



Further amended pursuant to the Case Plan Order of Madam Justice Power made May 3, 2021.
Amended pursuant the Case Plan Order of Madam Justice Power made September 23, 2019 and
pursuant to Rule 16-1(19)(b)(i) of the *Supreme Court Civil Rules*.
Original Petition to the Court filed September 12, 2018.

No. 184015
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, GERALD JOHN
ROTERING, HELEN ELISABETH VERWEY, HUGH ALEXANDER
TRENCHARD, IRIS IRENE HAYS, JACALYN GAIL HAYS, JUDITH
McNEIL SIM, MARTINE GODDARD, PATRICIA ANNE SMITH,
PETER JAMES ROURKE, REINER JOACHIN PIEHL, DOREEN
GREETA PIEHL, SANDRA SCOTT JONSSON also known as
SANDRA SCOTT GROVE-SAGER, GORDON WILLIAM GROVE
and SEE-LIN SHUM

RESPONDENTS

FURTHER AMENDED PETITION TO THE COURT

This proceeding has been started by the Petitioner(s) for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the Petitioner(s)
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the Petitioner(s),

- (a) if you reside anywhere within Canada, within 21 days after the date on which a copy of the filed petition was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed petition was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed petition was served on you, or
- (d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: 850 Burdett Avenue Victoria, British Columbia V8W 9J2
(2)	The ADDRESS FOR SERVICE of the Petitioner is: 1200 – 925 West Georgia Street Vancouver, British Columbia, V6C 3L2 Tel: (604) 682-7474 Attention: Mark C. Stacey Fax number for service: 604-682-1283
(3)	The name and office address of the Petitioner's lawyer is: 1200 – 925 West Georgia Street Vancouver, British Columbia, V6C 3L2 Tel: (604) 682-7474 Attention: Mark C. Stacey

CLAIM OF THE PETITIONER

Part 1: ORDERS SOUGHT

1. Against each of the Respondents and each of the respective leasehold interests owned by each Respondent, set out in **Schedule "A"** to this Petition to the Court, the declarations and orders set out in **Schedule "B"** to this Petition to the Court.

Part 2: FACTUAL BASIS

Background

1. The Petitioner Westsea Construction Ltd. ("**Westsea**") is a company incorporated under the Laws of British Columbia with an address for service in these proceedings of 1200 – 925 West Georgia Street, Vancouver, British Columbia, V6C 3L2.
2. These proceedings are in relation to a 22-story concrete apartment complex located at 647 Michigan Street, Victoria, British Columbia, known as Orchard House ("**Orchard House**"). There are 211 leased apartment units in Orchard House.
3. Westsea is the registered owner in fee simple and the manager of Orchard House.
4. The Respondents are owners of leasehold interests in the apartment units in Orchard House. Particulars of these Respondents' respective interests and their residential and/or mailing addresses are set out in **Schedule "A"** to this Petition.

The Lease

5. The relationship between Westsea and the Respondents is governed by a 99-year lease agreement (the "**Lease**").
6. The Lease was entered into between ~~the~~ Westsea and Capital Construction Supplies Ltd. in 1974. The Lease expires in 2073.
7. 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*, RSBC 1996, C. 57 nor the law of leasing generally.
8. After entering into the Lease, Capital Construction Supplies Ltd. sold assignments *pro tanto* of its leasehold interest in individual suites to third parties.
9. The leasehold interests in individual suites ~~has~~ have been variously sold to new third parties in the intervening period.
10. At the time the Respondents purchased their respective leasehold interests, each being an assignment *pro tanto* of the Lease, they each 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 [...]".
11. The Lease includes, *inter alia*, the following express terms:

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.

ARTICLE 8 – PROVISOS

[...]

8.04 Proviso for re-entry by the Lessor on non-payment of rent or non-performance of covenants.

[...]

Annual Operating Expenses

12. As described in the above Articles, Westsea has a number of obligations in respect to Orchard House under the Lease, including maintenance, repair, operation, care, servicing, control, insurance, management and administration.
13. 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.
14. In performing its Lease obligations, Westsea incurs expenses, including legal charges. Westsea incurs legal charges in connection with various matters relating to the management and administration of Orchard house, including issues relating to transfers of leasehold interests, addressing injury and loss claims, investigation of flood and fire damage and repair issues relating to the remediation of suites, review of issues related to unauthorized alterations within suites, review of Orchard House Lease and Rules and Regulations, as well as issues related to the Remediation Work and the Petition and the Supreme Court Action, as defined below.
15. 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 must then pay their proportionate share (as defined in Article 7.04) of estimated Operating Expenses on a monthly basis.

16. During any given calendar year, expenses are 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.
17. 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.
18. The audited financial statements are provided to the leaseholders.

