58. The petitioner had the power to apply for grants on behalf of the respondents, it did so such that the respondents could not bring their own application for the homeowner's grants and the respondents are reliant on the petitioner to remit the payment.

Part 6: Material to be Relied on

1. Affidavit #1 of D. Rycroft filed October 22, 2018
2. Affidavit #1 of G. Rotering filed November 26 2018
3. *Trenchard v. Westsea Construction Ltd.* 2016 BCSC 1752

The petition respondent estimates that the petition will take one day.

The petition respondent's address for service:

Infinity Law
200 - 931 Fort St.
Victoria, BC V8V 3K3

Fax number address for service: 250-385-6008

Email address for service: arafuse@infinity-law.com

Name of the petition respondent's lawyer, if any:

Andrew M. Rafuse

Date: November 29 2018

[ ] lawyer for petitioner/respondent
Andrew M. Rafuse