

CANADA / JUDGMENT

Trenchard v. Westsea Construction Ltd.

2020 BCCA 152

COURT

British Columbia Court of Appeal

DECIDED

28 May 2020

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2020 BCCA 152 Trenchard v. Westsea Construction Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Trenchard v. Westsea Construction Ltd.,

2020 BCCA 152

Date: 20200528

Docket: CA46417

Between:

Hugh Trenchard

Appellant

(Plaintiff)

And

Westsea Construction Ltd.

Respondent

(Defendant)

Before:

The Honourable Mr. Justice Hunter

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated

October 1, 2019 (Trenchard v. Westsea Construction Ltd.,
2019 BCSC 1675, Victoria Docket 16-3355).

The Appellant, appearing via videoconference:

H. Trenchard

Counsel for the Respondent, appearing via videoconference:

M.C. Stacey

C.S. Immega

Place and Date of Hearing:

Vancouver, British Columbia

May 5, 2020

Place and Date of Judgment:

Vancouver, British Columbia

May 28, 2020

Written Reasons by:

The Honourable Mr. Justice Hunter

Concurred in by:

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Abrioux

Summary:

The respondent is the owner and lessor of a residential building of which, the appellant is a lessee. The respondent commenced an extensive restoration project of the residential building which included replacing failing windows and sliding doors, as well as exhaust fans. The respondent then charged back these costs to the lessees, asserting its right to do so pursuant to the lease agreement between the parties. The appellant challenged the chargeback of these costs, but his claim was dismissed. He appeals. Held: Appeal dismissed. The trial judge committed no error in concluding that the project costs were Operating expenses within the meaning of the Lease, and were properly chargeable to the lessees.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

- [1] This appeal requires consideration of the liability for the cost of replacing windows and fans in a residential building in which certain costs are to be incurred by the owner and then allocated to the resident leaseholders pursuant to the provisions of a common lease. The question is whether the costs incurred in the circumstances at bar fall within the relevant lease provision, or lie outside this provision and thus are to be absorbed by the owner.
- [2] The resolution of this issue depends upon both an interpretation of the lease in question, and an assessment of the evidence called at trial to explain the nature of the repair project. After hearing and assessing the evidence called by both parties, the trial judge concluded that the type of repair undertaken by the owner was contemplated by the lease provision that permitted the owner to allocate the costs to the leaseholders. The appellant submits that this was an erroneous reading of the lease.
- [3] The appellant has raised a preliminary question whether the lease at issue is a standard form contract. The appellant says that this is important for two reasons. First, he says that if it is a standard form contract, it should be read *contra proferentem*, meaning against the position of the party who drew up the document, here the respondent. He attempted to introduce similar leases at trial, but the trial judge ruled them irrelevant and inadmissible. That ruling is the basis for the appellant's first ground of appeal.
- [4] The appellant also says that it is important for this Court to consider whether the lease in question is a standard form contract because it will affect the standard of review of the trial judgment to be undertaken by this Court. With that argument in mind, he seeks to introduce nine similar leases into evidence before this Court. The respondent objects, arguing that the application to admit new or fresh evidence does not meet the tests established by this Court for that purpose.
- [5] Finally, the appellant argues that the trial judge misinterpreted the lease, and should have found that the repairs undertaken by the respondent were not required under the lease to be made by the respondent, and accordingly were not permitted to be allocated to the leaseholders. The respondent supports the interpretation of the lease made by the trial judge.
- [6] In my view, the trial judge did not err in refusing to admit the similar leases tendered by the appellant. 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.
- [7] On the other hand, the question whether the lease was a standard form document is relevant to this Court because it affects the standard of review. The reason this is relevant in this Court is that where the interpretation of a contract that is unique to the parties is at issue,

this Court employs a deferential review of a judge's analysis. The judge's interpretation is treated as akin to a finding of fact, which this Court will not interfere with unless there is an extricable legal error or an obvious factual error going to the heart of the judgment. But if the contract provisions to be interpreted appear in other standard form contracts, there may be precedential value in the interpretation beyond the interests of the parties, and in those circumstances this Court reviews for correctness. This situation typically arises in connection with insurance policies in widespread use.