Remediation Work in 2010-2011

19. On or after February 5, 2010, Westsea delivered a notice to all leaseholders at Orchard House about repairs, including tower restoration and window replacement.
20. The work in 2010 included specific work on the drainage system, applying sealants to windows and various delamination repairs.
21. Some, but not all, of the windows at Orchard House were also replaced during this time period.

Remediation Work in 2015-2017

22. In 2013, Westsea engaged a 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. The Priority Assessment Report made recommendations for, *inter alia*, window and sliding door replacement.

23. RJC subsequently prepared a building envelope condition assessment dated March 24, 2016, regarding window and door replacement at Orchard House (the "**BECA**"). 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.
24. The BECA was provided to all leaseholders by letter from Westsea dated March 29, 2016.
25. Following receipt of the BECA, Westsea decided to undertake the building envelope remediation steps recommended by RJC (the "**Remediation Work**").
26. Westsea entered into a contract with Farmer Construction Ltd. ("**Farmer**") for the scope of work prepared by RJC. The Contract price was \$5,551,460, inclusive of GST (the "**Project Price**"). Farmer commenced work on July 11, 2016, with an anticipated project schedule of 44 weeks.

27. Pursuant to Article 7.01, expenses incurred by Westsea in the context of the Remediation Work are chargeable to the leaseholders at Orchard House as Operating Expenses.
28. Westsea wrote to all leaseholders at Orchard House on July 5, 2016, notifying each of them of their share of the Project Price and requiring payment by September 1, 2016. Each Respondent's proportionate share of the Project Price was payable either as a one-time payment or in 12 monthly installments.
29. Westsea wrote to all leaseholders at Orchard House on July 21, 2016, and August 22, 2016, and October 21, 2016 providing further details regarding construction.
30. On December 14, 2017, Westsea wrote to all leaseholders at Orchard House, providing notice of outstanding payments.

Litigation

31. On August 1, 2014, Hugh Trenchard, a leaseholder in Orchard House, filed a Petition in British Columbia Supreme Court, Victoria Registry No. 141941, naming Westsea as the Respondent (the "**Petition**"), in which Mr. Trenchard sought a number of orders with regard to the interpretation of the Lease.
32. The Petition sought, without legal justification, to restructure Westsea's obligations under the Lease by, *inter alia*, implying a new and ongoing term of "transparency" that would require Westsea to disclose substantial amounts of documents to Mr. Trenchard and other leaseholders on request, despite the lack of such an obligation being found in the plain language of the Lease.

33. Had Westsea not opposed the relief sought by the Petition, it would have become bound to open-ended obligations to satisfy requests for documents and information from leaseholders such as Mr. Trenchard, which would constitute a significant and expensive undertaking, the substantial costs of which would be borne by all leaseholders at Orchard House as Operating Expenses under the Lease.
34. Westsea defended the Petition pursuant to its covenants under the Lease and to ensure the continued operation of the Lease in a commercially efficacious manner for the benefit of both Westsea and all of the leaseholders at Orchard House.
35. ~~32.~~ The ~~majority of the~~ relief sought by Mr. Trenchard, except with respect to the recoverability of legal costs under the Lease, was dismissed by consent after four days of hearing in January 2016.
36. The sole condition of the consent dismissal of the Petition was that Westsea send a letter to all leaseholders at Orchard House that stated it would provide a copy of an engineering report to all leaseholders as a courtesy. Westsea had already agreed to circulate said engineering report to all leaseholders prior to the commencement of the Petition.
37. The consent dismissal of the Petition did not impose any implied term of "transparency" into the Lease, as was sought by Mr. Trenchard in the Petition, and Westsea asserts that there is not, and never was any such obligation under the Lease.
38. ~~33.~~—A decision on the relief sought by Mr. Trenchard with regard to the recoverability of legal costs under the Lease was pronounced by the British

Columbia Supreme Court on September 23, 2016 in Trenchard v. Westsea Construction Ltd., 2016 BCSC 1752 (the "**Petition Judgment**"). ~~The decision of the British Columbia Supreme Court was set aside by the British Columbia Court of Appeal. Both Westsea and Mr. Trenchard applied for leave to appeal the Court of Appeal's decision to the Supreme Court of Canada. Those applications have been denied.~~

39. The Petition Judgment contained a finding that Westsea's legal charges incurred in defending the Petition were not Operating Expenses under the Lease, along with, *inter alia*, findings that Mr. Trenchard had "basically received what he had sought" in the Petition and that Westsea had breached its duty of prudent and reasonable discretion in incurring legal charges defending the Petition.

Paragraphs 5, 17, and 22 to 23 of the Petition Judgment

40. Westsea appealed the Petition Judgment because it respectfully asserts that the above-noted findings in the Petition Judgment were erroneous and based on, *inter alia*, errors in interpreting Westsea's obligations under the Lease, errors in characterizing Mr. Trenchard's success in the Petition, and without consideration of the consequences of the relief sought by Mr. Trenchard on the continued operation of the Lease in a commercially efficacious manner, for the benefit of both Westsea and all of the leaseholders at Orchard House.

41. The Petition Judgment was set aside by the British Columbia Court of Appeal on October 6, 2017. Both Westsea and Mr. Trenchard applied for leave to appeal the

Court of Appeal's decision to the Supreme Court of Canada. Those applications were denied.

42. ~~34.~~ On August 9, 2016, Mr. Trenchard filed a Notice of Civil Claim in the British Columbia Supreme Court, Victoria Registry No. 163355, in which he named Westsea as the defendant (the "**Supreme Court Action**"). Mr. Trenchard ~~alleges~~ alleged, inter alia, that Westsea has had breached the Lease in the context of the Remediation Work.

43. ~~35.~~ On August 31, 2016, Westsea filed a Response to Civil Claim in the Supreme Court Action, denying all of Mr. Trenchard's allegations.

44. ~~36. The trial of the Supreme Court Action is scheduled for June 3, 2019, and is scheduled for 10-15 days. A trial of the Supreme Court Action was heard before~~ Madam Justice Douglas over 10 days in June 2019 (the "**Trial**"). On October 1, 2019, Madam Justice Douglas issued reasons for judgment dismissing the Supreme Court Action in *Trenchard v. Westsea Construction Ltd.*, 2019 BCSC 1675 (the "**Trial Judgment**").

45. There were two key issues at the Trial:

a. whether Westsea was obliged under the Lease to undertake the Remediation Work; and

b. whether the cost of the Remediation Work was properly charged to all leaseholders as an Operating Expense pursuant to the Lease.

Paragraph 4 of the Trial
Judgment

46. Mr. Trenchard's argument at the Trial was that the Lease obliged neither leaseholders nor Westsea to undertake the replacement of the sliding doors, windows and bathroom fans at Orchard House that had deteriorated due to reasonable wear. As such, leaseholders should have no financial responsibility to pay for the costs associated with those aspects of the Remediation Work.

Paragraphs 99 to 100 of the
Trial Judgment

47. Madam Justice Douglas found that the Lease was clear and unambiguous in both obliging Westsea to undertake the Remediation Work and entitling Westsea to charge leaseholders their proportionate share of the costs of the Remediation Work as Operating Expenses under the Lease. Her reasons stated:

"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."

Paragraph 164 of the
Trial Judgment

48. Madam Justice Douglas found that the interpretation of the Lease advanced by Mr. Trenchard would lead to an absurd result, wherein if neither leaseholders nor Westsea were obliged to undertake the Remediation Work, and if no parties did, Orchard House would have fallen into disrepair and may not have survived the term of the Lease.

Paragraph 108 of the
Trial Judgment

49. Mr. Trenchard appealed the Trial Judgment and it was subsequently upheld by the British Columbia Court of Appeal in May 2020.

50. In the Supreme Court Action, Mr. Trenchard sought to fundamentally restructure the obligations of Westsea and the leaseholders under the Lease. Westsea defended the Supreme Court Action because the relief sought therein would have compromised the continued effective operation of the Lease, to the detriment of the quality of life of all leaseholders, and the Orchard House building would have fallen into disrepair and have become uninhabitable well before the expiry of the Lease.

51. ~~37.~~ Pursuant to Article 7.01, expenses incurred by Westsea in the context of defending the Petition and the Supreme Court Action are chargeable to the leaseholders at Orchard House as Operating Expenses.

52. ~~38.~~ All legal costs and expenses charged as Operating Expenses to leaseholders at Orchard House were incurred pursuant to the Lease and in the exercise of Westsea's reasonable and prudent discretion.

Arrears

53. ~~39.~~ On June 7, 2018, Westsea delivered a letter to each of the leaseholders at Orchard House, including the Respondents, providing notice of the amounts owed by each leaseholder for their proportionate share of the actual Operating Expenses for 2017. Each leaseholder's full payment was due on August 1, 2018.

54. ~~40.~~ The Respondents have failed to pay their proportionate shares of the actual Operating Expenses for 2017 in contravention of Articles 7.02 and 7.03 of the Lease.

55. ~~41.~~ A number of the Respondents have communicated to Westsea that their refusal to pay their proportionate shares of the Operating Expenses for 2017 is based on an objection to the inclusion of legal expenses.

56. In August 2018, Westsea wrote to Orchard House leaseholders, including the Respondents, about their refusals to pay their proportionate share of Operating Expenses for 2017. The letters advised that it was not acceptable for any

leaseholder to unilaterally reduce any amount paid in respect to the shortfall of Operating Expenses owed pursuant to the terms of the Lease.

57. The letters further advised the leaseholders, including the Respondents, that in the event they did not make the required payments, Westsea would consider them to be in default under the terms of the Lease.