- [8] I agree with the appellant that the evidence he wishes to provide to us is helpful on the issue of precedential value, and would admit the evidence in this Court, notwithstanding that it does not meet the usual test employed in this Court for the receipt of evidence that was not before the trial judge. I would admit the evidence, but only for the limited purpose of determining whether the standard of review of the judge's interpretation is correctness or palpable and overriding error, and for no other purpose.
- [9] Having reviewed the nine leases tendered by the appellant, I agree that they are in all relevant aspects identical to the lease at issue in this appeal. That being so, the standard of review for the interpretation of these provisions is correctness. The standard of review for the judge's application of the lease provisions to the particular circumstances before her remains that of palpable and overriding error.
- [10] In the course of deciding this case, the judge was required to interpret several provisions of the lease as they relate to the contract as a whole. Having reviewed the judge's analysis and considered the submissions of the parties, I agree with the judge's interpretation of the lease. Accordingly, having applied a standard of correctness, I would not give effect to this ground of appeal.
- [11] The more detailed decisions made by the judge concerning the nature of the repair being undertaken were decisions of fact, to which deference must be given. Applying the palpable and overriding error standard, I can see no error in the judge's consideration of this evidence.
- [12] For these reasons, further explained in the reasons that follow, I would dismiss the appeal.

Background

- [13] The appellant Mr. Trenchard owns an interest pursuant to a lease agreement ("the Lease") in a unit in a 22-storey residential building called Orchard House in Victoria, British Columbia. The lease has a term of 99 years, ending in 2073. The appellant acquired his interest in January 2011. The respondent ("Westsea") is the owner of Orchard House and the lessor under the Lease.

- [14] In 2010, Westsea began a restoration project for Orchard House to be completed in two phases. Phase 1 involved the replacement of east/west facing windows and windows at building corners as well as exterior walls and other repairs. The costs associated with Phase 1 were charged back to leaseholders. Phase 1 was underway when the appellant purchased his leasehold interest. No claim is made with respect to these costs in this proceeding.
- [15] Phase 2 involved a building envelope remediation project. It included the replacement of windows, sliding doors and exhaust fans in the building, as well as some work on the external walls. In 2013, Westsea wrote to the leaseholders of Orchard House to advise them of the anticipated costs for Phase 2, characterizing them as Operating expenses, and the proportionate shares of those costs for the leaseholders. The appellant disputed the ability of Westsea to charge these costs back to the leaseholders as Operating expenses. Phase 2 was subsequently completed and the appellant has paid his proportionate share under protest. The question for the trial judge was whether Westsea was entitled under the Lease to charge the costs of Phase 2 back to the leaseholders as Operating expenses.

The Lease

- [16] The Lease defines the obligations of lessor and lessee in respect of Operating expenses in Article 7, which reads in relevant part as follows:

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, expense 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 event 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), any legal and accounting charges and all other expenses paid or payable by the Lessor in connection with the Building, the common property charges 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 Prior to the 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 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 the Lessee's share of such excess

[Emphasis added.]

[17] The question under the Lease is whether the costs of Phase 2 are Operating expenses within the meaning of Article 7.01. If they are, they may be charged back. If they are not, they may not be charged back.

[18] In challenging Westsea's position that these costs are Operating expenses within the Lease's definition, the appellant relies on two other provisions of the Lease. Article 4, entitled "Lessee's Covenants", includes the following obligations of the Lessee:

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

[Emphasis added.]

[19] Article 5, entitled "Lessor's Covenants", includes the following obligation on Westsea:

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

[Emphasis added.]

[20] The appellant takes the position that the Phase 2 costs are not Operating expenses within the meaning of Article 7 for several reasons. First he argues that the Lessor has no obligation under the Lease to replace windows, sliding doors and exhaust fans, noting that they are not referred to in Article 5.03. He points out that windows (and doors) are specially referred to in Article 4.03 as Lessee responsibilities, but excluding reasonable wear and tear. In this case, it is common ground that the windows had exceeded their service life, and fell within the concept of reasonable wear and tear. Finally, he argues that Phase 2 was a capital project requiring expenses of a capital nature, to be distinguished from operating expenses, which are said to be regular, recurring expenses.

[21] After a ten-day trial, the trial judge rejected these arguments and concluded that the Phase 2 costs were Operating expenses within the meaning of Article 7, and could be apportioned among the leaseholders in accordance with the approach set out in Article 7. Her extensive reasons for judgment are indexed as 2019 BCSC 1675. The question in this appeal is whether she erred in coming to this conclusion.

- [22] A related issue in this appeal is whether the trial judge erred in ruling inadmissible nine leases tendered by the appellant as demonstrating that the Lease was a standard form contract.