58. On May 14, 2019, Westsea delivered a letter to each of the leaseholders at Orchard House, including the Respondents, providing notice of the amounts owed by each leaseholder for their proportionate share of the actual Operating Expenses for 2018. Each leaseholder's full payment was either due in full on August 1, 2019 or by three separate payments due on August 1, 2019, September 1, 2019, and October 1, 2019, respectively.

59. The Respondents have failed to pay their proportionate shares of the actual Operating Expenses for 2018 in contravention of Articles 7.02 and 7.03 of the Lease.

60. On October 19, 2020, Westsea delivered a letter to each of the leaseholders at Orchard House, including the Respondents, providing notice of the amounts owed by each leaseholder for their proportionate share of the actual Operating Expenses for 2019. Each leaseholder's full payment was due on December 1, 2020.

61. The Respondents have failed to pay their proportionate shares of the actual Operating Expenses for 2019 in contravention of Articles 7.02 and 7.03 of the Lease.

62. ~~42.~~ A number of the Respondents have communicated to Westsea that they refuse to pay their proportionate shares of the Operating Expenses for 2018 and 2019 on the basis that the ~~estimated~~ Operating Expenses include charges for legal costs.

63. ~~43.~~ Despite several demands, the Respondents have failed to pay the outstanding arrears as required by the terms of the Lease.

Notice to All Leaseholders at Orchard House

64. By letters dated October 2, 2018 and January 28, 2019, Westsea wrote to all of the leaseholders at Orchard House and advised that if they wished to contest the issue of legal charges being assessed as Operating Expenses under the Lease, Westsea would consent to them being added as a Respondent to the herein proceeding, notwithstanding that they are not in default of payment of the Operating Expenses for their suite.

Home Owner Grants

65. Westsea has for many years processed Home Owner Grants pursuant to the *Home Owner Grant Act*, RSBC 1996, c 194 (the "***Home Owner Grant Act***") on behalf of leaseholders at Orchard House.

66. If a leaseholder is up to date in terms of payment of Operating Expenses under the Lease, Westsea has and continues to forward a cheque for the Home Owner Grant to each leaseholder.

67. However, if a leaseholder is in arrears with respect to the payment of Operating Expenses, their Home Owner Grant is credited to their outstanding account in respect to their suite.
68. Westsea has credited the Respondents' 2018, 2019, and 2020 Home Owner Grants to the outstanding arrears owed by the Respondents.

Res Judicata

69. Various issues raised in both the Amended Response to Petition of Hugh Trenchard filed March 3, 2021 (the "**Trenchard Response**") and the Response to Petition of Andrew Scott Taylor *et al.* filed November 30, 2018 (the "**Taylor *et al.* Response**") are barred by the doctrines of *res judicata* or relatedly, abuse of process, from being litigated in this proceeding.

i. **The Respondents' pleadings that the Lease may be ambiguous**

70. At paragraph 19 of Part 5 of the Taylor *et al.* Response, the Respondents plead that "where the court notes that there may be various interpretations available to a term, the court then may look to surrounding circumstances." The Respondents then plead the parol evidence rule at paragraph 20.
71. At paragraphs 21 to 22 of Part 5 of the Taylor *et al.* Response, the Respondents plead that in interpreting the Lease, the Court may apply the rule of *contra proferentem* to resolve ambiguities.

72. The issue of whether the Lease, particularly Article 7.01, is ambiguous and thus may require interpretive presumptions or extrinsic evidence to interpret was previously litigated and decided in the Supreme Court Action.

73. In the Supreme Court Action, Madam Justice Douglas found that the Lease, construed as a whole, is clear and unambiguous, and there is no need to use interpretive presumptions such as *contra proferentem* to interpret it in favour of any party. In particular, Madam Justice Douglas found that the meaning of "Operating Expenses" can be determined on the plain reading of Article 7.01, construed in the context of the Lease as a whole.

Paragraphs 138-139, 156-157, and 164 of the Trial Judgment

74. The Respondents are barred by the doctrine of *res judicata* or, alternatively, abuse of process from arguing that the Lease is ambiguous or that interpretive aids or extrinsic evidence should be used to resolve the ambiguity.

ii. Mr. Trenchard's pleadings that evidence of other leases is relevant

75. At paragraphs 7 to 8 of the Trenchard Response, Mr. Trenchard pleads that there are other 99-year leases in British Columbia of varying similarity to the Lease which govern other, unrelated properties. Mr. Trenchard seeks to adduce copies of some of these other leases into evidence in this proceeding.

76. At paragraph 19 of the Trenchard Response, Mr. Trenchard pleads that the terms of some of these other 99-year leases should inform the interpretation of the Lease.

77. The issue of whether evidence of other 99-year leases in British Columbia should be admitted for the purpose of interpreting the Lease was already litigated by Mr. Trenchard in the Supreme Court Action and his related Appeal. The Court of Appeal issued reasons for judgment dismissing the Appeal in *Trenchard v Westsea Construction Ltd.*, 2020 BCCA 152 (the "**Appeal Judgment**").

78. Both Madam Justice Douglas and the Court of Appeal found that there was no basis for admitting evidence of other leases before a Court of first instance in order to interpret the Lease.

Paragraphs 6 and 32 to 36 of
the Appeal Judgment

79. The issue of whether evidence of other 99-year leases is relevant to the interpretation of the Lease by a Court of first instance has been decided in Mr. Trenchard's previous litigation and he is barred by *res judicata* from litigating this issue again.

iii. The Respondents' pleadings regarding the Lease being a standard form contract

80. At paragraphs 9 and 58.1 to 59.1 of the Trenchard Response, Mr. Trenchard pleads that the Lease is a standard form contract.

81. At paragraphs 22 to 23 of Part 5 of the Taylor *et al.* Response, the Respondents plead that the Lease is a contract of adhesion.

82. The effect of the Lease being a standard form contract on its interpretation by a Court of first instance was previously litigated by Mr. Trenchard in the Supreme Court Action and the related Appeal.

83. In the Supreme Court Action, Madam Justice Douglas found that the Lease, construed as a whole, is clear and unambiguous and that it was not necessary to consider whether the Lease was a standard form contract when interpreting its terms.

Paragraphs 156-157 and 164
of the Trial Judgment

84. The Court of Appeal upheld Madam Justice Douglas' decision that it was not necessary for a Court of first instance to consider whether the Lease was a standard form contract when interpreting its terms. The Court of Appeal held:

"Whether or not this lease was a standard form lease was not relevant to the issues before the trial judge. The task for the judge was to determine the meaning of the contested provisions of the lease by reading them in the context of the lease as a whole. Once that was done, the judge had to apply that determination to the particular facts of the case in order to resolve the dispute. It was of no consequence to the task of the trial judge whether the lease was one of a kind, or in a form used by other leaseholders. The question was the meaning of this lease in the context of these particular facts."

Paragraph 6 of the Appeal
Judgment

85. Whether the Lease is a standard form contract and what effect it should have on the interpretation of the Lease by a Court of first instance has been decided in Mr. Trenchard's previous litigation. Mr. Trenchard and the rest of the Respondents are barred by *res judicata* or, in the alternative, abuse of process from litigating this issue again.

iv. **Mr. Trenchard's pleadings regarding the meaning of operating expenses *simpliciter***

86. At paragraph 64 of the Trenchard Response, Mr. Trenchard pleads that "unless expressly stated to form part of a lease, many kinds of costs are not included as Operating expenses in leases, including management fees and those carried out by the landlord in its own interest." This issue was previously plead by Mr. Trenchard in the dismissed Supreme Court Action.

87. The Court of Appeal specifically considered and rejected Mr. Trenchard's arguments that the meaning of "Operating Expenses" under the Lease should be determined by reference to the meaning of operating expenses *simpliciter*. Mr. Trenchard is barred by *res judicata* from litigating this issue again.

Paragraphs 63-67 of the
Appeal Judgment

v. **Mr. Trenchard's pleadings regarding an implied term of transparency in the Lease**

88. At paragraphs 38.1 to 38.5 of the Trenchard Response, Mr. Trenchard raises the issue that the Lease could contain an implied term of transparency. Mr. Trenchard's claim that the Lease contains an implied term of transparency was already the subject of a consent dismissal order after four days of hearing on the issue in 2016.

89. In both the aforementioned Petition and the Supreme Court Action, Mr. Trenchard placed Articles 4, 5, and 7 of the Lease before the Court for interpretation. Arguments that the Lease contains implied terms were or could have been raised before the Court in both proceedings. Both the Petition and the Supreme Court Action were dismissed.

90. Mr. Trenchard is barred by *res judicata* from raising the issue of implied terms in the Lease, including an implied term of transparency, in this proceeding.

vi. Mr. Trenchard's pleadings regarding Westsea's obligations outside of the Lease

91. From paragraphs 41.17 to 41.24 of the Trenchard Response, Mr. Trenchard pleads that Westsea had legal obligations outside of the Lease to perform the Remediation Work.

92. By his own admission, Mr. Trenchard already raised this issue before the Court of Appeal when arguing that Madam Justice Douglas had erred in finding that the interpretation of the Lease advanced by Mr. Trenchard would lead to an absurd result wherein the Lease obligated neither leaseholders nor Westsea to undertake the Remediation Work.

Paragraph 108 of the Trial Judgment

93. The Court of Appeal dismissed the entirety of Mr. Trenchard's Appeal as it related to the interpretation of the obligations of Westsea and the leaseholders under the Lease. Mr. Trenchard is barred by *res judicata* from litigating this issue which he previously argued before the Court of Appeal in the dismissed Appeal.