The Trial Judgment

- [23] The trial judge first considered whether Westsea was obliged under the Lease to undertake this project. If so, the costs would be Operating expenses in accordance with the first two lines of Article 7.01.
- [24] The judge reviewed the evidence given by the engineer on the project to the effect that complete repair of the outer walls of the building was not possible without also replacing the windows and sliding doors. The building windows and walls were structurally integrated. Leakage was occurring through the windows, and new glazing assemblies (windows and sliding doors) would prevent recurring instances of leakage into suites and the concrete wall assembly and prevent long-term deterioration of the building. The judge concluded as follows:
- [50] The evidence of Mr. Gallant and Mr. Hasham is clear that glazing assemblies are integral parts of the Building envelope and exterior wall systems. The unchallenged evidence of Mr. Gallant establishes the exterior wall system controls interior moisture primarily by exhaust fans and that, if they are not functional, the Building exterior wall system would be adversely affected by an increased risk of high interior humidity which would, in turn, cause condensation on the glazing assemblies and water-related damage.
- [51] On all the evidence, I find repair of the outer walls, remediation of the water ingress problem, and ensuring the integrity of the Building envelope and structure were inextricably linked to the replacement of old and failing windows, sliding doors, and fans. I conclude complete outer wall repair would not have been possible without replacing failing windows, sliding doors, and fans at the same time. For those reasons, I conclude the proper interpretation of "outer wall" repairs in the context of Article 5.03 must include the glazing assemblies and exhaust fans to give effect to the parties' agreement in the Lease.
- [25] The judge addressed and rejected the appellant's argument that the effect of the Lessee's obligation to repair and maintain windows and doors in Article 4.03 supersedes the Lessor's covenant to keep in good repair and condition the foundations and outer walls found in Article 5.03. She expressed her analysis and conclusion in this way:
- [54] In my view, it is possible to construe the Lease as a whole and give effect to Articles 4.03 and 5.03. Article 4.03 requires leaseholders to repair and maintain windows in all instances, except those relating to reasonable wear and tear. Article 5.03 requires the lessor to keep in good repair and condition the Building foundations and outer walls; this may include the repair or replacement of failing windows and doors which have deteriorated due to reasonable wear and tear and which may be undermining the structural integrity of the Building foundation and outer walls. Such an interpretation is consistent with the plain

wording of the Lease, the reasonable expectations of the parties at the time they entered into the Lease, the evidence at trial, the notion of commercial efficacy, and common sense. The Lease does not distinguish between structural and non-structural components of the outer walls. The law on this issue, including the decisions cited by the plaintiff, indicates that whether windows and doors are part of exterior building walls is fact-specific.

- [26] The judge then considered the necessity of the project by reference to the Lessor's obligation to keep the foundation and outer walls in good repair and condition, and concluded on the evidence that "there was a water ingress problem at the Building in 2016 which would have worsened if not addressed, thereby causing the Building to fall into a serious state of disrepair": para. 92.
- [27] The judge then considered the appellant's argument that neither the Lessor nor the Lessees were obligated under the Lease to undertake the project, and came to the following conclusions:
- [109] On a plain reading of Article 5.03, considered in the context of the Lease as a whole and the relevant authorities including, notably, JEKE, and a review of all the evidence, I conclude as follows:
- a) By 2016, the windows, sliding doors, and fans replaced during the Project had deteriorated due to reasonable wear and tear occasioned by the passage of time and were not functioning at the expected level;
 - b) The windows, doors and fans could not be repaired and required replacement;
 - c) Leaseholders were not obliged under the Lease to replace windows, sliding doors, or fans in their suites damaged due to reasonable wear and tear;
 - d) Requiring individual leaseholders to do so would be impractical, inefficient, and expensive, assuming that were possible and permitted by the City of Victoria;
 - e) Article 5.03 is reasonably construed in the context of the Lease as a whole as obliging Westsea, as lessor, to replace failing Building components, as contemplated by the Project; and
 - f) To conclude otherwise would result in an absurdity, which would be inconsistent with the notion of commercial efficacy and what the parties could reasonably have contemplated when they entered into the Lease.
- [28] The trial judge then turned to the question of betterment: did this project maintain the building or improve it? After reviewing the evidence, she concluded that the project did not result in betterment:

- [117] The evidence at trial establishes that failing to replace the windows, sliding doors, and fans would have caused the Building to deteriorate to a state worse than its original condition. The evidence also establishes the windows, sliding doors, and fans replaced during the Project will require further replacement in another 25-35 years (or 20-30 years before the end of the Lease term).
- [118] I am satisfied on a review of all the evidence that the Project did not result in betterment.
- [29] Finally, the judge reviewed and dismissed various arguments of the appellant as to the proper interpretation of the Lease. She concluded that it was unnecessary to consider whether or not the project was a capital cost in an accounting sense. Relying on this Court's judgment in JEKE Enterprises Ltd. v. Northmont Resort Properties Ltd., 2017 BCCA 38, she concluded that the parties could define operating expenses in whatever manner they wished, and also that the interpretative aids, *noscitur a sociis* and *eiusdem generis* were ousted by the language of the Lease. She held further that it was not necessary to determine whether the Lease was a standard form contract, and rejected the application of the doctrine of *contra proferentem* on the basis that the doctrine applied only when the general rules of contractual interpretation fail to resolve an ambiguity. Here she concluded that there was no ambiguity in the Lease. Her summary was as follows:
- [164] My conclusions are summarised as follows:
- a) The Lease, construed as a whole, is clear and unambiguous;
 - b) The Project was necessary to address a water ingress problem at the Building occasioned by reasonable wear and tear;
 - c) The Project outer wall repairs could not have been completed without replacing the existing windows, sliding doors, and fans;
 - d) Westsea was required to undertake the Project pursuant to its lessor covenants in Article 5.03 of the Lease;
 - e) Westsea was entitled to charge the plaintiff his proportionate share of the Project as operating expenses, as defined in Article 7.01 of the Lease;
 - f) Westsea did not breach Article 7.02 of the Lease;
 - g) The Project did not result in betterment;
 - h) It is unnecessary for this Court to consider whether:
 - i. The Project was a capital cost or could have been paid for using prepaid rent;
 - ii. The Lease was a standard form contract;
 - iii. The doctrine of *contra proferentem* applies; or
 - iv. It is appropriate to pierce Westsea's corporate veil.

[165] For the reasons set out herein, the plaintiff's claim is dismissed.

Issues

[30] The appellant alleges the trial judge made four errors:

- (i) The judge failed to consider and find that the Lease is a standard form contract;
- (ii) The judge erred in law by finding the lease contains an implied covenant for Westsea to replace old and worn windows and fans;
- (iii) The judge erred in law by failing to consider and find that the wear-and-tear exception specifically exonerates Lessees from liability for costs to replace old and worn windows, doors and fans; and
- (iv) The judge erred by misinterpreting the meaning of Operating expenses and by finding they are broad enough to include capital costs.

[31] The appellant also brings an application to adduce additional evidence in this Court that was not before the trial judge, namely nine long-term leases said to be in identical form as the Lease.

Analysis

Did the Trial Judge err in Failing to find that the Lease was a Standard Form Contract?

- [32] At trial, the appellant sought to introduce nine leases said to show that the Lease was a standard form agreement. The trial judge ruled the evidence inadmissible. In this Court, the appellant submitted that the judge was in error and that at a minimum, the evidence was admissible to set up an argument that the Lease should be interpreted *contra proferentem*.
- [33] I cannot see any basis for admitting this evidence before the trial judge. The task for the judge was to interpret this Lease by considering the language of the Lease in the context of the document as a whole. Whether or not the Lease is a standard form agreement, the judge must attempt to find the most reasonable interpretation of the contested language. If there are two reasonable but inconsistent interpretations of the meaning of the provisions, then the judge would apply the general rules of contract interpretation to resolve the ambiguity. It is only when these rules fail to resolve the ambiguity that the doctrine of *contra proferentem* is applied. If the analysis reaches that point, the doctrine of *contra proferentem* applies if one party drafted the contract and there were no negotiations between the parties, whether or not the contract is one-of-a-kind, or in a standard form used by other parties.
- [34] The appellant has submitted that the use of *contra proferentem* may be applied more readily in the case of standard form contracts. The proper approach to standard form contracts was summarized recently by the Supreme Court of Canada in *Sabean v. Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7:

- [12] In *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, this Court confirmed the principles of contract interpretation applicable to standard form insurance contracts. The overriding principle is that where the language of the disputed clause is unambiguous, reading the contract as a whole, effect should be given to that clear language: *Ledcor*, at para. 49; *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245, at para. 22; *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at para. 71. Only where the disputed language in the policy is found to be ambiguous, should general rules of contract construction be employed to resolve that ambiguity: *Ledcor*, at para. 50. Finally, if these general rules of construction fail to resolve the ambiguity, courts will construe the contract *contra proferentem*, and interpret coverage provisions broadly and exclusion clauses narrowly: *Ledcor*, at para. 51.
- [35] If the trial judge had found the Lease ambiguous, and if application of the general rules of contract interpretation had failed to resolve the ambiguity, the judge could have applied the doctrine of *contra proferentem*, whether or not the Lease was a standard form contract. Thus the additional nine leases tendered by the appellant were not relevant to the judge's task, and were rightly ruled inadmissible.
- [36] The appellant also submitted that the trial judge should have admitted the leases because whether the Lease is a standard form agreement has implications regarding the applicable standard of review on appeal. I will discuss this submission further when I review the application to file the leases as additional evidence in this Court, but for purposes of considering the trial judge's ruling on admissibility, it is my view that this factor has no bearing on the task that was before the judge, namely to give a contextual interpretation of the Lease. I would not give effect to this ground of appeal.
- Did the Trial Judge err in law by Finding the Lease contains an Implied Covenant for Westsea to Replace old and worn Windows and Fans?
- [37] This ground can be dispensed with in short order, because the trial judge made no finding that the Lease contained any implied covenants. The judge did not mention "implied term" or "implied covenant" in her reasons. What the judge did was to interpret the scope of the Lessor's covenant under the Lease. The construction of an explicit obligation to keep in good repair may include matters not expressly stated but implicit in the explicit obligation. This exercise of construction does not amount to the creation of an implied term in a contract.
- [38] The last two grounds of appeal relate to the judge's interpretation of the Lease. This raises the issue of the standard of review to be applied by this Court on this appeal.