Part 3: LEGAL BASIS

1. The Petitioner pleads and relies upon Rule 16-1 of the *Supreme Court Civil Rules*, BC Reg 168/2009.
2. The Petitioner pleads and relies upon the *Land Title Act*, RSBC 1996, c 245.
3. The Petitioner relies on the law of leasing.
4. The relationship between the Petitioner and the Respondents is governed by the terms of the Lease.

Westsea Construction Ltd. v. Mathers,
2014 BCSC 143 at para: 32.

5. The Lease, construed as a whole, is clear and unambiguous.

Trenchard v Westsea Construction Ltd., 2019 BCSC 1675 at para 164,
aff'd 2020 BCCA 152.

6. "Operating Expenses" is a defined term in the Lease, the meaning of which can be determined on the plain reading of Article 7.01, construed in the context of the Lease as a whole. Whether an expense incurred by Westsea constitutes an "Operating Expense" under the Lease is determined by whether it falls within the special meaning of "Operating Expenses" set out in Article 7.01 of the Lease, not by reference to tax or accounting authorities.

Trenchard v Westsea Construction Ltd., 2019 BCSC 1675 at paras 138-139, 149-152, aff'd 2020 BCCA 152.

Trenchard v Westsea Construction Ltd., 2020 BCCA 152 at para 67.

7. Where an operating expenses provision in a lease allows a lessor to charge lessees the lessor's expenses incurred performing its obligations under the lease, the lessor is entitled to charge lessees its total expenses, including litigation expenses, which it incurred in the performance of its obligations under the lease.

JEKE Enterprises Ltd v Northmont Resort Properties Ltd, 2016 BCSC 401 at paras 373-378, aff'd 2017 BCCA 38 at para 83.

8. Where litigation involves matters of lease interpretation that are central to a lessor's performance of its obligations under a lease, such litigation expenses can constitute operating expenses under the lease and be charged to lessees.

Ibid.

9. Under Article 7.01 of the Lease, "Operating Expenses" includes the total amount paid by the Petitioner in the performance of its covenants under the Lease, including legal charges, and all expenses paid by the Petitioner in connection with the Building, the common property therein or the Lands.

10. The legal charges incurred by the Petitioner defending the Petition, the Supreme Court Action, and the related appeals, were central to the performance of the Petitioner's covenants under the Lease and thus fall within the plain meaning of "Operating Expenses" contained in Article 7.01 of the Lease.

11. The legal charges incurred by the Petitioner which were charged to Orchard House leaseholders were properly charged pursuant to Article 7.01 of the Lease.

12. 5- The outstanding operating expenses were incurred in accordance with the Petitioner's obligations under the Lease and are properly due and owing.

13. The Lease provides the Petitioner with powerful remedies for the collection of outstanding arrears, including the termination of leasehold interests and a re-taking of the property.

Westsea Construction Ltd et al v Shao et al, (1 June 2018), Vancouver S140051 (BCSC) at para 24.

14. The Lease and the *Home Owner Grant Act*, RSBC 1996, c 194 authorize the Petitioner to credit a leaseholder's Home Owner Grant to any outstanding arrears owed by that leaseholder.

Res Judicata

15. The doctrine of *res judicata* prevents the re-litigation of issues already addressed by the Court. It has two branches: issue estoppel and cause of action estoppel.

16. Issue estoppel prevents a litigant from raising an issue that has already been decided in a previous proceeding. Cause of action estoppel prevents a litigant from pursuing a matter that was or should have been the subject of a previous proceeding.

Erschbamer v Wallster, 2013 BCCA 76 at paras 12-13, 15.

17. The requirements for establishing cause of action estoppel are as follows:

a. There must be a final decision of a court of competent jurisdiction in the prior action [the requirement of “finality”];

b. The parties to the subsequent litigation must have been parties to or in privity with the parties to the prior action [the requirement of “mutuality”];

- c. The cause of action in the prior action must not be separate and distinct; and
- d. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

Erschbamer v Wallster, 2013 BCCA
76 at para 15.

18. The requirements for establishing issue estoppel are as follows:

- a. that the same question has been decided;
- b. that the judicial decision which is said to create the estoppel was 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.

Erschbamer v Wallster, 2013 BCCA
76 at para 13.

19. Further, the doctrine of abuse of process can prevent the re-litigation of an issue where the technical requirements of *res judicata* are not met, such as when the parties to the proceedings are different.

Erschbamer v Wallster, 2013 BCCA
76 at paras 29-30.

20. A consent order is a formal expression of an agreement between parties. Where parties intend to finally dispose of the issues between them, a consent order will operate as a final judgment.

Shackleton v Shackleton, 1999
BCCA 704 at para 12.

Costs

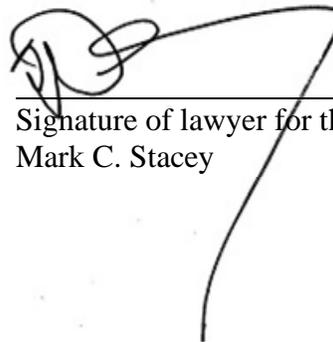
21. 15. The Petitioner elects to rely on its contractual rights to recover the costs of this Petition and does not seek an order for costs from this Honourable Court or, in the alternative, the Petitioner seeks the costs of this Petition.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Brian Slater, sworn September 10, 2018;
2. Affidavit #1 of Julie Trache, sworn January 11, 2021; and
3. ~~2.~~ Such further material as counsel will advise and the court will permit.

The Petitioner estimates that the hearing of the Petition will take 15 days.

Date: June 17, 2021
~~January 13, 2021~~
~~September 10, 2018~~



Signature of lawyer for the Petitioner
Mark C. Stacey

<p><i>To be completed by the court only:</i></p> <p>Order made</p> <p><input type="checkbox"/> in the terms requested in paragraphs of Part 1 of this petition</p> <p><input type="checkbox"/> with the following variations and additional terms:</p> <p>.....</p> <p>.....</p> <p>.....</p>	
<p>Date:</p>	<p>.....</p> <p>Signature of <input type="checkbox"/> Judge <input type="checkbox"/> Master</p>

Form 11 (Rule 4-5 (2))

**ENDORSEMENT ON ORIGINATING PLEADING OR PETITION FOR
SERVICE OUTSIDE BRITISH COLUMBIA**

The Petitioner Westsea Construction Ltd. claims the right to serve this petition on the Respondents REINER JOACHIN PIEHL and DOREEN GREETA PIEHL and GORDON WILLIAM GROVE, JAMES SCOT WALKER, SANDRA SCOTT JONSSON also known as SANDRA SCOTT GROVE-SAGER, and SEE-LIN SHUM outside British Columbia on the grounds that:

(a) this proceeding is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable property, pursuant to Section 10(a) of the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28;

(b) this proceeding is brought to interpret, rectify, set aside or enforce any deed, will, contract

or other instrument in relation to property in British Columbia that is immovable or movable property, pursuant to Section 10(c)(i) of the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28; and

- (c) this proceeding concerns contractual obligations which, to a substantial extent, were to be performed in British Columbia, pursuant to Section 10(e)(i) of the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28.

SCHEDULE "A"

647 Michigan Street

LEASEHOLDER	MAILING ADDRESS	CITY	PROV	PC	UNIT	ADDRESS	LEASE REGISTRATION NUMBER
Andrew Scott Taylor	2002 - 647 Michigan Street	Victoria	BC	V8V 1S9	2002	647 Michigan Street	F20355
Douglas George Routley and Leanne Finlayson	272 Coronation Avenue	Duncan	BC	V9L 2T2	1806	647 Michigan Street	ED84996
Edith Wood	205 - 647 Michigan Street	Victoria	BC	V8V 1S9	205	647 Michigan Street	EP55709
Gabriella Eva Seofield	2709 Scott Street	Victoria	BC	V8R 4J3	601	647 Michigan Street	EJ58227
Gerald John Rotering	807 - 647 Michigan Street	Victoria	BC	V8V 1S9	807	647 Michigan Street	J30654
Helen Elisabeth Verwey	405 - 647 Michigan Street	Victoria	BC	V8V 1S9	405	647 Michigan Street	EE15664
Hugh Alexander Trenchard	805 - 647 Michigan Street	Victoria	BC	V8V 1S9	805	647 Michigan Street	EH136953
<u>Iris Irene Hays</u>	<u>1901 - 647 Michigan Street</u>	<u>Victoria</u>	<u>BC</u>	<u>V8V 1S9</u>	<u>1901</u>	<u>647 Michigan Street</u>	<u>EJ29049</u>
Iris Irene Hays	2103 - 647 Michigan Street	Victoria	BC	V8V 1S9	2103	647 Michigan Street	EB89049
Jacalyn Gail Hays	250 - 8th Street N.E.	Salmon Arm	BC	V1E 1G9	2207	647 Michigan Street	D86269
James Scot Walker	P.O. Box 764	Jasper	AB	T0E 1E0	901	647 Michigan Street	EE143817
Judith McNeil Sim	1808 - 647 Michigan Street	Victoria	BC	V8V 1S9	1808	647 Michigan Street	EN84928A
Martine Goddard	1702 - 647 Michigan Street	Victoria	BC	V8V 1S9	1702	647 Michigan Street	EB31962
Michael Gordon Clark, Chantelle Marie Clark	1107 - 647 Michigan Street	Victoria	BC	V8V 1S9	1107	647 Michigan Street	EB38601
Nigel John Joslin	408 - 647 Michigan Street	Victoria	BC	V8V 1S9	408	647 Michigan Street	S91374
Patricia Anne Smith	1503 - 647 Michigan Street	Victoria	BC	V8V 1S9	1503	647 Michigan Street	EJ74681
<u>Isobel Sarah McIntyre, the Executor of the Will of Peter James Rourke, Deceased</u>	2206 - 647 Michigan Street	Victoria	BC	V8V 1S9	2206	647 Michigan Street	EL102225A