The Standard of Review of the Trial Judgment

- [39] The usual standard of review for contract interpretation by first instance decision-makers is that of palpable and overriding error: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53. This means that in the ordinary course, this Court will not interfere with the contract interpretation made by a trial judge unless an error is identified that is obvious and was central to the outcome.
- [40] There are two exceptions to this rule. If a question of law can be extricated from what was initially characterized as a question of mixed fact and law in the interpretation of the contract, the appellate court should review that question for correctness: *Sattva* at para. 53. The Supreme Court of Canada has cautioned appellate courts, however, to take a restrained approach in identifying extricable questions of law in disputes over contractual interpretation: *Sattva* at para. 54.
- [41] The second exception to this deferential review occurs when there is precedential value to the interpretation of the agreement. This exception is generally associated with the Court's decision in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, but it was anticipated in *Sattva*, when the Court explained one difference between questions of law which are reviewed on a correctness standard and questions of mixed fact and law which are accorded deferential review:
- [51] One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam [Canada] (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 identified the degree of generality (or "precedential value") as the key difference between a question of law and a question of mixed fact and law.

[Emphasis added.]

- [42] In *Ledcor*, the Court made this distinction explicit:

- [24] I would recognize an exception to this Court's holding in *Sattva* that contractual interpretation is a question of mixed fact and law subject to deferential review on appeal. In my view, where an appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.

[Emphasis added.]

- [43] Thus, if the interpretation of the Lease involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, the interpretation by the trial judge should be reviewed on a correctness standard. The application of the interpretation of the Lease to the particular circumstances of the dispute remains a question of mixed fact and law, and is subject to deferential review, absent the identification of an extricable question of law.
- [44] This takes me to the application of the appellant to tender the nine leases as additional evidence in this Court, even though the leases were properly rejected by the trial judge as evidence at first instance. If the standard of review by this Court depends on whether the Ledcor exception applies to override the usual deferential review of contract interpretation, it is my view that it must be open to the appellant to adduce the additional evidence for this Court to review. In some cases, such as pre-printed insurance contracts in wide circulation, it will be obvious that the contract is a standard form contract, the interpretation of which will have precedential value. But in other cases, it will not be obvious, and there must be a mechanism to bring evidence before the Court to establish whether the interpretation of the agreement can be expected to have an impact beyond the parties to the particular dispute.
- [45] The respondent objects to the receipt of this evidence on the basis that it does not meet the test in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, which this Court has adopted for determining whether to grant leave to adduce either fresh or new evidence in this Court. I agree that this application to adduce the additional evidence does not meet the test in *Palmer*, but this Court retains the discretion to admit evidence that does not meet the test if the interests of justice require it: *Santelli v. Trinetti*, 2019 BCCA 319 at para. 39.
- [46] The test in *Palmer* has been modified in criminal cases when the issue to which the evidence relates does not involve the determination of an issue of fact relevant to the outcome of the trial: *R. v. Budai*, 2001 BCCA 349 at para. 88; *R. v. Nguyen*, 2013 BCCA 125 at para. 9. In *R. v. Wolkins*, 2005 NSCA 2, at paras. 58-61, Cromwell J.A. (as he then was), distinguished between evidence directed to an issue decided at trial, to which *Palmer* applied, and evidence directed to other matters, to which the admissibility of the evidence depends on the nature of the issue raised. I can see no reason why this sensible distinction should not be applied in civil appeals. As I have already determined, the existence of the nine leases is irrelevant to the interpretation of the Lease. It is relevant, however, to the standard of review to be applied to the interpretation of this Lease on this appeal. I would admit the evidence for that limited purpose, and only for that purpose.
- [47] Having reviewed the leases, I agree with the appellant that they are in substance identical to the Lease in question. The nine leases, each for a different building, reflect many multiples of leaseholders. It is reasonable in these circumstances to characterize this Lease as a standard form agreement. The interpretation of the Lease will have precedential value for the holders of substantially identical leases. There is no meaningful factual matrix that is specific to these parties to assist the interpretation process. Accordingly, on the authority of

Ledcor, I conclude that the interpretation of the meaning of the Lease by the trial judge is to be reviewed on a standard of correctness.

- [48] Thus, what the Lease means is to be reviewed for correctness, but how the Lease applies to the particular Orchard House project has no precedential value to leaseholders in other buildings, and will be reviewed on a standard of palpable and overriding error.
- [49] The appellant made a number of submissions challenging the conclusion of the trial judge that the Phase 2 costs fell within the definition of Operating expenses, but as I understand them, these submissions are subsumed in two broad propositions:
- (i) There is an inconsistency between Article 4.03 and 5.03 that should be resolved by an interpretation that the Lessor never has an obligation to replace windows, sliding doors and exhaust fans; therefore any amounts paid to replace windows, doors and fans cannot be Operating expenses chargeable to the leaseholders;
 - (ii) Operating expenses within the meaning of Article 7.01 cannot include capital costs.
- [50] These submissions allege errors of law in the interpretation of the Lease, and are reviewable on a standard of correctness.
- [51] If either of the conclusions of the trial judge on these two interpretative questions is incorrect, the appellant submits that the costs incurred in Phase 2 cannot be Operating expenses chargeable to the leaseholders, on the basis that these costs are both costs to replace windows, doors and fans, as well as capital costs. This submission depends upon the factual nature of the Phase 2 costs and raises a question of mixed fact and law, reviewable on a standard of palpable and overriding error.

The Alleged Inconsistency between Articles 4.03 and 5.03

- [52] The appellant submits that on a proper interpretation of the Lease, Lessees cannot be made liable for the replacement of old and worn windows through Article 7.01 because the exception for wear-and-tear in Article 4.03 exonerates Lessees for liability for such costs. He says further that this interpretation is supported by the principle that general terms of a contract are qualified by specific terms, so that the general terms buildings and walls (that must be maintained by the Lessor) should be interpreted as not extending to the more specific terms, doors and windows, that are to be maintained by the Lessee, subject to the exception for reasonable wear and tear.
- [53] The effect of this interpretation would be to create a gap, whereby no one would have the responsibility to repair doors and windows that have failed, but the appellant submits that this is the only interpretation that protects the exception for reasonable wear and tear in Article 4.03.

- [54] The trial judge did not consider that there was an inconsistency between Articles 4.03 and 5.03. She was of the view that the Lessor's responsibility to keep the outer walls and the building in good repair could include replacing the windows, sliding doors and exhaust fans, depending on the circumstances. The judge referenced the judgment of *Holiday Fellowship v. Viscount Hereford*, [1959] 1 All E.R. 433 (Eng. C.A.) for the proposition that "whether windows form part of the outer walls of a building is a matter of degree, to be determined on the facts." Thus she rejected the assertion of the appellant that the effect of Articles 4.03 and 5.03 necessarily excluded any obligation of the Lessor to replace windows and doors of the building.
- [55] This can be an erroneous interpretation only if the Lease provides that the Lessor can never have an obligation to replace the windows, doors and exhaust fans, no matter what impact their obsolescence had on the building. I do not consider that the wear and tear provisions of Article 4.03 compel such a categorical result.
- [56] In support of his argument, the appellant relies on *B.G. Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, for the proposition that general contract terms are qualified by specific terms, and argues that the reference to building and walls must be regarded as excluding windows and doors, being more specific terms. In my view, this submission mistakes interpretative aids for irrebuttable rules. The actual passage from *B.G. Checo* that contains the reference to general and specific terms is as follows (at pp. 23-24):

It is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole: Where there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective: In this process, the terms will, if reasonably possible, be reconciled by construing one term as a qualification of the other term: A frequent result of this kind of analysis will be that general terms of a contract will be seen to be qualified by specific terms - or, to put it another way, where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term.

[Citations omitted.]

- [57] An example of an apparent inconsistency between different terms of a contract can be seen in *Lavin Agency Ltd. v. Blackhall & Company Ltd.* (2004), 185 O.A.C. 48, another judgment relied on by the appellant. In *Lavin*, the lessor was to pay utilities and the tenant was to "pay Hydro directly to the Utility company". The tenant argued that it should be credited with the payment to Hydro, but the Court held that the reference to Hydro qualified the more general provision of utilities. Hydro was a specific kind of utility. The tenant paid the Hydro; the landlord paid all other utilities.