Reiner Joachin Piehl and Doreen Greeta Piehl	505 - 10045 - 117 Street NW	Edmonton	AB	T5K 1W8	2009	647 Michigan Street	EE76018
Robert John Calder	1804—647 Michigan Street	Victoria	BC	V8V 1S9	1804	647 Michigan Street	M107224
Sandra Scott Jonsson also known as Sandra Scott Grove Sager, Gordon William Grove	285 Hawkstone Drive NW	Calgary	AB	T3G 3S4	1004	647 Michigan Street	M21556
See-Lin Shum	2549 Montgomery Way	Sacramento	California, USA	95828	1003	647 Michigan Street	EE77620
Stephen James Matthew and Anne Udale	1206—647 Michigan Street	Victoria	BC	V8V 1S9	1206	647 Michigan Street	EL81553A
Wendy Elizabeth Duval	1701—647 Michigan Street	Victoria	BC	V8V 1S9	1701	647 Michigan Street	EH96212

Schedule "B"

1. A declaration that the Respondent is in default of Article 7.02 of the Lease, defined herein, against lands and premises legally described as:

Lot A of Lots 1761 to 1765 inclusive and Lots 1803 to 1807 inclusive, Victoria City, Plan 22534 PID 004-154-878 (the "**Lands**")

and, specifically, the leasehold interest owned by the Respondent, set out in **Schedule "A"** to this Petition to the Court (the "**Suite**").

2. An order for the sale of an assignment of the Suite and that the Petitioner has exclusive conduct of the sale of the assignment on the following terms:
 - a. the Petitioner be at liberty to list the Suite for sale, until further order, and to pay a realtor's commission of up to 7% of the first \$100,000 of the gross selling price and 2.5% of the balance, plus applicable taxes, from the sale proceeds;
 - b. any sale be subject to Court approval unless otherwise agreed by the Petitioner and the applicable Respondent;
 - c. the applicable Respondent or any person(s) on his behalf (including anyone in possession of the Suite) shall permit any agent of the Petitioner to inspect, appraise or show to any prospective purchaser the Suite including the interior of the Suite on any day between 9:00 a.m. and 7:00 p.m., and to post signs offering the Suite for sale;
 - d. an order for appointment of a receiver, or a receiver and a manager; and
 - e. an order for possession of the Suite.
3. An order setting a date for redemption of the Suite.
4. An order that the amount to be paid to the Petitioner on redemption of the Suite or on the sale of the Suite shall be the balance found to be due and owing as at the date of the redemption or sale plus interest under the Lease accruing to the date of redemption or the date the proceeds from a sale are received and the costs of the Petitioner in these proceedings.
5. An order that the Respondent pay to the Petitioner the amount of money found to be due at the dates set out above and the costs of this proceeding.
6. An order that the legal charges associated with this form part of the amount required to cure the default.
7. Alternatively, if the Suite is not redeemed, an order that:

- a. the Petitioner may apply for an order that, on pronouncement, the Respondent and all persons claiming by or through him, shall be foreclosed from all right, title, interest and equity of redemption in and to the Suite, or any one of them;
 - b. by reason of said defaults, all right, title and interest of the applicable Respondent in the Suite pursuant to the Lease be, and are hereby forthwith, cancelled and at an end;
 - c. all money received under or pursuant to the Lease shall become the property of the Petitioner;
 - d. the applicable Respondent forthwith deliver vacant possession of the Suite within 14 days of this Court's order; or, alternatively,
 - e. the Respondent deliver up vacant possession of the Suite in a manner that the Court directs;
 - f. Writs of Possession be issued accordingly; and
 - g. the Registrar of the Victoria Land Title Office discharge, release and cancel charges from title to the Lands in respect to the Respondent's leasehold interests.
8. An order for leave to further amend this Petition and to file and deliver further affidavits in support of those amendments in respect to further arrears that may be later owed by the Respondent.
 9. An order that the Petitioner may apply for a summary accounting of amounts owed to the Petitioner for interest or as reimbursement for payments made for protective disbursements in relation to taxes, insurance premiums or appraisal or for inspecting, repairing or maintaining the Suites, or for other expenses which the Petitioner may incur before or after the date of the orders set out above before a Master or by reference to the Registrar.
 10. An order for all necessary accounts, directions and inquiries and such further and other relief as this Honourable Court deems just.