[58] In the case at bar, windows cannot be regarded as a specific kind of wall, foundation or building, in part because, in fact, they are not that and in part because the Lessee is not obligated to replace all windows, just certain windows (windows that require replacement for reasons other than wear and tear). Under the Lease, Lessees have two sets of obligations. They have obligations in respect of their individual units, and they have an obligation to pay their proportionate cost of keeping the building in good repair. There is no inconsistency in the Lessee being obligated to replace the specific windows in the Lessee's unit that have not failed through wear and tear, and the Lessor being obligated to replace failed windows that are undermining the structural integrity of the building. The two sets of obligations are complementary. Whether in a particular situation the Lessor is under an obligation to make repairs that include replacing the windows, doors and fans cannot be answered by a categorical interpretation of the Lease; it depends on the circumstances in which the need for replacement arises.

Operating Expenses and Capital Costs

- [59] The appellant also submits that Phase 2 was a capital project because it was not a recurring cost and was intended to extend the life of the building. He relied upon a number of cases in the tax and accounting field to argue that capital costs cannot be operating expenses, and since the Lessor is only authorized to charge back Operating expenses, the chargeback of the Phase 2 costs was contrary to the Lease.
- [60] The trial judge held that it was unnecessary to consider whether the Phase 2 costs were capital costs, as the interpretative question was whether they were Operating expenses within the meaning of Article 7.01. She relied on this Court's judgment in JEKE Enterprises.
- [61] The issue in JEKE was similar to the issue at bar. JEKE had purchased two time share units as lessee in a development. The agreement contained a provision, clause 9, requiring the lessees to pay their proportionate share of what were described as "all administration[,] maintenance and repair costs (the 'Operating Costs') and replacement costs incurred with respect to the Vacation Resort and the Vacation Properties including, without limiting the generality of the foregoing", followed by a list of specific items, one of which was "repairs to both the exterior and interior of the Vacation Properties". The lessor then began an extensive remediation and renovation project, including the replacement of the water pipes, repairs to the exterior building envelope and decks/patios, installation of a storm water pipeline and replacement of furnishings and fixtures suffering from functional obsolescence and wear and tear. The question was whether the lessor could charge the costs back to the leaseholders under clause 9.
- [62] One of the principal issues in JEKE, as it is on this appeal, was whether the project costs were capital costs which were by definition distinct from operating costs. Chief Justice Bauman dealt with this argument in this way:

- [53] JEKE seeks to restrict the generality of these words through a number of submissions. First, it says that nothing in clause 9 makes mention of "capital costs". JEKE seizes on the phrase "Operating Costs" in clause 9 and submits that "operating costs" are by definition distinct from capital costs. English authority is cited to suggest this is so. But this is an erroneous take on the interpretation exercise. The VIA in clause 9 does not use the phrase "operating costs" simpliciter and thereby possibly leave its meaning to be determined by commercial or accounting usage. It rather simply uses the phrase as a defining term for "all administration, maintenance and repair costs". To put it another way, "Operating Costs" in the VIA are not necessarily "operating costs" in commercial or accounting parlance.
- [54] Contracting parties are free to define words or phrases in a manner that differs from their ordinary usage. Where they have clearly done so, a court need go no further than this unambiguous language in interpreting the meaning of that word or phrase (*Belsat Video Marketing Inc. v. Astral Communications Inc.* (1999), 86 C.P.R. (3d) 413 at paras. 7, 8 (O.N.C.A.)).

[Emphasis added.]

- [63] In my view, the principles outlined by the Chief Justice apply directly to the case at bar. Article 7.01 does not use the phrase "Operating expenses" simpliciter. It uses the phrase as a term to describe all the Lessor's obligations, as amplified by the list of matters following the phrase "and includes but without restricting the generality of the foregoing". The very first matter listed to amplify the Lessor's obligations is "the amount paid or payable by the Lessor in connection with the maintenance, operation and repair of the Building". The very last item specified is "and all other expenses paid or payable by the Lessor in connection with the Building ". As in JEKE, the contracting parties for Orchard House were free to define "Operating expenses" in a manner that differs from their ordinary usage.
- [64] The appellant relies on the judgment in *Parsons Precast Inc. v. Sbrissa*, 2012 ONSC 6098, aff'd 2013 ONCA 558, in support of his position that replacement of the windows, doors and exhaust fans lay outside the Lessor's obligations under the lease. *Parsons* was a case in which the issue was whether the repaving of an asphalt parking lot could be charged back to the tenants based on the wording of the lease between landlord and tenant in that case. The tenant was obliged to pay its proportionate share of common area maintenance, as well as repairs, excepting reasonable wear and tear.
- [65] The trial judge in *Parsons* analysed the obligations of the parties and concluded that the issue was whether the total repaving of the parking lot could fairly be found to constitute maintenance or repair (reasonable wear and tear excepted), for which the tenant bore proportionate responsibility. The judge concluded that the paving was not chargeable to the tenants, not on the basis that it was a capital cost (which was argued), but because the repaving did not constitute repair or maintenance.

- [66] In the case at bar, the trial judge was dealing with a different lease, with an express obligation on the respondent to keep the outer walls and foundation in good repair. Similar obligations do not appear to have been included in the Parsons lease. The trial judge was not dealing with a discrete repaving project, but a restoration project in which she found that complete outer wall repair would not have been possible without replacing failing windows, sliding doors, and exhaust fans at the same time. It was open to the judge under the terms of this Lease to conclude that the Phase 2 project was directed to the maintenance of the outer walls, as well as the building as a whole.
- [67] As a consequence, it does not matter for the interpretation of this Lease whether the costs incurred in Phase 2 would be considered capital expenses or operating expenses for tax or accounting purposes. What matters is whether they are "Operating expenses" within the special meaning set out in Article 7.01. That is answered by applying a proper interpretation of the Lease to the particular circumstances of the Phase 2 project. Those circumstances are heavily fact-specific.
- [68] Thus, in my view, the trial judge was correct to conclude that it was unnecessary to decide whether the Phase 2 costs were capital costs as they might be characterized for tax or accounting purposes. Whether they were Operating expenses depended upon her assessment of the evidence as to the purpose and the function of the maintenance project, and is subject to deferential review.

Did the Judge err in concluding that the Phase 2 Costs were Operating expenses?

- [69] In this case, the judge concluded on the evidence that "repair of the outer walls, remediation of the water ingress problem, and ensuring the integrity of the Building envelope and structure were inextricably linked to the replacement of old and failing windows, sliding doors, and fans": para. 51. There was evidence to support this conclusion, which was not directly challenged on appeal. On a proper interpretation of the Lease, it did not matter whether these expenses would have been considered capital expenses for tax or accounting purposes, as long as they fit the definition of Operating expenses under Article 7.01. The judge concluded that they did, because they were costs incurred by the Lessor integral to the performance of its covenant to keep the foundations and outer walls in good repair and condition. On the strength of this factual finding, I can see no reviewable error in her judgment that the Phase 2 costs were Operating expenses as defined by Article 7.01.
- [70] This conclusion does not mean that the Lessor can make any expenditures on the building and charge them back to the leaseholders. There are two constraints on the Lessor's ability to charge building expenses to the Lessees. First, the expenses must be prudent and reasonable. That qualification is expressly built into the definition of Operating expenses in Article 7.01. In this case, the cost, scope and reasonableness of the work performed were not in issue: para. 20.

- [71] The second constraint identified by the judge is that the project must be one of maintenance, operation and repair of the building, not of betterment. The term Operating expenses is a defined term, and a proper construction of that term must hew to the definition contained in the Lease. Maintenance is not, however, a defined term, and I agree with the trial judge that it is implicit in the term "maintenance" that the expenditure must be directed to maintaining, not improving, the building. The distinction can be subtle, but in this case the judge concluded that the Phase 2 project returned the building to its original condition, and did not amount to betterment. This is a finding of mixed fact and law to which I would defer.
- [72] In coming to this conclusion, the judge accepted the evidence that the windows, sliding doors and exhaust fans would require further replacement in another 25-35 years. As this will be well before the end of the term of the Lease, the judge commented that the only parties who will benefit from the Project are the leaseholders. The appellant takes issue with this comment, since the Lessor as owner of the Building presumably obtains some benefit from the continued upkeep of the building, but the judge's comment was made in contradistinction to the facts in Parsons, where the lessee in question had only 14 months left on its lease.
- [73] The appellant cited a large number of authorities to us which I have not found it necessary to address. Some involve short-term leases and most appear to have sparsely worded lease agreements. Each decision relates to the particular factual context before the court. None of these cases, so far as I can determine, contains operating cost chargebacks as detailed and specific as Article 7.01. Any contractual provision must be interpreted in the context of the entire document. That is what the trial judge did in this case and I can see no error in her approach or her conclusions.
- [74] In the result, it is my view that the appellant has not established that the trial judge erred in concluding that the Phase 2 costs were Operating expenses within the meaning of Article 7.01. I would dismiss the appeal.
- [75] The respondent has advised that it is not seeking an order as to costs from this Court, as it intends to rely on its contractual rights. Accordingly, I would order that the appeal be dismissed, without costs to any party. Whether the respondent has the contractual rights it asserts is not before us, and I express no opinion on that matter.

Disposition

- [76] For these reasons, I would admit the evidence of the nine leases for purposes of assessing the standard of review, but dismiss the appeal, without costs.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Mr. Justice Abrioux"

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